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REPORTS OF CASES

DECIDED IN THE

SUPREME COURT

OF THE

STATE OF NORTH DAKOTA,

FROM MARCH 20th, 1895,
TO JUNE 15th, 1896.

Edited by JOHN M. COCHRANE, Reporter.

VOLUME 5

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Rec July 28, 1897

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OFFICERS OF THE COURT DURING THE PERIOD OF THESE REPORTS.

HON. ALFRED WALLIN, of Fargo, Chief Justice.

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

HON. J. M. BARTHOLOMEW, of Bismarck, Judges.

R. D. HOSKINS, Bismarck, Clerk.

JOHN M. COCHRANE, Grand Forks, Reporter.

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CONSTITUTION OF NORTH DAKOTA.

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

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

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF NORTH DAKOTA

HUGH DOHERTY *vs.* THE COUNTY OF RANSOM.

Opinion filed March 15th, 1895.

Delegation of Legislative Power—When Void.

Chapter 55, Laws 1890, which delegates to boards of county commissioners the power to fix salaries of state's attorneys, is in contravention of section 173 of the constitution of North Dakota, which requires the legislative assembly "to prescribe the duties and compensation of all county, township, and district officers," and is therefore void.

Constitution Did Not Repeal Existing Statutes.

The adoption of the foregoing provision in the constitution did not in itself repeal the pre-existing statute, valid when enacted, and which gave to boards of county commissioners power to fix the salaries of state's attorneys, and such boards may continue to exercise such power until the legislative assembly prescribes such compensation by statute as required by the constitutional provision.

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

From an order of the board of commissioners of Ransom County, disallowing his claim for salary of state's attorney, Hugh Doherty appealed to the District Court. The appeal having been dismissed, appellant appeals.

Affirmed.

Hugh Doherty, for appellant.

Goodwin & Van Pelt, for respondent.

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BARTHOLOMEW, J. The controversy in this case arises out of the following facts: The plaintiff was the duly elected and qualified state's attorney in the defendant county, and entered upon the duties of his office, January 3, 1893. Prior to that time, and prior to the time that North Dakota became a state, the board of county commissioners of said county, acting under the provisions of § 431, Comp. Laws, fixed the salary of the district attorney for that county at $800 per annum. Section 173 of the state constitution, subsequently adopted, contains the following: "The legislative assembly shall provide by law for such other county, township and district officers as may be deemed necessary, and shall prescribe the duties and compensation of all county, township and district officers." Subsequently the legislative assembly passed an act known as Ch. 55, Laws 1890, the first section of which reads as follows: "The board of county commissioners, at their quarterly meeting in the month of July, or at some special meeting during said month next prior to each and every general election, shall fix the amount of salary which shall be received by every county officer for the ensuing term, whose salary is fixed by the board of county commissioners, and is entitled by law to receive a salary, payable out of the county treasury. And the salary so fixed shall not be increased or diminished during said term of office. This section shall not apply to any county wherein the salaries of its officers have been provided and fixed by law." Under this statute the board of supervisors of said defendant county in July, 1892, fixed the salary of state's attorney at $500 per annum. At the end of his first quarter year's service as state's attorney, plaintiff presented his bill for salary to the county commissioners, at the rate of $800 per year. This the board refused to allow, but did allow the claim at the rate of $500 per year. From this action plaintiff appealed to the District Court, where his appeal was dismissed, and from such judgment of dismissal he appeals to this court. He bases his claim for the larger salary upon the ground that the section of the constitution heretofore quoted devolved upon the

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legislature the duty of fixing the salary of state's attorney, and prohibited the legislature from delegating that power to the board of county commissioners, and that consequently Ch. 55, Laws 1890, is unconstitutional and void; and that, as the legislature never has fixed the salary of state's attorney, the salary prevailing at the time of the adoption of the constitution must remain as the salary of that office until changed by the legislature. The respondent contends that said chapter 55 is in all respects a valid enactment, and that the constitutional provision already quoted is but a grant of power to the legislature, and the grant of a power which the legislative branch of the government would have possessed, and does possess, without the constitutional grant; but that the right of the legislature to delegate to municipalities the power to fix the compensation of local municipal officers has been so often asserted by the courts that it no longer remains an open question. It is no doubt true that the legislative branch of government possesses the power to prescribe the compensation of municipal officers without any constitutional grant of such power, and it is equally true that the power thus possessed can, in the absence of all inhibition, be delegated to the municipalities created by legislative authority. Cooley, Const. Lim. (5th Ed.) 228 *et seq.*; 2 Am. and Eng. Enc. Law, p. 699, and notes; *Ryan* v. *Outagamie Co.*, 80 Wis. 336, 50 N. W. 340. But we are constrained to view our constitutional provision, not as a grant of power, but as a limitation upon power. As we have said, no grant of power was required. If that were the purpose, the language was superfluous. The words used are not the words usually employed to confer power. For that purpose the constitutions generally, if not universally, use the word "may." Here the mandatory word "shall" is used. The connection is also suggestive. The constitution says: "The legislative assembly * * * shall prescribe the duties and compensation of all county, township and district officers." It will not be contended for a moment that under this language the legislature could delegate to a board of county commissioners the power to

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prescribe the duties of a state's attorney, and yet the words are so connected that they will not admit of a construction that places the legislature in one relation to the duties of county officers and another relation to their compensation. One phrase covers both, and one intention covers both, unless the constitutional convention was guilty of juggling with words. The propriety of having duty and compensation prescribed by one and the same authority is too evident to require mention. In *Dougherty* v. *Austin*, 94 Cal. 601, 28 Pac. 834, and 29 Pac. 1092, the court had under consideration the corresponding provision in the California constitution. That provision is perhaps somewhat clearer as to the intention of the constitutional convention than ours. It provides that the legislature "shall regulate the compensation of all such officers in proportion to their duties and for that purpose may classify the counties by population." There the legislature is required to regulate compensation in proportion to duty. Here it is required to prescribe the duties and the compensation clearly, with the thought that the latter would be commensurate with the former. We think the two provisions should receive the same construction. The California court held that a statute delegating to the board of county commissioners power to increase the pay of a county officer under certain circumstances was void, being in contravention of their constitutional provision, and the dissent of Judges McFarland and Patterson was as to the effect of the statute. The judges were unanimous, as we gather, in holding that the legislature could not delegate the power to fix compensation, and this holding was affirmed in *People* v. *Johnson*, (Cal.) 31 Pac. 611. Under these authorities, as well as under the wording of our constitution, we hold that Ch. 55, Laws 1890, which empowered boards of county commissioners to fix the salaries of state's attorneys, was a violation of section 173 of our constitution, and void.

But there is yet another point in the case. The respondent contends that, if said chapter 55 be unconstitutional, the law existing prior to statehood, which empowered county commis-

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sioners to fix the compensation of state's attorneys, remains in force until such time as the legislature shall act under the constitutional provision, and fix such compensation by legislative enactment; that section 2 of the schedule of the constitution, which says "all laws now in force in the Territory of Dakota, which are not repugnant to this constitution, shall remain in force until they expire by their own limitations or be altered or repealed," continued the prior law (the validity of which is not questioned) in force; that the limitation contained in section 173 of the constitution was prospective only; that while the legislature could not thereafter delegate to boards of county commissioners the power to fix compensation, yet the limitation, standing alone, was powerless to repeal an existing power legally resting with such board. And the further point is urged that, if the constitutional limitation repealed the former law, then the office of state's attorney was left without any salary attached whatever, and in either view the action of the trial court must be affirmed. To this contention the appellant responds that the prior law which empowered the board of county commissioners to fix the salary of state's attorney was repugnant to the constitutional limitation which required the legislature to fix such compensation, and was, by the adoption of the constitution, to that extent repealed, and that thereafter boards of county commissioners could not act under the former law, but that any legal action already taken would stand and govern the question of compensation until such time as the legislature acted under the provision of the constitution, and, the board having already fixed the salary at $800 per annum, he is entitled to receive that sum. The decisions are not entirely uniform, but, under the decided preponderance of authority as well as upon principle, we are of opinion that appellant's contention cannot be sustained. Legislative power is plenary. Our constitutional provision under discussion is, as we have said, a limitation upon that power. A constitutional limitation from its very nature is, and must be, prospective, and not retroactive. It does not render unlawful

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that which had theretofore been lawfully done, and whether or not it repeals a former valid statute that could not be subsequently enacted, where such repeal results by implication, depends largely upon whether or not it furnishes any instrumentality to replace the former law. If it simply provides for subsequent legislation which shall, when enacted, furnish the instrumentality to replace the former law, then such preceding law is not repealed until the subsequent legislation is enacted. In *State* v. *Swan*, 1 N. D. 5, 44 N. W. 492, we held that the prohibition article in our constitution which prohibited the sale of intoxicating liquors within the state, but fixed no provisions or penalties by which the prohibition could be enforced, and declared that "the legislative assembly shall by law prescribe regulations for the enforcement of the provisions of this article, and shall thereby provide suitable penalties for the violation thereof," did not of itself repeal the pre-existing license law, and that a party who sold intoxicating liquor in the state without a license, after the adoption of the constitution, but before the legislature had taken any action as required by the prohibition article, might be punished under the pre-existing license law. That holding necessarily covered the proposition that during such interval a license to sell intoxicating liquor might be issued under the former law. We held that the existing law was not repealed by the adoption of the prohibition article, and not being repealed, it remained in force for all purposes. The principles there announced and the authorities cited fully cover this case. In *Cutting* v. *Taylor*, (S. D.) 51 N. W. 949, the learned court uses this language: "All legislation under the constitution must be tested by its provision, but a law valid when passed, and regularly enacted as there required, is not necessarily abrogated or repealed by a subsequent constitutional provision requiring the pursuance of other or different methods or forms of legislation than those which were adequate when such law was passed, as that would be to make such constitutional requirement retroactive." *People* v. *County Com'rs of Grand Co.*, 6 Colo. 202, was a case where, upon the

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point under discussion, the court, upon a rehearing, reversed its former decision, and in the opinion the following language is used: "The law of the case is in favor of the constitutionality of the statute. Similar provisions had, long prior to the adoption of our constitution, existed in the constitutions of many of the states, and had been construed as wholly prospective, and as only intended to affect future legislation. At first this doctrine met with opposition, as being unsound in principle, and it was announced by divided courts, but later it received a unanimity of opinion, which gave to it the force of a settled rule of construction. It was held that they were not intended to annul or affect existing laws of the character prohibited. The clause continuing in force laws not inconsistent with the constitution was held not to abrogate laws which, if subsequently enacted, would be clearly inconsistent and unconstitutional." See, also, *People* v. *District Court of Pilkin Co.*, 11 Colo. 147, 17 Pac. 298; *Williams* v. *Mayor, etc.*, 2 Mich. 560; *Goldman* v. *Clark*, 1 Nev. 610; *Lehigh Iron Co.* v. *Upper Macumgie Tp.*, 81 Pa. St. 482; *Indiana Co.* v. *Agricultural Soc.*, 85 Pa. St. 357; *People* v. *Bradley*, 60 Ill. 390; *State* v. *Trustees of Union Tp.*, 8 Ohio St. 394; *Allbyer* v. *State*, 10 Ohio St. 589; *State* v. *Barbee*, 3 Ind. 258; *State* v. *Macon County Court*, 41 Mo. 453. We hold that our constitutional provision which required the legislature to prescribe the compensation of state's attorneys did not in itself repeal the pre-existing law which gave that authority to boards of county commissioners, and that such boards may continue to exercise such power until the legislature by law fixes such compensation. It is true that in the resolution adopted by the board of commissioners of the respondent county in July, 1892, wherein they fixed the salary of state's attorney at $500 per annum, the board bases its right so to do upon Ch. 55, Laws 1890, but the fact that they mistook the source of their authority will not affect their action so long as their authority in fact existed.

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

(63 N. W. Rep. 148.)

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HOMER E. SARGENT *vs.* CHARLES F. KINDRED.

Opinion filed March 18th, 1895.

Removal of Causes—When Right Waived.

Where a request was filed under the provisions of the enabling act, under which North Dakota became a state, for the transfer of a case pending when the statehood was acquired from the state to the Federal Court, and which case was so transferable under the provisions of the act, provided the request was made at the proper time, but when the record of the state court showed that, on two different occasions after statehood, the party filing the request had submitted matters for the decision of the state court, and such matters had been decided by the state court prior to the time of filing such request, and when the state court denied such request, *held*, that filing the request did not, under the circumstances, oust the state court of jurisdiction, or deprive it of the power to proceed to hearing and judgment in the case.

Per CORLISS and BARTHOLOMEW, J's.

Mistake—When it Will Avail to Vacate Judgment.

To warrant a court in setting aside a judgment under the provisions of § 4939, Comp. Laws, on the ground of mistake, such mistake must consist in something having been done in the case, either by the court or the party, that was not intended to be done.

Per BARTHOLOMEW, J.

Moving Papers Must Cover Terms of Statute.

Upon an application to the court to set aside a judgment for any of the causes specified in said section, the record upon which the application is heard must present facts which bring the case within the terms of the statute, or the application must be denied.

Per BARTHOLOMEW, J.

Affidavit of Merits on Motion to Vacate Default.

On motion by defendant to be relieved from a judgment entered against him because of his default, he must present an affidavit of merits as well as a verified answer, or his motion must be denied.

Per CORLISS, J.

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

Action by Homer E. Sargent against Charles F. Kindred. From orders setting aside a judgment for plaintiff, and refusing, in a supplemental proceeding, to vacate said order, plaintiff appeals.

Reversed.

Ball & Watson, for appellant.

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The defendant did not apply for relief from the judgment entered against him, within a year after he had knowledge of the judgment. Section 4939, Comp. Laws. Service of notice of judgment upon the attorney who had appeared in the cause was sufficient. *Merriam* v. *Gordon*, 22 N. W. Rep. 563; *Bell* v. *Lumber Co.*, 32 N. W. Rep. 561. And is notice to the party. *Schobacher* v. *Ins. Co.*, 17 N. W. Rep. 969; *Robbins* v. *Kuntz*, 44 Wis. 558; *Knox* v. *Clifford*, 41 Wis. 458; § 5336, Comp. Laws; *Yorke* v. *Yorke*, 3 N. D. 343; *Flanders* v. *Sherman*, 18 Wis. 575, 592.

Under the Wisconsin statute identical with our own, it is held that the court cannot grant relief from a default after a year from the time when defendant had notice, although he applied for relief within the year. *McKnight* v. *Livingston*, 1 N. W. Rep. 14; *Knox* v. *Clifford*, 41 Wis. 458; *Whitney* v. *Karner*, 44 Wis. 563; *Flanders* v. *Sherman*, 18 Wis. 593. Defendant is barred from relief by his own laches. *Cutler* v. *Button*, 53 N. W. Rep. 563; *Altman* v. *Gabriel*, 9 N. W. Rep. 633; *Groh* v. *Bassett*, 7 Minn. 259; *Gerish* v. *Johnson*, 5 Minn. 12; *Robbins* v. *Kuntz*, 44 Wis. 558; *McMurran* v. *Meek*, 49 N. W. Rep. 983. And laches will defeat the vacation of judgment, even within the time provided by statute. *Jonet* v. *Mortimer*, 29 La. Ann. 206; *Birch* v. *Frantz*, 77 Ind. 199; *Williams* v. *Williams*, 70 N. C. 665; *Bradford* v. *Coit*, 77 N. C. 72; *Calhoun* v. *Millard*, 121 N. Y. 69. And especially where the adversary has been prejudiced by the delay. *Wheeler* v. *Monahan*, 23 N. W. Rep. 109. The defendant submitted himself to the jurisdiction of the state court, and the petition for removal to the Federal Court did not destroy jurisdiction of the state court. *Wing* v. *C. & N. W. Ry. Co.*, 1 S. D. 455.

Davis, Kellogg & Severance, for respondent.

The statute authorizing the relief from a judgment entered through mistake or inadvertance within one year after notice thereof, is equivalent to providing that this relief may be granted within one year after actual knowledge of the judgment. *Pier* v. *Millard*, 63 Wis. 33; *Bever* v. *Beardmore*, 40 Ohio St. 70; *Wielan*

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v. *Shilloch*, 23 Minn. 227; *Washburn* v. *Sharpe*, 16 Minn. 53; 1 Black on Judgments, 387; Freeman on Judgments, § 105. There are many purposes for which the implied authority of the attorney for a prevailing party is held to continue beyond the entry of the judgment. Not so, however, as to the attorney for the defeated party. Service of papers on the former attorney of the defeated party after judgment, is entirely ineffectual to bind the defendant. *Berthold* v. *Fox*, 21 Minn. 51; *Kronsnable* v. *Knoblauch*, 21 Minn. 57; *Sheldon* v. *Risedorph*, 23 Minn. 518; *Clark* v. *McGregor*, 21 N. W. Rep. 866; *Hooker* v. *Village*, 43 N. W. Rep. 741; *Hillegrass* v. *Bender*, 78 Ind. 228; *Cruikshank* v. *Goodwin*, 66 Hun. 626, 20 N. Y. Supp. 577; *Person* v. *Leather*, 7 So. Rep. 391; *Grames* v. *Hawley*, 50 Fed. Rep. 319; *Kamm* v. *Stack*, 1 Saw. 547; *Jackson* v. *Bartlett*, 8 Johns. 367; *McLaren* v. *Charrier*, 5 Paige Ch. 534; Weeks on Attorneys, 238, 239, 248. Where a petition for removal in proper form is made by the filing of a petition, the state court loses jurisdiction and cannot proceed further in the case until the Federal Court shall have held the removal improper. *Miller* v. *Sunde*, 1 N. D. 1, (44 N. W. Rep. 301.) The judgment having been entered without jurisdiction, the statutory limitation does not apply to a motion for its vacation. *In re Tilden*, 98 N. Y. 444; *Hurlburt* v. *Coman*, 43 Hun. 586; *Wharton* v. *Harlan* 66 Cal. 422; *Cowles* v. *Hayes*, 69 N. C. 410; *In re Underhills' Estate*, 9 N. Y. Supp. 457; *Hansen* v. *Hansen*, 12 Pac. Rep. 736; *Feikert* v. *Wilson*, 37 N. W. Rep. 585.

BARTHOLOMEW, J. There are two appeals submitted in this case. The first is from an order setting aside a judgment in plaintiff's favor, and the second is from an order refusing, upon a supplemental showing, to vacate the first order. These orders in turn involve two cases between the same parties which were in the same condition, and by stipulation the appeals in one case shall be held to cover both. We shall speak of but one case in this opinion.

In the order setting aside the judgment it is recited, *inter alia*,

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that "at the time of the trial of said action the same had been removed to the Circuit Court of the United States, and this court had no jurisdiction to try and determine the same." This point is urged in this court. The above recital seems to contradict the record. The record shows that a request was filed by the defendant, under the provisions of the enabling act, under which this state was admitted into the Union, for such a transfer of the case, and that the request was denied. Furthermore, no such claim is made in the application to set aside the judgment, and it is not clear that point is in the case. But in no event is it well taken. The action was commenced in 1887, in the District Court of Cass County, in the late Territory of Dakota. There was diverse citizenship, the defendant not being a resident of such territory, and had North Dakota been a state at that time the action could have properly been transferred to the United States Circuit Court. Under the terms of the enabling act, after North Dakota became a state, cases in that condition might, upon request filed, be transferred to the proper Federal Circuit Court. But it has frequently been held, under such circumstances, that any action in the case after statehood by which a party submits himself to the jurisdiction of the state court, and the state court acts thereon, precludes such party from subsequently removing the case to the Federal Court. *Gull River Lumber Co.* v. *School District No. 39*, 1 N. D. 408, 48 N. W. 340; *Wing* v. *Railroad Co.*, (S. D.) 47 N. W. 530; *Ames* v. *Railroad Co.*, 4 Dill. 257, Fed. Cas. No. 324; *Gaffney* v. *Gillette*, 4 Dill. 264, Fed. Cas. No. 5,168; *Carr* v. *Fife*, 44 Fed. 713; *Murray* v. *Mining Co.*, 45 Fed. 387. The state court, as the successor of the territorial court, acquired jurisdiction of this case in November 1889, subject to be divested as in the enabling act specified. In June, 1890, the defendant moved upon affidavits for a continuance of the case, and such motion was granted. At the December term, 1890, this was repeated, and the motion denied. Thereupon the request to transfer to the Federal Circuit Court was filed and denied. If the right to the transfer depended upon the decision of any question of fact, such

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as the question of diverse citizenship or the like, the filing of the application at once divested the state court of all jurisdiction to determine that question, and consequently of all jurisdiction of the case. *Miller* v. *Sunde*, 1 N. D. 1, 44 N. W. 301, and case there cited. But the court was bound to take notice of its own records, and those records showed conclusively that the defendant had waived his right to have the case transferred. It was as if a party should file a petition for removal on the ground of diverse citizenship and at the same time admit upon the record that no diverse citizenship existed. With the admission of the nonexistence of the only fact that could give the Federal Court jurisdiction standing upon the record, the state court could not be ousted of jurisdiction, as jurisdiction must rest somewhere. The order setting aside the judgment cannot be sustained upon the ground that the case had been transferred to the Federal Court.

The application to set aside the judgment was brought under § 4939, Comp. Laws, in which it is provided that the court "may also 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 proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect," etc. As has been stated, the action was commenced in 1887, in the District Court for Cass County, in which two regular terms of court were held each year. The case was continued from term to term, always, as the record shows, at the request of the defendant, except in one instance. Plaintiff claimed in his complaint about $11,000, and defendant set up a counterclaim amounting to about $30,000. The amounts involved were such that the case was not likely to be forgotten or neglected. The interests of the defendant were in the hands of one of the most experienced and careful attorneys at this bar. At the June, 1890, term of the court, the case was continued, on defendant's motion, based upon affidavits showing the absence of a material witness, the court then stating that the case should stand for trial at the December term, and no further continuance would be granted, except for extraordinary

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cause. When the case was reached for trial on December 6, 1890, the attorney for the defendant moved for a further continuance, and, we gather from the record, based his motion upon an affidavit of the defendant. The nature of that affidavit is not disclosed, but no claim whatever is made that it was based upon the sickness of defendant's son hereinafter mentioned. The application was denied. Immediately following this the request for the transfer was made and denied, thereupon the attorney for the defendant announced that he was under instructions from his client to first apply for another continuance, and, failing in that, to apply for the removal of the case, and pay no further attention to the case in that court, and then left the court room. The case having been called for trial, the attorney for the plaintiff then waived a jury, and introduced his proofs to the court, and the court at once entered an order for judgment, and the record recites that there was no appearance for defendant.

No further action seems to have been taken in the case until about November 1, 1891, when plaintiff caused a transcript of the case to be filed in the proper Federal Court, and at once moved to remand. The same attorney who had represented the defendant in the state court appeared for him in the Federal Court, and opposed the motion to remand. The motion was not finally decided until March 2, 1892, (49 Fed. 485,) when the case was remanded. About that time counsel for plaintiff for the first time discovered that no formal judgment had ever been entered on the order for judgment made December 6, 1890. Thereupon he procured an order for the entry of judgment *nunc pro tunc* as of December, 6, 1890, and such judgment was entered March 15, 1892, and on the following day notice thereof, and of the taxation of costs, was served upon the defendant's attorney. On October 16, 1893, the defendant applied to the court to have such judgment set aside and vacated. The application was by sworn petition, wherein defendant declares he has a good defense as shown by his answer, that he is a resident of the State of Pennsylvania, and then proceeds: "That on or about the 6th day of

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November, 1890, Charles G. Kindred the son of your petitioner, was taken suddenly and seriously ill with typhoid fever, and was confined to his bed by said illness until said illness was terminated by his death, which event took place on December 8, 1890, two days subsequent to the day fixed for the trial of the above cause. That during the illness of his son your petitioner was unable to leave his bedside for any length of time, and was unable and totally unfit, mentally and physically, to attend to any business whatsoever. That your petitioner, believing his son would not be well enough to permit him to be present on the day fixed for the hearing of said cause, and that he would not be able to subpœna his witnesses and prepare himself in time for the trial of said cause, mailed a letter to his counsel at Fargo, stating his inability to be present, and the reasons therefor, and, not hearing from them, presumed the hearing thereof had been postponed. That your petitioner was not aware of the fact that said hearing had taken place during his enforced absence, or that judgment had been entered against him, until about December 1, 1892, when he immediately sent his attorney from Philadelphia to ascertain the reason why judgment had been entered against him during his unavoidable and excusable absence, to effect an amicable adjustment of the matter, and have said judgment removed. That negotiations looking to an amicable settlement were entered into between the plaintiff and your petitioner, through their respective counsel, and remained pending for a long time, but finally terminated without any satisfactory arrangement for settlement being made between them. That since said negotiations were discontinued the plaintiff has obtained a certified copy of the record of said judgment, and has brought suit thereon in the Circuit Court of the United States for the eastern district of Pennsylvania, for the purpose of enforcing the payment of said judgment in the City and County of Philadelphia, the present residence of your petitioner, which suit is now pending and undetermined. That although the hearing in this cause was fixed for December 6, 1890, your petitioner had a right to, and did,

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presume that no judgment would be entered without notice, and without giving him an opportunity to present his defense; and the entering of said judgment *nunc pro tunc* on March 15, 1892, after a lapse of very nearly a year and a half from the time of hearing, without notice of any kind or character being given to him, either that said judgment would be or had been entered against him, tended to mislead and deceive him, and did mislead and deceive him, and deprived him of the opportunity of opposing the entering of said judgment, or, when entered, of appealing to the discretion of your honorable court, under the circumstances of the case, to open said judgment and permit him to present his defense. Your petitioner avers that he will be able, if granted the opportunity by your honorable court, to fully establish by competent testimony the facts set forth in his answer; and he further avers that except for the long and fatal illness of his son he would have presented himself with his witnesses before your honorable court on December 6, 1890, the last date fixed for the hearing of said cause, fully prepared to sustain all the allegations contained in his answer in the said cause; and he respectfully submits that said answer sets up a full, complete, and conclusive defense to the whole of the plaintiff's claim." We have set out in full all material averments in said application. It was supported and opposed by affidavits. The order of the court setting aside the judgment, after reciting the record upon which the application was heard, and that the court was without jurisdiction at the time the order for judgment was entered, as hereinbefore noticed, proceeds: "And it further appearing that the said defendant had no notice or knowledge of said judgment herein entered until on or about the 1st day of December, 1892, and that the answer of said defendant states a good defense upon the merits of said action, and that the defendant was surprised and misled by the entry of said judgmemt on the 15th day of March, 1892, said cause having been tried in the December, 1890, term of said court, and the court having heard the arguments of counsel herein," etc. We quote this to show the precise ground

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upon which the court based the relief that it gave, and that such court did not find as a matter of fact that defendant's failure to appear and contest the case in December, 1890, was due to the sickness of his son, or that there was any mistake, inadvertence, surprise, or excusable neglect upon the part of the defendant in the conduct of said cause at, or prior to, the time of the entry of the order for judgment. But the fact that the trial court may have based the relief granted upon improper grounds would not warrant a reversal, provided, upon the whole record, the defendant was entitled to the relief which he received; and we shall therefore review the application briefly.

We first notice the allegations pertaining to the sickness of defendant's son. The facts as stated are no doubt true, and had these facts been brought to the attention of the court in any proper manner on December 6, 1890, the cause would certainly have been continued. But did the sickness of the defendant's son in any manner influence him in his conduct of the case? It is true that the petition states that but for such sickness defendant would have been present with his witnesses on December 6, 1890. But this petition was verified three years later. In the *interim* many facts would escape the memory. The recollection of the melancholy facts of the sickness and death of a son would remain vivid with the defendant while contemporaneous facts would be forgotten. There are certain undisputed facts in this case, of a character so easily disputed, if not true, that, in the absence of all contradictions, we must regard them as true, which make it certain that the conduct of the case was not influenced by the sickness of defendant's son. When the case was reached for trial, the attorney for defendant moved on affidavit of defendant and upon undisclosed grounds for further continuance, which being denied, he filed a request for a transfer to the Federal Court, and when that was denied he stated in open court that he was instructed by his client to take the course he had taken and then give the case no further attention in that court. This shows conclusively that defendant had determined, for reasons irrespec-

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tive of the sickness of his son, not to be present at the December, 1890, term when said case was set for trial; and, as we have stated, these facts are not questioned by affidavit, nor was any attempt made to avoid their force in argument. We cannot, therefore, nor could the trial court, properly consider the fact of the sickness of defendant's son, as that fact had no bearing upon the conduct of the case. We are left with this state of facts: The case is standing on call for trial. The attorney for the defendant leaves the court room, with the statement that he is instructed to pay no further attention to the case in that court. Thereupon plaintiff proceeds with his proofs and obtains an order for judgment. Fifteen months thereafter he has judgment entered *nunc pro tunc*, and at once serves notice of the entry of judgment and of the retaxation of costs upon defendant's attorney. More than a year and a half thereafter, an application is made to set the judgment aside on the ground of mistake, inadvertence, surprise, or excusable neglect, with an allegation that no actual notice of the judgment was had until about ten months before the making the application. It is urged upon us that the application was not within the statutory limitation; that notice of the entry of judgment to the attorney was notice to the defendant, and more than a year had expired after notice before application for relief was made; and that in any event, the lapse of ten months after notice was brought to defendant personally, and before application, was, under the circumstances of this case, such laches on the part of defendant that he ought not to be relieved. I find it unnecessary to discuss these interesting questions, as I do not think the facts entitle defendant to any relief. There was no claim of any mistake of fact, or that anything was done, either by the defendant or the court, that was not intended to be done; and it is only in such cases that relief can be granted on the ground of mistake. 1 Black, Judgm. § 335, and cases cited. There was no inadvertance. The course the defendant pursued he pursued advisedly. There was no neglect. Defendant did all that he

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intended to do. Where a case is on call for trial and the defendant voluntarily withdraws, he cannot afterwards be heard to say that the judgment was a surprise to him. True, he says that, because judgment was not entered at the time fixed for hearing, therefore he had a right to presume, and did presume, that no judgment would be entered against him without notice, and that the entry of the judgment *nunc pro tunc* without notice misled and deceived him, and deprived him of the right to oppose the entry of judgment. But the entry of judgment after the order of December 6, 1890,—and the lower court seems to have found such to be the fact,—was a duty that devolved upon the clerk. *Gould* v. *Elevator Co.*, 3 N. D. 102, 54 N. W. 316. No further action of the court would have been required but for the failure of the clerk to perform that duty. It was too late to urge anything against the entry of judgment. The order for that had already been made. The only matter that subsequently came before the court was the propriety of directing that judgment to be entered *nunc pro tunc*, and the order in that respect is not assailed. There is nothing in that connection entitling defendant to any relief. To us it seems too clear for argument that defendant voluntarily abandoned his case in the state court because he believed that jurisdiction had been transferred to the Federal Court. Then, instead of taking the proper steps to give himself a standing in that court, he waited until the other party, in order to clear the record of all doubt, and nearly a year thereafter, took a transcript into the Federal Court, and moved to remand the case. That motion the defendant vigorously opposed, but it was ruled against him. He now seeks by this application to be relieved from the consequences of his own deliberate and voluntary acts. We know of no statute or legal principle that entitles him to relief, and his application should have been denied; and, since the order vacating the judgment was wrong, it necessarily follows that the order refusing to set aside such improper order was also wrong.

On each appeal the order appealed from is reversed.

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WALLIN, C. J., having been of counsel, did not sit at the hearing of this case, or take any part in the decision.

CORLISS, J. I am unable to concur in the views of my associate, but I reach the same conclusion on a different line of argument. The defendant was, on the motion, asking a favor of the trial court; but he failed to present any affidavit of merits on the motion. This would clearly be fatal to his claim for relief, had there been no verified answer in the case (*Gauthier* v. *Rusicka*, 3 N. D. 1, 53 N. W. 80,) and I do not think that the fact that he had already served a verified answer excused him from making such an affidavit. To require it imposes no great burden on a man who honestly believes that on the whole case he has a meritorious defense. Such affidavit is short and easily drawn, and its averments cannot for the purposes of the motion be denied. They must be taken to be true. Freem. Judgm. § 109; *Worth* v. *Wetmore*, (Iowa,) 54 N. W. 56. If a judgment is not unjust, a court will never relieve a party from it if the court rendering it had jurisdiction. When the suitor is forced to ask a favor of the court, he must make out a strong case of injustice. It is not sufficient to show that his default was taken. It is not even enough for him to be able to swear to an answer setting forth a defense. The averments of the answer may all be true, and yet there may exist facts, to the knowledge of the defendant, which entirely destroy the force of the defense. He may know of matters in avoidance of such defense. In such a case he should not be relieved from the judgment, for the judgment is just. When he prays for such relief he should satisfy the court by his oath that such condition does not exist,—that he not only has a defense, but that he knows of no matter which will render that defense nugatory. It is for this reason that courts hold that an affidavit of merits is insufficient which sets forth that the party has stated "his defense" to his attorney, or "the facts of his defense," or "his case." He must swear that he has stated the whole case, or "the case," to his attorney, and that on such disclosure of everything that he knows about the case his attorney

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advised him that he has a good and substantial defense on the merits. *Morgan* v. *McDonald*, 70 Cal. 32, 11 Pac. 350; *Burnham* v. *Smith*, 11 Wis. 258; Freem. Judgm. § 108. Had there been no verified answer, an affidavit setting forth that the defendant had stated his defense to his attorney, and had been advised by him that it was meritorious, would have been insufficient. And yet that is the full scope of the verified answer. It does not purport to negative the knowledge of the defendant of the existence of facts in avoidance of the defense. Is there any reason why a party who is asking for indulgence after an answer is served should be allowed to obtain relief on terms less strict than one who is asking for such relief before an answer has been served? What the court should require in all such cases is the oath of the party that he has been advised by his counsel that he has a good and substantial defense on the merits, after full disclosure to such counsel of all facts relating to the case of which the client has knowledge. It may often be true that a client can truthfully swear to facts which on their face constitute a defense, knowing all the time that his counsel has advised him that certain other facts which he has disclosed to his attorney utterly destroy the defense; or the client may not reveal such facts to his counsel, and yet he could verify the answer. In *Gauthier* v. *Rusicka*, 3 N. D. 1, 53 N. W. 80, we intimated that there was much force in the position that an affidavit of merits should be required in addition to the verified answer. There is express authority to support it. *Mowry* v. *Hill*, 11 Wis. 146; *Jones* v. *Russel*, 3 How. Prac. 324; Freem. Judgm. § 108; *Burnham* v. *Smith*, 11 Wis. 269; 1 Black, Judgm. § 347. Says Mr. Black: "But in all cases where the application is not based upon want of jurisdiction or irregularity, but upon something presented as an excuse by the defendant, he must make an affidavit of merits, and nothing else can take its place or serve its purpose. An answer to the complaint already on file, or which the defendant proposes to file, is not equivalent to an affidavit of merits, although it discloses a defense apparently complete and meritorious, and although it is

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verified." In *Burnham* v. *Smith* the court, speaking of its decision in *Mowry* v. *Hill*, says: "We held in *Mowry* v. *Hill*, (decided at this term) 11 Wis. 152, that an affidavit of merits should be filed on such application. The practice is salutary, and tends to prevent litigation for delay merely. We held also that a sworn answer was not sufficient, because a party may be able to swear to an answer which alone would show a defense and yet know that on the trial its effect might be entirely avoided by other facts. It is upon this reason that the authorities deny that it is sufficient in an affidavit of merits to state that the party has stated 'his defense' to counsel. If he had stated the whole facts of the case within his knowledge, then advice might have been entirely different." I have been unable to find a single decision holding that an affidavit of merits is not, in a case like this, indispensable, in addition to a verified answer. For the reasons that I have stated, I am in favor of a reversal of the orders appealed from.

(63 N. W. Rep. 151.)

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IVER E. SHELLY *vs.* MADS MIKKELSON.

Opinion filed April 11th, 1895.

Bond for Deed—Suit Upon Purchase Money Notes after Conveyance of Land.

Plaintiff sold real estate to the defendant, and received defendant's two promissory notes, due, respectively, in one and two years, for the purchase money. At the same time, plaintiff executed and delivered to defendant a bond for a deed, binding himself or his assigns to convey the land to the defendant upon full payment of the purchase money according to the terms of the notes. The bond was duly recorded. About the time the note last falling due matured,—no action having been brought on the first note, and time not being of the essence of the contract,—the plaintiff, without tendering a deed of conveyance to the defendant, sold and quitclaimed the land to one Percival; and the latter, prior to the commencement of this action, sold and conveyed the land to the defendant, who still owned the land at the time of the trial of this action. Plaintiff, when he quitclaimed to Percival, did not turn over the notes but retained possession thereof, and brought this action upon said notes. Upon this state of facts appearing in evidence, the trial court directed a verdict for the plaintiff for the amount of the notes, with interest. *Held* error.

Action for Specific Performance.

Held, further, that the action which was tried as an action at law was essentially an action in equity for the specific performance of a contract to convey land brought by the vendor. In such cases the vendor must either tender a conveyance before suit, or be in such a position with reference to the land that he can be compelled by a decree to perform his part of the contract. When not so compellable, the plaintiff cannot recover.

Note and Bond for Deed One Indivisible Contract.

Held, further, that after both notes had fallen due, neither having been sued independently, or transferred, the notes and bond for a deed became essentially one indivisible contract, and must be construed together, as a single contract embracing mutual and dependent covenants.

Abandonment of Contract Presumed from Transfer of Land.

Held, further, that the defendant has a right to assume, *prima facie*, and act on the assumption, that the plaintiff, who transferred the land to a stranger without tendering a conveyance to the defendant after the debt matured, intended thereby to abandon the contract on the plaintiff's part, and turn over to his grantee all of his rights and obligations growing out of the land contract, and the trust relation created by it, and that if the defendant then, in good faith, purchased of the plaintiff's grantee, and obtained title from him, without any notice that the plaintiff had reserved the right to recover the purchase money, the plaintiff could not recover the purchase money from the defendant, even if

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the right to recover the purchase money had in fact been reserved, as between the plaintiff and his grantee.

Corliss, J., dissenting.

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

Action by Iver E. Shelley against Mads Mikkelson. Judgment for plaintiff, and defendant appeals.

Reversed.

M. H. Brennan, for appellant.

Cowan & Denoyer, for respondent.

Wallin, C. J. The principal facts in this case, appearing of record, may be condensed as follows: On January 20, 1890, the plaintiff sold to the defendant certain real estate, which was then incumbered by a mortgage, and received as consideration for such land the defendant's two promissory notes, falling due, respectively, on December 15, 1890, and December 15, 1891. The contract of sale was reduced to writing, in the form of a bond for a deed, which was duly recorded on September 7, 1890, and was in the following language: Know all men by these presents that Mads Mikkelson, of De Groat, in the County of Ramsey and Territory of Dakota, is held and firmly bound unto I. E. Shelly in the sum of three hundred and four and 38-100 dollars, lawful money of the United States, to be paid unto I. E. Shelly, his heirs, executors, administrators, or assigns, for which payment well and truly to be made he binds his heirs, executors, and administrators firmly by these presents. Whereas, the said I. E. Shelly has this day bargained and sold unto the said Mads Mikkelson, his heirs, executors, and assigns, a certain lot or parcel of land, situate, lying, and being in the County of Ramsey and Territory of Dakota, designated and described as follows, to-wit, the north half of the southeast quarter of southeast quarter of section eleven, and the northeast quarter of the northeast quarter of section fourteen, in township one hundred and fifty-six north, of range sixty-five west: Now, therefore, the condition of this obligation is such that if the said I. E. Shelly, his heirs,

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executors, administrators, or assigns, make, execute, and deliver a good and sufficient warranty deed, with full covenants, except as to such incumbrances as may arise by virtue of any tax assessed subsequent to the execution of this instrument, and a first mortgage of $275 and interest now on the land, and tax of 1889, of the above-described premises, upon being paid the full sum of three hundred and four and 38-100 dollars, according to the conditions of the two notes, one for $154.38, due December 15th, 1890, and one note for $150, due December 15th, 1891, both notes bearing dates the 20th day of January, 1890, and 10 per cent. int., or when he has broken 80 acres on the land, and secured said notes with mortgage on crop for 1891 on said land, bearing even date herewith, then this obligation to be null and void, otherwise to remain in full force and virtue. In testimony whereof, I have hereunto set my hand and seal this 20th day of January A. D. 1890. I. E. Shelly. [Seal.]" This action is upon said promissory notes, and was not instituted until after both notes had matured, by their terms. The plaintiff prays only for a money judgment, and does not set out in his complaint any ground authorizing the intervention of a court of equity. Defendant, by his answer, admits the execution and delivery of the notes, and alleges a failure of consideration as a defense. A copy of said bond for a deed is annexed to and made a part of the answer, and the answer further alleges "that defendant went into possession of said land under said arrangement, and broke and cultivated thereon 80 acres, and improved said land to the amount of four hundred dollars; that all of said acts were done prior to the commencement of this action, and prior to March, 1892; that defendant has demanded of plaintiff a full and faithful performance of the conditions of said bond, and offered to do what he (defendant) was required to do by the terms thereof, but that plaintiff has neglected and refused to execute to defendant said warranty deed for said land; that prior to the commencement of this action, and prior to March 1, 1892, the said plaintiff conveyed and transferred said land, by quitclaim deed, to John

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A. Percival, and that thereafter, and prior to the commencement of this action, defendant, in order to protect himself, and save to himself the benefits of his improvements on said land, was obliged to purchase said land from John A. Percival; the consideration for said notes has wholly failed; that by reason of said transfer of land to said Percival, and by reason of the fact that since prior to March 1, 1892, plaintiff has not be able or willing to comply with the term of said bond, and has made it impossible for him to comply therewith." The case was tried before a jury, and at the close of the testimony the court directed a verdict for plaintiff, and a verdict was accordingly returned for plaintiff for the amount of both notes, with interest.

At the trial the following facts were made to appear: Plaintiff rested his case after putting the notes in evidence, and testifying that he owned the notes, and they had never been paid. The bond for a deed was also put in evidence. Defendant testified that in the year 1890 he entered upon the land under the contract and broke and backset 80 acres thereof, and raised a crop thereon in 1891. The plaintiff tendered a deed of warranty to the defendant some time after the breaking was done, in 1890, and offered to deliver the deed on condition that defendant should execute a crop mortgage on the crop to be grown in 1891 as security for the purchase-money notes. Defendant refused to do so, and plaintiff never delivered a deed to defendant, and never at any time tendered defendant a deed after both notes fell due. Defendant testified that he was at the time of the trial the owner of the land, and had purchased it, about one year prior to the trial, of one Percival. He was asked, "How much did you pay for the land?" Plaintiff, by his counsel, objected to this question on the ground that it was immaterial. The objection was sustained, and defendant excepted to the ruling. Defendant was asked: "Was there any other consideration for these notes, besides the land described in this bond for a deed? A. He says, 'No.' The consideration for the purchase of the land was six hundred and forty-four dollars, and a part of that was the two hundred and seventy-five

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dollars, and he was to get a larger loan on the land, and through that indemnify himself." On plaintiff's motion, this answer was stricken out as unresponsible, and as immaterial and irrelevant, and defendant excepted to the ruling. Plaintiff was sworn as a witness for the defendant, and testified, in effect, that he never tendered a deed of the land to the defendant at any time after both notes matured. Plaintiff was asked: "Then, afterwards, without tendering to him any deed, you sold the land to another person, did you? A. I simply quitclained my interest. Q. You quitclaimed your interest? A. Yes sir. Q. You made a quitclaim deed? A. Yes, sir. Q. To whom. A. To John A. Percival." Plaintiff's counsel, on cross-examination, asking the following question: "Did you receive any consideration for this quitclaim deed you say you gave to John A. Percival?" Defendant objected upon the ground that the question was immaterial, and not proper cross-examination. The objection was sustained, and plaintiff excepted to the ruling. Plaintiff further testified that he gave the quitclaim to Percival either in November or December, 1891, or in January 1892; that he had, prior to the quitclaim, a good title to the land, subject to the first mortgage referred to in the bond; that the mortgage was foreclosed, and bought at the sale by one Wilmott, and the title was afterwards transferred to said Percival. There was no redemption from the mortgage sale. Plaintiff made the quitclaim to Percival after the latter acquired the interest obtained by Wilmott at the foreclosure sale, and some months prior to the expiration of the period allowed by law for redemption from such sale. In other words, the year had not run when the quitclaim was made by the plaintiff to Percival. It does not clearly appear whether the note last falling due had matured at the time the quitclaim to Percival was made. Percival executed and delivered to the defendant a quitclaim deed of the land, bearing date March 12, 1892, which deed recites on its face that it was given for a consideration of $600.

As we construe the bond, it gave the defendant an option. He

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could not be compelled to close the transaction before the last note fell due, *i. e.* December 15, 1891; but defendant might require the plaintiff to deliver a deed prior thereto on performing the other conditions of the bond, *i. e.* on breaking 80 acres of the land in 1890, and by giving a chattel lien on the crop of 1891 to secure the notes. Defendant in fact broke the 80 acres in 1890, and thereafter plaintiff tendered him a deed of the land on the condition that defendant should execute a chattel mortgage on the crop of 1891, and upon the further consideration that defendant should execute a real-estate mortgage on the land to secure the notes. This the defendant refused to do, except that he did, for reasons not appearing in the record, make and deliver the required real-estate mortgage. At this point the defendant refused to give the chattel security, and the deed was not delivered to him by the plaintiff. The defendant, in our opinion, was fully justified by the agreement in refusing. Besides, the plaintiff appears to have exacted from the defendant, as a condition of delivering the deed, a real-estate mortgage. This was not a condition in the contract for delivering the deed. The defendant not having elected to comply with the option stated in the bond by giving security on the crop of 1891, and taking a deed at that time, the instrument must be construed independently of the option feature contained in it. Under the terms of the agreement, the plaintiff could have instituted an action upon the note first falling due as soon as it matured, and without tendering a deed. The covenant to deliver a deed, and the cevenant to pay the first note, were independent covenants. *McCroskey* v. *Ladd*, 96 Cal. 455, 31 Pac. 558; *Beecher* v. *Conradt*, 13 N. Y. 108; *Eddy* v. *Davis*, 116 N. Y. 247, 22 N. E. 362. But this was not true with respect to the last note, which matured December 15, 1891. By the terms of the agreement the deed was to be delivered on payment of this last installment of the purchase money, and when this became due the agreement to pay the entire purchase money, and to deliver the deed, at once became mutual and dependent covenants. *Bank* v. *Hagner*, 1

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Pet. 455; *Loud* v. *Water Co.*, 153 U. S. 564, 14 Sup. Ct. 928. In such a case, according to one class of cases, a tender before suit becomes necessary. Another class of decisions, however, hold—and we think this is the better rule—that the vendor need not tender a deed before suit, and if plaintiff is able and willing to convey, and tenders performance after suit is brought, that this will answer, and the judgment will provide for the delivery of a deed concurrently with the payment of the purchase money. *Hogan* v. *Kyle*, 7 Wash. 595, 35 Pac. 399, and authorities above cited. Where the covenant to pay is independent, an action at law for the purchase price may be maintained; but, where the time for the delivery of the deed has arrived before suit is brought for the price, we think the only action which, on principle, can be maintained by the vendor, is one for specific performance. That such an action will lie is elementary. *Baumann* v. *Pinckney*, 118 N. Y. 604, 23 N. E. 916; *Rock Island Lumber & Manuf'g Co.* v. *Fairmont Town Co.*, (Kan. Sup.) 32 Pac. 1100; 22 Am. & Eng. Enc. Law, 947, and cases cited in note 7; Comp. Laws, § § 4627-4629, 4635. Under the weight of authority, after the time fixed for delivering a deed has arrived a suit for the purchase money is necessary, by an action in equity. *Johnston* v. *Wadsworth*, (Or.) 34 Pac. 13; *Hogan* v. *Kyle*, 7 Wash. 595, 35 Pac. 399; Warv. Vend. p. 961. In *Rindge* v. *Baker*, 57 N. Y. 209, the court says: "It is claimed that the present action is not an equitable one. The fact that it is brought for money is not decisive on that point. The real test in such an action is this: If it be brought for damages for breach of contract, it is a case at law. If it be brought for money, by way of a specific performance of a contract, it is a case in equity. Thus, where a vendor in a contract for the sale of land sues for the price, his action is equitable."

Both notes having matured before suit, the notes and bond must be construed together, and treated as one instrument, embracing mutual and dependant covenants, viz. a covenant to convey, dependent upon payment, and a covenant to pay, dependent on conveyance. *Hill* v. *Grigsby*, 35 Cal. 656; *Underwood* v.

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Tew, (Wash.) 34 Pac. 1100; *Glassell* v. *Coleman*, 94 Cal. 260, 29 Pac. 508; *Divine* v. *Divine*, 58 Barb, 264; *McCroskey* v. *Ladd*, 96 Cal. 435, 31 Pac. 558. It is true that promissory notes, upon their face, import a consideration; hence the plaintiff, under a familiar rule, was enabled to make out a *prima facie* case by the introduction of the notes in evidence. Nevertheless, as we have seen, the vendor's action was in equity, for the specific performance of the contract on defendant's part. The action was not one for damages, but was brought by the vendor for the stipulated price after the time of delivering the deed had expired. True, the real character of the action was not revealed by the complaint, nor by the introduction of the notes in evidence; but when and as soon as it appeared that the notes were one feature only of the entire contract for the purchase and sale of land, the essential nature of the action became at once revealed. From the first the action was in equity, for the specific performance of a contract for the purchase and sale of real estate. If this were an action at law, the plaintiff would necessarily be cast in his suit, because it appears distinctly that the plaintiff did not tender a warranty deed after the purchase money became due. At law, the plaintiff must tender performance on his part before an action will lie upon the dependent covenant of the other party. This rule is strictly enforced in jurisdictions where the action by a vendor for the purchase money is regarded as an action at law. *Goodwine* v. *Morey*, 111 Ind. 68, 12 N. E. 82; *Undewood* v. *Tew*, (Wash.) 34 Pac. 1100. But, as already stated, we hold that the better doctrine is that this action is in equity, and in such actions the question of tender is important only in its bearing upon the question of costs. It is true that in contracts of sale, where time is of the essence of the contract, a failure to tender performance may defeat the action altogether, but otherwise not. *Freeson* v. *Bissell*, 63 N. Y. 168; *Bruce* v. *Tilson*, 25 N. Y. 194; *Railway Co.* v. *Crisolm*, (Minn.) 57 N. W. 63; *Lewis* v. *Prendergast*, 39 Minn. 302, 39 N. W. 802; 3 Pom. Eq. Jur. § 1407, note on page 453; Comp. Laws, § 4628. Under these authorities,

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in a court of equity tender before suit is not vital to a recovery. The action will lie if the plaintiff is compellable by the decree to carry out his part of the agreement; but in this case the plaintiff was wholly unable to give the defendant title to the land in question at the time suit was instituted or at the time judgment was rendered. Before instituting the action, plaintiff had parted with the land, and the defendant, after buying it from plaintiff's grantee, had received a deed from such grantee, several months prior to the bringing of this action.

But it does not necessarily follow from the fact that the plaintiff was unable to convey that he must go out of court. If the defendant, by any voluntary act, has caused the plaintiff's inability to convey, the defendant can derive no benefit or advantage from plaintiff's failure or inability to perform on his part. This rule is tersely expressed by § 3480, Comp. Laws, as follows: "If the performance of an obligation be prevented by the creditor the debtor is entitled to all the benefits which he would have obtained if it had been performed by both parties." The question is presented, therefore, whether the act of the defendant in obtaining a deed of conveyance of the land in question from the plaintiff's grantee (Percival) was of such a nature as to exonerate the plaintiff from giving the defendant title. In our opinion, this question must receive an affirmative answer. Turning to the condition in the bond, we ascertain that it was expressly stipulated therein that upon the payment of the purchase money, "if the said I. E. Shelly, his heirs, executors, administrators, or assigns, make, execute, and deliver a good and sufficient warranty deed," etc., "then this obligation to be null and void." The obligation bound the vendee, therefore, to accept a deed either from the plaintiff or his "assigns," as it might happen; in such a contract, the word "assigns," must be construed to mean "grantee." In effect, the writing made it obligatory upon the defendant, after paying the price, to receive a deed from either the plaintiff or his grantee as the case might be. The contingency of a transfer of the title by the vendor before the time of performance arrived had been anti-

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cipated by the parties, and expressly provided for by a stipulation whereby the vendee agreed to accept a conveyance from the grantee of the vendor as a full performance of the contracts on the part of the vendor. This consideration, therefore, is fatal to any claim which might be put forward on the vendee's part that the transfer to Percival, followed as it was by a conveyance by the latter to the defendant, was in any sense a breach of the contract to convey title. On the contrary, such conveyance constituted a full and literal performance of the terms of the contract to convey the title of the land to the defendant. The defendant now has the title, and he received it from one of the sources agreed upon in the writing. Nor does the defendant complain that his title is imperfect, or different from that which the plaintiff bound himself to furnish. In brief, the defendant is entirely satisfied with his title, and does not ask for any further assurance of title, either from the plaintiff or from the court.

The bond was recorded, and was clearly entitled to record. It is an instrument which directly affects the title to real estate, and which, by a plain inference from its terms, relates to its possession also. Comp. Laws, § 3268. Furthermore, while there is no statute providing in terms that the recording of such instruments shall operate as constructive notice to the public of its contents, we are of the opinion that it should so be construed. By authorizing such instruments to be recorded, the legislature must have intended, we think, to protect the parties thereto, and those subsequently dealing with the land to which the instruments relate. *Case* v. *Bumstead*, 24 Ind. 429-432.

It follows that, in receiving a quitclaim deed of the land from Shelly, Percival took with contructive notice of all the rights and obligations springing from the contract of sale. He was chargeable with notice that prior to his purchase from S. the latter had sold the land to Mikkelson, and had bound himself and his assigns to convey the land to Mikkelson, with covenants of warranty, whenever and as soon as the stipulated purchase price of the land should be paid by Mikkelson. Hence Percival

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received his title from Shelly burdened with the obligation of the trust to convey on payment of the purchase money. But to whom, under these circumstances, did the right to receive the purchase money belong? Or, in other words, to whom, after the land was conveyed by Shelly to Percival, was Mikkelson bound to pay the purchase money, as a condition of receiving title from Percival? He was bound, as has been said, under the contract, to take title either from his vendor, or any of his assigns. The title had been transferred, and was, when the money became due, vested in the grantee or "assigns" of the vendor. Shelly had not tendered the defendant a conveyance after the purchase money became due, and had, without such tender, quitclaimed to Pecival. Under such circumstances, we are of the opinion that the conveyance by Shelly to Percival (a stranger to the contract) was sufficient of itself, *prima facie*, to justify the defendant in assuming, in the absence of any other notice or kowledge, that Shelly had transferred to Percival, not only the legal title of the land, but all the rights and obligations incident to his trustee relation thereto, including the right to receive the purchase price which was to be paid as a condition of a conveyance to the vendee. True, the quitclaim did not, in terms, refer to either the bond or the notes; but this, we think, is unimportant, because the bond was on record, and the notes, having both matured, ceased to be independent obligations thereafter, and became a part of, and inseparable from, the bond. The question, as between Shelly and Percival, whether the latter acquired the right by his purchase to collect the purchase money, would depend upon the intention of the parties, and would not be determined by the delivery or nondelivery of the notes with the quitclaim deed. The bond advertised the fact that the purchase money was to be paid before the land was to be conveyed to the defendant. But the controversy does not arise between Shelly and Percival, and we are not, therefore, called upon to determine in this case whether the former did transfer to the latter, by the quitclaim deed or otherwise, the chose in action *i. e.* the right to collect the

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purchase money, or whether that right was reserved to Shelly by some collateral agreement.

From our point of view, the crucial question is whether the defendant, on learning the fact that his vendor had conveyed the land to a stranger,—and having no notice of any collateral agreement or reservation, if any there was,—was justified in assuming from the fact of such conveyance, and from that alone, that Shelly had conferred upon his grantee all the rights, as well as all the obligations, arising from the trustee relation which Shelly sustained to the land, as springing from the contract of sale. In other words, in our opinion, the vendee was warranted in assuming from the fact of the conveyance that Percival was clothed by Shelly with authority to close up the deal. The question is one of considerable nicety, and we freely confess that our minds are not free from doubt as to its proper solution; but a majority of the members of this court hold that the facts justified the defendant in negotiating with Percival for the title, and in assuming that his obligations under the bond could be discharged by acquiring title to the land upon terms mutually satisfactory to Percival and himself. By one of the terms of the bond, the vendee might be required to accept the deed and personal covenants of a grantee of the vendor It seems a legitimate inference to draw from this stipulation that in a certain event the purchase money was to be paid to another than the vendor, *i. e.* that grantee of the vendor, who was vested with title when the purchase money became payable by the terms of the contract. We are unable to see how the words "or assigns," found in the condition of the bond, can weaken the natural inference to be drawn from the fact that the vendor of the land, without tendering a deed to the vendee, dispossessed himself of the title, and thereby disabled himself from performing the contract in his own person. The vendor did not repossess himself of title after his conveyance, and we are therefore of the opinion that his conveyance operated *prima facie* as an abandonment of the contract, so far as he was personally

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concerned; and, in the absence of notice or knowledge to the contrary, we think the vendee was justified in assuming that the vendor had, so far as he was personally concerned, abandoned the contract, and turned over to Percival, his grantee, all of his rights and duties growing out of the trust. If the defendant, relying upon the appearance of abandonment created by the vendor's conveyance, has negotiated for the title with Percival, and in good faith paid Percival for the land, it would manifestly be inequitable to allow the plaintiff to recover. We think the authorities cited below will sustain our conclusions upon this point: *Sons of Temperance* v. *Brown*, 9 Minn. 157 (Gil. 144;) *Ten Eick* v. *Simpson*, 1 Sandf. Ch. 246; *Mackreth* v. *Symmons*, 15 Ves. 350; *Champion* v. *Brown*, 6 Johns. Ch. 403; 2 Story, Eq. Jur. § 784, and cases in note 3; *Burwell* v. *Jackson*, 9 N. Y. 535; *Wyvell* v. *Jones*, 37 Minn. 68, 33 N. W. 43; *Bennet* v. *Phelps*, 12 Minn. 326, (Gil. 216;) *Taylor* v. *Read*, 19 Minn. 372, (Gil. 317.)

It follows from the views we have expressed that the learned trial court erred in directing a verdict in favor of the plaintiff for the amount of the notes, with interest; and for this error the judgment will be reversed, and a new trial granted. We are also of the opinion that it was error to exclude evidence of what Mikkelson paid Percival for the land. The action was tried by a jury, and as a purely legal action, whereas, as has been shown, it is essentially an action in equity, for the specific performance of a contract for the purchase and sale of land. But no objection was made to the form of trial, and hence no reversible error can be predicated upon it in this court. In the event of a new trial the action should be tried by the court, and specific findings, upon all material facts should be made a part of the record. The fact should be found whether or not there was an agreement between Shelly and Percival that the right to recover the purchase money should be reserved to Shelly, and not transferred to Percival, and that Percival should convey the title so received to Mikkelson, on payment of the purchase price by Mikkelson to Shelly, and whether, if there was such an agreement made, that Mikkelson

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had any notice or knowledge of the same at any time prior to obtaining title from Percival. If there was such a reservation of the right to recover the purchase money, and Mikkelson had notice thereof before closing the deal with Percival, the plaintiff should recover in this action. The mere fact that Mikkelson bought the title acquired by Percival through the foreclosure will not exonerate Mikkelson from the obligations assumed by him in the contract of sale. All matters, therefore, connected with the sale, as between the plaintiff and Percival, and as between the latter and the defendant, should be carefully investigated, and specific findings of fact made thereon.

Reversed, and a new trial ordered.

BARTHOLOMEW, J. (concurring.) I concur in the conclusion reached by the Chief Justice. I also concur in his reasoning. The exceptional facts in this case require the application of intricate, and perhaps not very well settled, legal principles. For this reason I desire to call attention, as briefly as may be, to the presence of certain facts in the record, as well as the absence of certain facts, that have influenced my mind somewhat in reaching my conclusion. It is a trite remark, but true, that the object of all litigation is to secure justice, and that the substance must never be sacrificed to the shadow. We must, if possible, so order that no wrong or injustice may be done in this case. I do not think that it is possible to do so, on the record as it now stands. The case was not closely tried. Many important matters are left uncertain which the parties had it in their power to make certain. Both parties are somewhat in default in that direction, but I attach more blame to plaintiff. While the record does not disclose his occupation, yet it shows him to be a business man. He testifies that he drew several of the conveyances which were introduced in evidence, and that he had prepared an application for defendant to sign in order to procure a loan upon the land, but which was never signed. It is evident that he fully understood the nature and legal effect of all ordinary conveyances. The defendant's occupation was that of a farmer. He

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is a foreigner, and so poorly versed in the English language that he was obliged to testify through an interpreter. I deem it of importance to know the exact date of the quitclaim deed from the plaintiff Shelly to Percival. The last note given by defendant for the purchase price matured December 15, 1891. As stated by the Chief Justice, from that time the promise to pay and the promise to convey became interdependent. From that time the relations of the plaintiff and defendant were not different from what they would have been under an ordinary land contract wherein one party promises to pay upon receiving a conveyance, and the other promises to convey upon receiving payment. Should the grantor in such a contract subsequently quitclaim his interest in the land to a third party, his conveyance would constitute an assignment of his interest in the contract; and no lawyer would claim that he could thereafter sue upon the promise to pay contained in the contract, unless it clearly appeared from testimony that he reserved his right to the purchase money, and that the grantee in the contract knew of such reservation before he received and paid for a conveyance from the grantee in the deed. Nor would the sum paid for such conveyance in any manner concern the original grantor. These principals apply in full force, as against plaintiff, if his quitclaim to Percival was subsequent to December 15, 1891. He was asked to fixed the date, and, while he might easily have obtained it, he fixed it no more specifically than to say that it was in November or December, 1891, or January, 1892. Under these circumstances, I do not think it would be just to defendant, Mikkelson, to presume that it was prior to December 15, 1891.

Again, after the execution of the title bond, the relations of the parties were those of mortgagor and mortgagee. Jones, Mortg. § § 226, 1449, and cases cited. The plaintiff, Shelly, held the legal title, but only as security for the payment of the purchase money. I recognize fully the general doctrine that while a transfer of the debt carries with it the security, as an incident, an assignment of a mortgage does not necessarily carry with it the

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debt. But I believe the authorities sustain the proposition that when the parties intended that the assignment of the mortgage should include the debt, and when no adverse interest will be affected, the courts will enforce such intention. In Jones on Mortgages (section 805,) it is said: "But the beneficial interest in the debt is, however, generally included in an assignment of the mortgage, although the terms of the assignment embrace the mortgage alone. This would be the presumed intention of the parties in all cases where the debt had not already been transferred to another, and an adequate consideration is paid." In *Philips* v. *Bank*, 18 Pa. St. 403, it is said: "The rule of common sense is the rule of law on this subject, and an assignment of the mortgage is an assignment, not only of the claim against the mortgagor, but of all the securities which the assignor may hold against him, or other parties, for the same debt." In *Olson* v. *Martin*, 38 Iowa, 347, it is said: "It is urged that the agreement or instrument in question provides only for the transfer to Morse of the mortgages, and makes no stipulation affecting the transfer of the notes; that the notes carry with them the mortgages, and the instrument, not showing the transfer of the notes, was not admissable in evidence. But certainly a contract for the transfer of a mortgage would be evidence of an intention to transfer the debt it was given to secure, and would establish such intention, in the absence of conflicting proof." In *Merritt* v. *Bartholick*, 36 N. Y. 44, a case which held that the transfer of the mortgage did not carry the debt, the court, in speaking on that point say: "So that, unless we are authorized to say that such was the intent of the parties, we cannot hold that it did." I think these authorities sufficiently show that an assignment of a mortgage does carry with it the debt, if such was the intent of the parties. This intent in this case, as in others, must be gathered from the attending facts and conditions. When these are sufficient to raise a presumption of such intent, there must be proof that such intent did not exist; and knowledge of that fact must be brought home to the mortgagor before he deals with the assignee, otherwise the

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assignor should be bound. What were the attendant facts and circumstances in this case? Shelly held the legal title to the land. His beneficial interest in it consisted in his right to hold it as security for the payment of the purchase money. If, by his quitclaim to Percival, he conveyed the legal title only, he made his grantee a mere naked trustee, who could by no possibility receive any benefit from his purchase. This fact alone might not show the intent, but it has a bearing. The plaintiff, on the stand, in speaking of this transfer, says, "I simply quitclaimed my interest." That means his entire interest,—his beneficial interest. If the quitclaim simply empowered the grantee to hold the legal title for Shelley's benefit, *i. e.* until Shelly received the purchase money from defendant, then Shelly did not quitclaim his interest, but on the contrary he retained just the same beneficial interest that he held prior to the transfer. His own language contradicts any such reservation.

Again, Mikkelson purchased subject to an existing mortgage. Thereafter Shelly stood in the position of a junior incumbrancer. In the meantime the senior incumbrance had been foreclosed, and Percival held the certificate of sale. At the time Shelly quitclaimed to Percival, the year for redemption had not expired. It had not less than one or more than three months yet to run. The evidence leaves the exact time uncertain. Shelly might have redeemed from the foreclosure sale, and thus rendered his security good. He did not choose so to do. If no redemption from that sale was made, then Shelly's security became worthless. There were but two ways in which he could save himself,—one, by redeeming the land; the other, by selling his security before the time for redemption expired. He chose the latter. But it would aid him none to sell the naked legal title. That had no money value. If he desired to save himself, he must sell his beneficial and valuable interest. And I think that the time and circumstances of the sale, together with his own testimony, lead the mind, in the absence of all contradictory or explanatory evidence, irresistibly to the conclusion that he intended to sell, and

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Percival intended to buy, plaintiff's beneficial interest in the land, and this necessarily included the debt for which he held the land as security. Had plaintiff been able to show that he received from Parcival but a nominal consideration, that fact would have had a tendency to show that it was not the intention to pass the beneficial interest or debt. But no such testimony was given. It is claimed, however, that defendant is not in a position to insist that plaintiff received a valuable consideration, because, when plaintiff, as a witness, was asked what consideration he received for the quitclaim, the court on defendant's objection excluded the question. But the fact that plaintiff received only a nominal consideration, if such be a fact, was one that it was necessary for plaintiff to establish, in order to recover. The defendant called plaintiff as a witness to prove certain formal matters, and, while thus on the stand, plaintiff was asked by his own counsel, on cross-examination, concerning the consideration. The counsel for defendant objected on the ground that it was not proper cross-examination. It would have been improper, I think, to have permitted the plaintiff to establish his own case on his cross-examination as a witness for defendant. He did not otherwise attempt to prove the consideration.

It is urged, also, that the fact that Mikkelson, when he finally purchased from Percival, did not receive his notes, was notice to him that the debt had not been transferred with the security. I readily admit that there is force in the suggestion, but I do not think it controlling. I can understand that Percival might well be indifferent about the notes. If he understood that the debt was transferred, he knew that under the terms of the bond he was perfectly secure. The land had been improved to the extent of $400 after the debts were incurred, and Mikkelson would be forced either to redeem from the foreclosure, and pay, under the provision of the bond, or subsequently purchase at Percival's own terms, in order to save his improvements. The notes were not material to Percival, and Mikkelson may well have supposed, when he purchased from Percival, that he extinguished the debt.

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From that time forth he repudiated all liability on the notes. The bond recited that he should pay the purchase money to Shelly or his "assigns." Business prudence might have suggested the propriety of obtaining the notes, yet the fact that he failed to do so ought not, in my judgment, to deprive him of his defense. If Shelly sold the debt to Percival at such a price as he and Percival agreed upon, it would be highly inequitable to permit him to collect it again from Mikkelson; and if the debt was so transferred, or if Mikkelson believed it was so transferred, and in good faith dealt with Percival on that basis, then he ought not to be required to pay again. On the other hand, if the debt was not transferred, and if Mikkelson believed, or had good reason to believe, that it was not so transferred, the fact that he allowed the foreclosure to ripen into full title, and afterwards purchased such title from Percival, and now needs no further assurance of title either from Shelly or his "assigns," would not relieve him from his obligations to pay the debt contracted with Shelly, because it was his duty to take up the first mortgage, and see that it did not ripen into a title that would cut off Shelly's security. But, in my judgment, when the verdict was ordered the testimony did not establish this latter state of facts. For these reasons, also, I think the judgment must be reversed.

Corliss, J. (dissenting.) While much that is contained in the prevailing opinions in this case meets my approval, I am compelled to dissent from the decision of the court in reversing the case. The ground on which this decision is placed is that Mikkelson was justified in assuming that the quitclaim had transferred to Percival the right to the purchase price represented by the two notes. In my opinion, this view of the case is unsound. It protects Mikkelson, despite his gross negligence. When he paid Percival for the deed, he was bound, as a prudent man, to ascertain whether Percival had a right to receive the purchase price. The mere fact that he was the grantee in a quitclaim deed would not, of itself, justify Mikkelson in assuming that Percival was also the assignee of the notes. It by no means follows, as a necessary

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consequence, that one who has received the legal title from the vendor in a contract for the sale of real property is also invested with the right to the agreed purchase price. Certainly, the legal effect of a transfer of real property is not ordinarily to pass to the grantee a chose in action. Mikkelson was bound to know that the obligation to convey, and the right to receive the fruits of the conveyance, might part company; that there was no inflexible rule of law that they must forever remain inseparably bound up together. If the grantee of the vendor pays nothing for the property, there is no reason in equity why he should claim the right to receive the purchase price merely because he is the grantee in a deed. The circumstances surrounding this transaction indicated that Percival had not acquired Shelly's right to receive the purchase money. The deed was a mere quitclaim. It was executed after Percival had acquired an interest in the property under the foreclosure proceedings. These facts were sufficient to lead a careful man to inquire whether the parties had any other purpose than that of vesting in Percival the legal title which the foreclosure ultimately would give him. Moreover, errors in foreclosure proceedings are not unknown things, and quitclaim deeds are not infrequently given to obviate the legal consequences of such errors. But, even if the facts were different, Mikkelson could not deal with Percival on the theory that he was the owner of these notes, without making any inquiry whether he held them, or they were still in the possession of Shelly, and yet escape the charge of the grossest carelessness. If he went to Percival to demand a deed under the contract, he was bound, as a prudent man, to ascertain whether Percival owned the notes, before paying him the purchase price. It is true that the notes were mere representatives of the purchase price, but this is always the case. A note is only evidence of the obligation which lies behind it. But no one can escape the charge of gross inattention to his affairs who pays to one a debt represented by a note given to another, without ascertaining whether the debt has been transferred to the one to whom he pays it. The most satisfactory

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evidence of such transfer is the possession of the note, and the written evidence of the assignment of it. If the necessary legal effect of a deed, in such a case, were to vest the title to the purchase price in the grantee, the case would be different. But the vendor's deed to a third person has no such necessary legal effect. In fact, the deed itself never transfers the right to the purchase price. It is the intent of the parties, as shown by their conduct and by the circumstances of the transaction outside of the deed; that works an assignment of the right to the purchase money. As I have stated before, the obligation to convey, and the right to the purchase money, may part company. They always do when the vendor dies. The naked legal title, burdened with the trust in favor of the vendee, passes to the heirs at law. The right to the purchase price vests in the personal representatives. The heirs must execute the conveyance, but the money must be paid to the personal representatives. *Thomson* v. *Smith*, 63 N. Y. 301-303; *Potter* v. *Ellice*, 48 N. Y. 323; 2 Story, Eq. Jur. (13th Ed.) 111, 112. It is true that our statute gives the personal representatives the power to execute the conveyance, in such a case. But this does not affect the principal. The obligation and the right may be separated by the act of the vendor, as well as by operation of law. He may convey the naked legal title to one person, and either retain himself the right to the purchase price, or transfer it to another third person. What right had Mikkelson to assume that Shelly had transferred to Percival the right to receive the amount due on these notes, when the notes were not in the possession of Percival? Mikkelson had expressly agreed to pay these notes to Shelly on receiving a conveyance from him or from his grantee. He had agreed to pay them to Shelly on a conveyance to him of the land by a grantee of Shelly. He knew that Shelly might convey the land subject to the obligation to convey, and yet reserve to himself the right to the purchase money. He knew that Shelly had not transferred to Percival either the notes or the contract, for what he could have ascertained by inquiry he is charged with knowledge of, when he fails

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to make such inquiry, it being his duty to make the same; and he also knew that all that Percival had was a mere quitclaim deed, whose utmost legal effect was to transfer the legal title to the land, and yet it is said that he was justified in assuming that he could safely pay the purchase price to Percival. Moreover, the opinion assumes that Mikkelson dealt with Percival under the contract, when it is obvious that in dealing with him he ignored the contract, and treated the act of Shelly in conveying to Percival as an abandonment thereof. This he had no right to do. From one portion of the opinion of the Chief Justice, I am led to believe that he agrees with me on this point. But in another part he seems to take the position that the conveyance to Percival was *prima facie* an abandonment of the contract by Shelly. Whatever might be the rule in a case, where the contract was silent on the subject, I am very clear that, under the language of the agreement in this case, Mikkelson had no right to infer from the conveyance to Percival any purpose on the part of Shelly to abandon the contract. Mikkelson had expressly agreed to accept a deed from either Shelly or his grantee. The very contingency of a transfer by the vendor before conveyance to the vendee was contemplated and provided for by the parties. For this reason a number of the authorities cited by the Chief Justice do not seem to be in point. I am unable to discover any force in the construction placed by Judge Bartholomew, in his opinion, upon the testimony of Shelly that he had merely quitclaimed his interest, as showing a transfer of the right to the purchase price. The word "interest" unquestionably refers to only the land. That he does not mean to testify that he assigned the right to the purchase price is made clear by his testimony that he had always been, and still was, the owner of the notes. His testimony would not be true if he had transferred to Percival the right to the purchase price, for such a transfer would, of itself, vest in Percival the title to the notes. It is possible that, when the purchase price is not evidenced by a note or notes, the conveyance of the land by the vendor to a third person would raise a

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presumption that the vendor intended to transfer the right as well as the obligation. See, on this point, as favoring this view, *Sons of Temperance* v. *Brown*, 9 Minn. 157 (Gil. 144;) *Ten Eick* v. *Simpson*, 1 Sandf. Ch. 244; *Daniels* v. *Davison*, 16 Ves. 249, and 17 Ves. 433. But there are cases which seem to support the other view. *Chinn* v. *Butts*, 3 Dana, 547; *Lodge* v. *Lyseley*, 4 Sim. 70; *Whitworth* v. *Gaugain*, 3 Hare, 416; *Scott* v. *Coleman*, 5 T. B. Mon. 73; *Secombe* v. *Steele*, 20 How. 94-107. On this question, it is unnecessary to express any opinion. But when the purchase price is evidenced by notes which are not transferred, but retained by the vendor, the mere fact of a conveyance cannot create a presumption that the right to the purchase money has been assigned. And the vendee is not justified in drawing such inference when he knows that such notes have not been transferred. Such knowledge he is presumed to have when he blindly deals with a third person, making no effort to ascertain the fact. The mere circumstance that the notes are not surrendered to him is sufficient to put him on his guard. The rule is well settled that one who pays a note, without requiring surrender of the possession of it, cannot derive any protection from the payment, if at the time of payment the note had in fact been transferred to another. See *Kernohan* v, *Durham*, 48 Ohio St. 1, 26 N. E. 982, and cases cited. In view of such a rule, can it be said that the debtor can assume the fact of an assignment from the mere execution of an instrument whose legal effect is not to transfer the note, and, acting on such assumption, pay the debt to a person not entitled to receive it, without inquiring for the note, or ascertaining whether it has in fact been assigned, and then claim protection as one who has acted with reasonable prudence? The opinion of the Chief Justice exonerates the defendant from liability, although it is conclusively shown on the new trial that the right to the purchase price was not assigned to Percival, unless it can be proved, by some fact other than the retention of the notes by Shelly, that he (Mikkelson) had notice that Shelly had not transferred them to Percival.

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I cannot assent to the reasoning of Judge Bartholomew that the poverty or ignorance of the defendant, or the shrewdness of the plaintiff, should influence us in the least. These questions are important when there is an issue of fraud or mistake or duress to be tried. But in this case we have merely a question of law, to decide. Rules of law cannot be adjusted to the varying faculties and attainments of men. There must be one law for all. In the administration of justice in the courts, ideal justice can never be attained. The most that can be hoped for is a reasonable approximation to it. That this practical justice may in the main be meted out, it is indispensable that the law should be stable. I believe that the practice of doing violence, however slight, to legal principles to accomplish justice in individual cases, has resulted in incalculable injustice to future litigants, by unsettling the law. From the two views that appear to be set forth in the opinion of my associates,—that the right to the purchase price was in fact transferred to Percival, and that Mikkelson was justified in assuming that it was so transferred,—I am constrained to dissent. I think that there was nothing in the case to warrant a finding that the right to the purchase money had been assigned to Percival and I also think that Mikkelson was not justified in assuming that this right had been so assigned. And, in addition, the case shows, to the satisfaction of my mind, that he did not act upon such assumption, but upon the theory that Shelly had abandoned the contract by conveying to Percival. My vote is for the affirmance of the judgment. I concur in the opinion of the Chief Justice in all respects except as I have otherwise indicated in this opinion.

(63 N. W. Rep. 210.)

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SAMUEL L. LINN *vs.* CHARLES R. JACKSON.

Opinion filed May 14th, 1895.

Action by Sheriff—Conversion by Deputy—Pleading.

The complaint stated, in effect, that the defendant was deputy sheriff of Steele County, and that a writ of attachment issued out of the District Court for said county in a certain action, and was delivered to the defendant for service; and that the defendant, under and by virtue of said writ, levied upon certain personal property. *Held*, that these averments, nothing to the contrary appearing in the complaint, sufficiently allege that the court issuing the writ had jurisdiction of the subject of the action, that the writ was regular upon its face, and that the levy was made within the limits of Steele County. Order overruling a demurrer to the complaint, affirmed.

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

Action by Samuel L. Linn against Charles R. Jackson. From an order overruling a demurrer to the complaint, defendant appeals.

Affirmed.

McMahon Bros. (*M. A. Hildreth* of counsel,) for appellant.

C. J. Paul, (*E. W. Camp*, of counsel,) for respondent.

WALLIN, C. J. This action is brought to recover damages. The complaint alleges, in substance that at all times mentioned in the complaint the plaintiff was the duly elected and acting sheriff in and for the County of Steele, in this state, and that the defendant was the duly appointed and acting deputy of the plaintiff. That on the 12th day of April, 1890, the defendant qualified as such deputy sheriff by taking the usual official oath, and giving the plaintiff a bond, the condition of which was as follows: "The condition of the obligation is such that whereas, the said Charles R. Jackson has been appointed to the office of deputy sheriff within and for the said County of Steele, now, therefore, if the said Charles R. Jackson shall faithfully and impartially discharge the duties of his said office of deputy sheriff, and render a true account of all moneys, credits, accounts, and property of all kinds that shall come into his hands as such officer, and pay over

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and deliver the same according to law, then the above obligation to be void; otherwise to remain in full force and virtue." The complaint further charges: "That on or about the 1st day of November, 1890, under and by virtue of a writ of attachment issued out of said court, and placed in the hands of said defendant for service, in an action then pending therein, wherein one George F. Porter was plaintiff, and one Barron M. Hervey was defendant, said defendant herein, as such deputy sheriff, attached and levied upon and took into his possession the sum of four hundred and thirty-nine dollars and sixty cents, the property of said Barron M. Hervey. That on September 24, 1891, said court, by its order, vacated and discharged said attachment, and commanded that any and all proceeds of sales and moneys levied upon and collected by the sheriff of Steele County, under and by virtue of said attachment, and all property of the defendant attached therein by said sheriff, be paid and delivered by said sheriff to the defendant's attorney, and released from said attachment. That the following is a copy of said order, to-wit: 'State of North Dakota, County of Steele—ss.: In District Court, Third Judicial District. George F. Porter, Plaintiff, Barron M. Hervey, Defendant. On the annexed notice of motion, and the affidavits of Barron M. Hervey and Charles R. Jackson, and on the pleadings and proceeding in this action, and after hearing Messrs. E. J. and J. P. McMahon, attorneys for the plaintiff, and C. J. Paul, attorney for the defendant: Ordered, that the attachment issued in this action on the 31st day of October, 1890, be, and the same is hereby, vacated and discharged. And it is further ordered that any and all proceeds of sales, and moneys levied upon and collected by the sheriff of Steele County under and by virtue of said attachment, and all property of the defendant attached therein by said sheriff, be paid and delivered by said sheriff to the said defendant's attorney, and released from said attachment. Dated September 24, 1891. Wm. B. McConnell, Judge.' That defendant has at all times failed, neglected, and refused, and still fails, neglects, and refuses, to account for and

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pay over to plaintiff any portion of said sum of four hundred and thirty-nine dollars and sixty cents so as aforesaid levied upon and taken into his possession as such deputy sheriff, although often requested by plaintiff so to do, and has failed, neglected and refused, and still fails, neglects, and refuses, to pay the said sum of money so as aforesaid levied upon and taken into his possession, or any part thereof, to the said Barron M. Hervey, or his attorney, as required by the said order of said court, although often requested and directed by plaintiff so to do, to the damage of plaintiff in the sum of four hundred and thirty-nine dollars and sixty cents, and interest thereon at seven per cent. per annum from and after the 1st day of November, 1890."

The only question presented for determination is whether the complaint states facts sufficient to constitute a cause of action. We are clearly of the opinion that this question must receive an affirmative answer. The defendant's counsel urged against the sufficiency of the complaint only that it does not allege in specific terms that the court issuing the writ of attachment in question had jurisdiction of the subject matter; nor that the writ was regular on its face, and that the complaint "nowhere specificially alleges that said levy was made in Steele County." The position is further taken by defendant's counsel (and in this we agree with him) that no facts are alleged tending to show a liability other than in an official capacity, *i. e.* upon the facts as stated the defendant is liable only on the theory of an official liability as the deputy sheriff of Steele County, appointed by the plaintiff. This court will take judicial notice that the District Courts of this state have authority to issue writs of attachment, and hence that fact need not be averred in any pleading, and the fact that the writ in question was issued by the District Court of Steele County appears, at least *prima facie*, upon the face of the complaint. The order discharging the attachment is set out in the complaint in full, and shows that there was an action pending in the District Court for Steele County in which George F. Porter was plaintiff and Barron M. Hervey was defendant, which is the title of the

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action in which it is alleged that the writ issued out of said court. From these averments of fact it sufficiently appears that the writ issued out of the District Court for Steele County. The complaint alleges that the defendant "levied upon and took into his possession the sum of four hundred and thirty-nine dollars and sixty cents, the property of the said Barron M. Hervey," and that such levy was made by the defendant "under and by virtue of a writ of attachment issued out of said court." This language imports *ex vi termini* that a valid writ of attachment regular on its face was issued out of said court, inasmuch as no fact is set out in the complaint tending to show that the writ was invalid, or in any respect irregular. It would manifestly be superfluous to add in this connection that said writ was properly sealed and attested, and that it embraced the mandate to the sheriff which the statute requires. All of these features are implied in the statement that a writ of attachment issued out of said court. It is never necessary in a pleading to allege any fact which will appear by necessary inference from facts set out in the same pleading. We think it sufficiently appears also that the levy which is stated to have been made by the defendant, "under and by virtue of said writ of attachment," was made within the limits of Steele County. True, the averment is not made in express terms. But the fact that the defendant as "deputy sheriff" attached said money under said writ is alleged in terms; and from such express averments the legal inference follows that the levy was made within the sheriff's bailiwick, which under the law was the County of Steele. There is no intimation in the complaint that the defendant made, or attempted to make, any extraterritorial levy under such writ, and the averment that the levy was made in fact necessarily imports a legal levy and excludes the notion that an unlawful seizure was made under color of the writ outside the limits of Steele County. The mandate of the writ required defendant to "attach and safely keep all the property of defendant within his county." Comp.

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Laws, § 4997. Where the allegation is that there was a levy in fact, there is a necessary inference that the levy was lawful, unless some other fact appeared tending to impeach the lawfulness of the levy. The case turns entirely upon the elementary rules of pleading, and we deem it unnecessary to cite authority in support of the views we have expressed.

The order overruling the demurrer to the complaint will be affirmed. All concur.

(63 N. W. Rep. 208.)

INA N. GEORGE *vs.* N. M. TRIPLETT.

Opinion filed May 14th, 1895.

Discrediting Own Witness—Surprise.

When a party calling a witness is surprised by his testimony, which not only fails to prove, but actually disproves, his case, he has a right to ask the witness whether he has not made a statement to the plaintiff conflicting with his testimony, and which, if true, would tend to prove the plaintiff's case.

Disproving Testimony of Own Witness.

Whether, if the witness denies making such statement, the plaintiff may be allowed to prove the contrary, in the discretion of the court, for the purpose of impeachment, not decided.

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

Action by Ina N. George against N. M. Triplett for slander. Judgment for defendant, and plaintiff appeals.

Reversed.

L. B. Everdell and *Crum & Hanson*, for appellant.

W. E. Purcell and *McCumber & Bogart*, for respondent.

CORLISS, J. This action is for slander. On the trial the plaintiff to prove her case, called, as a witness, Dr. Bates. The complaint alleged that the slanderous words were spoken to him. The witness not only failed to testify to the alleged slander, but distinctly denied the speaking by defendant of such words in the

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conversation in which it was alleged they were uttered. Thereupon plaintiff's counsel asked the witness whether he had not made to plaintiff statements different from his testimony,—whether he had not informed plaintiff, before the trial, that the defendant had spoken to him (the witness) the slanderous words set forth in the complaint. On objection this evidence was excluded. We think it was error. The general rule undoubtedly is that a party cannot impeach his own witness by proving that he has made different statements out of court. This rule, however, is by no means universally accepted and followed. In some jurisdictions a party surprised by the testimony of a witness he calls may, in the discretion of the court, prove by third persons conflicting statements made by the witness, provided he has not merely failed to testify for the party calling him, but has given damaging testimony against him. See *Selover* v. *Bryant*, (Minn.) 56 N. W. 58. We are not called upon, in this case, to decide which of these two rules shall govern trials in this state. Had the witness Bates denied making any conflicting statements, and had the trial court then permitted the plaintiff to prove such statements, a different question would have been presented. Without expressing any opinion on this point, we are clear that plaintiff had a legal right to ask the witness if he had not made inconsistent statements to herself. This may be done when a party is surprised by the evidence of a witness he calls, for the purpose of refreshing the recollections of the witness. Other considerations make it plain that a party should have this right when taken by surprise by the unexpected hostility of his own witness. If the witness is in fact testifying falsely, it may bring him to the truth to probe his conscience, or to call to his mind the danger of punishment for perjury, in view of the fact that he has, by statements out of court inconsistent with his testimony, furnished evidence for his conviction. Moreover, a lawyer of strong personality, burning with indignation at the witness' deceit, may cow and break down a corrupt witness who has told him or his client a different story. Without further elaboration

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of this point,—for the ground has been already fully covered by discussion in other opinions,—we hold that, both on sound principle and under high authority, the rule is that in such a case the party calling a witness may ask him whether he had not previously made a particular statement as to material facts inconsistent with his testimony on the trial. *Hurley* v. *State*, (Ohio Sup.) 21 N. E. 645; *Humble* v. *Shoemaker*, 70 Iowa, 223, 30 N. W. 492; *Hildreth* v. *Aldrich*, 15 R. I. 163, 1 Atl. 249; *Bullard* v. *Pearsall*, 53 N. Y. 230; *Melhuish* v. *Collier*, 15 Adol, & E. (N. S.) 878: *State* v. *Sortor*, (Kan. Sup.) 34 Pac. 1037; *Hickory* v. *U. S.*, 151 U. S. 303, 14 Sup. Ct. 334; *Hall* v. *Railway Co.*, (Iowa,) 51 N. W. 150; 1 Whart. Ev. § 549. See 1 Thomp. Tr. § 512; *Cox* v. *Eayres*, 55 Vt. 24; *Hemingway* v. *Garth*, 51 Ala. 530. Had plaintiff been allowed to ask the proposed questions, the witness Bates might have so materially altered his testimony as to establish the speaking of the slanderous words set forth in the complaint. For the error in excluding this evidence the judgment of the District Court is reversed, and a new trial ordered. All concur.

(63 N. W. Rep., 891.)

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McCormick Harvesting Machine Co. *vs.* Wm. Taylor.

Opinion filed May 17th, 1895.

Sale by Agent—Note to Principal—Defenses—Breach of Warranty.

When A., who was the agent of C. for the sale of certain machinery, sold a horse belonging to himself to B., with a warranty, and received in payment therefor, B's note, made payable directly to C., and when there was a breach of the warranty, B. could properly, in an action brought against him by C. upon the note, set up such breach of warranty, and defeat a recovery, even where C. was ignorant of the transaction out of which the note arose, and received the same from A. upon a settlement of the agency account, and gave A. credit for the full amount thereof.

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

Action by McCormick Harvesting Machine Company against William Taylor on a promissory note. Judgment for defendant, and plaintiff appeals.

Affirmed.

A. T. Cole, (*McCumber & Bogart*, of counsel,) for appellant.

W. H. Rowe, for respondent.

Bartholomew, J. Action on a promissory note given as purchase price for a horse. Defense of warranty of the horse and breach thereof by reason of horse being diseased with glanders. Counterclaim for damages by reason of the communication of the disease to other horses, and infection of stable. At the close of the testimony the court directed a verdict for defendant. Subsequently a motion for a new trial was denied, and defendant had judgment for costs. Plaintiff appeals. The case was correctly ruled, and on entirely elementary principles. Assuming all that plaintiff's evidence tended to prove as proven, and the facts are as follows: The firm of Martin & Strane were the agents of plaintiff at Ellendale, in this state, for the sale of machinery. For machinery so sold they accounted to plaintiff either in money or notes. Martin & Strane sold a piece of machinery of their own, not of plaintiff's manufacture, and received in payment therefor a horse. This horse they subsequently sold to defendant with a warranty.

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The note in suit was taken in payment, but instead of being made payable to Martin & Strane they had it made payable to plaintiff, and turned it over to plaintiff in their next settlement, plaintiff at the time supposing that it had been taken in payment for its machinery. The horse was entirely worthless, and was killed by order of the proper authorities.

Plaintiff's sole ground for recovery upon the note rests upon the proposition that it is an innocent purchaser for value before maturity, and thus relieved from the defense pleaded. In other words, it claims to be a *bona fide* indorsee of the note. Section 4487, Comp. Laws, reads: "An indorsee in due course is one who, in good faith, in the ordinary course of business, and for value, before its apparent maturity or presumptive dishonor, and without knowledge of its actual dishonor, acquires a negotiable instrument duly indorsed to him, or indorsed generally, or payable to the bearer." Plaintiff did not acquire the note by indorsement. It was the payee named in the note. "A *bona fide* holder must be a purchaser in the usual course of business." Rand. Com. Paper, § 988. Plaintiff was not a purchaser in any such sense. It received the note from its agents as its property in the hands of its said agents. It was named as payee therein, and when it accepted the note in that form it was bound to know that it took it subject to any defenses that the maker had against it. See Rand, Com. Paper, § 1875. The case of *Aldrich* v. *Stockwell*, 9 Allen, 45, fully covers this case. We quote the head note: "If the vendor of an article with warranty of quality takes a promissory note for the price, payable on demand to a third person, and the article proves worthless, the maker of the note may rely upon the breach of warranty in defense to an action upon it by the payee, although he cannot show that the payee had any knowledge of the warranty, or took the note otherwise than in good faith and for value."

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

(63 N. W. Rep. 890.)

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CYNTHIA N. PATCH *vs.* NORTHERN PACIFIC RY. CO.

Opinion filed May 18th, 1895.

Appeal—Order Granting New Trial.

The decision of the trial judge in granting a new trial on the ground of newly discovered evidence will seldom be distured on appeal. In this case the order is affirmed.

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

Action by Cynthia N. Patch and others against the Northern Pacific Railroad Company. Verdict for plaintiffs. From an order granting a new trial, they appeal.

Affirmed.

S. L. Glaspell, and *J. F. Keime*, for appellants.

Ball & Watson, for respondent.

CORLISS, J. The appeal is from an order granting a new trial on the ground, among others, of newly discovered evidence. It is seldom that an appellate court will disturb the decision of the trial court in such a case. The reasons for the rule have been often stated, and need not be here repeated. The moving party in this action, the defendant, brought the case he presented to the trial court on the motion fully within the rules regulating such motions. In fact, there is no claim made by the plaintiff that defendant failed to comply with all the rules governing such motions, except as to the character and force of the alleged newly discovered evidence. We have carefully examined the record, and, while we have doubts whether this new evidence will lead to a different verdict on a new trial, yet on this question we are bound by the judgment of the trial judge, who enjoyed advantages for arriving at a correct conclusion on this point superior to those within our reach.

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

(63 N. W. Rep. 207.)

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WILLIAM D. HEEBNER *vs.* CHARLES C. SHEPARD.

Opinion filed May 18th, 1895.

Sale—Action for Purchase Note—Counterclaim—Breach of Warranty.

The action was upon two promissory notes given by defendant to plaintiff for a thrashing machine sold by plaintiff to defendant. The answer admitted the execution and delivery of the notes, and in addition set out, as new matter, that the thrashing machine was sold with a warranty, and did not work as it was warranted to do, and that by reason thereof the defendant was damaged in a large sum, for which defendant demanded judgment against the plaintiff. *Held*, that such new matter constituted a counterclaim, within the meaning of the statute.

Judgment on Counterclaim for Want of Reply.

No reply was served to the answer, and after the time for reply had expired the defendant moved in the court below for judgment, under section 4919, Comp. Laws. The court adjudged the plaintiff was in default for reply, and directed the defendant to offer proof in support of his counterclaim. *Held*, that the order was a proper order, upon the facts stated.

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

Action by William D. Heebner, as Heebner & Sons, against Charles C. Shepard, on notes given for the price of a thrashing machine. From a judgment of default for want of a reply to a counterclaim, plaintiff appeals.

Affirmed.

A. T. Cole, (*McCumber & Bogart*, of counsel,) for appellant.

W. H. Rowe, for respondent.

WALLIN, C. J. Action on notes given for a thrashing machine. The answer alleges that the machine was sold on a warranty, and that it did not work as warranted, and by reason thereof the defendant was damaged in a large sum, for which judgment was demanded. The plaintiff never at any time served either a demurrer or a reply to the answer, and after the time for serving a reply had expired the defendant moved the court "to dismiss plaintiff's complaint, and give judgment for his counterclaim." The motion was made upon the ground that no reply had ever been served to the defendant's answer, and that the time for

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reply had expired. Pursuant to said motion of the defendant, an order of the trial court was made, adjudging plaintiff in default for want of a reply to the counterclaim, as stated in the answer, and further adjudging that the defendant could submit proof of the facts alleged in the answer. Plaintiff appeals to this court from said order.

Plaintiff's sole contention in this court is that the order should be reversed for the reason that the matter pleaded in the answer is purely defensive matter, and does not constitute a counterclaim, and therefore no reply was required. In our judgment, the contention of the plaintiff is untenable. The answer stated, in substance, that the notes described in the complaint were given by defendant to the plaintiff for a thrashing machine, which machine was sold by plaintiff to defendant upon a warranty, and that the machine did not work as warranted, and by reason of which fact defendant had been damaged in a large sum, for which defendant demanded a judgment against the plaintiff. The action is upon contract, and the defendant, by his answer, admits the execution of the contract, *i. e.* the notes in suit, and thereby confesses the cause of action stated in the complaint. The defendant then proceeds to set out by answer another contract between the plaintiff and the defendant, and alleges a brief act thereof, and damages resulting from such breach, and demands judgment against the plaintiff for damages. In brief, the case falls clearly within the terms of the second subdivision of section 4915, Comp. Laws. The action is one arising on contract, and the counterclaim set out in the answer is one also arising on contract, and one existing at the commencement of the action, in favor of the defendant, and against the plaintiff. The answer contains no defense whatever to the causes of action stated in the complaint. On the contrary, the answer, by admitting the execution and delivery of the notes, and by failing to allege any facts tending to defeat the notes, thereby confesses the plaintiff's cause of action. It follows that the cause of action against the plaintiff as stated in the answer was a counterclaim, pure and simple, and

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nothing else. To this counterclaim the plaintiff should have replied, if he desired to controvert the same. No reply was served, and therefore the defendant was entitled to make the motion indicated by section 4919, Comp. Laws. The order appealed from was made upon such motion.

The order of the District Court must be affirmed. All the judges concurring.

(63 N. W. Rep. 892.)

NOTE—The defendant may move for judgment on counterclaim for want of reply. *Power* v. *Bowdle*, 3 N. D. 107. That the facts pleaded are not the proper subject of counterclaim, can only be taken advantage of by demurrer, and cannot be raised on the trial by motion. *First Nat. Bank* v. *Laughlin*, 4 N. D. 401. Where an answer states a good defense imperfectly, the defect should be met by motion to make the pleading more definite and certain, and not by motion for judgment on the answer as frivolous. *Yerkes* v. *Crum*, 2 N. D. 72. A motion to strike out a verified general denial as sham and for judgment cannot be entertained. *Cupples Wooden Ware Co.* v. *Jansen*, 4 Dak. 149.

MARGARET TAYLOR *vs.* WM. TAYLOR.

Opinion filed May 18th, 1895.

Trial De Novo in Supreme Court.

Actions tried below under the provisions of Ch. 82, Laws 1893, can only be tried in this court *de novo*.

All Evidence Preserved—Review of Entire Case.

In such cases all the evidence offered in the trial court should be preserved in the record, together with the objections thereto, if any; and, when the case reaches this court, such objections will be passed upon as original questions, and evidence improperly excluded below under objections will be considered here, and evidence improperly admitted below over objections will be excluded here. A respondent cannot complain that all the evidence is not here when the omitted evidence was excluded on his objection, nor can appellant complain of such omission when it is clear from the record, beyond controversy, that such evidence was properly excluded.

Indentification of Exhibits—Certificate of Judge.

All exhibits offered in the court below, whether received or not, should be identified in this court by the certificate of the trial judge, as admitted exhibits are indentified in other cases.

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Condonation of Cruelty by Cohabitation.

In an action for divorce on the ground of cruelty, cohabitation after such cruelty does not establish condonation, in the absence of an express agreement to condone.

Revocation of Condonation.

In such an action, an express agreement to condone is revoked, and the original cause renewed, by subsequent act of cruelty on the part of the condonor towards the condonee.

Record Remanded for Judgment in Lower Court.

In actions tried here under the provisions of said Ch. 82, Laws 1893, while this court will determine the final judgment or decree to be entered, such entry will not be made in this court, but the record will be remanded to the court from which the appeal was taken, under the provisions of § 26, Ch. 120, Laws 1891, and it will be the duty of that court to order the entry of a judgment in conformity with the determination of this court.

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

Action for divorce by Margaret Taylor against William Taylor. From a judgment dismissing the action, plaintiff appeals.

Modified.

J. E. Robinson, for appellant.

W. H. Barnett, for respondent.

BARTHOLOMEW, J. The condition of the record in this case has caused us some embarrassment. The action was for a divorce, and was dismissed. It was tried after the enactment of Ch. 82, Laws 1893, the first section of which contains the following language: "In all actions tried by the District Court without a jury, wherein issue of fact has been joined, all the evidence offered in the trial shall be taken down in writing, or the court may order the evidence or any part thereof to be taken in the form of depositions, or either party may, at pleasure, take his testimony or any part thereof by deposition; *provided*, that whenever such evidence is taken down in shorthand and written out at length, it shall be deemed to have been taken down in writing, and all testimony so taken in shorthand must, at the request of either party, be so written out at length, and filed with the clerk. All evidence taken as provided by this section shall be certified

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by the judge at any time after the trial, and within one month before the time allowed for the appeal of said cause shall have expired, and shall thereupon become a part of the judgment roll, and the original of such judgment roll shall go on appeal to the Supreme Court, which shall try the cause anew upon such judgment roll and render final judgment therein, according to the justice of the case, and in the decision of all equitable actions the rules of equity must prevail. And in all actions tried in the District Court according to the provisions of this act no exceptions need be taken on findings of fact made." This is the first appeal that has reached us under that act. No question is made upon the legality or constitutionality of the act, nor upon any matter of procedure thereunder; and we therefore disclaim passing upon any questions of practice arising under said law except such as are herein specifically mentioned. Both parties treat the case as properly in this court for trial *de novo*, and for no other purpose. It is clear that it was the duty of the trial court to try the case under the above statute, and equally clear that we can only try it *de novo* in this court. But there is nothing in the abstract from which we can gather that it is an abstract of all the evidence adduced at the trial. This, under the circumstances, may be a violation of rules of this court. But as the foregoing statute marks a most radical change in procedure in this court, and as the rule was formulated to meet the previous practice, we are not inclined to favor any strict application of the rule to cases of this character until we have indicated the proper practice under the new statute. We have carefully explored the record. We find the oral evidence offered at the trial all properly preserved and certified. We find, however, that plaintiff (appellant here) offered in evidence two exhibits (Exhibits A and B,) which, on defendant's objection, were rejected by the court. Exhibit C offered by plaintiff, was received. There are certain papers found in this record marked Exhibits "A," "B," and "C," respectively, but these papers are in no manner authenticated or identified by any certificate of the trial judge. Two of the

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exhibits (A and B) were rejected. If we treat them as not in the record, the respondent cannot complain, as they were excluded on his objection, and we must presume that their presence would be to his detriment and appellant's advantage. *Lumber Co.* v. *Mitchell*, 61 Iowa, 132, 16 N. W. 52. Nor can appellant be heard to object to their absence, as the preliminary oral testimony which is in the record, and which led up to the offer of the exhibits, shows so clearly that they were inadmissable that they would not be considered for a moment if here. We wish to say in passing, however, that we deem it the proper practice in cases tried in this method to make the record show all the evidence offered in the lower court, and the objections thereto, whether such evidence he received and considered by the trial court or not. When the case reaches this court, the objections will be passed upon as original objections, and without regard to the rulings of the trial court, and evidence improperly excluded below, under objections, will be considered here, and evidence improperly admitted below, over objections, will not be considered here. Such seems to be the practice under similar statutes. *Taylor* v. *Kier*, 54 Iowa 645, 7 N. W. 120; *Blough* v. *Van Hoorebeke*, 48 Iowa, 40; *Lumber Co.* v. *Mitchell*, *supra*. Exhibit C, while not indentified by the certificate of the trial judge, is yet so far identified that we deem it our duty to consider it in this case. The oral evidence discloses its date, the signatures thereto, and its purport. The paper found in the record, and marked "Exhibit C," corresponds in all respects with the paper described in the oral testimony. No suggestion is made that it is not properly before us. On the contrary, both parties are in this court, claiming rights under such instrument; and we shall therefore in this instance regard it as properly before us. But it is evident that in these cases the proper and orderly practice requires all exhibits offered in the trial court to be made a part of the record in the case, together with the objections thereto, if any; and all such exhibits should be certified to this court in the same manner that exhibits received in evidence are certified in other cases.

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Turning to the evidence in the case, we are unanimously of the opinion that under it appellant should have a decree in this case. No good purpose can be subserved by setting out the evidence. The complaint was for cruelty, and the evidence shows a case of almost unparrelled cruelty, by use of personal violence and brute force. There is no attempt to deny or palliate this extreme cruelty. Respondent relies solely upon this plea of condonation. In this, we think, he signally failed. Exhibit C is an instrument dated December 23, 1893, and signed by the parties hereto, and by which respondent releases to appellant all claim to certain real estate and personal property therein described, and agrees to pay her $100 per year for the support of the two minor children. The last paragraph of the instrument is as follows: "And, until after seeding next spring, William Taylor is to have the use of the granary on said land for his wheat and oats, and the barn for his stock, in the same manner as the same is now used by him, and likewise the use of the fanning mill." Respondent contends, and so testifies, that this instrument was signed upon appellant's promise to condone his past conduct, dimiss her complaint for divorce then pending, and resume her relations as his wife. At the time the instrument was executed, respondent had served no answer to the divorce complaint, nor did he intend so to do. Appellant testifies that there was no promise to condone or dismiss, and that the instrument was intended as a settlement of property questions between them, and provision for the two minor children, in anticipation that a decree of divorce would be granted her. She has sworn corroboration in the oral testimony. But we think the instrument itself is almost conclusive against respondent's position. The exception from the household furniture transferred to appellant of "the bedding and the bed occupied and used by William Taylor," the promise to pay appellant the $100 per year for the support of the two little girls, and the reservation of the use of the granary and barn and fanning mill "until after seeding time next spring," are all clearly inconsistent with any purpose to resume and continue

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their relations as husband and wife. Respondent also relies, as showing condonation, upon cohabitation subsequent to the commencement of the action after the execution of Exhibit C. Appellant admits cohabitation on several occasions, but swears that she was compelled by force and threats to submit to respondents's embraces. It is suggestive in this connection to note that after appellant had testified to such force and threats, and when respondent was placed upon the stand to rebut such testimony, and was asked by his counsel, "You my state, Mr. Taylor, whether or not you forced her to have marital relations after the signing of that document," respondent remained silent, and made no answer. But, further as to this matter of condonation: Section 2569, Comp. Laws, reads: Condonation is the conditional forgiveness of a matrimonial offense constituting a cause for divorce." Section 2570 reads: "The following requirement are necessary to condonation: Restoration of the offending party to all marital rights. Condonation implies a condition subsequent,—that the forgiving party must be treated with conjugal kindness. Where the cause of divorce consists of a course of offensive conduct, or arises in cases of cruelty from excessive acts of ill-treatment, which may, aggregately, constitute the offense, cohabitation, or passive endurance, or conjudal kindness, shall not be evidence of condonation of any of the acts constituting such cause, unless accompanied by an express agreement to condone." Section 2571 reads: "Condonation is revoked and the original cause of divorce revived: When the condonee commits acts constituting a like or other cause of divorce; or when the condonee is guilty of great conjugal unkindness, not amounting to a cause of divorce, but sufficiently habitual and gross to show that the conditions of condonation had not been accepted in good faith, or not fulfilled." By supplemental complaint, appellant charges various acts of cruelty after the execution of Exhibit C. She testifies to these acts positively. Respondent denies them. Appellant testifies that at one time, nearly eleven months after the exhibit was signed, respondent seized a

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neck yoke, and, with threatening language, ran at her, and that she took refuge behind one Williams, Taylor's hired man. Mr. Williams testifies as to this affair: "While we were having these words [Mr. Taylor and witness] Mrs. Taylor came to the field, and she said, 'Taylor,' she said, 'there is no use of you two men having any words'; and he swore at her, and said she was the cause of it all, and that he would kill her, and he picked up a neck yoke that was lying on the ground, and started for her. She ran behind me, and he turned around, and threw the neck yoke down." This witness testifies to other threats of violence made by respondent to appellant; and, in answer to the question, "What kind of language did he commonly use to her?" he replied, "Well I should call it quite rough, the language that he used sometimes,—language not often heard in families." It is clear that, under our statute, cohabitation, even if not enforced, does not condone extreme cruelty, in the absence of an express agreement to condone, and we have held that no such agreement was shown in this case. But, even if such an agreement was made, we are clear that the condonation was revoked, and the original cause of action revived by the subsequent conduct of respondent.

Having reached a conclusion as to what the decree must be in this case, we find ourselves with no certain guide as to the manner in which it shall be entered. Chapter 82, Laws 1893, declares that this court shall "render final judgment therein according to the justice of the case." The rendition of judgment is the act of a court. The entry of judgment is the act of a clerk. *Gould* v. *Elevator Co.*, 3 N. D. 96, 54 N. W. 316. In § 26, Ch. 120, Laws 1891, it is provided that "in all cases the Supreme Court shall remit its judgment or decison to the court from which the appeal was taken to be enforced accordingly, and, if from a judgment, final judgment shall thereupon be entered in the court below in accordance therewith, except when otherwise ordered." Our practice has been in accordance with this provision. The law of 1893 does not repeal or modify or refer to this provision. There is no statutory authority for the entry of judgment in this court,

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except in matters where this court has original jurisdiction. A judgment of this court does not constitute a lien upon realty, nor is there any provision whereby a transcript of a judgment of this court can be filed in any other court. In the great majority of cases a final judgment entered in this court would be of but little value to the successful party. From these facts we are led to conclude that the legislature intended that judgment should be entered in these cases in accordance with our former practice. Accordingly, the record in this case, together with a copy of this opinion, will be transmitted to the District Court for Cass County, and said court will annul and cancel its judgment heretofore entered in this case, and order the entry of a decree granting appellant an absolute divorce from respondent, and giving to her the care and custody of the two minor children, Bertha Jane and Ethel Irene, and conferring on her the title to all the property described in Exhibit C, to-wit: the S. E. ¼ of section 4, in township 141 N., range 49 W., in said Cass County, also one cow, and all the household property, except one bed and bedding, four horses, with their harness, the two colts mentioned, the harrow, buggy, Havana press drill, two wagons, fanning mill, sulky rake, and anvil, and ordering that respondent make to appellant all necessary conveyances to invest appellant with all his interest and title in said property, and the whole thereof, and further ordering that respondent pay appellant the sum of $100 per year towards the support of said minor children, the same to be paid in equal quarterly payments until the youngest of said children reaches the age of 18 years; these provisions to be in lieu of all other claims for alimony whatsoever, unless, on application, such decree be subsequently modified in that respect; appellant to have and recover her costs in both courts.

Ordered accordingly. All concur.

(63 N. W. Rep. 893.)

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OWEN MARTIN *vs.* WILLIAM R. HAWTHORNE.

Opinion filed May 20th, 1895.

Foreclosure Threshers Lien—Report of Sale.

On the foreclosure of a thresher's lien, the failure of the officer making the sale to file a report of the sale with the register of deeds of the county where the lien was filed within ten days after such sale will not invalidate such sale. *Johnson* v. *Day*, 50 N. W. 701, 2 N. D. 295, followed.

Proof Necessary to Establish Lien.

To uphold a seizure of grain under a threshers lien, the party making the seizure must establish that the grain seized was grown upon the land described in the statement for the lien.

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

Action by Owen Martin against William R. Hawthorne and another to recover the value of grain sold under a thresher's lien. Judgment for defendants, and plaintiff appeals.

Reversed.

S. L. Glaspell, for appellant.

F. Baldwin, for respondents.

BARTHOLOMEW, J. This case is in this court for the second time. The decision on the first appeal is reported in 3 N. D. 412, 57 N. W. 87. The action is, in brief, for the recovery of the value of certain grain belonging to plaintiff, which was seized and sold by defendants, who justify the act under a thresher's lien. The second trial was by the court by consent of parties, and defendants again prevailed. The case was tried after Ch. 82, Laws 1893, went into effect, and must be governed by the provisions of that act, which require all actions tried by the court where issue has been joined to be tried by having all testimony offered by either party reduced to writing, and, on appeal to this court, the evidence is sent up, and the facts tried here *de novo*. We can no longer review facts in these cases by exceptions to findings. There is no suggestion that the evidence was not so taken and is not properly before us for our consideration; nor is

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there anything in the abstract or transcript or certificate of the trial judge that indicates the contrary. We must proceed on the theory that it is so before us.

The law authorizes a thresher's lien to be foreclosed in the same manner that chattel mortgages are foreclosed. Laws 1889, Ch. 88. Section 7, Ch. 26, Laws 1889, provides that, upon a foreclosure of a chattel mortgage, the officer making the sale, within ten days after making the sale, shall make a written report of his proceedings in the matter, and file the same with the register of deeds where the mortgage was filed. The undisputed evidence shows that in the foreclosure of this thresher's lien no such report was filed until the eleventh day after the sale. Plaintiff claims that this fact invalidates the sale, and renders the seizure a conversion. We think not. The point is covered by *Johnson* v. *Day*, 2 N. D. 295, 50 N. W. 701. That was a case of real estate foreclosure, but the principle is the same. We held the provision requiring the subsequent filing of the certificate within a specified time was directory, and not mandatory. It is a matter over which a purchaser has no control, and need not take place until ten days after a completed sale. It would be most unjust to hold that such a sale could be destroyed by the nonaction of the officer.

We held in our former opinion in this case that the lien holder, in order to justify his seizure, must show that the grain seized was grown on the land described in the affidavit for the lien. The case was reversed for failure of proof in that direction. The failure was equally signal upon the second trial. The lien affidavit asserts that the grain was grown upon the W. ½ of section 28, township 144, range 65. The undisputed proof shows that the W. ½ of the W. ½ of said section was, at the time the threshing was done, unbroken prairie land. The E. ½ of said W. ½ contained the trees for what the witnesses call the "tree claim." A portion of it was meadow and the balance cultivated land. A highway runs east and west through said section. That portion of the E. ½ of the W. ½ north of the highway which was

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cultivated was sown to barley in the year in question. The portion south of the highway was sown to wheat. The amount thus sown to wheat was, under the testimony, about 15 acres. The lien was claimed for 2,223 bushels of wheat, and 296 bushels of barley, grown on said W. ½ of said section. Now, we are always glad to support the high reputation of North Dakota soil for fertility, but the utmost stretch of local pride will not warrant us in going upon record as believing that 2,223 bushels of wheat can grow on 15 acres of land, even in North Dakota. Moreover, the undisputed evidence relieves us. It shows that most of the wheat threshed by defendants was grown upon the E. ½ of said section 28, or upon section 27 in said township. There is no evidence that shows that one grain of the wheat seized under the lien was grown upon the W. ½ of said section 28. Nor is appellant in any better position as to the barley seized. The proof shows that some barley was grown on the W. ½ of 28; but whether the barley so grown, or any part of it, is the barley seized under the lien, does not appear. There is no force in the suggestion that, if plaintiff mixed the grain grown on the W. ½ of 28 with other grain, appellant may satisfy his lien from the bulk as thus mixed. The evidence fails to show that such mixture, if made, was made for the purpose of destroying the lien. The respondents, at the time the threshing was done, were entitled to perfect their lien upon all the grain threshed. Subsequently they claimed a lien only upon a small portion of the grain, and a portion which had already been mixed with the entire bulk. The fault, if any, was theirs, and not that of plaintiff. No doubt, these respondents have a just claim for the balance of their threshing account against plaintiff, but we have repeatedly held that the benefits of these statutory liens could be realized only by strict compliance with the statute. On the second trial the respondents failed to establish the fact which our first opinion declared they must prove in order to defeat the action. In accordance with the practice indicated in *Taylor* v. *Taylor*, 5 N. D. 59, 63 N. W. 893, the record will be remanded to the District Court for

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Stutsman County, together with a copy of this opinion, and that court will annul its former judgment herein, and order judgment for plaintiff for $160.40 and costs.

It is so ordered. All concur.

(63 N. W. Rep. 895.)

STATE *ex rel* VAN HORN *vs.* FRANK A. BRIGGS.

Opinion filed May 20th, 1895.

Trustees of Penitentiary—Compensation.

Section 4, Ch. 93, Laws 1889, construed. *Held*, that a member of the board of trustees of the penitentiary of North Dakota is entitled to receive a per diem of three dollars per day for each day actually spent in "attendance" upon the sessions of the board, including the time necessarily and actually spent in traveling by the usual and direct route from the place of his residence to and from the place where the session of the board is held.

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

Application by the State of North Dakota, on the relation of Arthur Van Horn, against Frank A. Briggs, auditor of the state. Writ granted, and defendant appeals.

Affirmed.

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

N. F. Boucher and *F. H. Register*, for respondent.

WALLIN, C. J. The relator by this proceeding is seeking to compel the defendant, as auditor of the state, to issue a warrant upon the state treasurer in payment of a claim originally filed by the relator with the defendant's predecessor in office, one A. W. Porter, who disallowed the claim. The defendant having likewise disallowed the claim, mandamus was resorted to in the court below, and resulted in a judgment directing the defendant to draw a warrant on the treasurer as demanded by the relator. The defendant appeals to this court from said judgment. There is no controversy concerning the facts, and, so far as they are

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necessary to present the question of law to be decided, they may be condensed as follows: The relator, on the 2d day of March, 1894, and long prior and subsequent thereto, was a trustee and member of the board of trustees of the North Dakota penitentiary, located at Bismarck; and at that time the relator resided at Hillsboro, in the County of Traill, in said state. That on said day a regular session of said board of trustees was held at Bismarck, aforesaid, and the relator, as in duty bound, attended said session, and took part in its proceedings. The relator, in attending said session of the board of trustees, traveled by the most usual and direct route by rail from his said residence, at Hillsboro, to Bismarck, and returned to Hillsboro by the same route. The time necessarily and actually consumed by the relator in traveling to and from said Hillsboro to Bismarck, including one day at Bismarck, during which the board was in actual session, was three day's time. The relator, in due form, presented his claim to said auditor, Porter, and to the defendant, the present auditor, for his per diem for said attendance at the rate of three dollars per day for three day's time, and for the aggregate per diem of nine dollars. That said Porter and said Briggs, as such state auditors, have refused and still refuse to audit and allow said claim for a per diem in full, and no warrant therefor has ever been issued for said claim.

The question arises on this state of facts—and it is the only question discussed by counsel or considered in this court—whether the relator, as such trustee, is entitled to a per diem compensation for each day's time spent by him in and about his attendance at such session, including the neceesary time actually consumed in traveling to and from Bismarck, as well as for the day upon which the board was in actual session at Bismarck. The compensation of trustees of the public institutions of the late territory and of the state is fixed by Ch. 93 of the Laws of 1889, and particularly by section 4 of said chapter, the first sentence of which reads: "The said trustees shall be entitled to receive the sum of three ($3) dollars per day for each day employed in attendance upon said

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sessions, and all traveling expenses necessarily incurred therein." The meaning of the statute is not entirely clear, but we are inclined to interpret it liberally, and in such a way as will avoid unjust result. If a narrow and literal meaning is given to the word "attendance," it will follow that no member can receive anything at all for his traveling expenses, because there can be none while a member is in attendance at a session. During a session the member who is present cannot be traveling nor incurring expense in travel. But if the term "attendance" receives a more liberal construction when used in connection with traveling expenses, and is construed to mean the whole period during which the member is traveling to and from his place of residence to the place of the session, as well as while at the place of session, we can see no reason why the same word should not have the same significance when used in connection with the per diem allowed for compensation. The phrase "necessarily incurred therein" refers back to the word "attendance," and throws light upon the sense in which that word is used. A local member of the board who resides at Bismarck receives a per diem for all the time in which he is engaged in the service of the state as a member of the board; and we cannot, in the absence of an express provision requiring it, impute to the legislature a purpose to unjustly discriminate between a local member and one residing at a distance, who is, in equal justice, entitled also to pay for all the time which he devotes to the service of the state as a member of such board. The member residing at a distance from the place of meeting is not engaged in his own private business while traveling to and from the place of meeting, but is then employed in and about the matter of his "attendance" upon a session. The legislative purpose is clearly manifested that the office of trustee shall not be a purely honorary office. The intention to compensate for their services by a per diem is clearly expressed in the statute; and we are unable to see, either in the language employed by the legislature or in reason, why members should not be compensated for all the time necessarily and actually employed in the service of the state as

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members of such board. Our views are strengthened by the consideration that no mileage is given to members of the board, which is often done as a compensation for time spent in traveling in the public service, as well as for disbursements therein. Our conclusion is that the judgment awarding the writ was properly entered in the court below, and the same will be therefore affirmed. All the judges concurring.

(63 N. W. Rep. 206.)

JOHN N. BRUNDAGE *vs.* R. B. MELLON.

Opinion filed May 21st, 1895.

Fraudulent Representation of One Partner Binds the Other.

Every partner is liable for the fraudulent representations of every other partner made in the sale of partnership property as a means of effecting such sale.

Judges Statement in Excluding Evidence—Effect.

Where the trial court, by its ruling in excluding evidence, plainly asserts that the plaintiff cannot, as a matter of law, recover on the theory on which he is seeking to sustain his action, he is not bound, in the absence of notice that he must so do, to offer proof of the other allegations of his complaint. The other facts, for the purpose of reviewing the ruling of the trial court, are, under such circumstances, to be deemed capable of proof; and it is to be assumed that plaintiff could have proved them had he not been met with such adverse ruling, rendering further evidence meaningless and without force in the case.

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

Action by John N. Brundage against R. B. Mellon, surviving partner of the firm of Mellon Bros. Judgment for defendant, and plaintiff appeals.

Reversed.

Newton & Patterson, for appellant.

E. W. Camp, for respondent.

CORLISS, J. Defendant was sued as surviving member of the firm of Mellon Bros. for deceit in the sale of horses by such firm to plaintiff. On the trial, plaintiff sought to establish the allegations of the complaint as to fraudulent representations connected

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with such sale by offering to prove that the member of the firm who was dead at the time of the trial had, in effecting the sale, made certain representations touching the soundness of the horses sold. The evidence was excluded by the trial court, plainly on the ground that one partner is not liable for the fraudulent representations of his copartner in effecting a sale of partnership property. This is not the law, and, on principle, it ought not to be the law. Although a few courts have taken a different view of the question, there is ample authority to support the rule which renders all the members of the firm liable for the tort of one of its members under such circumstances. 1 Bates, Partn. § 472; *Chester* v. *Dickerson*, 54 N. Y. 1; Mechem, Ag. § 743; *Wolfe* v. *Pugh*, 101 Ind. 293; Story, Partn. § 108; *Strang* v. *Bradner*, 114 U. S. 555, 5 Sup. Ct. 1038; *Locke* v. *Sterns*, 1 Metc. (Mass.) 560; *Jewett* v. *Carter*, 132 Mass. 335. See, also, *Haney Manuf'g Co.* v. *Perkins*, 78 Mich. 1, 43 N. W. 1073; *Stanhope* v. *Swafford*, 80 Iowa, 45, 45 N. W. 403. Our Code settles the law in this state. The liability of one partner for the act of another partner is declared by section 4052, Comp. Laws, to be governed by the title relating to agency; and, when we turn to that title, we find it there clearly asserted that the principal is liable for the wrong of the agent when committed by him in and as a part of the transaction of the business of the principal. Comp. Laws, § 3997. The offer of the plaintiff by the questions he asked was to prove a representation made by the deceased partner in and as a part of the transaction of the business of his principal; *i. e.* the other partner, the defendant in this case. The offer was to prove that the representations were made in connection with a sale of partnership property, and as a means of effecting such sale. It is obvious that the trial court ruled out the evidence on the theory that the defendant was not liable for the deceit of the deceased partner, as the ruling followed a statement by plaintiff's counsel, in answer to an inquiry by the court touching the nature of the action as disclosed by the complaint, that it was not an action for breach of warranty, but for deceit.

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But it is insisted that plaintiff failed to establish, or offer to establish, a case against defendant, even assuming that the evidence rejected had been received. But we do not think that, in the absence of notice from the court that he must so do, a party is bound to proceed to offer further evidence in the case when a ruling is made which renders it impossible for him to recover. The plaintiff, by the decision of the trial court, was notified that, no matter what he might prove, he could not make out a cause of action for deceit against defendant, unless he (defendant) could be personally connected with the wrong. It was waste of time for him to proceed further. Nay, the foundation for further proof was wanting. He could not prove that the representations were false, and were known to be false by the party making them, with no representations established in the case on which he could base a further inquiry. The true rule is stated in *Loeb* v. *Willis*, 100 N. Y. 231, 3 N. E. 177. The court say, at page 235, 100 N. Y., and page 177, 3 N. E.: "After ruling, as a matter of law, that Willis was estopped by the former adjudication, he was under no obligation to offer any evidence; and it cannot be said here that his offer was not sufficiently broad or specific, because we cannot tell what, but for the erroneous ruling, he might have proved." For counsel for respondent to insist that the error was without prejudice is to beg the whole question. By making this contention he necessarily assumes that the plaintiff would have been unable to prove a case had his course not been blocked on the very threshold of the trial by defendant's objection. We do not wish to be understood as asserting that where the objection relates to incidental matters, and the parties proceed with the trial, and it is apparent that the plaintiff has offered his entire evidence, this court will reverse for the error in excluded testimony where the plaintiff has failed in making a case, even assuming that the excluded evidence is in the case. But where a fundamental objection is interposed, where it strikes at the very heart of the case, and where logically it must, if sustained, result in the exclusion of evidence of sequent

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facts which hang upon it and have no meaning or force in the case without proof of this main fact on which they rest for their significance in the cause, then, when the ruling of the court is adverse, the baffled litigant need proceed no further in the hopeless effort of establishing a cause of action. The attitude of the court in such a case is that, assuming that all the other allegations of the complaint are true, the plaintiff, as a matter of law, cannot recover on the theory of the case on which he is seeking to recover at the trial. It would be waste of time for him to proceed further; and, unless the trial court notifies him that it desires him to offer proof of the other facts necessary to sustain his action, he has a right to assume in such a case that, for the purpose of testing the correctness of the ruling of the court, the other facts are deemed by the court to be capable of proof. The decision of the court was a plain and decisive declaration to plaintiff that, although he should prove all the other facts as alleged, he could not in that court recover damages against defendant for the fraudulent representations of the deceased partner. The trial judge, of course, can compel the plaintiff to prove all the other facts. He may admit the evidence which he deems incompetent, and, after the case has been fully tried, may strike it out, and direct a verdict for the defendant. But, unless he calls for proof of the other facts, the plaintiff has a right to accept the ruling of the court as settling the question that he cannot in any event recover upon the theory on which he is proceeding, and may therefore, without further futile struggle against the inevitable, withdraw from that tribunal, and test the soundness of the ruling in the appellate court.

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

(63 N. W. Rep. 209.)

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ANNE M. KVELLO *vs.* F. W. TAYLOR.

Opinion filed May 21st, 1895.

Homestead—Transfer—Fraud on Creditors.

Fraud upon creditors cannot be predicated upon the disposition of a homestead.

Surrender of Land Contract—Consideration.

Where a vendee in a land contract surrenders his contract to the vendor, and the same is accepted, the release of the vendor from the obligations of the contract is a sufficient consideration to support the surrender.

Instruction Assuming Facts in Issue.

Instructions asked that require the court to assume the existence of any fact in issue are properly refused.

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

Action by Anne M. Kvello and others against F. W. Taylor to recover possession of wheat. Judgment for plaintiffs, and defendant appeals.

Affirmed.

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

P. H. Rourke, for respondents.

BARTHOLOMEW, J. This action involves the ownership of a quantity of wheat of which plaintiffs claim to be the owners, and which had been seized by the defendant, Taylor, as sheriff of Ransom County, under and by virtue of a special execution, to him directed, issued upon a judgment foreclosing a chattel mortgage given by one Nels O. Anderson, and which, it is claimed, covered this particular wheat. The admitted facts in the case are as follows: In 1890 one Oium was the owner of the N. W. ¼ of section 10, township 135, range 55, in Ransom County. In June of said year Oium sold the land to said Nels O. Anderson by a land contract, upon what is called the "crop plan," calling for a deed upon the payment of the amount and performance of the conditions on the part of Nels O. Anderson therein specified. Anderson, with his family, at once took possession of the land, it

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being unbroken prairie land at the time, and proceeded to break up a portion of it and erect buildings thereon. It constituted his homestead. In November, 1891, Mr. Anderson executed a chattel mortgage to one Johnson, covering the crop of wheat to be grown upon said land in the year 1893. Johnson sold and transferred the note secured by the mortgage to the Sheldon State Bank, and in the fall of 1893 the bank foreclosed the mortgage by action, and it was under this foreclosure that the wheat was seized, it being wheat grown on said land in 1893. In 1891 Oium deeded the land and assigned the Anderson contract to Anne M. Kvello, one of the plaintiffs. In the fall of 1892 Nels O. Anderson, by agreement with Anne M. Kvello,—her husband, Mr. Kvello, acting for her, surrendered and abandoned his land contract. About 30 days thereafter, Mrs. Kvello, by her said husband, leased the land to Eli O. Anderson, the other plaintiff and the wife of Nels O. Anderson, for the year 1893.

Plaintiffs claim that the wheat seized was raised under this lease. By the terms of the lease, the title to the entire crop of 1893 was to remain in Mrs. Kvello until certain conditions were performed, which it is admitted were not performed at the time of the seizure. The defendant claims that the pretended surrender by Nels O. Anderson, and the subsequent lease to Eli O. Anderson, were colorable only, and were in fact made for the purpose of defrauding the creditors of Nels O. Anderson, and particularly the plaintiff in the special execution; that this purpose was known to and aided and abetted by Mrs. Kvello; that in fact the land contract was not surrendered, but was continued in full force, and Nels O. Anderson continued to act thereunder, and did in fact raise the crop of 1893 by virtue of his rights given by the contract, but under the fraudulent cover of a pretended lease to his wife. The jury resolved the issues in favor of the plaintiffs.

Under the first assignment of errors it is urged that this verdict is not supported by the evidence. The abstract is somewhat voluminous. All the circumstances surrounding these transac-

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tions were brought out in detail. We cannot disturb the verdict upon the ground assigned. It has support in the evidence. The proper triors of fact have declared that such evidence was sufficient to satisfy them, and that must satisfy us. We may remark, in passing, that appellant's severest criticisms upon the verdict arise upon the lease, from the showing made in the evidence that Mrs. Anderson had no separate property, and that she had neither machinery nor stock wherewith to raise a crop, and that Anderson did or hired the work required to raise the crop, that he furnished the seed, machinery, and teams. All this might be admitted. It might be admitted that the lease was in fact for Anderson's benefit. Nevertheless he could acquire no greater rights under the lease than Mrs. Anderson had, and under the terms of the lease Mrs. Kvello was clearly entitled to the possession of the wheat when it was seized. It may even be true that Anderson's surrender was made for the purpose of defrauding his creditors. Yet, if it was actually made, if he retained no rights under the contract of purchase, if that was extinguished, even with an understanding that such contract might be renewed in future, if with better prices and with better times Anderson saw his way clear to comply with the terms of the contract, such surrender would not avail appellants. The land was Anderson's homestead, and as such exempt from any claim for debt, and he could dispose of it as he saw proper, and creditors would have no legal cause of complaint. It was only necessary that such surrender be actual. Its character cannot be assailed by creditors. This has been so often ruled that appellant's counsel frankly admit that they could not attack an actual transfer.

In answer to the contention that the surrender under the circumstances was without consideration and void, it need only be stated that the release of Anderson from the obligations of the contract which would necessarily arise from an acceptance of the surrender would be sufficient consideration to support the same.

Errors are assigned upon the admission of certain evidence. We find no merit in them. The evidence thus admitted tended

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to show the character and condition of the land, the amount realized by Anderson in farming the same in 1892, and the size of Anderson's family. This was introduced for the purpose of showing why Anderson desired to surrender his contract; and, while one result may have been to arouse in the minds of the jury sympathy for Anderson, yet the evidence was none the less competent.

Complaint is made of that portion of the charge where the court instructs the jury that the proofs of fraud must be clear and convincing. But this principle is so elementary that it needs no defense at our hands.

A large number of instructions were requested and refused. Errors are assigned upon the resusal to give the fifth, eighth, ninth, and eleventh instructions refused. The fifth deals with an actual transfer, made for the purpose of defrauding creditors. As already seen, that point was not and could not be urged in this case. Appellant must defeat the case on the ground that there was no transfer in fact. It would not avail him to show a transfer good as between the parties, but made to defraud creditors. The instruction was properly refused. The eighth and eleventh instructions refused relate to transactions between husband and wife. The court could not give them in the form requested without assuming that there had been transactions in this case between Mr. and Mrs. Anderson. That was directly opposed to plaintiffs' theory of the case. They claimed that there had been a transaction between Mr. Anderson and Mrs. Kvello, and subsequently Mrs. Kvello had a transaction with Mrs. Anderson, but neither in fact nor in law did such transaction amount to a transfer from Mr. Anderson to his wife. The court could not properly assume the contrary, and the instructions were properly rejected. The ninth instruction refused required the court to assume that the appellant had made out a *prima facie* case of fraud. If more guarded in its language it might properly have been given. Still, we think the point fully covered by the charge, and in better form than that requested.

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We find no error in the record and the judgment must be affirmed. All concur.

(63 N. W. Rep. 889.)

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

Opinion filed May 14th, 1895.

Amendment of Pleading to Conform to the Proofs.

The trial court has power to allow the amendment of the complaint on the trial to conform to the proof by the insertion of an allegation that defendant sold to itself property of the plaintiff, where the original complaint set forth a cause of action for the balance of the proceeds in the hands of the defendant on the theory that he had sold such property to a third person as agent for plaintiff, plaintiff not asking to have the complaint so amended as to entitle him to recover as for conversion, but only on the theory of waiving the tort and suing on an implied promise to pay the value of the property so converted.

Surprise—Abuse of Discretion to Refuse Amendment.

Plaintiff having been so misled by defendant's conduct as to believe that defendant had in fact sold to a third person, and having therefore framed his complaint on that theory, and defendant's cashier having, without objection from defendant's counsel, testified on the trial that defendant sold such property to itself, and such fact being undisputed, *held*, it was an abuse of discretion for the trial court to refuse to allow plaintiff to amend his complaint to conform to the proof.

Agent Cannot Sell to Himself.

An agent authorized to sell property of his principal cannot sell the same to himself. The rule is the same when he is authorized to sell at a specific price, and assumes to sell to himself at that price. Such a sale, followed by a claim of ownership thereunder, constitutes a conversion of the property.

Waiver of Tort, and Suit in Assumpsit.

The owner may waive the tort, and treat the conversion as a purchase, and recover in assumpsit the value of the property at the time of such conversion, with interest from the date thereof.

Practice—Notice of Intention, and Motion for New Trial—Not United.

It is bad practice to unite in the same instrument notice of intention to move and notice of motion for a new trial.

Appeal from District Court, Grand Forks County; *Templeton*, J. Action by Alexander Anderson against the First National

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Bank of Grand Forks, N. D. Judgment for defendant, and plaintiff appeals.

Reversed.

Phelps & Phelps, for appellant.

Burke Corbet, for respondent.

CORLISS, J. On the former appeal this litigation presented to us the case of the pursuit by the plaintiff of an alleged balance in the hands of the defendant arising from a supposed sale by defendant as agent for the plaintiff of certain promissory notes owned by him. It was on this theory that the complaint was framed. We so held when the case was before us on the previous appeal. See *Anderson* v. *Bank*, (4 N. D. 182,) 59 N. W. 1029. It is true that the question of the proper construction of the complaint was not regarded by counsel on that appeal as being of much moment, and we have therefore felt disposed to consider it anew. Further study of the pleading only confirms our former view. It does not set forth a sale by plaintiff to defendant. Neither does it allege a breach of the agent's duty to sell for the price specified by the plaintiff in his instructions to the agent. It discloses only one theory of liability, and that is the receipt by the defendant, as agent of the plaintiff, of a larger sum on the sale of the property by the defendant than it had accounted for. A reference to the complaint will make this clear. It alleges that: "On the 3rd day of October, A. D. 1891, the defendant telegraphed to the plaintiff at Seattle, Washington, requesting plaintiff to telegraph his best offer for a sale of said seven promissory notes by the defendant for the plaintiff to a third person, who was not named in said telegram from defendant to plaintiff, and thereupon the plaintiff telegraphed to the defendant as follows: 'To First National Bank, Grand Forks, North Dakota: Will give discount of five hundred dollars. Alex. Anderson.' That the defendant duly received said telegram from the plaintiff, and thereupon the defendant sold the said seven promissory notes to a person

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unknown to the plaintiff, and received the proceeds of said sale, and on the 7th day of October, A. D. 1891, the defendant remitted to the plaintiff the sum of four thousand three hundred and ninety-seven and 48-100 ($4,397.48) dollars, part of the proceeds of said sale, and mailed to the plaintiff his promissory note to the defendant for two thousand ($2,000) dollars, hereinbefore mentioned, and notified the plaintiff that defendant's commission for selling said seven promissory notes was the sum of thirty-five ($35) dollars, but the defendant has wholly failed to pay or remit, or cause to be paid or remitted, to the plaintiff the balance due him on said sale, and the defendant is now indebted to the plaintiff, as and for said balance due him, in the sum of six hundred and ninety-seven and 52-100 ($697.52) dollars, with interest thereon at the rate of seven per cent. per annum from and after the 7th day of October, A. D. 1891. That on receiving from the defendant said remittance of four thousand three hundred and ninety-seven and 48-100 ($4,397.48) dollars, and said note for two thousand dollars, the plaintiff forthwith mailed and deposited in the post office at the City of Seattle, in the State of Washington, directed to defendant, at Grand Forks, North Dakota, a written notice that he would not accept said remittance and note as full payment of the proceeds of said sale, but that he should insist that defendant account to plaintiff for and remit to him the balance due him upon the full amount owing to plaintiff on said notes at the time of said sale, to-wit, the sum of seven thousand six hundred and thirty ($7,630) dollars, less the five hundred ($500) dollars discount which had been agreed to by plaintiff, as aforesaid."

The failure of the plaintiff to allege in terms the amount actually received by defendant does not affect the question. The pleading might have been open to demurrer on that account, or to a motion to make it more specific; but the whole scope of the pleading shows that plaintiff claimed that there was an unpaid balance in defendant's hands arising from such sale, for which he sought to have the defendant account. Our conclusion touching

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the true interpretation of the complaint destroys the force of defendant's argument that plaintiff had elected to treat the relations between himself and the defendant as that of seller and purchaser, instead of that of principal and agent, and therefore could not, by the proposed amendment hereinafter referred to, seek to hold defendant on the theory of a conversion of the property, on the ground that, while acting as agent, it had, in violation of its duty, attempted to sell the property to itself. The complaint remained in this form down to the time of the second trial. In the course of the trial the plaintiff called as a witness the cashier of the defendant. He testified that the bank did not sell the notes to a third person, but sold them to itself. Thus was revealed a conversion by the defendant of the plaintiff's property. An agent authorized to sell cannot himself make the purchase. This is elementary. *Bank* v. *Simons*, 133 Mass. 415; Story, Ag. § 211; Mechem, Ag. § 401, and cases cited. Nor does the fact that he is authorized to sell at a specified price alter the rule. Story. Ag. § 211; *Ruckman* v. *Bergholz*, 37 N. J. Law, 437; *Tyler* v. *Sanborn*, 128 Ill. 136, 21 N. E. 193; *Iron Co.* v. *Harper*, 41 Ohio St. 108; *Porter* v. *Woodruff*, 36 N. J. Eq. 174.

The defendant, having assumed to own and control these notes by virtue of an illegal and void purchase thereof, converted them to its own use, and became liable for their value. The attitude it took with respect to the paper on the 7th of October, 1891, was hostile to the rights of the plaintiff, the owner thereof. It obtained no title by virtue of this attempted sale to itself, and yet it assumed to own them, and has exercised acts of ownership over them ever since that day. Its position on the argument of this case was that it owned them. It thus appears that, on the trial, the defendant's cashier, without any objection being interposed by defendant's counsel, testified to a fact which established that defendant was liable for the conversion of these notes. Immediately upon discovering this fact, the counsel for plaintiff asked leave to amend the complaint by incorporating an allegation of such fact in the complaint. The court denied his motion,

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and directed verdict against him, except as to the small items referred to in the former opinion. We think that this was an abuse of discretion. Of course, we use this phrase in its legal sense. The undisputed facts showed that defendant had converted the plaintiff's property, and was liable for such conversion. It is true that, despite the testimony of defendant's cashier, defendant might have been able to produce witnesses to show that his testimony was false. But this is extremely improbable. Such evidence, coming from defendant's cashier, was almost equivalent to an admission by defendant of the fact of such conversion. Its failure to claim that it was surprised by the proposed amendment, or that, if the amendment was allowed, it ought to be granted a continuance to enable it to prepare to meet this issue, and show the evidence of its own cashier to be untrue, makes it plain to our minds that the evidence of such cashier was in fact true; and in this view we are confirmed by the statement of defendant's counsel in this court that defendant did in fact buy the notes itself. The defendant was responsible for the error of the plaintiff in framing his complaint. The whole trend of the correspondence between the parties shows that defendant assumed to act as agent for the plaintiff in selling these notes to a third person, and that plaintiff supposed that he had done so. On the 14th of September, 1891, defendant wrote the plaintiff a letter relating to this matter in which the following passage occurs: "We offered you a trade at $1,000 discount. Now, if you will make it $700 or $800, and allow us a small commission, I will try and place the paper for you." "If you care to have us go to work on these terms, you write or wire me." On the 31st of August the defendant telegraphed plaintiff as follows: "If accepted now, a party is here, so we can send you four thousand dollars together with your note." On the 3rd of September they wrote plaintiff a letter, stating that they had telegraphed him. On October 3rd they telegraphed plaintiff: "Wire us your best offer, so we can advise a party who said he would hold his money till we heard from you."

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On October 7th the defendant reported to plaintiff the sale, not revealing the fact that it had sold to itself, and the statement it sent the plaintiff indicated the exact reverse, one of the items being a charge against plaintiff by defendant for $35 for commission in making the sale. The answer of the defendant expressly avers a sale by it in accordance with the instructions of the plaintiff, and that the proceeds thereof were applied by it as directed by defendant, thus plainly claiming a sale to a third person. The answer stood in this form at the time of the second trial. It is urged that plaintiff's counsel, as early as the first trial, knew of the fact that defendant had itself bought the notes, and to make good the assertion we are referred to a letter offered in evidence by plaintiff's counsel, on the former trial as appears from the record before us on the former appeal, written by defendant to the makers of these notes, stating that defendant owned them. But an examination of the testimony of defendant's cashier on the former trial, in which he assumed to explain this letter, discloses the fact that such testimony might well have left on the minds of the counsel the impression that the defendant did not claim to the makers of these notes the ownership thereof, in a different sense from that in which it claimed to be the owner of all paper held by it for collection or as collateral.

In view of the letters, telegrams, and account of defendant, the ambiguous testimony of defendant's cashier in explaining the meaning of this last-named letter and the explicit statements in the answer, the claim that plaintiff should have discovered that defendant had violated its duty to plaintiff comes with ill grace from the defendant. We have, then, a case where plaintiff has been so misled by the conduct of the defendant as to mistake his right of action, and on this mistaken theory to frame his complaint. On the trial the defendant's cashier, without any objection to the evidence that it was not within the issue, or, indeed, on any other ground, testified to a fact which established the defendant's liability on another theory. This fact was not controverted,—was virtually admitted,—and the plaintiff asked leave to

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amend his complaint to conform to such proof. Such an amendment is in furtherance of justice. To refuse to allow it is an abuse of discretion. Not a single reason can be adduced to support such denial. No possible prejudice could have resulted to defendant from the granting of it. Defendant would not have been surprised to its prejudice, as it did not then and does not now dispute the fact the allegation of which plaintiff sought to incorporate in the pleading by the proposed amendment. In denying the application for leave to amend, the court debarred the plaintiff from recovering the amount due the plaintiff from defendant. To have granted the motion would have resulted in no prejudice or injustice to defendant. The denial of it resulted in great injustice to the plaintiff, and when, in addition, we consider that defendant was responsible for the error of plaintiff in framing his complaint on a wrong theory, knowing all the time the facts which rendered it liable on another theory, the conclusion that the court should have allowed the amendment,—that it was in furtherance of justice,—is irresistible. Had the testimony of defendant's cashier been objected to and excluded, then a different case would have been presented. But the fact as to which plaintiff sought to have the complaint amended was proved without objection, and was practically admitted on the trial, and is expressly admitted in this court. The authorities all agree that an abuse of discretion in this class of cases is established by facts less favorable to plaintiff than the facts in the case at bar. *Cook* v. *Croisan*, (Or.) 36 Pac. 532; *Drew* v. *Hicks*, (Cal.) 35 Pac. 563-565; *Cooper* v. *Wood*, (Colo. App.) 27 Pac. 884; *Yetzer* v. *Young*, (S. D.) 52 N. W. 1054; *Jenkinson* v. *City of Vermillion*, (S. D.) 52 N. W. 1066; *Lefler* v. *Sherwood*, 21 Hun. 573.

We are not confronted with the question whether a party can by amendment change his cause of action from contract to tort, as the amendment proposed, while showing a conversion, would have left the complaint still standing as a complaint on contract, —the contract implied by the law,—as against one who has converted the property of another, to pay the value thereof in case

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the owner of the property elects to waive the tort and sue in assumpsit. We have held that this waiver may be evidenced either by express language in the pleading to that effect or by the manner of stating the cause of action. *Braithwaite* v. *Aiken*, 2 N. D. 57, 49 N. W. 419; *Id.*, 56 N. W. 133. The manner of stating the cause of action in the complaint, as plaintiff proposed to amend it, would, had the amendment been allowed, have evinced a purpose to waive the tort, as there would have been in it no averment of a wrongful conversion, or any language characterizing the defendant's act as a tort. See *Goodwin* v. *Griffs*, 88 N. Y. 629-640.

We do not think that the proposed amendment substantially changed the nature of the plaintiff's claim, within the meaning of § 4938, Comp. Laws, permitting courts to allow an amendment on the trial, to make the pleading conform to the proof. *Smith* v. *Savin*, 141 N. Y. 315, 36 N. E. 338; *Culp* v. *Steere*, (Kan. Sup.) 28 Pac. 987; *Spice* v. *Steinruck*, 14 Ohio St. 213; *Esch* v. *Insurance Co.*, (Iowa) 43 N. W. 229. Indeed, it is not urged in this court by the respondent's counsel that the learned trial court did not possess power to grant the amendment. The whole of his argument was directed to the question of abuse of discretion, he insisting that a case of abuse had not been made out. We think otherwise, for the reasons already stated. It was not necessary for the plaintiff to pay or tender back the amount paid him by defendant. He was entitled to this sum, and more too. On the theory of a conversion, whether the tort was or was not waived, plaintiff had a right to recover from defendant the value of the property at the time of conversion, with interest, and, having received a portion of the value, he could recover the balance without first paying back the amount already received. He was not seeking to rescind a contract. He had never assented to a sale of the property by the defendant to itself at any price. We deem this point so clear that we dismiss it without further discussion, citing a single authority: *Greenfield Savings Bank* v. *Simons*, 133 Mass. 415. We do not think that plaintiff waived his

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right to treat the act of the defendant as a conversion by bringing his action to recover on the theory of a sale by defendant as agent for plaintiff. Had he sued for the proceeds of a sale, on the theory that his instructions furnished the test of the amount he was entitled to recover, knowing full well that defendant had assumed to sell to itself, then it might be urged that he had waived his right to treat the defendant's act as a conversion. See *Terry* v. *Munger*, 121 N. Y. 161, 24 N. E. 272; *Braithwaite* v. *Aiken*, (N. D.) 56 N. W. 133. But plaintiff does not appear to have such knowledge at the time of commencing such action. Defendant's conduct would naturally create in his mind the contrary impression, and this would be strengthened by the language of the answer in the case.

It was urged on the argument that the order denying the motion for a new trial should be affirmed, for the reason that it appears that the notice of intention to move for a new trial was not served within the statutory time. But an examination of the record satisfies us that the time in which to serve such motion was extended by the court, and that the notice was served within the time as so extended. Nor do we think there is any force in the contention that the paper so served was not a notice of intention. It is true that it was in bad form, in that it embodied a notice, not only that plaintiff intended to move for a new trial on the grounds therein stated on a statement of the case, but that he would bring his motion for such new trial on to a hearing at a specified time and place. The notice of intention and the notice of motion are two distinct and utterly different notices, and it is not good practice to embrace both elements in one paper. Sections 5090, 5092, Comp. Laws. The notice of intention should not state when and where the motion for a new trial will be heard. As a general rule, the person who desires to make such motion is not in position to notice his motion for a hearing at the time he serves his notice of intention, for it often happens that at that time the bill or statement has not been settled.

The order is reversed, and a new trial is granted. All concur.

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ON REHEARING.

CORLISS, J. Counsel for defendant urges in his petition for rehearing that we have mistaken the particular amendment which the plaintiff sought to make on the trial. It is claimed by him that the plaintiff attempted to have his complaint amended, not in such a manner as to set up a conversion and then waive the tort, but so as to entitle him to recover of defendant such of the notes as were still retained by it, and the proceeds of such of the notes as had been collected by it. The fact that the defendant had illegally attempted to sell the notes to itself while acting as agent for plaintiff gave the plaintiff an option of three remedies. He might have sued as for conversion, or he might have waived the tort and sued on the theory of a sale, or he might compel the defendant to account for such of the notes as were still in its possession and the proceeds of the other notes collected by it. This latter remedy would be in equity. We will assume, in this discussion that defendant's counsel is correct in his assertion that the proposed amendment showed that it was this remedy to which the plaintiff desired to resort. The mere fact that by this amendment the plaintiff sought to change his action from one at law to one in equity is by no means decisive against the power of the court to make it. Unlike a motion to amend by transmuting an equity into a law case, the granting of it does not deprive the defendant of the right to a jury trial. When the action is transformed into an equity action, defendant has no right to a jury trial. The judge who has heard the evidence up to the time the amendment is allowed will alone hear the rest of the case, and decide the whole case as in other equity actions. And where, as in this case, there is no controversy about the facts, no right of the defendant to a jury trial is infringed, even by changing from equity to law, for there is no issue of fact for a jury to determine. Should a jury be called, the court would be compelled to direct a verdict one way or the other. The power of the court to amend the complaint on the trial to conform to the proof is not so limited by the statute that it cannot be exercised where the

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amendment will change the action from law to equity. The language of the statute is that the amendment shall not "substantially change the claim." We do not think that the proposed amendment substantially changes the plaintiff's claim. The form of the action is altered. The recovery will be somewhat different. But both complaints rest ultimately upon the ownership by plaintiff of the notes in question. While we have been in doubt on this question of power ever since the argument of this case, yet, as counsel for defendant have all along conceded the power, not only on the argument, but also in their petition for rehearing, we will adhere to our original view on this question. The case of *Steamship Co.* v. *Otis*, 27 Hun., 452, strongly supports our conclusion on this branch of the case. See, also *Knapp* v. *Fowler*, 30 Hun. 512; *Beck* v. *Allison*, 56 N. Y. 366; *Davis* v. *Railroad Co.*, 110 N. Y. 646, 17 N. E. 733; *Bedford* v. *Terhune*, 30 N. Y. 453; *Dexter* v. *Ivins*, 15 N. Y. Supp. 495; *Coby* v. *Ibert*, 58 N. Y. St. 117, 25 N. Y. Supp. 998; *Flynn* v. *Westmayer*, 4 N. Y. Supp. 188. It is to be noticed that the statute declares that, to cut off the power to amend to conform to the proof, it is not enough that the cause of action is different. The claim itself must be changed, and that, too, in a substantial way. If in substance the two claims—the one set forth in the original and the one embraced in the amended complaint—are the same, the power to amend on the trial to conform to the proof exists. There has been a judgment rendered in this action in favor of the plaintiff, and it is a serious question whether he could bring a new action to compel defendant to account to him for the notes still in his possession, and for the proceeds of those collected, so long as such judgment should remain unreversed. It might with great and perhaps unanswerable force be urged that such judgment was a bar to such action. One of the tests by which to determine whether the complaint as amended sets forth substantially the same claim as that contained in the original complaint is whether a recovery upon the latter would have been a bar to a recovery upon the former. *Davis* v. *Railroad Co.*, 110 N. Y. 646, 17 N. E. 733. As

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soon as plaintiff ascertained the fact that entitled him to the relief which he sought by his proposed amended complaint, he not only asked leave to amend, but offered to restore all moneys received by him in excess of the amount which it should be ascertained that the defendant had collected upon the notes. No tender of any specific amount was necessary. The plaintiff was not in position to know how much money he must return to defendant, for this would depend upon the amount collected by the latter upon the notes. It might appear upon the trial that defendant had collected more than the sum remitted to plaintiff. Plaintiff was under no obligation to tender back to defendant all that he had received, only to recover it back in the same action. The judgment in the case would have afforded the defendant ample protection. The court would have embodied in the decree, directing defendant to turn over to plaintiff such of the notes as it still had in its possession, a provision that this be done only on condition that plaintiff restore to defendant all moneys received from defendant over and above the amount collected by defendant, with interest. It is fair to the defendant's officers to say that it does not appear that plaintiff was induced to fix the price at which he was willing to sell because of anything said by them or any of them. He appears to have relied on his own judgment, and not to have been influenced in any manner by defendant's cashier, or by any other officer of the bank. Nor is there anything in the case to show that any of them attempted to influence him in fixing the price. This record does not, therefore, present to us the case of an agent betraying the confidence reposed in him by so moulding the mind of his principal as to subserve his own, instead of the principal's interest.

As we have reached the conclusion that the District Court had power to allow the amendment which counsel for defendant contends the plaintiff asked for, there remains nothing further to be said. The question of abuse of discretion we have discussed in the original opinion, and we adhere to the views there expressed. It follows that the petition for rehearing is denied.

(64 N. W. Rep. 114.)

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TRACY R. BANGS *vs.* JOHN O. FADDEN, *et al.*

Opinion filed May 18th, 1895.

Assignment for Creditors—Reservation of Exemptions.

The reservation, in general terms, of exempt property by an assignor in an assignment for the benefit of creditors, does not render the assignment void, although the assignment does not specify such exempt property.

Construction of Deed of Assignment.

Such an assignment construed, and *held* not to require creditors to execute releases as a condition for securing benefits thereunder. See opinion for the peculiar features of the assignment which were claimed to render it void as requiring such releases.

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

Action by Tracy R. Bangs, assignee, against John Fadden and others. Defendants had judgment and plaintiff appeals.

Reversed.

Bangs & Fisk, for appellant.

Burke Corbet, for respondents.

CORLISS, J. The sole question before us relates to the validity of a general assignment for the benefit of creditors executed by William Brown to the plaintiff. Creditors of the assignor having attached the property embraced in the assignment, the plaintiff sued them and the sheriff who levied the attachments in conversion. On the trial the assignment was excluded from evidence on the ground that it was void on its face. The court directed a verdict in favor of defendants, and from the judgment entered on that verdict plaintiff appeals.

The validity of the assignment is assailed on two grounds. It is first insisted that the assignment is void for the reason that by the reservation of exempt property contained therein the particular property which was to pass thereunder was at the time of the execution and delivery of the assignment rendered uncertain, and hence that no property can be said to have been conveyed by the instrument. This proposition is not destitute of logical force.

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Our statute plainly contemplates that it shall be lawful for the assignor to reserve his exempt property. Section 4663, Subd. 3, Comp. Laws, declares that an assignment is void if it reserves any interest in the assigned property, or in any part thereof, to the assignor, or to his benefit, before all his existing debts are paid, "other than property exempt by law from execution." And section 4667, Comp. Laws, provides that the assignor shall within 20 days after making an assignment make and file an inventory, in which, among other things, he must list first the exempt property, and then all other property, in separate schedules. This legislation makes it apparent that the law intended that the assignor should be entitled to his exempt property as in other cases (as, indeed, we held in *Bank* v. *Freeman*, 1 N. D. 198, 46 N. W. 36,) and that the assignment would be valid, although reserving the exempt property in general terms only. The assignment law does not contemplate that the assignment shall specify the property claimed as exempt. On the contray, it in terms declares that such specification shall be made in the inventory to be subsequently filed. It, indeed, would be strange if the assignor could not obey the statute without thereby destroying the assignment. It would be utterly impracticable to require him to specify in the assignment the exempt property, for the law allows him only property of the value of $1,500, aside from the specific articles which are exempt, and does not permit him to fix that value himself so as to bind his creditors. Should the exempt property be specified in the instrument itself, and excepted from its provisions, then, in case it should exceed $1,500 in value, the assignment would not embrace all of the assignor's property subject to execution, and hence would not be a general assignment for the benefit of creditors. But the statute relates to only general assignments,—*i. e.* those embracing all the assignor's property not exempt by law from execution—and not to partial assignments. It is absurd to suppose that the legislature intended to require the assignor to designate in the assignment itself the property which he claims as exempt, when

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the effect of such a designation would in many a case be to render the assignment a transfer of only a portion of his property not exempt, and thus defeat the object of the law, which relates exclusively to general assignments. In the majority of the cases it would be found to be the case that the assignor had claimed in the assignment more than $1,500 of property in value, when the value of the specified property came to be fixed in such a way as would bind his creditors as to its value. In no case would his valuation be found to agree with the valuation as ultimately established. One of two things would invariably be true,—the assignment would embrace only a portion of the assignor's property not exempt because of undervaluation by the assignor, or he would lose a portion of the exemption given him by the law by reason of an overvaluation of the specified property. If the statute were silent, such a construction should not be placed on it as to require the exempt property to be specified in the assignment. But the statute is not silent. It declares that the particular property claimed as exempt shall be set forth, not in the assignment itself, but in the inventory to be subsequently filed. And yet it is asserted that an assignment whose terms are in harmony with the letter and the obvious policy of the law is void. We hold that a general assignment which, in general terms, excepts exempt property; is a valid general assignment for the benefit of creditors. Whether the particular property which is finally set apart as exempt passes to the assignee on the delivery of the assignment, and the assignment as to such property is subsequently defeated when it is finally determined what particular proporty the assignor can claim as exempt, or whether such property never passes to the assignee at all, it is unnecessary now to decide. The creditors of the assignor have no interest in that question, for they have no right to interfere with the exempt property, and the title to all the other property unquestionably vests in the assignor at the time of the assignment.

We now come to the second question in the case. It is urged that the assignment is void for the reason that it requires all

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creditors who desire to receive any benefit from the trust to release their claims as a condition of receiving any dividend. If the instrument must he necessarily so construed, then its invalidity cannot be doubted. Both under a settled rule of law and under the express provisions of our Code such an assignment is void. Comp. Laws, § 4663. On this point there is no difference of opinion between the counsel in the case. Their views diverge on the point of construction. Counsel for plaintiff insist that the instrument, when taken as a whole, does not in fact require any creditor to release his claim as a condition of being entitled to a dividend out of the assigned estate. We are all very clearly of opinion that this is the true construction of the instrument. A reference to its language now becomes necessary. It recites that the assignor is desirous of conveying all his property for the benefit of his creditors without any preference or priority, and then it conveys such property as is not exempt, in trust for the following purposes: "To pay and discharge in full, if the residue of said proceeds be sufficient for that purpose, all the debts and liabilities now due and to become due from said party of the first part to all his creditors who shall file releases of their claims and debts against said party of the first part, as provided by law, together with all interest due and to become due thereon; and, if the residue of said proceeds shall not be sufficient to pay said debts and liabilities and interest in full, then to apply the same as far as they will extend to the payment of such debts and liabilities and interest, proportionately to their respective amounts, and in accordance with the statute in such case made and provided." A general survey of the instrument makes it plain that the assignor intended to avail himself of the provisions of the general assignment law of this state. He recites that he desires to assign his property for the benefit of all his creditors without preference or priority, thus bringing the instrument in harmony with section 4660, Comp. Laws, which prohibits preferences. He then declares that he desires his debts and liabilities to be paid out of the assigned estate "in accordance with the

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statute in such case made and provided." Having clearly evinced a purpose to proceed under the assignment law, it seems to us a strange construction to interpret the same instrument as expressing a purpose to fly directly in the face of one of its explicit provisions, thus rendering the instrument void, and defeating the very purpose which elsewhere in the assignment plainly appears. Section 4663, Comp. Laws, in express terms declares an assignment to be void which tends to coerce a creditor to release or compromise his claim. Subdivision 1. So far from expressing such a purpose so subversive of his main object, the assignor attaches to the clause relating to releases a condition,—the creditor is to file releases "as provided by law." It is no violent stretch of the meaning of these words, in view of the duty of courts to so construe instruments as to sustain them, and in view of the assignor's obvious purpose to proceed under our assignment law, to hold that this language means that creditors are to file releases, provided there is any law requiring them to do so as a condition of receiving dividends. The learned trial judge must have eliminated these words "as provided by law" from the assignment in interpreting it, for on his interpretation of it they are meaningless, and are, therefore, to be expunged from the instrument. This is certainly a novel rule of construction,—one for which we have been unable to find any authority. The elementary rules of interpretation as they are embodied in our Code control this case. "Particular clauses of a contract are all subordinate to its general intent." Comp. Laws, § 3565. "Repugnancy in a contract must be reconciled if possible by such interpretation as will give some effect to the repugnant clauses subordinate to the general intent and purposes of the whole contract." *Id.* § 3567. "A contract must receive such interpretation as will make it lawful, operative, definite, reasonable and capable of being carried into effect if it can be done without violating the intention of the parties." *Id.* § 3558. The learned trial judge appears to have removed the qualification attached by the assignor himself to the provision relating to the filing of releases,

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thus giving to that provision a meaning not expressed therein, and destructive of the undoubted purpose of the assignor. It seems to us that it is more proper to respect the condition which the assignor has affixed to this provision, and so construe such condition as to support his purpose, and sustain the assignment, instead of defeating it. In the very portion of the assignment in which he directs distribution among his creditors he in terms invokes the statutes of this state which prohibit a condition requiring releases, declaring that it is his purpose that such distribution shall be made "in accordance with the statute in such case made and provided." And yet the conclusion is drawn from this conditional provision relating to releases that the assignor did not intend that the trust should be administered in accordance with the statute, but in flat defiance of it. The cases of *Henderson* v. *Pierce*, (Ind. Sup.) 9 N. E. 449; *Redpath* v. *Tutewiler*, *Id.* 911; and *Grubbs* v. *King*, (Ind. Sup.) 20 N. E. 142,—while not directly in point, strongly support our views in this case.

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

ON REHEARING.

In denying the petition for rehearing we deem it necessary to refer to and answer a contention on the part of the defendants not noticed in the original opinion. It is urged that a rule applies to assignments for the benefit of creditors different from that which governs ordinary contracts, and that, where there is any uncertainty as to the true construction of the instrument, arising upon the face thereof, the instrument is void. No authority is cited which supports this novel exception to the otherwise universal rule that an ambiguous instrument is regarded as meaning what the courts construe to be its true interpretation, and is overthrown or sustained accordingly as such interpretation does or does not bring it within the condemnation of some rule of law. Whatever authority there is on the subject is the other way. *Coyne* v. *Weaver*, 84 N. Y. 386. The reasons urged for this

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distinction do not appear to us to possess any force. Not only would this distinction be a departure from all former rulings, and be without support in reason, but it would leave the creditors in the same state of uncertainty as to the validity of the assignment as it is insisted they are in when the instrument is ambiguous on its face. There would arise in every case the question whether the instrument was sufficiently obscure with respect to its true interpretation to bring it within this rule. To escape one kind of uncertainty the creditors would be offered another equally troublesome. We would have that very point to meet in this case. It might with much force be urged that the assignment in question is not so ambiguous as to warrant the application of this doctrine for which counsel for defendants contend. The Minnesota decisions cited by him do not sustain his position. Two of them have no bearing whatever on this case,—*In re Bird*, 40 N. W. 827; *May* v. *Walker*, 35 Minn. 194, 28 N. W. 252. In the other one—*McConnell* v. *Rakness*, 42 N. W. 539—the uncertainty as to the purpose of the assignor was created by an uncertainty as to a fact outside of the assignment. The assignment was in fact a common law assignment, it not reciting the facts necessary to make it an assignment under the insolvency act, and it appearing that such facts did not exist. The clause of the assignment which the court held destroyed its validity provided for the payment of all creditors of the assignor who should file releases of their claims, or who should otherwise be or become entitled to payment of their claims out of the property assigned according to law and the statute in such case made and provided. The ground of the decision was that the assignment itself did not inform creditors as to the terms and conditions on which they would be entitled to share in its benefits; that they might be led to believe from its provisions that because of an extraneous fact —*i. e.* the seizure of the assignor's property by a creditor—the assignor had made an assignment requiring releases, which would, if this fact existed, be a valid assignment under the insolvency law. Whether the assignor intended to require releases could

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not be determined by a construction of the instrument based upon its language alone, but depended also upon the existence or nonexistence of a fact outside of the assignment. The court in that case did not hold that the instrument was ambiguous on its face alone, and that, therefore, it was void, but held that, inasmuch as the assignor might lawfully require releases in certain cases, there was an uncertainty as to his purpose, growing not out of the language of the assignment alone, but out of that in connection with the fact that he could, in specified cases, require releases to be given; that the assignment would not on its face inform creditors whether releases were necessary, but that only by ascertaining an extrinsic fact—the fact whether the assignor's property had been seized by his creditors—could they find out whether the assignor intended to exact releases as a condition of their participating in the benefits of the assignment. We regard that case as an authority against the defendants, for the court impliedly holds that when the instrument itself, when properly construed without reference to extrinsic facts, informs the creditors as to the terms and conditions on which they will be entitled to share in the benefits of the assignment, it is valid. The language of the court in that case is "that creditors have a right to be informed by the assignment itself what its conditions are, and on what terms they are entitled to share in its benefits, and not have their rights left in a state of uncertainty, and dependent upon the existence or nonexistence of certain extraneous facts."

The application for a rehearing is denied.

(64 N. W. Rep. 78.)

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W. E. PURCELL *vs.* ST. PAUL FIRE & MARINE INSURANCE CO.

Opinion filed June 7th, 1895.

Complaint Upon Policy of Insurance—Directed Verdict.

The complaint set up a good cause of action on an insurance policy; also a good cause of action on a promise to pay a specified amount in settlement of the loss thereunder. Defendant put in issue the allegations of both causes of action, and set up as an affirmative defense a defense which was good only on the theory that the action was on the policy. No motion was made by defendant, either before or at the trial, to compel the plaintiff to elect on which cause of action he would stand. It was not precluded by the action of the court or of plaintiff from availing itself on the trial of the defenses to the cause of action on the policy set forth in its answer, nor did it offer evidence to sustain them. *Held*, that the trial court did not err in directing a verdict for plaintiff where the undisputed evidence established a liability under the policy, although the plaintiff failed to prove the alleged promise.

Evidence of Disclosure of Defendant Upon Garnishment in Another State Competent.

Held, further, that an exemplified copy of the record of garnishee proceedings against defendant herein in an action in the State of Minnesota against the insured, in which appeared what purported to be defendant's disclosure therein, was competent evidence that such disclosure was in fact made, and therefore admissible against defendant as an admission by its officer in the course of his duty under the law.

Foreign Garnishment—When no Defense.

In an action against A. in one state, the pendency of garnishment proceedings against A. in another state is no defense when it appears that at the time they were commenced A. knew that the defendant in the action in which they were instituted did not own the claim against A.

Waiver of Notice of Loss.

Proofs of loss constitute notice of loss. If furnished too late to constitute notice of loss according to the terms of the policy, the company waives the element of time, under section 4179, Comp. Laws, by omiting promptly and specifically to object to them on the ground that they do not constitute timely notice of loss.

Incompetent Evidence Cannot be First Objected to in Appellate Court.

When evidence is offered to establish a fact from which the law infers a waiver of notice of loss, and defendant does not object to the evidence as incompetent to establish such waiver under the pleadings, it is too late to raise the point for the first time in Supreme Court that the complaint sets forth a performance of the conditions of the policy relating to the giving of notice of loss, instead of a waiver of the performance of such conditions.

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

Action by W. E. Purcell against the St. Paul Fire & Marine Insurance Company. From an order denying a new trial after verdict for plaintiff, defendant appeals.

Affirmed.

John E. Greene and *Kueffner & Fauntleroy*, for appellant.

The defendant having been garnished in Minnesota, and the action in that jurisdiction not yet determined, the courts of this jurisdiction should not interfere until a determination of the case pending in the Minnesota court. Otherwise the garnishee may be made twice liable for payment of the same debt. *Grosslight* v. *Cresup*, 25 N. W. Rep. 505; *German Bank* v. *American Fire Ins. Co.*, 50 N. W. Rep. 53. This is not an action upon a policy of insurance but upon an express agreement to pay the loss which it is alleged was adjusted between the parties. Therefore the proof must sustain the finding that there was an express promise to pay. *Stockton Harvester Works* v. *Ins. Co.*, 33 Pac. Rep. 633. The burden was on plaintiff to show that the person making the agreement had authority to bind the company thereby. *Mitchell* v. *Minnesota Fire Ass'n*, 51 N. W. Rep. 608. The agency of the person must be shown before his acts or declarations are put in evidence. *Walsh* v. *St. Paul Trust Co.*, 39 Minn. 23; *Sencerbox* v. *McGrade*, 6 Minn. 334; *Woodbury* v. *Larned*, 5 Minn. 339, (Gil. 171.) Mere declarations or acts of the alleged agent, are not proof of his authority. *Bowlin* v. *Ins. Co.*, 46 Minn. 435; *Gude* v. *Ins. Co.*, 54 N. W. Rep. 1117. The conditions of the policy as to waiver are positive and charge the insured with notice of the limitations upon authority of agents. There is no proof of the agency of the person who adjusted this loss, or of his authority to waive any of the conditions of the policy. *Bourgeois* v. *Ins. Co.*, 57 N. W. Rep. 347; *Quinlan* v. *Ins. Co.*, 133 N. Y. 356; *Baumgartel* v. *Ins. Co.*, 136 N. Y. 547; *Frankfitter* v. *Home Ins. Co.*, 31 N. Y. Supp. 3. The court will not take judicial notice of the scope of an adjusters authority; it must be proven the same as any other fact. *Hollis* v.

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Ins. Co., 21 N. W. Rep. 774; *Barre* v. *Ins. Co.*, 41 N. W. Rep. 373; *Victoria Co.* v. *Frazer*, 29 Pac. Rep. 668; *German Ins. Co.* v. *Davis*, 59 N. W. Rep. 698. By the terms of the policy, written notice of loss must be immediately given, and proofs of loss must follow within sixty days after the fire. These preliminaries are conditions precedent to plaintiffs right of recovery. *Edgerly* v. *Farmers Ins. Co.*, 43 Ia. 589; 5 Ins. Law, Jr., 846; *Blakeley* v. *Phœnix Ins. Co.*, 20 Wis. 217; 2 May on Insurance, 1063; *Shapiro* v. *Ins. Co.*, 51 Minn. 239; *Shapiro* v. *Ins. Co.*, 63 N. W. Rep. 614; *Bowlin* v. *Ins. Co.*, 36 Minn. 433; *Sergent* v. *London L. & G. Ins. Co.*, 32 N. Y. Supp. 594; *Armstrong* v. *Ins. Co.*, 130 N. Y. 562; *Kirkman* v. *Farmers Ins. Co.*, 57 N. W. Rep. 952; *Lyon* v. *Ins. Co.*, 46 Ia. 631. The burden is on plaintiff to allege and prove all conditions precedent, as performed by him. *Rockford Ins. Co.* v. *Nelson*, 2 Ins. Law, Jr., 341; *Cooledge* v. *Continental Ins. Co.*, 30 At. Rep. 803. Notice and proofs of loss are not one and the same. *DeSilver* v. *Ins. Co.*, 3 Pa. St. 13; *O'Reilly* v. *Ins. Co.*, 60 N. Y. 169; *Knudson* v. *Ins. Co.*, 75 Wis. 202; *Perry* v. *Phœnix Ins. Co.*, 8 Fed. Rep. 643. If the terms of the policy have been waived, the waiver must be pleaded in the complaint. *Western Ins. Co.* v. *Thorp*, 28 Pac. Rep. 991; *Gillett* v. *Ins. Co.*, 36 Pac. Rep. 52; *Edgerly* v. *Ins. Co.*, 43 Ia. 591; *Weidert* v. *Ins. Co.*, 24 Pac. Rep. 242; *Boon* v. *Ins. Co.*, 37 Minn. 426; *Hand* v. *Ins. Co.*, 59 N. W. Rep. 538; *Vanhue* v. *Ins. Co.*, 26 N. E. Rep. 120.

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

If the loss was unadjusted at the time of the Minnesota garnishment, the garnishment was ineffectual. *Gies* v. *Bechkner*, 12 Minn. 183; *Mansfield* v. *Stevens*, 16 N. W. Rep. 455. If the loss was adjusted and the account stated, then the claim had been transferred, prior to the service of the garnishment summons the garnishee had notice of the transfer and disclosed it. That exhonerated appellant. *Williams* v. *M. & St. L. Ry Co.*, 6 N. W. Rep. 445; *Bailey* v. *N. P. Ry. Co.*, 17 N. W. Rep. 567. The assignment of the chose in action, conveyed the title to the

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assignee—and the garnishment created no lien against the assignee. *McDonald* v. *Kneeland*, 5 Minn. 294; *Lewis* v. *Lawrence*, 15 N. W. Rep. 113. The pendency of the garnishment proceedings cannot be set up in bar of this action, or any part thereof. *Irvine* v. *Lumberman's Bank*, 2 W. & S. (Pa.) 190; Fitzsimmons Appeal, 4 Pa. St. 248; *Near* v. *Mitchell*, 23 Mich. 382; *Kase* v. *Kase*, 34 Pa. St. 128; *Brown* v. *Scott*, 51 Pa. St. 357; *Wallace* v. *McConnell*, 13 Pet. 136. All the evidence offered and received was competent to show the authority of the adjuster to adjust the loss and make the agreement to pay it. *Aultman, Miller & Co.* v. *Dodson*, 62 N. W. Rep. 708; *Hirschman* v. *Iron Range R. R. Co.*, 56 N. W. Rep. 842. The facts proven show a complete and binding ratification of the adjusters settlement. *Mitchell* v. *Minnesota Fire Ass'n*, 51 N. W. Rep. 608; Story Agency, § 251; Meecham Agency 127. Appellant denied its liability upon the policy. This waived notice of loss. *Johnson* v. *Ins. Co.*, 1 N. D. 167; *Brown* v. *Ins. Co.*, 31 How. Pr. 508; *Smith* v. *Glen Falls Ins. Co.*, 62 N. Y. 85; *Illinois Mutual Ins. Co.* v. *Archdeacon*, 82 Ill. 236; *Parker* v. *Amazon Ins. Co.*, 34 Wis. 364; *Cobb* v. *Ins. Co.*, 11 Kan. 93. Appellant accepted proofs of loss and adjusted the loss. This waived all defects in the notice and proofs. *Parker* v. *Amazon Ins. Co.*, 34 Wis. 364; *Aurora Ins. Co.* v, *Krauich*, 36 Mich. 289; *Ins. Co. of N. A.* v. *Hope*, 58 Ill. 75; *Humphrey* v. *Hartford Ins. Co.*, 15 Blatch. 504; *Enterprise Ins. Co.* v. *Parisot*, 35 Ohio 35; *Williams* v. *Niagara Ins. Co.*, 50 Ia. 561; *Badgers* v. *Glen Falls Ins. Co.*, 49 Wis. 389; *State Ins. Co.* v. *Maakens*, 9 Vroom 429. Respondent was not obliged to plead waiver of proofs of loss. *Gans* v. *St. P. F. & M. Ins. Co.*, 43 Wis. 108; *West Rockingham Ins. Co.* v. *Sheets*, 26 Grat. 854; *Ferrer* v. *Home Ins. Co.*, 47 Cal. 416; *Tray Ins. Co.* v. *Carpenter*, 4 Wis. 20; *St. Louis Ins. Co.* v. *Kyle*, 11 Mo. 278; *Waddell* v. *Morrell*, 26 Wis. 614; *Webster* v. *Ins. Co.*, 36 Wis. 67; *N. W. Life Ins. Co.* v. *Ins. Co.*, 40 Wis. 446.

CORLISS, J. Plaintiff has obtained a verdict against defendant on a claim arising out of the insurance of the property of one

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Horatio Taylor by defendant. The verdict in favor of plaintiff was directed by the court at the close of the case. From an order denying a motion for a new trial this appeal is taken.

Defendant contends that the court should have granted its motion made at the trial that the court direct a verdict in its favor on account of the failure of the plaintiff to prove his case. The complaint alleges the incorporation of the defendant, the ownership of the insured property by Taylor, the execution and delivering to him by defendant of an insurance policy wherein and whereby defendant insured this property against all loss or damage by fire for the period of five years from the date thereof, the destruction of such property by fire, the making of proofs of loss by Taylor; and alleges in terms a performance of all the other conditions of such policy of insurance on his part. Then follows an averment in these words: "That thereafter, and on the 3d day of November, 1893, the said Horatio Taylor and defendant adjusted the amount of said Taylor's loss and damage by reason of said fire, and it was then mutually agreed between the said Taylor and the defendant that in settlement of the said Taylor's claim for loss under said policy of insurance by reason of said fire he would accept from the defendant, and the defendant should pay to the said Taylor, the sum of seven hundred dollars; and the defendant, in consideration of such settlement of the said Taylor's claim for such loss and damage, then promised and agreed to pay to said Taylor said sum of money." The defendant further alleges that at a specified time Taylor assigned "to one James Purdon all the right, title, and interest of the said Horatio Taylor in and to the said claim against the defendant by reason of said insurance and said loss and said adjustment and settlement;" and, further, that Purdon thereafter assigned to the plaintiff "all his right, title, and interest in and to the said claim against the said defendant by reason of the insurance and loss and of the adjustment and settlement aforesaid." Then follows an averment that defendant has not paid "the said loss or the said sum of money." It is apparent from this analysis of the complaint that the pleader

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has set up two causes of action for the same claim,—one arising out of the contract of insurance, the destruction of the insured property by fire, and the adjustment of the loss from such fire, thus fixing the amount of recovery; the other springing from the express agreement of the defendant to pay the sum of $700 in settlement of Taylor's claim for his loss under the policy. The insured, in case there has been an adjustment and an agreement to pay a stipulated sum, may sue on his promise, or he may, at his option, fall back upon the policy for his cause of action. 2 Wood, Ins. § 450. In case he unites both causes of action in the same complaint, the defendant has his remedy by motion to make the pleading more definite, or possibly to compel the plaintiff to elect on which theory he will proceed. Under common law rules of pleading the objection that the declaration was faulty for duplicity had to be taken advantage of by special demurrer. This is stated to be the law by Stephens, Chitty, and Bliss. Steph. Pl. 251; 1 Chit. Pl. 226; Bliss, Code Pl. § 288. Mr. Bliss says: "This vice, both in the declaration and in subsequent pleadings, is treated as a fault in form merely, and can only be brought to the notice of the court by special demurrer." Indeed, he indicates that different grounds of recovery may be set forth in the same pleading where they are stated in different counts, and this is expressly held in many cases, as we shall see. We are not called upon to express any opinion upon that point. But it is clear that the settled rule was that the party could attack the pleading only by special demurrer. Special demurrers have been abolished in this state, and it is no longer a ground of demurrer under our procedure that the plaintiff has set forth two causes of action in his complaint, when his purpose is to recover only a single claim. It is not a case of failure to set forth a cause of action. Instead of that the complaint states two causes of action. Bliss, Code Pl. § 293; *Mills* v. *Barney*, 22 Cal. 240. Such a case would not fall within any other ground of demurrer. Comp. Laws, § 4909. But the defendant may move to compel the plaintiff to elect on which theory he will try his case. If he does not

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so move either before or at the trial, the plaintiff may recover on either cause of action if the evidence will justify such a recovery. *Conaughty* v. *Nichols*, 42 N. Y. 83-88; Bliss, Code Pl. § 292. In the case in 42 N. Y. the court said: "If they choose to accept the complaint without moving to strike out any portion of it, or to compel the plaintiff to make it more definite, or to elect in regard to the form of action, they should not upon the trial have been allowed to prevent a recovery by the plaintiff of a judgment for the amount of his demand. * * * It is quite probable that the plaintiff intended, down to the trial, to recover against the defendants for a wrongful conversion of the proceeds of the sale of the property consigned to them and doubtless the mistake should have been fatal but for the ample statement of facts contained in the complaint, which justified a recovery on contract for the amount of his demand. It does not follow that, because the parties go down to the trial upon a particular theory, which is not supported by the proof, the cause is to be dismissed, when there are facts alleged in the complaint, and sustained by the evidence, sufficient to justify a recovery upon a different theory or form of action. There is no substantial reason why, under such circumstances, a party should be turned out of court, and compelled to commence a new action, thereby occasioning expense, delay, and multiplicity of suits to accomplish a just result. It is against the spirit and letter of the Code, and substantial justice is not promoted thereby." Mr. Bliss says that, if no objection is made by motion, the objection is waived, "and, if plaintiff shows himself entitled to relief on either ground, it should be given him." Section 292. To same effect are *Hawley* v. *Wilkinson*, 18 Minn. 525, (Gil. 468;) *Plummer* v. *Mold*, 22 Minn. 15; *Fern* v. *Vanderbilt*, 13 Abb. Prac. 72; *Seymour* v. *Lorillard*, 51 N. Y. Super. Ct. 399; *Waller* v. *Lyon*, 17 N. Y. Wkly. Dig. 305; *Roberts* v. *Leslie*, 46 N. Y. Super. Ct. 76; *Longprey* v. *Yates*, 31 Hun. 432; *Birdseye* v. *Smith*, 32 Barb. 217; *Velie* v. *Insurance Co.*, 65 How. Prac. 1; *Dorr* v. *Mills*, 3 Civ. Proc. R. 7; *Blank* v. *Hartshorn*, 37 Hun. 101; *Rothchild* v. *Railway Co.*, (Sup.) 10 N. Y. Supp. 36. Indeed

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many of these cases hold that it is entirely within the discretion of the court to allow both causes of action to stand, and in some of them the action of the trial court refusing to compel the plaintiff to elect was sustained; and in one case—*Blank* v. *Hartshorn*—the general term reversed an order of the special term compelling the plaintiff to make such election. To hold that a defendant, without calling upon the plaintiff to elect on which cause of action he will stand, can at the end of a trial, insist that the case shall be dismissed because the plaintiff has not sustained one cause of action, although the other is fully made out, would be to establish a rule which did not exist under a much less liberal system of procedure than that under which we are now administering justice. The defendant has at no time called upon the plaintiff to elect on which cause of action he would proceed. On the contrary, the whole scope of its answer makes it plain that defendant intended to put in issue material averments of the complaint under both causes of action. The answer denies the ownership of the property by Taylor, its destruction by fire, the furnishing of proofs of loss by Taylor, and the fact that he has performed the other conditions of the policy. In fact every allegation is controverted except those relating to the issue of the policy and the non-payment of the plaintiff's alleged claim. If defendant was not defending this case on the theory that the complaint set up a cause of action on the policy, but on the sole hypothesis that the suit was on the promise to pay $700 in settlement of the loss, it is strange that it should have wasted any time in denying averments which, on the latter theory of the case, were utterly immaterial. If the action was on the promise alone, then defendant would be successful if the promise was not established, although all the other facts were admitted. On the other hand, if plaintiff should succeed in establishing such promise, then these other allegations of the complaint would become immaterial, and disproof of them would not save the defendant from defeat. 2 Wood, Ins. § 450.

Defendant, in its answer, alleged as a defense that the fire was

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set by Taylor for the purpose of obtaining the insurance money. But this would constitute no defense to an action on the promise, in the absence of further allegations showing a right on the part of the defendant to rescind the alleged settlement. It would, however, constitute a perfect defense to an action on the policy, and was plainly inserted in the answer on that theory. The complaint contained a perfect cause of action on the policy. It also set forth a cause of action on the promise. Defendant, without moving to have plaintiff elect on which cause of action he would stand, saw fit to interpose an answer to both causes of action. It might have protected itself fully by compelling the plaintiff to choose his ground of recovery. In that event it would have only one cause of action to answer and litigate. It cannot claim that it has been debarred from proving defenses that would be good to an action on the policy, for there were in fact several such defenses set up in the answer, and they could unquestionably have been proved on the trial, the plaintiff having failed to make out a case against defendant under the alleged promise. The condition in which the defendant found itself on the trial could not have been forced upon it against its wish. It might have compelled the plaintiff to elect. Instead of doing this, it accepted the issues tendered, and went to trial on them. Had the trial court ruled that no defense to the cause of action on the policy should be proved, then a different question would be presented; but defendant made no attempt to establish any defense on this theory of the case. It was not because of the condition of the pleadings, but because of its own voluntary failure to offer evidence, that it failed to establish a defense to the cause of action on the contract of insurance. The case of *Stockton Combined Harvester & Agricultural Works* v. *Glen's Falls Ins. Co.*, (Cal.) 33 Pac. 633, is not directly in point. In that case the whole emphasis of the complaint was on the promise to pay, made after adjustment. But in this case the real stress of the pleading appears to be placed on the contract of insurance. The plaintiff set forth the contract, the ownership by Taylor of the

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insured property, the destruction thereof by fire, the making of proofs of loss, and the performance of all the conditions of contract of insurance to be performed on the part of the insured, the fact that the amount of the damage occasioned by the fire had been fixed at the sum of $700; and averred the assignment to Purdon, and by him to plaintiff, of the claim against the defendant, by reason, not of the promise to pay, but by reason of the insurance, loss, adjustment, and settlement; and in conclusion it is alleged, not only that defendant has not paid said sum of money, but also that it has not paid said loss. The whole trend of the complaint seems to indicate a purpose on the part of the pleader to rely on the promise to pay on the adjustment of the loss only as fixing the amount of such loss. Certainly, in view of the other averments of the complaint, it cannot be said that by a single allegation of a promise to pay, in connection with an allegation as to adjustment of the loss, the pleader has precluded himself from claiming that his action is on the policy, when defendant has not called on him to elect, but has by his answer treated it as an action thereon as well as on the promise. In the case in 33 Pac., the defendant does not appear to have treated the complaint by his answer as embracing a cause of action on the policy, as defendant has done in this case.

The question then arises whether plaintiff established a cause of action on the policy. The only defect of proof on that theory of the case which is here urged relates to the extent of the damage sustained by the loss. We think there was ample evidence on this point, and, there being no proof to the contrary, the court was justified in directing a verdict for the plaintiff. The evidence to establish the amount of the loss was contained in a disclosure made by defendant's president in garnishee proceedings in the State of Minnesota. In a suit in that state, brought against Taylor, the plaintiff in that action served a garnishee summons on the defendant herein, and such defendant, through its president, made disclosure that, while it disputed its liability for the loss, the amount thereof had been adjusted by it, and

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fixed at the sum of $700; and that, in case it was liable at all, this was the amount of its liability. This was the only additional fact which the plaintiff herein needed to prove to make out his case, and this admission by the defendant in its disclosure, which was in a sense its answer in the garnishment proceedings, fully established such fact. It was not contended on the trial that the papers received in evidence were not an exemplification of the record of the action in Minnesota. The disclosure of the defendant therein was in the nature of answer in a judicial proceeding. The garnishment law of Minnesota gave Taylor's creditors a right to institute in effect an action on the policy against the insurance company by the garnishment proceedings. This action within an action proceeds in all respects as the main action itself in case the garnishee denies liability and the plaintiff desires to litigate that question in that action. In such a case the plaintiff, with leave of court, files his supplemental complaint against the garnishee, and the latter answers it, and the issues thus presented are tried the same as the issues in the main action. But if the garnishee in his disclosure admits his liabilty to the defendant in the action, no supplemental complaint and answer thereto are necessary, and judgment against the garnishee is, at the proper time, rendered upon the disclosure. That there may be a record on which this judgment can be entered, the law requires the officer taking the disclosure to take full minutes of the same, and file them with other papers in the case. The disclosure is thus made a record in the action. Like all other records, it imports verity. What it purports to show is deemed true. There is stronger reason for putting faith in the truthfulness of the statements of a record that it contains the disclosure made by a garnishee than for accepting as true the utterances of a record that a certain paper therein is the answer of a defendant. The record in the former case has behind it the oath of a sworn officer; *i. e.* the officer who takes the disclosure of the garnishee. Such disclosure is not merely testimony. It is a record in a judicial proceeding, and, if it purports to contain the admissions of

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the defendant, as it does in this case, it must, like all other records, be regarded as speaking the truth. In this case it is a record in a proceeding against the same defendant on the same claim; and on principle it is as competent evidence of defendant's admissions as would be a record of an answer in an action brought by Taylor himself against the defendant to enforce the same alleged liability. This garnishment record would have been admissable in the State of Minnesota as against this defendant. It must have the same faith and credit here. The disclosure of a coporation is required to be made by an officer thereof. It must, therefore, be presumed that the officer who makes such discosure had authority to make the same for the corporation. The garnishment law of Minnesota was proved in this case as a fact. See § § 164-187, both inclusive, of title 10, Ch. 66, of the General Statutes of 1878, (§ § 5306-5331, Gen. St. 1894.)

There remains one more point to be considered. The defendant interposed as a plea in abatement the pendency of these garnishment proceedings in that state. Assuming, without deciding, that such a plea would be good in a proper case, it is clear that defendant's own answer defeats its plea. It alleges that more than a month before the institution of the garnishment proceedings against it the defendant Taylor in that action assigned his claim against the garnishee to Purdon, and that Purdon notified the defendant herein of such assignment. It thus appears that at the time the plaintiff in the action in Minnesota sought to attach the claim against the garnishee as the property of Taylor it was not his property, but belonged to Purdon, who thereafter assigned it to plaintiff. These facts would establish a perfect defense to the garnishment proceedings in Minnesota. It is plain that the garnishee cannot be held liable therein. *Mansfield* v. *Stevens*, (Minn.) 16 N. W. 455; *Williams* v. *Railroad Co.*, (Minn.) 6 N. W. 445; *Macdonald* v. *Kneeland*, 5 Minn. 352, (Gil. 283;) *Lewis* v. *Lawrence*, (Minn.) 15 N. W. 113. It is a significant fact that, while the garnishee might have secured his discharge, or compelled the plaintiff in that action to proceed to enforce the

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claim against it, it had at the time of the trial of this action, taken no such steps, although nearly a year had then elapsed since the disclosure was made. The defendant, therefore, is in this position before this court: It claims and shows that it has a perfect defense to these garnishment proceedings, and yet urges its failure to secure a discharge therefrom as a reason why this plaintiff should wait until it has seen fit to move for a discharge. The plaintiff is under no obligation to make such a motion, and none of the parties to the proceedings in Minnesota have any interest in making it, while one of them at least—the garnishee therein, the very defendant in this case—has a direct interest in permanently postponing the day of its discharge as such garnishee. The case of *Williams* v. *Ingersoll*, 89 N. Y. 508-525, is directly in point as fully supporting our view that, under the facts of this case, the pendency of the garnishment proceedings constitutes no defense to the action.

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

ON REHEARING.

CORLISS, J. The only question not already discussed in the opinion in this case is the question of notice of loss. We assumed, in writing such opinion, that there was evidence that notice of loss had been given according to the provisions of the policy. On discovering our error in this particular, we granted a rehearing. It is obvious from the terms of the contract that the giving of immediate notice of loss in writing was a condition precedent to liability. No such notice was given apart from that contained in the proofs of loss. That proofs of loss constitute notice of loss cannot be doubted. See *Weed* v. *Insurance Co.*, (N. Y. App.) 31 N. E. 231-234. When the proofs of loss in this case were furnished we are unable to say from the evidence. In view of the fact that the burden was on plaintiff to establish a case under the policy, we are compelled to hold that he has failed to show that immediate notice of loss was given by the furnishing of proofs of loss. They may not have been furnished until after it was too late under the terms of

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the policy to give notice of loss. Of course, the provision requiring immediate notice of loss must have a reasonable construction. A notice given within a few days after the loss would be in time. May, Ins. § 462. But the record does not show that the proofs of loss which constituted the only written notice given were furnished within a few days after the fire. But we are clear that there was ample evidence that the giving of immediate notice of loss was waived. When the proofs of loss were received by defendant, there is no pretense that it promptly, or at all, objected to their receipt, either as timely proofs of loss or as timely notice of loss. On the contrary, it retained such proofs of loss without objection or comment. Under our statute this constituted a waiver of timely notice. "Delay in the presentation to an insurer of notice or proofs of loss is waived if caused by any act of his or if he omits to make objection promptly and specifically upon that ground." Comp. Laws, § 4179. See, also, *Johnson* v. *Insurance Co.*, 1 N. D. 167, 45 N. W. 799. It is urged, however, that the plaintiff cannot sustain the judgment on the theory that notice of loss was waived for the reason that no such issue was tendered by the complaint. The allegation in that pleading is that notice of loss was in fact given according to the terms of the policy. But the evidence showing that proofs of loss had been furnished and were received without objection was evidence from which the law would infer a waiver of timely notice of loss. When offered, the defendant was bound to know that such evidence could be used for both purposes. If, therefore, defendant's counsel desired to raise the point that the waiver, which this evidence established as a matter of law, in the absence of proof that the defendant had objected to the proofs of loss as timely notice, was not pleaded, he should have objected to the evidence as being incompetent for the purpose under the pleadings. The result would have been an application to amend the complaint by setting up a waiver; and then if defendant had desired time to meet this new issue, the court, on a proper showing, would have

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unquestionably granted him a continuance. Having allowed evidence to be received which established a waiver as a matter of law, without insisting that that issue was not within the pleadings, it is too late for it to raise the point for the first time in this court.

The judgment is affirmed. All concur.

(64 N. W. Rep. 943.)

In re HENDRICKS.

Opinion filed July 11th, 1895.

Revised Codes—Time of Taking Effect.

Chapter 74, Laws 1893, provides for a revision of the statutes of the state, and for the publication of such revision in a volume to be known as the "Revised Codes," and section 7 of the act provides that the finished copies of the volume shall be delivered to the secretary of state, and thereupon the governor shall issue his proclamation announcing such delivery and his acceptance of the volume "and thirty days after the date of his proclamation said Revised Codes shall take effect and thereafter be in force and be received as evidence of the laws of this state in all the courts thereof." *Held*, that it was not only the legislative purpose to fix by said section the date at which the volume should be received as evidence, but also to fix a date when the system of laws contained in the volume should go into effect; and *held*, further, that the alterations in and additions to the laws directed to be published in said volume do not, except when otherwise provided by an emergency clause, go into effect until the completion of the events specified in said section 7.

Application of Stephen A. Hendricks for discharge on a writ of *habeas corpus*.

Application granted.

George W. Newton, for petitioner.

J. F. Cowan, Atty. Gen., in opposition.

BARTHOLOMEW, J. Stephen A. Hendricks, a prisoner confined in the penitentiary at Bismarck, being in the County of Burleigh and within the limits of the Sixth Judicial District of the State of

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North Dakota, on the 5th day of July, 1895, presented to the Supreme Court his petition for a writ of *habeas corpus* to be directed to the warden of said penitentiary, for the purpose of testing the legality of his imprisonment. This court, being in doubt as to its authority to issue the writ upon the petition presented, directed by order that a copy of the petition be served upon the attorney general of the state, which was accordingly done, and the attorney general filed certain objections to the allowance of the writ, and the objections were fully argued by the attorney general and counsel for the petitioner. The objections filed contained the following: "That by the provisions of section 886 of the Code of Criminal Procedure passed February 21, 1895, by the fourth legislative assembly of the State of North Dakota, and approved March 2, 1895, it is provided, regarding the issuance of the writ of *habeas corpus* and the jurisdiction of the courts and judges so to do, as follows: The writ of *habeas corpus* must be granted: 1. By the Supreme Court or any judge thereof, upon petition by or on behalf of any person restrained of his liberty in this state. When so issued it may be made returnable before the court, or any judge thereof, or before any District Court or judge thereof. 2. By the District Courts or any judge thereof, upon petition by or on behalf of the person restrained of his liberty in their respective districts. When application is made to the Supreme Court, or to a judge thereof, proof by the oath of the person applying, or other sufficient evidence shall be required that the Judge of the District Court having jurisdiction by the provisions of subdivision 2 of this section is absent from his district, or has refused to grant such writ, or for some cause to be specially set forth, is incapable of acting, and if such proof is not produced the application shall be denied."

It is conceded that the petition contains no proof or statement that the Judge of the Sixth Judicial District is absent from his district, or has refused to grant the writ, or is in any manner incapable of acting upon the application of the petitioner. Prior to the enactment of the provisions above set forth, application for

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the writ of *habeas corpus* might be made direct to the Supreme Court, without any reference to the Judge of the District Court of the district wherein the petitioner was confined. The learned counsel for the petitioner contends that the provision of the Code of Criminal Procedure enacted by the 4th general assembly have not yet gone into effect and are not in force, that we are still acting under the provisions of the law as it stood prior to that enactment, and hence his petition is sufficient in that respect. The attorney general, on the other hand, contends that all of the provisions of the Code of Criminal Procedure enacted by the 4th general assembly that were not theretofore in effect went into effect and became of binding force on July 1, 1895. This is the controversy, and the only controversy, that we are required to decide, in passing upon the sufficiency of the petition. The provisions of our constitution and laws are such that the question is involved in some uncertainty. For convenience, we will at this point refer to all of the provisions bearing upon the subject that it will be necessary for us to discuss in this opinion.

Section 1 of Ch. 3 of the Session Laws of Dakota Territory for 1889 reads as follows: "That all laws hereafter enacted by the legislative assembly of Dakota unless otherwise expressly provided therein shall be in force and take effect on the first day of July after their passage and approval." Section 67 of our state constitution reads as follows: "No act of the legislative assembly shall take effect until July 1st, after the close of the session, unless in case of emergency (which shall be expressed in the preamble or body of the act) the legislative assembly shall, by a vote of two-thirds of all the members present in each house, otherwise direct." The 2nd legislative assembly, by Ch. 82, Laws 1891, created a compilation commission whose duty it was "to compile, arrange, classify and report the laws of this state which may be in force on the 1st day of July, A. D. 1891." It was by said act further provided: "There shall be printed and bound as aforesaid, 2,000 copies of such Compiled Laws, and delivered to the secretary of state for distribution and sale, and

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the governor shall issue his proclamation announcing such fact and his acceptance of such compilation and revision, and thirty (30) days after the date of such proclamation said compilation shall go into effect and thereafter the laws so compiled shall be received by all the courts and officers of this state, as original enrolled acts approved and filed in the office of the secretary of state as now provided by law." The legislature that convened in 1893 saw proper to create another commission known as the "Revising Commission," and to fix their duties and powers. This was done by chapter 74 of the Session Laws of that year. The first section provides the manner in which the revising commission shall be appointed. The second provides that such commission shall have charge of the report of the compilation commission. The third section reads: "It shall be the duty of the revising commissioners: First. To examine the laws reported by said committee for compilation and compare the same with the statutes of Dakota Territory and the State of North Dakota with due reference, also, to the constitution and such other enactments as may effect their validity, and make convenient notes of reference indicating what statutes or parts of statutes not in force, if any, are now included therein, what statutes or parts of statutes still in force are omitted therefrom, what changes are necessary by reason of the enactments of this session of the legislative assembly, and generally what inconsistent, conflicting or superfluous provisions are to be found in the existing laws, and what statutes or parts of statutes are of doubtful force or validity, and make such further investigation as may be necessary to bring before them the real state of the law. Second. To revise the law generally, by rejecting all unnecessary, inharmonious, obsolete or otherwise objectionable enactments, and reporting them in proper bill form for the purpose of repeal to the fourth session of the legislative assembly, and adopting only those statutes or parts of statutes in distinct sections, which do not require change, and by preparing anew and embodying in connection therewith, upon any particular subject wherein

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it may be found necessary, such other provisions as may be required to avoid uncertainty and harmonize and complete the law according to its true intent; and all newly prepared matter so introduced shall be reported to the fourth legislative assembly in the form of appropriate bills for enactment or re-enactment, each of which shall designate by the proper number or numbers the section or sections of the Revised Code for which it is intended." The third subdivision of this section directs the commission to codify the laws so adopted and revised under seven titles, namely: The Political Code, the Civil Code, the Code of Civil Procedure, the Probate Code, the Justices' Code, the Penal Code, and the Code of Criminal Procedure. The fourth subdivision directs the commission to prepare the codes in proper form to be used by the printer, for publication in one octavo volume, to be known as the "Revised Codes of North Dakota." The fourth section reads: "As soon as practicable after the adjournment of the fourth regular session of the legislative assembly, said revising commissioners shall complete their codifications by incorporating therein the general laws passed at said session in the manner hereinbefore prescribed." The fifth and sixth sections pertain to the printing of the volume, and the seventh section reads: "The printed copies shall be delivered when completed to the secretary of state, and the governor shall issue his proclamation announcing the delivery and his acceptance of such copies, and thirty days after the date of his proclamation said Revised Code shall take effect and thereafter be in force and be received in evidence of the laws of this state in all courts thereof."

A decision of the point here involved requires a particular construction of this section 7. The attorney general contends that the sole object and purpose of the legislature in its enactment was to fix a time when the printed volume should become evidence of the laws, and that the legislative intent would have been as fully expressed and more clearly expressed had the language been: "And thirty days after the date of his proclama-

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tion said Revised Codes shall be received as evidence of the laws of this state in all courts thereof." After careful consideration of all the provisions bearing upon the subject we are unable to accept the views of the attorney general, but, on the contrary, reach the conclusion that the Revised Codes, as such, do not go into force or become effective as law until 30 days after the date of the governor's proclamation accepting the printed volume. Before discussing the causes which lead us to this conclusion, it is justice to the attorney general that we notice the reasons that have been so strongly pressed upon us in support of his views. It is urged that the words of the section—"and thirty days after the date of his proclamation said Revised Codes shall take effect and thereafter be in force"—necessarily imply that the thing thus put in force was not in force before, and that the statute must have a construction not antagonistic to this plain implication, and it is urged, by way of illustration, that the language fixing the time when the Revised Codes should go into effect is identical in its import with the language used by the 2nd general assembly in fixing the time when the anticipated volume to be prepared by the compilation commission should take effect. But as that commission was directed to compile the laws that might be in force on the first day of July, 1891, and as it could compile nothing not then in force, it would be an absurdity to claim that the laws thus compiled were not in effect until the compiled volume was published, and hence the legislature must have intended to fix only the time when the printed volume should go into effect as evidence of the laws. And by reason of the great similarity, if not identity of import, in the language used in the statutes of 1891 and 1893 it is claimed that the latter must receive the same construction as the former, particularly as the conditions are practically the same. The commission created by the act of 1893 were required to make such investigation as should "bring before them the real state of the law." They were then directed to revise the law generally, by recommending such eliminations, alterations, and changes as might be required "to avoid uncer-

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tainty, and harmonize and complete the law according to its true intent." It is urged that under this authority the great mass of the law, which—as was well known—as already harmonious and certain, would remain unchanged and continue in force, just as it had been in force, perhaps for years, and that it never could have been the legislative purpose that such laws should go into effect and be of force only after the publication of the volume and the governor's proclamation accepting the same. The difficulty with this position in both instances arises from confounding the Revised Codes as an entity and as a system of law with particular enactments that may be therein incorporated. Particular acts and any number of them may have been theretofore in force, but the entire statutory law of the state is to be presented in a new and different form with new and different matter, *i. e.* in the form of the Revised Codes. As the system of law thus presented never before had an existence, it could not, as a system, have been in force, and it was entirely competent that the legislature should fix a time when it should go into effect and be of force, and the learned attorney general admits that, in a proper case, the legislature may name a date that is uncertain or that depends upon a contingency.

Another argument is based upon the fact that the act of 1893 requires the revising commission to incorporate the general laws to be passed by the 4th general assembly—the legislature of 1895—with the Revised Codes. The statute of 1889 already quoted provides, in effect, that, except for reasons expressed therein, all laws passed by the legislature shall go into effect on the 1st day of July succeeding their passage. Section 67 of the constitution provides that, except in cases of emergency, laws passed by the general assembly shall not go into effect prior to July 1st succeeding their passage. It is urged that if the acts of the 4th general assembly can only go into effect upon the publication of the Revised Codes and the proclamation of the executive accepting the same, then the act of 1893 repeals the act of 1889 and violates the constitutional provision. We think otherwise. We

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do not, however, agree with the learned counsel for the petitioner that the adoption of the constitution worked a repeal of the act of 1889. There is no repugnancy. The constitution provides that the laws shall not go into effect prior to a certain date. The statute provides that they shall go into effect on that particular date. The two provisions can stand together. But under the constitution it was perfectly competent for the legislature of 1893 to fix a date subsequent to the 1st of July next succeeding their passage as the time when the anticipated laws of the 4th general assembly should take effect. Nothing but the act of 1889 stood in the way, and that, being only a legislative enactment, could not control a subsequent legislature. The law of 1893 did not repeal the law of 1889, but excepted the laws to be passed by the 4th general assembly from the operation of that law. But the legislature of 1893 could not control the legislature of 1895, and when the latter passed an act with an emergency clause and declared, "This act shall go into effect and be in force from and after its passage and approval," such action took such act out of the operation of the statute of 1893 and the act became effective immediately upon its approval. But the general laws of the 4th general assembly passed without emergency clauses would remain under the act of 1893, and would go into effect only upon the publication and acceptance of the Revised Codes. Against this proposition it is urged that, if such be the law, then the revising commission may by accident or design omit some such act or acts from the Revised Codes, and thus nullify the expressed will of the legislature, and arrogate to themselves legislative functions, contrary to the provisions of the constitution. This argument is not sound. An examination of the act of 1893 as herein quoted will show that the commission are required to codify all the general laws of the 4th general assembly in the Revised Codes. A law should never be condemned because its disobedience may be followed by unfortunate or unconstitutional consequences. Not only are the codifiers required to incorporate the laws of the 4th general assembly in the Revised Codes, but,

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after the volume is published, and before it can have any force or effect, the governor of the state is required to issue his proclamation accepting the volume, and thus announce to the citizens of the state that all the requirements of the law have been met in its production. It is not to be presumed for a moment that the executive will accept the volume unless the laws of 1895 are properly incorporated therewith. The reasons urged in support of the position of the attorney general are plausible, but in our judgment entirely insufficient.

The grounds upon which we base our conclusion that the Code of Criminal Procedure, as revised and changed by the 4th general assembly, does not go into effect until 30 days after the date of the governor's proclamation accepting the printed volume of the Revised Codes, are few, and may be briefly stated. They rest largely upon the express language of section 7 of the act of 1893. This section, after directing that the printed copies shall be delivered to the secretary of state, and that the governor shall issue his proclamation announcing the delivery and his acceptance of said copies, continues: "And thirty days after the date of his proclamation said Revised Codes shall take effect and thereafter be in force, and be received as evidence of the laws of this state in all the courts thereof." There is no more elementary rule of construction than that which requires a statute to be so construed as to give full force and effect to all its terms. This rule should be departed from only when it clearly appears that its enforcement would not reflect the legislative intent. To hold in this case that the statute only determines the time at which the Revised Codes shall be received as evidence of the laws requires us, as the attorney general concedes, to entirely reject the words "take effect and thereafter be in force." The idea would be much better expressed without them. They become, not only surplusage, but they become mischievous, and convey to the mind a radically different conception. None of the reasons urged by the attorney general, and none that we can conceive to exist in this case, show clearly that the legislative purpose in the enact-

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ment of the section was confined to the one object of making the Revised Codes evidence of the laws. Hence, under elementary rules we are not at liberty to reject any of the terms of the section. And this rule must apply with unusual force in a case like the present, where the language used is such as has been used from time immemorial in this country, and is familiar to all courts, lawyers, and legislators, and which, when used in substantially the connection in which we here find it, is always used to mark the time at which the law becomes effective and binding upon all persons within the jurisdiction. And it must be a clear case indeed that will warrant us in wresting from the words their familiar, usual, and long established signification, and reducing them to tautological surplusage. We find nothing in the statute that requires this, but, on the contrary, we do find in the statute, aside from the unequivocal language used, strong indications that it was the legislative purpose in the enactment to fix the time when the Revised Codes, as such, should go into effect and possess binding force. If all the provisions of the Revised Codes were in force and effect at and prior to the time when the published copy should be publicly accepted by the executive, and if the sole purpose of the section under consideration was to make the Revised Codes authoritative evidence of the laws, then why were they not so made evidence at once? Why was their evidential character postponed for 30 days? All the provisions being in force, and the printed volume being complete, the most natural and reasonable course would have been to declare it evidence *eo instanti*. No reason whatever for postponement has been suggested, and we can think of none. On the other hand, if the changes made in the laws by the Revised Codes were not already in force, and if such Revised Codes furnished to the people of the state their first opportunity of ascertaining the changes that had been made in the laws, save and except the limited opportunity offered by consulting the enrolled bills in the office of the secretary of state, then it becomes highly reasonable and proper, if not absolutely necessary, that some time should elapse

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in which courts and officials charged with the duty of applying and enforcing the laws, as well as the citizens generally, should have the opportunity of obtaining the means of ascertaining what the changes in the laws were before they should be required to enforce or comply therewith.

We do not concede the contention of the attorney general, that the language used in the statute is ambiguous, but, even if that were granted our conclusion would not be different. Where the language used is ambiguous, courts may, in the construction of a statute, properly consider the hardship, the inconvenience, and the benefits that would adhere to any particular construction of which the language used is susceptible, and that construction should be adopted which will most favor public convenience and prevent hardship or injustice. Suth. St. Const. § 324. We do not hesitate to declare that any construction of the statute under consideration which would put the changes in the laws accomplished by the revision in force before their publication, and before they have been made available to the public generally, would be productive of great public inconvenience, of hardship, and perhaps positive injustice. It is well known that the 4th general assembly, largely at the instance of the revising commission, and by means of bills prepared by them, made radical and sweeping changes in our system of laws. Old provisions, old methods, and old procedure have been swept away, and new substituted therefor. It does not answer this position to say that the act of 1893 did not contemplate any such radical action by the revising commission. That commission received its authority from the legislature, and, so far as its work has been accepted and enacted into law, its acts have been ratified by the same power from which it received its original authority, and hence, for practical purposes, power to perform those acts must be read into the original act. If these changes be declared in effect prior to their publication and acceptance, then it will be always highly dangerous and often impossible to take any steps in the administration of the law without resorting to the inconvenient,

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expensive, and sometimes impossible course of consulting the enrolled bills. Even were the statute ambiguous, we would not give it a construction productive of such mischief.

The questions raised by the objections of the attorney general are of such importance to the people of the state just at this time that we have deemed it proper to formulate an opinion expressing our views at length.

The objections of the attorney general are overruled. All concur.

(64 N. W. Rep. 110.)

CLINTON G. NICHELLS *vs.* MINNIE B. NICHELLS.

Opinion filed June 27th, 1895.

Misconduct of Attorney—Withdrawal of Appearance.

Where an attorney, after appearing for the defendant in an action, and serving an answer to the complaint therein, withdraws such answer and appearance as an act done in avowed hostility to his client, and as an act of retaliation against his client for alleged nonpayment of his fees, *held*, that such withdrawal was an act done in bad faith, and hence was beyond the scope of the authority of an attorney at law.

Bad Faith Appearing—Default Cannot be Taken Without Notice.

Where the grounds and reasons for such withdrawal are reduced to writing, and such bad faith and hostile purpose are apparent upon the face of the writing, and such writing is presented to the trial court and filed in the action before a default is declared therein, and where, upon such attempted withdrawal of the answer, the court declared the defendant to be in default for answer, and allowed judgment to be entered against the defendant as in a default case, *held*, that such judgment is illegal in its inception, and should be set aside, on defendant's motion therefor, as a matter of strict legal right, and not as a matter of favor.

Rule of General Application.

Held, further, that this rule applies to actions for divorce as well as to other actions.

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

Action for a divorce by Clinton G. Nichells against Minnie B.

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Nichells. From an order denying a motion to vacate a decree for plaintiff, defendant appeals.

Reversed.

Ball & Watson and *I. J. Ringolsky*, for appellant.

The judgment was taken against appellant through surprise, and under section 4939, Comp. Laws, it was abuse of discretion to refuse her petition for leave to come in and defend. *Simpkins* v. *Simpkins*, 36 Pac. Rep. 759; *Herbert* v. *Lawrence*, 18 N. Y. Supp. 95; *Loree* v. *Reeves*, 2 Mich. 133; *Comstock* v. *Whitworth*, 75 Ind. 129. The power of the court to open up judgments is a highly remedial one, and should be liberally exercised in furtherance of justice. *Buell* v. *Eurich*, 24 Pac. Rep. 644; *Griswold* v. *Lee*, 47 N. W. Rep. 955; *Baxter* v. *Chute*, 52 N. W. Rep. 379; *Pierson* v. *Drobax*, 34 Pac. Rep. 76; *Beard* v. *McAllester*, 24 Pac. Rep. 263; *Taylor* v. *Trumble*, 49 N. W. Rep. 375; *Black* v. *Hurlbert*, 40 N. W. Rep. 673; *Dixon* v. *Lyne*, 10 S. W. Rep. 469. In cases where default is caused by the attorneys negligence the relief will not be denied. *Loree* v. *Reeves*, 2 Mich. 133; *Green* v. *Stobo*, 20 N. E. Rep. 850; *Robbins* v. *Kountz*, 44 Wis. 558; *Doherty* v. *Bank*, 9 Pac. Rep. 112. The public has an interest in the result of suits for divorce, and for this reason courts should be liberal in relieving parties from judgments obtained against them by default. *Cottrill* v. *Cottrill*, 83 Cal. 457; *Bell* v. *Peck*, 37 Pac. Rep. 776. The withdrawal of her answer by the attorney was not a withdrawal of her appearance, nor could he without her authority withdraw her appearance. *Eldred* v. *Bank*, 84 U. S. 545; *Creighton* v. *Kerr*, 87 U. S. 8. If defendant is entitled to this relief, the marriage of plaintiff to another woman furnishes no reason for its denial. *Yorke* v. *Yorke*, 3 N. D. 343; *Denton* v. *Denton*, 4 How. Pr. 221; *Simpkins* v. *Simpkins*, 36 Pac. Rep. 759; *Olmstead* v. *Olmstead*, 43 Pac. Rep. 67; *Everett* v. *Everett*, 18 Pac. Rep. 637; *Allen* v. *Maclellan*, 51 Am. Dec. 608; *Rush* v. *Rush*, 46 Ia. 648; *Holmes* v. *Holmes*, 63 Me. 420; *Caswell* v. *Caswell*, 24 Ill. App. 548; *Stephens* v. *Stephens*, 62 Tex. 337.

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W. E. Purcell, and *McCumber & Bogart*, for respondent.

The court had no authority to open up its decree for error in ordering judgment. *Grant* v. *Schmidt*, 22 Minn. 1; *Aetna Life Ins. Co.* v. *McCormick*, 20 Wis. 265; *Bank* v. *Moss*, 6 How. 31; *Donnam* v. *Springfield Hardware Co.*, 62 Fed. Rep. 110; *Edwards* v. *City*, 14 Wis. 27. The withdrawal of the answer and appearance of his client is within the implied scope of an attorneys power. *Gaillard* v. *Smart*, 6 Cow. 385; Weeks on Attorneys § 218; *Tomson* v. *Kershing*, 86 Ind. 303; *Bray* v. *Doheny*, 40 N. W. Rep. 262; *McLaurin* v. *McNamara*, 55 Cal. 508; *Moulton* v. *Bonner*, 115 Mass. 36; *Holmes* v. *Rogers*, 13 Cal. 191; *Bingham* v. *Supervisors*, 6 Minn. 82; *Rodgers* v. *Greenwood*, 14 Minn. 256; Whatever adverse proceedings the attorney may take are to be considered so far as they effect the defendant in the suit as approved in advance by the client, and therefore as his act, even though they prove to be unwarranted by law. *Foster* v. *Wiley*, 27 Mich. 244. Whether the attorney is faithful to his trust is a matter between him and his client. *Henck* v. *Todhunter*, 16 Am. Dec. 300; *Tomson* v. *Kershing*, 86 Ind. 303; Unless there is ground to charge the adverse party with fraud or collusion, the client must abide by the steps taken by the attorney and seek his remedy for the injury sustained in consequence of the attorneys acts. *Lawson* v. *Bettson*, 12 Ark. 401; *Sampson* v. *Ohleger*, 22 Cal. 200; *Bethel* v. *Carmock*, 2 Md. Ch. 143; *Chambers* v. *Hodges*, 23 Tex. 104. The withdrawal of answer and appearance by defendants counsel, left the case as if no appearance had been put in. *Graham* v. *Spencer*, 14 Fed. Rep. 603; *The Dubois* v. *Glaub*, 52 Pa. St. 238; *Creighton* v. *Kerr*, 20 Wal. 8.

WALLIN, C. J. The record in this action presents a state of facts which, so far as they are important to a decision of the question involved, may be stated as follows: The action is for a divorce from the bonds of matrimony, and was commenced by the personal service of a summons and complaint, which, after an order of publication was obtained, was made upon the defendant

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at Kansas City, Mo., the place of the defendant's residence, on February 3, 1894. On April 14, 1894, the defendant by her attorney, Frank Gray, Esq., appeared in the action and served an answer to the complaint. The plaintiff's ground of action, as stated in the complaint, was cruel and inhuman treatment. The marriage between the parties was celebrated at Kansas City in 1883, and two children were born of the marriage, both of whom were living with their mother at Kansas City when the action commenced, and ever since have been in her custody. The answer of the defendant denied the allegations of the complaint, and alleged that the plaintiff was not a resident of North Dakota in good faith, but was and is a resident Kansas City aforesaid; that plaintiff deserted the defendant in September, 1893, leaving the defendant and said children without means of support, and that, after such desertion, plaintiff went to the State of North Dakota with one———, with whom plaintiff now is and ever since has been living in open adultery, said———being a married woman, and not the wife of the plaintiff. On the 11th day of May, 1894, a document signed by the defendant's said attorney was filed with the clerk of the District Court in which the action was pending, which read as follows: "State of North Dakota, County of Richland—ss.: In District Court, Fourth Judicial District. Clinton G. Nichells, Plaintiff, vs. Minnie B. Nichells, Defendant. To W. E. Purcell, Attorney for the Above-Named Plaintiff: You are hereby notified that, in the above entitled action, the undersigned withdraws his appearance for the above-named defendant, Minnie B. Nichells and withdraws the answer by him interposed on behalf of said defendant, for the reason that the undersigned was retained to appear in said action in the month of February, 1894; that he furnished the defendant with a copy of the summons and complaint in said action, and, during said month of February, demanded of the defendant that he be put in communication with her attorneys, if any she had, in the City of Kansas City, Missouri; that he was instructed by the defendant to prepare and serve the said answer in said action,

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and to make a draft on the defendant's representatives for his retainer in said action; that he prepared and served said answer in this action within the time by law prescribed after the service of the summons and complaint herein upon the defendant; that he demanded from the defendant and her representatives in said Kansas City, Missouri, the payment of a reasonable retainer for his appearance in said action on or about the 14th day of April, 1894; that defendant and the said representatives have failed, neglected, and refused to pay the undersigned any sum whatever as a retainer or for his fees in said action; that the represesentative of said defendant in Kansas City, Missouri, has been notified long prior to this date that, unless the retainer of the undersigned was paid, he would have nothing further to do with this action.—Dated May 8th, 1894. Frank Gray, Defendant's Attorney." On the same day (May 11, 1894) the trial court made and filed its findings of fact and conclusions of law, and directed a judgment to be entered dissolving the bonds of matrimony existing between the parties, whereupon said judgment was then formally entered in the judgment book. Preceding said findings of fact was the following recital made by the trial court: "The above-entitled action having been brought on for trial before the court on this 11th day of May, 1894, and it appearing to the satisfaction of the court that the summons and complaint herein were personally served upon the defendant at Kansas City, in Jackson County, State of Missouri, on the 3rd day of February, 1894, the same being in lieu of service by publication, which had been theretofore ordered by this court by an order herein filed; and the defendant having appeared by Frank Gray, Esq., her attorney, and having answered herein, and served her answer to the plaintiff's complaint upon the attorneys for the plaintiff on the 14th day of April, 1894; and the defendant having on the 8th day of May, 1894, by a stipulation in writing herein filed, withdrawn her appearance and her answer in said action, and being, therefore, on this day, in default,—and the court having

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proceeded to hear the evidence adduced on the part of the plaintiff in support of the allegations of his complaint, and having duly considered the same, and being fully advised in the premises, now makes and files the following findings of fact." The defendant, through her other attorneys, Messrs. Ball & Watson, of Fargo, N. D., made application to said District Court in July, 1894, and obtained an order to show cause before said court why said judgment should not be vacated, and the defendant be allowed to interpose a defense to the cause of action alleged in the complaint; said application being based upon a proper affidavit of merits and other affidavits, and a proposed amended answer to the complaint, which embodied, in addition to the defenses stated in the original answer, other defensive matter. After several adjournments, a hearing was had upon the order to show cause, and upon October 31, 1894, the trial court entered its order discharging the order to show cause and denying the application to vacate said judgment, and refusing to allow the defendant to interpose her proposed amended answer. The case is brought to this court for review on appeal from said order.

Without adverting now to any of the facts contained in the numerous affidavits which were presented to the court upon the hearing of the motion below, it will be convenient here to pause and consider whether, upon the conceded facts appearing of record and already narrated, the District Court erred in denying defendant's motion to vacate the judgment and allow her to interpose a defense to the merits of the action. In other words, was the judgment entered below upon the defendant's alleged default a valid judgment, regularly and legally entered, or was such judgment illegally and irregularly entered? If the judgment was illegally entered, it would, of course, be *prima facie* valid, because it is conceded that the court entering the same had jurisdiction of the subject matter and of the parties to the action. But it is likewise true that if the judgment was irregularly entered—*i. e.* entered as a default judgment when there was no default in law or in fact existing, and while there was an issue of fact joined in the

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action upon a complaint and answer—then such judgment would be illegally entered, and hence vulnerable to attack by motion in the court which entered the judgment; and upon such motion, if seasonably made, the moving party would be entitled, as a matter of strict legal right, to have the judgment vacated. In such a case as that suggested, the motion would not be addressed to the discretion of the trial court, nor would it be an appeal to the favor of that court. Upon such a motion, if the judgment was illegally entered, it would be error to refuse to set aside the judgment, and the trial court would be without discretion in the premises. In reviewing such an order as that supposed, this court is never in the attitude of reviewing a matter lying within the discretion of the court below. Applying the elementary principles of law and rules of practice to which we have adverted to the undisputed facts in this record, and above set out, the question is presented whether or not the judgment herein was a valid judgment regularly entered. We think it was not a valid judgment, and that its entry was illegal, and in violation of the most sacred legal rights of a suitor, viz. the right to appear in open court and there confront his adversary, the opportunity to present witnesses in his own behalf, and that right of paramount importance and of priceless value to every suitor in a court of law,—the right to be represented in court by faithful counsel, whose fidelity has not been tainted by hostile passion prejudicial to his client, or being swerved by selfish considerations personal to himself and inimical to the suitor whose cause he has undertaken to defend. The attempted withdrawal of the defendant's answer and appearance in this action contemporaneously with the open and avowed desertion of the case by the defendant's counsel (for the reasons spread out upon the record) operated necessarily, and in this case speedily, to strip the defendant of every right we have enumerated, and to leave her cause to be sacrificed without a hearing and without a defender.

The facts involved call for some consideration of the authority, power, and duty of an attorney in conducting a cause in court,

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and the crucial question is whether Frank Gray, Esq., as defendant's attorney in the action, in virtue alone of his professional relation to the cause, and without the knowledge or consent of the defendant, could legally withdraw the defendant's answer and his own appearance in the case, at the time when he did so, and for the reason which he stated in the writing which was presented to the court, and upon which the court then and there declared the defendant to be in default. In our judgment, the reason for the attempted withdrawal was trivial and wholly inadequate, legally or morally, to justify the action of the counsel, and was also legally insufficient as a basis for the ruling of the trial court declaring defendant to be in default for want of an answer. It will readily be conceded that an attorney that has been retained and has entered an appearance for a party in an action is, within his proper sphere, possessed of plenary authority and discretion, and in all matters appertaining to the remedy alone he may lawfully control, even against the wishes of his client, all of those processes which are strictly incidental to the regular course of procedure in the action. Nor do we question the right of counsel, under some circumstances, and when the act is done with an honest purpose to subserve the interests or to comply with the wishes of his client, to withdraw his own appearance and the answer of the defendant, and thereby accelerate the entry of a default judgment against a defendant. Such authority is not infrequently exercised in courts of original jurisdiction in this and in other states, and it would undoubtedly be very dangerous to the interests of suitors to abridge such authority in cases where it can be properly exercised. 1 Lawson, Rights, Rem. & Prac. § 169. But the record before us presents no such facts as those we have supposed. In the case at bar the attempted withdrawal of the defendant's answer and of her counsel from the case (while it was manifestly done to facilitate the entry of a default judgment against the defendant) was not professedly or actually done with the intention of promoting the defendant's interests or of complying with her wishes. The one

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reason assigned for the withdrawal stated in the formal notice served on plaintiff's counsel and filed in the trial court, and upon which the default of the defendant was promptly declared, precludes the idea that the action of counsel was taken with the purpose of promoting either the interests or the wishes of the defendant. It was on its face an act of bitter retaliation, and that alone, because it was not done as a means of expediting the payment of the fees claimed by counsel to be due from the defendant. If the withdrawal operated at all upon the claim of counsel for fees, its legal effect would be prejudicial to such claim. In fact, the act of deserting a cause without any justifiable excuse would wholly defeat a claim for counsel fees in the same cause. "The contract of an attorney or solicitor retained to conduct or defend a suit is an entire and continuing contract to carry it on until its termination." 2 Greenl. Ev. § 142. In the absence of an express stipulation for fees in advance, the contract is single and entire, and no right of action accrues for fees until the services are fully performed. *Bathgate* v. *Haskin*, 59 N. Y. 533. We gather from the record in this case that defendant's counsel did not demand of the defendant a cash retainer in advance, but, on the contrary, permitted himself to be retained as an attorney, and proceeded to enter an appearance and serve an answer for the defendant, without any advance retainer; nor is it claimed that there was ever an agreement for the payment of advance fees to defendant's counsel. Under such circumstances, it is very doubtful, to say the least, whether an action would lie for fees at the time the cause of the defendant was abandoned by her counsel. But, be this as it may, nothing is clearer than the fact that defendants attorney had no warrant or excuse in law or morals for abandoning the cause of the defendant without giving his client ample notice and a full opportunity to procure other counsel to defend the case in court. 2 Greenl. Ev. § 142. Reverting to the notice of withdrawal, it appears therefrom that the notice bears date on the 8th day of May, and that it was filed in court on the 11th day of May, 1894. It appears, after serving the answer, defendant's counsel

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"demanded from the defendant and her representatives in said Kansas City the payment of a reasonable retainer for his appearance on or about the 14th day of April, 1894; that defendant and her said representatives have failed, neglected, and refused to pay the undersigned any sum whatever as a retainer or for his fees in said action; that the representatives of said defendant in Kansas City, Missouri, have been notified long prior to this date that unless the retainer of the undersigned was paid he would have nothing further to do with the action." From this it appears that defendant's counsel made a demand for fees on defendant's representatives less than one month prior to his attempted withdrawal of defendant's answer, and at some date prior to such withdrawal had notified such representative that unless the retainer was paid counsel "would have nothing further to do with the action." It will be noticed that no exact time was fixed in the demand for fees within which they were required to be paid, or the alternative stated be suffered by the defendant. It is further noticeable that there was no threat or intimation conveyed in the demand for fees that counsel would, if the demand was not complied with, withdraw the answer and leave the defendant in default for want of an answer. The utmost scope of the threat was that the counsel would personally withdraw from the case if his demands were not complied with. This is quite different from a notice that he would withdraw the answer; and, in its effect upon the case, the simple withdrawal of counsel would, of course, leave the case at issue, and not to be tried until the next term of the District Court, which term, as defendant had been previously informed by her said counsel, would not convene until the month of July, 1894.

Enough has been set out to clearly show that the defendant's counsel, in attempting to withdraw the answer of the defendant at the time and under the circumstances stated, did so, not only for the express and advertised purpose of betraying the cause intrusted to his protection, and allowing judgment to be entered as for a default in answering the complaint, but did so without

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any previous notice to the defendant that he meditated any such drastic measures. We unhesitatingly characterize the course of counsel in attempting to withdraw the answer as an act of bad faith, and as such it was an act beyond the scope of an attorney's authority, and hence, in legal contemplation, the act was without binding force or effect. The nature of the pretended act of withdrawal and the motive with wnich it was done were spread out in writing upon the records of the District Court before the default was entered, and hence we hold that it was error in the court below to direct the entry of a default judgment in the case. The judgment in its very inception was tainted with the vice of illegality, and hence, under the settled practice, was vulnerable to attack by motion to set it aside as an illegal judgment. *Garr, Scott & Co.* v. *Spaulding*, 2 N. D. 414, 51 N. W. 867. The defendant had the right to move the court below to set it aside, and in doing so the defendant was not in the attitude of appealing to the favor of the trial court. In justice to the defendant's counsel, we will add that in holding that the attempted withdrawal of the answer was an act of bad faith we do not wish to be understood as stating or intimating that in our opinion counsel was influenced by any corrupt consideration moving from the plaintiff or his counsel.. The evidence in the record will warrant no such statement, and we distinctly disclaim any such inference. We nevertheless assert, and place our ruling on that ground, that the act of the defendant's counsel was one of bad faith towards his client, and hence an act which was beyond his power to legally do or perform. We shall place our ruling upon familiar and elementary principles of the law governing the relation of attorney and client, and do not cite or expect to find a precedent which is on all fours in its facts with the case at bar. At the foundation of the trust relation which exists between an attorney and his client lies the fundamental doctrine that so long as the relation continues to exist the attorney is without power or authority to do any act in a cause which is confessedly inspired by malevolence and hostility to the client or to his cause, and the effect of which

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is necessarily injurious to the cause intrusted to the guardianship of the attorney. The cases cited below will illustrate this well settled rule: *Herbert* v. *Lawrence*, (Com. Pl.) 18 N. Y. Supp. 95; *Howe* v. *Lawrence*, 22 N. J. Law, 99; *Ohlquest* v. *Farwell*, (Iowa) 32 N. W. 277; *Haverty* v. *Haverty*, (Kan. Sup.) 11 Pac. 364; *Quinn* v. *Lloyd*, 36 How. Pr. 378; *Dickerson* v. *Hodges*, (N. J. Ch.) 10 Atl. 111; *Simpkins* v. *Simpkins*, (Mont.) 36 Pac. 759.

Enough has been said to fully dispose of the case presented in the record, and we will not prolong this discussion further, except to state that in our judgment there is ample in the affidavits presented upon the motion to have justified the trial court in granting the motion and opening the case upon the ground of surprise, under the authority conferred by section 4939 of the Comp. Laws. True, the application under that section of the statute would be addressed to the sound judicial discretion of the trial court, and would be in the nature of an appeal to the favor, and not in the nature of a demand of a strict legal right. But in that aspect of the application the refusal to grant the defendant an opportunity to be heard, in our opinion, presents a case of an unsound exercise of judicial discretion. It is urged by counsel that shortly after the divorce was granted—about one month thereafter—the plaintiff contracted another marriage with——, referred to in defendant's answer, and that to now allow the judgment for a divorce to be vacated would be to invite results which may be disastrous to an innocent person,—yet unborn,—as well as the parties who have so precipitately entered into a new conjugal alliance. Upon authority, it is clear that judgments entered in divorce cases are open to attack in the same manner, upon the same grounds, and within the same periods of time as other judgments, and this court has already had occasion to apply this rule of law to a divorce case. *Yorke* v. *Yorke*, 3 N. D. 343, 55 N. W. 1095. See, also, *Simpkins* v. *Simpkins*, (Mont.) 36 Pac. 759; *Cottrell* v. *Cottrell*, 83 Cal. 457, 23 Pac. 531; *Bell* v. *Peck*, (Cal.) 37 Pac. 766. But, aside from authority, the rule commends itself to our judgment as a wise and conservative civic regulation tending

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to restrain divorced parties from entering into new matrimonial alliances with too much precipitation, and at a time when the decree which severed a former marital connection is still legally open to assault and reversal in the courts of the state where the judgment is entered. We conclude on this point with an apt quotation taken from the opinion of the court in *Simpkins* v. *Simpkins*, *supra*, which case much resembles this: "Now, under all these circumstances, for plaintiff to claim that his remarriage in this hot and indecent haste is pertinent upon this motion is a sorry sort of a reply to the motion of defendant setting up the pitiable facts disclosed by this record. Nor is the situation of the person whom plaintiff purported to marry a consideration that set aside the rights of the defendant." Our conclusion is that the judgment was irregularly entered, and that the learned trial court erred in denying the defendant's motion to vacate the judgment and allow the defendant to come in and defend her action. The defendant was not in default for want of an answer. The order denying the motion is reversed, and the case is remanded for further proceedings in conformity with the views expressed in this opinion. All the judges concurring.

CORLISS, J. (concurring.) I fully concur in the opinion of the Chief Justice. I merely desire to answer the point of counsel for respondent that the proper practice was either to move for a new trial or to appeal from the judgment itself, and thus raise the question that the judgment was irregularly entered. It is contended on the part of the respondent that the trial court adjudicated on the same facts the question of the power of the attorney to withdraw the answer when it declared the defendant in default after such attempted withdrawal, and that therefore such court could not, on the motion to set aside the judgment as irregularly entered, review its own decision. It is insisted that defendant's only remedies were a motion for a new trial and an appeal from the judgment. But how can it be said that the trial court had settled against the defendant, so as to bind her and force her to review the decision on appeal from the judgment, a question as

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to which the defendant was not heard before that court? In assuming to withdraw the answer for the reasons stated in the written withdrawal, the attorney for defendant did not pretend to represent her. On the contrary, he was acting in hostility to her interests. On the question of power she was not heard. To the knowledge of the court and of the opposing counsel, she was not heard on that point. They knew that the attorney did not pretend to represent the interests of his client in withdrawing the answer. On the contrary, they knew it was an act of hostility to her interests, conceived and carried out in a spirit of retaliation for a fancied grievance. Counsel for plaintiff cannot, therefore, claim to have relied on the withdrawal as an act done within the scope of the attorney's power, for they were chargeable with knowledge that the exact reverse was the case. Had they been justified in assuming that Mr. Gray, in attempting to withdraw the answer, was acting in furtherance of his client's interests, then it might perhaps be urged that they had a right to assume that she was represented on the hearing as to the attorney's power to withdraw the answer, and could therefore claim that the question was finally adjudicated, and could only be reviewed by motion for a new trial or an appeal. But where counsel are informed of the contrary by the attorney himself, and where the court is appraised of the fact that the attorney, in the absence and without the consent or knowledge of his client, is assuming to do an affirmative act disastrous to his client's case, and for the sole purpose of righting a supposed personal wrong to himself,—there being not pretense that he is thereby seeking to further his client's interests,—in such a case both court and counsel are bound to know that the client is in no sense represented before the court, and has no chance to be heard as to the correctness of the decision that sweeps away all the client's rights. To say that such a decision is *res adjudicata* is to declare that a litigant can be defeated without a hearing. Had the defendant appealed directly to this court from the judgment, it might have been urged here with great force that she should first make an effort

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to rectify in the court below the mistake made against her without any hearing. But, even if we would review the question on appeal from the judgment, it does not follow that a motion to set aside the judgment as irregularly entered will not lie. We held in the case of *Garr, Scott & Co.* v. *Spaulding*, 2 N. D. 414-420, 51 N. W. 867, that a motion to set aside the judgment is the proper remedy in such cases. In that case we said: "We suggest that in such cases, and in all cases of an irregular entry of a judgment in the District Court, a motion is the proper remedy. A motion is a speedier remedy; and in many cases would avoid the more tedious and expensive process of direct appeal. This is the established course of practice in New York, Minnesota, and some other code states. * * * To correct mere irregularities which do not affect the jurisdiction of the court to enter the judgment, and especially those which do not affirmatively appear of record, application should be first made by motion in the court below; and where the judgment is entered without jurisdiction a motion is also the better practice. Of course, a judgment will be reversed on appeal if it is void on its face, but mere irregularities should be assailed by motion below." This decision is decisive of the point I am considering. A court in rendering judgment without findings in a case where they have not been waived would necessarily pass upon its right so to do, because it must know in such a case that findings have not been made, and also that they have not been waived before it renders judgment. According to the plaintiff's contention in the case at bar, such decision could not be reviewed on motion to set aside the judgment as irregularly rendered. But we have held the exact reverse of this in the case cited. The decision in the case of *Grant* v. *Schmidt*, 22 Minn. 1, is not in point. In that case there was no question of irregularity in the entry of the judgment. It was claimed that the judgment should have contained provisions different from some of those it embraced, and that some of its conditions should not have been inserted therein. In other words, it was a case of an erroneous decision as to the relief to

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which the plaintiffs were entitled. Such questions are never reviewed by motion to set aside the judgment. They relate to the merits, and do not have any relevancy to matters of procedure in and about the rendition of a judgment. We have settled the law in this state that it is proper practice to attack all the irregularities in the entry of a judgment by a motion to set it aside. That the judgment in this case was irregularly entered cannot be doubted. It was entered as in cases of default two months before the next term of court at which issues of fact could be tried, while there was an answer in the case raising issues of fact. The answer was never withdrawn in contemplation of law, but stood there, and stands there to-day, as an answer in the case. It will continue to stand there until it is lawfully withdrawn, or the case is regularly tried. In these views my associates concur.

(64 N. W. Rep. 73.)

SYDNEY S. ST. JOHN *vs.* JOHN F. LOFLAND.

Opinion filed October 28th, 1895.

Competency of Witness—Payment to Deceased Administrator.

Section 5260, Comp. Laws, does not prohibit a party to an action from testifying in his own behalf to a personal transaction (in this case, payment) had with a deceased administrator, as against the successor of such deceased administrator, who sues to enforce, as part of the assets of the estate of the intestate, the claim which the party testifies he paid to the deceased administrator as administrator of the estate of such intestate.

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

Action by Sydney S. St. John, administrator of Albert C. St. John, against John F. Lofland. Judgment for defendant, and plaintiff appeals.

Affirmed.

George Murray, for appellant, contended that section 5260, Comp. Laws, extended its operation to transactions with the

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deceased as administratrix, citing: *Boynton* v. *Phelps*, 52 Ill. 210; *Whitmere* v. *Rucker*, 71 Ill. 410; *Redden* v. *Junman*, 6 Ill. App. 55; *Waldman* v. *Crommelin*, 46 Ala. 580.

F. W. Ames, for respondent, cited: *Voss* v. *King*, 10 S. E. Rep. 402; *Morgan* v. *Bunting*, 86 N. C. 66; *Hedsbrant* v. *Crawford*, 65 N. Y. 107; *Sprague* v. *Bond*, 18 S. E. Rep. 701; *Lobdell* v. *Lobdell*, 36 N. Y. 326; *Palmateer* v. *Tilton*, 39 N. J. Eq. 40; S. C. 5 At. Rep. 105; *Hodge* v. *Corriell*, 44 N. J. L. 456; *Crimmins* v. *Crimmins*, 10 At. Rep. 800; *Lehigh, etc. Co.* v. *Cent. Ry. Co.*, 3 At. Rep. 147; *Wassell* v. *Armstrong*, 35 Ark. 247.

CORLISS, J. The decision of this case will turn upon the construction of Comp. Laws, § 5260. The action was to foreclose a mortgage given to secure a promissory note. The note and mortgage were executed by defendant. The consideration for the note was the sale to defendant by Lydia B. St. John, as administratrix of the estate of Albert C. St. John, of certain personal property, constituting a portion of the assets of such estate. The note and mortgage were both executed to such administratrix. Subsequently she died, and the plaintiff was appointed administrator of the estate in her place. The defense to the action is payment. To prove it, the defendant himself testified that he paid the note and mortgage to Lydia B. St. John, as administratrix, during her lifetime. This evidence was objected to as incompetent, under the provisions of Comp. Laws, § 5260. The objection was overruled, and the plaintiff excepted. The court having found on this evidence that the debt had been paid, judgment was rendered for the defendant. From this judgment the plaintiff has appealed. We think that the evidence was competent. The section referred to (5260) reads as follows: "No person offered as a witness in any action or special proceeding, in any court, or before any officer or person having authority to examine witnesses, or hear evidence, shall be excluded or excused, by reason of such person's interest in the event of the action or special proceeding; or because such person is a party thereto;

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or because such person is a husband or a wife of a party thereto, or of any person in whose behalf such action or special proceeding is brought, opposed or defended, except as hereinafter provided: * * * (2) In civil actions or proceedings by or against executors, administrators, heirs at law, or next of kin, in which judgment may be rendered or order entered, for or against them, neither party shall be allowed to testify against the other, as to any transactions whatever with, or statement by, the testator or intestate, unless called to testify thereto by the opposite party. But if the testimony of a party to the action or proceeding has been taken, and he shall afterwards die, and after his death the testimony so taken shall be used upon any trial or hearing in behalf of his executors, administrators, heirs at law, or next of kin, then the other party shall be a competent witness, as to any and all matters to which the testimony so taken relates." The extent to which this statute seals the lips of a party is with regard to "any transaction with or statement by the testator or intestate." The definite article "the" makes it certain that the testator or intestate referred to is the one whose executor or administrator is the party to the suit, and not any testator or intestate with whom the transaction has been had or by whom the statement has been made. But we are urged to broaden this statute by interpretation, on the theory that its true spirit demands an expansion of its literal meaning. If we were to do this, we must, if we would be logical and consistent, continue in the same line; and hence we would be compelled to hold that a transaction with a deceased agent was within the statute, for in that case, as in this, the surviving party would have the advantage of testifying without the possibility of his evidence being contradicted. So, where one of two partners had died, and the survivor, who, so far as the partnership assets are concerned, occupies a position very similar to that occupied by an administrator, should sue on a partnership claim, we would have to hold that a debtor of the firm could not in such action by the surviving partner swear to a payment made by him to the deceased

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partner in his life time. This so-called "spirit" of the statute would embrace such a case also.

So far as a transaction with a deceased agent is concerned, there is express authority for the doctrine that, under such a statute as ours, the transaction may be proved by the testimony of the debtor. *Voss* v. *King*, (W. Va.) 10 S. E. 402. This whole argument that the letter of this law should be expanded to the dimensions of the spirit of the statute rests on a false assumption as to the spirit of this legislation. The general policy of the section is to make all persons competent witnesses. So far as the question of the extent of the limitations of that policy is concerned, the only way we can ascertain the scope of this limitation is by looking to the language in which that limitation is expressed. We cannot look beyond the language. We cannot say that it was the purpose of the leglslature to exclude all evidence merely because the witness from whose lips it might fall would eñjoy the advantage of testifying to a transaction with a deceased person, who on that account could not confront and contradict him. Statutes which exclude testimony on this ground are of doubtful expediency. There are more honest claims defeated by them by destroying the evidence to prove such claim than there would be fictitious claims established if all such enactments were swept away, and all persons rendered competent witnesses. To assume that in that event many false claims would be established by perjury is to place an exremely low estimate on human nature, and a very high estimate on human ingenuity and adroitness. He who possesses no evidence to prove his case save that which such a statute declares incompetent is remediless. But those against whom a dishonest demand is made are not left utterly unprotected because death has sealed the lips of the only person who can contradict the survivor, who supports his claim with his oath. In the legal armory, there is a weapon whose repeated thrusts he will find it difficult, and in many cases impossibe, to parry if his testimony is a tissue of falsehoods,—the sword of cross-examination. For these reasons, which lie on the very surface of this

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question of policy, we regard it as a sound rule to be applied in the contruction of statutes of the character of the one whose interpretaion is here involved, that they should not be extended beyond their letter when the effect of such extension will be to add to the list of those whom the act renders incompetent as witnesses. There is ample authority for our ruling in the case. The decision of the court in *Palmateer* v. *Tilton*, (N. J. Err. & App.) 5 Atl. 105, is directly in point. Said the court in this case: "In the court below, Amos Palmateer was not permitted to testify for the purpose of proving the bargain for the sale of the land in question. It is admitted that the exclusion is not to be justified by the language of the statute which is applicable. This is its language: 'That in civil actions,' etc., 'any party thereto may be sworn and examined as a witness, notwithstanding the party may be sued in his representative capacity; *provided*, nevertheless, that this supplement shall not extend so as to permit testimony to be given as to any transaction with, or statement by any testator or intestate represented in said section.' It will be observed that this exclusive clause embraces only transactions with and statements by any 'testator or intestate.' In the present case a transaction with the executor of the testator was excluded. The case was supposed to be within the equity of the act; hence the rejection of the testimony. But the language of the act is clear and definite, and the result, if we adhere to the language, is entirely reasonable; and, this being the case, the judicial duty is one of interpretation only. The statute itself enumerates the cases in which the testimony is to be rejected, and no case can be added to that enumeration. If we attempt to leave the plain terms of the act, we enter into an undefined field of inference and conjecture. The regulution applies to the practice in the trial of causes, and it is important, therefore, that its limitations be clear. If, in the present instance, the statutory terms are to be disregarded, and the operation of the law extended, what is to be its reach? If a surviving contractor cannot prove by his own testimony a bargain made with the executor of the testator, could he

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prove such a bargain if made with the agent of the testator, such agent having died? The two cases, with regard to the presumed equity, stand on the same plane; and yet to exclude the testimony in either case is obviously to do violence to the words of the act, in order to enact a rule which would conform to judicial notions, and this would be judicial legislation, pure and simple. 'We are bound,' said Mr. Justice Buller, over a century ago, 'to take the act of parliament as they have made it. A *casus omissus* can in no case be supplied by a court of law, for that would be to make laws.' *Jones* v. *Smart*, 1 Term R. 44." The same decision was made in *Wassell* v. *Armstrong*, 35 Ark. 247-274, under practically the same provision as section 5260. The language of the court in *Lobdell* v. *Lobdell*, 36 N. Y. 327, is in harmony with our reasoning in this case. The court said: "Although it may be said that a party standing in the relation in which he does ought to have been excluded, for he has the same advantage over the plaintiff, as a witness, as his father would have if living and standing as defendant, still, unless the section can be construed so as to exclude him, the legislature, and not the court, must rectify the omission. It will not suffice to say that the case is within the spirit of the enactment, unless a fair construction of the enactment will bring it within the enactment itself. The subject of the enactment is allowance of the parties to be witnesses in their behalf, and the object is to provide generally for their examination as witnesses, and, the specific exception to such examination the legislature having undertaken to provide, the courts cannot allow any that are not specified by the legislature." In fact, practically the whole drift of the adjudications is along the line of construction which we follow. See *Clapp* v. *Hull*, 29 Atl. 687; *Wood* v. *Stewart*, (Ind. App.) 36 N. E. 658; *Association* v. *Newman*, (Tex. Civ. App.) 25 S. W. 461; *Hayward* v. *French*, 12 Gray, 453; *Bellows* v. *Litchfield*, (Iowa) 48 N. W. 1063; *Johnson* v. *Johnson*, 52 Iowa, 590, 3 N. W. 661; *Voss* v. *King*, (W. Va.) 10 S. E. 402; *Sprague* v. *Bond*, (N. C.) 18 S. E. 701; *Hodge* v. *Correll*,

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44 N. J. Law, 456; *Crimmins* v. *Crimmins*, (N. J. Ch.) 10 Atl. 800; *Goulding* v. *Horbury*, 85 Me. 227, 27 Atl. 127; *Newton* v. *Newton*, 77 Tex. 508, 14 S. W. 157; *Roberts* v. *Yarboro*, 41 Tex. 451; *McBrien* v. *Martin*, 87 Tenn. 13, 9 S. W. 201. The case of *Waldman* v. *Crommelin*, 46 Ala. 580, is undoubtedly an authority for plaintiff, but we do not regard it as sound, and it stands alone. The Illinois cases cannot be classed with it, as they were decided under a statute radically different from section 5260,—a statute so broad as to render a party incompetent from testifying in his own behalf as to any fact in a suit in which the adverse party is an executor, administrator, etc. Under such a statute, no question relating to a personal transaction could possibly arise. See *Boynton* v. *Phelps*, 52 Ill 210; *Whitner* v. *Rucker*, 71 Ill. 410; *Redden* v. *Inman*, 6 Ill. App. 55. Even if these cases supported the plaintiff's contention, we should adhere to the views we have expressed.

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

(64 N. W. Rep. 930.)

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STATE *vs.* NORMAN MARKUSON.

Opinion filed October 28th, 1895.

Writ of Error in Contempt Proceedings.

A judgment imposing a fine and imprisonment for contempt of court under section 13, Ch. 110, Laws 1890, may be reviewed by writ of error, and upon such review this court will consider (1) whether or not the alleged act of contempt was in law a contempt of court; (2) whether or not there is any evidence tending to establish the commission of the act; and (3) whether or not the court had jurisdiction to pronounce the judgment.

Affidavit for Attachment—When Sufficient.

An affidavit made as the basis of an order for attachment for contempt, in violating an injunctional order theretofore granted in an equity case brought to abate a nuisance, is not defective because it does not allege in terms that the action is still pending at the time of making the affidavit, where it does allege that "said injunctional order so made as aforesaid has not been dissolved or modified."

Contempt not Triable by Jury.

In contempt proceedings under the statute above mentioned, the party charged with the contempt is not entitled to have the charge tried to a jury.

Legislature can Prescribe Minimum Punishment for Contempt of Court.

Since the minimum punishment found in said statute in no manner tends to destroy or impair the inherent power of courts of general jurisdiction to enforce obedience to their orders by contempt proceedings, *held* a valid exercise of legislative power.

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

Norman Markuson was convicted of contempt of court, and brings error.

Affirmed.

Crum & Hanson and *G. K. Andrus*, for plaintiff in error.

A writ of error is the proper remedy by which to review a judgment for contempt. Sections 7499, 7500 and 7502, Comp. Laws; *State* v. *Knight*, 54 N. W. Rep. 413; *State* v. *Sweetland*, 54 N. W. Rep. 416; *Gandy* v. *State*, 14 N. W. Rep. 146; *Myers* v. *State*, 22 N. E. Rep. 43; *In re Smith*, 7 N. E. Rep. 685; *Wyatt* v. *People*, 28 Pac. Rep. 962; *Cooper* v. *People*, 22 Pac. Rep. 796; *State*

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v. Davis, 2 N. D. 461. The appellate court will review the testimony in contempt cases, to determine whether the testimony showed a contempt, or jurisdiction. *Ex parte Rowe*, 7 Cal. 176; *Romeyn* v. *Caplis*, 17 Mich. 454; *Wyatt* v. *People*, 28 Pac. Rep. 962; *Peo.* v. *Kelley*, 24 N. Y. 74; *State* v. *District Court*, 62 N. W. Rep. 832; *Granholm* v. *Sweigle*, 3 N. D. 476; *In re Pryor*, 26 Am. Rep. 747; *Storey* v. *People*, 22 Am. Rep. 158; *Ex parte Grace*, 79 Am. Dec. 529; *McCredie* v. *Senior*, 4 Paige 378. In order to give the court jurisdiction every jurisdictional fact must be set forth in the affidavit upon which the attachment for contempt issues. *State* v. *Sweetland*, 54 N. W. Rep. 415; *Bachelder* v. *Moore*, 42 Cal. 412; *Wyatt* v. *People*, 28 Pac. Rep. 961; *Thomas* v. *People*, 23 Pac. Rep. 326; Ralpalje on Contempts, § 94.

J. F. Cowan, Atty. Gen'l; *Herman Winterer*, States Atty., and *Chas. A. Pollock*, for defendant in error.

A judgment rendered in a contempt proceeding is not within the statute, and subject to review by writ of error, and in the absence of express statutory provision therefor the writ of error will not lie. *State* v. *Galloway*, 98 Am. Dec. 404; 5 Crim. L. Mag. 647; Rapalje Contempt, § 13; *People* v. *Owens*, 28 Pac. Rep. 871; *Land and Water Co.* v. *Sup. Ct.*, 28 Pac. Rep. 813; *Ex parte Tyler*, 149 U. S. 180, 13 S. C. Rep. 77. The infliction of punishment for contempt of court is not an infringement of the constitutional guaranty of jury trial. 4 Blacks. Com. Ch. 20; 3 Am. & Eng. Enc. L. 721; 5 Crim. L. Mag. 515; *Garrigus* v. *State*, 93 Ind. 239; *In re Terry*, 128 U. S. 289; *Eilenbecker* v. *Dist. Court*, 134 U. S. 31; *In re Debs*, 158 U. S. 594; *State* v. *Doty*, 90 Am. Dec. 671; *Neal* v. *State*, 50 Am. Dec. 209; *State* v. *Becht*, 23 Minn. 411.

BARTHOLOMEW, J. On the 12th day of December, 1894, an action in equity entitled "The State of North Dakota *ex rel. Martin H. Wilberg* v. *Norman Markuson*" was commenced by the state's attorney of Barnes County under the provisions of section 13, Ch. 110, Laws 1890, commonly known as the "Prohibitory Law." The relief asked was that certain premises occupied by

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the defendant in that action be declared a nuisance and abated as such. The usual preliminary injunction was granted, restraining the defendant, his agents, servants, and employes, from selling or keeping for sale any intoxicating liquors on said premises during the pendency of the action. The papers in the case—summons, complaint, injunctional order, affidavit for search warrant, and search warrant—were served upon the defendant on December 29, 1894. On June 11, 1895, the said state's attorney of Barnes County by affidavit brought to the attention of the court the fact that the defendant had violated and was violating the terms of the temporary injunction, in that he had sold intoxicating liquor on said premises, and asked an order of attachment against the body of the defendant, and that he be arrested and brought before the court to answer for contempt of court. The order was granted and the defendant was produced in court, and on June 28, 1895, a hearing was had, and evidence introduced by both the state and the defendant. The court found the defendant in contempt, and adjudged him to be imprisoned in the county jail of Barnes County for 90 days and pay a fine of $200,—the minimum punishment permissable under the statute. This judgment has been brought into this court for review upon a writ of error.

The first point to be considered relates to procedure. The defendant in error contends that contempt proceedings are not reviewable on writs of error. The cases are in conflict on this point. The briefs of counsel in this case furnish long lines of authorities from eminent courts on both sides of the question. At common law the position of defendant in error was doubtless correct, but in this country (particularly in the Western states, and under statutory provisions) the opposite practice largely prevails, in what are known as "criminal contempts" as distinguished from "civil contempts,"—a distinction which was clearly pointed out and discussed by Corliss, C. J., in *State* v. *Davis*, 2 N. D. 461, 51 N. W. 942, and which we need not further discuss at this time. Proceedings in criminal contempts were held properly

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reviewable by writ of error in *Gandy* v. *State*, 13 Neb. 445, 14 N. W. 143; *Myers* v. *State*, 46 Ohio St. 473, 22 N. E. 43; *In re Smith*, 117 Ill. 63, 7 N. E. 683; *Cooper* v. *People*, 13 Colo. 337, 22 Pac. 790; *Wyatt* v. *People*, 17 Colo. 252, 28 Pac. 961; and *State* v, *Knight*, 3 S. D. 509, 54 N. W. 312. The South Dakota statutes pertaining to writs of error are identical with the statutes of this state. In *New Orleans* v. *Steamship Co.*, 20 Wall. 387, the Federal Supreme Court, speaking through Justice Swayne, said: "Contempt of court is a specific criminal offense. The imposition of the fine was a judgment in a criminal case. That part of the decree is as distinct from the residue as if it were an indictment for perjury committed in a deposition read at the hearing;" citing in support of the proposition Crosby's Case, 3 Wils. 188; Williamson's Case, 26 Pa. St. 24; and *Ex parte Kearney*, 7 Wheat. 41. See, also, *Fischer* v. *Hayes*, 6 Fed. 63. We think that under the statute under which the fine and imprisonment were imposed in the case at bar the proceedings were so far criminal in their nature that this judgment is peculiarly a judgment in a criminal case. The statute requires that the contempt "processes shall run in the name of the State of North Dakota," and "the accused may plead in the same manner as to an indictment, in so far as the same is applicable." It thus appears the contempt proceedings under this statute do not follow the title of the main case, but are distinct and separate, and carried forward entirely by the state for punitive purposes solely, and the judgment of the court is the final determination of the proceedings in that court. Section 7499, Comp. Laws, is as follows: "Either party may sue out a writ of error to remove to the Supreme Court, and therein to re-examine and review the record and bills of exception in a criminal action, upon matters of law decided in the District Courts, in manner as prescribed in this chapter." Section 7502 reads: "The writ may be sued out by the defendant: (1) From a final judgment of conviction." Without further examination of authorities or elaboration, we hold that contempt proceedings in this case may be reviewed by writ of error. It is proper to add

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that the question will soon cease to be of any importance whatever in this state. The Revised Codes, which will go into effect at an early day, specifically provide the manner in which contempt proceedings may be reviewed. This court cannot, however, in a proceeding of this character, review any disputed question of fact. The unanimous voice of authorities forbids, unless express statutory authority be given. See *State* v. *McKinnon*, 8 Or. 487; *Romeyn* v. *Caplis*, 17 Mich. 454; *Wyatt* v. *People*, *supra*; *Cooper* v. *People*, *supra*; *Ex parte Smith*, 53 Cal. 204.

But it is conceded that if a writ of error be proper in this case the appellate court may inquire (1) whether or not the act alleged to have been committed constitutes a contempt of court; (2) whether or not there is any evidence that the act was committed; (3) whether or not the court had jurisdiction of the contempt proceedings, and herein whether or not the affidavit which initiated the contempt proceedings contained the necessary jurisdictional averments, and whether or not the statute under which the court proceeded was a valid constitutional enactment.

The first inquiry is answered by section 13 of the prohibition law, which expressly declares that any person violating the terms of any injunction granted in an equity case shall be punished for contempt. The violation of an injunctional order, was, however, equally a contempt without the statute. The statute adds nothing to it as a contempt.

It is strenuously urged by plaintiff in error that there is an entire absence of evidence establishing the commission of the act constituting the contempt. A perusal of the record leads us to the opposite conclusion. The particular point made is that the restraining order prohibited the defendant from selling intoxicants upon certain premises described therein, and that the evidence entirely fails to establish a sale upon such premises. We have carefully read the record, and we find evidence tending to support the ruling of the trial court.

Under the third head of inquiry open to this court; it is claimed that the affidavit of the states's attorney upon which the con-

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tempt proceedings were based failed to state facts giving the court jurisdiction to proceed as for contempt, in that it did not state that the equity action in which the injunctional order was made was still pending when the contempt affidavit was made. It is conceded that the affidavit must contain all the allegations necessary to give the court jurisdiction. In other words, it must be such that, if its allegations be established by proof, judgment may follow. Nor can it be aided by presumptions or intendments. Still we think the affidavit sufficient. After setting forth the institution of the original action, and the issuance and service of the injunctional order, and its violation, the affidavit continues: "That said injunctional order so made as aforesaid has not been dissolved or modified." This could not be true unless the original case was still pending, and is equivalent to a direct allegation of that fact.

We now reach the more difficult points in this case. When the plaintiff in error appeared in court to answer to the contempt proceedings the following record was made: "The defendant objects and excepts to the proceeding with the trial of this case under section 13 of Ch. 110 of the Session Laws for the year 1890, as the same abridges the right given to him under section 7 of article 1 of the constitution of the State of North Dakota; and the defendant now demands the right to trial by jury under the accusation laid before him. The demand is refused by the court, to which ruling of the court the defendant by his counsel duly excepts." Under this broad demand and refusal the plaintiff in error has the right in this court to insist upon a reversal if, upon any view of the case, he was legally entitled to a trial by jury. Section 13 of said act contained the following: "All places where intoxicating liquors are sold, bartered or given away, in violation of any of the provisions of this act, or where persons are permitted to resort for the purpose of drinking intoxicating liquors as a beverage, or where intoxicating liquors are kept for sale, barter or delivery in violation of this act, are hereby declared to be common nuisances; and if the existence of such nuisance be

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established, either in a criminal or equitable action, upon the judgment of a court or judge having jurisdiction, finding such place to be a nuisance, the sheriff, his deputy or under sheriff, or any constable of the proper county or marshal of any city where the same is located, shall be directed to shut up and abate such place, by taking possession thereof, if he has not already done so under the provision of this act by taking possession of all such intoxicating liquors found therein together with all signs, screens, bars, bottles, glasses and other property used in keeping and maintaining such nuisance, and such personal property so taken possession of shall, after judgment, be forthwith publicly destroyed by such officer, and the owner or keeper thereof shall, upon conviction, be adjudged guilty of maintaining a common nuisance, and shall for the first offense be punished by a fine of not less than two hundred (200) dollars, nor more than $1.000, and by imprisonment in the county jail of not less than ninety days or more than one year, and for the second and every successive offense be punished by imprisonment in the state's prison for a period not exceeding two years and not less than one. * * * The attorney general, his assistant, state's attorney, or any citizen of the county where such nuisance exists, or is kept, or is maintained, may maintain an action in the name of the state to abate and perpetually enjoin the same. The injunction shall be granted at the commencement of the action in the usual manner of granting injunctions, except that the affidavit or complaint, or both, may be made by the state's attorney, attorney general or his assistant upon information and belief; and no bond shall be required. * * * Any person violating the terms of any injunction granted in such proceedings shall be punished for contempt, for the first offense by a fine of not less than two hundred (200) dollars nor more than $1,000, and by imprisonment in the county jail not less than ninety days nor more than one year, and for the second and every successive offense of contempt be punished by imprisonment in the state's prison for a period not exceeding two years and not less than one in the discretion of the court or judge

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thereof. * * *" It will be noticed that section 13 declares all places where intoxicating liquors are sold or kept for sale to be common nuisances. The power of the legislature to thus place a ban upon a traffic recognized as lawful by the common law and provide for its suppression has been abundantly recognized by the courts as a proper exercise of the police power of the state. See *State* v. *Fraser*, 1 N. D. 425, (and cases cited on page 430) 48 N. W. 333; also *Eilenbecker* v. *District Court*, 134 U. S. 31, 10 Sup. Ct. 424. And, the law having declared all such places to be common nuisances, it follows necessarily that the inherent powers of a court of equity may be invoked in any proper manner to inquire into the existence of such nuisance, and, if found to exist, to abate the same. And as incident to the main purpose the court may by injunction restrain the continuance of the nuisance pending the litigation, and any violation of such injunction will subject the offender to punishment for contempt of court. It is true that the statute authorizes the court to take these successive steps, but the power of the court so to do does not come from the statute. That power exists in all its force, and without statutory aid, the moment the law declares all places where intoxicating liquors are sold or kept for sale to be common nuisances. The abatement of nuisances was one of the earliest recognized, as it is one of the most important, offices of equity jurisprudence. The power to punish for contempt is inherent in every court of record, and is as old as the common law. It was confirmed by Magna Charta, and has been uninterruptedly exercised in England and in this country to the present day. It is a power indispensably necessary to the very existence of courts, and without which they would be powerless to enforce their orders, mandates, and decrees, or to protect from indignity and wanton insult the sovereignty which they represent. If they have not this power, then they are,—in their impotency,—of all conceivable governmental instrumentalities, the most contemptible. This is elementary; but see Rap. Contempt, 1, and cases cited. Nor is this power to punish for contempt in any manner affected by the fact that the

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act which constitutes the contempt may also be a substantive crime,—for instance, an assault. Punishment by the court of the contempt does not preclude the state, in a proper action, from punishing the crime. In law the two things are entirely distinct, although one act embodies both. *Arnold* v. *Com.*, 80 Ky. 300; *Foster* v. *Com.*, 8 Watts & S. 77; 2 Bish. Cr. Law, § 250. In this country, under that perhaps universal constitutional guaranty that the right of trial by jury shall remain inviolate, it has often been urged that punishment for contempt of court could not be inflicted without the intervention of a jury. But the claim has never been admitted by the courts, on the ground that no such proceeding was known to the common law; that under that law punishment was always inflicted by the court in its discretion, and that the trial by jury for contempt was unknown, except in cases of indictment; and that the trial by jury which the citizen might demand as a constitutional right was the jury trial as it existed at common law at the time of the adoption of the constitution. Among the many cases that have so held, we cite *Ex parte Grace*, 12 Iowa, 208; *Neal* v. *State*, 9 Ark. 259; *State* v. *Matthews*, 37 N. H. 450; *Ex parte Terry*, 128 U. S. 289, 9 Sup. Ct. 77; *Eilenbecker* v. *District Court*, 134 U. S. 31, 10 Sup. Ct. 424.

Learned counsel for plaintiff in error do not particularly dissent from the propositions thus far enunciated upon this branch of the case. But as we understand them they build an argument of this character: At the time of the adoption of our constitution, section 7 of which declares "the right of trial by jury shall be secured to all and remain inviolable," there existed upon our statutes a provision (section 6402, Comp. Laws) which declared, "Every person guilty of any contempt of court of either of the following kinds is guilty of misdemeanor;" and among the contempts enumerated is that of willful disobedience to an order of court lawfully made. That this section constituted the particular contempt here under review a misdemeanor. By section 6213, Comp. Laws, then and now in force, a misdemeanor was punishable by imprisonment in the county jail not exceeding one year,

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or by fine not exceeding $500, or by both such fine and imprisonment. That prior to the adoption of the constitution contempts were punished without a jury trial. That section 6204, then and now in force, defines a felony to be a crime which is or may be punished by death, or imprisonment in the penitentiary. That section 13 of Ch. 110 of the Laws of 1890, in declaring that "any person violating the terms of any injunction granted in such proceedings shall be punished as for contempt for the first offense by a fine of not less than two hundred dollars nor more than one thousand dollars and by imprisonment in the county jail not less than ninety days nor more than one year, and for the second and every successive offense of contempt be punished by imprisonment in the state's prison for a period not exceeding two years and not less than one, in the discretion of the court or judge thereof," made the second offense a felony; and that at the time of the adoption of the constitution no person could be punished for a felony except upon a trial by jury, and that consequently no person can now be punished for a second offense under the statute except upon a trial by jury. Therefore the statute, in so far as it relates to the second or any subsequent offense, violates section 7 of the constitution, and that the punishments prescribed for the first and second offenses are so interdependent that neither can stand if the other be held unconstitutional. We may concede the position; still we think that this portion of the argument of plaintiff in error against the constitutionality of the law proceeds upon a wrong theory. At common law contempts were indictable. Rap. Contempt, § 4; 2 Bish. Cr. Law, § 250 *et seq.* The statutes of the late Territory of Dakota, in force since the early days of the territory, and still in force in this state as section 6201, Comp. Laws, provide that "no act or omission shall be deemed criminal or punishable except as provided or authorized by this Code." By this broad provision all common law offenses were swept away, including of course the indictable offense of contempt. For that reason the legislature enacted section 6402, Comp. Laws, which declared, "Every

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person guilty of any contempt of court of either of the following kinds, is guilty of misdemeanor." This act restored indictable contempts. But we do not think it was intended thereby to in any manner interfere, or that it did in any manner interfere, with the power of the courts to punish for contempt. The fact that contempts were indictible at common law never was held to take from the courts the power to punish summarily. Of course, where indictment was found for contempt it could only be tried by a jury. The same conditions existed under the statute. A party guilty of one of the enumerated contempts of court could be indicted or informed against therefor, and the trial upon such indictment or information must be had before a jury, and the punishment must be such as may be imposed for a misdemeanor. But the fact that the party is liable to be thus proceeded against in no manner impairs the power of the court to punish the contempt summarily; and when so punished the amount of punishment rests in the discretion of the court, uncontrolled by the statute which prescribes the punishment for misdemeanors, and limited only by the constitutional provision against cruel and unusual punishments. It follows, then, that at the time of the adoption of our constitution a court might punish for contempt, without the intervention of a jury, in an amount greater than the punishment prescribed for a misdemeanor, so far as any statutory limitation was concerned, and the statute under consideration gives the court no greater power; hence it does not deprive plaintiff of any right of trial by jury that existed at the time of the adoption of the constitution. We hold that in no case when a party is brought by order of attachment to the bar of the court, to answer to a charge of contempt, has the accused the legal right to have the charge tried by a jury. Nor do we feel at liberty to say in this case that it is the purpose and effect of the statute to punish for a substantive offense under the guise of punishing for contempt. It is among the highest duties of courts to jealously guard the constitutional rights of the citizen from all legislative encroachments, however stealthily, or under whatever

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cover, or by whatsoever name, the same may be made. *Boyd* v. *U. S.*, 116 U. S. 616, 6 Sup. Ct. 524; *In re Debs*, 15 Sup. Ct. 900. It is true the punishment prescribed may be very severe,—more severe than the courts ordinarily, or perhaps ever, in this age, inflict of their own volition in criminal contempt cases. But one of the prime objects of punishment for contempt is to enforce and insure obedience to the lawful orders of the court. It is notorious that courts are loath to punish summarily disobedience to their own authority. They do so only when the disobedience is clear and flagrant. "As courts in punishing contempts are dealing with cases which concern their own authority and dignity, and which are likely to suggest, if not excite, personal feelings and animosities, the case should be plain before they assume the authority." Cooley, Const. Lim. (5th Ed.) note to page 390, and for the same reasons courts are as a rule very lenient in fixing the quantum of punishment. We are not prepared to say that the efforts that have been put forth by a more highly developed and awakened civilization for the last half century to suppress the liquor traffic have not demonstrated that obedience to an order restraining the keeping of a place for the sale of intoxicating liquors cannot be coerced by the ordinary fines that courts feel warranted in inflicting for violations of injunctional orders. It may be that the profits of the prohibited traffic are such that the dealer could well afford to pay an occasional fine of such a character, and yet find great profit in violating the order of the court. If this be true,—and we think it is,—it might then be highly proper for the legislature, finding the courts in this delicate position, to step forward and assume the responsibility by requiring the courts to inflict such punishment as will unmistakably enable them to enforce obedience in these as well as in other cases. Such an act confers no additional powers upon the courts, but it may vastly strengthen them in exercising a power that they already possess; and as the legislative action in no manner tends to destroy or impair the powers of the court to enforce obedience to its orders by contempt proceedings, we can see no valid

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objection to it. There is no force in the suggestion of counsel that to recognize this legislative right gives the legislature power to force a court to imprison a man for life for contempt of court, and without intervention of a jury. There still remains the all sufficient constitutional guaranty against cruel and unusual punishments. No court would inflict or enforce any such punishment. It should be remarked in passing, however, that no punishment can be considered cruel or unreasonable which is barely sufficient to accomplish the object for which it is inflicted. This court does not intend by this this opinion to in any manner recognize the power of the legislature to so regulate either the procedure or punishment in contempt cases as to destroy or materially impair the inherent right of courts of general jurisdiction to punish for contempt.

We find no error in the record, and the judgment below is affirmed. All concur.

WALLIN, C. J. (concurring.) The summary power vested in all judicial tribunals to punish contempts of their proper authority, while it is inherent and necessary, is nevertheless arbitrary in its character; and in this country, at least, the decided trend of current authority is to regulate the exercise of such power by statutes passed for that purpose. While there is some conflict in the cases, the better opinion is that the lawmaking branch of the government may primarily regulate the procedure, and also prescribe the penalties, for contempts of court. But the rule of legislative control is never announced, as to constitutional courts, without stating the necessary limitation which goes with the rule, namely, that the legislature cannot either destroy or substantially impair the inherent power vested in such courts to punish contempts of their authority by summary methods. The constitutional courts hold in reserve the implied power to annul any legislative enactment which seeks to deprive them of the authority necessary to the discharge of their constitutional functions. Such power is inherent, and founded on the right of self-protection. *State* v. *Frew*, 24 W. Va. 416; *State* v. *Mc-*

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Claugherty, (W. Va.) 10 S. E. 407; *Hughes* v. *People*, 5 Colo. 436; *Ex parte Robinson*, 19 Wall. 505; *Anderson* v. *Dunn*, 6 Wheat. 204; *People* v. *Wilson*, 64 Ill. 195; *Batchelder* v. *Moore*, 42 Cal. 415; *Wyatt* v. *People*, (Colo.) 28 Pac. 961; *Arnold* v. *Com.*, 44 Am. Rep. 480. I think the statute under which the punishment was inflicted in this case does not destroy or substantially impair the inherent power of the District Court to punish contempts of its authority. On the contrary, the statute obviously reinforces such authority. With the expediency of such enactments the courts have nothing to do. I am authorized by my associate, Judge Corliss, to say that he agrees with the views that I have above expressed.

(64 N. W. Rep. 934.)

NOTE—See *State* v. *Kerr*, 3 N. D. 523 and note.

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FIRST NATIONAL BANK *vs.* MERCHANTS NATIONAL BANK, *et al.*

Opinion filed October 28th, 1895.

Appeal—Trial DeNovo.

This is an action at law, and was tried to a jury. After the testimony was introduced, and counsel for both sides had rested the case, it was agreed in open court that the jury might be discharged, and the case be submitted for determination to the court. The jury was accordingly discharged, and the court made and filed its findings, and judgment was entered thereon. *Held*, that the case is not triable "anew" in this court, under Ch. 82, Laws 1893. That chapter applies only to such cases as are "tried by the District Court without a jury." This action was not so tried.

Certificate of Trial Judge.

The judge's certificate appended to the record sent to this court certified only that such record contained all testimony "taken" at the trial. *Held*, that this does not bring the case within the terms of said chapter 82, which requires that all evidence "offered" in such cases "shall be taken down in writing," and that "all evidence taken as provided by this section shall be certified by the judge."

Specifications and Assignments of Error.

A bill of exceptions was settled below, and is embraced in the record sent to this court; but the same does not contain any specifications of error occurring at the trial, nor any exception pointing out wherein any finding of fact is not justified by the evidence. No errors are assigned in the brief of appellants' counsel filed in this court. *Held*, under the statutes and rules of court, and upon the authority of *Hostetter* v. *Elevator Co.*, 61 N. W. 49, 4 N. D. 357, that this court will not examine the record for the purpose of reviewing errors in the procedure below.

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

Action by the First National Bank of Devils Lake, N. D., against the Merchants' National Bank of Devils Lake, N. D., and others. Judgment for plaintiff, and defendants appeal.

Affirmed.

Cowan & McClory, and *Joseph Denoyer*, for appellants.

M. H. Brennan, (*Cochrane & Feetham*, of counsel,) for respondents.

WALLIN, C. J. This was an action in the nature of replevin to recover the possession of certain wheat. It was tried to a jury,

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but after all the testimony had been put in, and after both sides had rested the case, it was agreed in open court that the jury might be discharged, and the case be submitted to the court for final determination; whereupon the jury was discharged, and the court made and filed its findings of fact and conclusions of law, and directed that judgment be entered in favor of the plaintiff, and judgment was entered accordingly. The only exception taken to such findings is in the following language: "The defendants, by their attorneys, hereby except to the findings of the courts in the above entitled action." Subsequently the defendants proposed a bill of exceptions, and a bill was settled by the trial court; but there were no specifications of errors of law incorporated in such bill, nor was there an attempt made to specify in such bill wherein the findings of fact were not justified by the evidence. In its order settling the bill, the trial court states that the bill "is hereby settled and allowed as a true bill of exceptions herein, containing all the testimony in said case necessary to the determination thereof." Appellants' brief, as filed in this court, contains no assignments of error, as required by rule numbered 15 of the rules of this court; nor is the judge's certificate, as required by rule 12 of the rules of this court, appended to the record transmitted to us by the court below. We further find in the record, following the order setting the bill of exceptions, and in addition to the certificate of the clerk of the District Court, as required to be made by section 5217 of the Compiled Laws, the following certificate of the trial judge: "I hereby certify that the above and foregoing is a full, correct, and complete transcript of all testimony taken, proceedings had, and exhibits introduced in evidence, in the above entitled action; that the exhibits hereto attached are the original exhibits introduced in the said action."

When the case was reached in this court, and pursuant to notice, counsel for respondent made and argued a preliminary objection (based upon the record) to the hearing or trial of the case in this court. Appellants' counsel did not appear to oppose

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said motion. The court took the motion under advisement, and the case on the merits was submitted on briefs. It is never a pleasant duty to dispose of a case coming into this court upon purely technical grounds, and without considering the merits; but, in the interest of a sound and uniform practice, it sometimes becomes necessary to do so. This course must be pursued in the case under consideration. The preliminary objections urged by respondent's counsel against either hearing this case for the purpose of reviewing errors below, or for the purpose of trying it "anew," are, in our opinion, insurmountable. Not considering other objections, the case cannot be tried anew, under Ch. 82, Laws 1893, because the record shows that the case is not within the terms or purview of that chapter. That chapter by its terms applies "in all actions tried by the District Court without a jury." The case at bar was not so "tried." It is an action at law, and was tried throughout the whole trial, and until after both sides had rested the case, as a jury case, and not otherwise. The record forbids the idea that either court or counsel supposed during the trial that the evidence was being adduced in conformity to the peculiar and exceptional provisions of the act of 1893. This court is not disposed to extend that statute, by a loose construction, so as to embrace cases not within the fair import of its language. The statute is a radical innovation upon the established practice in this state and in all the code states, and should, we think, not be expanded by judicial interpretation in such a way as to include cases not strictly within its terms.

But the case cannot be tried anew in this court, under the act of 1893, for another reason. The act requires that "all the evidence offered at the trial shall be taken down in writing," and, further, that "all evidence taken as provided by this section shall be certified by the judge," etc. In this case it does not appear by the judge's certificate appended to the record either that all the evidence "offered" in this case was taken down in writing, or that all the evidence offered is now incorporated in the record sent to this court. The judge's certificate refers only to evidence

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actually "taken" at the trial, and does not purport to deal with evidence which may have been "offered," and not taken.

Turning now to the so-called "bill of exceptions" found in the record, it is apparent that this court, under its printed rules, as well as under the language of the statute itself, is precluded from any consideration of errors which may have occurred in the procedure below. There are no errors assigned in the brief of appellants' counsel, as required by the rule of court. True, counsel have attempted to assign errors in the abstract, where they do not belong; but, if this defect in practice were waived by the indulgence of the court by relaxing such rule, such assignments would be necessarily worthless because they are not preceded by any specifications of error in the bill of exceptions. Such specifications are indispensable under both the statute and rules of court. *Hostetter* v. *Elevator Co.*, 4 N. D. 357, 61 N. W. 49. In the condition of the record, we are not at liberty to consider the evidence or the procedure in the court below, and must therefore affirm the judgment. All the judges concurring.

(64 N. W. Rep. 941.)

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MIKE SCHMITZ *vs.* ANTONIO HEGER.

Opinion filed October 28th, 1895.

Specification of Error in Bill.

The defendant moved in the District Court, upon a bill of exceptions, to vacate the verdict and for a new trial, and, from an order denying the motion, appeals to this court. The bill of exceptions embodied no specifications of error. *Held*, that alleged errors of law occurring at the trial, and discussed in the appellant's brief, will not be reviewed by this court. *Hostetter* v. *Elevator Co.*, 61 N. W. 49, 4 N. D. 357; *Illstad* v. *Anderson*, 49 N. W. 659, 2 N. D. 167; *First Nat. Bank of Devils Lake* v. *Merchants Nat. Bank of Devils Lake*, 64 N. W. 941, 5 N. D. 161.

Assignments of Error—Rule Fifteen.

In their brief filed in this court, counsel for appellant have attempted to assign certain errors of law occurring at the trial, which errors are discussed at length in such brief. There were and could be no specifications of errors in the abstract, as none were contained in the bill; and there was no attempt in the assignments of error appended to appellant's brief to refer to any page in the abstract where any specification of error could be found. *Held*, that such attempted assignments of error were insufficient, under Rule 15 of the Supreme Court Rules. 3 N. D. xiii.

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

Action by Mike Schmitz against Antonio Heger. From an order refusing a new trial, defendant appeals.

Affirmed.

Ingwaldson & Howland, and *H. Steenerson*, for appellant.

P. G. Swenson, (*Cochrane & Feetham*, of counsel,) for respondent.

WALLIN, C. J. In this action, plaintiff sues to recover money claimed to be due him from the defendant upon contract. There was a jury trial, resulting in a verdict for the plaintiff. Defendant served notice of intention to move in the District Court to vacate the verdict, and for a new trial; but said notice of intention omitted to state any grounds upon which the motion would be based. Later a bill of exceptions was settled, but there were no specifications of error embodied in the bill. In this court we find in the brief filed by counsel for the appellant that an attempt

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has been made to assign errors, as required by rule 15 of the rules of this court. The assignments do not comply with such rule, and could not do so in the absence of specifications of error in the bill. The assignments do not and could not refer to "the page of the abstract where the particular specification of error is found." Our attention having been called to the condition of the record, we are without power to examine alleged errors of law occurring at the trial, and none other are discussed in appellant's brief. We have reserved in the rule the right to relax the rule requiring assignments of error, and this we have done in other cases, in furtherance of justice; but we have no power to relax a statutory requirement intended to aid both court and counsel in the court below, as well as in this court. Our attention being called to the omission, we cannot overlook the requirement of the statute that errors must be specified in the bill of exceptions. See section 5090, Comp. Laws; Court Rules Nos. 13, 15, found on pages 12, 13, 3 N. D., and page ix., 61 N. W.; *Hostetter* v. *Elevator Co.*, 4 N. D. 357, 61 N. W. 49; *First Nat. Bank of Devils Lake* v. *Merchants Nat. Bank of Devils Lake*, 64 N. W. 941, 5 N. D. 161; *Illstad* v. *Anderson*, 2 N. D. 167, 49 N. W. 659; 3 Estee, Pl. & Prac. § 4896, and authorities cited.

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

(64 N. W. Rep. 943.)

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JOHN K. DORAN *vs.* CHARLES F. DAZEY.

Opinion filed October 30th, 1895.

Constructive Notice—Facts Sufficient to Excite Inquiry.

A person who has knowledge of facts sufficient to put a prudent man on inquiry with regard to the existence of an unrecorded deed, and fails to make such inquiry, cannot claim protection as a bona fide purchaser under the recording act.

Instrument Out of Chain of Title.

Actual knowledge of the existence on the public records of an instrument purporting to be a mortgage of the property he is about to purchase is notice to such purchaser of the existence of the original mortgage, and knowledge of such mortgage, although the same is given by one who appears by the records to have no title to the land, is sufficient to make it the duty of the purchaser to inquire whether the mortgagor, who asserts in the mortgage that he owns the land, is not in fact the owner thereof.

Chargeable with the Notice Inquiry Would have Disclosed.

If, with such knowledge, he parts with the consideration for the land without making any investigation as to the title of the mortgagor, when such investigation would probably have led to a discovery of such title, he is chargeable with notice of it.

Ignorance of a Recorded Instrument, Out of Chain of Title.

But the mere recording of an instrument out of the chain of the title will not, of itself, constitute constructive notice of such instrument, so as to bind one who deals with the apparent owner of the land according to the record, in ignorance of the existence of such instrument.

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

Action by J. K. Doran against Charles T. Dazey. Judgment for plaintiff, and defendant appeals.

Affirmed.

Swiggum & Myers, for appellant.

Phelps & Phelps, for respondent.

CORLISS, J. The object of this action is to secure the judicial cancellation, as a cloud on plaintiff's title, of certain deeds purporting to convey the real estate which the plaintiff claims to own. It is situated in the City of Grafton. The defendant,

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Charles T. Dazey, who is the only person affected by the judgment appealed from, and who is the appellant on this appeal, insisted in the trial court, and, having been there unsuccessful in his contention, insists in this court, that he, and not the plaintiff, has the better title to the land. Both parties trace their title from the title of Ole H. Nelson, Lewis E. Nelson, and George C. Sims, who, it is conceded, were originally the fee simple owners of this real estate. On the 7th of August, 1883, these parties executed and delivered to L. G. Sims a warranty deed of the premises in question, by which he became vested with the full legal title thereto. This deed, however, was not recorded until September 10, 1887, or more than four years later. It is under this deed the plaintiff claims. While this deed remained unrecorded, and in October, 1884, the defendant, Dazey, entered into negotiations with Laura C. Nelson and Ole H. Nelson, who claimed to be the owners of the property, looking to a purchase of it by him, in exchange for real estate owned by him in the City of Fargo. The terms of sale were finally agreed on, and these pretended owners executed a warranty deed of the property to defendant, Dazey, and the same was placed on record. Dazey, however, was not willing to part with the stipulated purchase price, to-wit, the property owned by him in Fargo, until he had secured an abstract, and had ascertained that the title was all right. Accordingly, instead of delivering his deed at this time to the grantors in the deed to him, he left it in escrow with a person connected with the law office of Stone & Newman, to be delivered if the grantor's title to the Grafton property proved to be all right. Stone & Newman, acting for him, procured an abstract, and discovered from it that these grantors were not the owners of this land, but that the record showed the title to be in Ole H. Nelson, Lewis E. Nelson, and George C. Sims, their deed to L. G. Sims not then being on record. This defect in the title, however, was remedied by the execution by these parties of a deed to Laura C. Nelson, one of the grantors in the deed to defendant, Dazey. Thereupon Stone & Newman having advised

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Dazey that the title was perfect, his deed of the Fargo property was delivered. Then, for the first time, did he pay his consideration for the Grafton real estate. Before he made this payment, he was informed by his attorneys that the abstract of title disclosed the fact that one L. G. Sims, who was the grantee in this unrecorded deed, had executed a mortgage on the property in question for the sum of $1,200; but, acting on the advise that this would not affect his rights as a bona fide purchaser, because the record did not show that L. G. Sims was the owner of the property when he gave the mortgage, or ever had been the owner of it, defendant, Dazey, closed the deal, and thereafter his deed of the Fargo property was delivered and recorded.

These facts are all uncontroverted. In view of them, we do not regard it necessary to enter upon a discussion of any of the numerous questions argued in this case, except the one whether, under these conceded facts, the defendant can possibly sustain his title as against the prior title of the plaintiff under the unrecorded deed. It is an elementary rule in the construction of recording laws that notice of an unrecorded instrument is equivalent to the recording of it, with respect to the person having such notice. Our statute, in express terms, declares this to be the rule: "An unrecorded instrument is valid as between the parties thereto and those who have notice thereof." Comp. Laws, § 3297. It is true that Dazy did not have actual notice of the unrecorded deed to L. G. Sims, but he did have actual knowledge of the existence on the records in the county in which the land was situated of a mortgage given by L. G. Sims on this very property for quite a large sum. Had he not actually known that such a mortgage was on record, it is undoubtedly true, as counsel for defendant asserts, that the mere recording of the mortgage would not have constituted constructive notice of it, within the meaning of the recording law. The recording of an instrument out of the chain of title does not constitute such constructive notice. This is well settled. 20 Am. & Eng. Enc. Law, 595, and cases there cited; Wade, Notice, § § 205–207. But this doctrine

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is not applicable to the facts of this case, for it is a conceded fact that Dazey, before he parted with his consideration, knew that such a mortgage was on record. This, under the authorities, was notice to him that such a mortgage had been given. *Clark* v. *Holland*, (Iowa) 33 N. W. 350; Wade, Notice, § 250; *Musgrove* v. *Bonser*, 5 Or. 313; *Hastings* v. *Cutter*, 4 Fost. (N. H.) 481; *Barnes* v. *McClinton*, 3 Pen. & W. 67. An examination of this mortgage would have disclosed the fact that the mortgagor, L. G. Sims, therein asserted that he was the owner in fee simple of the premises in question. A prudent man should have made inquiries of the mortgagor, if possible, to ascertain whether he in fact owned the land. Such an inquiry would, in all probability, have led to a discovery by him, before he had parted with his consideration by delivering the deed to the Fargo property, of the fact that L. G. Sims was the owner of the Grafton land under the unrecorded deed to which we have referred. Whatever conflict of authority there may be on the question, the doctrine which has the support of the great mass of the decisions, and which is certainly sustained by the better reason, is that which regards knowledge of facts sufficient to put a prudent man on inquiry as to the existence of other facts, as equivalent to actual knowledge of those facts, which such suggested investigation would in all probability have disclosed had it been properly pursued. Wade, Notice, § § 246, 250, 251; *Gress* v. *Evans*, 1 Dak. 387, 46 N. W. 1132; *Tuttle* v. *Jackson*, 6 Wend. 213; *Morrison* v. *Kelley*, 22 Ill. 610; *Allen* v. *McCalla*, 25 Iowa, 464; *Bernstein* v. *Roth*, (Ill. Sup.) 34 N. E. 37. Our recording statute does not require that the notice, to defeat the claim of priority, should be actual. It merely declares that notice of the unrecorded instrument will be sufficient to defeat such claim. Comp. Laws, § 4743, provides that "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." Therefore, whatever might be our conclusion,

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independently of the language of our statutes, touching the soundness of the rule established in some jurisdictions, that mere want of caution will not affect the alleged bona fide purchaser with notice, but only willful and fraudulent blindness, we are clear that, in view of the legislation in this state, no such doctrine can here obtain. We are not without express authority in support of our conclusion that knowledge of existence of this mortgage was sufficient to put the defendant on inquiry as to the existence of title in the mortgagor. *Pleasants* v. *Blodgett*, (Neb.) 58 N. W. 423. In this case the court said: "The fact that there was of record a mortgage from Pleasants to Boyd on this property was sufficient, of itself, to warn a prudent intending purchaser thereof that Pleasants probably claimed some interest in the property. When one makes a mortgage on real estate to another, the presumption, at least, is that the mortgagor is the owner of the property mortgaged." To same effect is *Clark* v. *Holland*, (Iowa) 33 N. W. 350. We do not think that the court intended to lay down any different rule in *Chicago* v. *Witt*, 75 Ill. 211, although the language of the court leaves the matter in some doubt. To entitle one to protection as a bona fide purchaser, he must have parted with his consideration before notice of the prior conflicting right. This rule is too elementary to require the citation of many authorities in its support. *Wood* v. *Rayburn*, (Or.) 22 Pac. 521; *Veith* v. *McMurtry*, (Neb.) 42 N. W. 6; *Otis* v. *Payne*, (Tenn.) 8 S. W. 848. At the time defendant's deed of the Fargo property was delivered, he had knowledge of the fact, which we regard as equivalent to actual notice of the unrecorded deed; he not having made any effort to make the investigation which a prudent man should have made under the circumstances. It furnishes him no justification that he relied on the advice of counsel. Such advice could not make that conduct prudent which the law regards as careless.

We were asked by the appellant in this case to try it *de novo*, but we have found ourselves unable to do so, owing to the insufficiency of the judge's certificate certifying the evidence.

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The statute requires all the evidence offered to be taken down, and provides that all this evidence shall be certified to this court. Laws 1893, Ch. 82, § 1. The certificate in this case gives no guaranty that all the evidence offered is before us, but only such as was both offered and received. Under such certificate, we cannot try the case *de novo*. See *First Nat. Bank of Devils Lake* v. *Merchants Nat. Bank of Devils Lake*, (decided at this term) 64 N. W. 941, 5 N. D. 161. But we have a right, and it is our duty, to look into the findings, and it is from the findings that we have taken the facts which have been set forth in this opinion. The appellant concedes them all to be true. He is therefore not in the least prejudiced by our inability to try the case *de novo*, as, in view of these conceded facts, we are all clear that in no event could he possibly succeed.

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

(64 N. W. Rep. 1023.)

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RUTH J. CHACEY *vs.* THE CITY OF FARGO.

Opinion filed November 4th, 1895.

Liability of City for Defective Sidewalk—Proximate Cause.

Plaintiff was injured by stepping into a hole in the sidewalk made by the displacement of a loose plank; which was thrown out of its position by a passing bicycle just as plaintiff was about to step on it, so that she stepped into the hole instead. *Held*, that, the defendant being, under the circumstances, liable for the defective condition of the walk, it was liable for the damages sustained by the plaintiff upon two principles: First, that the loose plank was one of the proximate causes of the injury; second, that when two causes combine to produce an injury to a traveler upon a public street or highway, both of which are in their nature proximate, the one being a culpable defect in the highway and the other some occurrence for which neither party is responsible, the city is liable if the injury would not have been sustained but for the defect for which the city is responsible.

Existence of Defect—Constructive Notice.

When the defect is a loose plank in a sidewalk, it is competent to prove that the sidewalk at that place had been in dilapidated condition for a long time, as bearing on the question whether the particular defect which caused the injury had existed for a sufficient length of time to give the city constructive notice thereof; and such evidence is sufficient for that purpose.

Recovery for Medical Attendance by Married Woman.

A married woman, who has in fact, incurred liability for medical attendance made necessary by an injury for which another is liable, may recover as part of her damages a sum equal to the amount of such liability the same as a *feme sole*, although she has not paid for such medical attendance at the time of trial.

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

Action by Ruth J. Chacey against the City of Fargo. Judgment for plaintiff, and defendant appeals.

Affirmed.

Fred B. Morrill, for appellant.

A bicycle is a carriage or vehicle and should not be used upon a sidewalk. *Taylor* v. *Goodwin*, L. R. 4 Q. B. Div. 228; *Mercer* v. *Corbin*, 3 L. R. A. 221; *State* v. *Collins*, 3 L. R. A. 394; *Swift* v. *City of Topeka*, 8 L. R. A. 772; *Holland* v. *Bartch*, 22 N. E. Rep. 83. Where the city has laid out and maintained a place for foot passengers separate and apart from that used by persons traveling

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in or on vehicles, it has done its corporate duty to the public. The city might have passed an ordinance forbidding the use of sidewalks by persons riding on bicycles. Its neglect in this regard was the neglect of a police duty, rather than of a corporate duty. *Hayes* v. *Oshkosh*, 33 Wis. 314; *Fisher* v. *Boston*, 104 Mass. 87; *Hafford* v. *New Bedford*, 16 Gray, 297. A municipal corporation will be liable for the neglect of a purely corporate duty, and not for the neglect of a governmental or police duty. *Schultz* v. *Milwaukee*, 5 N. W. Rep. 342; *Burford* v. *Grand Rapids*, 18 N. W. Rep. 571; *Hutchinson* v. *Concord*, 41 Vt. 271; *Faulkner* v. *Aurora*, 44 Am. Rep. 1; *Pierce* v. *New Bedford*, 129 Mass. 534. The bicycle was the proximate cause of the injury. In law the direct cause is to be considered and held responsible. *Chamberlain* v. *Oshkosh*, 19 L. R. A. 513; *Schaffer* v. *Jackson Township*, 18 L. R. A. 100; *Herr* v. *LeBannon*, 16 L. R. A. 106; *Kidder* v. *Dunstable*, 7 Gray, 104. If the proximate cause of the injury was not the defect in the highway or if the injury was the combined result of a defect in the street, and the negligence of some third person, the defendant city will not be liable. *Kidder* v. *Dunstable*, 7 Gray, 104; *Rowell* v. *Lowell*, 7 Gray, 100; *Shepherd* v. *Chelsea*, 4 Allen, 113; *Childrey* v. *Huntington*, 11 L. R. A. 313; *Horrigan* v. *Clarksburg*, 5 L. R. A. 609; *Smith* v. *Kanawah Co.*, 8 L. R. A. 82; *McClam* v. *Garden Grove*, 12 L. R. A. 482; *Handelun* v. *B. C. R. & N. Ry. Co.*, 32 N. W. Rep. 4; *Hembling* v. *City*, 58 N. W. Rep. 310; *Kieffer* v. *Hummelston*, 17 L. R. A. 217. The city cannot be charged with notice of a defect in a sidewalk by evidence that there were other defects in other parts of the walk. *Ruggles* v. *Town of Nevada*, 18 N. W. Rep. 866; *Goodson* v *Des Moines*, 23 N. W. Rep. 655; *Carter* v. *Monticello*, 26 N. W. Rep. 129.

Newman, Spaulding & Phelps, for respondent.

The testimony as to other accidents of the same character and as to the condition of the walk in front of the lot upon which the accident occurred was proper under the allegation in the complaint. *Quinlan* v. *Utica*, 11 Hun. 217, 74 N. Y. 603; *District of Columbia* v. *Armes*, 107 U. S. 519; *Dougan* v. *Transportation Co.*, 56 N, Y. 1;

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Hill v. *Portland Co.*, 55 Me. 438; *House* v. *Metcalf*, 27 Conn. 631; *Bailey* v. *Trumbull*, 31 Conn. 581; *Darling* v. *Westmoreland*, 52 N. H. 401; *Kent* v. *Lincoln*, 32 Vt. 591; *City of Chicago* v. *Powers*, 42 Ill. 169; *City of Delphi* v. *Lowry*, 74 Ind. 520; *Augusta* v. *Haffers*, 61 Ga. 48; *Smith* v. *Des Moines*, 51 N. W. Rep. 77; *O'Neill* v. *West Branch*, 45 N. W. Rep. 1023; *Campbell* v. *Kalamazoo*, 45 N. W. Rep. 652; *Alberts* v. *Vernon*, 55 N. W. Rep. 1022; *Bloomington* v. *Legg*, 37 N. E. Rep. 696; *Golden* v. *Clinton*, 54 Mo. App. 100; *Osborne* v. *Detroit*, 32 Fed. Rep. 36; *Plattsmouth* v. *Mitchell*, 29 N. W. Rep. 593; *Munger* v. *Waterloo*, 49 N. W. Rep. 1028; *Armstrong* v. *Ackley*, 32 N. W. Rep. 180; *McConnell* v. *Osage*, 45 N. W. Rep. 550; *Riley* v. *Iowa Falls*, 50 N. W. Rep. 33; *Pomfrey* v. *Saratoga Springs*, 11 N. E. Rep. 43. It was competent for the plaintiff to show that bicycle riding upon the street in question had been allowed by the city for some years, it being the duty of the city to use ordinary care to keep its sidewalks in such repair that they will be reasonably safe for pedestrians with reference to accidents which may be reasonably expected to happen at any time in the ordinary use of the walk for such purposes and in such manner as is permitted by the city. *Honfe* v. *Fulton*, 29 Wis. 296, 9 Am. Rep. 573; *Kelsey* v. *Glover*, 15 Vt. 708; *Allen* v. *Hancock*, 16 Vt. 231; *Hunt* v. *Pownal*, 9 Vt. 411; *Campbell* v. *Stillwater*, 20 N. W. Rep. 320. Where several proximate causes contribute to the accident, and each is an efficient cause without the operation of which the accident would not have happened, it may be attributed to all or any of the causes, but it cannot be attributed to a cause unless without its operation the accident would not have happened. *Ring* v. *Cohoes*, 77 N. Y. 83; *Ivory* v. *Deer Park*, 116 N. Y. 476; *Ehrgott*, v. *Mayor*, 96 N. Y. 264; *Phillips* v. *N. Y. C. Ry. Co.*, 127 N. Y. 657; *Dreher* v. *Fitzburg*, 22 Wis. 643; *Taylor* v. *Yonkers*, 105 N. Y. 202; *City of Joliet* v. *Shufelt*, 32 N. E. Rep. 969; *McClure* v. *Sparta*, 54 N. W. Rep. 337; *Campbell* v. *Stillwater*, 20 N. W. Rep. 320; *Atkinson* v. *Trans. Co.*, 60 Wis. 141; *Dotton* v. *Albion*, 15 N. W. Rep. 46.

CORLISS, J. The plaintiff has recovered a judgment against

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the defendant, the City of Fargo, for damages sustained by her by reason of a defective sidewalk within the corporate limits of that city. While walking along this sidewalk, she was overtaken and passed by a person riding a bicycle, which threw out a loose plank immediately in front of plaintiff, who stepped into the hole in the walk, thus unexpectedly made, and sustained severe injuries. One of the contentions of defendant against its liability is that the defective walk was not the proximate cause of the injury; that plaintiff must, in law, trace her fall to the bicycle alone. Had some one, a short time before the accident, removed the loose plank, and had plaintiff thereafter been injured, the city might not have been liable, in the absence of notice of the hole in the sidewalk, for in that case the hole, and not the loose plank, perhaps, would have been the proximate cause of the injury. But the case before us presents no such question. The loose plank was one of the proximate causes of the injury, for it was the existence of such a loose plank that made it possible for a passing bicycle to throw it out of its place, and suddenly open before the plaintiff a dangerous pitfall. She was precipated to the ground and hurt, not because there was a hole in the sidewalk, but because there was a loose plank there which might be thrown out immediately in front of her by another, thus causing her injury. Undoubtedly it is true that, but for the passing of the bicycle at that time, no accident would have occurred. But it is also true that, had it not been for the defective walk, the passing of the bicycle would have resulted in no harm to the pedestrian. Under these circumstances we regard as controlling the rule laid down by the court in *Ring* v. *City of Cohoes*, 77 N. Y. 83: "When two causes combine to produce an injury to a traveler upon a highway, both of which are, in their nature, proximate, the one being a culpable defect in the highway, and the other some occurrence for which neither party is responsible, the municipality is responsible, provided the injury would not have been sustained but for that fact. Where several proximate causes contribute to the accident, and each is an efficient cause, without the operation of

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which the accident would not have happened, it may be attributed to all or any of the causes, but it cannot be attributed to a cause unless, without its operation, the accident would not have happened." This rule has been generally recognized, and has been applied in many cases. Its soundness cannot be questioned. See Jones, Neg. 163, and note 381; 2 Shear. & R. Neg. § 426; Elliott, Roads & S. 451, and notes; Morrill, City Neg. 106-110.

It is next urged that the city is not liable, because a bicycle is a vehicle, and that, while the city must provide a safe place for pedestrians, it is not bound to make that place so safe that a vehicle cannot render it unsafe. If this sidewalk had been in repair, and the plank been broken and thrown out by a person unlawfully driving over the sidewalk, the defendant's contention would undoubtedly be sound. But the plank was in fact loose, and it was thrown out by a class of vehicles which had been permitted by the city repeatedly to pass over this sidewalk; and under these circumstances we do not consider that the city is in position to claim that it was not bound to keep the planks of its sidewalk fastened as against the contingency of their being thrown out to the injury of pedestrians by this class of vehicles. Indeed, we are not prepared to say that the city could not have been liable even if this loose plank had been thrown out by a person unlawfully driving on the walk instead of by a bicycle.

It is also urged that the court erred in allowing plaintiff to prove the general delapidated condition of the sidewalk in front of the residence where this accident occurred, and that it had existed for a long time. In this there was no error. Such evidence had a tendency to prove that this plank had been loose for a sufficient period of time to give the city constructive notice of its condition. The long continued defective condition of the sidewalk generally at that very place would be very strong evidence that the city knew, or was bound to know, of this particular defect. On this point there is ample authority, and the doctrine is supported by reason. *Smith* v. *City of Des Moines*,

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(Iowa) 51 N. W. 77; *O'Neill* v. *Village of West Branch*, (Mich.) 45 N. W. 1023; *Campbell* v. *City of Kalamazoo*, *Id.*. 652; *McConnell* v. *City of Osage*, (Iowa) 45 N. W. 550; *Armstrong* v. *Town of Ackley*, (Iowa) 32 N. W. 180. It will generally be the case that, where there is a defect of the character of the one which caused plaintiff's injury, the only proof of the existence of the particular defect for a period long enough to charge the municipality with notice will be evidence that at that place the walk was generally out of repair. Such evidence was, therefore, not only competent, but it was also sufficient to warrant a finding that the particular defect had in fact continued long enough to give the city constructive notice of it. The language of the court in *Campbell* v. *City of Kalamazoo*, (Mich.) 45 N. W. 652, is particularly applicable to this branch of the case, and therefore we quote it: "When an entire piece of sidewalk in front of a particular lot is out of repair, and, by reason of its age and decayed condition, is no longer safe or fit for use, it might be difficult, where many planks are loose and decayed, for a plaintiff to point out the particular one over which she stumbled and fell. The evidence offered by the plaintiff supported the declaration on this point, and was not disputed. It appeared without controversy that the walk in question was generally out of repair; that the stringers were rotten, so that the nails would not hold; that the boards, which were laid crosswise, would, many of them, fly up when stepped upon; and this condition was shown to have existed for a year and upwards. We think this testimony was competent for two purposes: First, it showed the negligence of the defendant as charged in the declaration; second, it tended to show notice to the defendant of the condition of the walk."

It is urged that the trial court erred in charging the jury that the plaintiff, a married woman, could recover such expenses as she had incurred for medical attendance. But the court did not instruct the jury that the plaintiff had in fact incurred liability for such medical attendance. If she had not incurred it, the charge was harmless. If she had in fact incurred such liability,

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she had an undoubted legal right to recover the amount of this liability as part of her damages notwithstanding her being a married woman.

Neither did the court err in refusing to charge the jury, as requested by defendant's counsel, that, unless the plaintiff had in fact paid out her own money for medical attendance, she could not recover for any debt she might have contracted for such medical attendance. If she saw fit to waive her right to insist that her husband should pay her doctor's bill, and to obligate herself to pay it, there is no principle of law which would prevent her recovering for the amount of this liability which she had incurred because of this injury merely on account of her being a married woman. That a married woman can render herself liable by special contract for the services of a physician in attending her cannot be doubted under our statute. *Mortgage Co.* v. *Stevens*, 3 N. D. 265, 55 N. W. 578. To deny to her the right to recover as damages a sum equal to the amount of this liability would be to refuse her full redress for the wrong she had suffered.

We have carefully considered all the other grounds urged for reversal, but are unable to discover in them any reason for disturbing the verdict of the jury, and the judgment is therefore affirmed. All concur.

(64 N. W. Rep. 932.)

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In re NORMAN MARKUSON.

Opinion filed November 6th, 1895.

Contempt—Judgment of Imprisonment—Effect of Suspending Sentence.

On June 29, 1895, petitioner was convicted of a criminal contempt of court, and judgment was entered of record against him in substance as follows: "That petitioner be imprisoned in the county jail of Barnes County for a period of ninety days, commencing with to-day at noon; that he pay a fine of $200, and if default be made in the payment of the fine he shall be imprisoned as many days as two dollars is contained in two hundred dollars,—or one hundred days." Immediately after said judgment was entered the court, of its own motion, made certain orders in the case, which were entered of record, to the effect: First, that in case an appeal was taken the time should commence to run from the date of the remittitur being filed in the District Court. Second, that the judgment be suspended 30 days, unconditionally, to facilitate an appeal to the Supreme Court. Third, the court ordered that the bail bond given to secure the petitioner's attendance from day to day during the trial in the District Court be and remain valid and binding upon the petitioner, and that petitioner was ordered to obey the further orders of the district Court, whether made by that court, or made to conform to orders of the Supreme Court. *Held*, that the time of said imprisonment began to run at noon on June 29, 1895, and that the several orders purporting to suspend or postpone the operation of the judgment were without authority of law, and null and void; that said orders did not operate as a stay or supersedeas, for reasons stated in the opinion of the court.

Original application by Norman Markuson for discharge from custody on writ of habeas corpus.

Granted.

Crum & Hanson, and *G. K. Andrus*, for petitioner.

Herman Winterer, State's Atty., for respondent.

WALLIN, C. J. On June 29, 1895, petitioner, with others, was convicted of a contempt of court, in violating the terms of an injunctional order issued out of the District Court for the County of Barnes, under section 13 of the act of 1890, known as the "Prohibition Law." At the close of the testimony, and after the court had announced that it would find the accused guilty of the contempt charged, and before judgment was pronounced, counsel for the defendants gave notice in open court that they would remove the cases to the Supreme Court for review, and requested

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sufficient time in which a bill of exceptions could be settled and the record obtained from the official stenographer. There seems to have been no response whatever on the part of the court to this request of counsel. The record shows that the trial court, immediately after such request was made, proceeded to pronounce and enter of record a final judgment in the cases, and followed said final judgment with certain orders. The judgment and orders, as entered, are as follows: "The judgment of the court in each case is that the defendants shall be imprisoned in the county jail of Barnes County for a period of ninety days, commencing with to-day at noon, and each pay a fine of $200; and if default be made in the payment of the fine he shall be imprisoned for as many days as two dollars is contained in two hundred dollars, or one hundred days. It is further ordered that in case an appeal be taken that the time shall commence to run from the date of the remittitur or judgment of the Supreme Court being filed in this court. It is further ordered that judgment in each of these several cases be suspended for a period of thirty days, for the purpose of allowing each of the several defendants to take an appeal to the Supreme Court, and that these sentences shall commence at the expiration of the said thirty days from date. It is further ordered that the bonds already given in these cases by the several defendants be and remain valid and binding upon the defendants. The defendants are each ordered to obey the further orders of this court in respect to said punishments and fines, and to obey the further judgment and all orders and judgments rendered by the Supreme Court in these several cases, which shall hereafter be made judgments in this court in pursuance of the judgments of the Supreme Court. And it was further stipulated in open court, by and between the above named defendants and the attorneys for the state, that the record should be made up in one case, and that the other three cases should abide the event of that one case." Petitioner sued out a writ of error, and his case was brought to this court for review. In this court no error was assigned upon the judgment entered in the

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court below, nor was the attention of this court called in any manner to the terms of said judgment, or to the orders following the judgment. *State* v. *Markuson*, (N. D.) 64 N. W. 934. The conviction having been affirmed in this court, the remittitur was sent down and filed in the District Court of Barnes County on the 31st of October, 1895; whereupon the said District Court, on motion of the state's attorney, ordered and directed that the petitioner be imprisoned for 90 days from and after the date last stated, and that he pay the fine originally imposed, or in default of payment that he should be imprisoned as stated in the sentence entered of record on June 29th. Upon such order being entered of record a commitment thereon was issued out of the District Court, and delivered to the sheriff for service, and under said commitment the sheriff took said Markuson into custody, and now brings him before this court as a prisoner, pursuant to a writ of *habeas corpus* issued out of this court on November 2, 1895. Petitioner had never been imprisoned or taken into custody, pursuant to said judgment of June 29, 1895, at any time prior to said arrest under the warrant issued upon the order of court made October 31, 1895, as above stated. Upon such arrest the petitioner paid to the clerk of the District Court for Barnes County a portion of said fine of $200, but deducted therefrom $2 for each day which had elapsed after the expiration of 90 days from said June 29th. This deduction was made on the theory that the petitioner was constructively in jail for nonpayment of fines at all times after the original period of 90 days had run, and until he was taken into custody as above stated.

The question presented upon the sheriff's return in this proceeding is whether the petitioner can be imprisoned and punished in accordance with the original sentence, and the order made thereon by the District Court on October 31, 1895. Counsel for petitioner contends that the judgment rendered on June 29th has lapsed, and by its terms, and by the payment of a portion of the fine imposed, as hereinbefore explained, has ceased to be operative. A solution of the question presented makes it neces-

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sary to consider the terms of the judgment entered on June 29th, and the orders immediately following the judgment. The language of the judgment is plain and unambiguous. All the elements of a proper judgment are set out with terse brevity, and the judgment by its own terms was to take effect at noon of the day upon which it was pronounced and entered of record, viz, at noon on June 29, 1895. The orders are also explicit in their terms. The obvious purpose of the orders was first to stay the operation or effect of the judgment; one order being an unconditional stay for thirty days, another being a stay to take effect conditionally. The latter provided "that in case an appeal be taken that the time shall commence to run from the date of the remittitur or judgment of the Supreme Court being filed in this court." Another of the orders related to the bonds, and has been quoted at length. The orders indicate that they were made with a view to facilitate a review of the cases in the Supreme Court, although at the time when they were made no bill of exceptions had been settled, and no writ of error had been applied for by counsel. It is perfectly clear that the order with respect to continuing the bail bonds "already given in these cases by the several defendant," which bonds, by the terms of the order, were to "remain valid and binding upon the defendants," could not operate to transmute such bail into a recognizance given after conviction, and after a writ of error had been issued. The obstacles in the way of putting such a construction upon the order are insurmountable. In the first place the order did not in terms refer to the sureties on such bonds, and did not on its face purport to bind such sureties; nor would a mere attendance bond, given to secure the attendance of the accused from day to day, pending the trial of the cases, operate as a bond given after judgment, to secure the discharge of the defendants after conviction. The obligation of a bond given after conviction would be radically different, and to be binding upon sureties it would have to be reframed, and signed or assented to by the sureties in open court. Nothing of this kind was attempted. Nor did the trial

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court, after making the orders with respect to the bail bond, enter an order discharging the accused from custody, as would be proper under section 7608 of the Compiled Laws. If the accused had given a sufficient bail bond after conviction, they would be absolutely entitled to an order from the court taking the bond for their discharge from custody. Such a bond, in connection with an order discharging the prisoner from custody, would beyond a peradventure operate as a stay of execution, and would prevent the running of the time of imprisonment until the case should be sent back from the Supreme Court. The bond and the orders of the trial court, when taken together, would not operate as a stay bond after conviction, for another reason. The other purporting to continue the bail bond in force was made long prior to the application to this court for a writ of error. A convict is not entitled to his liberty on giving bail, until he first sues out a writ of error. Comp. Laws, § 7606. Finally, the order and bond construed together could not operate as a means of discharging the prisoners from custody, for the reason that when the order was made the persons were not in custody, but were out on bail. It is therefore transparently clear that the operation of the judgment was not stayed by the order which in terms refers to the bail bond given to secure attendance at the trial. We think the order was made without authority of law, and was without any binding force upon any one.

Reverting now to what occurred before the entry of said judgment, and after the court had stated that the defendants were found guilty, we remark that it appears from the record, and it is conceded to be true, that counsel then asked for delay or time within which to make up a record for the Supreme Court. We think this request was made at the proper time, in view of the provisions of section 21 of said chapter 110, which reads: "The court whose duty it shall be to render judgment in any action or proceeding growing out of a violation of the provisions of this act, shall immediately upon the conviction of the defendant render judgment; *provided*, that for prudential reasons and for the

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ordinary purposes of perfecting an appeal judgment and sentence may be suspended for a period not exceeding thirty days, and then only upon the court or judge thereof entering in a public docket to be kept for the purpose, in his own hand writing, the cause of such suspension." The legislature in this class of cases has seen fit to require (subject only to the proviso stated in section 21) that judgments shall be rendered "immediately upon conviction." The case under consideration does not fall within the proviso. If the trial court had seen fit to facilitate a review of the case, the proper course would have been to withhold and not pronounce its judgment for a period of time not exceeding 30 days after the conviction. That course is plainly marked out by the terms of section 21, but as has been seen that course was not pursued. The judgment of the court was not held in abeyance after conviction. The judgment fell from the lips of the court and was recorded at once after conviction. By its express terms it took effect upon that day at noon. Nor do we think the orders made postponing the date upon which the judgment should take effect were of any validity. We know of no authority which will permit a trial court to postpone from time to time the date at which imprisonment shall go into effect after a valid judgment has been entered declaring that the imprisonment shall begin at a definite date, which is stated in the judgment. The time at which a sentence of imprisonment begins and ends is a matter of the greatest importance, and is so considered by all the authorities. See *Ex parte Roberts*, 9 Nev. 44; *In re Strickler*, (Kan.) 33 Pac. 620; *State* v. *Voss*, 80 Iowa, 467, 45 N. W. 898. Under section 21, *supra*, the judgment may be withheld for 30 days upon the terms stated in the statute, and to facilitate a review in the Supreme Court. But we find no authority anywhere under which the time of taking effect of a judgment of imprisonment as originally pronounced may, by orders of the trial court, be postponed from time to time for any purpose or under any circumstances. True, a stay or supersedeas may be had, as has been seen, but that is different from a mere order of

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the trial court postponing the time at which a judgment shall take effect to another and different time from that stated in the judgment itself. The law has definitely fixed the terms upon which a stay of execution may be had after conviction in a criminal case. At common law no stay after conviction could be obtained, and under the statute there is but one mode prescribed. Comp. Laws, § 7606 *et seq.* It must follow that the several orders made and entered immediately after the entry of final judgment, and purporting to postpone the operation of the judgment to dates in the future, were made without authority of law, and hence were null and void from the beginning. While these orders were doubtless made with a view of keeping the accused out of jail, and for the purpose of staying the operation of the judgment, pending a contemplated review of the case in this court, they did not and could not have that operation in law, for the reasons already stated. Despite the terms of such orders, we are clearly of the opinion that the judgment entered of record on June 29th authorized the clerk of the District Court for Barnes County to issue a commitment based upon such judgment, and to deliver the same to the sheriff of that county, and that the sheriff would have been authorized under such commitment to keep the prisoners in jail until their term expired as fixed in the judgment of the court. True, the clerk cannot be censured for not issuing such commitment, for the reason that the orders of the court were spread upon the minutes, and being upon the minutes they operated as a practical barrier, despite the fact that they did not constitute a legal barrier, in the way of carrying out the terms of the sentence. We cannot gather from the record, or by the returns made by the sheriff in this proceeding, or by anything stated upon the argument here, that either the accused or their counsel are in any way responsible for the orders appended to the judgment. On the contrary it seems to be conceded that such orders, and all of them, were made by the court of its own volition, and none of said orders appear to have been requested by the defendants or their counsel. Nor can it be said that the

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petitioner has ever escaped, since judgment was entered against him. There is no such claim. When the judgment against him was pronounced the petitioner was at liberty on bail, and he was never taken into custody under the sentence until arrested on October 31, 1895. As we have shown, the sentence has never been legally stayed, and therefore it began its operation when it was pronounced, and continued to be in full force from that day until it ceased to operate by its own terms. It is an unpleasant duty to enter an order discharging the petitioner from custody, in view of the fact that he was convicted by a competent court, and has not actually suffered the punishment indicated in the final judgment of that court. But our duty is plain, and we may not shrink from its performance.

The petitioner will be discharged. All the judges concurring.

(64 N. W. Rep. 939.)

LURY A. L. SIFTON *vs.* JOHN W. SIFTON.

Opinion filed October 26th, 1895.

Action on Contract—Pleading—General Denial.

A written contract, which is the basis of the action, is set out at length in the complaint. The contract embraced certain conditions precedent to be performed on plaintiff's part, and the complaint alleged that "the said plaintiff has fully performed all the conditions of said instrument on her part." The answer embraced a general denial. On motion the District Court struck out the answer as frivolous. *Held*, that the answer raised a material issue of fact, which defendant had a legal right to have presented to a jury for determination and hence that the answer was not frivolous. Rule of *Sigmund* v. *Bank*, 59 N. W. 966, 4 N. D. 164, followed and applied.

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

Action by Lury Ann Louise Sifton against John W. Sifton. Judgment for plaintiff, and defendant appeals.

Reversed.

Andrus & Remmen, for appellant.

Young & Burke, for respondent.

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WALLIN, C. J. In this action the complaint is as follows: "(1) That on the 30th day of June, 1892, the said defendant made, executed, and delivered to said plaintiff a certain instrument in writing, in words and figures following, to-wit: 'In consideration of Lury Ann Louise Sifton waiving her right to a decree for alimony and counsel fees in the action for divorce now pending in the District Court of the Fifth Judicial District, State of North Dakota, in and for the County of Barnes, wherein she is plaintiff, and James W. Sifton, the brother of the undersigned, is defendant, and in lieu of such alimony and allowances, I, the undersigned, hereby promise and agree to pay to said plaintiff $200.00 cash at the delivery of these presents; $200.00 July 1st, 1893; $200.00 July 1st, 1894; and $200.00 July 1st, 1895. In case the undersigned shall fail to make payments, or any of them, as hereinbefore provided, then said plaintiff shall be at liberty to apply to said court for a decree for alimony. After July 1st, 1896, if the parties to said action shall fail to agree upon the amount of alimony for the support of their child, then either of said parents shall be at liberty to apply to said court for the adjustment of such alimony. The payments hereinbefore first provided for shall be in lieu of all alimony, attorney's fees, and costs, and shall bear no interest, if paid at the dates specified; *provided, however*, that the household furniture and effects now in possession of said plaintiff may be assigned to her by the court, as alimony, in addition to the payments hereinbefore provided for. Dated this 30th day of June, 1892. John W. Sifton. Lury Ann Louise Sifton.' (2) That by the terms of the said written instrument the said defendant became indebted to the plaintiff in the sum of $200 on the 1st day of July, 1894. (3) That no part of the sum falling due July 1, 1894, has ever been paid, though payment has often been demanded. (4) That the said plaintiff has fully performed all the conditions of said instrument on her part. Wherefore, plaintiff demands judgment against the said defendant for the sum of $200, with interest thereon since the first day of July, 1894, together with costs and disbursements of this action." To which

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complaint defendant made answer as follows: "Defendant denies generally and specifically each and every allegation contained in plaintiff's complaint, except as hereinafter specially admitted or qualified. Defendant admits the execution of the contract described in the plaintiff's complaint, but avers that the same was executed by him under the following circumstances, and for the following reasons: That the plaintiff in this action and the said James W. Sifton, mentioned in the complaint, at the time the contract mentioned in the complaint was executed, were husband and wife. That the said James W. Sifton was at that time anxious to get a divorce from this plaintiff, and this plaintiff was anxious to secure a divorce from the said James W. Sifton. That the said contract was entered into for the purpose of facilitating a divorce for the said James W. Sifton from his wife, this plaintiff, and for no other consideration, so far as this defendant is concerned. It was agreed at the time this contract was executed that neither the said James W. Sifton nor his agent nor attorney should put in any defense, by the way of offering any evidence on the part of the defendant in the divorce proceedings then pending between the parties aforesaid, so the plaintiff could proceed without opposition to get her divorce, not only for herself, but also for the said James W. Sifton. Defendant further alleges that he signed said contract, not as principal, but simply as the agent of the said James W. Sifton, and it was so understood by the parties to this action, at the time said contract was signed, that this defendant was not to be personally liable. Wherefore defendant asks that this action may be dismissed." A motion was made in the District Court by the plaintiff's attorneys to strike out said answer as both sham and frivolous, and for judgment for the relief demanded in the complaint. The motion was based upon the pleadings served herein, and upon the affidavit of the attorney for the plaintiff in the action for a divorce, which action is referred to in the pleadings in this action. The affidavit referred to need not be set out. It will be enough to state that its tenor and effect are to deny some of the material

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features of the defendant's answer to the complaint. After hearing counsel upon the motion, the District Court "ordered and adjudged that the answer of the defendant herein be overruled, as frivolous, and that plaintiff have judgment thereon for the relief prayed for in the complaint." From this order defendant appealed to this court.

The court below struck out the answer, and directed the entry of judgment for the plaintiff, upon the sole ground that the answer was frivolous; and hence the only question which we shall consider is whether or not the answer is frivolous, within the meaning of the law. In *Sigmund* v. *Bank*, 4 N. D. 164, 59 N. W. 966, this court said: "To be frivolous, a pleading must be so clearly and so palpably bad as to indicate bad faith on the part of the pleader. Bliss, Code Pl. § 421; Maxw. Code Pl. 555, and note 2. From the nature of the motion, it must be determined from an inspection of the pleadings only, and hence the motion need not be aided by any proof of facts extraneous to the pleadings. *Perry* v. *Reynolds*, (Minn.) 42 N. W. 471." We think this rule has the sanction of good authority and sound reason, and hence we should apply it to this case, despite the fact that a different rule may exist in some other jurisdictions, as is claimed by counsel. Tested by this rule, is the answer frivolous? We think that it is not. Referring to the complaint, the plaintiff alleges, in effect, that the contract set out as a basis of the action was executed upon a certain consideration, viz, the express "waiver" by plaintiff of her "right to a decree for alimony and counsel fees in the action for divorce." Further along in the complaint it is alleged "that the said plaintiff has fully performed all the conditions of said instrument, on her part." By the general averment last above quoted, the plaintiff duly alleges performance of the conditions precedent in the contract to be performed on her part. Comp. Laws, § 4927. By this averment of performance on her part, the plaintiff, in effect, declares that she has met and fulfilled the precedent obligations resting upon her under the contract sued upon, and upon the performance of which alone the contract

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would become operative as against the defendant. It is manifest that the averment of fact which we are considering is vital to the plaintiff's recovery, and that without said averment the complaint would fail to state a cause of action. But this averment of fact is met by the denial contained in the answer. Nor is the effect of such denial waived or destroyed by any subsequent admissions made in the answer. The vital issue of fact thus presented is one which the defendant had a legal right to have determined by a jury, and to deprive the defendant of such right by striking out his answer is therefore prejudicial error. For this error the order must be reversed. We will only add that, with respect to the other defenses set out in the answer, they are in our opinion, of a character to be more properly considered when raised by a demurrer, or by objections raised at the trial.

The order appealed from herein must be reversed. All concur.

(65 N. W. Rep. 670.)

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

Opinion filed October 28th, 1895.

Action on School Bonds—Evidence of Want of Consideration.

Under the decision of the court on the former appeal in this case (58 N. W. 499, 4 N. D. 30,) it was held that the defendant could show a want of consideration for the bonds sued on by proving that defendant received neither cash nor audited and canceled warrants as a conderation for them. For error in refusing to allow such proof the judgment is reversed.

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

Action by Samuel D. Flagg against school district No. 70, Barnes County. Judgment for plaintiff, and defendant appeals.

Reversed.

G. K. Andrus, for appellant.

Ball & Watson, for respondent.

CORLISS, J. When this case was before us on the former

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appeal (4 N. D. 30, 58 N. W. 499) we held that the bonds in question were not negotiable instruments, and that, therefore, the defendant could make, as against the plaintiff, the same defense of want of consideration that it could have made against the original payee had the bonds never been transferred. We also held that such want of consideration could be shown by proving that the bonds were not sold either for cash or for warrants or claims actually audited and surrendered. The defendant had no right to issue them for any other consideration. That no warrants or claims were ever audited and surrendered we held could not be shown as against the recitals in the certificate on the bonds to affect the power of the defendant to issue such bonds. The question of power we regarded as no longer open to inquiry. But we distinctly held that if, as a matter of fact, these bonds were not sold, either for cash or for warrants actually audited and canceled, they were without consideration and void. On the trial the defendant offered to prove that neither money nor audited and canceled warrants or claims furnished the consideration for the sale of these bonds; that in fact no warrants were audited before or at the time they were delivered, and that all the defendant had ever received for them was a promise to deliver up certain warrants to the defendant, and that this promise had never been fulfilled. It is not pretended that cash was paid for these bonds. If no warrants were ever in fact audited, then no consideration growing out of the surrender of such warrants could possibly exist. But the offer of the defendant went still further, and included proof of the fact that no warrants of any kind were received by the defendant in exchange for these bonds, but only a naked unfulfilled promise to surrender such warrants. The error of the trial court was undoubtedly caused by a misunderstanding of our decision on the former appeal. What we intended to hold—and we think that the opinion in the case shows this—was that the fact that warrants had not been audited and surrendered could not be shown to establish a want of power to issue the bonds, but could be proved as bearing on the question

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whether in fact the bonds were issued in exchange for warrants which had been audited and canceled, for the purpose of establishing a want of consideration for their issue. The defendant should have been allowed to prove these facts, and for the error of the court in excluding the evidence the judgment is reversed, and a new trial is ordered. All concur.

WALLIN, C. J. (concurring.) In some respects I concur in the views of a majority of the court as expressed in the foregoing opinion, but I desire to add a few words as explanatory of my individual views. The statute under which the bond in question purports to have been issued contemplates that creditors holding outstanding orders or claims must surrender them to the district, and that the officials shall cancel the same before any bond can be registered or certified by the county clerk. The surrender and cancellation is as clearly a condition precedent to registering and certifying the bonds as is the vote of the people of the district. This matter of the surrender and cancellation of the outstanding orders is made very emphatic in the statute. Section 5 declares that "no bonds shall be issued until the claims for which they are issued shall be delivered up and canceled." With respect to indorsing and registering the bonds, section 6 provides that the county clerk, before doing either, must make an investigation of certain records, and must be "satisfied therefrom that such bonds are authorized to be issued as provided for in this act, and the claims for which they are issued are delivered up and canceled." This court held unanimously in its former opinion—and such is undoubtedly the law—that the certificate operates as an estoppel as fully as it would do if it were indorsed upon a negotiable instrument, and therefore this certificate must be held to be as broad as the facts which are to be investigated by the certifying officer; and among such facts, as has been shown, is the fact that the bond on which the certificate is indorsed was issued after some creditor had surrendered his claims against the district, and such claims had been

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canceled by the district. In my opinion, the fact of such surrender and cancellation cannot be reopened. It seems very clear that the statute does not contemplate that a claim holder who has surrendered his claims to be audited and canceled, and whose claims have been audited and canceled prior to the indorsement and registration of the bonds, can be called upon to retake possession of such canceled claims, and again pass them over to the district officers as a new and second consideration for the very bond voted to fund and take up his previously surrendered and canceled claims against the district. I cannot myself understand the necessity for such an absurd proceeding, nor do I see how it could be lawfully carried out in fact; and, if it could, I cannot see that any financial advantage would result to the district by its successful accomplishment. A majority of the court held in the former opinion that such surrendered and audited orders or claims would, under the statute, constitute a valid consideration for any bond issued to take up the same. For my part, I adhere to that view, for reasons very clearly set forth in the opinion formulated by my Brother BARTHOLOMEW in the former opinion, but I am also quite clear that the original surrender of the claims and their cancellation constitute the only delivery of orders or claims to the district which is necessary to be had or done, and no other or further consideration need be shown. I think, too, that the certificate estops the district from showing (as against the plaintiff, who bought the bonds in good faith and for cash) that no claims were in fact ever surrendered, audited, or canceled by any one. To so construe the certificate would, in my opinion, defeat its purpose entirely, and reopen all the questions covered by the certificate. But it must be kept in mind that the bond is to be executed, indorsed, and registered before it can be negotiated, and put afloat by the district. After a lawful bond has been signed, registered, and indorsed, their remains to be done the final act of negotiating the bond, which, of course, includes the vital act of delivery. It is at least supposable that a bond issued, registered, and indorsed as the statute directs may have

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been wrongfully and illegally delivered. In this case no claim is made that the bond in question was sold by the district for cash, but the statute provided that bonds might be sold for cash or issued to any person whose claims had been surrendered and canceled. Now, to defeat the *prima facie* case made by the plaintiff, I think any evidence tending to show that the bond in question was in fact delivered to some person who neither paid cash nor surrendered claims to the district was entirely competent, and to exclude such evidence when offered by the district was prejudicial error. The door should be thrown open for the admission of any such evidence, but I am clear that the district is estopped from showing that no claims were ever surrendered to the district or canceled by any person. That question is, in my judgment, foreclosed by the certificate.

(65 N. W. Rep. 674.)

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WILLIAM BRAITHWAITE *vs.* W. B. JORDAN.

Opinion filed October 28th, 1895.

Action Upon Appeal Bond in Admiralty—Jurisdiction of State Court.

A libel in a possessory action in *rem* was filed in the District Court of the Territory of Dakota, sitting as a court of admiralty. The plaintiff herein defended the action as claimant of the vessel, and was successful. On appeal by the libelants to the Territorial Supreme Court, the undertaking sued on was given to secure a stay of proceedings. The judgment of the District Court being affirmed, plaintiff, who was respondent on the appeal, brought suit on such undertaking. *Held*, that the action was not an integral part of the original admiralty case, and that, therefore, the Federal District Court for the district of North Dakota, as the successor in admiralty cases of the Territorial District Court, did not have exclusive jurisdiction of the proceedings to enforce such undertaking, although the plaintiff might have secured in that court, in the very action in which the undertaking was given, a summary judgment against the persons who signed such undertaking,—the defendants herein,—but that an action on such undertaking would lie in the District Court of this state.

Action Not One to Enforce Judgment.

Also, *held*, that this action on the undertaking is not a proceeding to enforce the judgment in the admiralty case, within the meaning of the rule that the court, whether state or federal in which a judgment is rendered, has exclusive jurisdiction to enforce it.

Concurrent Jurisdiction—Jury Trial.

Also, *held*, that no principle of comity requires the state courts to refuse to take cognizance of the case. It is no objection to the jurisdiction of the court in entertaining a common-law action of debt that the plaintiff has in another tribunal a remedy more speedy and simple in is character, and equally efficacious. Especially should this be the doctrine were to compel him to resort to the summary remedy would deprive him of the right to a trial by jury.

Undertaking was a Valid Common-law Obligation.

The judgment from which the appeal was taken merely adjudged that the claimant was entitled to possession, and ordered the marshal, who was legally in custody of the property, to deliver it to him. *Held* (by Corliss, J.), that this was not a judgment directing the delivery of personal property, within the meaning of section 416 of the Code of Civil Procedure, under revision of 1877 (Comp. Laws, § 5221), assuming such statute to be applicable to admiralty cases, and that, therefore, on this assumption, the appellants could have secured a stay of proceedings on the giving of a mere cost bond. Code Civ. Proc. § 422, Revision 1877. The undertaking, therefore, so far as it was more than a mere cost undertaking, was without consideration, and void as a statutory undertaking. But the majority of the court thought that the undertaking would be

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valid, even under the statute. But, *held*, that the practice on appeal in the admiralty case to the Territorial Supreme Court was not regulated by the territorial statutes, but by the rules and usages of courts of admiralty, and that as the appellants had no absolute right, under such rules and usages, to perfect an appeal to the Territorial Supreme Court, and secure a stay of execution pending such appeal, on the giving of a mere cost bond, and as the respondent in the appeal did in fact treat the undertaking as entitling the appellants to a stay, by abstaining pending the appeal from all attempts to enforce the judgment in his favor, *held*, further, that the undertaking was valid as a common-law obligation supported by a sufficient consideration.

Waiver of Statutory Requirement in Bond.

It is no defense to an action on a statutory undertaking on appeal that the court has not fixed the amount thereof under the statute. Such provision is for the benefit of the respondent, and if he waive it, and treat the undertaking as sufficient to accomplish the purpose for which it was given, the undertaking may be enforced by him, the same as if the statute had been complied with.

Stipulation for Value—Voluntary Bond.

The vessel at the time the appeal was taken was in actual possession of the appellants, and this appeared from the record in the case. The bond recited that the judgment was against them for delivery of possession to claimant. It was for $15.000. Having been given to secure a stay of proceedings under these circumstances, it was necessarily given to enable the appellants to retain possession pending the appeal. Therefore, *held*, that it was in the nature of a stipulation for value, and claimant having, in reliance thereon, actually refrained from disturbing the appellants in their possession of the vessel pending the appeal, the instrument was valid as a voluntary bond.

Stipulation for Value in Possessory Action Enforced in Any Court.

Unlike stipulations for value in other cases, a stipulation for value in a possessory action can be enforced in any court having jurisdiction of an action of debt, for the amount due on the stipulation.

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

Action by William Braithwaite against W. B. Jordan and others on an appeal bond. From a judgment sustaining a demurrer to the complaint, plaintiff appeals.

Reversed.

G. W. Newton, for appellant.

Courts of admiralty exercise a dual jurisdiction (a) as instance courts, (b) as prize courts. 3 Blackst. Com. 108, n. 14; *Percival* v. *Hickey*, 18 Johns. 257; *Doanes Adm.* v. *Penhallow* 1 Dall. 218. As instance courts they are governed by one system of laws, and

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as prize courts by another system. 3 Blackst. Com. 108. The instance court is governed by the civil law, the laws of Oleron and the customs of admiralty modified by statute. As an instance court the admiralty and the common law courts have exercised concurrent jurisdiction, whereas the admiralty as a prize court, has maintained exclusive jurisdiction of matters of prize. *Henderson* v. *Clarkson*, 2 Dall. 174; *Slocum* v. *Mayberry*, 2 Wheat. 1; *Novian* v. *Hallett*, 16 Johns. 327; *Doane* v. *Penhallow*, 1 Dall. 218; *Ross* v. *Rittenhouse*, 2 Dall. 160; *Sasportas* v. *Jennings*, 1 Bay. 470; *Finlay* v. *The Ship William*, 1 Pet. Adm. 12; *Montgomery* v. *Jecker*, 13 How. 498; *U. S.* v. *Weed*, 5 Wall. 62; *Rose* v. *Himely*, 2 Wheat. App. 41.

The case at bar is not affected by decisions in cases of prize or by the rule of exclusive jurisdiction in the admiralty is such cases, for the reason that *Rea* v. *The Eclipse* was not within the admiralty jurisdiction as a prize court, but upon the instance side of the admiralty.

The common-law courts have jurisdiction of all causes cognizable upon the instance side of the admiralty court, except where the proceeding is *in rem* to enforce a maritime lien. *The Belfast*, 7 Wall. 624; *The Moses Taylor*, 4 Wall. 411. There is nothing in the admiralty rules that effects the appeal from the Territorial District Court to the Supreme Court of the Territory taken in the "Eclipse" case. The organic law §§ 1865, 1869, 1909 and 1910 vested the Territorial District Courts with jurisdiction of cases arising under the constitution and laws of the United States. *Steamer City of Panama* v. *Phelps*, 25 L. Ed. 1061, 11 Otto 453. By the enactment of § 1910 the District Courts of the territory were not made Circuit and District Courts of the United States. They are courts of the territory invested for some purposes with the powers of the courts of the United States. *Reynolds* v. *United States*, 8 Otto 145 (25 L. Ed. 244); *United States* v. *Beebe*, 2 Dak. 292, 11 N. W. Rep. 505. There was a judgment in the District Court as to the ownership and right of possession of the boat in question. The defeated parties sought a review of that judgment

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by appeal to the Territorial Supreme Court, as provided by the territorial statute. They put up the undertaking required by § § 414 and 416 Code of Civil Pro. and in one instrument § 420 Code Civil Pro. This was not an admiralty bond, admiralty recognizance, or admiralty stipulation. It was an undertaking on appeal from the Territorial District Court in an action wherein it was attempting to exercise jurisdiction under the constitution and laws of the United States. It is admitted that under § 22 of the enabling act the case of *Rea* v. *The Eclipse* was properly remanded by the United States Supreme Court to the District Court of the United States for the district of North Dakota, and that that court properly entered up judgment as directed by the mandate against the libellants and their stipulators (for costs) and the intervenors and their stipulators (for costs). *Binney* v. *Porter*, 9 How. 235; *Forsyth* v. *United States*, 9 How. 571; *McNulty* v. *Batty*, 10 How. 72. But such fact does not change the rights of the parties to the undertaking in question. The relation of the parties is contractual and were fixed and vested before the enabling act was passed. The territorial statute under which the undertaking was given, neither the undertaking itself vests appellant or the court with the privilege or power of entering up summary judgment against the respondents. Stipulations for costs are enforced summarily, stipulations for value will stand in the place of the *res*. When a stipulation is taken in an admiralty suit for the property subject to legal process and condemnation, the stipulation is deemed a mere substitute for the thing itself and the stipulators liable to all those authorities on the part of the court, which it could properly exercise if the thing itself were still in its custody. *The Palmyra*, 12 Wheat. 1. *Bartlett* v. *Spicer*, 75 N. Y. 528; *The Schooner Ann Caroline* v. *Willis*, 2 Wall. 538; *The W. H. Webb* v. *Barling*, 14 Wall. 406. Summary judgment by motion is never deemed an exclusive remedy. It is cumulative. 1 Enc. Pl. and Pr. 1018. The case at bar is entirely distinct from the judgment in *Rea* v. *The Eclipse*. At the best that judgment is a mere incident. A purely personal contract

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without relation to any maritime service is not within the admiralty jurisdiction. *The Virginia*, 2 Paine, 115. The damages recoverable have nothing essentially maritime in their composition. *The Paola*, 32 Fed. Rep. 174. The undertaking in question did not take the place of the Eclipse. It is not a stipulation for value in admiralty to stand in the place of the *res* or any part or interest in it. *Hagan* v. *Lucas*, 10 Pet. 400; *Bartlett* v. *Spicer*, 75 N. Y. 528; *Ramsey* v. *Allegre*, 1 Wheat. 611; *Fox* v. *Patton*, 22 Fed. Rep. 746. And the state court has concurrent jurisdiction of a suit upon it. Hawes Jurisdiction of Courts § 47. *Myers* v. *Isaacs*, 35 La. Ann. 221, 30 L. Ed. 642; *Lacaze* v. *Penn.* 1 Addison 58.

Edgar W. Camp, for respondent.

Admiralty courts have jurisdiction to enforce bonds given therein. *The Baltic*, Fed. cases No. 826; *The Wanata*, 5 Otto 600; *The Allegator*, Fed. cases No. 248; *Nelson* v. *U. S.*, Fed. cases No. 10,116. Bonds are, to all intents and purposes, stipulations in the admiralty. Dunlap's Prac. 164. *McLellan* v. *U. S.* Fed. cases No. 8895. It matters not whether security in admiralty and maritime causes be a bond, recognizance or stipulation as the court has inherent authority to take it, and to proceed to award judgment or decree thereon according to the course of the admiralty, unless where some statute has prescribed a different course. *The Octavia*, Fed. cases No. 10,423; Conkling' Adm. 2nd Ed. 105; *Holmes* v. *Dodge*, Fed. cases, No. 6637; *Gaines* v. *Travis*, Fed. cases No. 5180; Ben. Adm. 2nd Ed. 290; *In Re Sawyer*, 21 Wallace 235; *The Sydney*, 47 Fed. Rep. 260. No discrimination is made between appeal bonds and other stipulations in admiralty. 2 Brown's Civ. and Adm. Law 407, 429, 440; *The Elmira*, 16 Fed. Rep. 138; *Bartlett* v *Spicer*, 75 N. Y. 528; *Campbell* v. *Hadley*, Fed. cases No. 2358; *The Deleware*, Fed. cases No. 3762; *The Oregon*, 15 Sup. Ct. Rep. 860, 3 Blackstone 108. A stipulation or bond in admiralty is regarded as a fund in court to be distributed by that court. *The Tolchester*, 42 Fed. Rep. 180; *Pearce* v. *Ins. Co.*, 96 U. S. 461. Admiralty having jurisdiction of

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the main case, has jurisdiction of all incidental and ancillary proceedings. 2 Brown 107, *DeLovio* v. *Boit*, Fed. cases No. 3776, *Dean* v. *Angus*, Fed. cases No. 3702; *Munks* v. *Jackson*, 66 Fed. Rep. 571; *Campbell* v. *Hadley*, Fed. cases No. 2358; *Jackson* v. *Munks*, 58 Fed. Rep. 596. In admiralty proceedings stipulations and bonds are treated as ancillary and subsidiary to the main case. *The Eclipse*, 135 U. S. 599; *Ramsey* v. *Allegre*, 12 Wheat. 611-630; 2 Browne 142-433 and 541. A suit upon an appeal bond in equity is not an original suit but is an off-shoot or out-branch of the suit in which the bond was given and jurisdiction of that suit gives jurisdiction of the subject matter of this suit. *Seymour* v. *P. and C. Con. Co.*, Fed. cases No. 12,689; *Arnold* v. *Frost*, Fed. cases No. 558; *Hatch* v. *Dorr*, Fed. cases No. 6206; *Lamb* v. *Ewing*, 54 Fed. Rep. 269. The jurisdiction of a court is not exhausted by the rendition of a judgment but continues until that judgment is satisfied, process subsequent to judgment is as essential to jurisdiction as process antecedent to judgment. *Rio Grande* v. *Vinet*, 132 U. S. 478; *Thompson* v. *McReynolds*, 29 Fed. Rep. 657. Debt on recognizance of bail is a continuation of the original suit, because as a general rule the action must be brought in the same court. *Davis* v. *Packard*, 7 Pet. 276; *McDermott* v. *Doyle*, 11 Mo. 443; *Burtus* v. *McCarty*, 13 Johns. 424; *Davis* v. *Packard*, 6 Wend. 327; *P. P. C. Co.* v. *Washburn*, 66 Fed. Rep. 790. Where the Federal Court had sole jurisdiction of the principal matter it should have also of the subsidiary. *Bartlett* v. *Spicer*, 75 N. Y. 528. The state court has no jurisdiction of this cause. *Penhollow* v. *Doane*, 3 Dallas, 54; *Jennings* v. *Carson*, 4 Cranch. 2; *The Blanche Page*, Fed. cases No. 1524; *Ex parte Philips*, 25 L. Ed. 781.

Corliss, J. Although the steamer Eclipse has for years lain at the bottom of the Missouri river, the litigation connected with her shows no signs of decadence. 4 Dak. 218, 30 N. W. 159; on appeal, 135 U. S. 599, 10 Sup. Ct. 873; 1 N. D. 455, 48 N. W. 354; 1 N. D. 475, 48 N. W. 361; 2 N. D. 57, 49 N. W. 419; 3 N. D. 365, 56 N. W. 133. In this case Capt. Braithwaite is seeking to recover damages for breach of an undertaking given by defendants

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on appeal from the District Court to the Supreme Court of the Territory of Dakota, from a judgment rendered in a proceeding in admiralty instituted to try his title to, and right to the possession of, this vessel. The questions of law on the merits which are here at issue arise on demurrer to the plaintiff's complaint. The trial court sustained the demurrer. The plaintiff has appealed. It is obvious from the complaint that the undertaking was given as a cost bond, and also for the purpose of securing a stay of proceedings under the judgment appealed from pending the appeal. It is in the following form: "Whereas, on the 18th day of September, 1884, in the District Court within and for the Third Judicial District, the above named respondent, William Braithwaite, recovered judgment against the above named appellants for the possession of said steamer Eclipse and costs, and the above named appellants and interveners, feeling aggrieved thereby, intend to appeal therefrom to the Supreme Court of the Territory of Dakota: Now, therefore, we do hereby undertake that the said appellants will pay all costs and damages which may be awarded against appellants on said appeal, or on a dismissal thereof, not exceeding two hundred and fifty dollars, and do also undertake that if said judgment so appealed from, or any part thereof, be affirmed, or said appeal be dismissed, the said appellants will pay the amount directed to be paid by said judgment, or the part of such amount as to which the said judgment shall be affirmed, if it be affirmed only in part, and all damages and costs which shall be awarded against said appellants on said appeal, and also undertake to obey any order the appellate court may make in the premises; conditioned, however, that our liability hereunder shall not exceed fifteen thousand dollars. Dated December 16, 1884." On the appeal the judgment was affirmed by the Supreme Court of the Territory of Dakota.

Preliminary to the consideration of the merits, we must settle the question of the jurisdiction of the state courts to take cognizance of this action. Counsel for defendants insists that the power to render judgment on the undertaking sued on is vested

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exclusively in the United States District Court for the district of North Dakota, sitting as a court of admiralty. He founds his contention upon the fact that the undertaking is the outgrowth of an action in admiralty, and on the proposition that any proceeding to enforce it is merely incidental to the main action in the course of which it was given. He asserts that a suit on the undertaking is an offshoot from the original proceeding,—is supplementel in character,—and that, therefore, the court in which it was given, and the court only, has power to enforce it. His argument certainly derives no support from the analogies of the law. If the doctrine to maintain which he has striven with great force in this court be a true doctrine, it stands alone. In no other case is it the rule that the court in which a bond, recognizance, undertaking, or other security is taken in the course of a judicial proceeding pending therein has exclusive jurisdiction of an action brought to enforce it. (Of course, where *scire facias* is resorted to, the court in which the main proceeding was had is the only court which can take jurisdiction.) An action on such security, whatever be its form, is always as much incidental to the original suit as this action is incidental to the admiralty proceeding in which the undertaking sued on was given. The security is in the same sense an outgrowth of the main litigation, and the action thereon is as strictly an offshoot from the original proceeding, as is any suit to enforce an appeal bond given in the course of an admiralty action an offshoot from such original proceeding in admiralty. And yet, aside from admiralty cases, no case can be found—with possibly a single exception, to which we will hereafter allude—holding that a suit to enforce any bond given during the progress of any judicial proceeding must be brought in the tribunal in which it was given. Undertakings given on suing out writs of attachments; undertakings given to secure the discharge of attachments; undertakings to obtain orders of arrest; undertakings to secure release from imprisonment thereunder; supersedeas bonds and undertakings on appeal; bonds given on the allowance of writs of injunction; bonds given by the plaintiff,

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and also bonds given by the defendant, in replevin actions, to obtain possession *pendente lite* of the property in controversy,—all these and other obligations given in the course of judicial proceedings may, in the absence of some statute to the contrary, be sued on in any court having jurisdiction of actions on contract involving a like amount. That the court in which any such security is given is not vested with exclusive cognizance of an action thereon is apparent from the general trend of practice, which is to institute such an action in any tribunal possessing jurisdiction of actions on contract, where the amount is the same as that for which suit is brought on such security. If there is any class of actions as to which it might be claimed with great force that the exclusive cognizance of actions on a judicial bond inheres in the court in which it was given, it is the class to which belong actions on bonds given in claim and delivery proceedings in replevin cases. Proceedings to enforce such bonds are not only incidental to the main case, and an offshoot therefrom, but they are also supplemental in their character to the original action. The property to recover which the replevin suit is brought is released, and the bond substituted for its possession. In the event of the sheriff's inability after judgment, to produce the property or collect its adjudged value, the successful litigant, in proceeding to enforce the bond, is merely pursuing his original purpose to secure redress for the wrong done him in depriving him of the possession of his property. Such action is strictly supplemental in its nature, and if, in any case aside from the class of cases to be hereafter noted, a subsequent proceeding to enforce a judicial bond could be regarded as in any sense an essential part of the prior suit, it is in just such a case; and yet we can find no authority which holds that the exclusive cognizance of an action on such a bond is vested in the court in which it was given. In *McDermott* v. *Doyle*, 11 Mo. 443, the court ruled, not that the court in which the replevin bond was given had exclusive jurisdiction of an action to enforce it, but that the action should have been brought in such court, unless the plaintiff was prevented from suing on the

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bond in that court. The language of the court in that case is that "the bond was given in the circuit court, and suit should have been instituted on it in that court, unless the party suing was prevented from instituting his suit in that court. The action on the bond, for a breach thereof, is virtually a continuance and part of the original detinue suit; and to permit the plaintiff to sue on the bond in the court of common pleas would be to permit him to divide his action, and prosecute one branch of it in the circuit court, and the other in the common pleas. On this point authorities are very abundant." In the first place, it is to be noticed that by necessary implication the court recognizes the fact that the question is not one of jurisdiction, by so qualifying the rule there enunciated as to allow the plaintiff to sue in another court when he is unable to bring his action in the court in which the bond was given. The utmost scope of the decision is that it is the duty of the plaintiff to sue in the latter court, if possible. To sustain this novel rule in actions on replevin bonds, the court cites the cases which lay down such a rule with respect to recognizances of bail. But this rule had its origin in a peculiar privilege enjoyed by the obligors on such recognizances, conferred upon them by statute. When proceeded against in the court in which such recognizance was taken, the statutue allowed the recognizors to retry the merits of the original action in which the recognizance was given, although judgment had already been rendered in such original action against the defendant therein. See the opinion of Smith, J., in *Lacaze* v. *Pennsylvania*, 1 Add. 59–90, and of Chew, J., in same case, at page 68. The courts have refused to allow the plaintiff to sue in another tribunal when he could bring his action in the court in which the recognizance was given, because they have assumed that the latter court only could give the recognizors the relief provided for by statute, or because, as some of the cases seem to indicate, no other court could afford the recognizors as effectual relief. According to Smith, J., in *Lacaze* v. *Pennsylvania*, 1 Add. 59-90, the foundation of the rule that the recognizors must be proceeded

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against in the court in which the recognizance is a matter of record is that no other court can give them the equitable relief provided for by the statute; and according to the United States Supreme Court in *Davis* v. *Packard*, 7 Pet. 276, the rule rests upon the supposition that the court in which the recognizance was given is more competent to relieve the recognizors. It is therefore obvious that the foundation of the rule is the protection of the recognizors against the loss or impairment of this special privilege, statutory in its origin. The plaintiff cannot force them into a court in which they will be deprived of it altogether, or, at the most, will enjoy it shorn of a portion of its efficacy, unless he is powerless to sue in the court in which the recognizance was given. The rule is not that no other court possesses jurisdiction to entertain the action, but that the recognizors may, for their protection, insist that, when possible, the plaintiff shall proceed against them in the court in which they gave the recognizance. It is purely a personal privilege, and if the defendants waive it the case may proceed in any other tribunal in whose jurisdiction over the case they acquiesce. *Davis* v. *Packard*, 6 Wend. 327. This could not be done if such tribunal did not possess jurisdiction of the subject-matter, as consent will never confer such jurisdiction. In many cases the recognizors have been sued in another court, and the jurisdiction of such court sustained. *Davis* v. *Gillet*, 7 Johns. 318; *Haswell* v. *Bates*, 9 Johns. 80; *Gardiner* v. *Burham*, 12 Johns. 459. See, also, *Burtus* v. *McCarty*, 13 Johns. 424, and *Davis* v. *Packard*, 7 Pet. 276. Moreover, a recognizance was a matter of record, and in the nature of a judgment against the recognizors in the case in which it was given. *Davis* v. *Packard*, 6 Wend. 327, 330, 331; *Respublica* v. *Cobbett*, 3 Dall. 467-475. Proceedings to enforce it were by *scire facias*. They might therefore be regarded as part of the original action with much greater reason than an action like the one at bar, on an undertaking on appeal. It is therefore clear that the cases cited to support the decision of the court in *McDermott* v. *Doyle*, 11 Mo. 443, do not sustain it, in

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so far as that case may be regarded as holding that exclusive jurisdiction of a proceeding to enforce a replevin bond resides in the court in which it was given. We feel justified in asserting it to be the general rule that the plaintiff may, in the absence of a statute regulating the matter, enforce any bond, undertaking, or other security given in the course of a judicial proceeding, in any court having jurisdiction of an action on contract for the amount he seeks to recover; and we are unable to discover any reason why this rule should not apply to an undertaking on appeal given in an admiralty action in *rem*. We are at a loss to understand on what principle it can be claimed that admiralty courts exercise a more extended jurisdiction than common-law courts in analogous cases. Formerly their powers were very much circumscribed, and, while it is true that their jurisdicition and powers have been considerably enlarged, we do not believe that they are in the possession of this exclusive jurisdiction which is not enjoyed by common-law courts in similar cases.

But counsel for defendants earnestly urges that a strong array of authority supports his contention. We are unable to agree with him in the view which he takes of the decisions he cites. It is undoubtedly true that courts of admiralty have power summarily to render judgment against stipulators upon any stipulation given during the progress of an admiralty proceeding, and that such judgment may be rendered in the very proceeding in which the stipulation was given. No new suit is necessary. Nor does it matter whether the stipulation is for value or for costs, or is given to perfect an appeal, or stay execution during the pendency thereof. *U. S.* v. *Ames*, 99 U. S. 35; *The Palmyra*, 12 Wheat. 1; *The Webb*, 14 Wall. 406; *The Wanata*, 95 U. S. 600; *The Lady Pike*, 96 U. S. 461; *Sawyer* v. *Oakman*, 11 Blatchf. 65, Fed. Cas. No. 12,403; *The Blanche Page*, 16 Blatchf 1, Fed. Cas. No. 1,524; *Id.*, 17 Blatchf. 221, Fed. Cas. No. 1,525; *The Alligator*, 1 Gall. 145, Fed. Cas. No. 248; *McLellan* v. *U. S.*, 1 Gall. 227. Fed. Cas. No. 8,895; *Nelson* v. *U. S.*, Pet. C. C. 235, Fed. Cas. No. 10,116; *The Virgin*, 8 Pet. 538; *The Baltic*, Fed. Cas. No. 826; *The*

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Sydney, 47 Fed. 260; 2 Conk. Adm. p. 114; *Bartlett* v. *Spicer*, 75 N. Y. 528. By virtue of admiralty rules 3 and 4 of the United States Supreme Court, the same practice is prescribed with respect to stipulations or bonds given in proceedings in personam to secure the discharge of an attachment or the release of the defendant from arrest. See these rules in Ben. Adm. pp. 381, 382.

Nor does the fact that a bond, instead of a stipulation, is taken, alter the rule that the admiralty court may, in the same proceeding, summarily enforce the obligation. Bonds are regarded in admiralty as stipulations to be enforced in the same manner. *The Wanata*, 95 U. S. 600; *The Alligator*, 1. Gall. 145, Fed. Cas. No. 248; *McLellan* v. *U. S.*, 1 Gall. 227, Fed. Cas. No. 8,895; *Nelson* v. *U. S.*, Pet. C. C. 235, Fed. Cas. No. 10,116; Conk. Adm. 434; *The Sydney*, 47 Fed. 260; Dunl. Adm. Prac. 164. Neither does the power of the court to render in the same action judgment against the parties bound by the stipulation or bond depend upon their express consent recited in the obligation, or their submission to the jurisdiction of the court by the terms of the security. It was long customary to embody such submission and consent in stipulations, and this is still done in many cases. It is possible that this doctrine that an admiralty court may proceed in the same suit summarily against the stipulators may have had its origin in such submission and consent. But, however this may be, such doctrine no longer rests thereon. In several cases in which this practice was upheld and followed with respect to supersedeas bonds on appeal, such bonds contained no clause by which the obligors in terms submitted themselves to the jurisdiction of the court, nor did they contain any consent that execution might issue against them in the same action in a summary manner. *The Sydney*, 47 Fed. 260; *The Blanche Page*, 16 Blatchf. 1, Fed. Cas. No. 1,524; *Id.*, 17 Blatchf. 221, Fed. Cas. No. 1,525; *The New Orleans*, 17 Blatchf. 216, Fed. Cas. No. 10,181; *The Wanata*, 95 U. S. 600. See, also, *The Alligator*, 1 Gall. 145, Fed. Cas. No. 248; *Sawyer* v. *Oakman*, 11 Blatchf. 65

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Fed. Cas. No. 12,403; *Ex parte Sawyer*, 21 Wall. 235. Mr. Conklin, in his work on Admiralty Practice, in which he declares that bonds and stipulations are placed in the same category, so far as the procedure to enforce them is concerned (page 434,) sets out at length the forms of bonds which may be given, instead of stipulations, in various stages of an admiralty proceeding; and in none of them is any submission to the jurisdiction of the court, or consent to summary proceeding to enforce the bond, to be found. Conk. Adm. pp. 574, 575, 581, 582, 589. He says that in this country the clause expressing the consent of the stipulators that execution issue against their property, on the bond to enforce the decree, is not necessary. *Id.*, p. 582, note. We are strongly of the opinion that the United States District Court for the district of North Dakota has jurisdiction to render judgment against the persons who executed the undertaking in suit, and to this extent we agree with counsel for defendants. It has the same power which it would have had if the admiralty suit in which such undertaking was given had been instituted in such court subsequently to statehood. It is the successor of the old Territorial District Court in which this action was brought, so far as such court was vested with admiralty jurisdiction. Section 22 of the enabling act. *The Walla Walla*, 44 Fed. 4. That the Territorial District Court was vested by the act of congress with the same admiralty jurisdiction as was vested in the several District Courts of the United States, is clear from the language of section 1910 of the Revised Statutes of the United States, which declared that the District Courts of the several territories therein referred to (Dakota being one of them) should have and exercise the same jurisdiction in all cases arising under the constitution and laws of the United States as was vested in the Circuit and District Courts of the United States. The authorities are explicit that under such legislation the same admiralty jurisdiction is vested in the Territorial District Courts as is vested in Federal District Courts. *Houseman* v. *Cargo of The North Caro-*

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lina, 15 Pet. 40; *The City of Panama*, 101 U. S. 453; *The Eclipse*, 135 U. S. 599, 10 Sup. Ct. 873. That the Territorial District Court had admiralty jurisdiction was held by the court in *The Eclipse* case; and that the proceeding in which the undertaking sued on was regarded by that court as an admiralty proceeding is apparent, not only from the language of the opinion in that case, but also from the fact that, being vested by congress with the duty of deciding what cases were and what were not exclusively of federal cognizance, on remanding them after final decision (see section 22 of the enabling act,) the court remanded *The Eclipse* case to the United States District Court for the district of North Dakota, instead of to the State District Court. Therefore, in determining what power the Federal District Court for the district of North Dakota has to enforce the undertaking in suit, we must proceed on the same theory on which we would proceed if the original admiralty suit had been commenced after such Federal Court had, by the admission of North Dakota into the Union, come into existence. The authorities seem to warrant the counsel for defendants in his contention that that court has full jurisdiction to enforce the undertaking sued on. But the right to exercise jurisdiction does not necessarily carry with it the right to an exclusive exercise of such jurisdiction. The plaintiff may at his election, proceed in that court, but we do not think he is bound to resort to that tribunal. The language of Smith, J., in *Lacaze* v. *Pennsylvania*, 1 Add. 59, 89, 90, in which this very question was involved, is in harmony with our views: "That all proceedings legally commenced in any court to which the parties have agreed to submit may be more properly carried into execution by that court than by any other, and that no superior court ought to prohibit the inferior court from carrying such proceedings to execution, unless when authority is expressly given to the Superior Court for this purpose, seems not to admit of dispute, when the party entitled to the effect of those proceedings applies to the inferior court to have them carried into execution. But does it follow that, if the party entitled to such effect

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chooses to apply to a Superior Court of common-law and general jurisdiction, the Superior Court is precluded from carrying into effect any of the acts of the inferior court? Does this follow, especially when the party applying has been forced into the inferior court? If the party who has chosen the admiralty jurisdiction in which to institute a suit should be confined to that court to the conclusion of the transaction, does it follow that the other party, who has been forced into it, should be thereby deprived of his election of applying to the courts of common-law and of trial by jury to carry into effect a stipulation taken in the cause by the admiralty, and so deprived without the intervention of positive law or any solemnly adjudged case? I think the affirmative cannot be supported." The plaintiff in this case did not seek a court of admiralty. He was forced into it by the libelants in the original case. To assert that he has made his election to proceed in admiralty, when he might have proceeded at common-law or in equity, and that, therefore, he is bound by his election, and hence that all proceedings which grow out of the principal case must by him be instituted in the admiralty court, is to ignore the undisputed facts of this litigation. He was dragged into admiralty by the libelants, when, as the United States Supreme Court held in that very case, the remedy of the libelants to secure the relief they were after was in a court of equity, for an accounting, and not in admiralty at all.

The courts in holding that stipulations may be enforced, against those that sign them, by summary proceedings in the original case, do not adjudge such proceedings to be an essential part of the main suit. The title of the original action is used. The proceedings are carried on with greater dispatch than a formal action, and the procedure is much simpler. But, in its essence, it is an independent litigation against new parties,—the stipulators. They cannot, it is true, retry the merits of the original action; but they have an absolute right to be heard, at some stage of the proceeding before their property is finally wrested from them under execution, on the questions whether they in

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fact signed the stipulation, and whether it is a valid and binding instrument. These facts may be put in issue by them, and some kind of notice must be given to them, and some opportunity afforded them to litigate such facts. The proceeding against the stipulators is, in its essential nature, as much an independent proceeding against them as though an entirely new action were instituted on the stipulation in the usual way, unless, indeed, such proceeding is indispensable to secure to the successful litigant the fruits of his victory according to the usages of courts of justice. This brings us to an important, and, in our judgment, controlling, distinction. A proceeding to enforce a stipulation for value, give in an action exclusively *in rem*, in admiralty, is an indispensable part of such action. Without it the action would be of no possible benefit to the suitor who had won. In an admiralty action, exclusively *in rem*, there is no personal defendant; and therefore no judgment against a personal defendant can be rendered, aside from a judgment on the stipulation for value, in case one is given. The suit is against an impersonal defendant, —the *res*. After it is seized the owner may appear, and on establishing his rights as owner he may secure the release of the *res* by the giving of the stipulation for value. Thereafter the original *res* disappears from the case, and the substituted *res* takes its place. Henceforth the suit is against the substituted *res*, and the court exercises, and must, from the necessities of the case, exercise, the same jurisdiction over it that it would have exercised over the original *res*, had such *res* remained in the possession and under the control of the court. The remedy is transferred from the ship to the stipulation. *U. S.* v. *Ames*, 99 U. S. 35; *The Palmyra*, 12 Wheat. 1; *The Webb*, 14 Wall. 406; *The Haytian Republic*, 14 Sup. Ct. 992. It is true that in cases of fraud or mistake, or when the *res* has been improvidently released, the court possesses ample power to order its return to the custody of the marshal. *The Thales*, 3 Ben. 327, Fed. Cas. No. 13,855; *The Virgo*, 13 Blatchf. 255, Fed. Cas. No. 16,976; *Livingston* v. *The Jewess*, 1 Ben. 21, note. Fed. Cas. No. 8,412; *The Union*, 4

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Blatchf. 90, Fed. Cas. No. 14,346; *The Favorite*, 2 Flip. 86, Fed. Cas. No. 4,698; 2 Pars. Shipp. & Adm. 411; *The Haytian Republic*, 14 Sup. Ct. 992, 994; *U. S.* v. *Ames*, 99 U. S. 35. But this must be done before final judgment against the stipulators. *Id.* And when this is done the stipulation is necessarily annulled. The libelant cannot have a remedy against both the *res* and the stipulation for value. The stipulation is not additional security. It is the only security. In every case, therefore, in which there is a valid stipulation for value, which may be enforced, no resort to the original *res* can be had. It is true that in every suit in *rem*, brought to enforce some claim against the *res*, the judgment, in terms, condemns the original *res* to be sold to satisfy the amount for which judgment is rendeıed. But such judgment is never enforced against the original *res* in those cases in which a stipulation has been given, and has not been annulled by the return of the original *res* to the custody of the marshal, under the order of the court. 2 Fost. Fed. Prac. § 416. This is recognized by all the decisions, and is an elementary principle of admiralty practice. Having no power to render a personal judgment against the owner, and no power to enforce according to its terms the judgment formally rendered against the original *res*, a judgment against the stipulators, on their stipulation, is an indispensable step in the case. Without it the remedy would be incomplete. The action would be a farce. The question of abstract right would be settled, but no means would be provided, by the employment of which the successful suitor could enforce the claim which the court had decreed to be just. Judicial tribunals are not wont to administer justice after the manner of moot courts. It is their invariable practice to give the victorious litigant a judgment which will be enforced by the court rendering it according to its terms. The only judgment which a court of admiralty can render in a proceeding in *rem*, brought to enforce a claim against the *res*, which it will execute according to the terms of such judgment, in those cases in which a stipulation for value has been given, and has not been annulled by the

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reseizure of the original *res* under the order of the court, is a judgment against the stipulators for value. And hence such a judgment is an integral part of the action in which such stipulation was given. It is as much an indispensable step in the case as any prior proceeding therein, or as proceedings with respect to the sale of the original *res* after judgment, in cases where such *res* has not been released. There is, therefore, an obvious reason for holding that the enforcement of the stipulation against the stipulators for value, in such cases, is within the exclusive cognizance of the court in which it was given. It is within its exclusive jurisdiction, the same as any other essential part of the case. No court has power to lay hold of an unfinished litigation pending in another court, and take cognizance of its remaining stages. The whole case must be finished in the forum in which it was started.

There is another conclusive reason why the court in which the stipulation for value is given has sole cognizance of the proceedings to enforce it: Its jurisdiction over the original *res* is exclusive. Such jurisdiction includes the power to make the *res* produce, up to its value, in that very suit, the money to satisfy the libelant's claim. This is accomplished by a sale after judgment. The stipulation takes the place of the ship. It, in turn, becomes the *res*, and over it the court exercises the same jurisdiction as over the vessel where it is not released. The court has, and must have, power, in the same suit, to make this new or substituted *res* produce, up to its value, money to satisfy the libelant's claim. The procedure against the stipulation is different from the procedure against the vessel, because the former differs from the latter in its nature. In making the stipulation produce money to apply on libelant's claim, the admiralty court proceeds as other courts proceed against similar instruments. It does not sell the obligation at public auction, but renders judgment and awards execution against the obligors therein. This it has the exclusive power to do just as it possesses exclusive jurisdiction to sell the original *res* in case it is not released from the control of the court. But

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the instrument sued on in the case a bar is an appeal bond, and not a stipulation for value, and judgment on such a bond is not an essential part of the admiralty proceeding in which it is given. The admiralty court in such a case can, without awarding judgment thereon in the same action, render a judgment which it will enforce according to its terms,--either a judgment against the original *res*, to be enforced against it by sale thereof in case it has not been released, or a judgment against the stipulators for value, in case it has been released, to be enforced against them by a general execution against their property. As a judgment against the sureties on an appeal bond is not an indispensable step in the case, as it is a judgment against stipulators for value, and as it is not a substituted *res* admiralty does not possess exclusive cognizance of the proceeding to enforce such bond. Many of the cases cited by counsel for defendants are cases which merely hold that summary judgment may be rendered in the original action against stipulators for value for costs, and sureties on appeal bond. They do not decide that admiralty has exclusive jurisdiction of proceedings to enforce such instruments. The case of *Bartlett* v. *Spicer*, 75 N. Y. 528, relied on by counsel for defendants, involved a stipulation for value, and not an appeal bond; and, for the reasons already set forth, such a case is therefore not in point. Moreover, the stipulation was given in an action in admiralty instituted by the majority owners of the vessel to secure possession thereof for a voyage. Such a remedy a common-law court was powerless to give. Exclusive jurisdiction of the subject matter rested with admiralty; and the decision of the court in the Bartlett Case is based on the ground that the proceeding to enforce such a stipulation is part of the original subject matter,—a subject matter within the exclusive cognizance of admiralty, just as in a prize case. But admiralty did not possess exclusive cognizance of the remedy which the libelants sought to enforce by their proceeding in admiralty. It is entirely competent for a court of common-law jurisdiction to entertain an action to recover possession of a vessel. *Taylor* v. *The Royal Saxon*, 1

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Wall. Jr. 311, Fed. Cas. No. 13,803. See, also, *Steamboat Co.* v. *Chase*, 16 Wall. 522. The subject matter of the original case not being within the exclusive jurisdiction of the admiralty, as in *Bartlett* v. *Spicer*, the reasoning of the court in that case does not apply. None of the decisions cited by the New York court of appeals in the Bartlett Case decide that admiralty has exclusive cognizance of actions to enforce even stipulations for value in cases on the instance side of the court, and in *Lacaze* v. *Pennsylvania*, 1 Add. 59, the majority of the court were of the contrary opinion. Three of the judges, (Chew, Biddle, and Smith) were of opinion that an action of debt would lie on such stipulation in a common-law court. Rush, J., while concurring in the result, thought that admiralty had exclusive jurisdiction. Addison inclined somewhat to the same view, but was by no means emphatic in the expression of his opinion. While, for the peculiar reasons already stated, we do not think that the doctrine of concurrent jurisdiction is applicable to proceedings to enforce stipulations for value, yet, with respect to appeal bonds, the reasoning of the majority opinions in *Lacaze* v. *Pennsylvania* seems to us to be conclusive. See these parts of such opinions as pages 65-68, 88-91, 1 Add.

It is true that cases can be found in which it has been asserted that admiralty has exclusive jurisdiction to enforce all bonds and stipulations given in admiralty proceedings. But these cases will be found, on examination, to be prize cases, and not actions on the instance side of the court. Such were the cases of *Smart* v. *Wolff*, 3 Term R. 336; *Brymer* v. *Atkins*, 1 H. Bl. 164. It is on this ground that these cases are distinguished by Chief Justice Chew in *Lacaze* v. *Pennsylvania*, 1 Add. 65, 66. The cases of *Penhallow* v. *Doane's Adm'rs*, 3 Dall. 54, and *Jennings* v. *Carson*, 4 Cranch, 5, cited by counsel for defendants, were both cases of prize. So are the cases of *Sasportas* v. *Jennings*, 1 Bay, 470; *LeCaux* v. *Eden*, Doug. 594; *Doane's Adm'rs* v. *Penhallow*, 1 Dall. 218; *Ross* v. *Rittenhouse*, 2 Dall. 160, 1 Yeates, 443; *Simpson* v. *Nadeau*, Cam. and N. 115; *Cheriot v. Foussat*, 3 Bin. 220; and *Novion* v. *Hallett*, 16 Johns.

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327. Except the New York case (*Bartlett* v. *Spicer*), we have been unable to find a single authority which asserts the exclusive jurisdiction of admiralty to enforce bonds and stipulations taken on the instance side of the court. The reason for the distinction, so far as the question of exclusive jurisdiction is concerned, between cases of prize and actions on the instance side of the court, is obvious. When sitting as a prize court, the tribunal is administering the laws of nations, and not the mere municipal jurisprudence of a single state or kingdom. The rights of foreigners are often involved. The decision in such a case may effect the public relations of the government whose tribunal had cognizance of the cause. Great international rights growing out of a state of war are generally at issue. No court of a nation, therefore, except such as is recognized by all the civilized powers as the proper tribunal in that nation to deal with such matters, should ever exercise any jurisdiction over the case or any of its incidents. Under such circumstances, the incidents are inseparably bound up with the main cause. This cogent reason for investing prize courts with exclusive jurisdiction over the whole controversy—incidental matters as well as the principal litigation—has been recognized by the master minds in jurisprudence. Said Chancellor Kent in *Novion* v. *Hallett*, 16 Johns. 327, at page 334: "Such cases generally arise between native citizens or subjects and foreigners, and it is highly expedient that they should be decided by general laws, known and adopted by every nation. Courts of common law are governed by local, municipal laws, and are incompetent, as Lord Mansfield afterwards observed, in *Lindo* v. *Rodney*, Doug. 613, note, 'to embrace the whole of the subject.' Matters of prize, and of piratical capture, without regular authority, involve more or less the responsibility of the national government, and may affect the public relations of the country. It is therefore exceedingly fit that they should be discussed and tried in a court proceeding according to rules of national law equally known to every country, and which court is specially intrusted with the cognizance of such questions." In *Lacaze* v.

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Pennsylvania, 1 Add. 55, Rush, J., at page 97, referring to the decision of the court in *Le Caux* v. *Eden*, Doug. 594-597, said: "As the admiralty had full authority to remedy an unlawful capture and all its consequences, the court thought it would be extremely inconvenient to withdraw this question, or any of its incidents, from the jurisdiction proceeding on a general law of all nations, and in a summary and equitable manner, and bring it before the jurisdiction governed by a limited municipal law, and proceeding with a formality and a mode ill suited to the nature of the subject. If captors were liable to a suit at common law by every person affected by the capture, none would venture to take a prize. And if foreigners had no remedy for injuries done to their property under color of prize but from suits in our courts of municipal law, to the principles and effects of which they are strangers, mutual confidence between nations would be destroyed; and, in a war between any two nations, all others would protect themselves by force, and compel by arms that administration of justice to which they are reciprocally entitled." But, when sitting as an instance court, a court of admiralty administers, not the laws of nations, but the municipal regulations of the jurisdiction under whose laws the tribunal is erected. Unlike a prize court, the instance court has not exclusive power to afford the suitor redress. There is nearly always a concurrent remedy at law. Section 563, subd. 8, of the Revised Statutes of the United States, saves this right to every litigant. It is true that the suitor cannot, in this country, proceed in *rem* in any other court. The *Moses Taylor*, 4 Wall. 411. But he always has a remedy in a common-law court to enforce the claim or redress the wrong of which he complains. *Percival* v. *Hickey*, 18 Johns. 257-291; *Leon* v. *Galceran*, 11 Wall. 185; *Schoonmaker* v. *Gilmore*, 102 U. S. 118; Ben. Adm. §§ 201, 205; *Steamboat Co.* v. *Chase*, 16 Wall. 522. There is, therefore, no more reason for the exclusive jurisdiction of an instance court over the incidents of the main case, than for the exclusive jurisdiction of any other of the municipal courts of the same government which administer the purely

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municipal law of that government over the incidents of an action tried and determined therein.

The Federal Supreme Court appears to have settled the question involved, under facts precisely the same as in the case at bar, so far as the issue of jurisdiction is concerned. An admiralty action in personam was instituted in the United States District Court, sitting as an admiralty court. The case having been decided in favor of the libelant in the District Court, and thereafter on appeal in the Circuit Court, it was carried by appeal to the Federal Supreme Court. On that appeal a supersedeas bond was given. The judgment of the lower court was affirmed. *New Jersey Steam Nav. Co.* v. *Merchants' Bank of Boston*, 6 How. 344. Instead of securing judgment against the sureties on the appeal bond in the very case in which the bond was given, the libelant sued them in the United States Circuit Court in an action of debt. This was a suit in a common-law court, and not in an admiralty court. The United States Circuit Court had common-law jurisdiction, but no original jurisdiction in admiralty cases. *Governor of Georgia* v. *Madrazo*, 1 Pet. 110. It could take cognizance of such cases only on appeal. The action to enforce the appeal bond was, like this action, a common-law action brought in a court possessing original jurisdiction of common-law and not of admiralty cases. *Ives* v. *Bank*, 12 How. 159. No one connected with the case, from the time the United States Supreme Court affirmed the original judgment on appeal (6 How. 344,) seems to have had any thought that the only remedy on the appeal bond was in admiralty. If such had been the law, the court in the Ives case would have declared the judgment appealed from a nullity, for want of jurisdiction of the subject matter. If counsel for defendants be correct in his contention, then both the judgments of both the Circuit and the Supreme Court were void, and always have been. With this case before us, we feel constrained to hold that the District Court of this state has jurisdiction of the subject matter of this action, and the case is therefore properly before us on appeal. We are of opinion that sound

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principal supports our view. The dictum of Judge Blatchford in *The Blanche Page*, 16 Blatchf. 1 Fed. Cas. No. 1,524, so far as it indicates that it was his opinion that admiralty only could render judgment on an appeal bond taken in the course of admiralty proceedings, cannot prevail against the decision in the Ives case. We attach very little importance to this dictum, in view of the facts of the case in which it was uttered; and it is apparent that he regarded the appeal bond as having been given under the act of 1847, which, in terms, declares that judgment shall be rendered in the very case in which the bond was given. The statute which authorized the giving of such bonds having declared how they should be enforced, that remedy might be regarded as exclusive. The effect of our refusal to entertain jurisdiction might be serious, in case we were in error in so holding. But no irremediable harm can flow from our taking jurisdiction of this case, as the Federal Supreme Court, on writ of error, can reverse our judgment, if we are wrong. Indeed, our judgment, in that event, would be a nullity, and could be attacked collaterally in any court having jurisdiction of the subject matter and the parties. So far from its being the rule that a court has exclusive jurisdiction of all the incidents of an action, it is a well settled doctrine that the court of equity in which an injunction bond has been given has no power, on dissolving the injunction, to render judgment on the bond, or even to assess the damages sustained by the defendant by reason of the injunction, unless some statute gives such power. The defendant must sue at law on the bond. 2 High, Inj. § § 1642, 1657, and cases cited.

A large number of cases have been cited by defendants' counsel, holding that an action may be maintained in the Federal Court, irrespective of diverse citizenship, if such action is an offshoot from another suit of which such Federal Court had jurisdiction. Among them are *Bobyshall* v. *Oppenheimer*, Fed. Cas. No. 1,592; *Arnold* v. *Frost*, Fed. Cas. No. 558; *Lacassagne* v. *Chapuis*, 144 U. S. 119, 12 Sup. Ct. 659; *Campbell* v. *Hadley*, 1 Spr. 470, Fed. Cas. No. 2,358; *Seymour* v. *Construction Co.*, 7 Biss. 460, Fed. Cas. No.

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12,689. But none of the cases cited hold that the Federal Court has exclusive jurisdiction under such circumstances. The decision in *Wade* v. *Wortsman*, 29 Fed. 754, is hostile to the contention of counsel for defendant. The original replevin suit was carried on in the United States Circuit Court. After judgment therein an action was commenced in a state court on a forthcoming bond given in such replevin suit. It was removed to the United States Circuit Court. The motion to remand was denied. But, if counsel's views be sound,—that the Federal Court had exclusive jurisdiction of the second action,—the motion must have been granted; for the Federal Court can never secure jurisdiction of a case by transfer from a state court under the laws of the United States, unless the state court had jurisdiction of the cause, so there could be something before it to be transferred. By holding that the case was properly removed to the Federal Court, the court necessarily held that the state court had jurisdiction of the case before it was so removed. In *Myers* v. *Block*, 7 Sup. Ct. 525, the court affirmed a judgment of the state court in an action of debt on an injunction bond given in a case in equity in the Federal Circuit Court. In *Campbell* v. *Hadley*, 1 Spr. 470, Fed. Cas. No. 2,358, the court merely held that the Federal District Court had jurisdiction of an action in the nature of a *scire facias* on a bail bond given in admiralty proceedings to secure release of defendant from execution. But the court did not decide that no other court had jurisdiction.

It is urged that the state courts ought not to take jurisdiction of this case, for the reason that the plaintiff has an adequate remedy by proceeding in the original admiralty case. While it is true that courts of equity will refuse to entertain a bill to set aside a judgment, where there is an adequate remedy by motion in the action in which the judgment was rendered, we have been unable to discover any decision making that general doctrine of equity jurisprudence applicable to suits at law. The fact that the suitor has another remedy, which may be more speedy, and even more efficacious, does not debar him from bringing his action at

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law. It appears to be the rule that, despite the fact that the respondent in an appeal has, by statute, a summary remedy to enforce the appeal bond, in the very case in which it was given, still he may sue on the bond at law. 1 Enc. Pl. & Prac. 1018.

It is next urged that comity requires us to refuse to take jurisdiction of this case. The cases to which we are cited on this point hold that where in an action in a Federal Court, property has been seized, the state courts must not interfere with the control of the property by the Federal Court, but that, if any person not a party to the suit desires to litigate his right to the property, he must intervene in the action, and there try his case. We have carefully examined these decisions, but the great length of this opinion prevents a review of them. It is sufficient to say that we are clear that they do not lay down any rule inimical to the jurisdiction of the state courts over this action. The rule which they lay down is thus stated in *Cohen* v. *Solomon*, 66 Fed. 411, at page 413: "No principle is more firmly intrenched in the law than that doctrine that, when one court acquires jurisdiction and power over the *res*, no other court can interfere with its possession and control." Many of the cases cited by counsel for defendants are there referred to. In *Meyers* v. *Block*, 120 U. S. 206, 7 Sup. Ct. 525, the court affirmed a judgment of the state court in an action on an injunction bond given in an action in equity in the Federal Court. This case is hostile to this contention of defendant's counsel. It furnishes, also, a complete answer to his contention that the suit on the appeal bond is ancillary to the proceedings in the admiralty court, within the scope of the rule that such proceedings must be carried on in the state or Federal Court in which the main action was litigated. The cases cited by counsel for defendants in this connection are cases in which the courts have held that the proceedings were inseparably connected with the enforcement of the judgment in the main action, and were therefore only additional steps in that action, looking to the enforcement of such judgment. The great length of this opinion prevents a more particular reference to

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these cases. A casual examination of them cannot fail to show that they are not in point. They are *Flash* v. *Dillon*, 22 Fed. 1; *Buford* v. *Strother*, 10 Fed. 406; *Pratt* v. *Albright*, 9 Fed. 634; *Poole* v. *Thatcherdeft*, 19 Fed. 49; *Bank* v. *Turnbull*, 16 Wall. 190. This action is not in any sense a proceeding to enforce, nor is it in any manner connected with the enforcement of, the judgment in the admiralty case. On the contrary, it proceeds on the theory that plaintiff has been and is unable to enforce it, and that, therefore, he desires to compel those to pay him the damages he has thereby sustained who have agreed to be bound in the event that he should not be able to enforce it. The decision in *Meyers* v. *Block*, 120 U. S. 206, 7 Sup. Ct. 525, is, as we have said, an authority against the defendants on this branch of the case.

We now come to the merits of the case. The defendants' counsel contends that the undetaking sued on is void. The plaintiff seeks to recover damages for the alleged breach of the condition of the undertaking that the obligors would obey any order the appellate court might make in the premises. The defendants' counsel asserts that, so far as this provision of the undertaking is concerned, the undertaking is void as a statutory undertaking. A consideration of this branch of the case necessitates a more particular reference to the facts. The action in which the undertaking was given was an action in admiralty in a cause of possession, civil and maritime, instituted in the District Court of the Territory of Dakota, for the Third Judicial District thereof, sitting as a court of admiralty under the laws of the United States. The power of such court to take jurisdiction of such an action was derived, as we have before said, from section 1910 of the Revised Statutes of the United States. This section provided that the District Courts of the several territories referred to therein (Dakota being one of them) should have and exercise the same jurisdiction, in all cases arising under the constitution and laws of the United States, as was vested in the Circuit and District Courts of the United States. That such a statute is valid, and that its effect was to vest in the Territorial

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District Court of Dakota Territory full admiralty jurisdiction, is well settled. *Houseman* v. *Cargo of The North Carolina*, 15 Pet. 40; *The City of Panama*, 101 U. S. 453; *The Eclipse*, 135 U. S. 599, 10 Sup. Ct. 873. This same section declares that "writs of error and appeals in all such cases may be had to the Supreme Court of each territory as in other cases." Construing this last provision, the Supreme Court of Dakota, when the admiralty case in question was before it on appeal, held that such appeal, and all appeals in admiralty cases from the District Court to that court, should be governed by the laws, statutes, and rules that obtained in other civil actions tried in such District Court. *Rea* v. *The Eclipse*, (Dak.) 30 N. W. 159. Both parties agree that this decision correctly states the law on this subject. It being conceded that the statutes of the Territory of Dakota regulated the appeal in that case, we will first treat the case from that standpoint. We therefore come to the question whether this undertaking is valid as a statutory supersedeas undertaking.

It is claimed by the plaintiff that the judgment appealed from directed the delivery of personal property, and that, therefore, the execution of a mere cost bond would not have been sufficient to stay the execution of such judgment. Section 416 of the Code of Civil Procedure, as revised in 1877 (the statute in force when the appeal in question was taken,) provides that: "If the judgment appealed from direct the assignment or delivery of documents or personal property, the execution of the judgment shall not be stayed by appeal, unless the things required to be assigned or delivered be brought into court, or placed in the custody of such officer or receiver as the court shall appoint, or unless an undertaking be entered into on the part of the appellant, by at least two sureties, and in such amount as the court, or judge thereof, shall direct, to the effect that the appellant will obey the order of the appellate court upon the appeal." The judgment that was appealed from did not, in terms, direct the delivery by the appellants, on such appeal, of the steamboat Eclipse, her tackle, apparel, and furniture. It merely adjudged that the

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claimant, who is the plaintiff in this case, was the owner of one-half of such property, and entitled to the possession thereof; that the libel be dismissed, with costs, and that the intervention of certain parties who had intervened in the case be dismissed, with costs; and that the marshal deliver the possession of such property to such claimant. Had the District Court as a court of admiralty, ordered that the marshal deliver the property to the libelants in that action, or to the interveners, on their giving proper security (whether this could be done we do not decide,) it is obvious that the judgment of the court must have been against the parties so lawfully in possession of the property, directing them to deliver such property to the claimant. In such a case there would have been a judgment directing a delivery of personal property, within the letter and the spirit of section 416, assuming that this section was intended to apply to admiralty cases. But that the particular judgment which was in fact rendered was not a judgment for the delivery of personal property, within the meaning of section 416, Code Civil Procedure, does not admit of doubt. That judgment merely adjudged that the claimant was entitled to possession. It did not direct that the libelants or intervenors deliver such possession. The judgment itself does not show that they were in possession. Its language indicates the contrary. We do not understand that in admiralty the libelant is ever allowed to secure possession of the *res pendente lite*, unless the action is to secure possession of the vessel for a voyage. In an action to secure absolute possession of a vessel, there seems to be no practice authorizing a delivery of the *res* to the libelant *pendente lite*. We must assume, therefore, that the property was in the legal custody of the marshal, as the hand of the court. The finding of fact (assuming that we may consider it at all) that the marshal had delivered possession of the steamer to the interveners in the action without any order of court does show that the legal possession of the property was anywhere except in the marshal. The court did not lose its control over

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the steamer by the illegal act of the marshal in suffering the intervenors to take possession thereof *pendente lite*. *The Rio Grande*, 23 Wall. 458. The marshal and his official sureties were liable to the claimant for his failure to keep possession of the steamer, as it was his clear duty to do. *The Jack Jewett*, 2 Ben. 353, Fed. Cas. No. 7,121. The judgment of the court recognized this obligation by directing that the marshal deliver the steamer to the claimant. The obvious meaning of this clause of the judgment is not that the marshal, as the executive officer of the court, shall take the property from the interveners or libelants, as under a judgment directing them to deliver the property to the claimant, but that the marshal (who is the legal custodian of the property, and is therefore responsible for the possession of the property, irrespective of what he has done with it) shall himself deliver to the claimant the property, which the law regards him (the marshal) as having in his control. If he had delivered it to any one *pendente lite*, it was to hold it for him. The law does not, in such a case, recognize the possession of any one else. The court deals with the marshal alone, in directing what shall be done with such possession. The judgment was therefore not a judgment against either the libelants or the interveners, directing them to deliver possession of the property to the claimant, but was merely a judgment declaring that the latter was entitled to the possession thereof, which the law deemed to be held by the marshal, as the hand of the court. Had the purpose of the court been to award a judgment against the libelants or interveners, directing them to deliver possession to the claimant, the phraseology of the judgment would have been different. It would have been similar to that of a judgment in a replevin action where the property is in the legal possession of the unsuccessful party. Such a judgment, in terms, adjudges that the plaintiff or defendant, as the case may be, recover possession of the property of the adverse party, who has such legal possession. But where the adverse party has no such possession, the property being already in the possession of the successful suitor, the judgment merely

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provides, as does the judgment under consideration, that the successful party is entitled to the possession. Comp. Laws, § 5099; 2 Abb. Forms, 554. In replevin actions the property is never left in the custody of the officer *pendente lite*, but always in the possession of one of the parties to the suit. Hence a judgment in such cases adjudging that one party is entitled to possession never contains a provision that the officer deliver the possession to him. But in admiralty actions to recover possession the property may be, and in this case it would seem that it actually was, left in the legal custody of the marshal during the pendency of the action. It was therefore entirely proper that the clause directing the marshal to deliver the property to the claimant should have been inserted in the judgment. It was aimed at the marshal solely, because the court regarded him as it was bound to do, as being legally in possession of the property. If the court had intended to render a judgment directing the libelants or interveners to deliver the possession of the property to the claimant, or that he recover the possession from them, it would have expressed such purpose in the judgment itself. The marshal in taking the property from the possession of the interveners, to enable him to comply with the judgment, would not have made the seizure under the judgment, but under his right to revest himself with the possession of such property *pendente lite*. He had the same power to take it from the possession of the interveners before the judgment was rendered. That the judgment was not a judgment directing the delivery of personal property, within the meaning of section 416, Code Civil Proc., is plain, when we consider the object of this section. It was passed to require the appellant to give a supersedeas bond in order to stay execution in cases in which the property should be in the legal possession of the adverse party, and would be left there by stay of execution. In such cases the respondent needs security. But when such property is in the custody of the court there is no occasion for additional security on appeal, as the party has the security of the court's control of it as much after appeal as

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before. The stay of execution will merely leave it where it was before,—not in the hands of a party, but in the custody of the court. That no supersedeas bond was required to be given to secure a stay, where the property was already legally in the custody of the court, is apparent from that provision of section 416 which gives the appellant the option of placing the property in the custody of the court, and thus securing a stay. If he can secure a stay by the giving of a cost bond, and the surrender of the property to the control of court, he may obtain a stay by the giving of such cost bond when the property is already legally in the control of the court. A stay of execution in the admiralty case in which the appeal bond sued on was given would not have left the property in the possession of the interveners, as a matter of legal right. The legal possession was all the time in the marshal, and he could at any time (as well after execution had been stayed as before) have taken the property from the interveners, and have held it himself pending the appeal. If an appeal, with stay of execution, would have entitled the interveners to retain possession of the property during the pendency of the appeal, the marshal would have been exonerated from liability because of their possession. But it was never the purpose of the court, in rendering the judgment in the admiralty case, to release the marshal from liability. On the contrary, it expressly ordered that he, and not the parties to the suit, should deliver the property to the claimant. We very much question the power of the admiralty court to discharge the marshal from liability without the consent of the claimant, in a suit in which such question was not at issue; and, if the marshal continued liable, it is because the intervenors, during the pendency of the appeal, had no right, as against him, to retain possession of the property.

In determining whether the judgment appealed from is of such character that a stay of proceedings under it will entitle the appellant to hold possession of the property which the judgment declares shall be delivered to the adverse party, we are never to

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look at the practical, but at the legal, situation at the time judgment was rendered, if it is at all permissable to travel outside of the terms of the judgment itself. A stay of proceedings confers no new privilege. It merely restores a right lost by the judgment whose execution is superseded. Unless the appellant had a legal right temporarily to hold the property in controversy before the judgment was rendered, he can secure no such right by staying the execution of such judgment. Of course, in speaking of the legal right to the possession of property pending litigation, we do not refer to the ultimate legal right. It often happens that the later right resides in a person different from the one who is vested with the former right. Property about which this litigation is pending must remain during the progress of the case, and before judgment, either in the possession of one of the parties to the suit, or in the hands of a third person. Whoever this may be, under the law, he is the one who is legally entitled to the temporary control of the property; and if he be the defendant, and is defeated, he may secure by a stay pending the appeal a restoration and continuation of this legal right to hold the property, which will not cease until the final decision on such appeal. But to obtain a restoration of this right lost by the judgment, and a continuation of it until the appeal is decided, he must have been vested with it before judgment. Now, it is evident that the appellants, before judgment, in The Eclipse case, were not vested with any legal right to hold possession of the property, as against the one who was vested with that right by the law, *i. e.* the marshal. The marshal might have seized the vessel at any time before judgment. The stay of proceedings did not divest him of that right and confer it on the appellants, for this would be to render the bare stay effectual to enlarge their legal rights, and not merely to revive and prolong them. If the stay of execution did not, under the statute, give the appellants such right, it was not a case in which the bond required by section 416 was necessary. They were not required by that section to give a supersedeas bond to secure a stay, unless they would thereby secure the right

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to retain possession of the property *pendente lite*. The authorities fully sustain this proposition under identical statutes. *In re Schedel's Estate*, (Cal.) 10 Pac. 334; *Pennie* v. *Superior Court*, (Cal.) 26 Pac. 617; *Born* v. *Hortsmann*, (Cal.) 22 Pac. 169. See, also, *McCallion* v. *Society*, (Cal.) 33 Pac. 329. I am therefore of opinion that the admiralty judgment does not fall within section 416. If, then, we are to accept the theory of both parties to this case that the territorial statutes, and not the practice in courts of admiralty, governed the procedure on appeal to the Territorial Supreme Court, the undertaking was in my judgment void as a statutory undertaking. It is conceded by counsel for plaintiff in this action that, if such judgment did not fall within section 416, there was no necessity, under the statutes, for the giving of a supersedeas bond to secure a stay of execution, but that the giving of the cost bond would, under section 422, have operated as a stay. For the reason stated I think that the case did not fall within section 416. Therefore, as no bond other than a cost bond was required to secure a stay, the undertaking sued on is void as a statutory undertaking, so far as it relates to anything more than the costs on appeal. There was no consideration for it. The parties on whose behalf it was given derived no benefit from it. *Powers* v. *Crane*, (Cal.) 7 Pac. 135; *Powers* v. *Chabot*, (Cal.) 28 Pac. 1070; *McCallion* v. *Society*, (Cal.) 33 Pac. 329; *Post* v. *Doremus*, 60 N. Y. 371; *Freeman* v. *Hill*, (Kan. Sup.) 25 Pac. 870. Said the court in *Powers* v. *Crane*, (Cal.) 7 Pac. 135: "On behalf of the sureties, who are the real parties in interest here, it is claimed that the undertaking, except in so far as the three hundred dollars is concerned, was without consideration and void. The pretended consideration, therefore, was a stay of execution of the judgment appealed from. And if the law itself operated a stay upon the giving of the three hundred dollar bond, it would seem that the point is well taken. That the statute did so operate was held by this court in the case of *Snow* v. *Holmes*, 64 Cal. 232, 30 Pac. 806. As the statute

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itself wrought the stay, there was no consideration for the sureties' promise."

If we were to be governed by the territorial statutes referred to, we would be of opinion that the undertaking was void, for the reason that under such statutes the libelants were entitled to a stay of execution on giving the mere cost bond specified in section 422. But, despite the agreement of counsel, we cannot accede to their view that these statutes in any manner controlled the appeal in the admiralty case to the Territorial Supreme Court. There are only two theories on which it can be held that the territorial statutes regulated the procedure on appeal in the admiralty case. One is that by the terms of section 1910, Rev. St. U. S., the procedure applicable to actions at law in the territorial courts was made applicable to actions in admiralty; and the other is that the territorial legislature had in fact regulated the procedure in admiralty cases on appeal. That section 1910 did not assume to regulate the practice on appeal to the Territorial Supreme Court of Dakota Territory in admiralty cases, at all, is apparent from its language. It merely declared that in such cases, among others, writs of error and appeals might be taken as in other cases. It gave the right to appeal, but did not attempt to establish the procedure on such appeal. On this point the decisions of the Supreme Court of Washington Territory and of the Supreme Court of the United States are express authorities in support of our view. Section 1911 of the Revised Statutes of the United States, which was applicable to the Territory of Washington, contains precisely the same provisions as section 1910. The Supreme Court of that territory held in the case of *The City of Panama*, 1 Wash. T. 615, that the territorial statutes did not govern the procedure on appeal to that court from a judgment of the Territorial District Court in an admiralty case, but that on such an appeal the case must be tried *de novo* in the Supreme Court, and that on such trial new evidence in that court might be received. On appeal to the Federal Supreme Court the judgment, of the Territorial Supreme

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Court was affirmed; and that the Federal Supreme Court must have passed upon this question, and settled it in accordance with the ruling of the Territorial Supreme Court, is evident from the fact that it appears from the report of the case that one of the assignments of error in the Federal Supreme Court related specifically to this point. It is in the following language: "The court erred in holding that the acts of congress and the rules of the Supreme Court of the United States governing the Circuit and District Courts of the United States in admiralty practice were in force in the courts of the territory, and regulated the practice therein." There was no statute in force in the Territory of Washington, giving the appellant in admiralty cases either a right to a new trial on appeal to the Territorial Supreme Court, or a right to introduce new evidence in such court. Had the Territorial and Federal Courts regarded section 1911 (which is the same as section 1910, which related to Dakota Territory) as, *ex proprio vigore*, making the practice in the Territorial Supreme Court in ordinary civil actions on appeal applicable to admiralty cases, the decisions in both courts would have been different. See, also, the opinion of Grier, J., in *Nickels* v. *Griffin*, 1 Wash. T. 374, 394, 395. In the case of *Zephyr* v. *Brown*, 2 Wash. T. 44, 3 Pac. 186, it was held that the territorial statutes regulating the practice in taking an appeal to the Territorial Supreme Court were not applicable to an appeal in an admiralty case, but that the steps necessary to perfect such appeal must be such as were recognized by the usages and practice of courts of admiralty. It is true that the Supreme Court of the Territory of Dakota, when The Eclipse case was before it, held that the territorial statutes regulated the proceedings on appeal; but no such question was before the Federal Supreme Court in that case, and the point was not settled either way by that tribunal. We are unable to agree with the decision of the Territorial Supreme Court in this particular. Undoubtedly, the legislature of Dakota Territory might have regulated the practice in admiralty cases on appeal, but it did not do so. It is obvious that the statutes of the

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territory did not in any manner regulate the practice in admiralty cases in the District Court. There was no statute which related to a single step in such cases, from the filing of the libel to the rendering of final decree. The whole scope of these statutes is limited to actions at law and in equity. This was the view of the counsel on both sides in The Eclipse case, when it was before the Territorial District Court. The procedure there was in accordance, not with the territorial statutes, but with the practice in courts of admiralty. If the territorial statutes did not relate to the proceedings in the District Court, they certainly could not govern the proceedings on appeal to the Supreme Court. The territorial statutes regulated only such proceedings on appeal as were governed by the same body of territorial law when pending in the District Court They did not purport to relate to any case tried in the District Court in a manner unknown to the statutes of the territory. The statutes of the Territory of Washington were fully as applicable to admiralty cases as were the statutes of Dakota Territory; and yet the Territorial Supreme Court of Washington, in the two case already cited, held that there was no legislation in that territory regulating the practice on appeal to that court in admiralty cases. The practice in admiralty courts has always been so different from that in common-law courts that rules of procedure governing the practice in the latter courts are unsuited to admiralty courts; and nothing short of a very decisive expression of such purpose should warrant us in assuming that the territorial legislature intended to introduce such an anomaly into admiralty practice as the complete assimilation of all procedure in admiralty cases to the procedure in common-law courts. Were this done where the same courts that administered relief in common-law cases already possessed admiralty jurisdiction, also, as in the Territory of Dakota, nothing would have been left of admiralty, in the territory, but the name. We do not believe that the subject of admiralty procedure was ever considered by the territorial legislature with a view to regulating it, but in the light of the fact that the practice in admiralty courts was reason-

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ably settled, and that the main features of that practice were so different from common-law procedure, it is a natural inference, which the silence of the statutes themselves significantly confirms, that the territorial legislature intended to leave undisturbed a practice whose boundaries were established, and which could not be regulated without either the framing of a special system of procedure adapted to admiralty cases, or the introduction of an anomaly into admiralty procedure,—the assimilation of the practice in such cases to the practice in common-law courts. Considering that the volume of admiralty litigation in the Territory of Dakota would necessarily be small, in comparison with the number of cases at law and in equity; that the territorial condition would cease before that volume would much increase; that the practice in admiralty was reasonably well defined; and that whatever statutory procedure was adopted would be substantially a codification of the existing practice,—the members of the legislative body would naturally leave the subject untouched by legislation. We would expect them to pursue just such a course, and the silence of the statutes on the subject renders it certain that the policy of leaving admiralty practice unaffected by territorial statute is the very one they adopted. It is therefore apparent that libelants and interveners had no absolute statutory right to a stay of proceedings pending their appeal to the Territorial Supreme Court, in giving a mere cost bond. This right they could derive only from section 422, which we hold to be inapplicable. To what authority, then, must we look to discover the rules of procedure which regulated the practice in appealing The Eclipse case to the Territorial Supreme Court? Not to any statute of the United States regulating the practice in admiralty in the Federal Courts, for it is well settled that territorial courts, although invested by statute with some of the jurisdiction of the Federal Courts, are not Federal Courts, within the scope of legislative or constitutional provisions relating to Federal Courts. They are merely territorial courts, which are for the time invested with some of the jurisdiction conferred upon the federal tribunals.

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Reynolds v. *U. S.*, 98 U. S. 145; *American Ins. Co.* v. *356 Bales of Cotton*, 1 Pet. 511; *Benner* v. *Porter*, 9 How. 235; *Clinton* v. *Englebrecht*, 13 Wall. 434; *Hornbuckle* v. *Toombs*, 18 Wall. 648; *U. S.* v. *Bisel*, (Mont.) 19 Pac. 251. For the same reason it is obvious that the rules of practice established by the Federal Supreme Court under the act of congress were not applicable. Such rules are in terms limited in their application to courts of the United States. They were adopted and published by that court as rules of practice "for the courts of the United States" in admiralty cases on the instance side of the court. See Ben. Adm. 381. Moreover, the statute under which that court derived its power to act in adopting these rules limited the court, in framing such rules, to regulating the practice to be used in suits of admiralty by the "Circuit and District Courts;" thus specifically referring to the Federal Courts, and excluding all other tribunals in which admiralty jurisdiction might thereafter be vested. Rev. St. U. S. § 917. The decisions of the Supreme Court of Washington Territory and of the United States Supreme Court in the cases already cited are in harmony with our views in this respect. At the time these cases were decided, the rules in question had already been in force; and yet they were not regarded as controlling, but, on the contrary, the courts went back to the old usages, rules, and practice of admiralty courts, to ascertain the correct procedure in those cases. *The City of Panama*, 1 Wash. T. 615; *The Zephyr* v. *Brown*, 2 Wash. T. 44, 3 Pac. 186. See, also, Conk. Adm. 404, 405. When we turn to the old admiralty practice, we find that the appellants, in order to perfect an appeal, were required to give new security for the full value of the property in controversy, or for the full amount in litigation. Dunl. Adm. Prac. 322; 2 Browne, Civ. and Adm. Law, 437.

Certainly, there was no settled rule of practice which would have entitled the appellants in The Eclipse case to a stay of proceedings, and even to appeal at all, without giving such a bond as the court might direct. There being no inflexible rule on the subject, the District Court of the territory in which The Eclipse

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case was decided might, in allowing the prayer of the libelants that an appeal be allowed, prescribe such terms as to security, as in the judgment of the court might seem meet under the circumstances. *Otis* v. *The Rio Grande*, 1 Woods, 596, Fed. Cas. No. 10,614. Under the settled practice in admiralty, the court must allow the appeal, to confer jurisdiction on the appellate court. The appeal must not only be prayed, but also allowed. *The Zephyr* v. *Brown*, 2 Wash. T. 44-47, 3 Pac. 186; *U. S.* v. *Haynes*, 2 McLean, 155, Fed. Cas. No. 15,335; 2 Conk. Adm. 405. Said the court in the case of *The Zephyr* v. *Brown*: "However, upon searching other books, we gather that no appellate court will assume jurisdiction until it is first satisfied that an appeal has been allowed by the judge of the court below. The allowance seems to have been invariably requisite both in ecclesiastical and admiralty cases." It is true that the Territorial District Court could not have arbitrarily refused to allow the appeal. *The New England*, 3 Sumn. 495, Fed. Cas. No. 10,151. But that court might certainly have required, as a condition of allowing the appeal, that the libelants give security for more than the mere costs. Indeed, it appears from several of the cases that the appellant, on appeal to the United States Circuit Court in admiralty cases, gave a bond as for a stay of proceedings, in addition to a mere cost bond, and such bonds were treated as valid. In the case of *The Wanata*, 95 U. S. 600, it appears that a bond on appeal to the Circuit Court, to prosecute such appeal with effect, was given, although a stipulation for value had been given. The same was done in *Dutcher* v. *Woodhull*, Fed. Cas. No. 4,204. In the case of *The Blanche Page*, *Id.*, 1,524, it appears that a similar bond to secure the whole claim was given on appeal to the Circuit Court, notwithstanding the fact that a stipulation for value, good in the appellate court as well as the District Court, had been executed. In all of these cases the bonds were treated as valid, and in two of them judgment was rendered against the sureties therein. The Wanata and The Blanche Page. Indeed, the court, in the case of *The Brantford City*, 32 Fed. 324, treated the whole matter of fixing the bond on

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appeal as within the discretion of the trial court; and, in refusing in that case to require a bond for the full amount of the claim, the court was influenced by the consideration that, in the light of the later decisions of the Federal Supreme Court, the court considered that the rule of that district, when construed in view of the change in the rulings of the Supreme Court, should be held not to require full security on appeal. But the court in that very case did require an additional bond for $7,000. Nor do we think that the fact that legally the *res* was in the custody of the court made it the absolute duty of the trial court, in The Eclipse case, to allow the appeal on the giving of a mere cost bond. It is by no means certain that, where a court has a discretion to require security as a condition of staying execution, such court ought invariably to refuse to exact security in addition to a cost bond, even in cases where the *res* is in the actual possession of an officer of the court. Such possession does not afford absolute security to the respondent, who has been successful, and who is, according to the judgment, entitled to the *res*. Courts can hold property only through the instrumentality of some officer, and such officer may be faithless to his trust, and he and his bondsmen may become insolvent, or his bond may be exhausted by others, who first proceed against it. Capt. Braithwaite would have had a right either to enforce his judgment after an appeal by the libelants accompanied by only a cost bond, or at least to move to require the appellants to give additional security to entitle them to a stay. By abstaining from the exercise of this legal right, he suffered detriment; and the appellants, in the same measure, were benefited. But the case is a much stronger one for him. If on such motion the appellants had insisted that they were in possession of the *res*, and desired and intended, if possible, to remain in possession thereof pending the appeal; that it was their wish to have the judgment regarded as practically, although not legally, a judgment against them for the delivery of this vessel to the respondent in the appeal, so that by stay of the execution of such judgment they could secure a right to retain possession pending

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the appeal; and if the respondent on such appeal had acquiesced in all this; had assented that a stay of execution, on proper security, should have the effect to leave appellants in possession of the property,—is it not clear that under such circumstances the trial judge would have required the appellants to give a supersedeas bond, in addition to a mere cost bond, as a condition of securing such a stay? It appears from the record that the appellants, in giving the bond in question, took precisely this position. They were in possession of the steamer. They prepared and executed an undertaking in which they recited that the respondent in the appeal had recovered a judgment against them for her possession. It is averred that they gave this undertaking to secure a stay of execution on such judgment. Had not the respondent a perfect right to rely on this position taken by them, and derive from it, through their voluntary action, the same advantage which he might have secured on motion, had they, on such motion, taken the same position? Well might he thus reason with himself: "This position taken by the appellants with respect to the nature of the judgment appealed from, and their right to retain possession of the steamer pending the appeal, on securing a stay of proceedings, would, if acquiesced in by me, undoubtedly impel the court to require security in addition to a mere cost bond. But there is no necessity for my urging this matter before the court, for lo! here is just such a bond as the court might, under these circumstances, require,—executed without any order from the court." That the respondent knew of this undertaking is undisputed. That he refrained from all efforts to enforce the judgment, and from all attempts to disturb the appellants in their possession pending the appeal, is also uncontroverted. The only natural inference is that his conduct in this regard was influenced by the giving of this undertaking. This furnishes a sufficient consideration to sustain the undertaking as a common-law obligation. *George* v. *Bischoff*, 68 Ill. 236, and cases hereafter cited. Nor can it be said that the sureties would not be bound, in such a case, because they had not signed the undertak-

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ing to be used as a means of enabling the appellants to retain possession pending the appeal, but only to secure for them such rights as a stay of proceedings would entitle them to, which would not include the right on their part to hold the vessel until the appeal had been decided. By the recital in their own instrument, they describe the judgment appealed from as such a judgment that, if the description were true, the stay of the enforcement thereof would give the appellants the right to hold the property during the pendency of the appeal. They recite that it is a judgment which the respondent has recovered against the appellants for the possession of the steamer, or, in other words, that it is a judgment which requires them to deliver the possession thereof to respondent. The stay of such a judgment would leave the appellants in possession. Now, it is true that no such a judgment was in fact rendered. But the sureties treated it as such a judgment, and therefore they justified the respondent in assuming that they signed to this undertaking to the end that the appellants might secure the right to hold the property pending the appeal. We have no doubt as to this being the object sought to be accomplished by the giving of this undertaking. The respondent, therefore, in seeking to hold the sureties responsible on the theory that this undertaking was given by them and accepted by him for this specific purpose, is merely taking them at their own word, as evinced by the very language of the instrument itself. Indeed, there is authority for the proposition that the recital would estop them from showing that the judgment was different in character. *George* v. *Bischoff*, 68 Ill. 236; *Pratt* v. *Gilbert*, (Utah) 29 Pac. 965; *Gudtner* v. *Kilpatrick*, (Neb.) 15 N. W. 708; *Adams* v. *Thompson*, (Neb.) 26 N. W. 316; 2 Am. & Eng. Enc. Law, 464. But we do not care to place our ruling on that ground. This doctrine of estoppel by recital has its limitations, and we should hesitate long before holding it applicable in a case like this. The bond appears to have been given in view of the practical situation, of which it is evident the sureties had knowledge, or could easily have obtained knowledge, *i. e.* the possession of

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the vessel by the appellants. On the records of the case in the paper preceding the judgment, and on which it rested, was a finding that a portion of the appellants were in possession of the boat. Still, notwithstanding this fact, the sureties, if the territorial statutes were applicable, would have the right to insist that the undertaking was intended as the statutory undertaking in such cases, and could not be used to accomplish any other purpose. But, the moment we conclude that these statutes were not applicable, then the sureties, being presumed to know the law, are not in position to urge that they merely intended to give a statutory bond, there being no statute regulating the matter; but, on the other hand, we are to discover their purpose from all the circumstances surrounding the transaction, the instrument itself being silent on the subject. We do not, however, need to rest the case on this reasoning, as clearly both the sureties and the appellants gave the undertaking to secure at least a stay, and this stay the appellants actually obtained; the property never having been delivered to the respondent under the judgment at all, either while the appeal was pending, or after it had been formally disposed of.

It is urged that the respondent could not have been compelled to refrain from enforcing his judgment pending the appeal, but we are decidedly of the opinion that he would have been promptly restrained, upon motion, it being shown that this bond had been given to secure him. But it would not be decisive of the question, if we should hold that he need not have abstained from proceeding under the judgment pending the appeal. The fact is that he did so abstain. This is sufficient. Said the court in *Wing* v. *Rogers*, 138 N. Y. 361, 34 N. E. 194: "When an action is brought against sureties on a bond or undertaking given in an action or upon appeal, the validity and force of the instrument depend upon its efficacy in performing the office or accomplishing the end or result contemplated by the parties at the time it was given." To same effect, *Carter* v. *Hodge*, (Super. Buff.) 27 N. Y. Supp. 219; *Hathaway* v. *Davis*, 33 Cal. 161; *Gardner* v. *Don-*

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nelly, 86 Cal. 367, 24 Pac. 1072; *Hanna* v. *Savage*, (Wash.) 36 Pac. 269; *Healey* v. *Newton*, (Mich.) 55 N. W. 666; *Moffat* v. *Greenawalt*, (Cal.) 27 Pac. 296; *Buchanan* v. *Milligan*, (Ind.) 25 N. E. 349; *Hester* v. *Keith*, 1 Ala. 316. Judge Elliot, in his work on Appellate Procedure, says: "Weight is attached,—justly, as we believe,—by the better-considered cases, to the fact that the bond has yielded the principal obligor beneficial consideration." Section 357. See, also, 1 Enc. Pl. & Prac. 1019. Supersedeas bonds on appeal to the Circuit Court in admiralty actions have been given in many cases where the claim was already secured, and yet it has never been intimated that such bonds were without consideration and void. So far as appears from the cases, they were given voluntarily. On principle, such a bond must be valid, unless the obligors can show that the appellants obtained nothing under the bond except what they were entitled to without it. That the appellants did obtain something else, we are clear, for it is our opinion that they had no absolute right to stay of execution of the judgment awarding possession to the respondent on the execution of a mere cost bond; and we are also clear that they obtained the privilege of retaining possession pending the appeal, and that the sureties signed it that they might retain such possession. Where an appellant, who does not become entitled to a stay, as a matter of right, by the doing of a particular act, voluntarily gives an undertaking for the purpose of securing a stay, which in its effect, is substantially the same as that which the court might have required as a condition of allowing a stay, the appellant, and those who signed the instrument with him for the purpose of his obtaining such stay, cannot, after it has accomplished its purpose, assail it for want of consideration, because the court did not order it to be given, or because it may not be precisely such an undertaking as the court would have required. The bond is good as a common-law bond. *Pray* v. *Wasdell*, 146 Mass. 324-328, 16 N. E. 266; *George* v. *Bischoff*, 68 Ill. 236; *Meserve* v. *Clark*, 115 Ill. 580, 4 N. E. 770. Indeed, this is the

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rule even in those cases where the statute prescribes what kind of a bond will stay execution, and the appellant gives a different one, and the respondent treats it as a sufficient stay bond. *Association* v. *Read*, (N. Y. App.) 26 N. E. 347; *Wing* v. *Rogers*, 138 N. Y. 361, 34 N. E. 194; *Goodwin* v. *Bunzl*, 102 N. Y. 224, 6 N. E. 399. See, also, *Granger* v. *Parker*, 142 Mass. 186, 7 N. E. 785. Nor can the sureties complain because the bond is upheld as a good common-law bond. It must have been evident to them that it was designed to subserve some other purpose than the mere securing of costs on the appeal. On the theory that it was only a cost bond, it was enormously excessive in amount, and it contains provisions which on that hypothesis are utterly meaningless. In view of the law that the appellants had no absolute right to secure a stay on the giving of a mere cost bond, the sureties were chargeable with knowledge, from the language of the bond and the amount of the penalty, that it was executed to secure a stay, or at least that the respondent might so treat it, and thus be induced to refrain from enforcing his judgment pending the appeal.

Counsel for defendants now takes up his stand at the last barrier, save one, against his clients' liability, left him, and asserts that the District Court did not in fact render a judgment against the libelants and interveners for the delivery by them of this property to the claimant, that when this judgment was affirmed its character was not changed in the least, and that, therefore, there has been no breach of the undertaking on appeal, as this refers to only such a judgment as the appellants must perform. It is on his construction of the undertaking that we differ from him. His two other propositions are clearly sound. The language of the undertaking is that the obligors undertake to obey any order made in the case by the appellate court. This does not mean merely any order requiring something to be done by the promisors, for no order of that kind could be made, as against such of the promisors as were sureties. The language is broad enough to cover any order which might be made in the case,

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whatever its character. The parties signing the undertaking, in legal effect, guarantied that such order would be obeyed, and that if it were not obeyed they would save the respondent from loss. This interpretation accords with the plain significance of the language of the instrument; and it is reasonable that we should so construe the contract as to make it a security for the obedience by the marshal of the order of the court, when we consider the fact that the judgment appealed from was directed against him, and not against the parties, and that on affirmance of such judgment the only order of the Supreme Court to be obeyed, as the sureties must have well known, would be an order binding the marshal, and not the appellants, to deliver this property to the respondent. Unless we are prepared to say that the parties, in signing this undertaking, did not intend to bind themselves at all, except for costs, we must give it this construction. It is an elementary rule of construction that a contract must be so construed as to make it valid and efficacious, rather than invalid or inefficacious. Unless they were guarantying the performance by the marshal of the judgment on affirmance, they were, by all this language, really imposing no liability on themselves at all. Said the court in a very similar case: "We must attribute to the obligors the intention to enter into an obligation every provision of which would be valid." *Shreffler* v. *Nadelhoffer*, 133 Ill. 555, 25 N. E. 630. See, also, *McElroy* v. *Mumford*, 128 N. Y. 307, 28 N. E. 502; 1 Enc. Pl. and Prac. 1011. We hold that the undertaking is supported by a sufficient consideration, and that the affirmance of the judgment, followed by the failure of the marshal and the appellants to deliver the steamer Eclipse to the plaintiff herein, constituted a breach thereof. The complaint therefore states a good cause of action for damages, unless there is force in the next point to be considered.

This brings us to the question whether the failure of the court to fix the amount of this bond as a supersedeas bond renders it void. Having held that the territorial statutes do not apply, but that the bond is good as a common-law bond, this question is not

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important. But, even if the case were governed by the statute, the instrument would be good. Section 416 provides that, in cases where a bond is given thereunder, the court or judge shall fix the amount thereof. This provision is obviously for the protection and benefit of the respondent on the appeal. He may waive compliance with it. If he is willing to accept as a stay bond a bond in the penalty of a certain sum, no one has any reason to complain. When the sureties sign it as a stay bond, and the respondent accepts it as such, what has the court to do in the premises? Under such circumstances, the court, if appealed to, would fix the amount of the bond at the sum agreed on by the parties. There is ample authority for the view that the respondent may waive a compliance with such a provision. *Hill* v. *Burke*, 62 N. Y. 111; *Irwin* v. *Crook*, (Colo. Sup.) 28 Pac. 549; *Bennett* v. *Mulry*, (Super. N. Y.) 26 N. Y. Supp. 790; *Scherer* v. *Hopkins*, (Com. Pl.) 16 N. Y. Supp. 863; *Coleman* v. *Bean*, 1 Abb. Dec. 394; *McCracken* v. *Todd*, 1 Kan. 348; *Skellinger* v. *Yendes*, 12 Wend. 308; *Shaw* v. *Tobias*, 3 N. Y. 188; *Wolcott* v. *Mead*, 12 Metc. (Mass.) 517; *Ducher* v. *Judson*, 16 N. Y. 439; 1 Enc. Pl. and Prac. 1007, cases in note 3. It is a necessary inference from the allegations of the complaint that the respondent on that appeal waived all objections to the bond because the court had not fixed the amount thereof. It alleges that the bond was given to secure a stay, and that it was served on respondent's attorney. It shows on its face that it is a stay bond. It must have been treated by respondent as such, for the complaint alleges that the possession of the boat has never been restored to him. In *Post* v. *Doremus*, 60 N. Y. 371, the party did not waive the omission to have the amount of the bond fixed, for the reason that it did not purport to be a stay bond, and the court took the view that the respondent accepted it only as a cost bond. In that case the bond could not operate as a stay without an express order of court to that effect. Here no order granting a stay was necessary. All the court was required to do, assuming that the statute applies, was to fix the amount of the bond. A waiver of this act by the

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respondent made the bond effective to stay the proceedings. The acceptance of a bond in the Post Case did not make such bond operate as a stay; for an order granting a stay was, as we have said, indispensable. It was on an appeal from an order granting a new trial that the bond in that case was given, and the court held that in such a case nothing would stay the proceedings except an order of court; citing *McMahon* v. *Allen*, 22 How. Prac. 193, where the judge who wrote the opinion said: "I conclude, therefore, that the only way in which, in such a case as this, the proceedings in the court below can be stayed after an order for a new trial has been made, is by a motion directly for that purpose in this court." As the respondent on the appeal in the admiralty case saw fit to accept and act on this bond as a sufficient stay bond, without the amount thereof being fixed by the court, the obligors therein are in no position to interpose the objection that the bond is void because the amount thereof was not so fixed.

The plaintiff successfully vindicated his right to the possession of the steamer Eclipse through the entire course of the action in admiralty; obtaining a judgment in the District Court, which was affirmed by the Supreme Court of the territory, and finally by the Supreme Court of the United States. The justice of the case is palpably with him. All parties have regarded this bond as taking the place of the vessel,—as his security in lieu of his obtaining possession of her under the judgment appealed from. It is a source of great satisfaction to the court that we are able, under the law to recognize and uphold the justice of his claim. The order of the District Court is reversed, and the trial court is directed to enter an order overruling the demurrer. All concur.

BARTHOLOMEW, J. (concurring.) I concur in the foregoing opinion, but also deem it proper to go one step further than my Brother Corliss has gone. Assuming that the territorial statutes were controlling in the matter of giving the undertaking on appeal from the original judgment in admiralty, I then think that the undertaking sued upon should be sustained as a statutory

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undertaking given to stay execution upon a judgment for the delivery of personal property. True, the judgment was not such in form, but the facts found show that it was such in its practical effect, and all the parties to the litigation so treated it. I am authorized by the chief justice to say that he concurs in this view, also.

ON APPLICATION FOR REHEARING.

CORLISS, J. On the application for rehearing, the opinion of the court has been attacked with such ability and earnestness by the counsel for defendants, who has laid under tribute, to strengthen his argument, so wide a field of juridical learning, that, despite the length of the original opinion, we feel constrained to state our reasons for not agreeing with him with respect to the new points he has presented. He seems to concede that we are correct in our view that the territorial statutes did not govern the appeal in the admiralty case. But he contends that such appeal was in all respects regulated by the statutes of the United States and the rules of the Federal Supreme Court relating to appeals from the Federal District to the Federal Circuit Court in that class of cases. The decision in *The City of Panama*, 101 U. S. 453, is cited as conclusive on this point. We do not so construe it. The court was not called on in that case to decide whether such statutes and rules governed the appeal to the Supreme Court of the Territory of Washington from the Territorial District Court, for the practice which was in fact adopted on such appeal was sanctioned by the usuages of courts of admiralty on appeal in such cases, and did not require any support from legislation or formulated rules of court. The Federal Supreme Court nowhere asserts that the acts of congress, and the rules promulgated by that court, governed the appeal to the Territorial Supreme Court, nor is there to be found in the opinion any reasoning leading up to this conclusion. There is only a faint inference that such was the decision of the court, from the language of the assignment of error which is overruled.

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But that assignment would not have been changed, in its essential nature, had it stated that the court erred in holding that the general practice in admiralty, independently of legislation and formulated court rules, governed the proceedings on appeal to the Territorial Supreme Court, and in refusing to hold that the territorial statutes regulated such appeal. And the assignment, as so framed, would have more accurately pressed the proposition before the Federal Supreme Court for decision. In *Smith* v. *The Challenger*, (Wash.) 7 Pac. 851, both parties agreed that rule 16 of the Federal Supreme Court, relating to admiralty practice in the Federal Courts, was applicable to a case in territorial courts, the only difference between them being as to the construction of that rule.

But, even if we should agree with counsel that the appeal to the Territorial Supreme Court in the admiralty case was governed by the statutes of the United States, so far as applicable, we could not assent to his view that at the time such appeal was taken there was any federal legislation relating to appeals from Federal District to Federal Circuit Courts in admiralty cases, aside from the statute giving the right to appeal. Rev. St. § 641. As this section originally stood, it provided that such appeals should be governed by the rules, regulations, and restrictions relating to proceedings on writs of error. While the statute remained in this form, there could be little doubt about appeals to the Federal Circuit Court, in admiralty proceedings on the instance side of the court, being governed by the statutes of the United States relating to proceedings on writs of error. See *The Lottawanna*, 20 Wall. 201; *Hayford* v. *Griffith*, Fed. Cas. No. 6,263. Mr. Conkling bases his criticism of Justice Story's ruling to the contrary on that language of the statute which had been dropped therefrom before the appeal to the Supreme Court of the Territory of Dakota was taken in The Eclipse case. 2 Conk. Adm. 385 *et seq.* Under the statute as it then stood, the authorities cited, which construed the statute as it originally was framed, are not in point. There is, however, a single decision in favor of the

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counsel's contention. It is *Insurance Co.* v. *Wager*, 37 Fed. 59. The reasoning of Judge Wallace does not convince us that he is right. He admits that his construction does violence to the language of the statutes relating to the subject. He finds his strongest—and practically his only—argument to justify his wresting of the words of the statutes in question from their obvious meeting in the circumstance that congress had, in express terms, exempted the government from the necessity of giving security on appeal to the Circuit Court in admiralty as well as in other cases. The inference he draws from this provison, that it indicates that congress considered that the government was not entitled to such an exemption as a matter of right, is a very natural inference. But his further deduction that, therefore, congress must, by prior legislation, have imposed on the government, as well as on others, the duty of giving security on such appeals, is not necessarily sound. The obligation to give security on appeal was, as we shall show later, recognized by courts of admiralty long before the federal government was established. It is just as logical a conclusion that congress had this practice in view, in framing the provision exempting the government from the performance of this obligation, as that it had in view a statutory enactment on the subject. Nay, the former conclusion is much more reasonable than the latter, when we examine the terms of the statutes from which the purpose to regulate proceedings on appeal to the Federal Circuit Court in admiralty cases is, by Judge Wallace, extorted by a process of construction which does violence to the language in which these acts are couched. Section 1012 of the Revised Statutes of the United States is, to our minds, a significant provision, and it seems to us to be hostile to the views of Judge Wallace. It, in terms, declares that the rules, regulations, and restrictions applicable to cases taken to a higher court on writs of error shall govern appeals in admiralty cases in only prize cases. Cases on the instance side of the court are not mentioned. In *The Brantford City*, 32 Fed. 324, Judge Brown held that there was no federal statute regulating the

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matter of security on appeals to the Circuit Court in admiralty cases, and this decision we regard as sound. It is not pretended that there was any rule of the Federal Supreme Court, at the time The Eclipse case was appealed, which regulated the matter of security on appeals to the Circuit Court in admiralty cases. Our conclusion, is that neither the territorial statutes, nor the acts of congress, nor the rules of the Federal Supreme Court, governed the question of security on appeal to the Territorial Supreme Court in The Eclipse case. We also hold that, even if the statutes and rules which governed appeals to the Federal Circuit Court in such cases applied to the appeal in question, still there was no statute or rule regulating this matter on appeals to the Federal Circuit Court.

But conceding all this to be true, counsel for defendants still contends that, on the assumption that general rules of admiralty practice regulated the appeal in question, the instrument sued on is void so far as it provides that the obligors shall obey any order which the court might make in the premises. We fully agree with him that if the appellants in that appeal had an absolute legal right to secure a stay of proceedings by appealing, without incorporating in the bond that condition, then that portion of the bond is without consideration and void, unless other circumstances, to be referred to later, take the case out of the general rule laid down and applied. *Kountze* v. *Hotel Co.*, 107 U. S. 378, 2 Sup. Ct. 911. In this connection we must express our dissent from the proposition that writs of error and appeals operated of themselves, at common-law, absolutely to stay execution. Counsel for defendants insists that no authority to require security as a condition of allowing a stay is ever vested in any court without a statute to that effect, and that, as we hold that there is no statute relating to this matter in admiralty cases, the bond was a nullity. This is not a correct statement of the law. There has always inhered in courts of law, courts of equity, and courts exercising admiralty jurisdiction, power to require security to be given as a condition of staying execution. It is

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true that at common-law a writ of error operated in the first instance as a supersedeas. But the court to which the writ of error was issued had power, in its discretion, to allow the successful party to enforce his judgment despite the issuance of the writ and the same power was vested in the tribunal by which the writ was issued. *Messonnier* v. *Kauman*, 3 Johns. Ch. 66; *Bradwell* v. *Weeks*, 1 Johns. Ch. 325; *Brewster* v. *Cowen*, (Conn.) 10 Atl. 509-511; *Allen* v. *Hopper*, 24 N. J. Law, 514, 515; *Entwistle* v. *Shepherd*, 2 Term R. 78; *Kempland* v. *Macauley*, 4 Term R. 436. This power to permit execution to be issued notwithstanding the issuance of a writ of error necessarily included the lesser power to require the appellant to give security to obtain a stay until final decision by the Supreme Court. The statutes in England referred to by Mr. Justice Bradley in *Kountze* v. *Hotel Co.*, *supra* were passed to give the respondent an absolute right to that which at common-law he could only pray for as a favor to be granted or withheld in the discretion of the court. When we turn to appeals in equity cases, we find that except during the struggle of the house of lords to maintain its jurisdiction to review cases in chancery on appeal, when the rights of litigants were lost sight of in the strife for power, an appeal has never, of itself, been sufficient to entitle the appellant to a stay of proceedings pending the appeal. So long as the jurisdiction of the house of lords was challenged, that body deemed every step taken in the case, however slight, as a denial of its authority; and accordingly it arbitrarily held that nothing could be done in the lower court after appeal, however foreign it might be to the branch of the case which was carried up. As soon as its jurisdiction was generally recognized, it began to abate, its now no longer ambition inspired pretensions, and in 1772 it was held that the stay did not extend beyond that portion of the case which was removed to the house of lords by the appeal. Finally, in 1807, it declared, by resolutions, that even this doctrine, which had its origin in bitter contentions for judicial power, in which the interests of the suitor were lost sight of, had for a long time

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previous thereto ceased to be followed, but that, on the contrary, an appeal, of itself, did not operate as a stay,—the appellant being required to apply to the chancellor to secure a stay, who could refuse it or allow it on such terms as he might prescribe. The action of the chancellor in this regard seems to have been subject to the supervision of the appellate court. *Hart* v. *Albany*, 3 Paige, 381; *Messonnier* v. *Kauman*, 3 Johns. Ch. 66; *Burke* v. *Brown*, 15 Ves. 184, note; *Willan* v. *Willan*, 16 Ves. 216; *Way* v. *Foy*, 18 Ves. 452; *Monkhouse* v. *Corporation of Bedford*, 17 Ves. 380; 2 Daniell, Ch. Prac. 1467. Except as changed by statute, this has been the law in England for upwards of a century. In this country some of the courts have followed the English practice, while others have held that an appeal in an equity case stays, in the first instance, the order or decree appealed from, but that the chancellor or the appellate court may allow the successful litigant to enforce the decree or order despite the appeal. *Messonnier* v. *Kauman*, 3 Johns. Ch. 66; *Riggs* v. *Murray*, 3 Johns. Ch. 160; *Bradwell* v. *Weeks*, 1 Johns. Ch. 325; *Green* v. *Winter*, 1 Johns. Ch. 77; *Hart* v. *Albany*, 3 Paige, 381; *Schenck* v. *Conover*, 13 N. J. Eq. 31; *Riehle* v. *Heulings*, 38 N. J. Eq. 83; *Peer* v. *Cookerow*, 14 N. J. Eq. 361-365; *Kimball* v. *Alcorn*, 45 Miss. 149; *Cook* v. *Dickerson*, 1 Duer, 691. This power to permit the successful suitor to enforce the decree pending an appeal includes the lesser power of requiring the appellant to give security, as a condition of withholding execution while the appeal is pending. In several of the English cases the appellant was required to pay into court the money which the decree adjudged that he must pay, to be invested for the benefit of the person finally adjudged entitled to it. *Willan* v. *Willan*, 16 Ves. 216; *Monkhouse* v. *Corporation of Bedford*, 17 Ves. 380. This was ordered to be done in *Riggs* v. *Murray*, 3 Johns. Ch. 160, also. It cannot be questioned that in these cases the court could have required a bond, instead of the payment of the money into court. Indeed, in *Riggs* v. *Murray* the appellant was given an option to furnish security, instead of

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bringing the money into court. See, also, *Cook* v. *Dickerson*, 1 Duer, 691.

With respect to appeals in admiralty cases, counsel contends that there is, in the absence of some statutory change in the practice, no such thing as a stay of proceedings, for the reason that the appeal, of itself, annuls the decree appealed from, thus leaving nothing to be enforced pending the appeal. Undoubtedly, it has been many times asserted by the courts that the case is to be heard *de novo* on the appeal,—as though no decree had been rendered. And in some of the cases even stronger language is used. *Yeaton* v. *U. S.*, 5 Cranch, 281; *The Collector*, 6 Wheat. 194; *U. S.* v. *Preston*, 3 Pet. 57; *The Lucille*, 19 Wall. 73; *Penhallow* v. *Doane*, 3 Dall. 54. But as was said by Judge Benedict in *Dutcher* v. *Woodhull*, Fed. Cas. No. 4,204, there was no question before the court as to the right of the respondent to enforce a decree after appeal, no security having been given. In this case Judge Benedict intimates it to be his opinion that, despite an appeal, the decree would stand unaffected for the purpose of enforcing it pending the appeal, should no security be given. "In determining this case, it is not necessary to say whether, under some circumstances, a decree in admiralty, made by the District Court, cannot remain of effect after an appeal is taken to the Circuit Court. It would seem that such may be the case where an appeal is taken, but no bond for damages on appeal is given. Under such circumstances, the failure of the appellant to give a bond for damages would seem to change the aspect of the case, and render it thereafter a proceeding to obtain a decree of restitution, and the numerous cases heretofore determined, both in the Circuit Court and the Supreme Court of the United States, do not appear to me to furnish authority for determining that, after an appeal without security for damages on the appeal, no effect whatever can be given to the decision of the District Court. The general language of these decisions can only be understood by referring to the position of the cases then under consideration, which were not cases of appeal without security." That an

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appeal did not, of itself, prevent an enforcement of a decree in admiralty, and that for that purpose it would be regarded as a subsisting decree, would seem to follow from the language of Clerke, Praxis Adm.: "If the party against whom sentence was passed shall have appealed at the time of delivering the sentence, and a term have been assigned for prosecuting the same, and a certificate of the prosecution of the same, and in the *interim* the judge has not been prohibited from further proceedings, the proctor who obtained the sentence ought to pray that the adverse party should be called upon to show cause why sentence of execution should not be ordered, and the costs be taxed." (How could the court proceed, if the appeal, of itself, annulled the judgment?) Title 61. See Page 110 of Hall's Practice and Jurisdiction of Courts of Admiralty, where this title is found translated. In this country stay bonds have been given, and their necessity, as a condition precedent to a supersedeas, have been recognized in many cases. Some of these cases are referred to in the original opinion. In our view, these bonds were not required to be given by any act of congress, but only by general principles of admiralty practice. If an appeal annulled the judgment, why was it necessary in these cases to give a stay bond to prevent the enforcement of the judgment, which, on this theory, was swept away by the appeal. But whether an appeal in admiralty cases left the decree standing for the purpose of enforcement, and security had to be given to obtain a stay, or whether the appeal was not perfected so as to annul the decree until proper security had been given, is not very important, for it cannot be denied that on appeal in admiralty cases the appellant was required to give security. "If the plaintiff in the first instance shall appeal, he is not allowed to file a libel until he has put in fide-jussory security to prosecute the cause, to pay the costs, to submit to the judgment, and to confirm the acts of his proctor." Clerke, Praxis Adm. Tit. 59. See, also, Brown, Civ. and Adm. Law, 437; Dunl. Adm. Prac. 322; *The Brantford City*, 32 Fed. 324-326.

We agree with counsel for defendants that the plaintiff or

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libelant, when he was the appellant, was ordinarily not required to give security to pay or obey any judgment which might be rendered in the case, because, as a rule, he was not in possession of anything belonging to his antagonist which could be awarded him by the decree of the court. Generally speaking, the utmost extent of his liability under the English practice was for costs, and his stipulation for costs covered this liability. But the situation of the parties in the Eclipse case, at the time the appeal was taken, was peculiar. The vessel was in the actual possession of the appellants, and this fact appeared upon the face of the record in the case. The appellants desired to retain such possession pending the appeal. The sureties must be deemed to have knowledge of the fact that appellants were in possession, for it was part of the record in the case in which the bond was given. And they must also be regarded as being cognizant of the object of the appellants in giving such bond, for its recitals as to the nature of the judgment appealed from, if true, show that it was such a judgment that a stay of execution on it would leave the appellants in possession of the property pending the appeal. The sureties were therefore plainly apprised of the purpose of the appellants to secure by means of that bond the right to remain possession of the boat pending the appeal; and the large penalty named in the bond was another circumstance which made it obvious that the bond was given to enable the appellants to hold the vessel until final decision on appeal, thus leaving very valuable property which the decree awarded to the claimant in their hands at his risk, making it necessary that he should be secured. The bond was in the nature of a stipulation for value. But counsel for defendants urges that it cannot be regarded as having been given for any such purpose, for the reason that the complaint, in terms, avers that it was given to stay execution. But this allegation of the complaint must be construed in the light of the other facts set forth in that pleading; and, when so interpreted, it is manifest that it is an averment of the ultimate purpose for which the bond was given, namely, to enable the

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appellants to retain possession of the vessel pending the appeal. To give a bond to stay execution of a judgment which those giving it construe as a judgment requiring the appellants to deliver property, of which they had actual possession, to their successful adversary, is, in its ultimate analysis, to give a bond to enable such appellants to hold possession of such property pending the appeal. We are therefore clear that the sureties executed this bond with full knowledge that it would be used by the appellants for the purpose of enabling them to keep possession of the vessel. When so used by them with the tacit acquiescene of the respondents, it became a valid obligation; having served the purpose which all the obligors intended it should serve. Whether the libelant in a possessory action is ever entitled to possession on giving a stipulation for value, or whether he may secure possession in this way after decree in favor of the claimant, even assuming that he may do so before final judgment, it is not necessary to inquire. 23 Am. and Eng. Enc. Law, 576· No statute or rule of law declares the bond in question void; and therefore, even though the claimant was not bound to allow the libelants to retain possession after the giving of this bond, still, as he did in fact permit them to remain in possession on the strength of the bond, the bond is valid in all its provisions, as a common-law bond, for the reasons set forth in the original opinion, Nor do we, by reaching the conclusion that the bond was in the nature of a stipulation for value, bring the case within the rules stated in the main opinion,—that exclusive cognizance of proceedings to enforce stipulations for value is vested in the Federal Court sitting as admiralty courts. The reasons for that rule do not apply to stipulations for value given in possessory actions. They are not substitutes for the original *res*, but are mere securities. Nor is it true that the only judgment which can be enforced according to its terms in a possessory action, where a stipulation for value has been given, is a judgment against the stipulators for value. Judgment is rendered for the delivery of possession to the successful party,

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and is enforced according to its terms, even if the property is in the possession of the defeated suitor. Were this not so, the right to maintain a possessory action in admiralty would, in most cases, be illusory. If the claimant, by giving a stipulation for value, could defeat the right of the libelant to recover possession of his property, the word of promise of the admiralty law that possession of property might be recovered in admiralty courts would be kept only to the ear, and broken to the hope. On principle, it must be the rule that in possessory actions the original *res* can be seized under the judgment, and delivered to the successful suitor. *The John*, 2 Hagg. Adm. 305-317; *The Elize*, 2 Spinks, 34; *The Gran Para*, 10 Wheat. 497. A stipulation for value, in such an action, is therefore not a substituted *res*, but in the nature of security for the property, as in replevin actions. The court can render a judgment for the delivery of the *res*, which it will enforce according to its terms. Therefore the reasons for the rule that exclusive jurisdiction of proceedings to enforce stipulations for value is vested in the court in which it was given do not apply to stipulations given in possessory actions, and it follows that they may be enforced in other tribunals.

Finally, it is said that there has been no breach of the condition of the bond to obey any order the appellate court might make, for the reason that no order requiring anything to be done has in fact ever been made by that court. It is urged that a judgment of affirmance is not; either in terms or in legal effect, an order requiring the delivery of the vessel to the claimant. In this connection the case of *The Lucille*, 19 Wall. 73, is cited. This merely holds that a judgment of affirmance in the Circuit Court is not a final judgment from which an appeal will lie to the Federal Supreme Court. The ground of this decision is that the Circuit Court should render an entirely new judgment, for the reason that the amount of the judgment should not be left to be ascertained by an examination of the records of another court. But in The Eclipse case it was not necessary to examine the records of the District Court to ascertain just what the judgment of the

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Supreme Court was. The original decree, or a copy of it, was among the records of the Supreme Court in the case, and that showed that the vessel was to be delivered to the claimant. By construing the judgment of affirmance in the light of the original decree, it would appear that the Supreme Court also had ordered that the vessel be delivered to the claimant. All this would be shown by the records of the Supreme Court. It would not be necessary to look to any other record to determine the exact nature of the judgment of that court. While, perhaps, for the purposes of an appeal, the judgment of affirmance might not have been sufficient to sustain an appeal, it was a sufficient order of the Supreme Court for the delivery of the vessel to constitute a breach of the bond. Indeed, the Federal Supreme Court took jurisdiction of the case on appeal from such judgment, and have thus treated it as a sufficient final judgment in the case. *The Eclipse*, 135 U. S. 599, 10 Sup. Ct. 873. How a new judgment could now be entered, after an affirmance of this judgment by the Federal Supreme Court, we are unable to see; and, if counsel's contention be sound, there could never be any recovery in this case, because the judgment of the Territorial Supreme Court did not, in terms, order that the vessel be delivered to the claimant, although, in legal effect, it was just such a judgment.

The application for a rehearing is denied.

WALLIN, J. I concur in the foregoing opinion, in so far as it denies the application for a rehearing.

(65 N. W. Rep., 701.)

NOTE BY G. W. NEWTON—The foregoing decision records only one turn in the litigation that has arisen from the ownership and doings of the steamboat "Eclipse." It is the aim of this note to epitomize briefly, the many points of law that have been mooted and decided in such litigation.

1. The jurisdiction of admiralty does not extend to the execution of a trust. The title of a steamboat being in trustees, the beneficiaries may terminate the trust, and obtain a decree of sale upon a proper proceeding in a court of equity. *Rea, et al* v. *Steamboat "Eclipse,"* 4 Dak. 218, S. C. 30, N. W. 159. Creditors and interveners, in order to wind up a trust, and enforce a contract of sale of a vessel, can not resort to a court of admiralty. A court of admiralty has not the characteristic powers of a court of equity in such case. *Rea, et al* v. *The Steamer "Eclipse,"* Wm. Braith-

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waite, claimant, U. S. Sup. Ct. Rep. L. Ed. B. 34, p. 269; S. C. *The Eclipse*, Rep. Ed. p. 599.

2. When a part owner is master, and in possession of a boat, under an agreement in writing, he is not subject to removal by his co-owners. *Rea, et. al.* v. *Steamboat "Eclipse,"* 4 Dak. 218, S. C. 30 N. W. 159. The owner of one-half of the legal title of a steamboat, who is the master in possession, and who is by written agreement entitled to such possession at master, is not liable to removal from his position as master. *Rea, et al* v. *The Steamer "Eclipse,"* Wm. Braithwaite, claimant, U. S. Sup. Ct. Rep. L. Ed. B. 34, p. 269; S. C. *The Eclipse*, Rep. Ed. p. 599.

3. The Supreme Court of the United States is limited, in reviewing judgments and decrees in admiralty cases, to a determination of the questions of law arising upon the record, and to such rulings of the court, excepted to at the time, as are presented by the bill of exceptions. *Id.*

4. Where the title to a boat is placed in two persons, as trustees, to be held by them as part owners, and for co-owners, until payment to the co-owners, of certain sums, representing the amount of their interests, and upon such payments the trust to terminate, and title absolute to vest in such trustees, the transaction is at most, a creation of a lien in the nature of a mortgage, and the trustees are the legal owners of the boat. Under such circumstances, a bill of sale executed by a part of the co-owners, would pass to the purchaser no title beyond the equitable interests of such co-owners, as beneficiaries of the trust. *Rea, et al* v. *Steamboat "Eclipse,"* 4 Dak. 218, S. C. 30, N. W. 159.

5. Where the transcript of record upon an appeal from the District to the Supreme Court of the Territory of Dakota, in an admiralty case, contains evidence and extraneous matter, not made a part of the bill of exceptions, such evidence and extraneous matter should, by motion, be stricken from the record. Appeals in admiralty cases, from the District to the Supreme Court, are governed by the same statutes and rules that obtain in other civil actions tried to the court. *Rea, et al* v. *Steamboat "Eclipse,"* 4 Dak. 218, S. C. 30 N. W. 159.

7. The District Court, of the State of North Dakota, is the successor of the Territorial District Court, and has jurisdiction to render judgments in actions pending in such territorial court, at the time of the admission of the state into the Federal Union; although the verdict was rendered before such admission. *Braithwaite* v. *Power, et al*, 1 N. D. 455, S. C. 48 N. W. 354.

8. Where the master of a vessel, who had agreed for a stipulated price, to transport goods upon the Missouri river, was interrupted by the closing of navigation, and the consignees forcibly took the goods from him, the master being able and willing to complete the transportation, to earn his freight, can recover full freight. No time for delivery being specified in the contract of affreightment, the master could rightfully have held the goods until the opening of navigation, that he might earn his freight by completing the transportation. *Braithwaite* v. *Power, et al*, 1 N. D. 455, S. C. 48 N. W. 354.

9. The master of a vessel who has entered into a contract of affreightment, in his own name as master, may maintain an action upon such contract as the trustee of an express trust, under § 4872, Comp. Laws of Dakota Territory. *Braithwaite* v. *Power, et al*, 1 N. D. 455, S. C. 48 N. W. 354.

10. Where the owners of three steamboats operated them jointly for their own benefit, under the name "Benton Line," they are all liable as partners, or joint traders on a contract of affreightment, made by their authorized agent in such name,

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to carry goods in place of one of such boats; and it seems that by operating such boats jointly, in such manner for two seasons, the owners would have rendered themselves liable as partners, or joint traders, even though they had not been such in fact. *Braithwaite* v. *Powers*, *et al*, 1 N. D. 455, S. C. 48 N. W. 354.

11. Where one of three defendants dies, *pendente lite*, and his administrator is substituted, and voluntarily appears and defends the action, and no objection is raised by any of the defendants to such course until after trial and verdict, the Supreme Court will not, on an appeal by the surviving defendants, reverse the judgment against all of them when it provides that the judgment against the administrator shall be paid only in due course of administration. Nor can defendants raise the point that a judgment against them should have been in favor of the plaintiff alone, and not in favor of plaintiff and interveners, as that is a matter exclusively between the plaintiff and intervenors. *Braithwaite* v. *Power*, *et al*, 1 N. D. 455, S. C. 48 N. W. 354.

12. Where the complaint in intervention is framed on the theory only, of co-operation by the interveners with the plaintiff, in the effort to secure judgment against defendants, and the prayer for relief merely requests payment of the money into the hands of a person to be designated by the court, no claim in the complaint, or on the trial being made that the rights of the plantiff and the interveners, as between themselves, are to be adjusted in the action; and the verdict is a joint verdict in favor of the plaintiff and interveners, for the amount of the recovery, it is error to award to interveners any specific portion of the money, without first having adjusted the equities between the plaintiff and the intervenors. *Braithwaite* v. *Aikin*, *et al*, 1 N. D. 475, S. C. 48 N. W. 361.

13. To warrant the granting of a new trial, on the ground of newly discovered evidence, the affidavits must show such new facts as will probably lead to a different result on a new trial. Applications for a new trial on this ground, are looked upon without disfavor and distrust. Such facts must be established by the affidavits of persons who are personally familiar with them, and it is not sufficient to set forth that another will testify to these facts, or some of them. The affidavit of such person, showing what he personally knows about them, must be produced; unless some strong reason is shown why this requirement should be dispensed with. Although the trial court has a large discretion in awarding or refusing new trials, which will not be interfered with except in case of abuse, yet, when a new trial is granted, upon a particular ground, there must be some legal evidence that such cause for a new trial exists; and the ground must be a legal ground for granting a new trial. *Braithwaite* v. *Aikin*, *et al*, 2 N. D. 57, S. C. 49 N. W. 419.

14. The plaintiff and interveners recovered judgment against the defendants, for certain earnings of the steamboat "Eclipse," while the plaintiff was operating her under the agreement for her purchase, set out in *Braithwaite* v. *Aikin*, 1 N. D. 475, S. C. 48 N. W. 361; and the interveners, by their complaint in intervention, claimed the money due under the judgment, as money to which they were entitled under the agreement. *Held*, that the plaintiff (defendant in intervention) could not set up as a counterclaim, a cause of action for the conversion of his interest in the steamboat, referred to in such contract; that the cause of action for the tort did not arise out of the contract or transaction set forth in the intervention complaint, as the foundation of the intervener's claim, and is not connected with the subject of the action. Also, that the cause of action for tort could not be sustained as an equitable set-off, independent of statute, there being no averment that the interveners are insolvent, and that the mere fact that they are not residents of the state does not warrant

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the application of the doctrine of equitable set-off; and also, that equity would not allow the set-off of a cause of action for an independent tort, against a claim arising on contract, even if the interveners were insolvent. *Braithwaite* v. *Aikin, et al*, 3 N. D. 365, S. C. 56, N. W. 133. One whose property has been converted, may waive the tort, and sue for the benefits received by the wrong-doers; although he has not disposed of the property converted, but the intent to waive the tort must appear on the face of the pleading. *Id.* One who intervenes in an action, subjects himself as fully to the jurisdiction of the court as if he had brought an original action against the person against whom his complaint in intervention is filed; and the defendant in intervention may recover an affirmative judgment against the intervener, either because of matters growing out of the intervener's claim, or by establishing a counterclaim, the same as a defendant in an ordinary action. *Id.*

15. A judgment against an administrator in one state, has no binding force or effect against another administrator of the same estate in another state; and such judgment need not be pleaded in an action on the same account, against another administrator, in another state, in order to show that the demand sued on, had been given credit for the amount realized under the foreign judgment. *Braithwaite* v. *Harvey, Adm'r*, 14 Mont. 208, S. C. 27, L. R. A. 101, S. C. 36 Pac. Rep. 38. An administrator will not become bound by the judgment by assisting in the defense of a suit against another administrator of the same estate, in another state. *Id.*

16. A statement in a letter that "whatever is due is ready whenever I can safely pay you or" a third person named is not a sufficient new promise to take the claim out of the statute of limitations. *Braithwaite* v. *Harvey, Adm'r*, 14 Mont. 208, S C. 27 L. R. A. 101, S. C. 36 Pac. Rep. 38. Striking a paragraph from a complaint, on motion, is not reversible error, if it was not sufficient to authorize a recovery. *Id.*

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GEORGE H. MCPHERRIN *vs.* ANDY JONES.

Opinion filed November 4th, 1895.

Instruction as to Credibility of Witness.

It is error for a court to instruct the jury that, if they believe that a witness has testified falsely as to any material fact in the case, they have a right to wholly disregard his testimony, except so far as it is corroborated by other credible evidence in the case, either positive or circumstantial. They should be told that this is the rule only in cases where the witness has willfully or knowingly or intentionally testified falsely. A presumption of prejudice arises from an error which might operate to the injury of the party against whom it was committed, and the burden is on the respondent on appeal to show that the appellant was not in fact injured by such error.

Appeal from Judgment—Review of Charge.

An error in the charge of the court to the jury can be reviewed on appeal from the judgment without a motion for a new trial being made.

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

Action by George H. McPherrin against Andy Jones. Judgment for plaintiff. Defendant appeals.

Reversed.

Bangs & Fisk, for appellant.

DePuy & DePuy, for respondent.

CORLISS, J. The judgment in this case must be reversed for error in the charge of the court. The court instructed the jury as follows: "If you believe that any witness has testified falsely as to any material fact in the case, you have a right to wholly disregard the testimony of such witness, except so far as it is corroborated by other credible evidence in the case, either positive or circumstantial." This instruction should have been so qualified as to make it applicable only in the event of the jury believing that a witness had willfully or knowingly or intentionally testified falsely. *Gold Co.* v. *Skillicorn*, (N. M.) 41 Pac. 533; *Linck* v. *Whipple*, 31 Ill. App. 155; *Follett* v. *Territory*, (Ariz.) 33 Pac. 869; *Barney* v. *Dudley*, (Kan. Sup.) 19 Pac. 550; 2 Thomp. Trials, § 2432, and cases cited; *People* v. *Sprague*, 53 Cal. 494;

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Pope v *Dodson*, 58 Ill. 365. It is said the error was without prejudice to the defendant. But a presumption of prejudice arises from the error, and the record is not in such condition that we are able to say that defendant suffered no injury from the erroneous charge. It is also urged that defendant is not in a position to raise the objection that the court erred in its charge because no motion for a new trial was made, but such an error is an error of law occurring at the trial, and we have held that to review errors of law occurring at the trial no motion for a new trial is necessary, but that they may be reviewed on appeal from the judgment. We think it is due to the learned judge who tried the case to say that the error committed was undoubtedly committed through inadvertence. The writer of this opinion, while at the bar and since occupying a seat on this bench, has often heard Judge Templeton charge the law on this subject correctly; and the true doctrine would have unquestionably been laid down in this case had the learned judge's attention been at the time called to the inadvertent error in this instruction. This case illustrates the impolicy of the statute allowing a party 20 days in which to file exceptions to the instructions of the District Court to a jury. Laws 1893, Ch. 84, § 1. Where a charge is oral, as was the charge in this case, it is unfair to both court and opposing counsel that a party should be allowed to except to instructions, the correctness of which he did not challenge at the time, at a subsequent time, when it is too late to rectify the error without granting a new trial. It is due to the learned trial judge to state also that he was given no opportunity to correct the error himself by granting a new trial, as no such motion was made. The appeal is directly from the judgment entered on the verdict. While regretting the necessity of reversing a judgment under these circumstances, our legal duty to do so is clear.

The judgment is therefore reversed, and a new trial ordered. All concur.

(65 N. W. Rep. 685.)

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SECURITY BANK OF MINNESOTA *vs.* JOHN P. KINGSLAND, *et al.*

Opinion filed November 5th, 1895.

Corporations—Pledge of Notes—Authority to Indorse—Bona Fide Indorsee —Subpledgee.

A corporation was the owner and in possession of certain promissory notes payable to itself. The corporation was indebted to its secretary—who was also its treasurer—for funds advanced to the corporation by such officer. By a resolution of its directors the notes were delivered and turned over to said officer as collateral to its said debt for advances. That resolution did not in terms authorize the indorsement of the notes in any manner, nor authorize the negotation of the notes by its said officer. Pursuant to said resolution, the notes were delivered to the officer, who subsequently repledged the notes to the plaintiff to secure a personal loan to himself, and, after indorsing the notes by an unlimited indorsement in the corporate name, he delivered the same to the plaintiff to secure said personal loan. The plaintiff took the notes with notice of the facts above set out. *Held*: (1) That the resolution of the board did not itself clothe the officer with authority to indorse the paper, and that such officer had no implied authority as an officer to indorse the paper for his individual use. (2) The loan transaction was *prima facie* illegal, because, upon its face, it involved the indorsement and delivery of the property of the corporation to secure a personal loan to the officer. Under such circumstances, the plaintiff, in order to show that it received the paper in due course of business, had the burden of showing that the officer who made the loan had authority to indorse and transfer the paper as was done. No such evidence was offered, and hence it did not appear that the paper was in fact received in due course of business. (3) The action was against the makers of the notes, and the defense was fraud, and failure of consideration as between original parties. If such defense were made out at the trial, the plaintiff, as subpledgee of the paper, with knowledge that the party from whom he received it held it simply as a pledge, could only recover the amout due from the corporation to the original pledgee, even if the evidence established authority on the part of such pledgee to endorse the notes in the corporate name of the subpledgee. No evidence was offered tending to show the amount due the original pledgee. This was a fatal defect in the plaintiff's case.

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

Action by the Security Bank of Minnesota against John P. Kingsland and others on notes. There was a verdict for plaintiff, and from an order granting a new trial plaintiff appeals.

Affirmed.

Burke Corbet, (*Van Fossen*, *Frost & Brown*, of counsel) for appellant.

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A denial that plaintiff is the owner and holder of the notes in suit, raises no issue. It does not meet the allegation of endorsement upon which plaintiffs title depends. *Poorman* v. *Mills & Co.*, 35 Cal. 121; *Wedderspoon* v. *Rodgers*, 32 Cal. 569; *Fleury* v. *Rodgers*, 9 How. Pr. 215; *Sherman* v. *Bushnell*, 7 How. Pr. 171; *Caswell* v. *Bushnell*, 14 Barb. 393. The answer does not allege a knowledge on the part of plaintiff of the want of consideration for the notes sued upon. *Parison* v. *Biddiker*, 15 Pac. Rep. 811; *Rand* v. *Company*, 28 Pac. Rep. 661; *Hunter* v. *McLaughlin*, 43 Ind. 338; *Morris* v. *Harshberger*, 39 N. E. Rep. 521. Defendant should have by special plea denied the authority of an officer of the Universal Gas & Construction Co., to transfer the notes. *McIntyre* v. *Preston*, 5 Gil. (Ill.) 48; *Frye* v. *Tucker*, 24 Ill. 180. As to anything beyond the bona fides of the holder the defendant who owes the debt has no interest. *Gage* v. *Kendall*, 15 Wend. 640; *City Bank of New Haven* v. *Perkins*, 29 N. Y. 554; *Hall* v. *Wilson*, 16 Barb. 551; *Phelen* v. *Moser*, 67 Pa. St. 59; *Rodgers* v. *Squires*, 98 N. Y. 49.

T. R. Bangs and *Bangs & Fisk*, for respondent.

Appellant cannot be treated as an indorsee of the notes in due course as defined by § 4487, Comp. Laws. *Robert* v. *Hall*, 37 Conn. 205; *Claflin* v. *Bank*, 25 N. Y. 293; Jones on Pledges § 105; *Maitland* v. *Bank*, 40 Me. 540; *Citizen's Nat. Bank* v. *Hooper*, 47 Md. 88; 2 Rand. Com. Paper, § 1012; Edwards on Bills and Notes, § 102; 1 Beach on Pr. Corp. § 205; *Wilson* v. *Railway Co.*, 120 N. Y. 145, (24 N. E. Rep. 384;) *Bank* v. *Savery*, 82 N. Y. 291; *Comstock* v. *Hier*, 73 N. Y. 269, (29 Am. Rep. 142.)

WALLIN, C. J. The facts necessary to the decision of this case may be stated as follows: The action is upon two promissory notes, each dated July 28, 1892, and falling due in one year from its date. The notes were payable to the order of the Universal Gas & Construction Company, and were delivered to the payee by delivering the same to one E. S. Austin. The payee named in the notes was a corporation organized under the laws of the

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State of Illinois, and when said notes were executed and delivered it was engaged in business at Minneapolis, in the State of Minnesota. Said E. S. Austin was the secretary and treasurer of the corporation. Said corporation had sold to the defendants a patent right for the manufacture of a certain kind of gas, and the notes were given as part payment for the purchase money. On the 24th day of August, 1892, said E. S. Austin borrowed of the plaintiff through its president, the sum of $6,500, and gave the plaintiff his individual note for that sum, and the loan was not in any sense a loan for the use and benfit of said corporation. The two notes in suit are the collateral notes delivered to the plaintiff by Austin. The note given to the plaintiff for $6,500 has never been paid, but has been renewed and increased in amount, and the collateral has been retained to secure the renewal notes. The complaint averred that the two notes given by the defendants,—the collateral notes aforesaid—were, before their maturity, "indorsed, sold, assigned, and transferred to the plaintiff." Issue was joined in the answer upon such sale, indorsement, and transfer. The answer also alleged want of consideration for the notes, and stated that said patent right was worthless, and dangerous in use. At the trial considerable evidence was offered upon the subject of consideration between the original parties, but, as this feature is not, as we view the record, material to a decision of the case, such evidence need not be further mentioned. Upon the issue of the sale of the notes in suit to the plaintiff, the plaintiff produced the notes, and put them in evidence. They were, when produced at the trial, indorsed as follows: "Universal Gas & Construction Company, by E. S. Austin, Secretary and Treasurer." The plaintiff called as a witness in its behalf one F. A. Chamberlain, who testified in substance as follows: "I reside in Minneapolis. Am a banker. Am president of the Security Bank of Minnesota, plaintiff in this action. Have been since January, 1892. Exhibits A and B are the notes described in plaintiff's complaint. These notes were presented to the bank—to me—by Captain E. S. Austin, who

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desired a loan, and offered these notes as collateral security for the loan which he wished to obtain. This was in August, 1892. We made some inquiry in reference to the notes, and consented to make the loan. On August 24, 1892, we loaned to Capt Austin sixty-five hundred dollars, taking as collateral security for the loan the notes in question. There is to-day owing from Capt. Austin to the Security Bank of Minnesota on the original indebtedness seventy-five hundred dollars and interest from Aug. 19, 1893. None of these notes have been paid, or any part thereof. Capt. Austin is a gentleman residing in Minneapolis. Have known him five or six years before this transaction. Have not been intimate friends. Nothing more than a customer in the bank. This, I think, is the first loan ever made him. I made this transaction with Mr. Austin. These notes were indorsed at the time they were delivered, when the first note was executed by Mr. Austin. I have no recollection of seeing him indorse the paper. The writing I saw on the back of the note was as it appears there now. The indorsement appears now as it did then." E. S. Austin testified in plaintiff's behalf in substance as follows: "Am acquainted with the Universal Gas & Construction Company. Am secretary and treasurer of the company. I received these notes from Mr. James Twamley, as secretary of the company. They were turned over to me some time later on, and I wished to raise some money, and I took them down to the Security Bank, to show them to Mr. Chamberlain, the president of the bank. In the meantime the notes were turned over to me in due form for money advanced for the Universal Gas & Construction Company. Prior to the time of receiving the notes they were owing me for funds advanced. I took the notes to Mr. F. A. Chamberlain, and stated the circumstances to him, and he took the matter under consideration, and said he would look it up. He wanted to know how much money I wished secure, and I told him sixty-five hundred dollars. This was a few days after I first spoke to him, and he then loaned me that amount, and I then indorsed the the paper." On cross-examination Mr. Austin testified: "The

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Universal Gas & Construction Company is capitalized at three millions. I have the original note that I gave the bank, but not here. I endorsed this paper over to the bank. Was the owner of it. The board of directors of the company held a meeting, and turned the paper over to me as collateral to money I had advanced. Have no record of that meeting here. Corporation has a seal. I don't know as there is any provision in by-laws as to transfer of paper. Q. Now, you say you indorsed this paper over to the bank, did you not? A. I did. Q. You owned this paper at that time, did you? A. I did not, sir. It was company paper. It belonged to the company. Q. How did this paper belong to the company if they had delivered it over to you? A. It was in my keeping as a matter of fact after they held that meeting. Q. When they held that meeting, then this paper was turned over to you? A. To me. Q. How long after? A. about thirty days. Q. So at the time this paper was put up as collateral it was corporation paper? A. It was corporation paper at that time. Q. And that is the way it was indorsed. 'The Universal Gas & Construction Company, by E. S. Austin, Secretary and Treasurer'? A. Yes; that is all right. Q. And when you got that indorsed you say you indorsed it at the time you got this $6,500? A. Yes sir. Q. And at the time you gave the original note? A. Yes, sir; as collateral. Q. Right at the same time you got this money you indorsed that on, 'The Universal Gas & Construction Company, by E. S. Austin, Secretary and Treasurer'? A. Yes sir. Q. And that is as true as any other of your testimony, is it not? A. That is right. Yes, it is. I did not own the paper at the time I transferred it. It belonged to the company. It was turned over to me, and was in my keeping, after they held that meeting. It was indorsed, 'The Universal Gas & Construction Company, by E. S. Austin, Secretary and Treasurer.' It was indorsed right at the time I got this money." Upon the question of the indorsement of the notes to the plaintiff, defendants offered witnesses who testified in effect that at or about the time the notes fell due they saw them in Grand Forks, and they

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were not then indorsed as they appeared, when put in evidence at the trial in this: that the words "The Universal Gas & Construction Company by" were not then written on the back of the notes, and did not form a part of the indorsement. Upon the question of the transfer of the paper to the plaintiff the trial court instructed the jury as follows: "Gentlemen of the jury: This is an action upon two promissory notes dated July 28, 1892, one for the sum of four thousand dollars and the other for the sum of five thousand dollars, each due one year from date. The making and delivery of these notes by the defendants is admitted. The payee in the notes is the Universal Gas & Construction Company. The plaintiff bank in this case claims now to be the owner of the notes, and brings this action as indorsee of this paper. The presumption is that plaintiffs are the bona fide holders of this paper; that is, that they obtained the paper before maturity, that they paid full value for it or part value for it, that they obtained it in due course of business, and that they obtained it without notice of any equities existing between the makers and payees of the notes, if any did exist. Now, so far as the testimony in this case stands, I charge you that the evidence shows that the plaintiffs obtained this paper before maturity; that they parted with value when they received the paper, and as consideration for receiving the paper; and that they had no notice of any equities, if any existed, between the original parties to the paper. As to whether or not they took the paper in due course of business within the meaning of the law, is a question I shall submit to you to determine, and that is the first question in this case; for if you find, under the instructions of the court, that they took this paper in due course of business, then your verdict in any event must be for the plaintiffs for the amount of their interest in the paper at least, notwithstanding the original makers may have a defense as against the payee of the note. Now, in order that a person may be said to take paper—commercial paper—in due course of business, the paper must be, where it is made payable to order, as this paper is made, legally indorsed. If, gentle-

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men of the jury, you believe under the evidence of this case that this paper in suit was indorsed at the time it was delivered to Mr. Chamberlain, the president of the bank, by Mr. Austin, as it is now indorsed, then I charge you, as far as the evidence in this case shows, the paper was taken in due course of business, and the plaintiff must recover. If, however, gentlemen of the jury, you believe that at the time this paper matured, to-wit, on the 29th day of July, 1893, the words 'Universal Gas & Construction Company' were not indorsed upon either of these notes, then I charge you that plaintiff cannot recover, unless there was a consideration moving between the makers and the payees of the note." The case was submitted to the jury, and a verdict was returned for plaintiff for the amount of its claim. Defendant moved in the District Court upon a bill of exceptions to vacate the verdict, and for a new trial. The motion was granted, and from the order plaintiff appeals to this court.

In connection with the order granting a new trial the learned judge who made the order, following an excellent rule which prevails in some other states (but is seldom observed in this state,) made and filed the following memorandum of reasons: "In the above entitled action a new trial will be granted. I have no doubt that the plaintiff received the paper in the utmost good faith, before maturity, and for value. The notes, however, in my opinion were not taken in the regular course of business, they having been pledged by an officer of the payee for his private debt. *Wilson* v. *Railway Co.*, 120 N. Y. 145, 24 N. E. 384; *Meads* v. *Bank*, 25 N. Y. 143; *Claflin* v. *Bank*, 25 N. Y. 293; *Shaw* v. *Spencer*, 100 Mass. 382; *Roberts* v. *Hall*, 37 Conn. 205." The order granting a new trial is assigned as error in this court, and the question presented by such assignment is the only point we are called upon to determine. A review of the testimony offered by the plaintiff brings out the following facts: First. The notes in suit were, when executed and delivered to the payee, the property of the corporation to which they were made payable on their face, and have ever since been, and now are, the property

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of said corporation. Second. There is no evidence tending to show that the corporation in terms authorized Mr. Austin to indorse said notes as they were indorsed or otherwise. Third. There is no evidence tending to show that the corporation owing the notes ever in terms authorized Mr. Austin to negotiate the same by sale or otherwise, or to part with the possession thereof for any purpose, or in any manner. Fourth. The notes were indorsed by a general indorsement made by E. S. Austin as an officer of the corporation, and in behalf of the corporation; and E. S. Austin did not indorse said notes individually, nor did he claim, in making the indorsement, or at any time, to act otherwise than as a representative of the corporation in which he held the office of secretary and treasurer. Fifth. When the bank loaned the money to Austin, its president was informed by Austin of the circumstances under which he (Austin) acquired possession of the paper, and was then informed, to some extent at least, of Austin's right thereto; *i. e.* the president was advised by Austin, during the negotiations for the loan, that the paper was delivered to Austin by the board of directors of the payee named in the notes as collateral to secure advances made to it by Austin. Austin testified: "I took the notes to Mr. F. A. Chamberlain, and stated the circumstances to him." Sixth. The notes were generally indorsed by the corporation by its secretary and treasurer, E. S. Austin, at the time the loan was made; nor prior thereto. This resume of the facts in the record embraces only the conceded facts, and such as are brought out by the plaintiff's evidence; and upon such facts the question arises whether the bank—the plaintiff—obtained possession of the notes in the regular course of business; that is, in accordance with the usages of merchants. One fact in the loan transaction is very prominent. It is this: Pending the negotiations for the loan, the bank, through its president, was informed that E. S. Austin was seeking a loan for his individual use, and was offering paper belonging to another—the corporation—as security for such loan. The president knew that the paper offered as collat-

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eral was the property of the corporation, and was payable to the corporation on its face, and that it had not been indorsed prior to the loan. Austin testifies that he made the indorsement then and there, at the time the loan was made. The president of the bank was, from the nature of the case, chargeable with knowledge that Austin never acquired the right to sell the paper or put it afloat in the business community by an unlimited general indorsement. The bank was informed that Austin had possession of the notes only as a pledgee to secure a claim of his own against the corporation whose officer he was. From our standpoint, the surroundings of the loan were of a character to put a prudent man upon inquiry to ascertain the true facts, and, therefore, that the bank in making the loan, assumed the burden of proving that the facts which could have been discovered by inquiry would have protected the bank. *Wilson* v. *Railway Co.*, 120 N. Y. 145, 24 N. E. 384. *Prima facie*, the act of pledging or indorsing the paper of the corporation was irregular, and hence the bank was bound to prove that it was regular, and authorized by the corporation. The mere fact that Austin was secretary and treasurer of the gas company would not clothe him with power to indorse and pledge the paper of his principal to secure a personal loan to himself; nor do we think that the fact that the board of directors had authorized Austin to hold its paper as collateral to a debt due Austin is alone sufficient to authorize that officer to indorse the paper to himself. It may well be true that the corporation was unwilling to assume the burden of paying the paper in full at maturity, as it would be obliged to do, regardless of the amount of its debt to Austin, if the paper was indorsed generally, and negotiated to good faith holders. *Claflin* v. *Bank*, 25 N. Y. 293. An agent never has implied authority to cast burdens upon his principal for his individual advantage. *Clarke* v. *Wallace*, 1 N. D. 404, 48 N. W. 339. Whatever the ultimate facts may prove to be, the plaintiff's evidence in this record discloses that Austin held the paper only as a pledgee to secure him for certain advances made to the gas company, and that this fact was made

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known to the bank before it made the loan. Under such circumstances, we may assume, for the sake of argument, that the original pledgee, Austin, had implied authority to indorse the paper. Nevertheless, his right to do so was limited. Austin could not subpledge the paper to one having notice of the facts to an amount beyond his own claim against the gas company; nor could the bank, knowing that Austin was a mere pledgee, take any better right or fuller power over the paper than that possessed by Austin as the original pledgee. This principle is elementary. Colebrooke, Collat. Sec. § § 180, 181. Upon the assumption that Austin had an implied authority to indorse the paper—which we by no means concede—the bank taking the paper with notice that Austin was a mere pledgee of the paper, would occupy no better position in court that that occupied by Austin. The bank, as subpledgee, in an action against the makers, in which the makers set up fraud and failure of consideration as between original parties, could, if such defense were established, only recover to the amount of the debt due from the corporation to Austin. At the trial no evidence was offered tending to show the amount due from the gas company to Austin, or when that debt fell due, nor does it appear by the record that any written evidence of such debt ever existed. We think this alone was a fatal omission in plaintiff's evidence. Under the evidence in this case, the amount of the recovery of the bank as an innocent good-faith subpledgee could not, as against equities between original parties, have exceeded the sum due the original pledgee, and there is no evidence in the record as to the sum due the original pledgee.

We think the order granting a new trial was clearly proper, and must be affirmed. All the judges concurring.

(65 N. W. Rep. 697.)

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CHARLES J. STEWART *vs.* JOEL S. PARSONS, *et al.*

Opinion filed November 7th, 1895.

Judgment by Default—Failure to Serve Defendant—Vacating.

A judgment was taken by default against defendants. The defendant Joel S. Parsons was served with process, but defendant Louisa F. Parsons was not served with process, although the sheriff's return showed that both were duly served. Defendants joined in a motion to vacate the judgment, and asked on the face of the motion papers to be allowed to come in and defend on the merits. The motion was based in part upon affidavits setting out the nonservice upon the wife. Such affidavits were not controverted upon the hearing of the motion. An affidavit of defendant Joel S. Parsons was made, which stated and set out in detail the various facts upon which the defendants relied as constituting a defense to plaintiff's cause of action as stated in the complaint. Said affidavit was met with an affidavit filed in plaintiff's behalf in opposition to said motion, in which all the material averments of fact as stated in the affidavit of Joel S. Parsons were met and fully denied. The motion to vacate the judgment was denied. *Held*, that such denial was error as to defendant Louisa F. Parsons. *Held*, further, that as to Joel S. Parsons the order should be affirmed for reasons stated in the opinion.

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

Action by Charles J. Stewart against Joel S. Parsons and Louisa F. Parsons. Judgment for plaintiff, and defendants appeal from an order denying defendant's application to vacate a judgment and to be allowed to come in and answer.

Affirmed in part and reversed in part.

Lyman B. Everdell, for appellants.

McCumber & Bogart, for respondent.

WALLIN, C. J. This is an action to foreclose a real estate mortgage given by the defendants, who are husband and wife, jointly, to secure a promissory note executed by the husband alone. Neither of the defendants appeared in the action before the entry of judgment, and in due time a default judgment was entered, which is in the usual form in such cases, and adjudges that the wife shall be debarred of all right, title, and interest in the premises covered by the mortgage, and adjudges that plaintiff

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recover from the husband the sum claimed to be due upon the note, with costs, and that the premises be sold to satisfy such claim, and the plaintiff have execution against the husband for any deficiency which may exist after selling said premises. The judgment was entered on the 20th day of February, 1894. On the 23rd of June, 1894, a notice of motion on behalf of the defendants jointly was served on the attorneys for the plaintiff by Lyman B. Everdell, Esq., who signed the notice as "attorney for the defendants for the purpose of the motion only." The object of the motion as expressed on the face of the notice was "to vacate and set aside the judgment herein, and to allow the defendants to answer to the complaint, and for such other and further relief as the court may deem just." The motion was supported by the affidavits of both defendants and by an affidavit of merits made by their said attorney. The affidavit of the defendant Louisa F. Parsons related wholly to the service of the summons and complaint in the action, and was to the effect that no service thereof was ever made upon her, either personally or otherwise. Defendant Joel S. Parsons' affidavit embraced, with other matter, a statement to the effect that he was personally served with a copy of the summons and complaint in the action when he was not at home, and when he was about one mile distant from his residence; and that the sheriff then and there delivered to him an extra copy of the summons and complaint, to be delivered to his said wife, and that he never did deliver them to his wife. The sheriff's return in the record certified that the sheriff had personally served the summons and complaint on both defendants, but upon the hearing of the motion the sheriff's return was not corroborated by the sheriff's affidavit, nor were the statements made in defendants' affidavits relative to the service upon the wife opposed by any proof whatever save only the return of the sheriff as indorsed on the summons. The affidavit of Joel S. Parsons further set out, in substance, as an excuse for his non-appearance in the action before the entry of the judgment, that the facts upon which he relied as a defense to the action, and

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hereafter referred to, never came to his knowledge until a date subsequent to the entry of the judgment. The facts which Joel S. Parsons relied upon as a defense, and which the defendants desired to interpose as a defense as against the foreclosure of said mortgage, were narrated at length and in detail in his said affidavit; but it will be unnecessary to quote from the affidavit here, or do more than to state that the statements of fact relied upon by him were wholly uncorroborated by other proof, and that all of such statements as to the merits were met and fully denied by an affidavit made and filed in plaintiff's behalf in opposition to the motion.

We may as well pause here, and consider the nature of the application to vacate the judgment, especially so far as the defendant Joel S. Parsons is concerned. In our opinion, it is entirely clear that the application as to him did not rest upon a definite legal right, but was, on the contrary, an appeal to the favor of the trial court, and nothing else. He had been regularly served with the process of the court, and made default for appearance. In due course of practice a default judgment was regularly entered in the action. To entitle Joel S. Parsons to have such judgment vacated as to him, it was incumbent upon him to satisfy the trial court, not merely by excusing his nonappearance in the action before judgment. He had the further burden of satisfying the court whose favor he was seeking that he had a valid defense upon the merits. We have seen that upon the matter of his proposed defense to the action that he rested his application upon his own unsupported affidavit, and that all the important facts contained in his affidavit were met by a full and detailed denial by an affidavit filed in plaintiff's behalf in opposition to the motion. Upon the presentation of the matter to the trial court that tribunal became vested with a sound judicial discretion either to grant or refuse the application. Nor could this court, except in a case of an unsound exercise of such discretion, review the action of the trial court. We certainly can discover no improper exercise of discretion in denying the application as

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to the defendant Joel S. Parsons, and shall therefore affirm the order of the court below as to him.

But the application of the wife rests upon a footing radically different. She brought to the attention of the trial court the fact that she had never been served with process in the action, and her proofs of such nonservice were abundant, and not controverted by a single affidavit. In this court the fact of nonservice was conceded upon the argument. Upon such showing it appeared that the court below was, when the judgment was entered, wholly without jurisdiction of the person of the wife. As to her, the judgment was clearly void for want of jurisdiction of her person in the action. True, the application was made by defendants jointly, and, so far as the grounds of the application were common to both defendants, the order denying the application applied to both; but the application as to Louisa F. Parsons stood upon an independent ground,—*i. e.* the ground of want of jurisdiction as to her. But the appearance of the defendants was a general appearance for the purposes of the motion. They sought not alone to vacate the judgment, but to go further, and be permitted to come in and answer the complaint, and for other and further relief. See *Gans* v. *Beasley*, (4 N.D. 140,) 59 N.W. 714. We are inclined to hold, however, and shall so hold, that a general appearance after judgment ought not to operate to validate a void judgment. In *Yorke* v. *Yorke*, 3 N. D. 343, 55 N. W. 1095, the matter was discussed, but not squarely decided. See *Godfrey* v. *Valentine*, 39 Minn. 336, 40 N. W. 163, in support of our holding. The defendant Louisa F. Parsons has never had an opportunity to answer the complaint, which on its face states a cause of action against her. It follows that, after her general appearance, resulting from their application to vacate the judgment and for further relief, she was entitled, as a matter of strict legal right, not only to have the judgment vacated as to her, but also to have the right belonging to every defendant, viz. the right to answer the complaint in the action. The denial of the motion deprives her of both of these rights, and therefore is prejudicial error as to her,

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and this error must lead to a partial reversal of the order appealed from; neither party to have either costs or disbursements in this court. The court below will modify its order so as to conform to the views expressed in this opinion. All the judges concurring.

(65 N. W. Rep. 672.)

THOMAS H. WELSH *vs.* O. G. BARNES.

Opinion filed November 7th, 1895.

Stable Keeper's Lien.

The lien given to a stable keeper by § 5486, Comp. Laws, is not lost, even as to an attaching creditor, because the horse is temporarily in the possession of the owner when it is levied on, who is using it in the usual manner; it being the purpose of the owner to return the horse to the stable as soon as he finishes his temporary use of it; the arrangement under which the horse is being boarded being still in existence at the time the levy is made.

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

Action by Thomas H. Welsh against O. G. Barnes, sheriff. Judgment for plaintiff, and defendant appeals.

Affirmed.

John E. Greene, for appellant.

Ball & Watson, for respondent.

CORLISS, J. This case presents a contest between a stable keeper claiming a lien on a mare for the feeding and care of her, and an attaching creditor, whose attachment was levied on the mare while she was temporarily in the possession of the owner thereof. The plaintiff, who was the stable keeper, brought replevin against the defendant, who was the sheriff by whom the levy was made. The defendant sought to justify under the writ. At the time he made the levy there was owing the plaintiff, for feeding and caring for this mare, something over $50. Plaintiff claimed a right to the possession of the mare under the statutory lien given him by § 5486, Comp. Laws, for the amount of this bill.

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The contention of defendant is that, as to the creditors of the owner of the mare, the lien was lost by allowing the owner to take the mare temporarily from the stable to drive. It is undisputed that he had not taken her permanently from the possession of the plaintiff, nor did any one so understand. The mare was, when seized by defendant, simply in his possession for a short time, to drive her about as is customary in such cases; and it was his purpose to return her to the stable of plaintiff, as he had done before. The statute giving the lien provides as follows: "Any farmer, ranchman or herder of cattle, tavern keeper, or livery stable keeper, to whom any horses, mules, cattle or sheep shall be entrusted for the purpose of feeding, herding, pasturing or ranching, shall have a lien upon said horses, mules, cattle or sheep, for the amount that may be due for such herding, feeding, pasturing or ranching, and shall be authorized to retain possession of such horses, mules, cattle or sheep until the said amount is paid; provided, that these provisions shall not be construed to apply to stolen stock." Comp. Laws, § 5486. It is obvious that this statute must be construed in the light of the usages of business, and the customs of people who place horses in stables to be cared for by the proprietor of such stables. It is always understood that the owner will, from time to time, take temporary possession of the horse, returning it to the stable after his temporary use of the animal has ceased. If the owner, with the consent of the stable keeper, removes the horse permanently from his possession, the lien is gone. Such was the case of *Ferriss* v. *Schreiner*, (Minn.) 44 N. W. 1083. If the circumstances of the case warrant the inference that the owner in the case cited had come to take his horse for good, then, if the plaintiff had assented to this his lien would have been gone. But the mare, in the case at bar, when she was taken out for a drive, was being boarded at plaintiff's stable by the month, and it was not the intention of either party to terminate this arrangement at the time she was attached. Under the facts of the case at bar, it is obvious that the plaintiff's lien was not lost or impaired at the time the defen-

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dant, as sheriff, seized the mare under attachment against the owner. The authorities are unanimous on this point. *Walls* v. *Long*, (Ind. App.) 28 N. E. 101; *Caldwell* v. *Tutt*, 43 Am. Rep. 307; *State* v. *Shevlin*, 23 Mo. App. 598; *Young* v. *Kimball*, 23 Pa. St. 193, There was not such a loss of possession as would defeat the lien as to third persons. *Caldwell* v. *Tutt*, 43 Am. Rep. 307; *State* v. *Shevlin*, 23 Mo. App. 598. Said the court in this last case: "In the view we take of the meaning of the statute, the lien thereby conferred is not dependent upon an actual, physical custody by the stable keeper at every moment of time. We think that the lien conferred by the statute subsists, even as against third persons without notice, while the horse is boarded in the stable of the lienor, although it may, with his consent, be used during the day by the owner in his business. To hold otherwise would be to construe the statute so as to deprive stable keepers of the protection which the legislature probably intended to give them; since, as is well known, in most cases where horses are boarded the owner is allowed to use them in his business during the day. This being so, the statute could not have intended to allow the owner to destroy the lien of the stable keeper, while having the possession of the horse on the street during the day, by selling or mortgaging it to a stranger without notice of the lien. On the contrary, we are of opinion that every person is bound so far to take notice of the statute that, when he is about to become the purchaser or mortgagee of a horse found upon the street in the custody of its owner, it is incumbent upon him to make inquiry as to the place where the horse is boarded, and whether anything is due for its keeping. There is no greater hardship in this rule than there is in the general rule in respect of purchases of personal property,—that the purchaser gets no better title than the seller has." The case of *Manufacturing Co.* v. *Morgan*, (Neb.) 10 N. W. 462, is not in point. The statute construed in that case is radically different from ours, and the stable keeper was not relying on his lien, but on a seizure under an ordinary execution issued upon a mere judgment for money.

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We have decided this case upon the theory that neither the sheriff nor the attaching creditor knew of plaintiff's lien. We agree with the court in *State* v. *Shevlin*, *supra*, that ignorance of the lien does not give the creditor any right to insist that it does not exist as to him.

It is also urged that the complaint did not state a cause of action. While, perhaps, it is not as full and explicit in its language as it might have been made, yet we regard it as sufficient, as against an attack, not upon demurrer, but for the first time upon the trial.

The judgment is affirmed. All concur.

(65 N. W. Rep. 675.)

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MARY OUVERSON *vs.* THE CITY OF GRAFTON.

Opinion filed November 7th, 1895.

Actual Contact with Obstruction in Street Need not be Plead in Action for Personal Injury.

In an action against a municipality to recover damages resulting from an injury caused by the negligent act of the defendant in permitting an obstruction (*i. e.* a steam threshing engine) to stand upon the traveled portion of one of its public streets, at which the horse behind which plaintiff was riding became frightened and momentarily unmanageable, and the injury resulted, it is not necessary to allege any actual contact with such obstruction.

Object Calculated to Frighten Horses—Jury Question.

Nor can a court say, as matter of law, that such an obstruction is not calculated to frighten horses of ordinary gentleness. That question is for the jury.

Two Causes—Proximate Cause.

When two causes unite in producing an injury,—one being the negligent act or omission of a municipality, and the other something for which neither the municipality nor the party injured was responsible,—and when the injury could not have resulted but for the negligent act or omission of the municipality, such act or omission is the proximate cause of the injury.

Injury Natural Result of Wrongful Act or Omission.

When a horse of ordinary gentleness becomes frightened at an object negligently and wrongfully permitted to stand in the public street of a city, and, because of such fright, becomes momentarily unmanageable, and by reason thereof an accident occurs, resulting in injury, and when no contributory negligence can be imputed to the injured party, the city is liable in damages for such injury, provided the injury be one that might reasonably be anticipated as a natural result of such negligent and wrongful act or omission; and § 4600, Comp. Laws, makes a defendant liable even when the injury is proximate, though not reasonably anticipated.

Burden of Proving Contributory Negligence is Upon Defendant.

A traveler is not required to forego travel on a street because he may know of a an obstruction thereon, nor is he required to show that in passing he used extraordinary care to avoid the injury for which he seeks to recover. But he is required to use ordinary care, in view of all the circumstances, and, if an ordinarily prudent person would not undertake to pass the obstruction under the circumstnnces, then it would be contributory negligence to do so. The burden of showing contributory negligence rests upon the defendant, and, unless such negligence conclusively appears from plaintiff's testimony, the court cannot take the case from the jury.

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Imputed Negligence.

When plaintiff, at her own request, was riding with a third person, who owned and controlled the horse and conveyance, and whose judgment and capacity to drive she had no reason to doubt,—such person being in no manner under plaintiff's control, and not being a person for whom plaintiff was responsible,—the negligence of such person, contributing to the injury, cannot be imputed to plaintiff to defeat a recovery.

Certain Evidence Incompetent.

Evidence that a certain steam engine (not the one at which the horse was frightened) was in operation an hour before the accident, and a few minutes thereafter, *held* incompetent to establish the fact that such engine was in operation when the accident occurred, the evidence generally showing that such engine was operated very irregularly.

Matters of Everyday Observation Not Subject for Expert Testimony.

Whether or not a given object, standing upon the street, is calculated to frighten horses of ordinary gentleness, is not a question for expert testimony.

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

Action by Mary Ouverson against the City of Grafton for injuries resulting from an obstruction in a street. There was a verdict for plaintiff, and from an order denying a new trial defendant appeals.

Affirmed.

Halvor Steenerson, *O. E. Sauter* and *J. H. Fraine*, for appellant.

An object in the highway with which the traveler does not come in contact or collision and which is not an obstruction in the way of travel is not to be deemed a defect. *Cook* v. *Montague*, 115 Mass. 571; *Keith* v. *Inhabitants of Easton*, 2 Allen, 552; *Durke* v. *Lowell*, 13 Metc. 292; *Kingsburg* v. *Dedham*, 13 Allen, 186; *Cook* v. *Charleston*, 13 Allen, 190. Where a horse takes fright at some object by the roadside and runs away but does not come in contact with obstructions or defects in the highway, the municipality is not liable. *Moulton* v. *Sandford*, 51 Me. 127; *Perkins* v. *Fayette*, 68 Me. 154; *Dreher* v. *Fitchburg*, 22 Wis. 675. The duty of the municipality does not go to the extent that it must keep its streets in such condition of repairs, and so free from obstacles that horses in general will not take fright at them. *County of*

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Fulton v. *Rickel*, 106 Ind. 501, (7 N. E. Rep. 220;) *Merrill* v. *Hampden*, 26 Me. 234; *Davis* v. *City of Bangor*, 42 Me. 522; *Nichols* v. *Athens*, 66 Me. 402. The collision with the platform scales was the proximate cause of the injury, and not the fright from the engine. *Campbell* v. *City*, 32 Minn. 308; *Lowery* v. *Manhattan Ry. Co.*, 1 N. E. Rep. 609; *Hinckly* v. *Somerset*, 14 N. E. Rep. 166; *Hoag* v. *Lake Shore Ry. Co.*, 27 Am. Rep. 653; *Savery* v. *Manchester*, 58 N. H. 44; *Schaefer* v. *Ry. Co.*, 105 U. S. 1070; *Insurance Co.* v. *Tweed*, 7 Wal. 44; *Railway Co.* v. *Kellogg*, 94 U. S. 469; *Town* v. *Adams*, 15 Am. & Eng. Corp. Cases, 259; *Houfe* v. *City*, 29 Wis. 296. One who voluntarily or needlessly puts himself in a dangerous place, must take whatever injury comes from his own act, or want of attention to danger. *Goldstein* v. *Railway Co.*, 46 Wis. 404; *Pittsburg Railway Co.* v. *Collins*, 87 Pa. St. 405; *Baltimore Railway Co.* v. *DePew*, 41 Ohio St. 121. Where the driver of a carriage by reason of his negligence causes injury either alone or concurrently with the acts of others to the passenger of the carriage, the negligence of the driver is imputed to the occupant. *Thoragood* v. *Bryan*, 8 C. B. 115; *Morris* v. *C. M. & St. P. Ry. Co.*, 26 Fed. Rep. 22; *Houfe* v. *Town*, 29 Wis. 296; *Olis* v. *Town*, 47 Wis. 422; *Railroad Co.* v. *Miller*, 25 Mich. 274; *Lockhart* v. *Litchtenthober*, 46 Pa. St. 151; *Cuday* v. *Harn*, 46 Mich. 596; *Prideaux* v. *Mineral Point*, 43 Wis. 513; *Stillson* v. *Hannibal Ry. Co.*, 67 Mo. 671; *Holly* v. *Boston Gas Light Co.*, 8 Gray, 123; *Carlisle* v. *Sheldon*, 38 Vt. 440.

Cochrane & Feetham, for respondent.

Where an object naturally calculated to frighten horses of ordinary gentleness is negligently permitted to remain in the highway, and a horse becomes frightened at it, and injury results, the corporation is liable. *Chicago* v. *Hay*, 75 Ill. 530; *Town of Rushville* v. *Adams*, 57 Am. Rep. 124; *Morse* v. *Richmond*, 41 Vt. 435; *Winship* v. *Enfield*, 42 N. H. 199; *Dimock* v. *Town*, 30 Conn. 129; *Ayer* v. *Norwich*, 39 Conn. 376; *Young* v. *New Haven*, 39 Conn. 435; *Bartlett* v. *Hooksett*, 48 N. H. 18; *Foshay* v. *Town*, 25

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Wis. 288; *Curd* v. *Ellsworth*, 20 Am. Rep. 722; *Stanley* v. *Davenport*, 6 N. W. Rep. 706; *Stanley* v. *Davenport*, 2 N. W. Rep. 1064; *Town* v. *Arnold*, 13 At. Rep. 444; *Bennett* v. *Fifield*, 43 Am. Rep. 17; *Turner* v. *Buchanan*, 42 Am. Rep. 485; *Hughes* v. *Fond du Lac*, 41 N. W. Rep. 407; *Cairncross* v. *Pewaukee*, 47 N. W. Rep. 13; *Little* v. *City*, 42 Wis. 643; *Bloor* v. *Delafield*, 69 Wis. 273; *Bennett* v. *Lovell*, 18 Alb. L. Jr. 303; Elliott on Roads and Streets, 449; Jones on Neg. sec. 84; 2 Thompson on Neg. 778; 2 Dillon on Muc. Corp. § 1011 and note; Shearman and Redfield on Neg. § 355; Deering on Neg. 169; Morrill on City Neg. 5. The duty being imposed upon the city to keep its streets free from nuisances, it is liable for a neglect of this duty. *Larson* v. *Grand Forks*, 3 Dak. 307; *Ludlow* v. *Fargo*, 3 N. D. 485; Morrill on City Neg. 72; Jones on Neg. 53. "Where two causes combine to produce an injury to a traveler upon a highway, both of which are in their nature proximate, one being a culpable defect in the highway, the other some occurrence for which neither party is responsible, the municipality is liable provided the injury would not have been sustained but for such defect. *Ring* v. *Cohoes*, 77 N. Y. 83; *Lake* v. *Milliken*, 16 Am. Rep. 456; *Lowery* v. *Manhattan Ry. Co.*, 99 N. Y. 158; *Ricker* v. *Freeman*, 9 Am. Rep. 267; *Chapman* v. *New Haven Ry. Co.*, 19 N. Y. 341; *Forner* v. *Geldmecher*, 42 Am. Rep. 388; Jones on Neg. 163 n. 381; 2 Shearman and Redfield, 346; *Turner* v. *Buchanan*, 82 Ind. 147; *Binford* v. *Johnson*, 42 Am. Rep. 508; *Griggs* v. *Fleckenstein*, 14 Minn. 62; *Harris* v. *Mobbs*, 31 Moaks Eng. Repts. 252; Morrill on Neg. 106; *Crawfordsville* v. *Smith*, 79 Ind. 308; *Chicago* v. *Schmidt*, 29 Alb. L. Jr. 479; *Emporia* v. *Schmidling*, 33 Kan. 485; *Pastene* v. *Adams*, 49 Cal. 87; Elliott on Roads and Streets 451, n.; *Boss* v. *N. P. Ry. Co.*, 2 N. D. 128. To establish contributory negligence, the burden is upon the defendant. *Gram* v. *N. P. Ry. Co.*, 1 N. D. 252; *Sanders* v. *Reister*, 1 Dak. 151; *Mare* v. *N. P. Ry. Co.*, 3 Dak. 336; Beach on Contributory Neg. § 426. Under the evidence in this case, the question of contributory negligence was one of fact for the jury, and could not be disposed of as a matter of law. *Jeffrey* v. *K. &*

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D. Ry. Co., 9 N. W. Rep. 884; *Town of Albion* v. *Hetrick*, 90 Ind. 545; *Pennsylvania Co.* v. *Hensil*, 36 Am. Rep. 188; *O. & M. Ry. Co.* v. *Collarn*, 38 Am. Rep. 134; *Henry County Turnpike Co.* v. *Jackson*, 44 Am. Rep. 274. "One is not required to forego travel on a highway merely because he knows it to be dangerous or to show that in the use of a highway know by him to be dangerous, he used extraordinary care to avoid an injury, for which he seeks to recover damages; but he should be careful in proportion to the danger of which he has knowledge and may proceed if it be consistent with reasonable prudence to do so; and it will generally be a question for the jury whether he used reasonable care, his knowledge of the defect in the highway being a circumstance to be considered with other circumstances in determining whether he used reasonable care." *Henry County Turnpike Co.* v. *Jackson*, 44 Am. Rep. 275; *Griffin* v. *Auburn*, 58 N. H. 121; *Osage City* v. *Brown*, 27 Kan. 74; *Estelle* v. *Lake Crystal*, 27 Minn. 243; *Kelly* v. *Southern Minn. Ry Co.*, 28 Minn. 98; *Mahoney* v. *Metropolitan Ry. Co.*, 104 Mass. 73; *Thomas* v. *Western Union Tel. Co.*, 100 Mass. 157; *Lyman* v. *Amherst*, 107 Mass. 339; *McKenzie* v. *Northfield*, 30 Minn. 456; *Mehan* v. *Syracuse*, 73 N. Y. 585; *Evans* v. *Utica*, 69 N. Y. 166; *City of Aurora* v. *Hillman*, 90 Ill. 61-65; *Lovenguth* v. *City of Bloomington*, 71 Ill. 238; *Bloomington* v. *Chamberlain*, 104 Ill. 268; *Harris* v. *Township*, 31 N. W. Rep. 425; *Allegany Co.* v. *Broadwaters*, 16 At. Rep. 223; *Kelly* v. *Fond du Lac*, 31 Wis. 179-187; *Elynton Land Co.* v. *Mingea*, 7 So. Rep. 666. The negligence of the driver was not imputable to the plaintiff. *Town of Albion* v. *Hetrick*, 46 Am. Rep. 233; *Robinson* v. *R. R. Co.*, 66 N. Y. 11; *Bennett* v. *R. R. Co.*, 36 N. J. L. 225; *Knapp* v. *Dagg*, 18 How. Pr. 165; *Nisbet* v. *Town*, (Ia.) 39 N. W. Rep. 516; *R. R. Co.* v. *Steinbremer*, 47 N. J. L. 161; *Little* v. *Hacket*, 116 U. S. 366, 6 Sup. Ct. Rep. 391; *Dyer* v. *Erie Ry. Co.*, 71 N. Y. 228; *Transfer Co.* v. *Kelly*, 36 Ohio St. 86; *Cuddy* v. *Horn*, 46 Mich. 596, 10 N. W. Rep. 32; *Tompkins* v. *Ry. Co.*, 4 Pac. Rep. 1165; *Follman* v. *Mankato*, 35 Minn. 522; *Metcalf* v. *Baker*, 11 Abb. Pr. (N. S.) 431; *St. Clair St. Ry. Co.* v. *Eadie*, 43 Ohio St. 91; *Elynton Land Co.*

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v. *Mingea*, 7 So. Rep. 666; *Ry. Co.* v. *Hughes*, 6 So. Rep. 413; *Noyes* v. *Roscawen*, 10 At. Rep. 690; *Carlisle* v. *Brisbane*, 6 At. Rep. 372; *Town* v. *Musgrove*, 18 N. E. Rep. 452; *Sheffield* v. *Cent. U. Tel. Co.*, 36 Fed. Rep. 164; *R. R. Co.* v. *Hogeland*, 7 At. Rep. 105; *State* v. *Boston & M. R. Co.*, 15 At. R. 36; Beach Cont. Neg. § 109 and note. The question whether this engine was an object in its nature calculated to frighten horses of ordinary gentleness, was a question for the jury to determine from a consideration of its character, situation, the amount of travel on the highway, and other like circumstances. Elliott on Roads and Streets, 450; 2 Thompson on Negligence, 778; *Cleveland C. C. & I. Ry. Co.* v. *Wynant.* 17 N. E. Rep. 118; *Ayer* v. *The City of Norwich*, 39 Conn. 376, 12 Am. Rep. 396; *Young* v. *City of New Haven*, 39 Conn. 435. Evidence of other horses having frightened at the same object was admissable to show its natural tendency to frighten horses. Elliott on Roads and Streets, 451; *Darling* v. *Westmoreland*, (N. H.) 13 Am. Rep. 55; *Crocker* v. *McGregor*, (Me.) 49 Am. Rep. 611. The question as to whether or not an ordinarily prudent person would attempt to drive by the engine, was properly a question for the jury. Beach on Contrib. Neg. 328; *Alleghany Co.* v. *Broadwaters*, 16 At. Rep. 223; *Harris* v. *Township*, 31 N. W. Rep. 425; *Kelly* v. *Fond du Lac*, 31 Wis. 179 and 187; *MacKenzie* v. *Northfield*, 30 Minn. 456; *Estelle* v. *Ry. Co.*, 28 Minn. 98; *Hampson* v. *Taylor*, 8 Atl. Rep. 331 and note; *M'Keigne* v. *City of Janesville*, 31 N. W. Rep. 298.

BARTHOLOMEW, J. Mary Ouverson sued the City of Grafton upon a complaint which, after setting forth the incorporation of the municipality, and its duty, under its charter, to keep its streets free from obstructions, alleged in substance that for two weeks prior to September 23, 1892, the defendant carelessly and negligently permitted a threshing engine to stand upon one of its principal business streets, in such a position as to greatly lessen the width for available travel, and that said engine was calculated to frighten horses and obstruct the free use of the street, and that on said date, while plaintiff and one Slette were

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carefully and cautiously driving along said street with a quiet horse, and while passing said engine, the horse became frightened thereat, and shied and became unmanageable, and overthrew the buggy in which they were riding, and plaintiff was thrown violently to the ground, and received injuries which crippled her for life, for which injuries, with the attending physical pain and distress, and loss of time, and the bills for surgical attendance and nursing, she sought to recover judgment against the city. The answer was partly in denial, and partly pleading contributory negligence. The case was tried to a jury. There was a general verdict in favor of plaintiff, and the jury also answered five questions submitted at defendant's request. A motion for a new trial was overruled, and judgment ordered on the verdict. Defendant appeals, and the first point urged as error was the action of the trial court in overruling defendant's objection to receiving any testimony under the complaint, on the ground that it did not state a cause of action. Much of the argument on this point seems to be based upon a misconstruction of the complaint. Appellant says in his brief, "As appears from the complaint, the alleged engine was standing by the roadside, and not in the raveled way of the street." On the contrary, the complaint specifically alleges that the engine was permitted "to be and remain upon the traveled portion of the street." But the principal point urged against the complaint is the fact that it does not allege that the injury was occasioned by coming in actual contact with any obstruction upon the street. The legal proposition advanced seems to be that a municipality is not liable for an obstruction on the highway, of such a nature as to frighten horses of ordinary gentleness, even though by reason of such fright an accident occurs, resulting in injury, and the injured party is without fault, when there was no actual contact with the obstruction. This proposition has some support in Massachusetts. See *Keith* v. *Inhabitants of Easton*, 2 Allen, 552; *Cook* v. *Inhabitants of Montague*, 115 Mass. 571. We do not think the doctrine has any support elsewhere, and even the Massachusetts cases would not aid

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appellant, because they distinctly assert that in order to avoid liability the obstruction must be outside the traveled portion of the highway, while here the contrary is alleged. *Moulton* v. *Inhabitants of Sanford*, 51 Me. 127; *Perkins* v. *Inhabitants of Fayette*, 68 Me. 154; *Dreher* v. *Town of Fitchburg*, 22 Wis. 675; and *Houfe* v. *Town of Fulton*, 29 Wis. 296,—cited by appellant on this point, are in no manner applicable. These cases discuss an entirely different question. In *Nichols* v. *Inhabitants of Athens*, 66 Me. 402, the court held, as matter of law, that the object which caused the fright was not such an object as was calculated to frighten horses of ordinary gentleness. Other cases to the same import may be found, and appellant seems to think such should have been the holding in this case. We think not even had the allegations been simply that the horse become frightened at a steam threshing engine standing in the street; but when, as in this case. the allegation is coupled with the statement that such engine was calculated to frighten horses, there can, we think, be no doubt as to the correctness of the ruling below. The question was peculiarly for the jury. In case of an accident and injury by reason of a horse becoming frightened at a traction engine in actual operation on the highway, as a means of conveyance, an entirely different question would arise, which we do not here discuss.

The next assignment relates to the proximate cause of the injury. And here it will be necessary to state certain undisputed facts. Sixth street, in the City of Grafton, runs east and west. Hill avenue runs north and south. The engine stood on the north side of Sixth street, and east of Hill avenue, in front of a building used for storing and selling machinery. Across Sixth street from the engine, and a little further east, was a building used as a steam printing office. Still east of that, and on the same side of the street, but with a platform between them, was a lumber office; and in front of the lumber office, and outside of the sidewalk, were platform scales, extending eight or nine feet into the street. The outside frame of the scales was higher than the street, and presented a perpendicular surface about eight

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inches high. East of the lumber office were the tracks of the Great Northern Railway,—a main track and two side tracks. These tracks crossed Sixth street. Plaintiff and Slette had driven in from the country, a distance of about 25 miles, and were going east on Sixth street, to plaintiff's home. About the time they approached Hill avenue, Slette noticed the engine, and asked if there was any fire in it. Plaintiff answered that she could see none. (There was, in fact, no fire in the engine.) As they approached near the engine, the horse gave some indications of becoming frightened, and Mr. Slette struck the animal lightly with a switch he was using for a whip. The horse then plunged violently, and shied diagonally across the street, and the buggy struck the frame of the platform scales, breaking the wheel and throwing Mr. Slette out. He held to the lines, and was dragged to the railroad track, where his hold was broken. The plaintiff was thrown out, and upon the iron rail. The knee cap to one knee was split, and she was otherwise bruised. Her injuries disabled her for weeks and resulted in a permanently stiff limb. From these facts it is argued that the defect in the street which caused the accident was the platform scales, and the jury, in answer to an inquiry, in terms, found that if the scales had not been there the driver would have recovered control of the horse, without injury to the occupants of the buggy. Hence appellants says the proximate cause of the injury was the scales, but, as the complaint was not leveled against that obstruction, no recovery can be had. We doubt if a single well-considered case can be found to support this position, under the facts in this case. None of the cases cited by the learned counsel establish any such rule. In *Campbell* v. *City of Stillwater*, 32 Minn. 308, 20 N. W. 320, cited by appellant, the law is thus stated: "Where several concurring acts or conditions of things —one of them the wrongful act or omission of the defendant— produce the injury, and it would not have been produced but for such wrongful act or omission, such act or omission is the proximate cause of the injury, if the injury be one which might reason-

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ably be anticipated as a natural consequence of the act or the omission." That decision would make this defendant directly liable, if permitting the engine to remain in the street was the wrongful act or omission of defendant. In *Lowery* v. *Railway Co.*, 99 N. Y. 158, 1 N. E. 608, also cited by appellant, fire was negligently permitted to drop from the engine upon a horse and driver passing below. The horse became frightened, and started to run. The driver intentionally, and for the purpose of stopping the horse, reined him against the curbstone. The driver was thrown out, and the horse ran over and injured the plaintiff. It was held the plaintiff could recover from the railway company. In *Hinckley* v. *Inhabitants of Somerset*, 145 Mass. 326, 14 N. E. 166, the plaintiff, driving a gentle horse, was approaching a bridge. The horse became frightened at an object for which the municipality was not responsible, to-wit, a sailboat in the water, and became momentarily unmanageable, and ran onto a defective wall that guarded the approach. A recovery was allowed. But we need not further discuss the cases cited by appellant. None of them would defeat a recovery in this case. It is true that a wrongful or negligent act or omission is sometimes followed by a result that could not ordinarily or reasonably be expected to flow from the negligent act or omission, and in such cases the negligent act or omission will not support an action for damages arising from such unexpected result. Such was the case of *Scheffer* v. *Railway Co.*, 105 U. S. 249, where a party, by reason of injuries received in a railroad collision, became insane and committed suicide. It was held that the railroad company was not responsible for the death. Likewise, in *Hoag* v. *Railway Co.*, 27 Am. Rep. 653, when a landslide derailed an oil train, and the oil tanks burst, and the oil caught fire, and a stream of water near the track, being unusually swollen, carried the burning oil down stream and set fire to plaintiff's buildings, this was held to be a result that could not reasonably be expected to follow the negligent omission of the engineer to see the landslide. But these cases only served to emphasize and clearly define the

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general rule that "when two causes combine to produce an injury to a traveler upon a highway, both of which are in their nature proximate,—the one being a culpable defect in the highway, and the other some occurrence for which neither party is responsible, —the municipality is liable, provided the injury would not have been sustained but for such defect." Shear & R. Neg. (4th Ed.) 346; Elliott, Roads, & S. 451; *Ring* v. *City of Cohoes*, 77 N. Y. 83; *Lowery* v. *Railway Co., supra*; *Lake* v. *Milliken*, 62 Me. 240; *Ricker* v. *Freeman*, 50 N. H. 420; *Forney* v. *Geldmacher*, 75 Mo. 113; *Binford* v. *Johnson*, 82 Ind. 426; *Turner* v. *Buchanan*, *Id.*, 147; *Pastene* v. *Adams*, 49 Cal. 87. And our statute (Comp. Laws, § 4600) seems to go further, and to make defendant liable for any result which is proximate, though not anticipated.

The question of contributory negligence is urged at great length, but we think no difficult questions are involved. Both plaintiff and Slette saw the engine when they reached Hill avenue. Slette knew the horse would sometimes shy a little at a dead engine, although it was a gentle, quiet horse, that he had driven for several years. Both plaintiff and Slette knew of the platform scales. They might easily have turned north on Hill avenue, and gone east on Fifth street, which runs parallel with Sixth. Under these circumstances, it is claimed that plaintiff voluntarily took the risk, and cannot recover in this case. We do not think this true, even if plaintiff were chargeable with negligence on the part of Slette,—a point to be hereafter considered. Of course, where a person voluntarily places himself in a known place of danger, he is barred from recovery if an injury follows. *Railway Co.* v. *Collins*, 87 Pa. St. 405; *Goldstein* v. *Railway Co.*, 46 Wis. 404. But can it be said that, because a party knows that his horse may shy a little in passing a given object, to pass such object is assuming a known place of danger? The experience of mankind is just the opposite. There are few horses indeed that will not shy at some of the many objects that are constantly met in the streets of a city, yet actual danger therefrom is never apprehended. "The fact that he voluntarily

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attempts to pass, with knowledge of the defect or obstruction, is not ordinarily conclusive evidence of a want of due care; but if he has, or ought to have, notice thereof, he must exercise such care as the circumstances demand, and if an ordinarily prudent person would not attempt to pass, under the circumstances, he will be guilty of contributory negligence." Elliott, Roads & S. 470, and cases cited in note 2; Bish. Noncont. Law, § 1013, and cases cited. In *Turnpike Co.* v. *Jackson*, 44 Am. Rep. 274, it is said: "One is not required to forego travel on a highway merely because he knows it to be dangerous, or to show that, in the use of a highway known by him to be dangerous, he used extraordinary care to avoid an injury, for which he seeks to recover damages. But he should be careful in proportion to the danger of which he has knowledge, and may proceed if it be consistent with reasonable prudence to do so; and this will generally be a question for the jury,—whether he used reasonable care,—his knowledge of the defect in the highway being a circumstance to be considered with other circumstances in determining whether he used reasonable care." And see, also, the valuable note to this case. It cannot be claimed, under the evidence and instructions in this case, that the jury were not fully warranted in finding that both plaintiff and Slette were in the exercise of due care, under all the circumstances of the case, in attempting to drive past the engine.

The court charged that the burden of showing contributory negligence was upon defendant, and error is assigned thereon. The charge was proper. *Gram* v. *Railroad Co.*, 1 N. D. 252, 46 N. W. 972, and cases cited. Of course, had plaintiff's evidence conclusively shown negligence on her part, no burden in that direction would have rested upon defendant, and the court should have taken the case from the jury; but what has been said clearly shows that such could not have been the case.

The court instructed the jury as follows: "That even though you find that Gilbert Slette, with whom the plaintiff was riding at the time of the accident, was guilty of negligence, and that such negligence contributed to plaintiff's injury, yet the plaintiff

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may recover, provided you do not find that she herself was guilty of negligence in remaining in the buggy and riding past the engine." Error is assigned thereon, but it was clearly right. Few questions have been more discussed in the authorities, or are more familiar to the bar. The case of *Thorogood* v. *Bryan*, 8 C. B., 115, announced the rule in England, that the negligence of the carrier, contributing to produce the mischief, must be imputed to the plaintiff, to bar a recovery. The courts of this country have, with few exceptions, refused to adopt this rule. It obtains without qualification in Pennsylvania, and in a modified form in Arkansas, Wisconsin, and Kentucky. A full discussion, with copious citations, may be found in Beach, Contrib. Neg. pp. 108-118, and Mr. Beach closes his discussion by saying: "It is reasonably certain that *Thorogood* v. *Bryan* will not be followed in the future in any state in the Union not already committed. Whether it will not ultimately be abandoned in Pennsylvania and the English courts is at least a question." We understand it has been expressly departed from in England, but have not access to the authority to verify the statement. The general American doctrine is to the effect that the negligence of a third person, contributing to the injury, which would not have occurred but for the defendant's negligence, cannot be imputed to the plaintiff, to defeat a recovery, unless such third person was in some manner under the control of plaintiff, or one for whom the plaintiff was responsible. *Town of Albion* v. *Hetrick*, 46 Am. Rep. 233; *Robinson* v. *Railroad Co.*, 66 N. Y. 11; *Bennett* v. *Transportation Co.*, 36 N. J. Law, 225; *Little* v. *Hackett*, 116 U. S. 366, 6 Sup. Ct. 391; *Transfer Co.* v. *Kelley*, 36 Ohio St. 86; *Cuddy* v. *Horn*, 46 Mich. 596, 10 N. W. 32; *Nisbet* v. *Town of Garner*, (Iowa) 39 N. W. 516; *Follman* v. *City of Mankato*, 35 Minn. 522, 29 N. W. 317; *Land Co.* v. *Mingea*, (Ala.) 7 South. 666. In *Town of Knightstown* v. *Musgrove*, (Ind. Sup.) 18 N. E. 452, the law is thus stated in a case that cannot be distinguished from the case at bar: "The negligence of a man who invited plaintiff, a women, to ride with him in his carriage,—the man keeping full

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control of the horse, and plaintiff having no reason to doubt his efficiency and care in driving,—cannot be imputed to her, in an action against a town for injuries due to an obstruction negligently left in the street." These cases furnish abundant authority for the instruction as given, when we remember, as the evidence shows, that plaintiff requested Slette to permit her to ride with him to the City of Grafton; that Slette owned the horse and buggy; that he was an ordinarily careful, prudent driver; that plaintiff was in no manner responsible for him; that she exercised no control over him or over the horse. The fact that, at Slette's request, she drove some distance before reaching the city, while he read his mail, in no proper sense gave her any control over the horse.

A group of assignments of error relate to the exclusion of testimony. It seems that there was an exhaust pipe to the engine in the printing office, which, it will be remembered, was on the opposite side of the street, and a little east of the threshing engine. This pipe extended out from the east side of the printing office, and could not be seen by a horse approaching from the west. When the engine in the printing office was in operation, this exhaust pipe emitted a noise not unlike the noise of a threshing engine in operation. Mr. Slette had testified that his horse was more inclined to become frightened at a "live" engine than at a "dead" engine. Therefore defendant sought to show that the engine in the printing room was in operation when the accident occurred, and thus pave the way for an argument to the effect that the horse, seeing the threshing engine, and hearing a noise not unlike that made by such engines in operation, concluded that the engine was alive, and for that reason became frightened at it. The testimony on that point was properly excluded. The offer only went to the extent of showing that the printing engine was in operation an hour before the accident, and a few moments afterwards. The evidence showed that the printing engine was operated when the office had job work, and on the day that the weekly paper printed thereon was issued.

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There was no claim made that it was press day for the paper. No jury would have been warranted, from the evidence offered, in finding that the printing engine was in operation when the accident occurred. It would have been a matter of pure speculation. But we may admit the printing engine was in operation at the time of the accident, and that will in no manner relieve defendant. If the association of the noise with the threshing engine was a natural one,—and we are bound to presume it was, on defendant's theory,—then the negligence of the defendant becomes more pronounced. If the surroundings made the threshing engine a more frightful object than it would have been under other surroundings, then the culpability in leaving it on the street, and thus surrounded, was so much the greater. But, if we disconnect the noise and the threshing engine, we then have two causes working together to produce an injury that would not have occurred but for defendant's negligence. When the horse shied, in spite of the driver's efforts to the contrary, it ran away from the engine, and almost directly towards the noise, if we assume the noise existed at the time; making it too clear for question that, if the engine had not been there, the accident would not have happened. The cases already cited clearly show that, where two causes thus unite, the defendant cannot escape liability. Defendant also sought to show by expert testimony that the threshing engine was not an object calculated to frighten horses of ordinary gentleness. The evidence was properly excluded for two reasons: Plaintiff sought to establish the affirmative of this proposition by the same class of testimony. Defendant objected, and the objection was promptly sustained. The city, having invoked the rule, cannot be heard to complain because plaintiff was given the benefit of the same rule. Abb. Trial, Brief, 54. But the testimony was inadmissable. It was not a case for expert testimony. No special study or preparation was necessary. It was simply a matter of everyday experience and observation. The jurymen must form their own opinions. They could not receive them at second hand. Neither party was

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restricted in showing the facts, and on the facts the jury were asked to say whether or not the engine was an object calculated to frighten horses of ordinary gentleness, and by a special finding they declared it was such an object.

We are not warranted in going into details in the examination of the many assignments of error based upon the refusal of the court to give the instructions asked. Defendant presented instructions covering almost every point in the case. None of them were given. We have carefully examined all of them. So far as they correctly state the law applicable to the case, they were fully covered by the instructions given, and the court was not required to repeat them. The others state, in various forms, propositions the converse of which were given, and exceptions taken, which exceptions have already been considered.

The record presents no error prejudicial to defendant, and the judgment is affirmed. All concur.

(65 N. W. Rep. 676.)

NOTE—The rule as to proximate cause in this case is also declared in *Chacey* v. *City of Fargo*, 5 N. D. 173, 64 N. W. Rep. 932.

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JAMES R. GAGE *vs.* ASA FISHER.

Opinion filed November 11th, 1895.

Specific Performance—Contract to Control Stock of Another, at Stockholders Meeting.

Equity will not specifically enforce a contract to give a minority stockholder the right to control the stock of another and vote it at a stockholders' meeting, where the sole purpose is to secure control of the corporation by the use of such stock.

Contract Contrary to Public Policy—Rescission.

Therefore, when such a contract has been made, and on the strength of it the promisee has suffered to pass beyond his control stock which, in connection with stock owned by him, would have given him control of the corporation, and thereafter the promisor threatens to sell his stock to the opposing faction, and thus give them control of the corporation, and the promissee, to save himself from defeat in his project to secure control of the corporation, purchases such stock at a figure much in excess of its normal market value, such contract of purchase cannot thereafter be rescinded, but the purchaser must pay the stipulated price.

Illegal Consideration.

A contract to allow another to control the voting of stock, based upon a promise of the one who is to control such stock to secure for the owner of the stock an office in the corporation, is illegal; and the whole contract is void, although the illegal consideration (*i. e.* the promise to secure for the owner of the stock a corporate office) constitutes only a part of the consideration for the agreement to give such promisee control of the stock.

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

Action by J. R. Gage against Asa Fisher. Judgment for defendant, and plaintiff appeals.

Reversed.

G. W. Newton and *S. L. Glaspell*, for appellant.

Alexander Hughes, for respondent.

CORLISS, J. We have reached the conclusion in this case that we must decide against the defendant and respondent, on his own theory. Taking the view of the facts which is most favorable to him, we are yet compelled to hold that he has neither any defense to the note sued on, nor any valid counterclaim against the plain-

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tiff for money paid by him to plaintiff in part payment of such note. We will state our reasons for this conclusion as briefly as the complicated nature of the case will permit.

The action is on a promissory note for $3,000 given by defendant to plaintiff. The consideration for the note was the sale by plaintiff to defendant of 10 shares of the stock of the First National Bank of Bismarck, N. D. The date of this transaction was December 19, 1893. The capital stock of the bank was $100,000, divided into 1,000 shares of $100 each. For some time prior to 1888, plaintiff and defendant had both been directors of this bank, and defendant had been president thereof. In 1888 plaintiff was dropped from the directory, and in 1889 the defendant also ceased to be a director. The control of the bank was then in the hands of a number of stockholders, who acted in unison, and who were more or less hostile to defendant and plaintiff. Among these stockholders were George H. Fairchild, H. R. Porter, and Daniel Eisenberg. This group of stockholders will be designated in the course of this opinion as the "Fairchild interest." The defendant, for the purpose of securing control of the bank, began purchasing its stock, and in the summer af 1892 he found himself the owner of 489 shares of such stock, and in the possession of a proxy to vote 16 shares more, owned by a Mrs. Shaw. Had this condition of affairs remained unchanged until the next annual stockholders' meeting, in January, 1893, the defendant would have been master of the situation, and would have secured full control of the bank, electing his own board of directors, and, through them, such officers of the corporation as he might see fit to elect. While this condition existed, the defendant claims that he was induced to part with his control over the Shaw stock at the suggestion of plaintiff, and under his promise to allow him (the defendant) to control, or in other words to direct, the voting of this stock at the next annual stockholders' meeting, in January, 1893. Relying on this promise of the plaintiff to defendant, who, unquestionably, could have voted the Shaw stock at such meeting, had he so desired, defendant notified Mrs. Shaw that she

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could sell this stock to the Fairchild interest. The plaintiff, the defendant, and Mrs. Shaw were all hostile to the Fairchild interest; and the motive which prompted defendant in releasing his control over the Shaw stock, and in suggesting to Mrs. Shaw that she sell it to the enemy, was apparently a desire to induce the Fairchild interest to assume the heaviest possible burden, without at the same time giving them control of the majority of the stock. Defendant, having purchased 2 more shares, was now the owner of 491 shares; and, when plaintiff promised him control of his 10 shares, defendant felt sure of a majority, and therefore permitted the control of the Shaw stock to pass from him. Plaintiff now held the balance of power. The Fairchild interest began to bid for his stock. Finding that plaintiff, despite his promise to allow defendant to control his stock at the meeting, intended to sell to the enemy unless he (the defendant) purchased it for the sum of $5,000, he finally yielded to this demand, and the contract of sale was entered into on this basis. It is not claimed, however, that plaintiff, from the start, intended to inveigle by his promises the defendant into a position where he could take advantage of the necessities of his situation to extort from him an exorbitant price for the stock. Fraud is not claimed, except as as it is urged that plaintiff's subsequent conduct was fraudulent in contemplation of law. Two thousand dollars of the purchase price was paid at the time of the sale, and the note in suit, for $3,000, was given for the balance of the consideration. Subsequently the defendant paid $1,000 on this note, and thereafter this suit was brought to recover the remaining $2,000 due thereon, with interest. The defendant interposed as a counterclaim a claim to recover back the $3,000 so paid; having, as he insists, rescinded the contract, and offered to restore to plaintiff the 10 shares of stock delivered under it. The trial court rendered judgment in his favor, both on the plaintiffs's claim against him, and on his claim against the plaintiff; directing that the note be canceled, and that defendant recover from plaintiff the consideration paid, namely, $3,000. It is true that the plaintiff

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claims and he so testified that the agreement between him and the defendant was that he would give defendant the preference in purchasing the stock, in case he offered as much for it as the Fairchild interest; and, if this be the case, he was acting strictly under the contract, in demanding the sum of $5,000 for his stock from the defendant. In that event, both law and good morals would approve the course. But the trial court found that the contract was as we have stated, and we will assume, for the purpose of this decision, that this finding is correct. The defendant certainly cannot, and he does not, claim that he proved a case more favorable to himself than the findings, nor does he pretend that he can ever establish a stronger case on another trial.

Taking these findings as the basis of our decision, we are very clear that the court erred in deciding the case in favor of the defendant. The court erred in its conclusions of law that the facts found established a defense to the note, and also a valid counterclaim for the $3,000 paid on account of the purchase price. We regard the contract for the sale of the 10 shares of stock for $5,000 as entirely legal, and we do not consider that the defendant is in position legally to claim that, because an unconscionable price was extorted from him on account of the necessities of the situation, he has any right, after having, with full knowledge of the facts, submitted to the demand, to rescind the contract he deliberately made. If it is true (but we express no opinion on this question of fact) that the plaintiff, after having induced the defendant to part with the control of the corporation, by letting the Shaw stock slip from him on promise to substitute his (plaintiff's) stock for the Shaw stock, and to allow defendant to use the plaintiff's stock as he (the defendant) could have used the Shaw stock at the next annual meeting, his subsequent conduct in repudiating his agreement was an act of gross perfidy, and the using of his power, under such circumstances, to coerce the defendant into paying an exhorbitant price for this stock, which was worth in the general market not over $500, was base and dishonorable in the extreme. But the decision of this case turns

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on a larger question,—the question of public policy. There is no pretense that plaintiff was guilty of any fraud in the sale of the stock. The parties both dealt at arm's length. There was no concealment of any fact. There was no misreprentation. Whatever relation of confidence which theretofore existed between the plaintiff and defendant must have ceased, whatever esteem which the defendant had entertained for the plaintiff must have instantly perished, when he was confronted by the plaintiff with this, to the defendant, unconscionable demand that he pay him $5,000 for stock which, as defendant understood, the plaintiff had agreed he was to have the right to use at the meeting without compensation. Whatever defendant did at this time must have been done, not cheerfully, in a spirit of confidence, but reluctantly, with anger in his heart, and therefore with no disposition on his part to yield to any demand, except so far as coerced by the necessities of his position.

It is said that plaintiff having, by his promises, induced the defendant to place himself in the plaintiff's power, the plaintiff should not be allowed to take advantage of the situation to extort from him an exorbitant price for the stock. The fallacy of this reasoning lies in its untenable assumption that defendant, at the time he bought the stock for $5,000, under the stress of necessity, could have maintained an action against plaintiff to compel the specific performance by him of his contract to allow defendant to vote his (the plaintiff's) stock. If, at the time defendant agreed to pay $5,000 for this property, he was powerless to secure redress in a ccurt of equity,—if at that time the plaintiff could not be compelled to permit him (the defendant) to vote the stock,—then plaintiff had a perfect legal right to sell to whom he pleased, for such price as he could obtain, and therefore had an undoubted legal right to sell to defendant for $5,000, so long as defendant, being under no other pressure than that of his necessities, agreed to pay that sum for it. Defendant has no right to insist that he was unexpectedly placed in this peculiar position, relying on the promise of plaintiff; for, if it was a

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promise which a court of equity would not enforce, he had no right to rely on such promise. He was bound to know that the plaintiff might refuse to carry out his agreement, and that in that event he (the defendant) would be powerless to compel its performance, but must, to save himself from being baffled in his scheme, buy the stock at such a figure as it could be purchased for. Even assuming the contract to allow defendant to control the stock to be valid; so that its breach would subject plaintiff to liability for damages, still defendant cannot use the breach of that promise as a basis for rearing upon it this argument that plaintiff took advantage of his necessities, unless such contract could be specifically enforced in equity. Plaintiff had a legal right to take advantage of his necessities, and exact such price as he could under the circumstances secure, if he could not be compelled by a court of equity to allow defendant to vote the stock. If plaintiff could break this promise without liability for damages, because it was void, he could charge what he chose for the stock, and defendant would have no legal ground for complaint. So if the breach of this promise, assuming it to be valid, subjected him to liability only for damages, he yet could break it, and compel the defendant to buy the stock and pay him what he asked for it, without rendering himself liable to the charge of having, in legal contemplation, extorted an unconscionable contract from the defendant. Suppose that the contract was valid, and that its breach would have subjected the plaintiff to liability for $500 damages. He might have broken it, and then have taken the position that, while he was liable for these damages, he yet had the undoubted legal right to break such contract and incur such liability, and thereupon sell the stock to whom he pleased, without being liable for anything more; and, if the defendant desired to purchase on the same terms as another person had offered, he had a legal right to make a new contract of sale with him (the defendant), and the contract would be as valid as a sale to a stranger. The defendant could not complain that an unfair advantage had been taken of him, for, if it is the

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law that a court of equity will not enforce such an agreement as the original one in this case, but will leave the party to his action for damages, then defendant was bound to know that he was all the time at the mercy of the plaintiff, who might at any moment repudiate the contract, without other liability than for damages; and the defendant was in this position because he had failed to take the precaution to secure a promise that would fully protect him. He has no legal right to appeal to equity for relief because the plaintiff took advantage of this struggle for supremacy to exact from him (defendant) an enormous price for his stock, if he (the defendant) failed to secure from plaintiff such a contract to protect him against such exaction as a court of equity would enforce for his protection. Before this promise to allow the defendant to vote the stock was made, plaintiff might have sold his stock to defendant for $5,000 without the possibility of any rescission of the contract. If defendant saw fit to let the Shaw stock go, without securing in place of it an agreement that he could enforce in equity against the plaintiff, and without securing the plaintiff's stock itself, he voluntarily relinquished his vantage ground without taking the precaution to protect himself legally, and trusted himself and his interests to the honor of the plaintiff; knowing full well, as he testifies himself, that the plaintiff, in the impending struggle for supremacy, would be sorely tempted to desert him, and, being only human, might fall.

If we should affirm this judgment, we would give the defendant all the benefit he could have obtained from a decree of specific performance, rendered before the stockholders' meeting, that defendant be allowed to vote the stock. Defendant would recover his money; plaintiff would have back his stock; and it is undisputed that defendant has in fact voted the stock in the manner he desired to vote, and has, through the use of this stock, secured control of the corporation. We are satisfied that, both on principle and under sound authority, the true rule is that a court of equity should never specifically enforce a contract by which one person agrees that another should control his stock

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without purchasing it, where the sole ground of the appeal to equity is the desire of the party making the appeal to secure control of a corporation through the use of the stock he is thus seeking to control. It is a general rule that a court of equity will not enforce a specific performance of a contract for the sale of personal property. Corporate stock comes within the scope of this rule, unless there are peculiar features calling for the interposition of a court of equity. But, when such peculiar features exist, equity will decree specific performance. *Eckstein* v. *Downing*, (N. H.) 9 Atl. 626; Appeal of *Goodwin Gas-Stove & Meter Co.* (Pa. Sup.) 12 Atl. 736; Cook, Stock, Stockh. & Corp. Law, §§ 737, 738; *White* v. *Schuyler*, 1 Abb. Prac. (N. S.) 300; *Treasurer* v. *Mining Co.*, 23 Cal. 390; *True* v. *Houghton*, 6 Colo. 318; *Bumgardner* v. *Leavitt*, (W. Va.) 13 S. E. 67. When the only peculiar feature is the desire of the plaintiff, with the aid of the stock he is seeking to obtain, to secure the control of a corporation, this, perhaps, so far from being a ground for taking the case out of the ordinary rule, may be a reason for denying the relief sought. While it is not illegal for a stockholder to buy up a controlling interest in a corporation, and so absolutely rule its affairs, and while it is also true that agreements to vote stock together are not, when carried out, illegal, in the sense that the law regards the vote as void or voidable, yet it may be contrary to public policy for a court of equity to decree specific performance of contracts touching the control of stock, where the sole object of the person who is seeking to enforce the contract is thereby to secure control of the corporation. We do not say that such a contract is necessarily void, as repugnant to public policy, but we are by no means clear that a court of equity would specifically enforce it. It may be that sound public policy demands that a court of equity should never lend its aid to the enforcement of a contract relating to stock, when the sole object of the person who wishes it enforced is to give that person control of the corporate affairs. Efforts are often put forth to secure the management of a corporation, which are inspired by laudable motives. But it is

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also true that many of these schemes to obtain the control of a corporation are conceived and carried on in a spirit inimical to the interests of the minority stockholders, and not infrequently for the purpose of so managing the affairs of the corporation as to force them to sell their holdings at practically such a figure as the majority stockholders should dictate. Should courts of equity adopt the practice of giving to a minority stockholder the right to enforce specific performance of a contract to buy stock, simply to enable him to control the corporation, or, what is still more indefensible, the right to vote or control the voting of stock that he does not own, to enable him to secure control of the corporation, they would find that in many cases they had suffered their functions to be perverted by designing men; that they had in fact been lending to dishonorable schemes such effectual aid as to insure their consummation. Proof that the object was legitimate, that the motive was pure, would furnish no guaranty that the real purpose was not to wreck or mismanage the corporate affairs. In no case can a court determine with certainty just what course the minority stockholder, when armed by the court with this absolute power over the corporation, will pursue when he has attained his vantage ground. It is therefore possible that the question whether specific performance should be decreed ought not to turn on the court's surmise or guess as to the ulterior purpose of the person who is seeking to secure control; but because there is always danger that such purpose may be dishonest, and because the court can never surely know the truth as to the real motive, it may be that courts of equity should inflexibly refuse to aid the minority stockholder in his effort to obtain control. In this case the defendant's motive appears to have been honorable, and we have no doubt that such is the fact. He was merely seeking to take the management of the bank from persons who, in his judgment, were mismanaging it, and resume control of its affairs, that it might be built up for the benefit, necessarily, of all stockholders. But perhaps this fact should

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not influence us. If the specific enforcement of such a contract is to turn on the opinion of the court touching motives, it is obvious that in many cases dishonest projects will receive effectual equitable aid. The decision of the Pennsylvania Supreme Court in Foll's Appeal, 91 Pa. St. 434, strongly supports the view that equity would not specifically enforce a contract for the sale of stock where the only ground for invoking the aid of the court is the peculiar value of the stock to the person who has contracted to buy it, because of his desire to secure control of the corporation. The bill in that case was filed to compel specific performance of a contract to purchase stock in a national bank. The basis of the application to equity was the desire of the plaintiff to secure control of the bank. The court unanimously held that, on grounds of public policy, the relief should be denied. The court said: "While the legal right of the complainant to buy up sufficient of the stock of this bank to control it in the interest of himself and friends may be conceded, it is by no means clear that a court of equity will lend its aid to help him. A national bank is a *quasi* public institution. While it is the property of the stockholders, and its profits inure to their benefit, it was nevertheless intended by the law creating it that it should be for the public accommodation. It furnishes a place, supposed to be safe, in which the general public may deposit their moneys, and where they can obtain temporary loans upon giving the proper security. There are three classes of persons to be protected,—the depositors, the noteholders, and the stockholders. We have no intimation that the bank, as at present organized, is not prudently and carefully managed. The stock, as now held, is scattered among a variety of people, and held in greater or lesser amounts. It is difficult to see how the small stockholders, who have their modest earnings invested in it, the depositors, who use it for the safe-keeping of their moneys, or the business public, who look to it for accommodation in the way of loans, are to be benefited by the concentration of a majority of its stock in the hands of one man, or in such way that one man and his friends shall control it.

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* * * We are in no doubt as to our duty in the premises. We are of opinion that the end sought to be attained by this bill is against public policy, and for that reason we refuse our aid."

It is true that some stress was laid by the court on the fact that the plaintiff was operating with borrowed capital, in his efforts to secure control of the bank. But this fact was not treated as decisive, and it is clear from the whole trend of the opinion that the absence of this fact would not have resulted in a different ruling in the case. Moreover, this fact was adverted to as tending to show that the object was to speculate, and not to invest funds in corporate stock. But in the case at bar the defendant never intended to invest a dollar in plaintiff's stock until he was compelled to do it to enable him to accomplish his real purpose, which was to secure control of the bank. In *Moses* v. *Scott*, (Ala.) 4 South. 742, after stating that a vote based upon a prior agreement to vote as a unit would not necessarily be illegal, the court say, at page 744: "Whether an agreement to vote as a unit, or as an agreed majority may dictate, for any given length of time, is a contract so binding in its terms that no party to it can withdraw from it or disregard it without the consent of his fellows, may be a different question. Possibly public policy may exert an influence in the solution of this problem. And even if such a contract be lawful, and on its face exert a continuing force, the grave question comes up, will a court of chancery, in its enlightened discretion lend its aid to the enforcement of a contract of so doubtful policy?" However, we are not called upon to settle this interesting question in this case. The case before us presents a stronger one against the exercise of the equitable powers of the courts to enforce specific performance than a contract for the purchase of stock; for here the contract was to give the minority stockholder the right to dominate and direct the judgment of the plaintiff, as stockholder, in the voting of his stock, without owning the stock himself. Every other stockholder in the bank had the right to demand that the plaintiff should, if he desired so to do, exercise at the very time of the

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annual meeting his own judgment as to the best interests of all the stockholders, untrammeled by dictation, and unfettered by the obligation of any contract. We know of no case where a court of equity has enforced such an agreement. We regard as controlling on this question the rule that an irrevocable proxy to vote stock is revocable. See Cook, Stock, Stockh. & Corp. Law, § 610, note 6.

There is another reason, and to our mind a still stronger reason, for holding that defendant could not have secured in a court of equity a decree specifically enforcing this contract. The plaintiff's promise to allow the defendant to control his stock was based upon an illegal consideration,—one condemned by public policy,—and the promise was therefore not binding in law. The trial court found that before defendant suffered the Shaw stock to pass beyond his control, and before plaintiff had agreed to permit defendant to control his stock, defendant had informed the plaintiff that it was his purpose to vote his own and the Shaw stock to make plaintiff one of the directors of the bank, and that it was also his purpose to cause him (plaintiff) to secure employment in the bank when the new board of directors was elected; that he desired the advice and co-operation of plaintiff in securing such control, and the selection of suitable persons to put in the directory to carry out his plans, etc. The court also found that thereafter plaintiff represented to defendant that he did not need the Shaw stock "to accomplish his said purpose," that he had better let the Fairchild interest purchase that stock, and that he (the plaintiff) would not permit his stock to be bought or controlled by the Fairchild interest, but that he would vote his stock with the defendant's stock at the next annual stockholders' meeting, for the persons agreed upon by plaintiff and defendant for directors, and would in every way aid and assist defendant in the consummation of his plans for securing the possession, control, and management of the bank and its affairs. These findings make it apparent that one of the considerations, if not the main consideration, which influenced plaintiff in agreeing to

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give defendant control of his stock, was the previous statement of defendant that he intended to make plaintiff a director, and see that he was employed in the bank by the new board of directors to be elected at the approaching stockholders' meeting. That both parties understood that at least a portion of the consideration for plaintiff's co-operation with defendant in the project to obtain control of the corporation was the promise of defendant to give him employment in the bank is apparent from a written contract subsequently entered into between the parties. On the 19th of December, but entirely separate from the contract of sale, the defendant signed and delivered to plaintiff, who accepted the same, the following memorandum of agreement: "Bismarck, N. D., Dec. 19, 1892. In consideration of J. R. Gage joining me in effecting the controlling interest of the capital stock of the First National Bank of Bismarck, I hereby agree to furnish said J. R. Gage, a position as cashier of said bank at a salary of not less than $100 per month, payable monthly, beginning at the 11th day of January, 1893, and during his ability to perform his duties as cashier, provided such control is assumed at such time. Asa Fisher." In connection with this agreement the court made a finding of fact which conclusively shows that, all along, one of the inducements to plaintiff's promise to vote his stock with defendant's stock was the promise of the latter to give him a place in the bank. "That said agreement was signed by the defendant, Fisher, and was then and there, on said 19th day of December, 1892, delivered to plaintiff, J. R. Gage, by the defendant, and was then and there accepted and retained by said plaintiff, and he, the said plaintiff, then and there promised to perform said agreement on his part; that said contract, interpreted and explained by the circumstances under which it was made and the subject to which it relates, was intended by each of the parties thereto as follows: That the plaintiff would vote his said ten shares of stock at the annual meeting of the stockholders of said bank, to occur in the month of January following, for the persons agreed upon by the plaintiff and defendant for the directors of

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said bank, and that he would aid, assist, and co-operate with the defendant in carrying out the plans which they had previously discussed and agreed upon for the management of said corporation, as hereinbefore set forth, and that the defendant would use his influence with the said persons proposed and agreed upon for directors, when chosen, to elect the plaintiff to the position of cashier of said bank, at a salary of not less than $100 per month, during his ability to perform said duties."

It is apparent from the findings that this written agreement represents the previous oral understanding between the parties, reduced to writing. It is not claimed that the parties entered into three different contracts. There were only two agreements made. One related to the control of the stock by defendant without buying it. The other was the contract of sale. The court expressly finds that this written contract was no part of the contract for the sale of the stock. That one of the considerations which induced plaintiff to enter into an agreement to vote his stock with defendant's stock was the defendant's promise to secure his employment in the bank, is apparent from the findings to which we have referred; and as it is not pretended, and does not appear, that two different contracts relating to the control of plaintiff's stock by defendant preceded the contract of sale, we can find no escape from the conclusion that the promise on which defendant relied in parting with the Shaw stock was a promise made by plaintiff under the expectation, justified by defendant's promise, that he (plaintiff) was to have a place on the board of directors, and also a position in the bank, at a salary. We are strengthened in this view by the consideration that, unless the promise to give plaintiff employment was part of the original arrangement, the subsequent written promise of defendant would be without consideration. If plaintiff, for a sufficient consideration, had already promised to let defendant control his stock, an agreement on the part of defendant to give him an additional consideration for the right which was already his would be a purely gratuitous promise, not binding in law. So far from its

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appearing that defendant regarded that he was making such a promise, he shows by the written agreement signed by him that the sole consideration running to plaintiff for his agreement to permit defendant to control his stock was defendant's promise to secure him a position as cashier in the bank. It is impossible to conceive that so shrewd a man as the defendant would have promised in writing to give plaintiff a postion in the bank, if such had not been part of the original understanding; for, unless it was part of it, the defendant had already secured, by his contract with plaintiff, all he could ever obtain by making additional promises. The case would be similar to that of a person, after having secured a contract for the sale to him of stock for a specified consideration, promising in writing that in consideration of such sale he would give the owner of the stock a place in the corporation. Such a promise would not be made by a reasonable being under such circumstances. The fact that such a contract was made in this case is convincing to our minds that the real consideration running to plaintiff for his original promise to let defendant control the stock was the promise of defendant to give him employment in the bank. This was what induced plaintiff to make the promise. At least, we are satisfied that it was one of the inducements. The contract was therefore contrary to public policy and void. At least a portion of the consideration was illegal, and hence the promise founded on it was a promise which no court would enforce. The law in such a case leaves both parties where it finds them. To neither will it give redress. That a contract relating to the purchase or control of corporate stock, founded in whole or in part upon a promise to secure for the person who owns the stock employment in the corporation, and an office therein, is illegal and void, is a doctrine supported by the unanimous voice of the decisions. *Woodruff* v. *Wentworth*, 133 Mass. 309; *Noel* v. *Drake*, 28 Kan. 265; *Guernsey* v. *Cook*, 120 Mass. 501; *Forbes* v. *McDonald*, 54 Cal. 98; *Cone's Ex'rs* v. *Russell*, (N. J. Ch.) 21 Atl. 847; *West* v. *Camden*, 135 U. S. 507, 10 Sup. Ct. 838. In the case last cited the court, referring to a contract,

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one element of which was a promise to give one of the parties to it permanent employment as manager of a corporation in which he was a stockholder, said: "It was a contract, the purpose and effect of which was to influence the defendant, as a stockholder and officer of the company, 'in the decision of a question affecting the private rights of others, by considerations foreign to those rights, and the defendant, by the contract, was placed under direct and very powerful 'inducement to disregard his duties to other members of the corporation, who had a right to demand his disinterested action in the selection of suitable officers.' He was to be in a relation of trust and confidence, which would require him to look only to the best interests of the whole uninfluenced by private contracts. We think this salutary rule is applicable in this case, notwithstanding the alleged contract was not corruptly made for private gain on the part of the defendant. There were other stockholders in the company. The defendant and the Standard Oil Company, for whose benefit it is alleged the contract was made, were not all the stockholders; and it seems to us that it was certainly the right of those other stockholders to have the defendant's judgment, as an officer of the company, exercised with a sole regard to the interests of the company." It cannot be claimed that the illegal parts of this contract could have been separated from the remainder, and the agreement sustained to that extent. The case falls within no exception to the general rule that where a part of a contract is illegal the whole agreement is void. It was not a case where the contract had been executed on one side, and the person who had received the benefit of it was asked to pay only the legal consideration he had agreed to pay, the illegal consideration being waived. In such a case the agreement can be sustained to the extent of the legal consideration. *Casady* v. *Woodbury County*, 13 Iowa, 113; 1 Pars. Cont. 380. So far as any consideration ran to plaintiff, there was only a single consideration to induce him to make his promise to allow defendant to vote his stock, *i. e.* the promise to give him employment in the bank. But even if he had been induced to make this

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promise for money, in addition to the agreement to give him a position in the bank, still the legal part of the consideration could not have been separated from the illegal, for no court could say, in the light of the actual contract, that he would have made the promise to allow his stock to be voted by another solely for the cash consideration. To separate the legal from the illegal consideration, under such circumstances, and then sustain and enforce the contract as so radically altered, wouldbe to make a new contract for one wrongdoer, to enable him to enforce against the other wrongdoer, who would be no more culpable, an agreement which he never made. See Greenh. Pub. Pol. p. 17, rule 21, and page 24, rule 25, and cases cited; 2 Add. Cont. pt. 2, bottom paging, 762, and cases in note 1; *Tobey* v. *Robinson*, 99 Ill. 222-233; Comp. Laws, § 3533. For both of the reasons set forth in this opinion, we are clear that, at the time plaintiff and defendant made the contract of sale sought to be rescinded by defendant, the latter was powerless to compel the plaintiff to carry out his promise to allow defendant to vote his stock, and that, therefore, as defendant, to secure control of the bank, saw fit to buy the plaintiff's stock for the sum of $5,000, he could not, after availing himself of all of the advantages growing out of the possession of such stock, rescind the sale, on the theory that he was coerced by his necessities into making a hard bargain.

The confidential relations existing between the plaintiff and defendant would not transmute into a contract binding in equity a contract which otherwise would not be enforced by a court of equity. Equity will not grant or withhold relief because the promisor was or was not trusted by the promisee, but it will withhold relief, in all cases of this character, irrespective of the question of confidential relations, because public policy demands that equitable aid should not be extended to what is in fact an illegal scheme. Nor is there any force in the contention that the case is brought within the scope of the doctrine that a court will relieve a party who has made a contract under the stress of great necessity. As we have already demonstrated, the

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defendant has only himself to blame for trusting to a promise the fulfillment of which equity would not compel. He was in no different position from that which he would have occupied had the promise of plaintiff never been made. And it is too clear to justify argument that had plaintiff demanded $5,000 for this stock, without having made any prior promise to permit defendant to control it, the defendant, if he saw fit to yield to this demand, would have been entitled to no relief on the ground that it was a hard bargain, extorted from him by the necessities of his situation. It would be a novel and dangerous doctrine that a party who, in his anxiety to secure property, had paid more than its market value, could appeal to equity to relieve him, because he had been impelled by his desires to pay a large price for the thing bought. The cases cited by counsel for defendant do not lay down any such doctrine. They are cases where one person has taken advantage of the financial distress of another to extort from him an unconscionable contract. See *Hough's Adm'rs* v. *Hunt*, 15 Am. Dec. 569, and note. Neither can it be said that the defendant was compelled to pay more for the stock than the market price. The strife of the controlling factions to secure control of the majority of the stock, to be used at the approaching stockholders' meeting, had temporarily given to this stock a value above its intrinsic value. To the purchaser of it, it meant victory and supremacy in the management of corporate affairs. Why should defendant claim that an exorbitant price had been extorted from him, if he was paying only what plaintiff could have secured from the opposing faction, had defendant declined to buy at that figure? The counsel for the defendant, in his learned and exhaustive brief, and in his very able oral argument before the court, has presented everything that could possibly be urged in favor of the case he represents; and this, too, with great ingenuity and force. But while we fully agree with him that, if the facts found be true, his client has a just grievance in the forum of conscience, yet we are unable, because of the considerations of public policy to which we have alluded, to give him any legal redress.

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The judgment of the District Court is in all things reversed, and that court is directed to modify its conclusions of law in accordance with this opinion, and to enter judgment for the plaintiff for the full amount due on the note, for principal and interest. All concur.

(65 N. W. Rep. 809.)

ACME HARVESTER COMPANY *vs.* M. P. AXTELL.

Opinion filed November 9th, 1895.

Acceptance of Notes on Approval as Payment.

Defendant, in settlement of a conceded balance due from him to plaintiff, paid the latter a portion of it in cash, and turned over to plaintiff certain notes of third persons, which were to be accepted by plaintiff in payment of the balance, if approved by plaintiff. *Held*, that the duty rested on plaintiff of ascertaining whether it would accept such notes as payment, and of notifying defendant as to its decision within a reasonable time after the delivery of the notes.

Delay in Giving Notice of Approval.

Held, further, that plaintiff having failed for a period of over 40 days after receiving the notes to notify defendant that it did not approve them, it was a question of fact for the jury whether they had not waited beyond a reasonable time to make manifest their disapproval, and were therefore to be deemed to have accepted them as payment.

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

Action by the Acme Harvester Company against M. P. Axtell. Judgment for defendant, and plaintiff appeals.

Affirmed.

E. P. Perry, (*Henry C. Hinckley*, of counsel,) for appellant.

A. T. Cole and *A. D. Flemington*, for respondent.

CORLISS, J. Only a single question of law arises on this appeal. The defendant was sued for an alleged balance owing by him to the plaintiff because of sales made by him as agent for the plaintiff of certain machinery and repairs for machinery upon commission. The defense was a settlement and payment of plaintiff's

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claim. There was evidence in the case tending to show that on June 5, 1894, the defendant and one of plaintiff's agents, who was authorized to settle claims for the plaintiff, agreed upon the balance owing by defendant to plaintiff, and that thereupon the defendant paid a portion of this balance in cash, and plaintiff's agent accepted of notes of third persons in full payment of the rest of the balance, on condition that these notes should be approved by the plaintiff. This arrangement was in writing. The terms of it were as follows: "The farmers' notes are to be approved by Acme Harvester Company, and, if so approved, shall be credited to M. P. Axtell's account." When these notes should be so credited they would, with the cash payment made by defendant, fully satisfy the balance so agreed on between the parties as that balance was testified to by defendant. From the time these notes were so delivered to plaintiff's agent on June 5, 1894, until some time after July 17, 1894, the plaintiff in no manner signified to defendant its disapproval of them. On July 17th plaintiff's general agent wrote defendant that he was just in receipt of a letter from the company, saying that they could not accept the notes. In this letter the agent suggested a different arrangement, but it affirmatively appears that the defendant did not assent thereto. He appears to have stood purely on whatever rights he had at the time this letter of July 17th was received. Just when it was received does not appear; but it is a fair inference that it reached defendant within a few days subsequent to the date it bears. At the close of the case the plaintiff requested that the jury be directed to render a verdict in plaintiff's favor. The ground of this motion was the proposition that, as plaintiff had never expressly approved these notes, they had never been received in payment of the defendant's debt, and hence that such conceded debt had never been extinguished except to the extent of the cash payment. The learned trial judge denied this motion. The correctness of his ruling in this regard presents the only question before us for decision. We fully agree with counsel for plaintiff that unless there was an agreement on the part of the

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plaintiff to accept these notes in payment, the mere receipt of them by plaintiff would not have such effect. But the facts of this case show that plaintiff's agent accepted them conditionally in payment. If approved by the company, they were to be credited to defendant's account. The essential nature of this transaction was that plaintiff was willing to buy these notes, and pay for them this claim it held against defendant, provided it determined, after investigation, that the notes were satisfactory. The case is strictly analogous to the case of a sale of property on the condition that the buyer shall be satisfied with the article sold. In such a case the law requires that the purchaser shall, within a reasonable time, come to a decision, and make known his dissatisfaction, if any; and if he waits an unreasonable time under all the circumstances, without notifying the seller that he is not satisfied, the law infers from his silence an acceptance of the property, an expression of his entire satisfaction with the thing retained by him, without any complaint. 3 Am. & Eng. Enc. Law, 434, note 1, and cases cited; Benj. Sales (Ed. 1888, by Edward H. Bennett) p. 560. See, also, *Childs* v. *O'Donnell*, (Mich.) 47 N. W. 1108; *Insurance Co.* v. *Sholes*, 20 Wis. 35. Our statute declares that when no time is specified for the performance of an act a reasonable time is allowed. Comp. Laws, § 3572. Under the terms of this settlement it was the duty of the plaintiff within a reasonable time to determine whether it would refuse to accept these notes in payment, and notify the defendant as to its decision. If it did not intend to accept this paper as payment, then it would be the property of the defendant, and he surely had a right to insist that he should not be left in the dark beyond a reasonable period of time with respect to the question whether these notes were his, or had become the property of the plaintiff under the arrangement made. During a reasonable period of time the property was at his risk, but after this period had elapsed he had a right to assume from the silence of the plaintiff that the notes were satisfactory to it, and that it had, therefore, decided to approve them, and accept them as payment. We think the learned trial

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judge was right in his view of the nature of the question of reasonable time, under the facts of this case. We fully agree with him that it was a question of fact for the jury. The time which elapsed between the delivery of the notes and the giving of notice to the defendant by plaintiff that the latter would not accept them as payment, was neither so short nor yet so long that we can say as a matter of law that the delay was or was not unreasonable. There was evidence in the case that it would take about four days for the plaintiff to communicate with persons living in the vicinity of the makers of these notes and receive a reply. Of course, an investigation of their financial responsibility would have required more time. But we cannot say, as a matter of law, that a delay of over 40 days before notifying defendant that they would not accept the notes was only a reasonable delay in view of the fact that the jury were justified in finding under the evidence that the investigation might have been made, and a decision reached, in a much shorter period of time. That the question was one for the jury, see 19 Am. & Eng. Enc. Law, p. 642, note 2; *Washington* v. *Johnson*, 7 Humph. 468. The learned trial judge, in his charge to the jury, instructed them very clearly as to the law, and we therefore see no reason why the judgment should not be affirmed. There was a contest over a small item of indebtedness which arose after the settlement of June 5, 1894. Defendant conceded the correctness of this item, but testified that under his agreement with plaintiff it was not to become due until a date subsequent to the commencement of this action. The jury have accepted his version of the matter. Their verdict is binding on us. This item, not being due when this action was brought, could not be recovered in this action.

The judgment is affirmed. All concur.

(65 N. W. Rep. 680.)

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WILLIAM DEERING & CO. *vs.* R. R. RUSSELL, *et al.*

Opinion filed November 29th, 1895.

Parole Evidence Inadmissable to Vary Written Contract.

Before parole evidence can be admitted to contradict the terms of a written contract, on the ground of mistake, it must clearly appear that such mistake was mutual. Hence, when the testimony of a witness showed that he had talked but with one paaty to the contract, it was not error to refuse to let him state his understanding of what the contract between the parties was, for the purpose of establishing a mistake in the written contract.

Parole Statements of Agent Made Prior to Execution of Contract and not in Writing—Nonenforceable.

A. and L. guaranteed the due performance of and compliance with all the terms of the contract whereby R. was appointed agent for W. D. & Co., a corporation, on the part of R. as such agent. A general agent acted for the corporation in making the contract. The guaranty contract was on the same sheet with the agency contract. The agency contract stated on its face that W. D. & Co. would not be bound thereby until the contract was accepted and approved at the home office in Chicago. *Held*, that A. and L. could not enforce, as against W. D. & Co., certain prior parole statements of the general agent, not incorporated in the written contract which was subsequently approved by the corporation.

Modification.

Held, further, that when the guaranty contract recited that the liability of the guarantors could not be modified or canceled, except in the manner therein specified, A. and L. could not insist upon a modification of such liability on other and excluded grounds.

Guarantors Ignorance of Contemporaneous Parole Contract.

Held, further, that while the agent, R., agreed by parol with the general agent that his commissions for handling a certain article should be used to reduce his prior indebtedness to W. D. & Co., W. D. & Co. was under no duty to impart this agreement to the guarantors, and their ignorance of it furnished no defense to an action on the contract of guaranty.

Guarantors not Entitled to Credit for Pledged Collaterals Securing Defalcation.

R. defaulted largely in complying with the terms of his agency contract, and turned over to W. D. & Co. an amount of notes and accounts as collateral to his indebtedness under the contract. *Held*, that W. D. & Co. was not obliged to exhaust the collaterals before proceeding against the guarantors, nor were they (the guarantors) entitled to be credited with the value of such collaterals.

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

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Action by William Deering & Co., a corporation, against R. R. Russell and others. Judgment for plaintiff, and defendants Aylen and Labbitt appeal.

Affirmed.

Mitchell & Gram and *Edward Engerud*, for appellants.

John E. Greene, for respondent.

BARTHOLOMEW, J. The plaintiff is a corporation engaged in manufacturing and selling machinery and supplies, with its home office at Chicago, Ill. In 1893 the defendant Russell was the agent for plaintiff at Sheldon and Enderlin, in this state. The other defendants were guarantors of the due fulfillment of the agency contract. On the settlement of the business for that year between the principal and agent, it was found that Russell had received property belonging to plaintiff, amounting to $2,325.64, for which he had not accounted. A large part of the deficiency was on twine account. This action was brought on the written guaranty to recover the deficiency. Russell was not served, and does not defend. The defendants Aylen and Labbitt answer jointly. There was a trial to a jury. Verdict directed for plaintiff. Judgment on the verdict, and defendants appeal from the judgment on alleged errors of law occurring at the trial, and duly excepted to.

The uncontradicted testimony shows that on February 16, 1893, two contracts were executed between respondent and Russell. One Stanton, who was a general agent for respondent, residing at Fargo, acted for the respondent in the transaction. One of these contracts appointed Russell agent for the respondent for the sale of twine alone, and specified in detail the manner in which that article should be sold, and at what prices, and the consideration that the agent should receive for selling the same. The other contract was more comprehensive. By its terms, Russell was appointed as agent for the respondent for the sale of "its harvesters, binders, reapers, mowers, twine, extra parts, trucks, bundle carriers, flax carriers, and other attachments, on commission." Defendant

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Russell took this contract away for the purpose of getting the guaranty contract, which was printed either at the bottom or on the back of the same sheet, signed by the other defendants. It was so signed and returned, but the machine contract was mutilated in some manner, and another contract was drawn, identical in its terms, but dated February 23, 1893, and the guaranty contract thereon was also signed by the defendants and appellants. It is upon this contract that this action is brought. It is in the following language: "In consideration of the appointment or retention of above party as agent of William Deering & Co. for the sale of its harvesters, binders, reapers, mowers, trucks, extras, twine and other property, in certain territory, the undersigned jointly and severally guaranty the fulfillment by said agent of all his obligations and duties growing out of and relating to such agency, or otherwise, that now or hereafter may exist, and we agree to pay said William Deering & Co., or its successors, all damages it or they may sustain by reason of any default of said agent; that the written acknowledgment of, or a judgment of any court against, said agent, shall in every respect bind and be conclusive against the undersigned, their heirs and representatives: and that the liability hereby created shall not be waived, modified, or canceled by any extension of time to pay or keep any part of said obligations or duties, or otherwise, nor except by surrender to us of this guaranty and agreement, or by indorsement hereon by William Deering & Co. at their home office in Chicago. Witness our hands and seals February 25th, A. D. 1893. R. R. Russell. Jas. P. Aylen. [Seal.] Henry F. Labbitt. [Seal.] P. O. Sheldon, No. Dak." At the end of the agency contract, and preceding the contract of guaranty, were these words: "This contract is not binding upon William Deering & Co. until accepted by it at Chicago, Illinois." The copy of the contract set out in the pleadings, and which is not questioned, shows immediately after the above these words: "Accepted and approved at Chicago, Ill., this 14th day of April, 1893. [Signed] William Deering & Co., by A. H. Upton."

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The defendants and appellants seek to avoid liability upon several grounds. They admit the making of the contracts on the part of Russell, as above set forth, except that they claim that the twine contract was entered into after the making of the machinery contract, and after they had signed the guaranty contract. They allege and here claim that the word "twine," which was in the printed form of contract used, was left in the machinery contract and in the guaranty contract inadvertently and unintentionally; that in fact the parties to said contract did not intend that the machinery contract or the guaranty contract should cover the article of twine; that appellants signed said guaranty contract on the representations of the respondent and Russell that the same did not cover the article of twine. They also allege payment in full. And as a further defense they allege that, when the twine contract for 1893 was made, Russell was largely indebted to respondent upon the prior contract of the firm of which he had been a member, for handling twine for respondent in the year 1892, and that it was secretly agreed between respondent and Russell that his compensation for handling twine in 1893 should be applied upon his pre-existing indebtedness to respondent; that such understanding was fraudulently concealed from them, and if they had known it they would not have signed said guaranty. Whether the separate twine contract was executed contemporaneously with or subsequent to the machinery contract is not, perhaps, very material. Still, if it be to appellants' detriment to hold that the twine contract and the original machinery contract, dated February 16, 1893, and which was mutilated and destroyed, were executed on the same date, and as a part of the same transaction, they cannot be heard to complain of such holding. Mr. Stanton, as a witness for appellants, testified: "Both contracts were entered into the same day. The bargain was all made the same day as far as that goes. There was another contract executed for the twine, supplementary to the machinery contract, and part of it. * * * The twine contract and the machine contract that was mutilated were

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executed the same day, and this other contract, in which twine is mentioned, was afterwards." There was no claim of surprise, and no effort made to show that the witness was mistaken. But if this guaranty is a valid, binding contract upon appellants, the time of the execution of the separate twine contract is immaterial, because it is admitted that "twine" was included both in the machinery contract, to which the guaranty contract was appended, and in the guaranty contract itself, and such contract reads: "The undersigned jointly and severally guaranty the fulfillment by said agent of all his obligations and duties growing out of or relating to such agency, or otherwise, that now or hereafter may exist."

We next inquire, then, whether or not this guaranty does legally include the agent's liability for twine handled. Appellants allege a mutual mistake of the parties in leaving the word "twine" in the machinery contract and the guaranty contract, and they also allege that plaintiff and Russell, in order to obtain their signatures to such guaranty, represented to and agreed with them that the agency should not embrace the article of twine. We have examined the evidence carefully, and there is no suggestion anywhere that either of the appellants ever had any conversation or communication with respondent, or with any agent of respondent, relative to Mr. Russell's contracts, until long after this guaranty was signed. Each of the appellants testified that he had some conversation with Russell about the matter, and then each in turn was asked for his understanding of what the contract included. The answers were excluded, and on the plainest possible principles. They could not hold plaintiff to any understanding that they obtained from Russell alone. They had established no such mutual mistake as would permit them to contradict the written instruments by parole evidence. It is true that Russell swears that his understanding with Stanton was that the machinery contract should not include twine. It nowhere appears that this was ever communicated to appellants, but it would not avail, in any event. When the guaranty contract was

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signed, appellants knew that respondents was not then bound. They knew that Stanton had no power to bind repondent. The contract on its face stated, "This contract is not binding upon William Deering & Co., until accepted by it at Chicago, Illinois." Appellants knew that the contract to be accepted at Chicago was the written and printed instrument, and not the understandings of Stanton and Russell. So knowing, they permitted their guaranty contract, which in terms made them liable for the agent's default on twine account as much as upon any other account, to be forwarded for acceptance. And they knew, or were bound to know, that it included twine. True, they swear they did not read it carefully, and did not know that it included twine. But they were amply competent to read it, and they were not induced to refrain from reading it by anything that was said or done by respondent, or any agent of respondent; and, respondent having accepted the contract and acted upon it, appellants cannot be heard to say that they did not know what was in the contract. Furthermore, they now seek to modify their liability in a manner expressly excluded and repudiated in their own contract. The guaranty contract which they signed says: "And that the liability hereby created shall not be waived, modified, or canceled by any extension of time to pay or keep any part of said obligations or duties, or otherwise; nor except by surrender to us of this agreement, or by indorsement hereon by William Deering & Co., at their home office in Chicago." Appellants now seek to limit and modify that liability by a parole understanding on the part of the general agent Stanton. The trial court was clearly right in refusing to permit any such modification.

Mr. Russell testified that by arrangement with Stanton his compensation for handling twine in 1893 was to be used to reduce his existing indebtedness to respondents. Appellant's counsel offered to show by each of the appellants that they did not know of this former indebtedness, and did not know of any arrangement by which Russell's compensation was to be used to reduce such indebtedness. The offer was refused, and this refusal is

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urged as error. We cannot so regard it. We know of no duty resting upon respondent to find out who these guarantors were to be, and impart that information to them. There is no pretense that they ever asked for it. It was a matter resting entirely between Russell and his guarantors. If Russell's financial circumstances would have influenced them in this matter, it was their duty to inform themselves thereof. It is claimed that Russell received no compensation for handling twine, and therefore it decreased his ability to meet his obligations under his contract. This is not correct. He had the full benefit of his commissions, as fully as if paid to him in cash. If paid in cash, he might the next moment have paid the money back to apply on the indebtedness. The result would have been the same. But how could appellants be prejudiced? Russell might have agreed to apply his twine commission to the payment of any other indebtedness, but such fact would furnish no ground of complaint to appellants, and yet the effect would be the same as that of the contract of which they here seek to complain. The offered proof constituted no defense, and the court was clearly right in excluding it.

The defense of payment remains yet to be considered. The evidence showed that Russell had turned over to respondent notes and accounts, as collateral to his indebtedness, amounting to nearly $2,000. It is urged that respondent was bound to show, as against these guarantors, that such collaterals had not been paid. We will assume that this position is correct. The general agent, Stanton, identified the sheet showing the balance due on settlement with Russell in September, 1893, and testified that nothing further was paid on said indebtedness during the continuance of his agency. He was, however, superseded by one Stavely, in March, 1894. Mr. Stavely testified that there had been paid on the collaterals during his agency the sum of $165.33, exclusive of costs of collection and no more. On cross-examination this witness testified that he gained his information of the fact that plaintiff had these collaterals from the books of the plaintiff, and from a list of notes signed by Russell, showing that they were

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taken as collateral at that time. Defendants thereupon moved the court to strike out the testimony of the witness in regard to the collaterals, as not being the best evidence. This was refused. It will be noticed that at that time the witness had gone no further than to testify that his knowledge that the notes and accounts were held as collateral was obtained from the books and the list signed by Russell. Undoubtedly there were more primary sources of evidence that the notes and accounts were held as collateral. But it was to defendants' interest to show that they were so held, as they subsequently did show by the witness Russell. So, if the ruling was error, it was without prejudice to appellants. At the time the motion to strike out was made, the witness Stavely had not testified that his knowledge as to accounts paid on the collaterals was obtained from the books. True, he did so testify subsequently; but the evidence was received without objection, nor was there any motion to strike it, or any effort to show that it was not correct.

It is urged that the guarantors must be credited with the value of such securities, and are only liable to respondent for the balance then remaining. This is not the law. Under our statute (Comp. Laws, § 4412,) the party holding evidence of indebtedness of this character in pledge as collateral security cannot sell the same, but must proceed to collect it, if he wishes to realize thereon. Hence there would be no means of determining the value, except at the end of an execution in each case. But it is well settled that a creditor whose claim is guaranteed and also secured need not proceed against the security, but may at once sue the guarantors, on default of the principal. *Penny* v. *Manufacturing Co.*, 80 Ill. 244; *Sigourney* v. *Wetherell*, 6 Metc. (Mass.) 553; *Forbes* v. *Rowe*, 48 Conn. 413; *Bingham* v. *Mears*, 4 N. D. 437, 61 N. W. 808. On payment of the debt the guarantors will, of course, be subrogated to all the rights of the creditor on the securities.

We find no error in this case, and the judgment is affirmed. All concur.

(65 N. W. Rep. 691.)

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JOHN L. MOEN *vs.* OLE P. LILLESTAL, *et al.*

Opinion filed November 29th, 1895.

Vendor and Purchaser—Executory Contract.

Under an executory contract of sale of land, where the purchaser was let into possession, with full use of the premises, but bound to pay a stipulated price therefor, and to pay each year "so much as the one-half of all crops on said land shall amount to," *held*, that no relation of landlord and tenant could arise under such contract, nor would the parties be tenants in common of the crops grown on such land by the vendee, unless the contract created such relationship by express language or necessary implication.*

Construction—Title of Crops.

Contract examined, and *held* not to constitute a transfer to the vendor, or a reservation in him of any title or ownership in or lien upon the crops to be grown on the land by the vendee.

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

Action by John L. Moen against Ole P. Lillestal and others. From the judgment, plaintiff and D. E. Rice, one of the defendants, appeal.

Modified.

McCumber & Bogart, for appellant Moen.

S. H. Snyder, for appellant Rice.

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

BARTHOLOMEW, J. This is a contest for priority of right to the proceeds of a crop raised by the defendant Lillestal in the year 1894 on the S. W. ¼ and the W. ½ of the S. E. ¼ of section 15, township 133, range 49, in Richland County, N. D. Plaintiff claims priority as to one-half of said crop as tenant in common of the crop with said Lillestal, and as to the other half he claims priority by reason of Lillestal's abandonment of the land. Both claims are based upon the contract hereafter mentioned. The defendant Lillestal makes no claim whatever to the crop. The defendant Rice claims a portion of the crop under a chattel mortgage executed by Lillestal to him on the 6th day of August, 1892, covering all crops growing or to be grown on the said S. W.

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¼ in the years 1892 and 1893, and until the debt secured by said mortgage was fully paid. This mortgage was entirely unpaid at the time of the trial. The defendant C. M. Johnson claims under a mortgage executed to him by Lillestal on November 1, 1893, covering the undivided one-half of all crops to be raised upon said premises in the years 1894, 1895, and 1896, to secure an indebtedness of $350. Nothing had been paid on this indebtedness. Johnson also claims under another mortgage upon the same property executed by Lillestal to him May 15, 1894, to secure the sum of $25.25, which was also unpaid. The defendant Van Dusen-Harrington Company claims under a mortgage executed by Lillestal to one Olsen on November 8, 1893, to secure a debt of $332.70 and interest, and covering all crops raised on said premises during the year 1894, and until the debt was paid. This debt was duly assigned by Olsen to the Van Dusen-Harrington Company, and the debt was entirely unpaid. The defendant D. M. Osborne & Co., a corporation, claims under a mortgage executed to it by Lillestal May 30, 1894, to secure $153.86 and interest, and covering all the crop to be grown in the years 1894, 1895, and 1896. All of these mortgages were duly and legally executed, and properly filed for record, so that no questions arise in that behalf. The contract between plaintiff and Lillestal, and under which plaintiff claims the crop, is too long for insertion here. We give it in substance, with quotations of the parts upon which counsel more especially rely. It is what is known as a "land contract," plaintiff being the vendor, and Lillestal the purchaser. It is dated April 20, 1892, and by its terms plaintiff agreed, upon payment by Lillestal of the sums therein specified, and the performance of certain conditions precedent, to sell and convey to Lillestal the premises already described. Lillestal was to pay therefor the sum of $3,000, in manner and at times as follows: "So much as the one-half of all crops on said land shall amount to at market price each year, and all interest to be computed at 8 per cent. annually, and paid out of the one-half belonging to second party each year until all is paid." As

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security for due performance on his part, Lillestal agreed to break up not less than 50 acres of said land in each of the years 1892 and 1893, and to prepare what was already broken for crop, and to properly seed, cultivate, and harvest the crops. And, continuing, this agreement declared: "Secondly. That he will deliver at the elevator or warehouse at Dwight the one-half (½) of all the grain, crops, or produce of every kind which may be grown, raised, or produced upon said land from year to year, beginning with the year 1892; said grain to be delivered as soon as threshed, free from all costs and charges, and receipts for the same to be made out in the name of the party of the first part, and to be at once sent to him. Thirdly. That the party of the second part shall have the option of the sale of said grain from year to year up to the first day of December, but on and after that date this option shall cease, and the sole right of sale belong to the party of the first part. Fourthly. The proceeds of the sale of said grain or produce shall be applied as follows: Firstly, to the payment of taxes on said land, if any are delinquent; secondly, to the payment of the insurance on said grain, and any costs or charges for storage or handling; thirdly, to the payment of the principal, until the same has been paid in full. Fifthly, The party of the second part covenants and agrees to duly execute, and place on file or record, as the case may be, a chattel mortgage on one-half (½) the entire crop sown, planted or to be raised upon said premises; said chattel mortgage to be drawn in favor of the party of the first part, and to be a first or prior lien upon that portion of the crop mortgaged, and to be given on or before May 15th, 1892, and yearly thereafter until one-half (½) of the purchase price of said land shall have been fully paid, together with the interest on the same." Second party reserved the right to make further payments, if he desired, and agreed to pay all taxes and assessments; and provision was made for declaring a forfeiture in case of default, and settling the rights of the parties in the land, time being made the essence of the contract. The findings of the trial court show that Lillestal signally

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failed in the performance of his covenants. This action was in fact brought to foreclose said contract, and get possession of the crop of 1894, and the other defendants were joined because they had liens of record on the crop. The findings are full, and are not questioned. The decree settles all rights in the realty, as between plaintiff and Lillestal, and no complaint whatever is made to that part of the decree. All the errors are assigned upon the court's conclusion of law as to the disposition of the crop. The court decreed the lien of defendant Johnson under his mortgage of November 1, 1893, to be a first mortgage lien upon the undivided one-half of said crop, and the lien of the Van Dusen-Harrington Company under the mortgage to Olsen dated November 8, 1893, to be a valid mortgage lien upon the whole of such crop, subject only to Johnson's lien on the undivided one-half, and the lien of Johnson under the mortgage of May 15, 1894, to be a valid lien, subject only to the two last above mentioned mortgages, and the lien of D. M. Osborne & Co. to be a valid lien upon the whole of said crop, subject to the mortgage liens already declared. All these defendants were awarded costs and disbursements against plaintiff. The defendant Rice was declared to have no lien on the crop of 1894. Plaintiff and defendant Rice appealed.

The case must turn upon the construction of the contract between plaintiff and defendant Lillestal. We reach no conclusion in the matter that is entirely satisfactory to ourselves. Remembering the nature and purpose of the contract, and the language used, we are unable to say with confidence what construction will certainly reflect the intentions of the parties. The language of the contract is somewhat ambiguous, and different provisions somewhat conflicting; but, after giving it due consideration, we are unable to say that the trial court erred in its construction of the contract. We think it did not, and we will briefly state our reason.

The learned counsel for appellant Moen, while claiming that the construction for which they contend has some support in the

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express wording of the contract, yet rely mainly upon the effect of the contrat taken as a whole. They claim that the effect of this contract was to put Lillestal in possession of land belonging to Moen, with the privilege of raising crops thereon, but bound to render the one-half thereof to Moen. They then state the proposition that "every form of an agreement by which land is let to one who is to cultivate the same, and give the owner thereof, as compensation, a share of the crop, creates a tenancy in common in the crops." There are many cases which sustain this rule, although it is far from uniform. The cases are fully cited in the note to *Putman* v. *Wise*, 1 Hill, 234, as reported in 37 Am. Dec. 317-323. But for the purpose of this case we may give our unqualified assent to the rule. The agreement which it contemplates must be one "by which land is let to one who is to cultivate the same and give the owner as compensation therefor a share of the crop." A distinction was early made between a contract which conferred a license to farm the land and reserve a share of the crop to the owner, and a formal lease, which put the tenant in possession for a specific term, and required him to pay a certain share of the crop as rent. In the former case the parties were held to be tenants in common of the crops, while in the latter it was held that the entire crop belonged to the tenant until the landlord's share was set apart or paid over to him. But courts refuse to recognize the distinction when the clear effect was to give the owner a share of the crop as compensation for the use of the land, and hence it was declared, whatever might be the form of the agreement, if such were its effects, the parties were tenants in common of the crop. Such was the holding in *Putman* v. *Wise*, *supra*, although the granting clause there was "to lease and to farm let." A moment's consideration will show the impossibility of assimilating the contract here under consideration with contract that could come under the rule. The land was not "let" to Lillestal. It was sold to him. He became the full equitable and beneficial owner. Moen held the legal title as security. He was a mortgagee, in effect, as he admits by bring-

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ing this action to foreclose the contract. Lillestal was to pay the owner nothing for the use of the land. He himself was the owner, and what he agreed to pay to Moen was the purchase price of the land; and even that was not to be paid in crops, but in money. True, the amount to be paid each year was measured by the market value of a certain share of the crop; but Lillestal could claim no credit until that share was sold, and then only for the amount realized. It has been repeatedly held that "an executory contract for the sale of land, which gives the purchaser a right to enter and possess the premises until default in payment of the purchase money, does not establish the relation of landlord and tenant, when there there is no reservation of rent fixed in the contract." 12 Am. & Eng. Enc. Law, p. 662. And this is generally true, even after condition broken. *Stone* v. *Sprague*, 20 Barb. 509; *Thompson* v. *Bower*, 60 Barb. 463; *Newby* v. *Vestal*, 6 Ind. 412; *Fall* v. *Hazelrigg*, 45 Ind. 576; *Cole* v. *Gill*, 14 Iowa, 527; *Dakin* v. *Allen*, 8 Cush. 33; *Hill* v. *Hill*, 43 Pa. St. 528; *Stauffer* v. *Eaton*, 13 Ohio, 322; *Klopfer* v. *Keller*, 1 Colo. 410; *Willis* v. *Wozencraft*, 22 Cal. 607. In some states the purchaser, after default, is treated as tenant at will. See cases cited in note 6, 12 Am. and Eng. Enc. Law, p. 662. It is clear that nothing in the nature of this contract constituted these parties tenants in common of the crops. If they were such, it must be by virtue of the language of the contract itself. And when we remember the nature of the contract; that by its terms the payments might extend over a long series of years; that the land at the time of the sale was largely unbroken prairie; that the purchaser was bound to put valuable improvements thereon before the maturity of his first crop; that his failure to do so, or his failure in any payment, authorized the vendor to at once bring his foreclosure action, thus giving the vendor fair security for the due performance on the part of the vendee,—remembering these things, it seems to us, that an executory contract for the sale of a half interest in the crop, extending over so many years, ought to rest upon something more substantial than a possibility or an infer-

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ence. Counsel place stress upon that portion of the contract which declares that the interest on the purchase price shall be "paid out of the one-half belonging to second party." This, it is claimed, is equivalent to a declaration that the other half belonged to the first party. That would be a natural inference, certainly. Still, as the parties had just provided that there should be paid annually upon the principal "so much as the one-half of all crops on said land shall amount to at market price each year." and had thus disposed of all the benefits arising from the one-half, they may have loosely used the language referring to that half the benefits of which were yet held by second party. Again, it is urged that the provision requiring second party to deliver one-half the crop at the elevator, and take receipts therefor in the name of the first party, and send same to him, indicates that half the crop belonged to him. To our minds, it has the opposite bearing. The crop, being threshed, and in a condition to be converted into money at any moment, it was highly proper that first party should then wish to get that portion of which he was to receive the proceeds in such shape that it could not be disposed of without his knowledge. But, had he considered that he had absolute title to the property thus delivered, no such precautions would have been necessary. The law would have protected him then, and any disposition of it by the second party as his own would have been a criminal act. Again, counsel urge that the fact that the second party was given the option of the sale of the property up to the 1st of December in each year indicates that he did not own the property, because if he did, his right to sell would be unquestioned, and the power need not be given him. This argument is based upon a misconception of the purpose of the provision. It was not inserted to give second party power to sell, but to fix a date when that power should cease. The contract declares, "but on and after that date [December 1st] this option shall cease, and the sole right of sale belong to the party of the first part." This was done to enable the first party to realize every year according to the intention of the contract.

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Otherwise the second party might carry the crop for an indefinite time, and the vendor thus be deprived of his purchase price. Further on the contract provides: "Fifthly. The party of the second part covenants and agrees to duly execute and place on file or record, as the case may be, a chattel mortgage on one-half (½) the entire crop sown, planted, or to be raised upon said premises; said chattel mortgage to be drawn in favor of the party of the first part and to be a first or prior lien upon that portion of the crop mortgaged, and to be given on or before May 15th, 1892, and yearly thereafter until one-half (½) of the purchase price of said land shall have been fully paid, together with the interest on the same." It is not stated positively what this mortgage was to secure, but the only reasonable construction that occurs to us is that it was to be given to secure the payment of the first half of the purchase price and interest. After one-half was paid, the vendor probably regarded the land as ample security. We do not think it will be claimed that the vendor was to own one-half the crop, and have a mortgage on the other half to secure his purchase price; and yet that is the only reasonable conclusion, if appellants' contention be correct. It seems clear from this analysis that we ought not to reverse the construction placed by the trial court upon this contract.

Upon the question of the forfeiture of all of the vendee's rights by an abandonment of the land, it is sufficient to say that the court specifically finds—and the finding is unchallenged—that after the threshing of the crop of 1894 the vendee wholly abandoned said land. An abandonment at that time could not forfeit any interest in grain that had been severed and threshed. On plaintiff's appeal, this judgment must be affirmed. On the appeal of the defendant Rice, it is admitted by the learned counsel for respondents that the decree should be modified as to him. As his mortgage antedates all the other mortgages, and covers the entire crop grown on the said S. W. ¼ the trial court will modify its decree, giving him a first lien upon such crop, or

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the proceeds thereof, for the amount due upon the note which his mortgage was given to secure.

With this modification, the decree is affirmed. All concur.

(65 N. W. Rep. 694.)

F. L. SYKES *vs.* G. S. HANNAWALT.

Opinion filed November 29th, 1895.

Chattel Mortgage of Future Earnings.

In this state it is competent for the owner and operator of a "threshing rig" to mortgage the future earnings thereof.

Filing.

But such mortgage must be filed for record in the same manner as a mortgage upon any other personal property, and, if not so filed, it is void as against a creditor of the mortgagor who became such in ignorance of the existence of the mortgage, after the same was executed, and before it was filed for record, relying upon the mortgagor's apparant ownernership of such earnings.

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

Action by T. L. Sykes against G. S. Hannawalt. Judgment for plaintiff, and defendant appeals.

Reversed.

DePuy & DePuy, for appellant.

Phelps & Phelps, for respondent.

BARTHOLOMEW, J. Both parties to this action claim the right to an amount of money that was due from one Kennedy for threshing performed for him in the fall of 1893. The threshing was done by one Fred Schimming, with a machine owned by him. Defendant and appellant, Hannawalt was hired by Schimming, and worked for him in threshing a portion of that season, including the threshing done for Kennedy. Schimming failed to pay Hannawalt for such labor, and Hannawalt brought suit in Justice's Court to recover the amount, and, having obtained judgment, execution was issued and levied upon the balance in Kennedy's

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hands due on account of the threshing. Kennedy, having received notice from plaintiff's agent that plaintiff claimed the amount by assignment from Schimming, did not pay over the money on the execution, but gave the officer a receipt therefor, and retained it. Subsequently plaintiff sued Kennedy in Justice's Court, claiming the amount as assignee of Schimming. Kennedy paid the money into court, and on application Hannawalt was substituted as defendant, and came in and answered, setting up the facts already stated as constituting his right to the money. He was unsuccessful in the Justice's Court, and appealed to the District Court, where he was again unsuccessful, a verdict being directed against him. The learned trial court based its ruling upon what is believed to be the superior rights of respondent to the money, as shown by the undisputed facts in the case. Respondent claimed to be the owner of the account against Kennedy under a written contract as follows: "This agreement, made and entered into this 19th day of August, A. D. 1893, by and between Fred Schimming, of Minto, Walsh County, and State of North Dakota, party of the first part, and T. L. Sykes, of the City of Fargo, County of Cass, and State of North Dakota, party of the second part, witnesseth: That the said party of the first part, for and in consideration of the sale to him of one 14-horse Gaar-Scott traction engine and one 40x60 Advance separator by the said party of the second part, hath given his certain promissory notes, executed and delivered to second party by the said party of the first part, and further acknowledges that there is now owing and unpaid on said promissory notes made, executed, and delivered by him, the said party of the first part, unto the said party of the second part, in payment for the engine and thresher above mentioned, the sum of $825, and interest in accordance with the provisions of said notes. Now, therefore, for the purpose of better securing the payment of said confessed indebtedness and interest thereon, and in addition to such other securities as may have been heretofore given, the said party of the first part doth hereby grant, bargain, sell, and mortgage unto the

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said party of the second part all and singular the earnings of the aforesaid threshing rig, which said threshing rig is now owned by and in the possession of the said party of the first part, and hereby agree to run the said threshing rig faithfully and economically from the beginning to the close of each threshing season, during the continuance of this agreement. And the said party of the first part further stipulates and agrees that he will act as the agent of second party in the matter of obtaining a settlement of each job of threshing done, said settlement to be made upon blanks furnished by the said second party, and, after been accepted by the person for whom the job of threshing was done, to be by the said party of the first part turned over to Ralp Welch for collection, for the account of the party of the second part; and as such agent the said party of the first part shall act for and in behalf of said party of the second part in a fuduciary capacity, and not otherwise. Now, the conditions of this agreement are such that when the said second party shall have received in cash at his office in Fargo, N. D., from the moneys collected from the earnings of the said threshing rig during the season of 1893, the sum of $425 and interest, to be applied by them upon the aforesaid indebtedness, then and in that case they, the said second party, will assign and turn over to the said party of the first part all uncollected accounts and cash then remaining in the hands of the said Ralph Welch, and in like manner in the year 1894, when they shall have so received a further sum of $400 and interest; and in like manner in the year of———, when they shall have received the further sum of $———and interest; and in like manner in the year 189—, when they shall have received the further sum of $———and interest. It is further agreed and understood that the said second party is not, under any circumstances, to be held liable for any expenses incurred in the running of said threshing rig, or in the collection of the aforesaid threshing accounts. It is further understood and agreed by and between the parties hereto that nothing contained in this agree-

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ment shall be construed as altering, changing, or abrogating in any manner whatever the existing obligations of the said party of the first part to the said party of the second part, and that in all its provisions it is to be considered as collateral to said obligations. It is distinctly agreed that the said party of the first part shall acquire no title to the earnings of said machine, but that they are and shall be the property of the said party of the second part until assigned to the party of the first part, in accordance with the provisions of this agreement. In witness whereof the said party of the first part hath hereunto affixed his hand and seal this 19th day of August, A. D. 1893. Fred Schimming. Witnesses: Lawrence Heerey, R. B. Welch."

This paper was never filed for record. What is the legal force and effect of this contract? It is an assignment absolute or conditional and by way of security? And, if conditional, is it a pledge or mortgage? There are terms in the instrument indicating by strong language that the accounts, when earned, were to be the absolute unqualified property of respondent, and his counsel urge that point with tenacity, and we gather from the record that such was the view of the trial court. But the language in the contract cannot prevail against the statute. Section 4348, Comp. Laws, reads as follows: "Every transfer of an interest in property, other than in trust, made only as a security for the performance of another act, is to be deemed a mortgage, except when in the case of personal property it is accompanied by actual change of possession, in which case it is to deemed a pledge." If this instrument had any effect whatever, it was a transfer of an interest in property. True, the property was not then in *esse*, but as an executory agreement of sale it might be made effectual under section 3258, Comp. Laws, and under section 4328, if a mortgage, the lien would attach when the property came into existence. But, being a transfer of an interest in property, and it being perfectly clear from the whole instrument that whatever interest was transferred was so transferred as security for the payment of an existing debt owing by Schim-

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ming to the respondent, whatever terms may have been used, the instrument was in fact a security only, and must be a mortgage or a contract of pledge. It is idle to say, that respondent retained the title to the earnings when he sold the machine. He never had title to such earnings, and a party cannot retain that which he never had. When the earnings accrued, the machine belonged to Schimming, and was operated by him, and the earnings necessarily belonged to him, except as his ownership was qualified or restricted by the written instrument. We are clear that the contract gave respondent no absolute title to the accounts. Schimming might have paid his debt to respondent at any time, and in that event he would have put an end to all claim of respondent to the accounts; hence whatever interest was transferred to respondent was so transferred as security, and not otherwise. But it is more difficult to determine the exact nature of that security. The statute declares that a transfer for security "is to be deemed a mortgage except when in the case of personal property it is accompanied by actual change of possession, in which case it is to be deemed a pledge." In this case the property transferred was an interest in choses in action not in *esse*. Had the accounts been then in actual existence, there is authority for holding that a written assignment by way of security is equivalent to the delivery of possession, because the property is intangible, and not susceptible of manual delivery; or perhaps it were better to say that the authorities hold that choses in action by reason of their intangible nature cannot be pledged without a written assignment, because a pledge is dependent upon possession. *Brewster* v. *Hartly*, 37 Cal. 15; *Wilson* v. *Little*, 2 N. Y. 443. But we find no case holding that such property may not be mortgaged if the parties so intend. An assignment of choses in action for security was held a mortgage in *Preston Nat. Bank* v. *George T. Smith Middlings Purifier Co.*, 84 Mich. 364, 47 N. W. 502; *Kirkland* v. *Brune*, 31 Grat. 127; *Tingle* v. *Fisher*, 20 W. Va. 497; *Bacon* v. *Bonham*, 27 N. J. Eq. 209; *Williamsen* v. *Railroad Co.*, 26 N. J. Eq. 398. And in *Manufacturing Co.* v. *Robinson*, 83

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Iowa, 567, 49 N. W. 1031, the court specifically held that threshing accounts, not yet in existence, might be mortgaged. Our statutes authorize the giving of a mortgage on property not in existence (section 4328, Comp. Laws,) and we have expressly given effect to this statute. *Bank* v. *Mann*, 2 N. D. 456, 51 N. W. 946; *Hostetter* v. *Elevator Co.*, 4 N. D. 357, 61 N. W. 49. There is nothing inherent in the nature of choses in action that would prevent a mortgage thereon if the parties so intended. Of course, at common law, property not in *esse* could be neither mortgaged nor pledged. Our statute has swept away the rule as to mortgages. But it is silent on the point as to pledges for the all-sufficient reason that an actual transfer of possession is necessary to a valid pledge, and possession cannot be predicated upon that which does not exist. Nor would the contract be good as an agreement to pledge. An agreement to pledge certain specific articles to be thereafter manufactured would constitute no lien upon such articles when manufactured. To create the lien the article must be placed in the possession of the pledgee after they are manufactured. The same would be true of the accounts. If it be claimed that possession thereof is transferred by assignment, still such assignment must be made after the accounts have an existence. Nothing of that kind was ever done; hence, on the theory that the contract was intended as a pledge, respondent would have no lien upon or right to the money here in controversy. His counsel insist, however, that if the instrument be construed as a mortgage, still respondent's rights are superior, because mortgages of choses in action do not come within the registry acts. This has been so held in several cases. *Preston Nat. Bank* v. *George T. Smith Middlings Purifier Co., supra*; *Marsh* v. *Woodbury*, 1 Metc. (Mass.) 436; *Kirkland* v. *Brune, supra*; *Gettinger* v. *Bank*, 3 W. Va. 317; *Williamson* v. *Railroad Co., supra*. That these cases were correctly decided does not admit of doubt, and yet we think they are without force as precedents in this jurisdiction by reason of peculiarities of our statute law. These cases state generally that registry is intended as a

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substitute for change of possession, and is necessary only where property is capable of manual delivery, and, as there can be no manual delivery of choses in action, a mortgage on that class of property need not be recorded. The statutes under which these decisions were rendered declare generally that a mortgage of goods and chattels shall be void as against creditors, and so forth, unless recorded, or unless followed by an immediate and permanent change of possession. Our statute is different. Section 4379, Comp. Laws, reads: "A mortgage of personal property is void as against creditors of the mortgagor, and subsequent purchasers and incumbrancers of the property in good faith for value, unless the original, or an authenticated copy thereof, be filed by depositing the same in the office of the register of deeds of the county where the property mortgaged, or any part thereof, is at such time situated." It will be noticed that this statute recognizes no such thing as a mortgagee in possession. There can be no such thing under our law, because, if possession be transferred to him contemporaneously with the execution of the instrument, he is not a mortgagee, but a pledgee, under section 4348, already quoted, and must proceed under the statute relating to pledge, and not under the statute relating to chattel mortgages. Of course, a mortgagee may take possession after condition broken, or for the purposes of foreclosure, without thereby becoming a pledgee; but, if the written instrument be accompanied by an actual transfer of possession, the transaction is a pledge. In a general sense, it is true in this state that registration takes the place of possession. A person in possession of personal property as security need not record a mortgage thereon in order to enforce a lien. It was in this general sense that this court said that registration was a substitute for possession in *Bank* v. *Oium*, 3 N. D. 193, 54 N. W. 1034; but under the statute already quoted registration is absolutely necessary to the validity of a chattel mortgage as against creditors, etc., hence the reasoning in the above cases is entirely inapplicable here.

But there is yet the further reason why such cases are not

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authority here. They were decided under statutes which speak of a "mortgage of goods and chattels," and, while some of the cases say that the word "chattels" might include choses in action, yet, as it is used in immediate connection with the words "actual possession,"—a condition which cannot be asserted as to choses in action,—therefore the word must be understood in a more restricted sense, and must exclude whatever is not visible, tangible, and capable of manual delivery. Now, our statute says, "a mortgage of personal property is void." etc. There are no exceptions if the mortgage covers personal property. Section 2679, Comp. Laws, defines real property, and section 2683 declares that "every kind of property that is not real is personal." Section 6973 reads as follows: "The term 'personal property' includes every description of money, goods, chattels, effects, evidences of right in action, and written instruments by which any pecuniary obligation; right or title to property, real or personal, is created or acknowledged, transferred, increased, defeated, discharged or diminished." Under these statutory definitions choses in action are personal property, and a mortgage thereon is a mortgage of personal property, and comes within the express letter of the statute. That it comes within the reason of the statute will not admit of doubt. The object of the statutory requirement is to prevent injury and loss to innocent persons, who, on the strength of apparent ownership, have been led to extend credit or change their position to their detriment, as fully set forth in *Bank* v. *Oium*, *supra*. To a person at all conversant with the manner in which threshing is conducted in this state it will be plain that in these cases, of all others, it is necessary, in order to protect innocent persons, that the mortgages be of record. A man who owns and operates a threshing engine and separator hires his threshing crew,—the entire complement of men and teams necessary to conduct a threshing business in the marvelous manner that steam power has made possible. His expenses are enormous, but his earnings are large. Very few men, indeed, could command the credit incident to such a business, but for the

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certainty that their daily earnings would meet their expenses. Hundreds of thousands of dollars are earned every fall in this state by laboring men employed in these threshing crews, who rely exclusively for their pay upon the fact that their employer is earning from day to day the money with which to pay them. Could that employer, by some secret and unrecorded mortgage, place those earnings beyond the reach of the laborer whom he employs, and who relies upon those earnings for his compensation, he would be able to entail great loss upon that class of the community least able to bear it. If we thought such were the law, we would regard it as a subject for early legislative action. But such is not the law in this state. Mortgages upon the earnings of a threshing machine must be filed for record in the same manner as mortgages upon any other personal property. This mortgage never was recorded. Appellant, in ignorance of its existence, performed the labor for Schimming for which he seeks to hold this money. He relied upon Schimming's apparent ownership of the earnings of the machine. He would not have performed the labor or extended the credit had he known of the mortgage. He comes clearly within the conditions specified in *Bank* v. *Oium*. As to him, the mortgage was void. It was, perhaps, void also by reason of the uncertainty in the description; but that point is not raised. In holding that it was competent for the owner and operator of a threshing machine to mortgage the future earnings of such machine, we must not be understood as intending to hold that the accounts due from the farmers to the person operating the machine necessarily represent such earnings. Such accounts usually, in this state, represent not only the earnings of the machine, but also the earnings of a large number of men and teams used in conducting the business of threshing. A description such as we find in the instrument in this case, to-wit, "all and singular the earnings of the aforesaid threshing rig," would not cover the earnings of the men and teams.

Some technical objections are made as to the sufficiency of the evidence to entitle appellant to the money in any event. We

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have examined the evidence, and, remembering that verdict was directed against appellant, and that hence we must regard every fact as established that his evidence tends to prove, we think the objections not well taken.

The trial court will reverse its judgment, and order a new trial. All concur.

(65 N. W. Rep. 682.)

NOLLMAN & LEWIS *vs.* EDWARD EVENSON.

Opinion filed December 2nd, 1895.

Same Facts May be Plead Both as a Defense and Counterclaim.

The same facts may constitute a defense to a claim made by plaintiff, and at the same time entitle a defendant to an affirmative judgment against plaintiff in excess of the claim made by the plaintiff; and, when such is the case, a defendant may plead such facts, both as a defense and as a counterclaim, and cannot be compelled to elect upon which he will rely.

Defense of Non-performance of Contract.

In an action to recover upon a contract to furnish materials and labor for plastering a house, the plastering to be of a certain quality, an answer which sets forth that the plastering was not such as the contract required, and that by reason of the inferior materials used and unskillful workmanship the plastering was worthless, and of no benefit to defendant whatever, states a good defense.

Evidence Sustains Finding of Fact.

Evidence examined, and *held* to establish that the plastering done in this case by plaintiffs for defendant was not according to their contract, and was of no benefit whatever to defendant.

Recovery of Money Paid by Mistake.

And *held*, under these facts, that when the defendant had made a payment upon such contract before he knew of the inferior and worthless quality of the plastering, he was entitled to recover back the amount so paid.

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

Action by Charles Nollman and John D. Lewis against Edward Evenson. Judgment for defendant, and plaintiff's appeal.

Affirmed.

Hauser & Gray, for appellants.

Swiggum & Myers, for respondent.

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BARTHOLOMEW, J. Action in equity to foreclose a mechanic's lien for materials furnished and labor performed in plastering a house for defendant on contract at so much per square yard. There was also a small item for shingles furnished for the house. The answer admits the contract, and the furnishing of materials and performance of the labor in plastering the house as alleged, but sets up, in substance, that the contract called for a good job, and walls that "should be as hard as stone," but declares that "the same, when so done as aforesaid, by reason of the inferior and worthless quality and grade of materials so furnished and used by plaintiffs, and by reason of carelessness, lack of skill, and faulty and negligent workmanship in applying the same, the said plastering, instead of being firm and hard, as plaintiffs had agreed the same should be, was soft and crumbling, and soon after the same was completed, by force of its own weight, began to fall from the walls in large blocks, and ever since, from time to time, has continued so to do. And defendant alleges that by and on account of the reasons aforesaid the said plastering done for him by the said plaintiffs as aforesaid was entirely worthless, and of no value to him whatsoever, but was and is an injury, detriment, and damage to him." This is pleaded as a defense to the action. For a counterclaim defendant relies upon the same breach of contract and worthless character of the work performed, and alleges that by reason thereof defendant will be obliged to remove all of said plastering from the walls, and have the same replastered, and that in so doing he will necessarily destroy casings, moldings, and trimmings in said rooms, to replace which will cost another certain amount, and he asks an affirmative judgment for these amounts less the contract price to plaintiff. As a further counterclaim he alleges the payment of $75 on this contract before he knew or could reasonably have known of the defect in the plastering. This he seeks to recover back. He also asks for the cancellation of the mechanic's lien of record. There was a reply in denial of the counterclaims. The case was tried below to the court on July 7, 1893, six days after chapter

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82, Laws 1893, went into effect; hence it should properly be tried *de novo* here, if the record is in shape to admit. The judgment below was in favor of defendant for the amount that he had paid on the account, less the value of the shingles, which was not disputed. Plaintiffs appeal.

We find no suggestion in the brief of the learned counsel that the record is not in such shape as to admit of a trial *de novo* here, nor was any such suggestion made in oral argument. It is true that the certificate of the trial judge is not technically such as this court said in *Taylor* v. *Taylor*, 5 N. D. 58, 63 N. W. 893, was necessary to enable us to try the case anew. We have had occasion heretofore to advert to the radical change in practice that became necessary in order to conform to the requirements and spirit of said chapter 82. This case was tried before any practice whatever had been settled under that law, and when both court and counsel were in some doubt as to the proper procedure. Under these circumstances we are not disposed to permit a mere technicality to throttle a full investigation. The certificate in this case recites that the record contains "all the proceedings had and testimony given" on the trial of the action. We held in *Taylor* v. *Taylor*, *supra*, and in *First Nat. Bank of Devil's Lake* v. *Merchants' Nat. Bank of Devils Lake*, (decided at this term) 5 N. D. 161, 64 N. W. 941, that the certificate should state that the record contained all the testimony offered at the trial. But the record before us contains all the "proceedings had" at the trial, and when we look at the record we find that in no instance was any testimony offered that was excluded; hence it is certain that we have before us all the testimony offered, and that is all that is required in that behalf to enable us to pass upon the whole case. We do so in this instance, without establishing it as a precedent that we will in any future case look beyond the certificate to determine whether or not all the testimony offered is contained in the record. We first notice the claim made below, and urged here, that respondent should have been required to elect whether he relied upon his defense or his first counterclaim, as both rested

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upon the same facts. This is true in part only. If the allegations (assuming now that they were properly made) were true in fact, they defeated appellants' action by showing that they had violated their contract, and had furnished respondent nothing of value. As thus pleaded, they constituted a deniel of appellants' cause of action. In the answer, as a defense, respondent went no further. But he relies upon the same facts as a counterclaim, with additional allegations showing damages by reason of appellants' failure to perform their contract in an amount in excess of their claim, and for this excess an affirmative judgment was asked. If no counterclaim had been interposed, a judgment in appellants' favor would have been a bar to any action thereafter founded upon the allegations of the counterclaim. *Nemetty* v. *Naylor*, 63 How. Prac. 387; *Dunham* v. *Bower*, 77 N. Y. 76. And we cannot see how appellants were prejudiced by having a portion of the same facts set up as a defense. The same facts may constitute both a defense and a counterclaim. *Manufacturing Co.* v. *Colgate*, 12 Ohio St. 344; and see the remarks of Church, C. J., in *Dunham* v. *Bower*, *supra*. Perhaps, in this case, all that respondent sought to accomplish might have been accomplished by pleading the counterclaim only had he been successful thereon, but to establish his counterclaim he was required to go further with his proofs than in the establishment of his defense only, and there is no rule of law that deprives him of both.

Objection was made below to the introduction of any evidence under the defense portion of the answer, on the ground that the facts alleged did not constitute a defense. The objection is renewed here. It is specially directed to that portion of the answer which, after setting forth the inferior materials used, the unskillful workmanship, and the soft, crumbling, and defective condition of the walls, declares that the plastering "was entirely worthless, and of no value to him (respondent) whatsoever, but was an injury and damage to him." Counsel then state the rule sometimes applied in cases of sale of chattels with warranty, that

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to constitute a complete defense to an action for purchase price the answer must show a breach of warranty, with a return or offer to return the article, or that the article was of no value whatever, to the purchaser or any one else. Should we admit—which we do not—that the allegation that the plastering "was entirely worthless" did not fully overcome counsel's objection, still we could not apply the rule contended for in this case. This was not a sale of chattels, but a contract for plastering a house. The plastering, when completed, became a part of respondents's realty, and, if of no value to him, it certainly could be of no value to any other person. It was not a chattel that could be returned. The rule in cases of this class permits the contractor, when the work has been performed,—though not in accordance with the terms of the contract,—and accepted by the other party, to recover upon a *quantum valebant*. But in that case his recovery is limited to the benefit conferred upon the other party, and, if there was no benefit conferred, there can be no recovery. *Moulton* v. *McOwen*, 103 Mass. 587; *Kelley* v. *Bradford*, 33 Vt. 35; *White* v. *Oliver*, 36 Me. 92; *Pinches* v. *Lutheran Church*, 55 Conn. 183; *Hayward* v. *Leonard*, 19 Am. Dec. 268, and note. The defense pleaded was complete in this case.

Numerous objections were made to evidence under the first counterclaim, which are renewed here. But we do not feel called upon to pass upon these objections. Respondent recovered nothing on such counterclaim in the court below. He is not asking anything thereon in this court. In fact, he expressly abandoned the same.

It remains, then, only to consider what the evidence in the case, under the contested issues, fairly establishes. The great bulk of the testimony on each side was directed to the quality of the plastering. There was much evidence upon the point, both expert and non-expert. The witnesses for respondent, who had personally examined the walls and the plaster, testified with great unanimity and positiveness that the plastering was soft, that it could be easily brushed away with the hand down to the lath,

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that it was constantly crumbling or dusting off, and that in some places it had fallen from the lath of its own weight. The witnesses for the appellants with equal positiveness declare that the plastering was not soft, could not be rubbed or brushed away with the hand, and was not constantly dusting down, and that it was a fair average job of plastering. We have given the evidence careful consideration, and we reach the same conclusion on the facts that was reached by the trial court. We do not think the affirmative evidence introduced by respondent was overcome by the negative evidence on the other side. It is not disputed that there were some portions of the walls that were reasonably hard and good. A party not familiar with the walls, and not guided by any one who was familiar with them, might, in an ordinary examination, strike the better portions, and be able thereafter to conscientiously swear that the plastering was not soft, and that it was a fair average job. On the other hand, the testimony of respondent's witnesses is either true or knowingly false. We are not warranted in accepting the latter alternative. Taking their testimony as substantially true, and it is certain that the plastering was of no benefit to respondent. True, it appears that by removing the defective portions, and patching the walls, they might be made serviceable. But there is positive evidence that to remove the defective portions and do the requisite patching would cost as much as it would have cost to plaster the entire house in the first place. We are clear that the plastering, so done, was of no benefit to respondent, and that he ought not to pay anything therefor. That he did make the payments thereon which he seeks to recover back by his second counterclaim is undisputed. It is claimed, however, that this was a voluntary payment, with full knowledge of the defects, and hence cannot be recovered. We do not think respondent knew, or could reasonably have known, the full extent of his damage at the time he made the payments. The last payment was made August 10th. The plastering was finished either in July or early in August. Respondent swears that he made the payments before

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the plastering began to fall off. We think he was entitled to recover it back.

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

(65 N. W. Rep. 686.)

STATE *ex rel* E. A. MEARS *vs.* O. G. BARNES.

Opinion filed December 27th, 1895.

Habeas Corpus—Contempt—Jurisdiction.

In an action in the District Court, a receiver of the defendant corporation was appointed. The corporation was ordered to convey its real estate to the receiver. The petitioner was also ordered to execute such conveyance, as president. He refused to do so, and was adjudged guilty of contempt for such refusal, and was by an order of that court committed to the county jail until he should purge himself of the contempt by executing such conveyance. On *habeas corpus*, *held*, that he could not show that the District Court had before it in the contempt proceeding no evidence "legal and sufficient" to prove that he was president of the corporation, or, assuming him to be president, that he had as such any power to execute such conveyance for the corporation, as this would not show that the court was without jurisdiction to make the contempt order, but merely that it had made an erroneous decision on questions of fact. Such an error can be reviewed only on appeal where the contempt proceeding is civil in its character, as was the contempt proceeding in question.

Removal to Federal Court—Petition.

Where it appears upon the face of the record that the petitioner is not entitled to a removal of the case to the Federal Court, because the application is not made in time, the filing of the petition does not divest the state court of jurisdiction.

If Application for Removal to Federal Court is not Made in Time, Right is Lost.

Where a nonresident defendant who is served in this state is entitled to have the service set aside on the ground of priviledge, the service is nevertheless not a nullity; and, for the purpose of determining whether he has made a timely application to have the action removed to the Federal Court, the time within which he must apply begins to run from the time of such service. Accordingly, *held* that, defendant having waited more than 30 days after such service before making such application (the statute of this state requiring him to answer within 30 days after he is served,) his right to have the case removed was lost. The filing of the petition for removal, therefore, did not divest the state court of jurisdiction of the action.

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Right of Intervener to Have Action Removed.

One who has not been allowed to intervene in an action, and who has made no application to be allowed to intervene, has no such relation to the action as will entitle him to petition for the removal of the case to the Federal Court. Whether an intervener can have an action removed to the Federal Court after he has been allowed to intervene, or has been denied that right after due application for leave to intervene, not decided.

Original proceeding on the relation of E. Ashley Mears against O. G. Barnes, sheriff, for discharge on *habeas corpus*.

Writ discharged.

W. H. Standish and *M. A. Hildreth*, for relator.

Newman, Spalding & Phelps, for defendant.

CORLISS, J. By this proceeding our original jurisdiction is invoked. The petitioner, E. A. Mears, has sued out a writ of *habeas corpus* to inquire into the legality of his imprisonment under an order of the District Court adjudging him guilty of contempt in refusing to obey an order of that court requiring him to execute and deliver, as president of the Bank of Minot, a corporation, certain conveyances of real estate, which, it is claimed, is the property of such corporation. The petitioner bases his application for release from such imprisonment on two grounds: He contends that the order adjudging him guilty of contempt, and imposing on him the punishment of remaining in confinement until he should obey the order directing him to execute such conveyances, is void for want of jurisdiction in the court making it. He also insists that, by reason of certain acts which have been performed by him since the contempt order was made, he has become entitled to his discharge from further imprisonment.

One of petitioner's assaults upon the jurisdiction of the court rests on the assumption that when the order in question was made the action in which it was made was no longer pending. This position is not tenable. In the action referred to, a receiver was appointed, and, while it is undoubtedly true that both the plaintiff and defendant in such action stipulated that it might be

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dismissed, this court held, on appeal from an order refusing to enforce such stipulation as against the objections of the receiver, that such receiver was entitled to protection with respect to his fees and expenses, and that before the action could be dismissed he had a right to have his accounts settled and allowed and his fees and expenses ajusted, and to be discharged on complying with the order of the court touching the receivership. *Hoffman* v. *Bank*, 4 N. D. 473, 61 N. W. 1031. It is not pretended that these necessary steps preliminary to a dismissal of the action had been taken, and the action dismissed, at the time the contempt order was made. That the action was pending, cannot therefore, be doubted. As only jurisdictional matters, as contradistinguished from errors in exercising jurisdiction, are open to inquiry in this proceeding, we must assume in support of the order that the court deemed these conveyances necessary to put the receiver in position to secure the necessary funds wherewith to pay his fees and disbursements as such receiver.

It was further urged that the contempt order was void for the reason that the District Court had before it, when it adjudged the petitioner guilty of contempt, no evidence "legal or sufficient" to show that he was president of such corporation, or had any authority, even assuming that he was president, to execute deeds of corporate real estate. On *habeas corpus* such matters are not open to investigation. It is undisputed that the court had jurisdiction of the person of the petitioner by service of necessary papers on him in such contempt proceeding; and that the District Court has general power to make the contempt order made by it, where the evidence warrants a finding that a party has been guilty of a contempt of the class which the court adjudged the petitioner to be guilty of, cannot be denied. The court had power to hear and determine the questions of fact and of law arising in the contempt proceeding against relator, and for mistakes and errors in its decision its judgment or order would be subject to reversal on appeal. But such mistakes and errors would not divest it of the complete jurisdiction which had already become vested in it

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when it entered upon the discharge of its functions, as a court of justice, to hear the case, and decide whether the petitioner had been guilty of contempt. We assume, in deciding this point, that the petitioner could have proved before us, had we permitted him to go into those questions, that there was no legal or sufficient evidence before the District Court showing that he was president of the corporation, or had power as such president to execute the conveyances he was ordered to execute. There is no difference, so far as these questions are concerned, between a final order in a contempt proceeding and a final judgment in a civil or a criminal case. A defendant in a criminal case can never secure his release on *habeas corpus* by showing that there was no evidence of his guilt to sustain the judgment of conviction. For an error of this kind, which does not touch jurisdiction, the law has opened up another channel of redress, and it is only when the case reaches the higher tribunal through this channel that the judgment can be overthrown. In this proceeding we are exercising, not our appellate, but our original, jurisdiction. If the anology between a judgment in a criminal case and the contempt order in question seems defective, because the contempt proceeding culminating in such order was civil in its character (*State* v. *Davis*, 2 N. D. 461, 51 N. W. 942,) we may resort to an anology not open to this criticism. When a defendant in a tort action is seized on execution after final judgment, he cannot on *habeas corpus* attack the judgment, and secure his release from imprisonment by showing that there was no evidence to sustain the judgment adjudging him liable for the alleged tort. The final order in a contempt proceeding, whether of a civil or criminal character, stands upon the same footing in this respect as such a judgment. Mr. Church says on this point: "A contempt, indeed, is in itself a distinct and substantive offense; and, in the case of a court of general jurisdiction, there is no distinction in principle between a judgment pronounced after trial upon indictment, and a summary committal for contempt, so far as

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concerns the question of collateral impeachment." Church, Hab. Corp. p. 451. It is true that he is speaking of a case of a judgment in a criminal action and a judgment in a criminal contempt proceeding, but in this respect we can discover no difference between contempt proceedings of a criminal and those of a civil nature. See, in support of our ruling on this branch of the case, *In re Rosenberg*, (Wis.) 63 N. W. 1065; *People* v. *Liscomb*, 60 N. Y. 570; *Ex parte Perkins*, 18 Cal. 64; *Forrest* v. *Price*, (N. J. Ch.) 29 Atl. 218; *State* v. *Houston*, (La.) 4 South. 131; *Ex parte Perdue*, (Ark.) 24 S. W. 423. Our statute in terms declares that except with respect to the question whether the court has exceeded its jurisdiction as to matter, place, sum, or person, and except in cases where the party has become entitled to his discharge by reason of some act, omission, or event which has taken place subsequent to the original imprisonment, and except with regard to certain other questions not relevant to this case, "no court or judge on the return of a *habeas corpus* shall in any other manner inquire into the legality or justice of the judgment or decree of a court legally constituted." Comp. Laws, § 7841.

It is next urged that the petitioner has become entitled to his discharge by reason of his having perfected an appeal from the contempt order. But the mere perfecting of an appeal would not stay the execution of such order. To secure such a stay, the appellant (the petitioner here) should have complied with the provisions of section 15 of chapter 120 of the laws of 1891. That he has made no effort to comply therewith is not disputed. No application was made to the District Court to have that court fix the terms on which it would allow a stay of proceedings.

It is further contended that the District Court was without jurisdiction over the case in which the contempt order was made, at the time it was made, because a sufficient petition for removal of the action to the Federal Circuit Court on the ground of diverse citizenship had been filed previously to that time. The petition was filed by the petitioner in this proceeding. He was not originally made a party defendant to the action, but subse-

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quently to the commencement of the action an order was entered directing him to be brought in as a party defendant, and thereafter he was served in this state with a copy of the summons and complaint in the action. At this time he claims that he was a non-resident, and that he was privileged from service of process when these papers were served on him for the reason that he was temporarily in this state, attending, as the general manager of the defendant corporation in such action, the hearing of a motion to vacate the receivership in such action. This claim is made by him to obviate the objection that his petition for transfer was not filed in time, it having been filed more than 30 days after the service of the summons and complaint on him. He insists that the service was illegal, and that, therefore, the time to answer had not expired when he filed this petition. Of course, under the act of 1887, the application must be made before the time to answer has expired, as that time is fixed by the laws of the state in which the action is pending. See *Railroad Co.* v. *Daughtry*, 138 U. S. 298, 11 Sup. Ct. 306. In this state the defendant must answer within 30 days after the service of the summons and complaint. There is no force in the contention of the petitioner that the date of the service of the papers on him should not be considered as fixing the time from which the 30 days in which to answer would begin to run. The service was not void. It was at most only irregular. The court had jurisdiction of the person of the defendant from the moment the papers were served on him. If he had such a standing in the case as defendant as would entitle him to petition for a removal of the cause, he was subject to all the rules which regulate the procedure and fix the rights of defendants on application for the transfer of actions to the Federal Court. See *Construction Co.* v. *Simon*, 53 Fed. 1. Until attacked by a motion to set aside the service, it stands as binding and as effectual as any other service. When the defendant suffered the 30 days after such service to elapse without seeking to have the suit removed to the Federal Court, he had lost his right to go into that court for any purpose. All that was left

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him was to claim his privilege in the state court, and, in the event of his defeat on that point, to litigate there the case on its merits, if relieved from his default. Whether he could, after default, insist on his privilege, as a matter of strict legal right, we do not decide, nor do we wish to be regarded as expressing any opinion on this point. Whether a defendant who has not, by a general appearance, waived his right to claim his privilege, may, after securing by timely application the removal of the action to the Federal Court, claim such privilege there, and have the case dismissed, is not before us on this hearing. See *McGillin* v. *Claflin*, 52 Fed. 657. We have assumed, in discussing this point, that the facts set forth in the petition for removal showed that there was a separable controversy with respect to the defendant Mears, who made the application for removal, and that the circumstances under which he was served in the action gave him a right to claim that he was priviledged from service at the time he was so served. We are not unmindful of the rule that questions of fact relating to the right to a transfer of a cause, and which can be determined only by resort to extrinsic evidence, must be litigated in the Federal Court. The state court has no right to try such questions, and from the moment a proper petition is filed, if filed in time, the jurisdiction of the state court is suspended. We have so held, and the rule is as well settled as the reason on which it is founded is obvious. *Miller* v. *Sunde*, 1 N. D. 1, 44 N. W. 301; *Railroad Co.* v. *Daughtry*, 138 U. S. 298, 11 Sup. Ct. 306. But it is equally well established that a state court is not bound to surrender its jurisdiction when, upon the face of the record, it appears that the defendant is not entitled to a removal of the case. Whether he fails to make out a case for a transfer of the action because of the insufficiency of the petition, or because it appears from his own showing, in connection with the record, that his application is not made in time, the rule must, on principle, be the same. The state court, if it correctly decides these questions, will retain jurisdiction of the action, and whether it has rightly decided them will be reviewed by the Federal

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Supreme Court on writ of error. *Crehore* v. *Railroad Co.*, 131 U. S. 240, 9 Sup. Ct. 692; *Stone* v. *South Carolina*, 117 U. S. 432, 6 Sup. Ct. 799; *Railroad Co.* v. *Daughtry*, 138 U. S. 298, 11 Sup. Ct. 306. We think, also, that it would be our duty to hold that the state court was without jurisdiction, had the petition been presented in time, and been sufficient in its averments, and had all the requirements of the statute been fully complied with, although as a matter of fact, that court had held that on the face of the proceedings the petition was not sufficient, or had not been filed in time. The distinction between the two rules may be thus stated: The state court has no jurisdiction to pass on disputed questions of fact, because there is no mode of reviewing such a decision in the Federal Courts. If it could decide such controverted questions of fact at all, it must, from the necessity of the case, decide them finally, and thus the jurisdiction of the Federal Courts would in these cases be at the mercy of the state tribunals. But, when the state court decides on the face of the record, then its decision is open to investigation; and, if it was right in its ruling, no sound principle requires it to wait until an inferior Federal Court has sent back the case with permission to proceed. The state court has no jurisdiction to decide a disputed question of fact affecting the right of the Federal Court to take jurisdiction, even if it correctly decides it. But it has jurisdiction to decide a question of law arising on the face of the papers, if the decision proves to have been correct. If, on the application for removal, there had been any claim that there had been a waiver of the element of time, by something outside of the record, it might be urged with great force that that question of fact might be settled by the Federal Court, and that until it was settled the state court was without jurisdiction to proceed. But no such claim was made, nor is it here pretended that the matter of time was waived. That it may be waived, see *Ayers* v. *Watson*, 113 U. S. 594, 5 Sup. Ct. 641; *Gerling* v. *Railroad Co.*, 151 U. S. 673, 14 Sup. Ct. 533.

It is next urged that the action was transferred to the Federal

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Court by the petition of one Hawkins, an alleged intervenor in the case. Without discussing the question whether an intervener, under our statutes, is the proper party to petition for a removal, —whether he comes within the purview of the act of congress relating to the subject,—we are compelled to hold that this petition did not affect the jurisdiction of the state court, for the reason that at the time it was filed Hawkins was a stranger to the action. He could not intervene without leave of court, embodied in an order. Comp. Laws, § 4886. No such leave was obtained. No order of this kind was entered. Indeed, no application for leave to intervene was ever made. Had it been made and improperly overruled, and then had the petition in question been filed, a different question would have been presented. There appears to have been a consent on the part of the plaintiff that Hawkins might intervene, but no such consent on behalf of the defendant corporation or the receiver was ever obtained. We reach the conclusion that the District Court had jurisdiction to make the contempt order, and we are unable to agree with counsel for the petitioner that by reason of anything subsequently occurring the petitioner became entitled to his discharge.

The writ is therefore discharged, and the petitioner is remanded to the custody of the sheriff, O. G. Barnes. All concur.

(65 N. W. Rep. 688.)

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STATE *ex rel* D. S. MOORE *vs.* O. W. ARCHIBALD.

Opinion filed February 20th, 1896.

Original Jurisdiction of Supreme Court in Mandamus.

This court has original jurisdiction in cases in which the writs named in the constitution may be employed to initiate such jurisdiction. But that jurisdiction is limited to cases involving the sovereignty of the state, its perogatives or franchises, or the liberty of the citizen; this court judging for itself in each case whether that particular case is within its jurisdiction.

Trustees of Hospital for Insane—Removal of Superintendent.

The state hospital for the insane is by law under the general management and control of a board of five trustees, which has power to appoint the superintendent of such hospital and remove him at pleasure. The defendant having been removed by the board from the office of superintendent, and the relator having been appointed by the board to fill such office in his place, *held* that, in mandamus proceedings to compel the defendant to turn over to the relator such office, the sovereignty of the state was involved, in a direct and important sense, the right of the board of trustees to control and manage a great state institution being necessarily involved, and that therefore this court held original jurisdiction of such proceedings.

Remedy by Mandamus.

Mandamus is the proper remedy to compel one who has no color of title to an office to surrender it to one who holds the *prima facie* title to it.

Power to Appoint, Carries Power of Removal.

The grant of power to appoint to public office, where no term of office is fixed by law, carries with it as an incident the absolute power of removal at any time, without notice or charges or a hearing, and without the cause for removal being inquired into by any court. Such power vested in a board cannot be limited by any action taken by such board, whether by appointing the officer for a fixed term, or by by-laws restricting the power of removal to cases where cause for removal exists.

Majority Vote of Trustees Effectual to Remove Superintendent.

A motion to remove the defendant having been made and seconded at a meeting of the board at which all the members were present, the chairman of the meeting refused to put the motion, on the ground that it was illegal. Thereupon it was put by the trustee who made the motion, and received the vote of three of the five members, the other two trustees refusing to vote. *Held*, that these proceedings were effectual to remove the defendant.

Appointment of Superintendent.

Also, *held*, that the relator was legally appointed to the office, the same proceedings being had on the motion that he be appointed.

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Approval of Bond.

Also, *held*, that the approval of his bond by the board was established by showing that the same proceedings were had on the motion to approve it.

Constitution Does Not Impair Power of Trustees to Remove.

The fact that the superintendent may be removed from office for the causes mentioned in section 197 of the constitution (assuming this to be the case) does not impair the power of the board to remove him at pleasure.

Original application on the relation of Dwight S. Moore against O. Wellington Archibald for a writ of mandamus.

Peremptory writ awarded.

Edgar W. Camp and *Glaspell & Ellsworth*, for petitioner.

F. Baldwin and *Newman, Spalding & Phelps*, in opposition.

CORLISS, J. Application is made to this court to put forth its original jurisdiction by issuing the writ of mandamus to compel the defendant to turn over to the relator the possession of the office of superintendent of the State Hospital for the Insane. The defendant was appointed to such office by the trustees of that institution (which, for convenience, will be designated in this opinion as the "asylum") on the——day of January, 1896; and before the time (one year) for which defendant was appointed had expired, he was removed from such office by a majority vote of the board of trustees, at a meeting called for that purpose, and at which all of the trustees were present; and by the same vote the relator was appointed superintendent in his place.

At the outset, this court is called upon to determine the question of its original jurisdiction in issuing the perogative writs named in the constitution, and the scope of that jurisdiction if such jurisdiction exists. The task is at once delicate and difficult. We are to trace the line that marks the boundary of our power, as the people have drawn it in the organic law, careful not to usurp unwarranted jurisdiction, and yet as careful not to withhold the exercise of jurisdiction conferred. That we have power to issue these original writs in some cases, not merely in aid of jurisdiction, but to found jurisdiction, we entertain no doubt. We so held in *State* v. *Nelson Co.*, 1 N. D. 88-101, 45 N.

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W. 33; and while the question was not discussed by counsel in that case, it was thoroughly gone into by this court, and the conclusion there reached was the result of a careful examination of the same arguments and cases which have been presented in this cause. However, while we feel bound by that decision, we would reach the same conclusion were the question open to debate. The grant of power to issue the specified writs to initiate jurisdiction, at least in some exigencies, is quite apparent.

The constitution, so far as it relates to this subject, provides as follows:

"Sec. 86. The Supreme Court, except as otherwise provided in this constitution, shall have appellate jurisdiction only, which shall be co-extensive with the state and shall have a general superintending control over all inferior courts under such regulations and limitations as may be prescribed by law.

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

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

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court at all, as two of them are not such writs as can be employed in aid of either the appellate jurisdiction or the power of superintending control conferred upon this court. This fact is fatal to the construction that the writs specified, as well as those included in the clause, "such other and remedial writs," etc., are to be resorted to only as the means of carrying into effect the appellate and superintending powers of this court. The writs particularly named constitute a class by themselves, and are to be issued independently of any other jurisdiction possessed by the court. It is true that some of them may be issued in aid of the other jurisdiction vested in this court. The other and unenumerated writs belong to a separate class, being only such writs as are necessary to be used in the aid of jurisdiction, and these are to be employed by this court solely for that purpose. They are instrumentalities which this court would have had power to use for such purpose had the constitution been silent on the subject. The grant of appellate jurisdiction, and of the power of superintending control, carries with it all writs necessary to the proper exercise of such jurisdiction and of such power. *Attorney General* v. *Chicago & N. W. R. Co.*, 35 Wis. 425-515; *Marbury* v. *Madison*, 1 Cranch, 137; *Wheeler* v. *Irrigation Co.*, 9 Colo. 248, 11 Pac. 103. Said Ryan, C. J., in *Attorney General* v. *Chicago & N. W. R. Co.*: "The framers of the constitution appear to have well understood that with appellate jurisdiction the court took all common-law writs applicable to it, and with superintending control all common-law writs applicable to that; and that failing adequate common-law writs, the court might well devise new ones, as Lord Coke tells us, 'as a secret in law.'"

As among the writs specified there are two which cannot be used in aid of either appellate jurisdiction or superintending control, it is demonstrated that the use of the writs particularly specified was not to be restricted, but that they were to be used for all purposes,—as well to take original cognizance of a case as to aid and effectuate other jurisdiction. In *U. S.* v. *Commissioners of Dubuque Co.*, 1 Morris (Iowa) 42-50, this position was recog-

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nized as sound. "The fact that the writ of *quo warranto* is mentioned (and perhaps some others,) which could only be issued in the exercise of original power, negatives the idea that these writs are only to serve as auxiliaries in the exercise of appellate jurisdiction." Other courts have considered this point as cogent in favor of original jurisdiction. *Attorney General* v. *Blossom*, 1 Wis. 317-327 (top paging, 277-287;) *Wheeler* v. *Irrigation Co.*, 9 Colo. 248, 11 Pac. 103. Said Justice Smith, in *Attorney General* v. *Blossom*: "Under whatever aspect this court can view this clause of the third section, we are unable to harmonize the nature and office of the class of writs therein named with an intention on the part of the authors of them to render them merely ancillary to the exercise of a power of superintending control over inferior courts lawfully established, or to provide them as mere instrumentalities of appellate jurisdiction." If, bound together with other writs which can be used either to initiate jurisdiction or make effectual other jurisdiction, there were found only a single writ, which could be issued for only the former purpose, this would give character to all the rest. But, as a matter of fact, two such writs are there found,—injunction and *quo warranto*. The grant is unquestionably two-fold with respect to the writs named, which can be used for both purposes. This court is thereby authorized to use them for either purpose,—to found jurisdiction, or in aid of jurisdiction. The writs of *habeas corpus* and mandamus belong to this class, while the writ of *quo warranto*, and also the writ of injunction, as used in the Supreme Court, can be employed only to bring the cause into court in the first instance. While the writ of injunction is not an original, but merely a remedial, writ, so far as courts of inferior jurisdiction are concerned, yet, since the decision in *Attorney General* v. *Chicago & N. W. R. Co.*, 35 Wis. 426-522, that writ has become, with respect to its use in the Supreme Court, a *quasi* perogative or original writ. And it was doubtless in this sense that it was employed when inserted in the constitution. It certainly is never used in aid of either appellate jurisdiction or superintending

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control. We find, therefore, in the constitution, two writs exclusively original in their character, in the position in which they are placed. They were placed there to give this court original jurisdiction, if for any purpose whatever; and we cannot, in effect, expunge them from the constitution by construction. Shall we, then, draw the line at these two writs, and say that this court has not original jurisdiction of the other specified writs with which these two are classed? Such arbitrary separation of the specified writs would be unjustifiable. The clause, "such other original and remedial writs as may be necessary to the proper exercise of its jurisdiction," shows that the writs specified shall, so far as they can be issued in furtherance of jurisdiction conferred, be used for that purpose; while, on the other hand, the fact that two of the writs named can be employed only to initiate jurisdiction, and never in aid of appellate jurisdiction or superintending control, shows, with equal force, that such other of the writs specified as can be used as original writs may be issued by this court to found jurisdiction, as well as for other purposes. To the argument that the words, "such other original and remedial writs as shall be necessary to the proper exercise of its jurisdiction," indicate that all the writs named were to be used only in aid of jurisdiction previously conferred, it is a complete answer, as we have already seen, that as to two of these writs the language can have no such significance, because their very nature forbids—renders impossible—such a construction. Why should it have such significance as to the balance of the writs specified, when the other interpretation begets harmony, gives full force to all the language used, and yet does violence to none.

There is no force in the position that the words "original jurisdiction" are not used in connection with the grant of power to issue the writs named. It would not have been proper to have thus restricted the scope of the specified writs. The use of these writs in aid of other jurisdiction could not be founded on the clause, "such other original and remedial writs," etc. This grant is expressly limited to writs other than those named. Unless the

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power to employ the specified writs in furtherance of jurisdiction was elsewhere conferred, it might be urged that it did not exist, —that the power had been taken from the court by implication. Certainly, this would be the case if the use of the writs named were restricted to original jurisdiction of them. The silence of the constitution is therefore very significant. It carries, to our mind, the conviction that the writs named were to be used in all proper cases,—as well in furtherance of jurisdiction as to initiate it. The power to issue them was granted in unqualified terms, so that they could be used in aid of superintending control and of appellate jurisdiction, as well as in the exercise of original jurisdiction. The constitution refers to two classes of writs, distinct each from the other with respect to the purposes for which they may be sent forth from this court. With respect to the writs named, the power of the court is unrestricted. They summon parties to its bar of justice in the exercise of original jurisdiction. They also supplement and make efficacious its other powers; while, on the other hand, the authority of this court to issue the unnamed writs rests upon their being necessary to the proper exercise of jurisdiction conferred upon this court.

We find that the separation of these two classes of writs is none the less distinct because the conjunction "and" is not found between the last two of the specified writs, as well as between the last of them and the succeeding clause. This consideration appears to have influenced the decisions in Alabama and Florida. *Ex parte Simonton*, 9 Port. (Ala.) 383; *Ex parte Mansony*, 1 Ala. 98; *Ex parte Henderson*, 43 Ala. 392; *Ex parte Croom*, 19 Ala. 561; *Ex parte White*, 4 Fla. 165. We cannot concur in the reasoning of these cases; and although the constitutions of those states, construed in those cases, were somewhat different from the constitution of this state, yet, if this difference can be said to be sufficient to affect the force of those cases as authorities against our construction, we feel compelled to say that we do not regard them as sound, and cannot follow them. That original jurisdiction was intended to be conferred is inevitable from the opening sentence

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of section 86. "The Supreme Court except as otherwise provided in this constitution shall have appellate jurisdiction only." This clearly contemplates a grant of original jurisdiction of some kind to follow. When we find in the next section a grant of power to issue original writs, which can be construed as a grant of power to take original jurisdiction of them,—and can be construed in no other way with respect to two of such writs, *i. e.* injunction and *quo warranto*,—to what conclusion are we impelled? It is to just such jurisdiction that the exception refers; otherwise, it cannot refer to anything. And shall we disregard these words "except as otherwise provided in this constitution"? May we expunge them from the instrument by construction? What rule more elementary or reasonable than that which commands us to give every word in statute or constitution at least some significance, if possible? This view is supported by *Wheeler* v. *Irrigation Co.*, 9 Colo. 248, 11 Pac. 103, where the court say, in answer to the claim that the court possessed no original jurisdiction of prerogative writs: "This position we consider untenable for the following reasons: First, section 2 itself, by the declaration 'except as otherwise provided in this constitution,' implies the conferring of some independent original jurisdiction." In Florida and Alabama, this clause was, without warrant from principle, torn from the constitution by interpretation. See cases already cited. In Iowa, on the contrary, the Supreme Court decided in favor of original jurisdiction, without the presence of such a clause in the constitution, the grant being, expressly of appellate jurisdiction only. *U. S.* v. *Commissioners of Dubuque Co.*, 1 Morris (Iowa) 42. Yet, as the constitution gave the court also power to issue certain specified writs, and all other writs necessary to the administration of justice, the court held that this was a grant of original jurisdiction, where necessary to be exercised by the court, notwithstanding the prior restriction of the power of the court to "appellate jurisdiction only." Therefore the court in that case inserted, by construction, an exception as to other jurisdiction than appellate jurisdiction only, to harmonize the two

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provisions. We are not called upon to insert, but merely to see, read, and give effect to such an exception already found in the constitution.

Nor is there any force in the position that the words, "except as otherwise provided in this constitution," were inserted for an abundance of caution. It is not customary, in framing constitutions, to scatter throughout its length provisions relating to the jurisdiction of courts, They are invariably collected in a few consecutive sections. In our constitution, all the provisions relating to the jurisdiction of the Supreme Court are found in two short sections, the one immediately following the other. The words enacted could not, therefore, have been inserted to save a possible clash of provisions because of an inconsistent provision in some unknown part of the instrument, but to prevent the word "only" conflicting with a further grant of power in these sections. In which section is this additional grant of power found? It is found in both. In section 86 there is a grant of superintending control. In section 87 there is a further grant of jurisdiction to issue the writs named, in the exercise of original jurisdiction. The language of the exception is significant. It is, "except as otherwise provided in this constitution," and not, "except as otherwise provided in this section." If the purpose had been to grant only superintending control, in addition to appellate jurisdiction, the language would have been "except as otherwise provided in this section;" for such section contains the express grant of the power of superintending control. There was no occasion to send the mind to look elsewhere for the satisfaction of this exception, if it was satisfied by the grant of the power of superintending control in the very section containing the exception. But the language used is of such a character as to prepare the mind for the discovery of a further grant of power in some other section. This expectation is not disappointed, if we hold, as the very nature of two of the specified writs compels us to hold, that there is in the next section a grant of original jurisdiction in those cases in which

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such writs can be used to bring a cause into court for the first time. If the sole purpose of section 87 was to give this court power to issue writs in aid of appellate jurisdiction and superintending control, why should any writs have been therein named? It was not necessary to name them for the purpose of showing what kind of writs should be issned for that purpose; for the very nature of the functions they would perform, on that theory of the object of section 87, would determine what writs could be employed. The section would have read, "It shall have power to issue such writs as may be necessary to the proper exercise of its jurisdiction." But five writs are named, and we must assume it possible that they were named for a purpose. By naming them, they were set apart in a class by themselves, to be used, so far as they could be used for that purpose, in the exercise of original jurisdiction. This is apparent, both because two of them can be issued for no other purpose, and also because in this way only can they be given a function different from the unnamed writs. The cases in Missouri, Wisconsin, Arkansas, and Colorado cannot be said to be conclusive authorities in favor of our construction. The grant of power in those states was to issued certain named writs, and other original and remedial writs, without anything added tending to qualify the purposes for which the writs should be issued, as in the case of our constitution which gives the power to issue the named writs, and such other writs "as may be necessary to the proper exercise of its jurisdiction." It could not be said in those cases, as it can be urged in this, with some plausability that all the writs—as well those specified as those not enumerated—are to issue only in aid of jurisdiction; that the qualifying clause refers to the specified writs as well as to the unnamed writs. Were this qualifying clause eliminated from our constitution, there would be nothing on which to hang a doubt. Still, these cases are not against our position, and some of the reasoning in the opinions supports it. See *Wheeler* v. *Irrigation Co.*, 9 Colo. 248, 11 Pac. 103; *Attorney General* v. *Blossom*, 1 Wis. 277; *Attorney General* v.

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Chicago & N. W. R. Co., 35 Wis. 425; *State* v. *Lawrence*, 38 Mo. 535; *State* v. *Vail*, 53 Mo. 97; *State* v. *Stewart*, 32 Mo. 382; *Vail* v. *Dinning*, 44 Mo. 210; *Price* v. *Page*, 25 Ark. 527; *State* v. *Johnson*, 26 Ark. 281. See, also, *State* v. *Griffey*, 5 Neb. 161; *State* v. *Stein*, 13 Neb. 529, 14 N. W. 481; *People* v. *Adam*, 3 Mich. 428; *People* v. *Sackett*, 14 Mich. 244; *State* v. *Ashley*, 1 Ark. 279, 513. In the Florida and Alabama cases relied on, and heretofore cited, no weight was given to the fact that two of the writs found among the enumerated writs were writs which could be issued only in exercise of original jurisdiction. Indeed, in one of these cases,—9 Port. (Ala.) 383,—this point was not discussed, and does not appear to have been considered by the court. The language following the words, "and such other original and remedial writs," was allowed to qualify and restrict the broad grant of power to issue the specified writs in all cases when the effect of such restriction was to annul the grant of power to issue the writs of *quo warranto* and injunction. In the Florida case, the opinion first construes the contitution, without considering this point, and then gravely asserts that the fact that these two writs cannot be used except in the exercise of original jurisdiction cannot be allowed to affect the interpretation built up by ignoring in the first instance this significant point. The fallacy of such reasoning requires no exposure. It was illogical to reach any conclusion as to the meaning of the constitutional provisions involved in those cases, without giving due weight to the fact that writs were specified which could never be issued in aid of appellate jurisdiction and of superintending control over inferior courts.

Having concluded that we have authority to issue the writs particularly specified in the constitution in the exercise of original jurisdiction, it remains to be determined whether that authority is as broad as the language of the section of the constitution, standing by itself, and abstracted from the character of the tribunal on which the power is conferred, would seem to warrant. We think not. The constitution vests in the District Court the

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power to issue these same writs. In most cases, application to that court for the remedies obtained by these writs affords ample redress to the suitor. It cannot be that it was designed to confer upon this court concurrent jurisdiction with the District Court, in all such cases. Especially violent and unwarranted is such an assumption when the nature of this court, and the object of its creation, are considered. This is not a forum for the litigation of private rights in the first instance. The suitor comes here for final judgment, but only after he has appealed for redress to inferior courts. There must, therefore be another class of controversies in which the judgment of this court may be invoked directly, and without the delay of previous trial in some inferior tribunal. The nature of these specified writs (or, at least, of all of them save injunction,) which this court is commanded to issue in the exercise of that original jurisdiction, makes clear the scope of that power. They are, with the single exception of the writ of injunction, prerogative writs. The writ of injunction, since the pioneer opinion of Chief Justice Ryan in *Attorney General* v. *Chicago & N. W. R. Co.*, 35 Wis. 425, 511-520, has become a *quasi* prerogative writ. Originally, these writs were issued for prerogative purposes soley. But they have come to be used for private, as well as for public, purposes; the sovereign power, through its proper representative, consenting to such use. Indeed, they are now writs of right, by the great weight of modern authority. It very little concerns the sovereign people which of two candidates for the office of constable shall hold the office. The litigation, to carry on which the state lends its prerogative writ of *quo warranto*, is often practically only a strife between two citizens for the honors and emoluments of office. Shall such controversies occupy the time of this court, when the District Court is competent to grant full relief? When used for such purpose, or for any other private end, the writs named in the constitution cease to be in reality prerogative writs, although such in form and name. They become assimilated to the ordinary process by which inferior courts acquire jurisdiction of parties in private controver-

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sies. So common has become the resort to one of these writs—*quo warranto*—in the interests of private suitors, that in many jurisdictions a civil action has been substituted for, or given as cumulative to, the remedy by that writ. Finding that these writs are put to both private and public uses, and that jurisdiction to issue them is conferred upon the District Court in all cases, to what can the grant of power to the Supreme Court, to issue them, refer, except to their issue in those cases in which the prerogatives of the sovereign power are directly, and in some public and important respect, involved, or the liberty of the citizen is at stake? If not, then we have concurrent jurisdiction with the District Court to issue these writs in all cases; and in reaching such a conclusion, we will be forced to say that the judiciary committee of the constitutional convention, from whose hand came, without change in the convention, these sections as finally adopted, intended that this court, charged with higher duties, and vested with higher jurisdiction, should yet determine in the first instance the claims of every suitor to every office, however local and insignificant; should nevertheless command, in the exercise of original jurisdiction, the performance of every duty, however trifling and unimportant to the state,—with another court, of competent jurisdiction to administer such relief, always open, and in which such causes are uniformly litigated. We do not believe that that committee, at whose head was one of the foremost lawyers of the territory, entertained the thought of distracting the attention of this court with the original cognizance of these private cotroversies, which can be better tried in an inferior tribunal, knowing the importance of an undisturbed devotion to the important duties devolving upon the court of last resort in the decision of appeals. An inferior court having been invested by the constitution with full and ample jurisdiction of these writs in all cases, we are clear that the otherwise broad and comprehensive import of the words conferring original jurisdiction on this court must be limited, by the rank of this court in the judiciary of the state, and the character of the other powers

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vested in the court, so that its original jurisdiction shall comport with its dignity and its high place among the tribunals of the commonwealth; and thus harmony of powers will be preserved, the classes of jurisdiction conferred upon it—appellate, superintending, and original—all, under such construction having for their objects exalted duties, the final review of the judgments of inferior courts, and the control of their actions, and the guarding and conserving of the great interests and prerogatives of the sovereign people, and of the liberty of the citizen, by original, prompt, and final action. This court will then be symmetrical in its jurisdiction. Its powers will then be homogeneous, all partaking of its high and sovereign character, and not a heterogeneous mixture of the jurisdiction of a Supreme Court with some of the jurisdiction which is uniformly vested in inferior courts. The important duties of this court will be best discharged, the main object of its creation will be the most regarded and most surely accomplished, when it gives to these higher trusts its whole energies and powers, undistracted by a multitude of suitors invoking its justice in private controversies which inferior courts can better hear and determine.

As we said before, all these writs, except that of injunction, were once exclusively prerogative writs. They were the voice of the sovereign commanding to justice, where ordinary judicial proceedings afforded no remedy. The king, as the fountain of all justice, in the exigencies of important public questions, exercised his prerogative of justice by the issue of extraordinary writs, thus bringing for decision such matters before the king's bench,—the court which represented the sovereign power in the kingdom, as our Supreme Court represents that power in the state. The philosophy of that system was the wisdom of having great questions, touching the important interests of the people as a nation, adjudicated in the higher court in the first instance. While these writs were purely prerogative writs, while they were unknown in private litigations, it was entirely fit that only the higher tribunal should have jurisdiction to issue them; but when

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they came to be used for the purpose of bringing private controversies into court, it was then proper—nay, necessary—that inferior courts, of original jurisdiction as to ordinary proceedings, should be vested with power to employ them. It is with this view that jurisdiction of them is given to the District Court, although that court doubtless has power to issue them in the other class of cases; the sovereign people having the choice of the tribunal in which they will proceed. Yet there remains the same reason as before for jurisdiction in the higher court to issue them in cases affecting the great interests of the state or the liberty of the citizen. It was in continuation of this old policy that the constitution was so drafted as to give this court power to issue the specified writs. And it is equally true that it was not to initiate any change in that policy that this power was conferred. As prerogative writs issued for prerogative purposes only, the highest tribunal has, and should have, jurisdiction to employ them. As the means of instituting private litigations, the inferior court of original jurisdiction has, and should have, exclusive power to use them. Says the court, in *Attorney General* v. *Chicago & N. W. R. Co.*, 35 Wis. 425, at page 521: "The same writs are granted to those [Circuit] Courts as to this. It is impossible for a lawyer to suppose that they are granted in the same sense, and with the same measure of jurisdiction, to this court as to those. Such a proposition would shock the legal sense of any professional man. And the distinction is to be looked for, and is readily found, in the general constitutions and functions of those courts and of this." We have had less difficulty in reaching this conclusion, because similar grants of jurisdiction had been thus construed at the time our constitution was framed; and it was undoubtedly in view of this almost uniform construction that the organic law was drawn. The cases sustaining our views as to the scope of our original jurisdiction are *Attorney General* v. *City of Eau Claire*, 37 Wis. 400-446; *Attorney General* v. *Chicago & N. W. R. Co.*, 35 Wis. 425-522; *State* v. *Baker*, 38 Wis. 79; *Wheeler* v. *Irrigation Co.*, 9 Colo. 248, 11 Pac.

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103; *State* v. *St. Croix Boom Corp.* (Wis.) 19 N. W. 396; *State* v. *Ashley*, 1 Ark. 309.

It is impossible to define with precision the boundaries of this jurisdiction; but the general outlines have been marked to our satisfaction in *Attorney General* v. *City of Eau Claire*, 37 Wis. 400. We quote with approval the views there expressed: "It is not enough, to put in motion the original jurisdiction of this court, that the question is *publici juris*; it should be a question *quod ad statum reipublicæ pertinet*,—one 'affecting the sovereignty of the state, its franchises, or prerogatives, or the liberties of its people.' *Attorney General* v. *Chicago & N. W. R. Co.*, 35 Wis. 425. It was repeated in that case, as it had been held in *Attorney General* v. *Blossom*, 1 Wis. 317, that this court takes the prerogative writs for prerogative jurisdiction, with power to put them to only prerogative uses proper. Prerogative writs often go in aid of private right or of local public right. But the original jurisdiction of this court is not only limited to the prerogative writs, but it is confined to prerogative causes. * * * And though the question did not arise in the case, it is quite evident from all that has any bearing on it in *Attorney General* v. *Chicago & N. W. R. Co.*, that, to bring a case properly within the original jurisdiction of that court, it should involve in some way the general interest of the state at large. It is very true that the whole state has an interest in the good administration of every municipality; so it has in the welldoing of every citizen. Cases may arise, to apply the words of Stow, C. J., 'geographically local, politically not local; local in conditions, but directly affecting the state at large.' Cases may occur in which the good government of a public corporation, or the proper exercise of the franchise of a private corporation, or the security of an individual, may concern the prerogative of the state. The state lends the aid of its prerogative writs to public and private corporations, and to citizens, in all proper cases. But it would be straining and distorting the notion of prerogative jurisdiction to apply it to every case of personal, corporate, or local right, where a prerogative writ happens to

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afford an appropriate remedy. To warrant the assertion of original jurisdiction here, the interest of the state should be primary and proximate, not indirect or remote; peculiar perhaps to some subdivision of the state, but affecting the state at large, in some of its prerogatives; raising a contingency requiring the interposition of this court to preserve the prerogatives and franchises of the state, in its sovereign character; this court judging of the contingency, in each case for itself. For all else, though raising questions *publici juris*, ordinary remedies and ordinary jurisdictions are inadequate. And only when, for some peculiar cause, these are inadequate, will the original jurisdiction of this court be exercised for protection of merely private or merely local rights." See, also, pages 445, 446, of this opinion. We further quote with approval the language of the court in *Wheeler* v. *Irrigation Co.*, 9 Colo. 248, 11 Pac. 103: "We are clearly of the opinion that original jurisdiction should be here entertained only in cases involving questions *publici juris*, and that the writs for this court should, in general, be put only to prerogative uses. But these writs are frequently invoked primarily for the enforcements of private rights, while the proceedings may also affect questions of public interest. The language used, and the general policy indicated, by the various provisions of our constitution relating to the judicial department, construed in *pari materia*, as they should be, indicate that it was not the intention to have the Supreme Court entertain original jurisdiction over controversies of the kind last above mentioned; that, even though questions *publici juris* might be indirectly or remotely involved, such cases were in general to be here considered only in the exercise of appellate jurisdiction. * * * We believe that original jurisdiction of the writs mentioned, except in cases presenting some special or peculiar exigency, should not be here assumed, save where the interest of the state at large is directly involved, where its sovereignty is violated, or the liberty of its citizens menaced, where the usurpation or the illegal use of its prerogatives or franchises is the principal, and not a collateral

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question." This court, in *State* v. *Nelson Co.*, 1 N. D. 88, 45 N. W. 33, cited these cases with approval, and declared that, "when the information makes out a *prima facie* case, the writ will issue only in cases *publici juris* and those affecting the sovereignty of the state, its franchises and prerogatives, or the liberties of the people." Tested by the rule recognized and declared by this court, we have concluded that the case is one calling for the exercise of our original jurisdiction. While the contest is nominally between two individuals claiming the office of the superintendent of the state asylum, the real question involved is whether a state board—the board of trustees of the asylum—shall be allowed to exercise that portion of the sovereignty of the state vested in it by the statute giving the board the general management and control of this state institution, and the power to remove at any time the superintendent, and appoint a new superintendent in his place. Rev. Codes, § 992. This institution receives a large appropriation of state funds, and is placed by the legislature under the control of a board of trustees. It certainly concerns the sovereignty of the state, not remotely and in a trifling particular, but directly and in a very important sense, whether one citizen shall defy the sovereignty of the people, and, by retaining his office of superintendent after removal, usurp to that extent the control of a great and expensive state institution. This court does not give relief in this case out of any consideration for the private rights of the relator, but solely to uphold the sovereignty of the state against a direct attack upon it in a matter of great public importance. The fact that the attorney general has declined in this proceeding to represent the relator, to appear for the board or the state, is not decisive against our jurisdiction. It will not infrequently happen that such officer will be of opinion that the law is with the defendant, and will therefore be unwilling to initiate proceedings against him. While it is the proper practice, as we said in *State* v. *Nelson Co.*, for the attorney general to make the application for the writ, yet, when it appears that he has declined to make application for it, we will not refuse to exercise

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our jurisdiction, but will protect the public interests by putting forth all the powers with which the people have invested this tribunal. In many cases the court has taken jurisdiction although the attorney general has not applied for the writ, and in some of the cases he has actually represented the defense. *People* v. *State Auditors*, 42 Mich. 422, 429, 4 N. W. 274; *State* v. *Frazier*, (Neb.) 44 N. W. 471; *State* v. *Cunningham*, (Wis.) 53 N. W. 35-52; *State* v. *Doyle*, 40 Wis. 175; *State* v. *Hewitt*, 3 S. D. 187, 52 N. W. 875. In the case at bar, the majority of the board of trustees—the majority which removed Dr. Archibald and appointed Dr. Moore —appear by counsel, and urge this court to sustain them in their exercise of the sovereign power of the state conferred upon the board of trustees, of which they form the majority, and therefore the controlling element. Under the peculiar circumstances of this case, we have no hesitation in holding that the refusal of the attorney general to apply for the writ affords no reason for our declining to issue it.

We now come to the merits of the case. That the board of trustees of the asylum had power to remove the superintendent, Dr. Archibald, without cause, without notice, and in the exercise of their own unfettered and unreviewable discretion, cannot admit of doubt, unless there is something in the by-laws to be hereafter referred to which interferes with that power. They were given the power of appointment, and no term of office was fixed. Rev. Codes, § 992. In such a case, the rule is, and on principle must be, that the power of arbitrary removal is vested in the person or board vested with the appointing power, as incidental to the power of appointment, unless the law places a limitation on such power. Mechem. Pub. Off. § 445; Throop, Pub. Off. § § 304-361; *Ex parte Hennen*, 13 Pet. 230; *People* v. *Robb*, 126 N. Y. 180, 27 N. E. 267; *Miles* v. *Stevenson*, (Md.) 30 Atl. 646-648; *Lease* v. *Freeborn*, (Kan. Sup.) 35 Pac. 817; *People* v. *Fire Com'rs of New York*, 73 N. Y. 441; *People* v. *Shear*, (Cal.) 15 Pac. 92; *Newsom* v. *Cocke*, 44 Miss. 352; *State* v. *City of St. Louis*, (Mo. Sup.) 1 S. W. 757, 758; *People* v. *Hill*, 7 Cal. 97; *Smith* v. *Brown*, 59 Cal. 672. It is con-

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tended, however, that, the board of trustees having apppinted Dr. Archibald for the term of one year, which had not expired at the time the board assumed to remove him, and having adopted certain by-laws, it was powerless to remove him, except for cause, and after due notice to him, and an opportunity on his part to be heard with regard to the truth of the charges preferred against him. The by-laws were passed in 1885 by a board composed of persons different from the present board. There are two which it is claimed are material to this case. They are as follows: "Charges against officers of the institution must be submitted in writing, and a copy thereof shall be furnished to the officers against whom the charge is made at least one month before it is acted upon." "The superintendent, assistant physicians, steward, and matron shall reside in the hospital, and devote themselves entirely to its interests, and be subject to removal, for good and sufficient cause, at the pleasure of the board of trustees, and shall be known as the 'resident officers' of the hospital." These by-laws are to be construed in the light of the power of removal vested in the board. That power was absolute. To show that the board intended to strip itself of any portion of this power, explicit language to that effect should be pointed out. So far from there being anything in the words used to evince a purpose to divest itself of its discretion as to the sufficiency and existence of the cause for removal, the by-laws in terms declare that the superintendent shall be subject to removal for good and sufficient cause "at the pleasure of the board." They are to judge, finally, of the whole matter. Certainly, they did not, by this language, confer upon the courts the power to inquire into the sufficiency or existence of any cause for removal. They left the power as broad as they found it. Nor could they do otherwise. The by-laws which they are authorized to pass must not be repugnant to the laws of the state. The statute by necessary implication confers upon the board unlimited power of removal. This manifests the legislative policy with respect to this particular office. That statute cannot be annulled, neither can such policy

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be overthrown, by a by-law passed by the mere creature of the legislature. The people, under such legislation, have a right to demand that, whenever the board shall deem it for the public interests to remove the superintendent, its power of removal shall be the absolute power vested in it by the legislature, and shall not be fettered by any restriction whatever. This power is delegated to the board for the public good, and the people cannot be prejudiced by limitations of that power to which they have not consented, and which they have not authorized the board to impose. If the board may lawfully fix a term of one year, it may likewise give the incumbent a life tenure. If it can, with legal effect, declare that the superintendent can be removed for good and sufficient cause, it may narrow the ground of removal to a particular case, and thus place this portion of the discretion vested in the board for the public welfare beyond the possibility of exercise by succeeding boards for years to come. Thenceforth the board of trustees would, for a season, be shorn of the specified power of appointment, of the incidental power of removal, and to this extent of the power of general control and management granted to it by the statute. Even if the by-laws in question were explicit in their limitation of the power of the board, we would be compelled, for the reasons set forth, to treat them as without effect. The authorities are unanimous in support of this view. *State* v. *Lane*, (N. J. Sup.) 21 Atl. 302; *City of Newark* v. *Stout*, (N. J. Sup.) 18 Atl. 943; *Williams* v. *City of Gloucester*, (Mass.) 19 N. E. 348; *Higgins* v. *Cole*, (Cal.) 34 Pac. 678; *Carter* v. *City of Durango*, (Colo. Sup.) 27 Pac. 1058; *State* v. *Johnson*, (Mo. Sup.) 27 S. W. 399; *Weidman* v. *Board of Education*, (Sup.) 7 N. Y. Supp. 309. We have not deemed it necessary to pass on the point whether these by-laws were legally repealed before Dr. Archibald was removed.

It is urged that the office of superintendent comes within the provisions of section 197 of the constitution. This may be conceded without at all affecting the absolute power of removal vested in the board by the statute. The constitution does not

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declare that the officers therein referred to cannot be removed in any other way. It merely provides that for certain causes they may be removed in such manner as the legislature shall prescribe. But they may be removed for other causes, too, or without cause, if the legislature so declares, provided they are officers whose offices are created by statute. The legislature created the office of superintendent of the State Hospital for the Insane, and have, by an implication as strong as an express declaration to that effect, conferred upon the board of trustees the absolute, unreviewable power of removal at any time. Section 197 of the constitution has not taken away or impaired the power of the legislature to provide that any officer whose office is created by the legislature shall hold his office, not for any fixed term, but during the pleasure of the board or officer appointing him.

It is urged that the board did not, in fact, remove Dr. Archibald, or appoint Dr. Moore in his place. This contention rests upon an alleged irregularity in the proceedings of the board in assuming to make such removal and appointment. The motion to remove Dr. Archibald having been made and seconded, the president of the board, who appears to have acted as chairman of the meeting, refused to put the motion, on the ground of its illegality. Thereupon the motion was put by the member of the board who made it, and three votes were cast in its favor; there being no opposing votes, owing to the refusal of the two other trustees (one of them being the president) to vote. The same proceedings were had on the appointment of Dr. Moore. It is, perhaps, true that this presents a case of a failure to pursue the practice which ordinarily obtains when persons gathered together as a body are acting as a body. But it cannot be said that every violation of parliamentary usage will annul the action of the body guilty of such irregularity. The course of procedure rests largely with the discretion of the majority, provided the course adopted affords a reasonable guaranty that the sense of the body on the particular measure before it has been fairly taken. In large bodies slight deviations from established practice might be fatal,

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because, in such bodies, the confusion consequent on departure from setted modes of transacting business may seriously impair or utterly destroy the rights of the minority to be heard in argument, to the end that they may convert an adverse majority into a minority. But, in smaller bodies,—one, for instance, composed of five members, sitting around the same table, each under the eye and within reach of the voice of every other member,—a strict observance of all the formalities prescribed by parliamentary usages is not necessary. The question for the court in such cases is whether, in view of the size of the body, the proceedings which were had resulting in the adoption of the motion before the body afford a guaranty that the sense of that body was fairly taken on that particular motion. Tested by this rule, we have no difficulty in reaching the conclusion that the resolution removing Dr. Archibald was legally adopted. The only irregularity in the proceedings was in the refusal of the president of the board of trustees, who assumed to act as chairman of the meeting, to put the motion; this being done by the person making the motion, on such refusal being declared to the board. The motion was regularly made and duly seconded. The two members of the board opposed to it expressed no desire to be heard in opposition to it. Whether the chairman or another should put it before the board to be voted on was a mere matter of form. Had the chairman put the motion, the result would have been the same. Certainly, the chairman of a meeting cannot paralyze the action of the majority by a refusal to discharge the functions of his office. It would be a monstrous doctrine that one man in a body of several hundred could stop all business until some court (and the power of a court to interfere is doubtful) had issued a writ of mandamus to compel action on his part, each refusal being followed by the impotence of the majority until some tribunal should come to their aid. When the chairman of the meeting refused to put the motion to remove Dr. Archibald, all that was left for the majority to do, if they were not to be thwarted in their purpose, was to have some one of

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their number put the motion, and call for the vote upon it. This was done, and there is no pretense that it worked any injury to the minority, or that it deprived them of any of their rights as members of the board. And it is obvious that the same result would have been reached had the chairman himself put the motion, as it was his duty to do. He undoubtedly acted in good faith, believing that, at that time, Dr. Archibald could not be removed. But it is clear that whether such removal could then be made was a question of law, to be decided by the courts, and not by a single member of the board. As well might the speaker of a legislative assembly refuse to put the question and call for the vote on the passage of a law because he deemed it unconstitutional. It was the duty of the chairman to allow the majority of the board to take such action as they might see fit to take. What would be the legal effect of that action was purely a judicial question, to be decided in another place, and by a different branch of the government. If the chairman had ruled that the motion was out of order, and had the motion then been put by another without any appeal from the ruling of the chair, a different question would have been presented; but, even under such circumstances, we would hestitate long before adjudging a vote on the motion illegal. However, no such problem is before us; for the chairman merely declared that the point was illegal, and not that it was out of order. To declare that a motion violates law, and therefore should not be voted on, is one thing. Such a question neither the chairman nor the majority can pass upon with any legal effect. But to rule that a motion is out of order is to take an entirely different attitude with respect to it. It is a decision that some rule of the body or some practice established by parliamentary usage has been violated. This question the chairman must decide in the first instance, and above him sits the court of final review, the majority who, on an appeal from the ruling of the chair, settle the issue beyond the power of any court to change their decision. The reasoning on this point applies with equal force to the approval of the relator's bond.

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The chairman refused to put the motion to approve the bond, and thereupon it was put by one of the other trustees, and was carried; three of the trustees voting to approve the bond, and the other two not voting at all.

The only question left relates to the remedy. The relator, having received the appointment, and having qualified, is in a position analogous to one who holds a certificate of election and has qualified. This *prima facie* title gives him the right to the office, pending any investigation as to the ultimate title; the defendant not being, as to him, even a *de facto* officer, but holding the office without so much as a color of title. That it is proper to try, in mandamus proceedings, all questions relating to the *prima facie* title is not open to debate in this state, since our decision in *Butler* v. *Callahan*, 4 N. D. 481, 61 N. W. 1025. See, also, *State* v. *Johnson*, (Fla.) 11 South. 845; *Conklin* v. *Cunningham*, (N. M.) 38 Pac. 170; *State* v. *Common Council of City of Duluth*, 53 Minn. 238, 55 N. W. 118. The defendant has been removed from the office, and he is not in a position to contest the right of the relator to hold the office. The state might hereafter, in *quo warranto* proceedings, try the question of the relator's eligibility to the office; but a judgment of ouster against him would not show that the defendant in this proceeding had had any right to the office during the relator's incumbency. The person who holds the *prima facie* title prays this court to compel the one who has no title whatever to turn over to him (the former) the possession of the office, with all its books and paraphernalia. His right to the writ of mandamus under such circumstances is absolutely clear. The peremptory writ will issue as prayed for.

BARTHOLOMEW, J. (concurring.) I concur in the conclusions reached in the opinion prepared by Justice Corliss. I also concur in all the reasoning of that opinion, except so much thereof as pertains to the original jurisdiction of this court. On that point I rest my concurrence solely upon the rule of stare decisis. Six years ago, and a very few months after the adoption of our constitution, this court held, in *State* v. *Nelson Co.*, 1 N. D. 88, 45 N.

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W. 33, that it had original jurisdiction in cases of this character. That decision has been repeatedly acted upon since that time, and has been adopted by the legislature, and forms a part of our statute law. Section 5165, Rev. Codes. The question should no longer be considered open in this state.

The Chief Justice did not sit in this case, owing to his absence from the state.

(66 N. W. Rep. 234.)

R. S. LEWIS *vs.* R. GALLUP.

Opinion filed April 16th, 1896

Certiorari—When Not Proper Remedy.

Certiorari is not the proper remedy to correct an error of law arising at a trial before a justice of the peace in any case where the ordinary remedy by appeal would be available.

Remedy by Appeal.

Where a defendant appeared by an attorney before a justice of the peace upon the return day, and such attorney asked to have his appearance entered by the justice in his docket, and the justice refused to do so, and proceeded to enter judgment against the defendant as for a default in his appearance, *held*, that the action of the justice of the peace could have been reviewed by an appeal upon questions of law, after settling and filing a statement with the justice setting out the facts of such appearance. *Certiorari* will not lie in such a case.

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

Certiorari on the petition of R. S. Lewis against R. Gallup, justice of the peace, and O. G. Barnes, sheriff. Writ quashed, and petitioner appeals.

Affirmed.

Ball, *Watson*, *& MaClay*, for appellant.

Certiorari is the proper remedy. The judgment being rendered as by default it is doubtful whether appellant could have appealed at all. 2 Enc. Pl. & Pr. 102; *Wiggins* v. *Henderson*, 36 Pac. Rep.

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459. The appeal or remedy which will prevent the issue of the writ of *certiorari* must be one which will set aside and annul the void proceeding of which the petitioner complains. *Memphis Ry. Co.* v. *Brannum*, 11 So. Rep. 386; *State* v. *Evans*, 13 Mont. 239, 33 Pac. Rep. 1010; *State* v. *Case*, 37 Pac. Rep. 95. The statute allowing the justice to relieve a party from a judgment taken against him by default in cases of mistake, surprise or excusable neglect is not an adequate remedy. And appellant was not bound to resort to this remedy, which not only puts him in the attitude of one confessing himself in error, but also imposes on him a monetary penalty. *Hawkeye Ins. Co.* v. *Judge*, 25 N. W. Rep. 117; *Callahan* v. *Judge*, 44 N. W. Rep. 892.

Bartlett & Lovell, for respondents.

The hearing upon the return of the writ should be confined to the assignments of error. *Blood* v. *Westbook*, 50 Mich. 443, 15 N. W. Rep. 544; *Witherspoon* v. *Clegg*, 42 Mich. 484, 4 N. W. Rep. 209; *Territory* v. *O'Hare*, 1 N. D. 30, 44 N. W. Rep. 1003; *Davis* v. *Lang*, 153 Ill. 175; *Erck* v. *Omaha Nat. Bank*, 62 N. W. Rep. 67; *Little* v. *Little*, 2 N. D. 175. The docket of the justice shows a valid judgment and it cannot be impeached in a *certiorari* proceeding. *In re Evingson*, 49 N. W. Rep. 733. *Certiorari* will not lie, when there is an appeal or any other plain speedy and adequate remedy provided by law. *Perrott* v. *Owen*, 64 N. W. Rep. 526; Sec. 5507, Comp. Laws; *Saunders* v. *Seed Co.*, 24 Pac. Rep. 532; *Sioux Falls Nat. Bank* v. *McKee*, 50 N. W. Rep. 1057, 3 S. D. 1; *Fall* v. *Moore*, 48 N. W. Rep. 404; *State* v. *Wischstadt*, 57 N. W. Rep. 477; *State* v. *State Board*, 53 N. W. Rep. 192; *Railroad Co.* v. *Christian* 1 S. W. Rep. 121. In the case at bar appellant could have appealed from the judgment. Sections 6129, 6130, Comp. Laws; 12 Am. and Eng. Euc. L. 483; *Perrott* v. *Owen*, 64 N. W. Rep. 526. Even though the judgment was void. *Sioux Falls Nat. Bank* v. *McKee*, 3 S. D. 1, 50 N. W. Rep. 1057. Or he could have made a timely application to the justice to open the judgment.

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Section 6065, Comp. Laws; *Perrott* v. *Owen*, 64 N. W. Rep. 526.

WALLIN, C. J. The controlling facts in this record are as follows:

This proceeding was initiated by an affidavit filed in said District Court, couched in the following words and figures:

"State of North Dakota, County of Cass—ss.: H. C. Southard, being first duly sworn, on oath says that on the——day of May, 1894, R. S. Lewis was served with a summons in an action wherein George M. Babcock was plaintiff and said Lewis was defendant, commenced before one R. Gallup, as justice of the peace in and for said county, which summons was returnable May 7th, 1894, at 10 o'clock A. M.; that, upon the return of said summons, C. R. Meredith, a citizen of the City of Casselton, in said county, and Pollock & Scott, attorneys of the said county and state, severally and separately tendered an appearance in said action on behalf of said Lewis, but that said justice of the peace refused to allow either said Meredith or said Pollock & Scott to appear by or on behalf of said Lewis, and refused to enter any appearance by or on his behalf; that thereupon said Gallup entered a pretended judgment in favor of said George M. Babcock, and against said Lewis, as upon default, in the sum of sixty dollars ($60) principal and interest, and twelve dollars ($12) costs, making the total of $72; that said action was brought in claim and delivery for the return of certain property in said summons described, or the value thereof; that, as affiant is informed and believes, said Gallup entered said judgment as aforesaid, without hearing or demanding any evidence whatever upon the part of the plaintiff; that said George M. Babcock has caused to be issued an execution, under the hand of said justice and in said action, and has placed the same in the hands of the sheriff of said county for service. Affiant further says that said Lewis has stated his case to him, and that he verily believes that said Lewis has a good and sufficient defense upon the merits to said action brought by said Babcock as aforesaid; that the application of said Lewis for a writ of *certiorari* is not for the purpose of delaying or hindering

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said Babcock from the collection of any just claims; and that said Lewis has no plain, speedy, or adequate remedy by writ of error, appeal, or otherwise."

Whereupon said District Court issued its writ of *certiorari* to said justice of the peace, and to said sheriff. To this writ said justice of the peace made due return to the District Court, as follows:

"GEORGE M. BABCOCK, *Plaintiff*, *vs.* ROBERT S. LEWIS, *Defendant.*
"Before R. GALLUP, *Justice of the Peace* within and for Cass County.

"To Walter W. Smith, Esq., Clerk of the District Court, County of Cass, and State of North Dakota, Third Judicial District—Sir: In compliance with the annexed order of the District Court of the Third Judicial District in and for said County, I herewith make return to you of all proceedings had before me as a duly elected and qualified justice of the peace, within and for the County of Cass, State of North Dakota, in the case of *George M. Babcock*, *Plaintiff* v. *Robert S. Lewis*, *Defendant*, together with all papers in said cause which are herewith attached and marked consecutively A, B, C, D, and E.

"R. GALLUP,
"*Justice of the Peace.*

"This action was brought for the recovery and possession of five ewes and one buck, together with the natural increase of said buck and ewes, or the sum of sixty dollars, the value thereof, in case a delivery cannot be had; said sheep having been taken from said plaintiff by said defendant.

"Summons issued May 1, 1894; service made on defendant by A. Gallup, a constable of Cass County, N. D.; and return made therein.

"Summons made returnable May 7, at 10 A. M. The following conciliators were subpœnaed to act, and appeared in the above action: F. T. Buckholz and J. R. Pollock.

"May 7, 1894, at 10 A. M., case was called. Plaintiff in court, and after waiting for one hour, defendant not appearing either in

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person or by an agent, duly authorized in writing to appear, due proof being made, judgment was rendered by default in favor of plaintiff by the court, for the relief demanded in complaint, to-wit, that plaintiff recover of the defendant the possession of the property described in the summons and complaint, or the value thereof, hereby fixed at sixty dollars, in case a delivery cannot be had, and the costs hereby taxed at thirteen dollars ($13.)

"R. GALLUP,
"*Justice of the Peace.*
"F. T. BUCKHOLZ,
"J. R. POLLOCK,
"*Conciliators.*

"Given under my hand, this 7th day of May, 1894.

"R. GALLUP,
"*Justice of the Peace.*

"State of North Dakota, County of Cass—ss.: I, R. Gallup, do solemnly swear that the within and foregoing is a true and correct report of all proceedings had before me in the within entitled cause of action, in which *George M. Babcock* v. *Robert S. Lewis* is interested; also, of all judgments and disposition thereof, and an itemized account of witnesses' fees, justice fees, and fees of jurors, and of other officers therein, as it appears of record in my justice docket, on page 5.

"R. GALLUP,
"*Justice of the Peace* within and for said County of Cass."

(Duly verified.)

In the margin of the justice's return, included as a part thereof, was the following statement of costs: "Justice's fees, $2.75; conciliators' fees, $2.20; constable's fees, $2.05; attorney's fees, Bartlett & Lovell, $6.00." Appended to the above return, as a part thereof, and marked "Exhibit A," was the summons issued by the justice in the case of *Babcock* v. *Lewis*, being the general form of summons used in Justice's Courts, and having indorsed upon it the names of Messrs. Bartlett & Lovell, as the plaintiff's attorneys, and the officer's return of service, showing the service

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on defendant May 2, 1894. Next, marked "Exhibit B," followed a subpœna issued to J. R. Pollock and F. T Buckholz, requiring them to appear on the return day of the summons, to act as conciliators in said case, and officer's due return of service. Next, marked "Exhibit C," followed an execution issued out of the Justice Court upon the judgment in said cause, dated May 17, 1894, containing description of the property described in summons, and having attached to it the officer's return of the same, that he had made due and diligent search for the property described in said execution, and had been unable to find the same, and "wholly unsatisfied." Upon such return, the matter came on to be heard before the District Court, and that court, after hearing counsel, made its final order in the proceeding quashing said writ. From this order, Robert S. Lewis has appealed to this court.

In presenting the case to this court, the arguments of the respective counsel have taken a wide range, but, in the view we have taken of the record, we deem it unnecessary in disposing of the case to pass upon more than a single feature. In resorting to the *certiorari* proceeding, we are of the opinion that the appellant has mistaken his remedy. Section 5507 of the Comp. Laws (which was in force when the proceeding was heard below) explicitly declares that this writ is available only in cases where "there is no writ of error or appeal, nor, in the judgment of the court, any other plain, speedy, and adequate remedy." In some of the states this ancient writ is regularly employed as a means of bringing up a record from an inferior to a superior court for review. Such is not its office in this state. In this jurisdiction, cases are regularly brought from a Justice's Court to the District Court by appeal, under an appeal statute so framed as to facilitate the review of all questions, whether of law or fact, arising in the Justice's Court. The remedy by appeal is familiar to the profession, and one which has been constantly employed in this jurisdiction. We can see no reason why an appeal was not resorted to in this case. The statute, in our judgment, was available to the appellant, and was perfectly adapted to meet the exigency

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presented by the facts occurring in the Justice's Court, as such facts are set out in the affidavit filed as a foundation for the writ of *certiorari*. The affidavit states "that, upon the return day of said summons, C. R. Meredith, a citizen of the City of Casselton, in said county, and Pollock & Scott, attorneys of said county and state, severally and separately tendered an appearance in said action on behalf of said Lewis, but that said justice of the peace refused to allow either said Meredith or said Pollock & Scott to appear for or on behalf of said Lewis, and refused to enter an appearance by or on his behalf; that thereupon said Gallup entered a pretended judgment in favor of said George M. Babcock, and against said Lewis, as upon default," etc. The justice's docket corroborates the statement made in the affidavit in so far as it shows that default judgment was in fact entered against the defendant on the return day named in the summons.

Upon this state of facts, appellant argues that it was manifest error to enter a default judgment against him, because, as he contends, there was no default in appearance on his behalf, inasmuch as he did actually appear in said action, at the proper time, and in the proper manner, and that the justice erred in refusing to enter such appearance upon his docket. To meet this argument, the respondent contends that the facts set out in the affidavit, and relied upon by appellant, as constituting an appearance in the action before the justice, fall short, and do not constitute an appearance, within the meaning of the law. In support of this contention the respondent calls attention to the record, and cites Ch. 45, Laws 1893, which was in force at the time in question, to show that the justice of the peace, in all that he did, was acting under and in conformity to said statute, and that the judgment entered was regular and valid, under the provisions of that statute. The statute in question creates a tribunal called commissioners of conciliation, directs how and when and where such tribunal shall be called together, and prescribes the proceedings to be had before it when it is convened. Construing this statute, it is respondent's contention that neither party to the

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action can appear and litigate the action proper before the justice of the peace, except upon the condition that he had first appeared before the board of conciliation, and that inasmuch as the appellant does not show or claim that he appeared before such board, or attempted to do so, he was legally in default, despite the fact that he did appear before the justice in manner and form as the law directed, before the statute in question was enacted. We are inclined to agree with the appellant's construction of the statute, but we shall not place our ruling upon that ground. In our opinion, it does not at all matter which view of the statute is the correct one. In either view, the appellant would have an unassailable right to have the facts upon which he relies as constituting an appearance in the action presented to the District Court, and have the point in controversy decided by that court. But the record of the justice fails to disclose whether the defendant appeared or did not appear in the action proper. The acts of the defendant relied upon as constituting a legal appearance in the action upon the return day are not set out in the docket. The entry is that the defendant did not appear, "either in person or by an agent duly authorized in writing to appear." We construe this language as having reference only to an appearance before the commissioners, inasmuch as the statute authorizes an appearance before that body only in person, or by an agent thereto authorized in writing.

It follows that the record as made up by the justice fails to set forth that certain facts, claimed to be vitally important, took place on the return day; *i. e.* the facts set out and relied upon by appellant as constituting his appearance in the action. It was requisite to a decision of the dispute in the District Court that these omitted facts should be brought upon the record of the proceedings in the Justice's Court. But how? This question is readily answered by reference to the statute regulating appeals to the District Court from Justice's Courts upon questions of law. If an error was made by the justice of the character complained of, it was manifestly an error of law; and, to correct it, an appeal

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upon questions of law was the appropriate statutory remedy. In such case, section 6130, Comp. Laws, provides for making and filing a statement of the case. Such "statement must contain the grounds upon which the party intends to rely on appeal." Under this statute, the facts relied upon as constituting a valid appearance in the action could have been brought upon the record of the proceedings had before the justice; and, upon an appeal upon questions of law, the point in dispute could have been adjudicated in the District Court. See *Perrott* v. *Owen*, (S. D.) 64 N. W. 526. The law therefore provided a remedy by appeal to correct the alleged error, and we are unable to discover wherein such an appeal would not have been adequate, or, at least, as adequate as such remedy ever is to correct an alleged error of law occurring in a Justice's Court. Another adequate remedy having been provided, it was not error in the court below to quash the *certiorari* proceeding, and therefore the order appealed from must be affirmed.

We remark, finally, that we deem it unnecessary to place a construction upon the statute creating tribunals of conciliation. It has been materially modified by subsequent legislation. See section 6796, Rev. Codes. We merely remark that, in our opinion, the statute did not embody or carry out the provision found in section 120 of the state constitution. That section of the organic law contemplates the establishment of a tribunal which, by the agreement of parties, would possess the power to determine a controversy, and to render a valid and binding judgment therein. The statute in question created no such tribunal. Under it, the commissioners of conciliation could render no judgment whatsoever. They were not clothed with authority to enter a binding judgment under any circumstances. The only judgment authorized by the statute was a judgment to be entered by the justice of the peace upon the agreement of the parties, such judgment to be evidenced by the signature of the parties appended to the judgment so entered. All concur.

(67 N. W. Rep. 137.)

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FIRST NATIONAL BANK OF HASTINGS *vs.* JOSEPH LAMONT, *et al.*

Opinion filed April 16th, 1896.

Mortgage of Homestead—Validity.

An existing legal obligation is sufficient of itself to constitute a valuable consideration for a promise to an extent corresponding with the extent of such obligation. Accordingly, *held*, that a mortgage executed by the wife of the debtor jointly with him upon their homestead, to secure the payment of new notes given by him as collateral to old notes, on which he was liable as maker, was a valid mortgage, although the mortgage would not have been binding upon her homestead interest in the property, and would therefore have been void in toto if it had been given to secure the old existing notes, without any new consideration. For the purposes of this point, the court assumed that there was no extension of time of payment.

Sufficiency of Consideration—Extension.

But, further, *held*, that the transaction on its face created a presumption that there was an extension of time for payment of the old notes, which was not rebutted; and that, therefore, for this reason also, there was a sufficient consideration to support the notes and the mortgage.

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

Action by the First National Bank of Hastings, Minn., and others, against Joseph Lamont and others. From a judgment for defendants, plaintiffs appeal.

Reversed with directions.

Charles J. Mahnken, (*Benton & Amidon*, of counsel,) for appellants.

The weight of authority is that a homestead right cannot be acquired in real property the title to which is held by tenents in common. Waples on Hd. & Ex. 131-140; *Threshing Machine Co.* v. *Joyce*, 16 S. W. Rep. 147. A partner cannot acquire a homestead right in real property owned by the firm. Waples Hd. and Ex. 143; *Drake* v. *Moore*, 23 N. W. Rep. 263; *Hoyt* v. *Hoyt*, 28 N. W. Rep. 500. The attempted denial in the answer, does not comply with the statute. It denies knowledge, but does not deny information. *Sigmund* v. *Bank of Minot*, 4 N. D. 164. The case at bar comes within section 3872, Rev. Codes.

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Spencer v. *Ballou*, 18 N. Y. 330; 1 Daniels Neg. Inst. 184. When the new notes were taken the old notes were past due. The taking of the new notes operated as an extension of the old notes— The law will imply an agreement to extend from the transaction, and this extension would be a sufficient consideration to support the new notes. *Baker* v. *Walker*, 14 M. and W. 464; *Mobile Life Ins. Co.* v. *Randall*, 71 Ala. 220; *Smarr* v. *Schmitter*, 38 Mo. 478; *Lea* v. *Dozier*, 10 Humph. 447; *Place* v. *McIlvain*, 1 Daly. 266, 38 N. Y. 96; *Hart* v. *Hudson*, 6 Duer, 304; *Jaggar Iron Co.* v. *Walker*, 76 N. Y. 521.

Fred B. Morrill, for respondent.

A homestead right can be acquired in real property the title to which is held by tenents in common. *Oswald* v. *McCawley*, 42 N. W. Rep. 769, 6 Dak. 289. And this accords with the decisions of other courts. *Sherrid* v. *Southwick*, 5 N. W. Rep. 1027; *Lozo* v. *Sutherland*, 38 Mich. 168; *Cleaver* v. *Bigelow*, 27 N. W. Rep. 851; *Shepard* v. *Cross*, 33 Mich. 98; *Dye* v. *Mann*, 19 Mich. 29; *Gyles* v. *Miller*, 54 N. W. Rep. 551; *Felds* v. *Duncan*, 30 Ill. App. 589; *Kaser* v. *Haas*, 7 N. W. Rep. 824. The notes themselves show that they were given as collateral to the old notes and without consideration. There being no consideration for them the mortgage and notes were void. *Kansas Mfg. Co.* v. *Grandy*, 9 N. W. Rep. 569; *Cawley* v. *Kelley*, 19 N. W. Rep. 65; *Coffln* v. *Lockhart*, 24 N. Y. Supp. 1025; *Vanderbilt* v. *Schreyer*, 91 N. Y. 392; *Wear & Co.* v. *Pierce*, 24 Pick. 141; *Connell* v. *Clifford*, 45 Ind. 392.

Corliss, J. This litigation involves the validity of two notes, and also a mortgage upon a leasehold interest in real property given to secure their payment. Joseph Lamont and Charles Scott, being the owners as tenants in common of a leasehold interest for a term of 99 years in certain real estate situated in the City of Fargo, executed and delivered a mortgage thereon to secure the payment of $16,500, borrowed by them of the mortgagee. This indebtedness was evidenced by their three promissory notes. Subsequently, one of these notes was paid, leaving the

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two other notes, one for $5,000 and the other for $6,500, still unliquidated. In August, 1888, the defendant Scott transferred his interest in the leasehold to the defendant Lamont. In April, 1891, defendant Lamont executed and delivered to the then holders of these two notes his two individual notes, for the amounts due thereon, respectively, at that time, for principal and interest, which notes were payable at a future day; and on the same day, and as part of the same transaction, he and his wife executed and delivered to the holders of such two original notes a mortgage upon Lamont's leasehold interest in such property. The original mortgage was not executed by Lamont's wife. At the time it was executed, Lamont and his wife were residing upon this property as their homestead. This mortgage was therefore void as to Lamont's interest in the leasehold, unless the fact that Lamont and Scott were tenants in common of this leasehold interest is fatal to the claim that it constituted Lamont's homestead at the time the mortgage was given. We will, for the purposes of this case, assume that Lamont had a homestead right in the property, despite the fact of such cotenancy. Strong reasons and a powerful array of decisions support it. See *Giles* v. *Miller*, (Neb.) 54 N. W. 551; *Oswald* v. *McCauley*, 6 Dak. 289, 42 N. W. 769; *Lozo* v. *Sutherland*, 38 Mich. 168; *Kaser* v. *Haas*, (Minn.) 7 N. W. 824; *Cleaver* v. *Bigelow*, (Mich.) 27 N. W. 851; *Sherrid* v. *Southwick*, 43 Mich. 515, 5 N. W. 1027. See cases cited in Thomp. Homest. & Ex. § 180, note 2. But in view of the fact that the question is difficult of solution, and that eminent courts have reached a different conclusion from that enunciated by the courts whose decisions are here cited, we deem it best to leave this interesting and perplexing problem for future solution.

Starting with the proposition that the first mortgage was void as to Lamont's interest, the defendant's counsel insists, and the trial court so ruled, that the facts surrounding the giving of the new notes and mortgage established the legal conclusion that they are unsupported by any consideration, and are therefore void. The action was to foreclose both of the mortgages, and

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in the complaint both sets of notes were relied on. If the new notes and the new mortgage are valid, this court is fully justified under the pleadings in treating this action as an action to enforce these new notes by a foreclosure of the new mortgage. The trial court rendered judgment annulling such notes and mortgage as void for want of consideration. It is from this judgment that the appeal was taken, and the case is here for a new hearing upon the whole record.

When these new notes and this mortgage were given, the old notes were not surrendered. Nor were such new notes given as renewals of the old notes. On the contrary, they were delivered and accepted merely as collateral security to the old notes. It is therefore contended that there was no consideration for them sufficient to support the mortgage against the wife of defendant Lamont. It is conceded by counsel for defendants that, if the time of payment of the original notes was extended by this transaction, there is sufficient consideration to support the new notes and the mortgage given to secure their payment. But it is urged that the evidence in the case is conclusive against this theory. Assuming at this point that this position is well taken, we are yet unable to agree with counsel for defendants that these new notes and the new mortgage are unsupported by a sufficient consideration. It is true that the wife of Lamont occupies a position analogous to a surety. She has in terms mortgaged her homestead right; and it is a well-settled rule of law that a contract made by a surety at a time subsequent to the execution of the principal agreement is, in the absence of some new consideration, invalid. But it is equally well established that if, contemporaneously with the execution of a contract binding on the principal, another person, without further consideration, becomes surety thereon or a guarantor thereof, the same consideration which suffices to render obligatory the promise of the principal is also effectual to support the promise of the surety or guarantor. That the new notes executed by Lamont were supported by ample consideration cannot admit of doubt. At the time of their execution, the

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persons to whom they were executed held the existing legal obligations of Lamont for the full amount for which they were given. This is undisputed. It follows, therefore, that the notes were supported by a sufficient consideration. Section 3872, Rev. Codes; *Spencer* v. *Ballou*, 18 N. Y, 327, 330. The mortgage having been executed by Lamont and wife as part of the same transaction, the consideration for the notes furnished ample legal consideration for the mortgage given by the wife on her homestead right. 2 Rand. Com. Paper, § 920; *Harrell* v. *Tennant*, 30 Ark. 684; *Bank* v. *Coit*, (N. Y.) 11 N. E. 54-56; *Spencer* v. *Ballou*, 18 N. Y. 327. The case of *Spencer* v. *Ballou* is directly in point; and it is a significant fact, as bearing upon the proper construction of what is now section 3872 of the Revised Codes, that that section is a verbatim copy of one of the sections of the proposed Field Code, which was not adopted in New York. The New York commissioners, in their note to that section, cite the case of *Spencer* v. *Ballou*, thus evincing a purpose to embody in that section the rule applied in that case. Of course, if no new notes had been executed, the mortgage would have been void as to Mrs. Lamont, and hence void in toto.

We desire to place our decision on still another ground. We think the fair inference to be drawn from the facts in this case is that all parties understood that the time for the payment of the original notes was extended until the maturity of the new notes. The holders of the old notes were pressing for payment, and it is evident that Lamont was unable to pay them at the time the new notes were given. What he needed was an extension of time, and it is incredible that he would have given these new notes and a mortgage on the property with the understanding that he could be sued the next moment on the old paper. The subsequent conduct of the holders of this new paper sheds some light on the implied understanding of the parties. No attempt was made by these plaintiffs to enforce the old notes until after the maturity of the new notes. It is to us a very significant circumstance that Lamont did not testify that it was the understand-

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ing that the time should not be extended by the giving of the new notes and mortgage. All he testified to was that there was entire silence on the subject so far as any understanding outside of the papers was concerned. He declared that the notes explained the transaction. There is not a particle of evidence showing that the parties agreed that, despite the fact that the new notes of one of the debtors were given for the same debt, the right to sue on the old notes should not be suspended for a single hour as to either defendant. The retention of these notes might under different circumstances have indicated a purpose not to extend the time. If there was no other reason for their retention by the holders of them, it possibly might be urged that they were kept by them because they did not desire to surrender their right to sue at any time. But the plaintiffs in this case had an all-sufficient reason for retaining these old notes, for to surrender them up would have been to discharge the liability of Scott, who was one of the joint makers thereof. We cannot therefore regard their retention and the fact that the new notes were taken as collateral to them as indicating a purpose not to suspend the cause of action on the old notes. When taken as a whole, the transaction creates a natural presumption that an extension was intended, and there is no evidence in the case to rebut this presumption. The testimony of Lamont is very evasive and unsatisfactory. Had the fact been that it was understood that, as soon as he had given these notes and the mortgage, he could be sued on the old notes, he could easily have testified to such fact. But there is no such evidence in the case. His explanation of the transaction is that these new notes were given to accommodate the bank, so that it would have live paper to present to the examiner. We do not question the fact that some talk of this kind may have occurred. But why did he execute a new note to the plaintiff Abbie I. Mairs? It has not been suggested that the bank examiner was to call on her as well, or that she was under any obligation to exhibit to him her private property, or that she would have had any reason for preferring to exhibit to

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him live rather than overdue paper. If we were to accept the theory that the only purpose in giving this new paper was to accomodate the bank, we would be compelled to believe that Lamont, without any necessity therefor, and utterly without any object whatever, if he was not obtaining an extension of time, voluntarily gave a new note to plaintiff Abbie I. Mairs, and, in addition, executed a mortgage to secure the whole debt, as well the portion owing to her as the portion due to the bank. This theory leaves the giving of the Mairs note and the execution of the mortgage entirely unaccounted for. On this branch of the case, we cite *Andrews* v. *Marrett*, 58 Me. 539; 3 Rand. Com. Paper, § § 1567, 1569; 1 Daniel, Neg. Inst. § § 830, 831; 2 Rand. Com. Paper, § 462.

Our conclusion is that the new notes and the new mortgage are valid, and that plaintiffs are entitled to the usual decree of foreclosure and sale. The District Court is directed to enter a decree in accordance with this opinion for the amount due upon the two notes, dated April 7, 1891—one for the sum of $5,793.35, and the other for $7,496.66,—and declaring the said mortgage to be a valid lien for the amount of such notes upon the interest of defendants Lamont and wife in the leasehold, and directing a sale of their interest in such premises to satisfy such mortgage lien, with costs, in accordance with law. All concur.

(67 N. W. Rep. 145.)

NOTE—See *Towle* v. *Greenberg*, 68 N. W. Rep. 82.

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WILLIAM H. FIELD, *et al* *vs.* GREAT WESTERN ELEVATOR CO.

Opinion filed April 21st, 1896.

Appeal—Dismissal—Entry of Judgment.

An order of the District Court, entered in its minutes by the clerk of that court, directing the dismissal of an appeal taken to the District Court from a judgment entered in a county court, does not itself accomplish the dismissal of the appeal. Until a judgment is entered in the District Court upon such order, the action will be pending in the District Court; and, while the action is pending in the District Court an appeal will not lie to this court from the county court, in which the judgment was originally entered.

Same.

This rule is the same whether the order of dismissal made by the District Court is made upon the appellants motion or upon the motion of his adversary.

Appeal from Ransom County Court; *Allen*, J.

Action by William H. Field and Clarence B. Wisner against the Great Western Elevator Company. From a judgment for defendant, plaintiffs appeal.

On motion to dismiss. Granted without prejudice.

Edward Engerud, for appellants.

P. H. Rourke, for respondent.

WALLIN, C. J. This action originated in the county court for Ransom County, and that court entered a judgment in favor of the defendant, whereupon the plaintiffs perfected an appeal in said action to the District Court for Ransom County, said appeal being taken upon questions of law alone, under the provisions of section 6591, Rev. Code. No statement of the case was made or settled in the county court prior to said appeal to the District Court or at any time. In the District Court the defendant moved to dismiss the appeal upon the ground that no statement had been filed in the action. This motion was denied. The plaintiffs in the action then moved to dismiss the appeal, which motion was granted, and the District Judge entered in the judge's minutes the following memorandum: "Nov. 30th, 1895, on motion of plaintiff's attorney, the appeal herein is dismissed." Subsequently

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the clerk of the District Court made the following entry in his minutes: "Nov. 30th, 1895, on motion of plaintiffs' and appellants' attorney, the appeal was ordered dismissed, and the papers in the case ordered returned to the county court." No judgment of dismissal or for the costs of the action was ever entered by the District Court, and no other entrees in the action than those above stated were made in the records of the District Court. Thereafter the plaintiffs, pursuant to said section 6591, made, served, and filed a notice of appeal and undertaking on appeal in said action in manner and form as required by the statute regulating appeals to this court from the District Court, and pursuant thereto the clerk of the said county court certified the record in the action to this court. In this court the defendant and respondent has moved to dismiss such appeal. The motion must be granted. The case falls squarely within the rule laid down in *Re Weber*, 4 N. D. 119, 59 N. W. 523. As has been seen, the appeal was ordered to be dismissed by the District Court, and such order was entered in the minutes of that court, but was not followed by the entry of a judgment of dismissal, or for defendant's costs on appeal. After a very careful consideration, this court laid down a rule for the guidance of counsel in cases of this character. In the case cited we said: "An order of dismissal, whether entered in the minutes of the court, or recorded in a book labeled 'Order Book,' or written out, signed by the judge, and filed, is still an order, and does not constitute a final determination or final judgment;" and further said: "Until judgment is entered upon the order, the action is not determined, but is pending in the District Court." This court, in the case cited, intended to settle a vexed question of practice, and to lay down a plain rule to govern in the matter of dismissing appeals from Justice's Courts to District Courts. We see no reason why the rule should not apply in a case where the appellant moves to dismiss his own appeal. In either case the respondent should have a final determination, and a judgment for costs, which can be reviewed upon appeal.

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Dismissals of appeals, for reasons too numerous to mention, are constantly occurring in the District Courts, and hence we consider it a matter of no small practical importance that the proceeding in such cases should be settled and governed by one plain and uniform rule. This rule, as has been stated, was laid down in the case cited, and the case at bar must be governed by it. The motion to dismiss is granted, but without prejudice to another appeal. All concur.

(67 N. W. Rep. 147.)

HARRIET E. FOLSOM *vs.* JOSEPHINE S. KILBOURNE, *et al.*

Opinion filed April 21st, 1896.

Usury—What Constitutes—Failure to State Rate of Interest Separately.

Where in the notes given for a loan of money and the mortgage securing the same, the rate per cent. of interest agreed to be paid for such loan is not separately stated, such fact alone will not make the transaction usurious and void, under § 4, Ch. 184, Laws N. D. 1890. Nor can a court declare such notes and mortgage void for that reason, under the provisions of section 10 of said statute, as said section was not intended to create any new penalty, or to make any contract void that was not declared usurious by the other sections in the act.

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

Action by Harriet E. Folsom against Josephine S. Kilbourne and Edward S. Kilbourne. From an order sustaining a demurrer to the answer, defendants appeal.

Affirmed.

Edward Engerud and *T. A. Curtis*, for appellants.

John D. Farrand and *Newman, Spalding & Phelps*, for respondent.

BARTHOLOMEW, J. This is an appeal from an order sustaining a demurrer to an answer, and we are all agreed that the order should be affirmed. Plaintiff brings an action of foreclosure, and declares as an indorsee of a promissory note executed by defendants in favor of the Fargo Loan Agency on November 1, 1892,

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and due in five years from date, for the sum of $600, with interest at 7 per cent. per annum, and exchange on New York; interest payable annually. This note was secured by a mortgage on real estate which provided that in case of default in the payment of interest the holder might declare the whole amount due and payable. The provision in the note for exchange on New York renders the note non-negotiable, under the decision of a majority of this court in *Flagg* v. *School Dist.*, 4 N. D. 30, 58 N. W. 499. The answer admits the execution of the note and mortgage, but seeks to set up a defense under chapter 184, Laws 1890, in force when the loan was made. The substance of the defense is contained in the allegations that on the date of the note defendants applied to the Fargo Loan Agency for a loan of $600 for a term of five years, with interest at the rate of 10 per cent. per annum, the loan to be secured by a mortgage on the real estate described in the complaint; that the Fargo Loan Agency accepted the application, and agreed to make the loan, but instead of making the loan in accordance with the agreement, said agency made the loan of $600 for five years, with interest at the rate of 7 per cent. per annum, as evidenced by certain coupon notes attached to the principal note, and required the same to be secured by mortgage, and at the same time required defendant to execute to it five separate notes for the sum of $18 each, due in one, two, three, four, and five years from date, with interest at the rate of 12 per cent. per annum after maturity, and required said last notes to be secured by a separate and second mortgage upon the same premises, which said mortgage recited that the consideration for said notes consisted of services performed by said Fargo Loan Agency for defendants, which said recital was false, and said notes in fact represented 3 per cent. per annum interest upon the amount of said loan. Defendants asked that plaintiff take nothing by the action, and that the note and mortgage declared upon be canceled and discharged. The demurrer was upon the ground that the answer did not state a defense or counterclaim to the cause of action stated in the complaint. Section 4, Ch. 184, Laws

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N. D. 1890, reads: "In all written contracts for the loan of money the exact amount agreed upon to be received for the use, by the borrower, shall be stated in the contract, and separately therefrom, the rate per cent. thereon of interest contracted to be charged, and if in any contract, either verbal or written, for the loan of money, the borrower receives a less sum than the principal sum so agreed upon and contracted to be loaned to and received by the borrower, the said contract shall be deemed to be usurious except as otherwise herein provided." Section 10 of the same act reads: "Whenever it shall satisfactorily appear to a court that any bond, bill, note, assurance, pledge, mortgage, contract, security, or other evidence of debt has been received in violation of the provisions of this act, the court shall declare the same to be void, and enjoin any proceedings thereon, and shall order the same to be canceled and delivered up." The answer was based upon these statutory provisions, and it is urged in its support that all of the documents as set forth in the answer were executed at one and the same time, and must be construed together as constituting the transaction between the parties; and when so construed they do not state the amount to be received by the borrower, "and separately therefrom the rate per cent. thereon of interest contracted to be charged." In other words, the original contract was for 10 per cent. interest, while the papers as executed express but 7 per cent. interest and 3 per cent. for services rendered. This is claimed to be a violation of section 4, above quoted, and that, therefore, under section 10, it was the duty of the court to declare the note and mortgage void, and order their cancellation. This contention is not satisfactory to this court, and for the following reasons: An analysis of section 4 shows it to consist of two principal provisions. The first covers the cases where the contract fails to separately and correctly state the rate of interest as agreed upon. Such is the case under consideration. A violation of this provision is not followed by any penalty or forfeiture, so far as section 4 is concerned. The second principal provision in the section covers the cases where some part of the

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principal is retained, and the borrower does not receive the full sum for which he contracted. A violation of this provision is declared by the section to be usurious, except as otherwise provided in the act. (The exceptions contained in the statute in no manner affect this case.) This whole statute is exceedingly harsh. It involves forfeiture of all money loaned, and creates liabilities for taking usuary that are severe in the extreme. We ought not to extend it, and never have intentionally extended it, beyond its strict letter. In the case of *Trust Co.* v. *Whithed*, 2 N. D. 82, 49 N. W. 318, the writer hereof used some language on page 91, 2 N. D., and page 318, 49 N. W., that should be limited. The case there under consideration was a clear violation of the second provision of said section 4. But the language used clearly denounces the penalty of usury for a violation of either provision. It was used without a critical examination of the section, and should have been limited to the provision violated in that case. But it is urged that the penalty for the violation of the first principal provision of said section 4 is to be found in section 10, and that under the latter section the violation here pleaded renders the contract void. We do not think section 10 was intended to declare any contract void that the statute had not previously declared to be usurious. Should we hold that it was the intention of the legislature by said section 10 to enable courts to declare contracts void that were not by the law made usurious, then said section 10 would be unconstitutional, as embodying a subject not included in the title of the act, which is as follows: "An act defining usury and the penalties for taking the same." If section 10 simply adds the penalty of cancellation to an usurious contract, it is clearly within the title; but if it enables a court to declare void a nonusurious contract, it is as clearly not within the title. It is our duty to give it a construction that will not render it unconstitutional if we are in any doubt. And indeed, we think section 10 has another and definite purpose. Under that section a party who has been induced to execute paper which the law declares usurious may go into a court of equity,

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and ask to have such paper declared void and canceled, without paying or tendering the amount equitably due. Without such section, as a condition to obtaining such relief, he would be required to do equity; or, in other words, to pay the amount of his debt, with legal interest. The value of the section, if this be its object, cannot be doubted. In *Scott* v. *Austin*, reported in 32 N. W. 89, and again at page 864, the Supreme Court of Minnesota construed a similar section in their usury law (of which ours is, in effect, a copy,) and reached the conclusion, after reargument and careful consideration, that the section gave a right of action in equity to cancel an usurious instrument without paying or offering to pay the amount equitably due with legal interest thereon. We are clear that such was the purpose of the section as used in our statute.

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

(67 N. W. Rep. 291.)

STATE *ex rel* SCOVIL *vs.* WM. S. MOORHOUSE.

Opinion filed April 24th, 1896.

Revised Code—Repeal of Revenue Law—District Assessors.

The broad language of the repealing act which went into effect with the Revised Codes must be so limited by the obvious purpose of the new revenue law as to leave unaffected those portions of chapter 132 of the Laws of 1890 as relate to the office of district assessors in unorganized townships.

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

Application by the State of North Dakota, on the relation of B. F. Scovil, against William S. Moorhouse, as auditor of the County of Burleigh, for mandamus. From a judgment denying the writ, plaintiff appeals.

Reversed.

John F. Cowan, Atty. Gen., for appellant.

Edward S. Allen, State's Atty., for respondent.

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CORLISS, J. This cause involves a question of great moment to the state. We are, in effect, called upon to decide whether there exists within this commonwealth any revenue law whatever. The particular point presented is whether there is any machinery for assessing property in this state situated in those portions of the state in which there are no organized townships. But it is obvious that, if the reveue law which went into operation on the 1st of last January has made no provision for the assessment of property in those portions of the state, it is wholly void, as violative of that provision of the constitution which requires that all property of the state shall be taxed by uniform rule, according to its true value in money, except where the constitution prescribes a different rule. Section 176. The exceptions referred to would not authorize the exemption of property merely because of its location in an unorganized township. The question, therefore, before us is whether there is any valid revenue law in this state at all. It comes before us on appeal from a final judment in mandamus proceeding instituted by relator to compel the defendant, as auditor of Burleigh County, to furnish him (the relator,) as assessor of the second assessor's district in Burleigh County, with the necessary notices and blanks to enable him to discharge his duties as such assessor. The defendant denies the right of the relator to compel him (the defendant) to furnish the relator these notices and blanks, basing his denial on the proposition that there is no longer any such office as that of district assessor in this state. The term for which relator was elected has not expired; and therefore he is clearly entitled to the relief sought, unless it is true that the law creating the office of district assessor has been repealed. The act creating this office is chapter 132 of the Laws of 1890. When we turn to the Revised Codes, we discover in them a general repealing statute, embracing many laws; and among the acts there enumerated as repealed is this chapter 132 of the laws of 1890. Were we furnished with no other light on this subject, we could not escape the conclusion that that section of this chapter which creates the office of

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district assessor, and provides for his election, etc., has been abrogated. But we must construe this blanket repealing clause in the light of the circumstances surrounding its enactment, and also in connection with other statutes passed at the same time as part of the general scheme of legislation of which this repealing statute was only a subordinate feature. It is evident that this repealing act was not specifically leveled at the abolition of the office of district assessor. The section of chapter 132 which relates to the office is one of more than a hundred sections of that chapter; and the only reference to the chapter itself in the repealing act is by use of the words and figures "chapter 132 of the Laws of 1890," buried in a mass of references to hundreds of other sections, chapters, and laws there declared to be repealed. To impute to the legislature an intent to repeal those parts of chapter 132 which provide for the office of district assessor, and regulate the election of such officer, etc., is to lay at its door the charge of enacting a law (the new revenue law) which could not be enforced in a large portion of the territory in which it is manifest that it was intended by the legislature that it should be operative. The most casual reading of this new revenue law makes it plain that the legislature proceeded on the theory that all the necessary machinery to assess property and levy and collect taxes in unorganized townships was entirely intact. Nearly every line of the revenue statute is a conclusive demonstration that it was not the purpose of the lawmaking power to render it impossible to assess property and collect taxes in large portions of territory of the state. The law proceeds on the theory, from its opening sentence to its last provision, that all property in the state not lawfully exempted from taxation shall be assessed by a legal assessor. In many sections of the act explicit reference is made to district assessors, showing clearly that it was never the purpose of the legislature to repeal that portion of chapter 132 which related to the office of district assessor. Under the provisions of the Laws of 1890, the district assessor has jurisdiction to assess in all those unorganized town-

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ships which lie within the same commissioner's district for which he was elected assessor. As contradistinguished from township districts, these assessors' districts are referred to as commissioner districts. In the following sections of the Revised Codes, these commissioner districts are distinctly recognized as existing, and the listing of property therein is specially provided for. Sections 1201, 1202, and 1203, Rev. Codes, read as follows: "The owner of range stock, including cattle, horses or sheep, or his agent, foreman or superintendent, shall list the same for purposes of assessment and taxation in the commissioner district or township in which he claims his home ranch for rounding and branding purposes, and where his herdsmen or employees are boarded and subsisted, regardless of where the cattle may range. If such owner of range stock, including horses, cattle or sheep, has at the time the assessment is made, no such home ranch, then such range stock shall be listed in the commissioner district or township in which the home ranch was situated at the last round-up and branding; provided, that any such stock, owned outside of this state, and ranging within this state, shall be assessed wherever and whenever found ranging within this state. When the home ranch of any owner of range stock is situated in an unorganized county of this state, such range stock shall be subject to taxation in the organized county to which it is attached for judicial purposes, and shall be listed and assessed by the assessor of the commissioner district or township lying in closest proximity to such home ranch." See, also, sections 1209 and 1212, Rev. Codes. In section 1191 both township and district assessors are named. But it is not on isolated provisions of the revenue law that we rest our decision. We hold that the purpose to keep alive the necessary machinery to enable property to be assessed and taxes to be collected in unorganized townships is so palpable that it must override the faint inference of a purpose to leave that territory wholly exempt from taxation, drawn from the fact that, in a vast mass of statutes enumerated as within the language of a repealing act, a brief reference to chapter 132 of

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the Laws of 1890 is found, without any particular reference to the section of that chapter which contains the provision relating to the office of district assessor, etc. It is obvious that the broad letter of this repealing act is in conflict with the whole spirit and purpose of the revenue law passed at the same time. As both cannot stand, it is obvious that we must give effect to that which expresses the true legislative purpose. It is too plain for argument that one of the great purposes of the legislation was to provide for the assessment of property throughout the entire state. To give effect to that purpose, we must limit the broad language of the repealing act, so that it will not defeat such purpose. Not having made provision in the new revenue law for the office of district assessor, and yet having clearly evinced a purpose that property in such territory should be assessed, and having in terms referred to that office and the district over which the jurisdiction of a district assessor extended, it does not admit of doubt that it was never intended by the legislature that those provisions of chapter 132 relating to the office of district assessor, etc., should be repealed. To reach the contrary conclusion would be to impute to the legislature a deliberate intention to pass an unconstitutional law, for its violation of the state constitution would be palpable if it left a portion of the territory of the state without any legislation authorizing the levy and collection of taxes therein. Moreover, we must not ignore the public mischief which would result from such a construction of the statute as would defeat taxation, not only in these unorganized townships, but throughout the entire state. In a doubtful case, such consideration should have great weight; but we do not regard this case as at all doubtful.

The decision of the New York court of appeals in *Smith* v. *People*, 47 N. Y. 330, is directly in point. The question before the court was whether certain portions of certain laws passed in 1853 and 1857 had been repealed. The repealing statute was broad enough in terms to embrace the whole of such laws. It was as comprehensive as the repealing law involved in the case at bar.

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On this subject the court said: "As there is no qualification or limitation annexed to the repealing clause, it is conceded that it is sufficient in terms to accomplish all that is claimed for it, and, literally interpreted, effectually abrogrates the laws of 1853 and 1857, reorganizing the criminal courts in the City of New York." But the court held that this sweeping provision of the repealing act must be limited, because other statutes made it manifest that it could not have been the purpose of the legislature wholly to abrogate these statutes, but on the contrary, it was the intent of that body to leave certain portions of them in force. Said the court: "The practical effect of a judgment giving full and literal effect to the repealing clause in the act of 1870 would be to annul all the proceedings in and judgments of both courts for the last two years, and the consequences would seriously affect the public as well as individuals. A statute should not be so construed as to work a public mischief, unless required by words of the most explicit and unequivocal import. *People* v. *Lambier*, 5 Denio, 9. In the construction of statutes, effect must be given to the intent of the legislature whenever it can be discerned, though such construction seem contrary to the letter of the statute. That intent must be primarily sought in the language of the statute; and if the words employed have a well understood meaning, are of themselves precise and unambiguous in most cases no more can be necessary than to expound them in their natural and ordinary sense. The words in such cases, ordinarily, best declare the intention of the legislature. Sussex Peerage Case, 11 Clark & F. 86; *Newall* v. *People*, 7 N. Y. 97; *McCluskey* v. *Cromwell*, 11 N. Y. 593. These rules are elementary, but it is equally well settled that words, absolute of themselves, and language the most broad and comprehensive, may be qualified and restricted by reference to other parts of the same statute in which they are used, and to the circumstances and facts existing at the time, and to which they relate or are applied. A literal interpretation of words in most common use, and having a well defined meaning as ordinarily used, would not unfrequently defeat, rather than accom-

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plish, the intent of the party using them. If, in reading a statute in connection with other statutes passed at or about the same time, a doubt exists as to the force and effect the legislature intended to give to particular terms,—that is, as to the meaning which it was intended they should bear and have in the connection in which they are used,—it is also competent to refer to the circumstances under which and the purposes for which a statute is passed, to ascertain the intent of the legislature. * * * The question whether a repeal of a prior statute, absolute in terms, can be limited in its operation and effect for any reason, has frequently arisen, and the decisions of the courts have been uniform that while the language of the repealing clause must be accepted as the expression of the will of the legislature, and effect given to it according to its terms, unless it appears, although the language of the appeal was general and unqualified, that it was intended to be used in a qualified or limited sense, that whenever that intent is discovered, effect must be given to it, as in the interpretation of other acts. *Rex* v. *Rogers*, 10 East, 569; *Warren* v. *Windle*, 3 East, 205. If the repeal of a statute is by express and positive terms, and there is no legitimate evidence in or out of the act of an intent to qualify and restrict the operation,—that is, no limitation or qualification, express or implied,—the only question is as to the effect of the repeal, and the rule is that, for all purposes, the law repealed is as if it had never existed. Miller's Case, 1 W. Bl. 451; *Butler* v. *Palmer*, 1 Hill, 324; *Maggs* v. *Hunt*, 4 Bing, 212; *Surtees* v. *Ellison*, 9 Barn. & C. 750. A clause in a statute purporting to repeal other statutes is subject to the same rules of interpretation as other enactments, and the intent must prevail over literal interpretation. One part of an act of the legislature may be referred to in aid of the interpretation of other parts of the same act. So, in case of doubt or uncertainty, acts in *pari materia*, passed before or after, and whether repealed or unrepealed, may be referred to in order to discern the intent of the legislature in the use of particular terms; and within the same rule, and the reason of it, contemporaneous

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legislation, although not precisely in *pari materia*, may be referred to for the same purpose. Statutes in *pari materia* relate to the same subject, the same person or thing, or the same class of persons or things, and are to be read together, for the reason that it is to be implied that a code of statutes relating to one subject is governed by the same spirit, and are intended to be harmonious and consistent. They are to be taken together as if they were one in law, as one statute. 1 Kent. Comm. 463; *Church* v. *Crocker*, 3 Mass. 21; *Mendon* v. *Worcester Co.*, 10 Pick. 235; *United Society* v. *Eagle Bank*, 7 Conn. 456; Bac. Abr. 'Statute,' I, 3; *McWilliams* v. *Adams*, 1 Macq. 120; *Rodgers* v. *Bradshaw*, 20 Johns. 735; *McCartee* v. *Society*, 9 Cow. 437. Statutes enacted at the same session of the legislature should receive a construction, if possible, which will give effect to each. They are within the reason of the rule governing the construction of statutes in *pari materia*. Each is supposed to speak the mind of the same legislature, and the words used in each should be qualified and restricted, if necessary, in their construction and effect, so as to give validity and effect to every other act passed at the same session." The court states its conclusion at page 341, in the following language: "The last act reflects light upon the first, and is a very significant indication that the legislature did not intend, by the comprehensive terms of repeal, to abrogate the organizing law of the criminal courts in New York, which had a place in the acts purporting in terms to be repealed, and did not suppose that the organization of these courts had been affected. Both acts can stand together by giving the repealing clause a qualified and restricted operation, in harmony with the evident intent of the legislature, and not otherwise." The principles which govern our decision in this case were recognized and applied by this court in *Trust Co.* v. *Whited*, 2 N. D. 82, (see pages 101 and 102 of the opinion,) 49 N. W. 318. The decisions in the New York case cited meet our full approval. To the same effect are *City of Janesville* v. *Markoe*, 18 Wis. 350; *Supervisors of Walworth Co.* v. *Village of Whitewater*, 17 Wis. 193. See, also, *State* v. *Miller*, 23 Wis. 634.

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The judgment of the District Court is reversed, and that court is directed to enter a judgment awarding a peremptory writ of mandamus. All concur.

(67 N. W. Rep. 140.)

M. W. DUNHAM *vs.* PETER L. PETERSON, *et al.*

Opinion filed April 24th, 1896.

Negotiable Note—Guaranty of Payment.

When the payee of a negotiable promissory note transfers it by indorsing thereon a guaranty of payment, the purchaser is an indorsee, within the rule protecting an innocent purchaser of such paper for value, and before maturity, against defenses good between the original parties.

Indorsee for Antecedent Debt Protected.

One who, in the usual course of business, takes such paper in payment of an antecedent debt, is a purchaser for value, within the spirit of the rule that the business world shall be protected in dealing with such paper.

Appeal from Ransom County Court; *Allen*, J.

Action by M. W. Dunham against Peter L. Peterson and others. Judgment for defendants, and plaintiff appeals.

Reversed.

C. E. Pierson and *Edward Engerud*, for appellant.

P. H. Rourke, for respondents.

CORLISS, J. The only serious question before us on this appeal is whether the indorsement by the payee of a negotiable note, upon such note of a contract of guaranty of payment at the time he negotiates it for value, destroys its negotiability, and thus renders it, in the hands of the purchaser, subject to all defenses. The notes in question were executed and delivered by defendants to A. H. Laughlin; and, before their maturity, they were transferred by him to the plaintiff. The consideration for the transfer was a credit by plaintiff upon a note held by him against Laughlin of the amount of these notes so transferred to him. At the time

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of such transfer, plaintiff was under a contract obligation to accept in payment such notes turned over to him by Laughlin as he (the plaintiff) should approve. Plaintiff testified that he approved these notes, and immediately indorsed the amount thereof with the amount of the other notes received and approved by him, upon the note he held against Laughlin, as a payment, to that extent, of such note. The indorsement thereon corroborated his testimony That these facts constitute plaintiff a purchaser for value cannot be doubted. 2 Am. and Eng. Enc. Law, 392; *Barker* v. *Lichtenberger*, (Neb.) 60 N. W. 79; *Insurance Co.* v. *Church*, 81 N. Y. 226; 1 Daniel, Neg. Inst. § 832. In consideration of the negotiation to him of these notes, be canceled to the extent of their face value the indebtedness he held against Laughlin. It is true, he secured, in place of Laughlin's obligation as maker, his liability as guarantor. But the two are not precisely equivalent. We are entirely satisfied that the facts show that plaintiff absolutely extinguished his claim against Laughlin on such note to the amount of the notes so received in payment as so much cash, in pursuance of his previous agreement to accept them as cash. Certainly, a creditor may agree to receive anything in payment; and, when the thing is accepted as so much money, the debt is to that extent extinguished. The creditor cannot thereafter repudiate his act. The only theory on which he can claim that there was in fact no payment is by establishing the fact that the thing accepted was worthless. This cannot be done in this case without assuming as the basis of this claim the postulate that the notes were subject to defenses, on the ground that plaintiff was not a purchaser for value. But this is the very point in controversy. If the plaintiff could not take such a position to defeat the fact of payment, the defendants cannot claim that he (the plaintiff) is not a purchaser for value. We do not care to place the decision on this branch of the case on the ground that one who takes negotiable paper merely as security for an antecedent debt is a purchaser for value. We think, on principle, this is the better rule. This doctrine prevails in

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England, and it has been adopted in most of the states of the Union. 1 Daniel, Neg. Inst. § § 831a, 831b; 2 Rand.. Com. Paper, § 465, note 6; *Rosemond* v. *Graham*, (Minn.) 56 N. W. 38; *Smith* v. *Biber*, (Me.) 19 Atl. 89. What, in the absence of any statute on the subject, would be decisive with us even if we were in that state of mind on this question described by the phrase "halting between two opinions," is the fact that in the Federal Courts this more universally accepted rule has become the law, by reason of the decision of the Federal Supreme Court in the case of *Railroad Co.* v. *National Bank*, 102 U. S. 14. There should be only one rule in this state, whether the litigant resort to the Federal Court or the state tribunals. But it is a serious question whether the legislature has not, by section 5130, Rev. Codes, settled this question against our view of the better doctrine on principal.

We are therefore brought to the question whether plaintiff's standing as an indorsee of these notes is destroyed by the form of the indorsement. Such indorsement was in the following words: "For value received, I hereby guaranty the within note, waiving notice of protest and demand." Beneath this guaranty the payee, Laughlin, signed his name In determining whether, under the facts of this case, plaintiff is an indorsee of these notes, we must fall back upon elementary principles, and especially must we keep in mind the foundation of the rule which exempted negotiable paper in the hands of a *bona fide* purchasar from equities existing against it in the hands of the payee. The assignee of an ordinary chose in action took it subject to all defenses. The reason for this rule was the defect in his title. The assignment did not transfer to him the legal title. It was only in equity that he was regarded as the owner. In a court of law he was obliged to sue in the name of the assignor, and on this account the assignment was without prejudice to defenses against the chose in action in the hands of the assignor. But a different rule has long prevailed with respect to negotiable paper. The necessities of commercial life impelled the courts to resort to the fiction that, when such an instrument was transferred, the legal title to

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it passed, so that the purchaser could sue on it in his own name, and therefore be unaffected by defenses against it in the hands of the former owner. No precise form of transfer was required to be adopted to pass the legal title, provided it was upon the paper itself. But the courts did insist that nothing should be done by the person negotiating it to affect the negotiable character of the paper. There must always be a transfer of the legal title, and such transfer must take such form as not to indicate a purpose to destroy the negotiable quality of the instrument. Accordingly, it has been held, and it is now the law, that the payee, if the note is not also payable to bearer, must indorse it; othewise, he manifests a purpose to assign the paper as a mere chose in action. Of course, the test is not whether, under existing laws, the legal title to a note is transferred, for this is now true as to all choses in action, whatever form the transfer of them assumes. The inquiry is twofold: First. Was the note so transferred as to pass the legal title to it at common law? Second. Does the manner of the transfer indicate a purpose to destroy the negotiable character of the instrument? The extent of the liability of the payee who indorses the note is not a decisive test. Indeed, it is no test at all. He may incur no liabilities whatever, as by indorsing without recourse, and yet in such a case the note has been negotiated to an indorsee within the law merchant, and the latter is protected as a *bona fide* purchaser if the other elements necessary to such protection exist. Indeed the payee need not indorse at all, to entitle the purchaser to protection, if the note be payable to bearer, or to the payee by name or bearer. *Teschler* v. *Merea*, (Ind. Sup.) 21 N. E. 316. This is also true after it has been indorsed generally by the person who is named as payee. His indorsee may, without himself indorsing it, transfer it, and cut off all defenses. On the other hand it is elementary that the indorser may enlarge his liability without destroying the right of his indorsee to protection as an innocent purchaser. By waiving demand and notice, he changes a conditional liability into an

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absolute one. Yet, although such a waiver is made, the indorsee can claim the same exemption from the interposition of desenses to the paper that he could have claimed had there been no waiver. It is therefore apparent that the inquiry whether one is an indorsee of negotiable paper does not depend upon the question whether the person negotiating it has incurred the precise obligation of an indorser. He may incur more liability, or less liability, or no liability at all; and yet the purchaser may be an indorsee, and protected as such. Nor is the form of the indorsement material. It is an indorsement, although it is in terms an assignment. This was held at an early time in England. *Richards* v. *Frankum*, 9 Car. & P. 221. And, with the exception of two states, it appears to be the law in this country. *Adams* v. *Blethen*, 66 Me. 19; *Davidson* v. *Powell*, (N. C.) 19 S. E. 601; *Sears* v. *Lantz*, 47 Iowa, 658; *Sands* v. *Wood*, 1 Iowa, 263; *Merrill* v. *Hurley*, (S. D.) 62 N. W. 958; *Bisbing* v. *Graham*, 53 Am. Dec. 510; *Halley* v. *Falconer*, 32 Ala. 536; *Duffy's Adm'r* v. *O'Conner*, 7 Baxt. 498; *Shelby* v. *Judd*, 24 Kan. 166; *Brotherton* v. *Street*, (Ind. Sup.) 24 N. E. 1068; *Hatch* v. *Barrett*, 34 Kan. 230, 8 Pac. 129; *Crosby* v *Roub*, 16 Wis. 616. See, *contra*, *Aniba* v. *Yeomans*, 39 Mich. 171; *Hatch* v. *Barret*, (Kan.) 8 Pac. 129.

The only argument against the proposition that such an indorsement constitutes an indorsement according to the law merchant is that, by expressing the contract of transfer which is always implied from the mere fact of indorsement, the negotiator of the paper has manifested a purpose to destroy the negotiable character of such paper. But the courts, with the two exceptions above noted, have refused to draw such an inference from the fact that an assignment in terms is written above the indorsement. On what principle, then, can it be said that the fact that a guaranty is written above the indorsement discloses a purpose to affect the negotiable character of the paper. Such a contract is an indorsement, and it is more. It is, indeed, under our statute, exactly equivalent to an indorsement with waiver of demand and notice. An indorser who is not entitled to insist upon

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demand and notice, or who, being so entitled, has been charged as an indorser, is a guarantor of the payment of the instrument. See Rev. Code, § § 4636, 4642, 4876, 4881. But, even if we were of opinion that his liability was different from that of an ordinary indorser,—even if we should conclude that in some respects his obligation was more, and in other particulars less, onerous than that of one who indorses in blank,—still the fact would remain that he had transferred the legal title to the paper in a mode sufficient to transfer such legal title according to principles of common law, and that he had not evinced a purpose to destroy the negotiable character of the paper. In such a case it would be true that he had indorsed it, notwithstanding the fact that he had so indorsed it as to alter his liability as an ordinary indorser. As we have already seen, the fact that the exact liability of an indorser is not incurred by one who transfers negotiable paper is not the true criterion whether the purchaser is an indorsee within the scope of the doctrine which throws about an indorsee a distinctive protection. One who is payee or is the holder of negotiable paper, and writes above his indorsement the contract of guaranty of payment, is an indorser with enlarged liability. It is on this ground that the decisions rest which hold that such a transfer of a negotiable instrument is an indorsement of it, within the purview of the rule which shields a *bona fide* indorsee against defenses good between the original parties. *Bank* v. *Haylen*, (Neb.) 16 N. W. 754; *Helmer* v. *Bank*, (Neb.) 44 N. W. 482; *Partridge* v. *Davis*, 20 Vt. 499; *Robinson* v. *Lair*, 31 Iowa, 9; *Buck* v. *Bank*, (Neb.) 45 N. W. 776; *Van Zant* v. *Arnold*, 31 Ga. 210; *Judson* v. *Gookwin*, 37 Ill. 286; *Heaton* v. *Hulbert*, 3 Scam. 489; *Childs* v. *Davidson*, 38 Ill. 437; *Heard* v. *Bank*, 8 Neb. 10; 2 Daniel, Neg. Inst. § 1781. We are aware that authorities can be found on the other side of the question. *Trust Co.* v. *National Bank*, 101 U. S. 70; *Bank* v *Walker*, 55 Fed. 399; *Tuttle* v. *Bartholomew*, 12 Metc. (Mass.) 454; *Lamourieux* v. *Hewit*, 5 Wend. 307; *Belcher* v. *Smith*, 7 Cush. 482; *Taylor* v. *Binney*, 7 Mass. 481. But Massachusetts at one time

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inclined to the doctrine we regard as sound. *Upham* v. *Prince*, 12 Mass. 14; *Balkely* v. *Grant*, 6 Mass. 386.

In view of the fact that it has long been the usage in this state of persons and corporations engaged in the business of purchasing and discounting commercial paper to have the indorser sign a guaranty of payment, and in view of the further fact that the legal effect of such an indorsement is precisely the same as that of a simple indorsement with waiver of demand and notice, we would regard it as a very unwise and entirely unjustifiable decision to hold that such a negotiation of such paper was not an indorsement of it within the law merchant. That a guaranty indorsed by a payee on the paper itself is equivalent to an indorsement with waiver is clear under our statutes, and also independently of them, upon common-law principles. Said the court in *Brown* v. *Curtiss*, 2 N. Y. 225, at page 230: "The direct engagement of the indorser of a negotiable note, and of the guarantor of the payment of a note, whether negotiable or not, is the same. Both undertake that the maker will pay the amount when it shall become due. If there is a failure in such payment, both contracts are broken. Ordinarily, upon the breach of a contract, the party bound for its performance immediately becomes liable for the consequent damages. In the case of the indorser of a negotiable promissory note, however, the liability does not become absolute, unless due notice of nonpayment is given to the party whom it is intended to charge. This is not because the indorser has thus stipulated in terms, but it is a condition annexed by the rules of the commercial law. In the case of a guarantor there is nothing to exempt him from the ordinary liability of parties who have broken their contracts, which is direct, and not conditional. No condition requiring notice of nonpayment is inserted in the contract, nor is any inferred by any rule of law." In our judgment, this mooted question, whether the fact that, in addition to indorsing the paper, the person who negotiates it writes above his indorsement a special contract, takes from the act of indorsing the legal character of an indorse-

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ment of the instrument, was intended to be put at rest in this state by section 4868, Rev. Codes. This section provides as follows: "One who writes his name upon a negotiable instrument, otherwise than as a maker or acceptor, and delivers it with his name thereon to another person, is called an indorser, and his act is called indorsement." It will not do to assert that this section was passed to settle the question whether one out of the chain of title who indorses negotiable paper before delivering it to the payee, to give it credit, is liable as indorser or guarantor or as joint maker. Section 4877, *Id.*, specifically relates to the subject. It declares that "one who indorses a negotiable instrument before it is delivered to the payee is liable to the payee thereon as an indorser." The only other purpose it could be enacted for, unless we assume it to be a purposeless enactment, was to declare that the act of writing his name upon negotiable paper by the holder thereof, as part of the negotiation thereof to a third person, should be an indorsement, despite the fact that, in connection with the act of indorsement, the indorser has, by special contract, restricted or enlarged his liability as indorser. We think this section is limited to the indorsement by the holder of the paper as part of the act of negotiation thereof. When these facts exist, the mere writing of a special contract above his name will not affect the character of his act as an indorsement. It is an indorsement, nevertheless. We are of opinion that the plaintiff was entitled to protection as a *bona fide* purchaser of negotiable paper, and that, therefore, it was error for the court to permit the defendant to prove a defense good as against the maker.

For this error, the judgment is reversed, and a new trial is ordered. All concur.

(67 N. W. Rep. 293.)

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F. C. MYRICK, *et al vs.* GEORGE H. MCCABE.

Opinion filed April 25th, 1896.

Removal of Sheriff—Demurrer to Petition—Appeal.

Section 7838 of the Revised Codes considered and construed. Said section creates a remedy, and authorizes a proceeding which is summary in its nature, and of a character peculiar to itself. The statute which creates the remedy also establishes the practice which governs the proceeding to obtain the remedy. The statute does not contemplate that the proceeding shall be delayed by appeals from intermediate orders or rulings, and does not authorize any appeal before the entry of judgment. Accordingly, *held*, that an attempted appeal to this court by the accused from an order of the District Court overruling a demurrer to the written accusation will not lie. Such appeal is dismissed.

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

Application by F. C. Myrick and J. D. Gordon for the removal of George H. McCabe from the office of sheriff of Pembina County. From an order overruling the demurrer of the defendant, he appeals.

Dismissed.

Cochrane & Feetham, *J. D. Stack*, and *W. J. Kneeshaw*, for appellant.

N. C. Young, *State's Atty.*, for respondent.

WALLIN, C. J. This is a proceeding for the removal of the appellant from the office of sheriff of Pembina County, and was instituted under the provisions of section 7838 of the Revised Codes, by a written and verified accusation, made by one F. C. Myrick and one J. D. Gordon, accusing the appellant of charging and collecting illegal fees as such sheriff, and of being guilty of other official misconduct. The written accusation was presented to the District Court, whereupon the appellant was cited before that court to answer the same. The appellant appeared by counsel in the trial court, for the special purpose of objecting to the jurisdiction of that court. After hearing counsel, the court entered an order overruling said objection, to which ruling an exception was entered. Appellant then moved the court below

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to strike out the charges and specifications embodied in said written accusation, which motion was denied, and the appellant excepted to the ruling. The appellant then filed a demurrer to said accusation, in writing, basing the same upon various grounds, which were detailed in the demurrer After hearing counsel, the District Court ordered that the demurrer be overruled, to which order appellant excepted. The record further shows that appellant having, through his counsel, in open court, given notice of his attention to appeal to the Supreme Court from the orders above mentioned, the trial court continued the hearing of the proceeding until such time as this court should pass upon the law questions presented upon the record. The case is sought to be brought into this court by an appeal from the order overruling the demurrer.

In our opinion, the appeal will not lie. It is elementary that the right of appeal is statutory. No such right exists at common law, and hence no case can be reviewed by an appeal to a court of superior jurisdiction, unless some statute gives the right either in express terms or by necessary implication. In this proceeding, there is no statute which allows an appeal from an order overruling a demurrer. In fact the statute itself contains no provision which, in terms, permits a demurrer to be interposed to the written accusation. The accused is, in terms, required to "answer" the written accusation, a copy of which is served upon him by the state's attorney. The statute makes no reference to a demurrer or to any of the pleadings named in a civil action, save only an answer to the accusation. On the contrary, the enactment throughout distinctly reveals a legislative purpose to make this remedy summary in all its features. A demurrer raises an issue of law, and the trial of such an issue, if regularly brought on, would at least involve the delay accasioned by a notice. In view of the manifest purpose of the statute, it is to say the least, doubtful whether it contemplates the use of the demurrer either to the accusation or to the answer thereto filed by the accused. However this may be, it is certain that the

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statute nowhere grants the right of appeal from an order either allowing or overruling a demurrer. If the law regulating appeals from orders made upon demurrers interposed to the various pleadings in use in civil actions is to be imported into this statute by construction, it must follow that the whole law regulating such appeals must be imported, including the right to appeal from an order allowing or overruling a demurrer to the answer of the accused. Such a construction would be without any warrant in the language used in the statute, and would, in its practical effect, operate to defeat the obvious purpose of the legislature to afford a summary method of removing certain officers from office, for reasons stated in the statute. The statute creating this remedy, which is in addition to all other remedies for the removal of incumbents from office, after providing for a speedy trial of the accused and the entry of judgment, proceeds as follows: "A statement of the case may be settled and an appeal taken as provided by law in a civil action." From this language it appears that a right of appeal is in terms given by the same statute which creates the remedy, and it is our opinion that such right is and must be limited by the language which creates the right. The appeal can be taken after judgment, and no other appeal is mentioned. From this we think that it was the legislative purpose to restrict such right to one appeal, and that such appeal can be taken only after the entry of judgment. This construction is in harmony with the obvious legislative purpose, and the opposite view would, as we have seen, lead to intolerable delays in a proceeding which must be expeditious in order to be beneficial in its operation. There is a statement of the case in terms provided for. This, in our opinion, will amply protect an officer against erroneous rulings in the trial court, whether made upon objections to the preliminary papers, or arising at the trial, or upon the evidence. In this respect the statute is assimilated to the practice which prevails in Federal Courts when sitting in equity cases. In equity cases, in such courts, no appeal can be had upon interlocutory orders; but, after a final decree, an appeal

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will lie, and the court reviewing the case may then pass upon all errors appearing upon the record. We deem it unnecessary to consider or determine whether the remedy we are discussing is or is not strictly a "special proceeding," within the meaning of that phrase as it is employed in the statute. If the proceeding should be classified as a special proceeding, because it is not a civil action,—a point not decided,—we should still regard the remedy as a special proceeding in a peculiar and limited sense. It is a remedy in which the legislature has seen fit to provide a special practice which governs in such proceeding only, and is not elsewhere used either in civil actions or in special proceedings, strictly so called. The legislature, in creating this remedy, has seen fit to borrow a few features only of the procedure which governs in civil actions; but the whole of such procedure has not been incorporated in this statute, nor can we find any support in the statute for the theory that an appeal may be taken upon any intermediate orders or rulings which a trial court may make prior to the entry of final judgment.

It follows from the conclusions we have reached in the case that we are not in a position to consider or decide any of the questions determined below. Having no jurisdiction to consider the case upon its merits, our duty is simply to direct the dismissal of the appeal, and an order to that effect will be entered.

We do not deem it advisable or proper to express any views we may have upon the merits of the law questions arising upon the record, despite the fact that we have been requested to do so. Having no jurisdiction to pronounce an authoritative decision, any views we might express upon the merits would be simply advisory, and would not be binding either upon the trial court or upon this court if the case should again reach this court after a trial below.

The appeal is dismissed. All concur.

(67 N. W. Rep. 143.)

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E. D. SMITH *vs.* M. NICHOLSON, *et al.*

Opinion filed April 25th, 1896.

Summons—When Issued.

Under section 4993, Comp. Laws (section 5354, Rev. Codes,) a summons is "issued" when it is duly drawn and signed with the intention that it be served, even though it yet remained in the hands of plaintiff's attorney.

Right to Answer After Default.

When, under Subd. 5, § 4900, Comp. Laws (section 5260, Rev. Codes,) application is made by a party on whom service has been made by publication before judgment, but after he is in default, for leave to serve an answer and defend in the case, when the court holds that sufficient cause has been shown, the right of such party to defend against the claim of plaintiff and the whole thereof is absolute.

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

Action by E. Delafield Smith against Malcolm Nicholson and Margaret Nicholson. From an order refusing to discharge attachment, and from a judgment for plaintiff, defendants appeal. Reversed.

S. L. Glaspell and *Glaspell & Ellsworth*, for appellants.

Fredus Baldwin, for respondent.

BARTHOLOMEW, J. This action was based upon promissory notes executed by the defendants in favor of plaintiff. It was aided by attachment. The service was by publication. Defendants appeared specially, and moved to discharge the attachment. The court denied this motion, and this made the ground of the first assignment of error. It is urged that the writ of attachment was prematurely issued, in that, when the clerk issued the writ, no summons had been issued in the case. The summons was dated November 1, 1893, and was in due and proper form and signed by plaintiff's attorneys. The writ of attachment was issued November 3, 1893. The return of the sheriff of the proper county shows that he received the summons for service on November 4, 1893. On these facts it is claimed that the summons was not issued at the time the clerk issued the warrant of attach-

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ment. Our statutes upon this subject, as found in the Compiled Laws, in force when this action was commenced, read as follows: "Section 4858. An action is commenced as to each defendant when the summons is served on him, or on a co-defendant who is a joint contractor or otherwise united in interest with him. An attempt to commence an action is deemed equivalent to the commencement thereof, when the summons is delivered, with the intent that it shall be actually served, to the sheriff or other officer of the county in which the defendants, or one of them, usually or last resided." Section 4892 reads: "Civil actions in the courts of this state shall be commenced by the service of a summons." Section 4993 specifies the actions in which and circumstances under which a writ of attachment may issue, and provides that "the plaintiff at the time of issuing the summons or at any time thereafter may have the property of such defendant or corporation attached, * * * and for the purpose of this section an action shall be deemed commenced when the summons is issued." In this case the writ of attachment was issued November 3, 1893. Was the summons which was drawn and signed November 1, 1893, "issued" prior to its delivery to the sheriff on November 4, 1893? To our minds, it seems clear that it was the legislative purpose in said section 4993 to declare an action in the cases therein specified to be commenced by other and different acts than such as were required to commence actions generally; otherwise it is fair to presume that the same language would have been used. So clear a diffence in language unmistakably shows a difference in purpose. If that summons was not "issued" until its delivery to the officer, then the case was sufficiently covered by sections 4858 and 4892, and there is no force in the special provision found in section 4993. We do not think the statute can be so construed. Section 4899, Comp. Laws, reads: "The summons may be served by the sheriff of the county where the defendant may be found, or by any other person not a party to the action." Quotations from two authorities will fully illustrate our views, and the reasons therefor. In *White* v.

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Johnson, 40 Pac. 511-516, the Supreme Court of Oregon says: "A summons may be said to have issued in an action commenced in the circuit or county courts of this state when it is made out and signed by the plaintiff or his attorney, and placed in the hands of the sheriff with the intention that it be served upon the defendant. It is difficult to see how anything less than this would constitute an issuance of a summons. The statute requires that the summons shall be served by the sheriff, and without a delivery to him for service such instrument is not yet endowed with vitality for any purpose." The case of *Mills* v. *Corbett*, 8 How. Prac. 500, was decided under statutes practically identical with ours. In that case an attachment issued while the summons was yet in the hands of plaintiff's attorney, and the same objection was made as here. The court said: "Had it been intended that the summons could be delivered to the sheriff, in order to warrant the attachment of the defendant's property, under the provisions of the 227th section, it may well be supposed that the same terms would have been employed to express such intention as are used in the 99th section. There it is provided that for the purposes specified the summons must be delivered to the sheriff, while to justify an attachment it is declared to be enough that the summons is 'issued.' Now, as the summons may be served by another person as well as the sheriff, I do not feel authorized to construe the word 'issued,' as used in the 227th section, as meaning the same thing as 'delivered to the sheriff,' in the 99th section. I think it is enough that the summons is made out and is ready for service." In the case at bar the summons was completed. It was intended that it should be served. It was in the hands of a party who had authority to serve it. We think it had vitality, and that it was "issued," and the action commenced, within the terms of section 4993, Comp. Laws.

The filing of the affidavit and bond for attachment is dated November 4, 1893, but the record shows without dispute that they were presented to the clerk on November 3d, and before he issued the writ of attachment. This was sufficient. In law they

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were filed from the time they were presented to the clerk for the purpose of filing. It is urged also that the affidavit is indefinite because it uses the word "defendant" in the singular number while the writ is prayed and was issued against the property of both defendants. It is true that the affidavit does not specify which defendant in terms, but it uses the masculine personal pronoun in referring to the defendant. The bond run to Malcolm Nicholson only, and the attachment was levied only upon his property. He cannot claim that he is not sufficiently identified in the affidavit, and, as no property of Margaret Nicholson had been attached, she had no standing to urge the discharge of the writ. No attack upon the writ of attachment was made on the ground that the debt was not due, and no showing of that kind was made, and the point cannot be considered in this connection. The motion to discharge the attachment was properly denied.

On December 10, 1894, more than a year after the case was commenced, a general appearance for defendants was served upon plaintiff's counsel by the attorney who had made the special appearance, and a copy of the complaint demanded. This notice was returned on the same day, for the reason, as stated, that defendants were already in default. On December 18, 1894, plaintiff served notice upon the attorney for defendants of an application for judgment, and on December 28th, pursuant to such notice, judgment was ordered for $2,495.74 and costs. On January 31, 1895, the defendants appeared before the court by their attorney, plaintiff also appearing by his attorney, and moved the court to set aside the judgment, and that the defendants be permitted to have a new trial; and as a ground therefor alleged that "there is no cause of action stated in the complaint against defendant, in that the indebtedness is not yet due, and the judgment herein rendered is premature." This motion was granted on April 13, 1895. The complaint alleged the execution of five promissory notes by defendant in favor of plaintiff for the sum of $666.67, each dated August 12, 1891, bearing 6 per cent. interest, payable annually, the first note maturing January 1, 1894,

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and the others at intervals of one year after that date. It also set forth the giving of a mortgage to secure said notes, containing a provision that in case of any default in payment the plaintiff might declare the whole sum due. It furthermore stated that default was made in the payment of the interest due August 12, 1893, and that plaintiff thereupon declared the whole sum due, and proceeded to foreclose the mortgage, and realized thereon a certain sum, which was applied in payment of the indebtedness, and judgment was asked for the balance. It will be observed that the amount realized on the foreclosure was more than sufficient to pay all accrued interest and the note that matured by its terms prior to the rendition of judgment on December 28, 1894. The ruling of the court in holding that the balance was not due under the provision in the mortgage is not before us for review. We must accept it as the law of this case, without expressing any opinion on the point.

After the judgment was set aside, and on April 20th, 1895, the attorney for the defendants made application to be allowed to answer in the case, and presented to the court an affidavit of merits, and his proposed answer. This application was doubtless made under the following language in Subd. 5, § 4900, Comp. Laws: "The defendant, against whom publication is ordered, 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 against whom publication is ordered, or his representatives, may, in like manner, upon good cause shown, be allowed to defend after judgment, or at any time within one year after notice thereof, and within seven years after its rendition, on such terms as may be just." The judgment having been previously set aside unconditionally, the case stood as though no judgment had been entered. It was, therefore, an application by defendants against whom publication had been ordered for leave to defend before judgment. In such case, where there is sufficient cause shown, the right of the defendants to come in and defend is absolute, and no

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terms can be imposed, as is the case where the application is made after judgment. The court, by order, permitted the defendants to defend as to a portion of plaintiff's claim; but, as the note maturing on January 1, 1895, had become due in the meantime, the court ordered judgment absolute for the amount due upon said note, and permitted a defense only as to the remaining notes. There is some confusion of dates in the abstract. While it is stated that the motion to set aside the original judgment was granted on April 13, 1895, in a subsequent portion of the abstract we find a formal order setting aside said judgment, dated June 29, 1895, and the same order directs judgment for the amount then due. But the application to be permitted to defend was made April 20, 1895; so, whether the judgment had then been vacated or was not vacated until June 29th is perhaps not very material. In the former case no judgment existed when the application to defend was made. In the latter the judgment was vacated in response to a prior motion before the application to be allowed to defend was ruled upon; so that in either case the application must be treated as an application before judgment. As the court allowed the defendants to defend as to the notes which the court held to be not due at the time of the application, we must hold that there was "sufficient cause shown," as no exception was taken to such ruling, and no complaint thereon is made, either in oral argument or otherwise. But the moment there was sufficient cause shown, then defendants' right to defend against the claim of plaintiff, and the whole thereof, became absolute, and could be burdened with no terms or conditions. From this it follows that the entry of judgment for the amount that the court held to be due at the time the application to be let in to defend was made was error, and such judgment must be reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed. All concur.

(67 N. W. Rep. 296.)

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NORTHWESTERN CORDAGE CO. *vs.* D. E. RICE.

Opinion filed April 25th, 1896.

Sale—Implied Warranty.

When, in response to an order for an article described in a particular way by the purchaser, the seller delivers an article of that general nature, but not fully corresponding with such description, the law regards his act as equivalent to a sale of such article by the particular description set forth in the order, and he is therefore considered to have warranted that it corresponded to such description. Accordingly, *held*, that where the purchaser had ordered pure Manilla twine, and the seller assumed to fill the order, he must be deemed to have warranted that the article delivered was in fact pure Manilla twine.

Waiver—Question for Jury.

The acceptance by the purchaser of an article which does not correspond to the warranty, with knowledge of the defect, does not, as a matter of law, bar his right to rely upon the warranty. It is a circumstance to go to the jury, on the question whether there was a breach, and possibly whether the purchaser has not waived his right to insist upon damages for it. The giving by the purchaser of notes for the purchase price, with knowledge of the facts, does not prejudice his rights, where he expressly reserves his right to insist upon his claim for damages, and gives the notes with the understanding that such claim will be recognized by the seller.

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

Action by the Northwestern Cordage Company against D. E. Rice. From a judgment for plaintiff, defendant appeals.

Reversed.

McCumber & Bogart, for appellant.

The oral agreement to allow a rebate for damages was valid and did not vary the terms of the notes. *Brayley* v. *Henry*, 12 Pac. Rep. 621; *Maltz* v. *Fletcher*, 18 N. W. Rep. 228. Such an agreement as is contended for may be shown. *Dickens* v. *Morgan*, 7 N. W. Rep. 145; *Buscher* v. *Knapp*, 8 N. E. Rep. 263; *Staab* v. *Ortiz*, 1 Pac. Rep. 857. The note in suit was a renewal of the note given for the purchase price of the twine and defendant had the same right to counterclaim that he would have had against the original note. *Osborne & Co.* v. *Marks*, 33 Minn. 56. When the defendant ordered "pure Manilla," plaintiff impliedly

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warranted that what it would send should be pure Manilla. The defendant had a right to retain the goods or to return them and recoup in damages. 2 Benj. on Sales, 1145 and 844, note 24. A sale by description is upon condition that the thing sold answers the description. 2 Benj. on Sales, 799, note 32; *Morehouse* v. *Comstock*, 42 Wis. 626; 2 Rice on Ev. 1317, and defendant can recoup damages for breach of the implied warranty. *Ottawa Bottling & Flint Glass Co.* v. *Gunther*, 31 Fed. Rep. 208; *Renard* v. *Peck*, 2 Hilt, 1375, cited in 2 Estees Pleading and Forms, 532. The words "pure Manilla" were not merely descriptive of the article sold to identify it, but were used for the purpose of describing its quality. *Hawkius* v. *Pemberton*, 51 N. Y. 206; *Osgood* v. *Lewis*, 18 Am. Dec. 317; 28 Am. and Eng. Enc. L. Subject "warranty."

Curtiss Sweigle, (*Morphy*, *Ewing*, *Gilbert & Ewing*, of counsel,) for respondent.

Parole evidence is inadmissable to show a parol understanding, at the time a promissory note was executed, that if the maker should assign for the benefit of creditors that the payee should file his claim with the assignee and execute a release to the maker. *Harrison* v. *Morrison*, 39 Minn. 319. A contract in writing can be altered only by a contract in writing or by executed oral agreement. § 3593, Comp. Laws. The burden of proof is upon defendant to show to what extent the consideration failed. *Bisbee* v. *Toeinus*, 26 Minn. 165.

CORLISS, J. Defendant ordered of the plaintiff 7,000 pounds of pure Manilla twine. Plaintiff, acting on this order shipped to defendant a lot of twine, which the evidence tends to prove was not pure Manilla twine, but an inferior article, worth much less in the market. Defendant having been sued upon the notes given for the puachase price of this twine, he interposed as a counterclaim an alleged cause of action founded upon breach of warranty. On the trial the District Judge directed a verdict in favor of the plaintiff. Defendant appeals.

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At the outset, we are required to determine whether, in fact, there was a warranty. It is true that the plaintiff did not, in terms, warrant that the twine sold by it to defendant was pure Manilla twine. Indeed, it made no representations whatever in written instrument, or by oral statement. But, when it accepted from defendant an order for pure Manilla twine, it, in contemplation of law, agreed to sell defendant an article answering to that description. That a sale of an article by a particular description constitutes a warranty that the article answers to that description, is well settled. Benj. Sales, pp. 619-622, and cases cited; *Brigg* v. *Hilton*, 99 N. Y. 517, 3 N. E. 51; *Dounce* v. *Dow*, 64 N. Y. 411; *Wolcott* v. *Mount*, 36 N. J. Law, 262; *Canning Co.* v. *Metzger*, 118 N. Y. 260, 23 N. E. 372; *White* v. *Miller*, 71 N. Y. 118; *Lewis* v. *Rountree*, 78 N. C. 323; *Hastings* v. *Lovering*, 2 Pick. 214; *Forcheimer* v. *Stewart*, 65 Iowa, 593, 22 N. W. 886; 28 Am. and Eng. Enc. Law, p. 776; *Gould* v. *Stein*, 149 Mass. 570, 22 N. E. 47; *Love* v. *Miller*, 104 N. C. 582, 10 S. E. 685; *Morse* v. *Moore*, (Me.) 22 Atl. 362. Said the court in *Gould* v. *Stein*: "The general rule is familiar and admitted, that a sale of goods by particular description imports a warranty that the goods are of that description."

We cannot say, under the facts of this case, that the defendant, as a matter of law, has waived his right to rely upon the warranty, The twine delivered was Manilla twine, but it was not pure Manilla. It is probable that a special examination of it before acceptance would have resulted in the discovery that it was not as warranted. But the case is not one of the failure of the vendor to deliver any article of the character of that ordered. It was not the purchase of twine, followed by the delivery of some other article. We hold that under the facts of this case the defendant cannot be deemed, as a matter of law, to have waived his right to rely upon the warranty. It is impossible to lay down a rule on this subject which can be readily applied to the varied facts of different cases. Cases may arise where it is apparent that the purchaser could not have relied on the warranty when he accepted

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the goods, or that he has waived his right to insist upon such warranty. But we think it would be an extremely unjust rule to interpret as an implied waiver the conduct of the purchaser in receiving the goods which do not exactly correspond to the warranty, merely because he might, by examination, have discovered the defect. It often happens that the purchaser is so situated that it is necessary for him to accept the article in its defective condition. It would indeed be singular that one who had placed him in this position should be allowed to escape liability on his contract of warranty. In many cases the inference of a purpose to rely upon the warranty is stronger than the inference of a purpose to pay the price of a good article for a defective one. In the case at bar the jury would have been justified in finding that defendant could not, without particular examination, have discovered that the twine was not pure Manilla. In favor of one who has warranted an article, the purchaser does not owe the duty of careful inspection. He may rely on the warranty. There is much confusion in the authorities. This is the consequence of too much refinement in reasoning, and the making of many nice distinctions. The law on this subject should be adjusted to the needs of the business world, and be made as simple as possible. Without attempting to anticipate the exceptions to the general rule which in the future it may be found necessary to establish, we believe it to be in the interests of justice, and to fairly express the sense of business men upon the subject, that whatever form a warranty assumes, if there is in fact a warranty, the mere acceptance of the property will not, as a matter of law, bar a recovery for breach of the warranty, although an inspection of the property would have led to a discovery of the breach. Nor will actual knowledge of the defective condition of the thing delivered necessarily preclude a reliance upon the warranty. All the facts are to be laid before the jury, to the end that they may determine whether the purchaser relied on the warranty, and whether he has waived his right to take advantage of its breach. *Gould* v. *Stein*, 149 Mass.

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570, 22 N. E. 47; *English* v. *Commission Co.*, 48 Fed. 196; *Lewis* v. *Rountree*, 78 N. C. 323; *Best* v. *Flint*, 58 Vt. 543, 5 Atl. 192; *Polhemus* v. *Heiman*, 45 Cal. 573; *Coal Co.* v. *Bradley*, (Wash.) 27 Pac. 454; *Hege* v. *Newsom*, 96 Ind. 431; *English* v. *Commission Co.*, 6 C. C. A. 416, 57 Fed. 451; 2 Benj. Sales (6th Am. Ed.) p. 856, note 29; *Daylor* v. *Hooglund*, 39 Ohio St. 671; *Holloway* v. *Jacoby*, 120 Pa. St. 583, 15 Atl. 487; *Parks* v. *Tool Co.*, 54 N. Y. 586; *Zabriskie* v. *Railroad Co.*, 131 N. Y. 72, 29 N. E. 1006; *Morse* v. *Moore*, (Me.) 22 Atl. 362; *Canning Co.* v. *Metzger*, 118 N. Y. 260, 23 N. E. 374. In *Morse* v. *Moore*, (Me.) 22 Atl. 362,—the best considered case to be found on the point in the books,—the court say: "The fact of acceptance, however, as a matter of evidence, may have great weight on the question of satisfactory or sufficient performance. In the first place, it raises considerable presumption that the article delivered actually corresponded with the agreement. In the next place, it is some evidence of a waiver of any defect of quality, even if the article did not so correspond,—evidence of more or less force, according to the circumstances of the case. If the goods be accepted without objection at the time, or within a reasonable time afterwards, the evidence of waiver, unless explained, might be considered conclusive. But if, on the other hand, objection is made at the time, and the vendor notified of the defect, and the defects are material, the inference of waiver would be altogether repelled. But acceptance accompanied by silence is not necessarily a waiver. The law permits explanation, and seeks to know the circumstances which induced acceptance. It might be that the buyer was not competent to act upon his own judgment, or had no opportunity to do so, or declined to do so as a matter of expediency; placing his dependence mainly, as he has a right to do, upon the warranty of the seller. Upon this question the facts are generally for the jury, under the direction of the court." In *English* v. *Commission Co.*, 6 C. C. A. 416, 57 Fed. 451, the court say, at page 456, 57 Fed., page 416, 6 C. C. A.: "There has been some controversy in the courts as to the right of the purchaser to accept the goods and rely upon the

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warranty; some of the authorities holding that where the sale is executory, and the goods, upon arrival at the place of delivery, are found, upon examination, to be unsound, the purchaser must immediately return them to the vendor, or give him notice to take them back, and thereby rescind the contract, or he will be presumed to have acquiesced in the quality of the goods. But the great weight of authority, as well as reason, is now, we think, well settled, that, in cases of this kind and character, if the goods upon arrival at the place of delivery are found to be unmerchantable, in whole or in part, the vendee has the option either to reject them, or receive them and rely upon the warranty; and if there has been no waiver of the right, he may bring an action against the vendor to recover the damages for a breach of the warranty, or set up a counterclaim for such damages in an action brought by the vendor for the purchase price of the goods." There is norhing in the decisions of this court conflicting with our views in this case.

It is claimed by plaintiff and defendant, by renewing the notes given by him for the purchase price of the twine, waived his right to recoup damages for breach of the warranty. But it is evident that, if a cause of action once existed in his favor for damages, the mere giving of renewal notes would not, of itself, extinguish that cause of action. Even payment of the purchase price would not have that effect. *Gilmore* v. *Williams*, (Mass.) 38 N. E. 976. The circumstance that a purchaser had given his note, or had paid for the property, with full knowledge of the facts, would generally be persuasive—and might, unexplained, be conclusive—evidence that there was in fact no breach of warranty, or possibly that the purchaser had waived his right. We do not, however, wish to be undestood as holding that a mere waiver by implication, without consideration, would necessarily operate to defeat the claim for damages. But the purchaser might negative the presumption of waiver, if such an act could create such a presumption, by showing that, as a matter of fact, he distinctly asserted his right to rely upon his claim for damages. In the

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case at bar it appears that the new notes were given at the solicitation of the plaintiff s agent, and on his promise that defendant should be allowed his damages. We do not say that a cause of action can be predicated on this arrangement. Serious questions of the extent of the agent's authority, and of the contradiction of a written contract by parol evidence, would have to be met, before we could decide the case on that theory. But the evidence was certainly competent to explain the circumstances surrounding the giving of the new notes, to the end that defendant might rebut any possible inference from that fact unfavorable to his claim for damages. The trial court should have submitted the quesion of breach of warranty to the jury, with proper instructions. For the error of the court in refusing to do so, and in directing a verdict for plaintiff, the judgment is reversed, and a new trial is ordered. All concur.

(67 N. W. Rep. 298.)

C. A. CHRISTIANSON, *et al vs.* THE FARMERS' WAREHOUSE ASS'N.

Opinion filed April 30th, 1896.

Trial De Novo in Supreme Court—Newman Law Constitutional.

This court has original jurisdiction only in the excepted cases mentioned in the constitution. But chapter 82, Sess. Laws 1893, which provides that all cases tried below by the court shall on appeal be tried anew in this court, and final judgment rendered thereon, does not require this court to perform any functions that do not pertain to appellate jurisdiction, and said chapter is not therefore a violation of the constitutional provisions conferring appellate jurisdiction only upon this court.

Negotiable Notes—Bona Fide Purchaser.

One who purchases a promissory note before maturity and for full consideration, and to whom the note is at the time indorsed by the payee and holder, takes such note in the ordinary course of business; and the fact that the purchaser took such note relying wholly upon the sufficiency of the mortgage security, or for the purpose of acquiring the mortgaged property by foreclosure, will in no legal sense affect his *bona fides*.

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

Action by C. A. Christianson and J. E. Stair against the

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Farmers' Warehouse Association. From a judgment for defendant, plaintiffs appeal.

Reversed with directions.

McCumber & Bogart, for appellant.

A contract must not be construed so as to deprive it of all force if it is susceptible of another construction. *Wing* v. *Glick*, 56 Ia. 473, 9 N. W. Rep. 384; Dewey on Contracts, 45; *Story* v. *Solomon*, 71 N. Y. 420. The evidence shows that Mann-Fraser Co., understood the purchases were for hedges. Even if the wheat buyer understood that there was to be no delivery, still the company would be bound. Dewey on Contracts, 750; *Pixley* v. *Boyington*, 79 Ill. 351; *Wall* v. *Schneider*, 17 Rep. 700, 18 N. Y. 443; *Gregory* v. *Wendell*, 39 Mich. 337; *First Nat'l Bank* v. *Oskaloosa*, 23 N. W. Rep. 255. An option as to the time of delivery is not contrary to law. *Whitesides* v. *Hunt*, 97 Ind. 191; *Logan* v. *Murick*, 81 Ill. 415. It is not necessary that the seller of grain for future delivery have the same on hand. *Stanton* v. *Small*, 3 Sandf. 230; *Kent* v. *Miltonberger*, 13 Mo. App. 503; *Mohr* v. *Miesen*, 49 N. W. Rep. 862; Dewey on Contracts, 209. It is not material that in order to protect the commission merchant, the purchaser is required to put up margins. *Markham* v. *Judson*, 41 N. Y. 235; *Hatch* v. *Douglas*, 48 Conn. 116; Dewey on Contracts, 107; *Wall* v. *Schneider*, 17 Rep. 700. It does not tend to invalidate the contract that the damages for breach thereof, is the difference between the contract price and the market value. *Sawyer* v. *Taggart*, 14 Bush. 722; *Wall* v. *Schneider*, 17 Rep. 700; Dewey on Contracts, 176, 177.

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

This appeal is taken under chapter 82, Laws 1893. Which act attempts to enlarge and change the jurisdiction of the Supreme Court. "The Supreme Court except as otherwise provided in this constitution shall have appellate jurisdiction only." Sec. 86, Const. Where the constitutional jurisdiction of the Supreme

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Court is appellate, the legislature cannot confer upon it original jurisdiction in any case. *Ames* v. *Boland*, 1 Minn. 268; *State* v. *Maynard*, 4 Ill. 419; *Smith* v. *Odell*, 1 Pinney, 449; *Chandler* v. *Nash*, 5 Mich. 409; *Gough* v. *Dorsey*, 27 Wis. 119; *Alexander* v. *Bennett*, 60 N. Y. 204; *Hughes* v. *Felton*, 11 Col. 489; *State* v. *Bank*, 5 Sneed. 573; *Com.* v. *Commissioners*, 37 Pa. St. 237; *Gibson* v. *Templeton*, 62 Tex. 555; *State* v. *Jones*, 22 Ark. 331; *Haight* v. *Gay*, 8 Cal. 297; *Zander* v. *Coal*, 5 Cal. 230; *U. S.* v. *Moore*, 3 Cranch. 159; *Ex parte McArdle*, 7 Wall. 506; Story on Const. 1773-4; Sutherland on Stat. Const. 395. When original jurisdiction is granted by the constitution to the District Courts that grant is exclusive. *Dillard* v. *Noel*, 2 Ark. 449; *Conners* v. *Goren*, 32 Wis. 518; *Meyer* v. *Calkman*, 6 Cal. 582; *Averill* v. *Perrott*, 41 N. W. Rep. 929; *Heith* v. *Kent*, 37 Mich. 372; *Calahan* v. *Judd*, 23 Wis. 343; *Jones* v. *Smith*, 14 Mich. 334; *Chandler* v. *Nash*, 5 Mich. 409; *Hicks* v. *Bell*, 3 Cal. 219; *Walbby* v. *Calender*, 8 Mich. 430; *Hornbuckle* v. *Toombs*, 18 Wall. 648. The words "Original Jurisdiction" as used in the constitution are to distinguish that jurisdiction from appellate jurisdiction, and must be interpreted to mean "may entertain in the first instance." *Castner* v. *Chandler*, 2 Minn. 86; *Kamdolf* v. *Thalheimer*, 17 Barb. 511. There being nothing in this case to which this court can apply its appellate jurisdiction, no judgment can be rendered here in the case. *Ames* v. *Boland*, 1 Minn. 268; *Hunt* v. *Pallas*, 4 How. 589; *McNalty* v. *Batty*, 10 How. 72; *Gordon* v. *U. S.*, 2 Wall. 561; *Gordon* v. *U. S.*, 117 U. S. 692. This appeal cannot be considered because no errors have been assigned. *Hutton* v. *Gullixon*, 10 N. W. Rep. 261; *Tizzard* v. *Fay*, 18 N. W. Rep. 869; *Freeman* v. *Rhodes*, 30 N. W. Rep. 891; *Rushfeldt* v. *Shave*, 33 N. W. Rep. 791; Rules 8, 13 and 15, Sup. Ct. § 5090, Comp. Laws. The plaintiff is not an indorsee in due course, within the meaning of Sec. 4487 Comp. Laws, because on the facts disclosed they were charged with knowledge of the illegality of the consideration. *Dows* v. *Glaspel*, 4 N. D. 251, 60 N. W. Rep. 60.

Bartholomew, J. The appellants, C. A. Christianson and J. E.

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Stair, commenced proceedings to foreclose, by advertisement, a chattel mortgage given by respondent, the Farmers' Warehouse Association, to the Mann-Frazer Company, a corporation doing business at Minneapolis, Minn., which said mortgage covered two certain frame elevators situated in Richland County, in this state, and was given to secure a promissory note for the sum of $2,850, executed by respondent to said Mann-Frazer Company. Said note and mortgage were dated July 3, 1893, and the note matured October 2, 1893. The foreclosure proceedings were commenced soon after the maturity of the note. The respondent presented to the Judge of the District Court for said county an affidavit of defense, under the law which is now embodied in section 5884, Rev. Code, whereupon said judge enjoined further proceedings by advertisement, and ordered that all further proceedings for foreclosure be had in the District Court, whereupon the matter was transferred to said court, and tried, under the provision of Ch. 82, Laws 1893; and, a judgment dismissing the action and for costs having been returned against plaintiffs, they appeal to this court, under the provisions of the statute last named. The portion of that statute material to the decision of this case reads as follows: "In all actions tried by the District Court without a jury, wherein issue of fact has been joined, all the evidence offered in the trial shall be taken down in writing, or the court may order the evidence or any part thereof to be taken in the form of depositions, or either party may, at pleasure, take his testimony or any part thereof by deposition: provided, that whenever such evidence is taken down in shorthand and written out at length, it shall be deemed to have been taken down in writing, and all testimony so taken in shorthand must, at the request of either party, be so written out at length and filed with the clerk. All evidence taken as provided by this section shall be certified by the judge at any time after the trial, and within one month before the time allowed for the appeal of said cause shall have expired, and shall thereupon become a part of the judgment roll, and the original of such judgment roll shall go

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on appeal to the Supreme Court, which shall try the cause anew upon such judgment roll, and render final judgment therein, according to the justice of the case." Under the above provisions, appellants procured the evidence to be properly certified and filed as a part of the judgment roll, and bring up on this appeal the original judgment roll only, no bill of exceptions or a statement of the case having been settled or allowed. Respondent in this court makes a preliminary motion to strike from the files all the record so transmitted to this court, except the notice of appeal, the summons and pleadings, the findings and conclusions of law made by the trial court, and the judgment thereon. In other words, respondent seeks to eliminate from the record everything except what would have appeared in the judgment roll had said chapter 82 never been enacted. The basis of the motion is the alleged unconstitutionality of said chapter 82, in that it attempts to confer upon this court a jurisdiction not contemplated or permitted by the constitution, and that, being unconstitutional and void, the evidence could only be brought to this court by bill of exceptions or statement of the case under the practice and provisions governing other cases.

The question of the constitutionality of said chapter 82, Laws 1893, has received much informal discussion in legal circles throughout the state since its passage, but this is the first instance where the question has been directly raised in this court, although we have decided several cases that were brought to this court under the provisions of that act. See *Taylor* v. *Taylor*, 5 N. D. 58, 63 N. W. 893; *Nollman* v. *Evenson*, 5 N. D. 344, 65 N. W. 686. The question is one involved in much difficulty, and upon which the members of this court have not at all times been in entire accord. Broadly stated, the objections urged against this law is that it attempts to confer original jurisdiction upon this court, while, under the constitution, our jurisdiction is appellate only, except in certain specified cases. The constitutional provisions are as follows: Section 86: "The Supreme Court, except as otherwise provided in this constitution, shall have appellate

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jurisdiction only, which shall be co-extensive with the state, and shall have a general superintending control over all inferior courts under such regulations and limitations as may be prescribed by law." Section 87: "It shall have power to issue writs of *habeas corpus*, *mandamus*, *quo warranto*, *certiorari*, injunction, and such other original and remedial writs as may be necessary to the proper exercise of its jurisdiction, and shall have authority to hear and determine the same: provided, however, that no jury trial shall be allowed in said Supreme Court, but in proper cases question of fact may be sent by said court to a District Court for trial." Section 103 of the constitution, defining the jurisdiction of the District Courts, reads: "The District Court shall have original jurisdiction, except as otherwise provided in this constitution, of all causes both at law and equity, and such appellate jurisdiction as may be conferred by law. They and the judges thereof shall also have jurisdiction and power to issue writs of *habeas corpus*, *quo warranto*, *certiorari*, injunction and other and remedial writs, with authority to hear and determine the same." It is apparent from these constitutional provisions that the decision of the question here raised must hinge largely upon the meaning that must be attached to the words "appellate jurisdiction" and "original jurisdiction," as used in that instrument, because it cannot be admitted for a moment, under the wording of our constitution, that the legislature has power to impose upon us the exercise of any original jurisdiction whatever not specially authorized by the constitution.

It may aid us to first accurately determine just what this court is required to do under the statute that has been attacked. The statute says that this court "shall try the case anew." This language, it is apparent, was not used with exact accuracy. The case is not tried anew. There is no new evidence or any evidence adduced in this court. The case must be decided upon a record already prepared by a judicial tribunal. This court simply reviews the record, and the practical and necessary result of such review is to correct the errors, if any, either of the law or

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fact, into which the court below may have fallen. It is difficult to perceive any marked distinction between the jurisdiction exercised by this court in a proceeding of this character and the jurisdiction exercised prior to the enactmnent of said chapter 82. Section 5237, Comp. Laws 1887, in providing what should be done by the Supreme Court on appeal, contained this provision: "Any question of fact or law decided upon trials by the court or by referee may be reviewed when exceptions to the findings of fact have been duly taken by either party and returned." This provision has been repeatedly acted upon since statehood, and we never heard its constitutionality questioned. In *Jasper* v. *Hazen*, 4 N. D. 1, 58 N. W. 454, this court took occasion to state at length what duty was devolved upon the Supreme Court by this provision. We then stated that this court would review questions of fact in proper cases, and would set aside findings of fact, when, under the restrictions there stated, this court could see that such findings were not supported by a preponderance of the evidence. Under that provision, the judgment of this court upon the facts was required to the same extent that it is required under the law here under discussion. The judgment of the trial court upon the facts must still have weight and influence with this court, especially when based upon the testimony of witnesses who appeared in person before that court. It may be that the strong presumption of correctness under which findings of fact came to this court under the former practice does not follow them with equal force under this statute, and it may be that to some extent the appellant is relieved from the burden of pointing out the specific error of the trial court. This would seem to follow from the fact that the particular errors of the trial court, if any there be, need not be discussed by this court, or pointed out to the court below, as was imperatively necessary in all cases where a reversal sent the case back for trial *de novo*. Nevertheless, the independent judgment of this court upon the record presented, irrespective of what the trial court may or may not have held, is based only upon a review of the record made in the trial court;

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and, when the judgment of the trial court was based upon error in law or fact, the judgment of this court necessarily reviews and corrects such error. But the manner in which this result is accomplished is radically different under the two systems of practice. The statute under discussion requires us to render final judgment, and thus, by its mandate, forever terminate the particular litigation. This is such an innovation upon a practice that is familiar to and well settled in the professional mind that it is received with distrust. But to the legislative mind it doubtless suggested a means of terminating litigation in a manner that should at once possess the strongest probability of absolute justice with the least expenditure of time and money. It avoids the delay and expense of a second trial, and the risk of further errors that might necessitate a second appeal. If these legislative objects can really be accomplished, the value and propriety of the statute cannot be doubted.

Is there anything, then, in the added duties devolved upon the Supreme Court, that is beyond the scope of appellate jurisdiction, and that inherently pertains to original jurisdiction only? An appeal is a process of civil law origin. In England it was in a great measure confined to equity, ecclesiastical, and admiralty jurisdictions, where trial by jury was unknown. As originally used, it removed the entire cause to the superior court, subjecting both law and fact to a retrial. For a review of errors of law in law courts, the writ of error was universally used. See *U. S.* v. *Wonson*, 1 Gall. 13 Fed. Cas. No. 16,750; *Wiscart* v. *D'Auchy*, 3 Dall. 327; *U. S.* v. *Goodwin*, 7 Cranch, 110. Appellate jurisdiction is defined in 1 Am. and Eng. Enc. Law, p. 629, as "pertaining to and having cognizance of appeals and other proceedings for the review of adjudications." In a code state it is thus defined: "Jurisdiction to revise or correct the proceedings in a cause already instituted and acted upon by an inferior court or by a tribunal having the attributes of a court." *Auditor of State* v. *Atchison, T. & S. F. R. Co.*, 6 Kan. 505. And, again: "Appellate jurisdiction is not only a continuation of the exercise of the same

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judicial power, which has been exercised in the court of original jurisdiction, but it necessarily implies that the original and appellate courts are capable of participating in the exercise of the same judicial power." *Piqua Bank* v. *Knoup*, 6 Ohio St. 391. And, for full discussion of this jurisdiction, see Elliot, App. Proc. § 16, *et seq.* We find no definition of appellate jurisdiction so limited that it will not permit the appellate court to review the facts as well as the law if the legislature so requires. As we have seen, the Supreme Court of the Territory of Dakota, at the time of and prior to the adoption of our constitution, was expressly required to review facts in certain cases, under section 5237, Comp. Laws. We have no warrant for saying that the constitutonal convention intended to curtail that jurisdiction. Nor have we any warrant for saying that such convention used the words "appellate jurisdiction," in section 86 of the constitution, in any other or different sense from that given to the same words in section 103, defining the jurisdiction of the District Courts. And when, in the latter section, it is declared that the District Courts shall have "such appellate jurisdiction as may be conferred by law," it is not meant that the legislature may define appellate jurisdiction, and make it mean one thing in one case, and a different thing in another case. It is only meant that it shall have appellate jurisdiction in such cases as the law may declare. It is undisputed that the appellate jurisdiction in such courts may be exercised by a strict trial *de novo*, upon new pleadings and entirely new evidence. But it is entirely competent—and it is almost universally done—for the legislature to declare that in certain cases, involving only small amounts, the appellate jurisdiction of those courts shall be exercised only in the correction of errors, and such provisions do not affect the question of appellate jurisdiction, but of appellate procedure. In Story on the Constitution (section 1761) that learned author, in discussing the appellate jurisdiction of the Federal Supreme Court, says: In the first place, it may not be without use to ascertain what is here meant by appellate jurisdiction, and what is the mode in which it may be exercised.

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The essential criterion of appellate jurisdiction is that it revises and corrects the proceedings in a cause already instituted, and does not create that cause. In reference to judicial tribunals, an appellate jurisdiction, therefore, necessarily implies that the subject-matter has been already instituted in and acted upon by some other court, whose judgment or proceedings are to be revised. This appellate jurisdiction may be exercised in a variety of forms, and indeed in any form which the legislature may choose to prescribe; but, still, the substance must exist before the form can be applied to it." We know of no clearer statement of the points under discussion than is contained in Judge Story's language. Appellate jurisdiction cannot create a cause. It must be first created and ajudicated by another judicial tribunal. Those facts existing, the appellate court may exercise its jurisdiction in any form the legislature may prescribe. The legislature may require the appellate court to review the facts, and render final judgment. If, in so doing, it exercise some of the same functions as a court of original jurisdiction, we answer that there is neither constitutional nor legal reason why it should not. Judge Elliot clearly shows that the power to render and enforce judgments is and must be inherent in every appellate court. The constitution of the State of Iowa (section 4, art. 5) reads: "The Supreme Court shall have appellate jurisdiction only in cases of chancery, and shall constitute a court for the correction of errors at law under such restrictions as the generally assembly may, by law, prescribe." Ever since *Preston* v. *Daniels*, 2 G. Greene, 536, the Supreme Court of that state has uniformly held that it had no original jurisdiction; but it has also uniformly held that the constitution gave an absolute right to a trial *de novo* in that court in chancery cases,—a right which the legislature could not take away. *Sherwood* v. *Sherwood*, 44 Iowa, 192. We are clear that, on the authorities already cited, and on sound reason and legal principles, chapter 82 of the Laws of 1893 does not confer, or attempt to confer, upon this court, any original jurisdiction; and respondent's motion must be denied.

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It is claimed that this question was differently ruled in *Klein* v. *Valerius*, 87 Wis. 54, 57 N W. 1112. We think the cases clearly distinguishable. The Wisconsin statute there held to be unconstitutional made it the "duty" of the Supreme Court to review "all questions of law or fact presented upon the record upon such appeal or writ of error." The learned Supreme Court of Wisconsin condemned the law, and a main reason therefor was that it deprived a party of the constitutional right to the verdict of a jury upon the facts of a law case, and, in effect, abolished the writ of error as it was known at the time of the adoption of the constitution, and which that instrument declared should never be abolished. If there be any language in that opinion that indicates that the views of that court do not correspond with what we have said in this case, we can only say that our great respect for that court causes us to regret that our views are different. And, perhaps,—although we are not clear that such is the case,—our views differ from those expressed by the Supreme Court of Florida in *State* v. *McClellan*, (Fla.) 5 South. 600.

On the merits of the case, the first inquiry that presents itself is this: Are the appellants indorsers in good faith of the note and mortgage which are the subject matter of the action? We have scrutinized the evidence carefully. Its volume forbids even a synopsis of it. Respondent certainly claims for it all that it tends to fairly support. We quote from the brief of the learned counsel: "The evidence shows that the plaintiffs in this action are grain dealers in Minneapolis, Minnesota, members of the Chamber of Commerce of that city, having offices next door to and adjoining the offices of the payee named in the note. The business relations between the two firms have been intimate for years. They have both been engaged in wheat operations on the floor of the Chamber of Commerce for years. Plaintiffs knew that the mortgage in this case covered all of the elevator property owned by the defendants. They knew enough about the transaction out of which the note and mortgage grew to have an abiding faith at the time of the purchase of the note that it would not be

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paid. Their object in buying the note and mortgage was not, in the usual course of business, to make an investment in commercial paper, but indirectly to buy the property covered by the mortgage. This note drew only eight per cent. interest; yet the plaintiffs paid twelve dollars more than the amount of the note, with interest to the date of purchase. No inquiries were made relative to the financial standing of the makers of the note; one of the plaintiffs testifying that he did not know, and he did not care. The express object of the plaintiffs in buying this note and mortgage was to obtain the property mortgaged." Do these facts show that appellants are not protected under the law merchant? The whole basis of respondent's contention rests upon his statement that the notes were not acquired in good faith and in the usual course of business. It is conceded by counsel that suspicious circumstances sufficient to put a prudent man upon inquiry are not in themselves sufficient to overcome the presumption of *bona fides* in the purchase of commercial paper. Our statute (section 4884, Rev. Code) thus defines an innocent indorsee: "An indorsee in due course is one who in good faith, in the ordinary course of business, and for value, before its apparent maturity or presumptive dishonor, and without knowledge of its actual dishonor, acquires a negotiable instrument duly indorsed to him, or indorsed generally, or payable to the bearer, or one other than the payee, who acquires such an instrument of such an indorsee thereof." What is meant by the "ordinary course of business"? In *Kellogg* v. *Curtis*, 69 Me. 212, the court says: "These words are usually defined to mean 'according to the usages and customs of commercial transactions.'" If the plaintiff purchased the note before maturity for value, that would be such a transaction. Randolph on Commercial Paper (section 988) illustrates the meaning of the words by stating what would not be "in the usual course of business;" and from his illustrations it is clear that a note purchased before maturity, for a valuable consideration, and duly indorsed by the payee, and delivered to the purchaser, is taken

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in the usual course of business. We need not multiply these definitions. Their correctness will not be questioned. What facts are relied upon to take this case out of the rule? It is admitted that the note was purchased before maturity, that full value was paid therefor. Indeed, respondent makes it a matter of complaint that appellants paid slightly more than the amount of the note at the time of the purchase. It is admitted that it was duly indorsed by the payee, and delivered to the purchaser, at the time of the purchase. But it is urged that as both the payee and indorsers of the note were members of the Minneapolis Board of Trade, and their business relations were intimate, therefore the indorsees were charged with notice that the note was given for gambling transactions on the Board of Trade. There is no rule of law that will support any such presumption. Again, it is said that appellants knew when they purchased the note that it would not be paid at maturity, and that their object in making the purchase was to secure the elevators that had been mortgaged to secure the same. Counsel cite us to no case where it has ever been held that the ultimate object of the purchaser of commercial paper in making the purchase could be considered upon the question of his *bona fides*. In this case, appellants knew that they took the mortgages—the incidents of the debt—as free from all equities as the note itself. See Colebrooke Collat. Sec. § 161 *et seq*. It would, indeed, be a novel doctrine if the fact that appellants relied upon the security in making the purchase should be held to constitute bad faith on his part; and, knowing the security to be ample, it is not strange that no inquiries were made touching the financial responsibility of the maker.

We reach the conclusion, after full consideration of the evidence, that appellants were *bona fide* indorsees in the usual course of business, and, as such, were entitled to full protection against any equities between the original parties. The appellants are entitled to judgment against the respondent for the full amount of the note in suit, and a decree of foreclosure against the property described in the complaint, with costs of both courts.

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The District Court for Richland County will enter judgment accordingly. Reversed. All concur.

(67 N. W. Rep. 300.)

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

Opinion filed April 30th, 1896.

National Banks—Sale of Collateral—Conversion.

Where a national bank holds notes of its debtor as collateral to his indebtedness to the bank, it may lawfully act as agent for him in the sale of such notes to a third person, such agency being merely incidental to the exercise of its conceded power to collect the claim out of such collateral notes. But, ordinarily, a national bank may not engage in the business of agency. The fact that its act in assuming to represent another as agent is *ultra vires* will not exempt it from those rules of law which regulate the duties of an agent to his principal. It cannot plead its own violation of law to justify a breach of trust. Accordingly, *held*, that a national bank which had assumed to sell for another certain notes owned by him, but had, instead of so selling them to a third person without his knowledge, sold them to itself, had violated its duty to the owner, the same as if it had full power under the law to act as such agent; and was, therefore, guilty of a conversion of such notes.

Election of Remedies—Waiver of Tort.

Where an agent, without the consent of his principal, sells to himself at the price he was authorized to sell to a third person, the waiver by the principal of his right to proceed as for tort founded on the conversion by the agent of his property in purchasing the same himself, and his electing to sue the agent on an implied contract of purchase by the agent, does not constitute a ratification of the original act of the agent in purchasing himself so as to limit the recovery to the price specified; but it is merely a waiver of the element of tort in the transaction. The agent is liable on the theory of the purchase by him of the property at the time of the conversion at the then value of the property, irrespective of the price for which he was authorized to sell to a third person.

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

Action by Alexander Anderson against the First National Bank of Grand Forks. From an order directing a verdict for defendant, plaintiff appeals.

Reversed.

Phelps & Phelps, for appellant.

Burke Corbett, for respondent.

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CORLISS, J. Banquo's ghost was not more persistent than is this litigation. It will not down, either in the court below or in this tribunal. Thrice has it been tried in the District Court, and it is now for the third time before us on appeal. The facts have been so fully developed in the opinions written on the two former appeals (4 N. D. 182, 59 N. W. 1029, and 5 N. D. 80, 64 N. W. 114) that it is unnecessary to do more at this time than to refer to those opinions, and point out the new elements which on the third trial were introduced into the case. On this last trial, as on the previous trials, the court directed a verdict for the defendant. It is this ruling of the District Court which is challenged on this appeal. Since the case was before us last, the pleadings on both sides have been amended. The plaintiff has elected to treat the act of the defendant in assuming to sell to itself, in violation of its duty to the plaintiff as his agent, as a conversion of the notes, and has also elected to waive the tort, and sue on the theory of an implied promise on the part of the defendant to pay the value of these notes at the time of their conversion. The defendant, by its amended answer, now for the first time asserts that it was not acting as agent, did not intend to act as agent, and was not regarded by the plaintiff as being his agent in the transaction leading up to the alleged sale of the property in question. No new facts were disclosed on the trial to support this utterly untenable theory. The facts are precisely the same as they were when this case was before us the last time. See 5 N. D. 80, 64 N. W. 114. We then held on these same facts that defendant was plaintiff's agent in the selling of the notes in question. That fact, is, therefore, no longer open to controversy. At all times up to the period when the defendant's answer was amended, it had conceded that it was agent, and it defended the case solely on the ground that it had accounted for and paid over to plaintiff all the net proceeds of the sale effected by it as such agent. The agency was, in effect, admitted in the original answer. It formed the corner stone of defendant's argument in this court on the first appeal, and was not questioned by defendant's counsel in brief or

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oral argument on the second appeal. But we do not need to rest our ruling on this point on the ground that the question is settled, or on the further ground that defendant has estopped itself by its own solemn admission from raising the point. The evidence adduced on this last trial not only utterly failed to support the defendant's theory in this regard, but, on the contrary, conclusively established the agency as a fact. As before stated, that evidence was the same as on the previous trials, and was the same evidence that was before us on the two former appeals. We might, without further discussion of this question here, refer to the opinions on those appeals as showing beyond doubt that both plaintiff and defendant understood, and had reason to understand, that defendant was acting as plaintiff's agent in the sale of the plaintiff's notes. But in view of the fact that the learned trial judge, in directing a verdict for defendant, placed his ruling on the ground that no agency had been established, we will briefly refer to the evidence on this point. It is undisputed that whatever arrangement was made between defendant and plaintiff is embodied in certain letters and telegrams which passed between them. On September 14, 1891, defendant wrote plaintiff that, if he would allow defendant a small commission, it would try and place the paper for him. This letter not being answered by plaintiff, the defendant telegraphed plaintiff as follows on October 3, 1891: "Wire us your best offer, so we can advise a party who said that he would hold his money till we heard from you." Plaintiff having telegraphed defendant that he would allow a discount of $500, the defendant assumed to make the sale under these instructions, and on October 7th sent him a statement, in which it charged a commission of $35 for selling the notes. To assert, in view of these communications by defendant to plaintiff, that it did not assume to act as agent for him, and that he did not so understood these communications, is to trifle with and pervert the plain meaning of the language diliberately employed by the defendant. The utter grotesqueness of this new theory of defendant's counsel, in view of the facts, is brought out very

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prominently in the amended answer. In that answer it is alleged that defendant believed, and was justified in believing, that plaintiff intended said telegram (*i. e.* the one offering to allow a discount of $500, following defendant's communications to plaintiff which have been already referred to) as an offer to sell said notes to defendant. In the next paragragh defendant avers that, acting on this belief, it wrote the letter of October 7, 1891, accompanied by the statement, as part of it, in which defendant charged the plaintiff a commission of $35 for making the sale. The allegation, therefore, is that, believing that plaintiff understood that defendant was acting for itself, and not for him, it nevertheless charged him a commission, on the theory that it was acting for him; and immediately reported to him the fact that it had made such charge. That defendant assumed to act as such agent for plaintiff cannot be doubted. But it is contended that a national bank cannot legally engage in the business of acting as agent for another in the sale of securities such as those which were owned by the plaintiff. But that is not the precise question before the court. It ignores the conceded fact that at the time this correspondence was had the defendant held plaintiff's note for $2,000, which it had discounted in the regular course of business. The seven notes in question belonging to plaintiff were also held by the bank as collateral to plaintiff's indebtedness on that note. The bank, as pledgee, could not sell these notes. It could only collect them. Certainly, in furtherance of its undoubted power to collect a debt from one whose paper it had discounted, it could, with the assent of the debtor, act as his agent in the disposition by sale of collateral held by it to secure such debt. In doing so in this case the bank was not engaged in the general business of agency. The bank merely acted as agent in the particular case under special circemstances, when the exercise of power to act as agent was merely incidental, and entirely subordinate to the exercise of the conceded power of every national bank to take all the steps which may be necessary, appropriate, or useful in the collection of its claims against others. To deny

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to a national bank large incidental powers in the enforcement of such claims would be seriously to hamper and cripple them, and this, too, without necessity, and in the face of general principles. There is a wide difference between a bank engaging in the business of agency when the agency is not in furtherance of the powers conferred upon the bank, and on the other hand, its acting for a debtor of the bank under his authority in the disposition of collaterals held by the bank to secure the debt, when without such authority the bank would have had no power to make such disposition. We are of opinion that under the facts of this case the defendant, in assuming to act for plaintiff in the sale of these notes with his consent, kept entirely within the limits of its power. The whole drift of authority seems to us to support this view. *Shinkle* v. *Bank*, 22 Ohio St. 516-524; *Holmes* v. *Boyd*, 90 Ind. 332; *John A. Roebling Son's Co.* v. *First Nat. Bank of Richmond, Va.*, 30 Fed. 744; *Reynolds* v. *Simpson*, 74 Ga. 454; *Wylie* v. *Bank*, 119 U. S. 361, 7 Sup. Ct. 268; *McCraith* v. *Bank*, (N. Y. App.) 10 N. E. 862; *First Nat. Bank* v. *National Exch. Bank*, 92 U. S. 122; 1 Morse, Banks, § § 77, 78. The Wylie case appears to be nearly in point. The principle which underlies all the decisions cited is the principle which we apply in this cause. We hold that, as an incident of the conceded power of the bank to realize on security it held, it had power to act as agent for the plaintiff in effecting a sale thereof; thus enabling it to turn that security into cash to be applied on its claim. But we would reach no different conclusion even though we should assume that the act of the bank was *ultra vires*. It is one thing to assert that a bank cannot legally engage in the business of acting as agent. It is an entirely different thing to assert that when it has in fact assumed to act as agent it shall not be held to the ordinary duties and obligations which govern such a relation. A bank may repudiate its promise to act as agent when such promise is not binding, and in so doing it will incur no liability. So long as the matter remains executory, it can fall back upon the defense of *ultra vires*. But a widely different question is presented when it has executed or pretended

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to execute the agency. So long as the business remains unfinished, the person dealing with the bank must take the risk of the refusal by the latter to proceed. He is bound to know that the act is *ultra vires*. But it is not a physical impossibility for a bank to act as agent. If it assumes to and does so act, and receives the proceeds of the sale, it must account for them as agent. It has undoubtedly violated the law by exercising powers not conferred upon it. But this violation can be taken advantage of only by the sovereign authority which created the bank. *Bank* v. *Butler*, 157 Mass. 548, 32 N. E. 909; *Bank* v. *Smith*, (S. D.) 65 N. W. 437; *Bank* v. *Hanson*, (Minn.) 21 N. W. 850; *Hennessy* v. *City of St. Paul*, (Minn.) 55 N. W. 1123. Indeed, in many cases this is the rule, although the act performed by the bank is in defiance of a positive statutory prohibition. *Bank* v. *Matthews*, 98 U. S. 621; *Bank* v. *Whitney*, 103 U. S. 99; *Thompson* v. *Bank*, 146 U. S. 240, 13 Sup. Ct. 66; *Bank* v. *Townsend*, 139 U. S. 67, 11 Sup. Ct. 496; *Bank* v. *Birch*, 130 N. Y. 221, 29 N. E. 127.

It will be noticed that the authorities hold that the bank itself can enforce a contract or obligation or security although in securing the cause of action or security it exercised a power not conferred. Surely, then, it should not itself be heard to urge its own violation of law as a defense to the contention that, having assumed to act as agent, it must live up to the common honesty which is required of all agents. Stripped of all disguise, the ruling of the court, if the decision herein was placed on that ground, is that the bank, which had induced another to believe that it was acting as agent for him, and who has therefore reposed full confidence in such bank, may urge its own unlawful usurpation of power as a justification for its betrayal of the trust reposed in it. If its first act, in assuming to represent the plaintiff in the sale, had been lawful, it would have been liable for its subsequent illegal act. But because both acts were illegal it is insisted, and seems to have been held in this case, and there is no liability whatever. On this theory, if one wrong is preceded by another, this fact makes right the last wrong. The defendant's lips are

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sealed against a denial of the agency, and as a matter of fact it did act as agent for the plaintiff. A national bank cannot lawfully engage in the business of buying and selling merchandise, but if it in fact does buy merchandise it must pay for it. Yet in such a case it has exercised a power not vested in it. So if it does in fact act as agent it must act with fidelity, the same as all other agents, although in so acting it exercises a power not conferred upon it by the law. In neither case will the law allow it to plead its own want of power to absolve itself from the principles of common honesty. In both cases the sovereign can punish it by depriving it of its franchise as a corporation. One who employs a bank to act as agent for him places the same confidence in the bank that he would repose in a person whom he had trusted as agent. The fact that it may not be within the powers of the bank to act as agent has no tendency to shake the faith of the principal in the honesty of the agent's conduct. To him the assumption of the agency by the bank means that the latter is willing to take the risk of attack and overthrow by the sovereign for its exercise of power not granted, and not that the agent will betray the principal it has induced to trust it.

But it is urged that defendant's cashier, with whom all the communications were had, and by whom all the letters and telegrams in behalf of the bank were written, had no authority to bind the bank by agreeing to act as agent for the plaintiff. There are several answers to this contention. If, as we hold to be the law, it was under the circumstances of the case, within the power of the bank to act as agent for plaintiff in the sale of those notes as a means to a lawful end,—*i. e.* the collection of plaintiff's note for $2,000 held by the bank, by realizing on the collateral by a sale thereof,—then it was within the ordinary powers of the cashier, as the financial officer of the bank, charged with the custody and control of its funds and the collection of its claims, to enter into this arrangement on behalf of the bank that the bank should act for plaintiff in the sale of these notes. See 1 Morse, Banks, § § 152, 159. Besides, it appears that the bank had ratified his acts

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in this respect. It has known from the inception of this case that the plaintiff claimed that the bank was acting as agent for him, and it has known on just what ground this claim was based. It has known for a long time that the plaintiff asserted that the defendant's cashier had acted for the bank in this whole transaction, and it has during this time known all the dealings between the parties purported to be with or on behalf of the bank; and yet it has made no effort to repudiate the act of its officer. It has never offered to restore the plaintiff's property to him. On the contrary, it has proceeded deliberately, with full knowledge of all the facts, to collect and exercise full control over these notes as owner. It is too late now for it to question the cashier's authority. It has ratified his acts. Indeed, it has not even taken the trouble, up to the present moment, to offer to give back to the plaintiff his property. After the bank had discovered what course its cashier had pursued, it could no longer keep the fruits of his acts without ratifying all he had done. Such ratification related back to the time when the cashier assumed to represent it, and rendered all his acts binding on the bank from their inception. Moreover, the defendant has deliberately set up in its answer that these letters and telegrams were sent out and received by the bank itself. There is no attempt to claim that the dealings were had with the cashier, and that he was not authorized to enter into them on its behalf. The defendant, in specific language, avers that whatever was done in the matter was done by the bank itself. By defendant's own amended answer, therefore, the question of the power of the cashier is eliminated from the case.

It is also insisted that the plaintiff, by waiving the tort, has ratified the sale by defendant to itself at the price specified by the plaintiff. This claim rests on an utter misconception of the effect of such a waiver. It is merely a relinquishment of the right to proceed as for a tort. The tort itself, so far as it gives rise to a cause of action, is not forgiven. The cause of action it created is not extinguished. The right to recover the value of

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the property illegally appropriated by the wrongdoer to his own use is not destroyed. Only the form of the action is changed. The one injured by the tort stills holds unimpaired his right to recover the value of the property converted at the time of the conversion. He merely elects to treat the act of the tort feasor as a purchase by him at the then value thereof. The waiver of the right to proceed as for a tort has, and can have, no other legal effect.

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

(67 N. W. Rep. 821.)

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JOSEPH SEYBOLD *vs.* GRAND FORKS NATIONAL BANK, AND CHAS. H. BALDWIN, INTERVENER.

Opinion filed May 12th, 1896

Gift Causa Mortis—Rights of Donors Personal Representative.

The donee of a gift *causa mortis* is not dependent upon the will of the personal representative of the deceased donor for his title. The title vests in the donee during the lifetime of the donor, subject to recall by revocation of the gift. The subject of the gift forms no part of the estate of the donor. His personal representative cannot, therefore, lay any claim to it, except in case of necessity, for the payment of debts which could not otherwise be paid. When such representative seeks to pursue such gift in the hands of the donee, he must show the facts constituting the necessity, *i. e.* deficiency of assets with respect to debts, and his recovery will be limited to the extent of such necessity.

Assignee of Chose in Action—Real Party in Interest.

The assignee of a chose in action who holds the legal title to it may maintain an action thereon, as the real party in interest, under the Code, although he holds only the naked legal title, the whole beneficial interest being in the assignor.

Unrestricted Indorsement of Certificate of Deposit.

Where the payee of a negotiable certificate of deposit indorsed the same to the cashier of a bank with an unrestricted indorsement, and his testimony showed that he had deposited the same with such bank to be collected as other similar paper, *held* that, as against the bank issuing the certificate, the legal title to such certificate was vested in the indorsee, and that the indorsee of such indorsee by a like unrestricted indorsement could sue thereon as the real party in interest. Had the indorsement been in terms for collection only, this fact might have shown a purpose not to vest the legal title in the indorsee.

Following Funds—Identification.

While the owner of property may, so long as he can identify it, follow it through all its transforma'ions in the hands of the person who received it in its original form, yet, when such property is turned into money, and loaned to a third person, he cannot follow such money in the hands of such third person, but must look to the obligation of such third person to the lender of the money in the hands of the lender as his (the owner's) property in still another new form.

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

Action by Joseph Seybold against the Grand Forks National Bank. Charles H. Baldwin, administrator, intervened. From a judgment for plaintiff, defendant and intervener appeal.

Affirmed.

J. H. Bosard, for appellants.

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The action must be brought in the name of the real party in interest and not by the person in whom the mere naked apparent legal title is vested. Sections 5221, 5223, Rev. Codes; Pom. Rem. 156. The assignee must hold both the legal and equitable title to be the real party in interest. *Gradwohl* v. *Harris*, 29 Cal. 150. The defense that plaintiff is not the real party in interest, when proven, is a bar to the suit. Pom. Rem. 156; *Edwards* v. *Campbell*, 23 Barb. 423; *Killmore* v. *Culver*, 24 Barb. 656; *James* v. *Chalmers*, 6 N. Y. 209-215; *Eaton* v. *Alger*, 57 Barb. 179; *Swift* v. *Ellsworth*, 10 Ind. 205; *Robbins* v. *Deverill*, 20 Wis. 150; *Grueber* v. *Baker*, 9 L. R. A. 302; *Hoagland* v. *Van Etten*, 22 Neb. 683; *Rock County National Bank* v. *Hollister*, 21 Minn. 385; *Third National Bank* v. *Clark*, 23 Minn. 268; *Bostwick* v. *Bryant*, 113 Ind. 438; *Bartholomew County Commissioners* v. *Jameson*, 86 Ind. 163; *Phelps* v. *Bush*, 15 Ia. 64; *Iselin* v. *Rowlands*, 30 Hun. 488; *Pixley* v. *Van Nostrum*, 100 Ind. 34; *Board of Commissioners* v. *Jameson*, 86 Ind. 163; *Ind. R. R. Co.* v. *Adinson*, 114 Ind. 282. The fact that plaintiff has the legal title without any beneficial interest does not entitle him to sue. *Parker* v. *Totten*, 10 How. Pr. 233; *McLaren* v. *Hutchinson*, 22 Cal. 187. This defense may be raised by any person beneficially interested in the result of the action who intervenes. *Gradwohl* v. *Harris*, 29 Cal. 150. The intervener as administrator is entitled to the certificate in dispute. Section 6372, Rev. Codes; *Reiser* v. *Gigrich*, 61 N. W. Rep. 30; *Wiswell* v. *Wiswell*, 35 Minn. 371, 39 N. W. Rep. 166. Property disposed of by residuary legacy does not vest directly in the legatee but in the executor by operation of law subject to distribution. *Melnes* v. *Pfister*, 18 N. W. Rep. 255, 59 Wis. 192; *Gundry* v. *Estate of Henry*, 27 N. W. Rep. 401, 65 Wis. 599. By section 3562, Rev. Codes, gifts in view of death are placed upon the same footing as legacies in so far as creditors are concerned.

Cochrane & Feetham, for respondent.

Seybold the plaintiff, is a party in sufficient interest to sustain this action. He held the certificate upon an unqualified indorsement of the payee, giving him the legal title to the paper, open

however, to any defenses to which it could be subjected in the hands of the original payee. *Anderson* v. *Reardon*, 46 Minn., 185, 48 N. W. R. 777; *Castner* v. *Austin*, 2 Minn. 32; *Vanstrum* v. *Liljengen*, 37 Minn. 191, 33 N. W. R. 555; *Elmquist* v. *Markoe*, 45 Minn. 305, 47 N. W. R. 970; *Sheridan* v. *Mayor*, 68 N. Y. 30; *Hayes* v. *Hawthorne*, 74 N. Y. 486; *City Bank* v. *Perkins*, 29 N. Y. 554, 86 Am. Dec. 331; *Felenthal* v. *Hawks*, 52 Minn. 178; *O'Connor* v. *Irvine*, 16 Pac. Rep. 236; *McLaughlin* v. *First Nat'l Bank*, 6 Dak. 406; *Giselman* v. *Starr*, 40 Pac. Rep. 8; *Rissing* v. *Teabout*, 35 N. W. R. 499; *Yonker* v. *Martin*, 18 Ia. 143; *Pierson* v. *Cummings*, 28 Ia. 345; *Green* v. *Marble*, 37 Ia. 95; *Warnock* v. *Richardson*, 50 Ia. 450; *Knadler* v. *Sharp*, 36 Ia. 234; *Boyd* v. *Corbet*, 37 Mich. 52; *White* v. *Stanley*, 29 O. St. 423; *Gere* v. *Ins. Co.*, 23 N. W. R. 137; *Sheldon* v. *Pringle*, 17 Barb. 468; *Gillepsie* v. *Ry. Co.*, 12 Ind. 398; *Cottle* v. *Cole*, 20 Ia. 485; *Eaton* v. *Alger*, 47 N. Y. 345; *Price* v. *Dunlap*, 5 Cal. 485; *Gushee* v. *Leavitt*, 5 Cal. 160; *Caldwell* v. *Lawrence*, 84 Ill. 161; *Rice* v. *Savery*, 22 Ia. 470; *Cassiday* v. *First Nat'l Bank*, 30 Minn. 86; *Devol* v. *Barnes*, 7 Hun. 342; *Davis* v. *Reynolds*, 5 Hun. 651; *Green* v. *Magra Ins. Co.*, 6 Hun. 128; *Allen* v. *Brown*, 44 N. Y. 228; *Meeker* v. *Claghorn*, 44 N. Y. 349; *Durgin* v. *Ireland*, 14 N. Y. 322; *Paddon* v. *Williams*, 2 Abb. Pr. (N. S.) 88; *Batesville* v. *Kauffman*, 18 Wall. 154, 21 L. Ed. 776; *Farwell* v. *Tyler*, 5 Ia. 535; *Wetmore* v. *Hegeman*, 88 N. Y. 72; *Pierson* v. *Cummings*, 28 Ia. 344; *Wetmore* v. *City*, 44 Cal. 294; *Gradwohl* v. *Harris*, 29 Cal. 150; *Schnier* v. *Fay*, 12 Kan. 184; *Williams* v. *Norton*, 3 Kan. 290; *Curtiss* v. *Mohr*, 18 Wis. 615; *Hilton* v. *Warning*, 7 Wis. 492; Pomeroy's Remedies 130, 131 and 132. Seybold was the trustee of an express trust and as such could recover. *McLaughlin* v. *Bank*, 6 Dak. 406, 43 N. W. Rep. 715; *Devol* v. *Barnes*, 7 Hun. 342; *Wetmore* v. *Hegeman*, 88 N. Y. 72; § 4872, Comp. Laws. No defense was proven against the debt and it was a matter of no concern of defendant or intervener whether Seybold owned the certificate or held it for collection only. *Giselman* v. *Starr*, 106 Cal. 65, 40 Pac. Rep. 10; *Wetmore* v. *Hegeman*, 88 N. Y. 72; *Cottle* v. *Cole*, 20 Ia. 485; *Price* v. *Dunlap*, 5 Cal. 485; *Gushee* v.

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Leavitt, 5 Cal. 160; *Caldwell* v. *Lawrence*, 84 Ill. 161; *Rice* v. *Savery*, 22 Ia. 470. The reading of our statute and of the Iowa, New York and California Codes are the same. Section 4870, Comp. Laws; § 367, Deerings Code Civ. Pro. of California; § 449, Stovers Code Civ. Pro. of New York; § 3748, McClains Annotated Code of Iowa. Our Code being last adopted and modelled from those of California and New York, we must be considered as having taken the statute with the construction placed upon it by their courts. *Jasper* v. *Hazen*, 4 N. D. 4. That plaintiff is not the real party in interest, is new matter in abatement and should be affirmatively plead. *Cottle* v. *Cole*, 20 Ia. 485; *Bowser* v. *Mattler*, 36 N. E. Rep. 714; *Felton* v. *Smith*, 84 Ind. 485; *State* v. *Ruhlman*, 11 N. E. Rep. 793; *Hereth* v. *Smith*, 33 Ind. 514; *Raymond* v. *Pritchard*, 24 Ind. 318; *James* v. *Chalmers*, 6 N. Y. 209-215; *Garrison* v. *Clark*, 11 Ind. 369; *Swift* v. *Elsworth*, 10 Ind. 205, 71 Am. Dec. 316 and note; Pomeroy's Remedies, § 698 and 711; 17 Am. and Eng. Enc. L. 551; *Price* v. *Dunlap*, 5 Cal. 483; *Gushee* v. *Leavitt*, 5 Cal. 160; *Caldwell* v. *Lawrence*, 84 Ill. 161; 1 Enc. Pleading & Pr. 11; *Laniar* v. *Trigg*, 45 Am. Dec. 293; *Varnum* v. *Taylor*, 14 N. Y. Supp. 243; *Spooner* v. *Delaware*, 21 N. E. R. 696; *Burnette* v. *Lyford*, 28 Pac. Rep. 855; *Gerrish* v. *Gray*, 1 Allen, 213; *Coburn* v. *Palmer*, 8 Cush. 124; *Smith* v. *Hall*, 67 N. Y. 50; *Poorman* v. *Mills*, 36 Cal. 121; *Denver* v. *Clark*, 23 Pac. Rep. 209; *Nat'l Distilling Co.* v. *Cream City, etc.*, 56 N. W. R. 864; *Globe Reserve Mutual Life Ins. Co.* v. *Duffy*, 25 At. Rep. 227; *Robinson* v. *Robinson*, 32 Mo. App. 88; *Farwell* v. *Tyler*, 5 Ia. 539. At the time this action was begun Hood was not administrator of the estate, and could make no claim to the funds in dispute. The rights of the parties must be determined by the facts as they stood at the time the cause of action accrued. *Bates* v. *Wilbur*, 10 Wis. 415; *Newman* v. *Tymeson*, 12 Wis. 448; *Case* v. *Jewett*, 13 Wis. 498; *Meech* v. *Patchen*, 14 N. J. L. 71; *Louis* v. *Palmer*, 28 N. J. L. 271; *Colter* v. *Beckley*, 30 Ohio St. 523; *Nichols* v. *Michael*, 23 N. J. L. 264; *Allen* v. *Crary*, 10 Wend. 349; *Hamer* v. *Hathaway*, 33 Cal. 117; *Blue Valley Bank* v. *Clement* 30 N. W. Rep. 64. Mrs. Hood by the

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gift of her son and upon delivery of the same became the absolute unconditional owner of the fund against all the world excepting only creditors of her donor. Section 3267, Comp. Laws; *McGrath* v. *Reynolds*, 116 Mass. 566; *Gass* v. *Simpson*, 4 Cold. (Tenn.) 297; *Basket* v. *Hassell*, 2 S. C. Rep. 418; *Daniel* v. *Smith*, 64 Cal. 346; *Hamm* v. *Moore*, 8 Ohio St. 242. There is no proof in the record that any claims have been proved against the M. C. Hood estate and there being no creditors this gift in view of death cannot be subjected to the control of the administrator. *House* v. *Grant*, 4 Lans, 296; 2 Deering's Cal. Code, 1153 and note; *Basket* v. *Hassell*, 2 S. C. Rep. 418, 107 U. S. 602; *Dunn* v. *German American Bank*, 18 S. W. Rep. 1141; *Gass* v. *Simpson*, 4 Cold. 288; *Kiff* v. *Weaver*, 94 N. C. 274, 55 Am. Rep. 601; 3 Pom. Eq. Jur. § 1147; *Emery* v. *Clough*, 63 N. H. 552, 56 Am. Rep. 543; *Marshall* v. *Berry*, 13 Allen 46; *Parish* v. *Stone*, 14 Pick. 204; *Michenar* v. *Dale*, 25 Penn. St. 64. This gift cannot be set aside in this action as a fraud upon creditors because the intervener has not exhausted his remedy at law and because Mrs. Hood is not a party to the suit. Wait's Fr. Conv. 68.

CORLISS, J. As originally instituted, the object of this action was to recover judgment against defendant, the Grand Forks National Bank, on a certificate of deposit issued by the bank to one John A. Greenlee. One of the points urged upon this appeal as a ground for reversal of the judgment in favor of the plaintiff and against the bank is that the plaintiff is not the real party in interest. The certificate of deposit was indorsed by Greenlee to R. R. Barrett, cashier, and by Barrett it was indorsed to the plaintiff. The indorsement to the plaintiff is in the following form: "Pay to the order of Jos. Seybold, cashier." The indorsements to Barrett, and by Barrett to plaintiff, were it is claimed, for collection; and therefore it is insisted that Greenlee, and not the plaintiff, is the real party interested under the Code. Rev. Codes, § 5221. That one who has the naked legal title to a chose in action may maintain an action upon it, under a statute which provides that an action must be brought by the real party in interest, is a doctrine

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supported by the almost unanimous voice of authority. *Anderson* v. *Reardon*, 46 Minn. 185, 48 N. W. 777; *Elmquist* v. *Markoe*, 45 Minn. 305, 47 N. W. 970; *Sheridan* v. *Mayor*, 68 N. Y. 30; *Giselman* v. *Starr*, 106 Cal. 651, 40 Pac. 8; *Cottle* v. *Cole*, 20 Iowa, 481; *Eaton* v. *Alger*, 47 N. Y. 345; *Knadler* v. *Sharp*, 36 Iowa, 234; *Allen* v. *Brown*, 44 N. Y. 228; *Wetmore* v. *Hegeman*, 88 N. Y. 72. Many other cases might be cited.

It is urged here that the indorsement of the certificate of deposit was merely for collection, and that therefore Seybold is only the agent of Greenlee for the purpose of collecting the paper; and in this connection the case of *Bank* v. *Hollister*, 21 Minn. 385, is cited. But in that case the indorsement itself stated that it was for the purpose of collection only. Neither of the indorsements in this case contain any such statement. They are both in terms unrestricted indorsements of the certificate. They therefore transferred the legal title to the paper to the respective indorsees. The fact that Seybold was, upon collecting the amount of the certificate, to account to Greenlee for the same, or, rather, was to account to Barrett, who was in turn to account to Greenlee, is by no means decisive of the question whether Greenlee intended that the legal title to the paper should pass to Barrett and to his indorsee. Greenlee himself has seen fit to use language sufficient to transfer the legal title to the instrument to his indorsee, and we do not see on what principle the defendant bank should be allowed to go outside of the contract, for the purpose of giving the transaction a different legal effect, when it has no possible interest in the question, and cannot be prejudiced by the ruling that the legal title was transferred to Barrett, and by him to plaintiff, by indorsement in terms purporting to make such transfer. We regard the recent case of *Elmquist* v. *Markoe*, 45 Minn. 305, 47 N. W. 970, as directly in point. In this case the court said: "The point is also made that there was evidence tending to show that plaintiff was not the owner of the note, but held it simply as agent for Benson, and that this question should

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have been submitted to the jury. We think the uncontradicted evidence is that plaintiff was a pledgee for value. But, in any event, it was unquestioned that he was the holder of the note under the unconditional and unrestricted indorsement of the payee. This vested in him the legal title, and entitled him to sue in his own name, whether he possessed the beneficial interest in its proceeds or not. A recovery by plaintiff will fully protect the defendants, and they have no interest in the equities between him and his assignor, unless an inquiry into the subject had become material upon the right of interposing some defense or counterclaim against the assignor. *Vanstrum* v. *Liljengren*, 37 Minn. 191, 33 N. W. 555; *Sheridan* v. *Mayor*, 68 N. Y. 30; *Hays* v. *Hathorn*, 74 N. Y. 486-490." See, also, *Boyd* v. *Corbitt*, 37 Mich. 52. If the sole object of Greenlee was to intrust this paper to an agent for collection, there was no occasion for indorsing it at all. A debtor has no right to insist that his creditor shall, on receiving payment, indorse to him (the debtor) the written obligation he holds. Surrender is all that can be required. The ordinary purpose of indorsing negotiable paper by an unrestricted indorsement in sending it through a bank for collection is to vest in the bank the legal title for purposes of collection. Where such indorsement is unrestricted, as in the case at bar, the indorsee is thereby made the holder of the legal title, although it may be that he is given such legal title to enable him to collect the paper for the indorser. See *McWilliams* v. *Bridges*, 7 Neb. 419. The finding of the court is merely that the instrument was indorsed to Barrett, and by him to plaintiff; and, when we turn to the testimony, we find that Greenlee testified that he put the certificate in the bank "the same as other checks, and expected them to collect it." This testimony tends to confirm the view that, while he deposited it for the purpose of having it collected, the general usage of business men was intended to be followed by him, *i. e.* he gave the bank the legal title to the paper, expecting it to forward it for collection as the holder of such legal title; and this the character of the indorsement confirms.

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At common law the assignee was obliged to sue in the name of the assignor. It was to do away with this rule that the statute has been adopted, in the several states, providing that an action must be brought in the name of the real party in interest. Under this statute the assignee may sue in his own name, although he holds the legal title merely for the benefit of another. All that the debtor is interested in is protection against a second action on the same claim. If the beneficial owner has vested the legal title to the chose in action in a third person by assignment, the assignee can collect the claim, and the debtor will be protected; and if the assignee sues upon the claim, a judgment in his favor will preclude a recovery on the same demand by the assignor. It is not contended, in this case, that the bank will suffer any prejudice by allowing plaintiff, instead of Greenlee, to maintain this action, owing to the existence of any offset in its favor, good as against Greenlee, and not good as against the plaintiff.

Subsequently to the commencement of this action, the appellant Charles H. Baldwin, as administrator of the estate of M. C. Hood, intervened in the action, claiming title to the certificate of deposit. Having failed to satisfy the District Court with respect to his title, he has appealed from the adverse judgment of that court. How the intervener can claim any interest in the certificate of deposit sued on is beyond our comprehension. His alleged title to it is based on the following facts: M. C. Hood, of whose estate he is administrator, shortly before his death, gave to his mother, as a gift *causa mortis*, an insurance policy on his own life, payable to himself or assignee. Subsequently she collected the amount of the policy from the insurance company, and deposited the money in a bank at Bridgeport, Ohio. Thereafter she loaned to John A. Greenlee individually the sum of $3,000, taking his note therefor; and it was this money which he deposited in the defendant bank, and for which was issued to him the certificate of deposit on which this action was brought. The money with which she made this loan was drawn from the bank in which she had deposited this insurance money, and

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the amount of such loan was the exact amount received by her from the insurance company, and deposited in such bank. It also appears that she had no money in the bank at the time she made such deposit, and never, at any time before drawing out this sum to make the loan to Greenlee, deposited any other moneys in such bank. The theory on which the intervenor seeks to have the certificate of deposit adjudged to belong to him as administrator is that the insurance policy on the life of M. C. Hood, his decedent, was part of the assets of the decedent's estate, and that he has followed the proceeds of the policy into the hands of Greenlee and the plaintiff, who, for the purposes of this action, occupies the exact position of Greenlee. Assuming that the policy did belong to the estate, we fail to discover the principle on which the intervener can claim this certificate of deposit in Greenlee's hands. The policy went into the hands of the mother of M. C. Hood, and she collected the amount due upon it. The right of the estate, assuming it had any right, to the policy itself, was then transferred to the money collected, and later it was transferred to the account in her favor with the bank created by the deposit of such money therein. When she loaned to Greenlee money taken from this same account, and took his note for the loan, the right of the estate, if any, was transferred to this note. But it did not follow the money into the hands of a third person, who had borrowed the money and given his obligation therefor. The doctrine that property may be followed in changed form is limited to the person who received it in the original form as the property of the claimant. No matter how often its character may be altered in the hands of the one who first acquired it, the owner may follow it, if he can establish its identity with the original property. Under this doctrine, the intervener could claim the note given by Greenlee to Elsie Hood, the mother of M. C. Hood, if the estate was the owner of the insurance policy. But he could not invoke this doctrine to justify the pursuit, not of the note in the hands of Elsie Hood, but of the money loaned by her to Greenlee, a third person; and such an

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application of this doctrine has never been made by any court. When one borrows money of another, the money so borrowed cannot be followed into his hands, and he be made to account for for such money to a third person, on the ground that the lender of the money had turned into cash property of such third person, and had loaned such cash to the borrower. The borrower's obligation is to the lender. The owner's rights attach to the changed form of the property in the hands of the lender, *i. e.* the note given him by the borrower on the loan, and to that alone.

But the decision in this case may and should be placed on another ground as well. The intervener has made out no claim to the insurance policy or its proceeds. The court merely finds that such insurance policy was given by the decedent, M. C. Hood, to his mother, just before, and in view of, his impending death. It was a gift *causa mortis*. It was consummated by delivery of the policy, and by the execution to his mother by him of an assignment thereof. It is therefore clear that the whole legal and beneficial interest in the policy was, at the time of M. C. Hood's death, vested in his mother, he not having revoked the gift in his lifetime, and having in fact died of the ailment (consumption) which, at the time of the gift, was inexorably dragging him to the grave. The donee of a gift *causa mortis* does not depend upon the will of the administrator for his title. His title vests before the death of his donor, subject to revocation by the donor during his lifetime, or by his recovery from the disease from which he apprehended death when he made the gift. The subject of the gift does not become a part of the assets of the estate, for the reason that it did not belong to the donor at the time of his death. But, upon the principle that one must be just before he is generous, the administrator may pursue the thing so given in the hands of the donee, whenever he can establish the fact that it is needed to pay debts of the donor, by reason of the insufficiency of assets for that purpose. The theory on which this action against the donee is instituted is that the transfer of the thing operated, under the circumstances, to defraud creditors,

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and therefore should, in their interest, be annulled. It presupposes that the title is in the donee, subject to recall by the estate in case of necessity. It is evident that, as the right of the donee to retain the gift can be defeated only by showing such necessity, he must be a party to the proceeding which assails his right, and therein have the opportunity to contest the truth of the claim on which, alone, his right can be divested. He must have a chance to be heard on the question whether there is a deficiency of assets. In the case at bar the donee is not a party to the action, and cannot possibly be heard on the question whether the gift is needed to pay debts. In support of the views above stated we cite the following cases: 8 Am. & Eng. Enc. Law, 1352; *House* v. *Grant*, 4 Lans. 290; *Basket* v. *Hassell*, 107 U. S. 602, 2 Sup. Ct. 415; *Gass* v. *Simpson*, 4 Cold. 288; *Dunn* v. *Bank*, (Mo.) 18 S. W. 1141; *Kiff* v. *Weaver*, 94 N. C. 374; *Emery* v. *Clough*, 63 N. H. 552, 4 Atl. 796; *Marshall* v. *Berry*, 13 Allen, 40; *Parish* v. *Stone*, 14 Pick. 204; *Michener* v. *Dale*, 23 Pa. St. 64; *Gaunt* v. *Tucker*, 18 Ala. 27; Schouler, Ex'rs, § § 219, 220. Our statute, which declares that a gift in view of death must be treated as a legacy, so far as relates only to creditors of the giver (section 3562, Rev. Codes,) is merely declaratory of the settled rule of law on this subject. Such a gift is not a legacy as to the administrator. He can exercise no control over it merely by virtue of his representative capacity. It is to be treated as a legacy as to creditors alone. It is only when it can be shown that creditors will be injured by sustaining the gift that the personal representative of the decedent can legally claim it, and then only to the extent of the necessity.

In the case at bar it appears that the inventory received in evidence shows assets of the estate of M. C. Hood amounting to $10,000, and few, if any, debts are shown to exist against the estate. The case, as it stands before us, does not disclose any necessity for a resort by the administrator to this fund to enable him to pay creditors of the estate. The contrary clearly appears. If, at any time in the future, it should be discovered that it was

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necessary to make Elsie Hood account to the administrator of her son's estate for the purpose of obtaining money with which to pay creditors of such estate who could not otherwise be paid, the proper action for that purpose can be instituted. To that action she would have to be a party. Here it is sought, in effect, to deprive her of her property without an opportunity to be heard. Of course, such a proceeding would be ineffectual to bind her, and she could therefore enforce her obligation against Greenlee for the money borrowed by him, although he would be stripped of this certificate of deposit, if we should hold that the intervener could maintain his contention in this case. If he saw fit to advance his individual money to pay debts of the decedent, no one can derive any advantage from that circumstance. Certainly that fact would not divest him of his title to the balance of the money on deposit with the defendant bank, and vest such title in the estate. The intervener, who was appointed administrator with the will annexed in place of Greenlee, as executor, cannot, therefore, lay any claim to this certificate of deposit. It was not a part of the assets, nor did Greenlee make it part of such assets.

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

(67 N. W. Rep. 682.)

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HOMER E. SARGENT *vs.* CHARLES F. KINDRED.

Opinion filed May 15th, 1896.

Notice to Attorney is Notice to Client.

Notice to the attorney for defendant of the entry of judgment against such defendant is notice to the defendant, within the meaning of the statute (section 4939, Comp. Laws) which confers upon the District Court power to relieve a party from a judgment entered against him through his mistake, inadvertence, surprise, or excusable neglect within one year after notice thereof.

Notice of Motion to Vacate Judgment by Default.

It is not sufficient that the notice to vacate a judgment under this statute is made within the year. It must also be submitted and decided within the year. But the court may, to prevent injury to the suitor through its own delay in deciding the motion, direct that the order granting the relief be made and entered *nunc pro tunc* as of the time when the motion was finally submitted.

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

Action by Homer E. Sargent against Charles F. Kindred. Reversed.

Ball, Watson & Maclay, for appellant.

Seth Newman and *C. A. Severance*, for respondent.

CORLISS, J. This is the second appeal from an order vacating a judgment in favor of plaintiff. See report of first decision in 5 N. D. 8, 63 N.W. 151. After the decision upon the former appeal, and after the record had gone down to the District Court, the plaintiff applied on notice for an order of the District Court making the order of the Supreme Court the order of the District Court. On the hearing of this application the defendant asked that he be allowed to reopen the motion, and to file additional affidavits. His request was granted. Such affidavits being filed, the court decided that on the new showing made the defendant was entitled to an order vacating the judgment under the provisions of section 4939, Comp. Laws; and such an order was accordingly made and entered. From this order an appeal has been taken, and we are again called upon to pass on the question whether the judgment vacated by the court should have been set aside. We find

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it unnecessary to decide whether it is within the power of the District Court, after the case had been decided in this court, to allow the defendant to make a further showing on the same motion, and on such new showing to make the order appealed from. It may be that the law is with the plaintiff on this point, he contending that when the case was decided in this court the motion was finally disposed of, and that all the District Court could do at the very most was to allow the defendant to renew the motion on new papers. But conceding, without deciding, that plaintiff is in error in this respect, we nevertheless are clearly of this opinion that the order appealed from should be reversed. The motion to vacate the judgment was based upon section 4939, Comp. Laws, (section 5298, Rev. Codes,) which declares that a 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, inadvertence, surprise, or excusable neglect. The motion as originally made was not made within one year after the defendant's attorney was served with written notice of the entry of such judgment. That notice to the attorney is notice to the client for the purposes of this section as well as for other purposes is supported by the following decisions: *Schobacher* v. *Insurance Co.*, (Wis.) 17 N. W. 969; *Jex* v. *Jacob*, 7 Abb. N. C. 452. It is urged that the authority of an attorney to represent his client when such client is a defendant in a case ceases with the entry of judgment. Assuming this to be so, yet, until after judgment is entered, the attorney not only has power to act for his client, but it is his duty to so act for him. It is as much a part of his duty as attorney in the action for him to see to it that no improper judgment is entered against his client as to protect his client's interests at any other stage of the case. An attorney who, after verdict or decision, should pay no further attention to subsequent proceedings leading up to and including the entry of judgment would be recreant to the trust reposed in him. He must prevent the taxing of improper items in the bill of costs

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(often not taxed until after entry of final judgment;) and he must see that the judgment entered is such a one as is warranted by the verdict or decision in the case. As it is his duty to ascertain the nature and extent of the judgment entered against his client, he represents him until such judgment is in fact entered. Notice to him of the entry of such judgment is therefore notice to his client for whom he is acting at the very time he receives such notice. We hold that notice to the attorney in this case that a judgment had been entered against his client, the defendant, was notice to such defendant within the meaning of section 4939, Comp. Laws. We desire to place our decision on another ground. While the motion appears to have been made within a year after the defendant himself had actual knowledge of the entry of judgment, it was neither decided nor submitted to the court until after the expiration of more than a year from the time the defendant knew of such judgment. It is not enough that the motion is made within the year, under section 4939, Comp. Laws. It must be made and submitted and the order granting the relief must also be made within the year. The language of the statute is explicit. It declares that the court shall have power to relieve a party from a judgment at any time within one year after notice thereof. It is not enough to satisfy the language of the statute that the application for relief is made within year, or that it is submitted within the year. But the court must take action within the year. It is true that a court, to prevent prejudice to a suitor through its own delays, has power to direct that the order granting the relief be entered *nunc pro tunc* as of the time the motion was finally submitted. In this way all possible injury to the litigants from the failure of the court to decide a motion of this character within the year may be prevented, provided the party has brought his motion to a hearing within the statutory time. There is no hardship in this construction of the statute. Certainly, a year after notice that a judgment has been entered against a suitor is ample time for him to prepare and submit his motion to have such judgment set aside. In practically every case a

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decision of the motion can be secured within the year, as there is but little occasion for delay in deciding such motions after they are finally submitted. And if the court discovers that it is unable to render a decision within the prescribed period it has power (and such power will invariably be exercised in favor of a litigant who has not been guilty of great laches) to direct that the order be entered *nunc pro tunc*, as of the time the motion was finally submitted. In plaçing a construction on the statute in question, we must keep in mind not only its language, which is very clear, but also the fact that it extends to the defeated party an extraordinary indulgence, even on the theory that he must both move and submit his motion within the year. The statute vests in him a new right, and he must take it burdened with the limitations found in the statute itself. The successful suitor is entitled to some protection. There should come a time when he may know that his judgment is secure against attacks allowed by the statute we are construing. It was unquestionably this consideration which prompted the legislature, while conferring upon the defeated party this new privilege, very broad in character, to place such a limitation on the enjoyment of this privilege as we are clear they have placed upon it. The conclusion we reach on this point is in accord with the decision in Wisconsin construing a statute identical in language. *Knox* v. *Clifford*, 41 Wis. 458; *Whitney* v. *Karner*, 44 Wis. 563; *McKnight* v. *Livingston*, (Wis.) 1 N. W. 14. See the well-reasoned opinion of Taylor, J., in the case last cited. The order is reversed, and the District Court is directed to enter an order denying the motion to vacate the judgment. All concur.

WALLIN, C. J., having been of counsel, did not sit at the hearing or take any part in the decision of this case; Templeton, J., of the First District, sitting by request.

(67 N. W. Rep. 826.)

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ROSENBAUM BROS. & CO. *vs.* JERRY HAYES.

Opinon filed May 22nd, 1896.

Factor's Lien—Delivery of Possession.

The lien of a factor is dependent on possession. A delivery of property to a carrier by the owner, to be shipped to another point, not the place of business of the factor, and the taking by the owner from the carrier of a bill of lading in the name of such factor, and forwarding it to him, are not conclusive on the question of the intent of the owner to deliver possession to the factor, where there are other facts in the case tending to show that it was not the purpose of the owner to surrender possession to the factor, but that the object of shipping in the name of the factor was to obtain the benefit of a through rate, which could not be attained if the shipment was made part of the way in the name of the owner, and thereafter the balance of the distance to the place of business of the factor in his name.

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

Action by Morris Rosenbaum and others, suing as Rosenbaum Bros. & Co., against Jerry Hayes, sheriff of Stark County. Judgment for plaintiffs, and defendant appeals.

Reversed.

Edgar W. Camp, *L. A. Simpson*, and *F. H. Register*, for appellant.

James G. Campbell, (*A. B. Melville*, of counsel,) for respondents.

CORLISS, J. We are compelled to reverse the judgment in this case for errors in the instructions of the court to the jury. The plaintiffs are seeking to recover in replevin the possession of 5,600 sheep from the defendant, who, as sheriff, seized them on attachment against George M. Beasley & Co. The plaintiffs base their right to possession upon a factor's lien for a general balance due them from Beasley & Co. on account of advances made by them as commission merchants to Beasley & Co. under an agreement that Beasley & Co. were to purchase sheep, and consign them to plaintiffs in the City of Chicago to be sold by plaintiffs, as commission merchants, on account of Beasley & Co.; all the surplus, after reimbursing the plaintiffs for

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their advances and expenses in the business, and after paying their commissions on such sales, to be turned over to Beasley & Co. There was evidence tending to prove that on the 11th of April, 1893, Beasley & Co. were, and ever since that day have been, indebted to the plaintiffs in the sum of about $16,000. If at any time before their seizure under the attachment by defendant the sheep in question came to the possession of the plaintiffs under the arrangement between them and Beasley & Co., then there attached to them a factor's lien in favor of plaintiffs for the general balance due them from Beasley & Co. 1 Jones, Liens, § 418. There was evidence in the case tending to show that the plaintiffs had in fact secured possession of the sheep prior to the levy of the attachment, but on this question of fact there was a controversy between the parties. There was evidence which tended to prove that Beasley & Co. had not in fact parted with their control over the sheep as owners thereof when the sheriff seized them under the attachment against Beasley & Co. The only evidence relied on by plaintiffs to establish a delivery of possession to them as a matter of law was a shipment of the sheep from Rosebud, Mont., to Dickinson, in this state, and the fact that Beasley & Co., when the shipment was made, took from the railroad company, and forwarded to plaintiffs at Chicago, a bill of lading of the property, in which plaintiffs were named as consignees. It is true that there are other facts in the case tending to show a delivery of possession, but there were also facts proven which had a tendency to show that Beasley & Co., by the shipment of the sheep, and the procuring and forwarding to plaintiffs of the bill of lading, did not intend to part with their control over the sheep as owners thereof, but that the purpose in shipping in the name of the plaintiffs was to secure the benefit of a through rate to Chicago on the shipment from Rosebud to Dickinson, it being the purpose of Beasley & Co. ultimately to send on the sheep to plaintiffs at Chicago. By shipping in the name of the plaintiffs, Beasley & Co. could obtain the benefit of the through rate; but could not secure this advantage if they shipped

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in their own name to Dickinson, and subsequently, in the name of the plaintiffs, from Dickinson to Chicago. It is not seriously contended that the question of delivery was not a question of fact, provided delivery as a matter of law was not established by the forwarding to plaintiffs of the bill of lading issued in their name. The court, in its charge, repeatedly instructed the jury that the mere fact of the shipment of the sheep in the name of the plaintiffs, and the procuring and forwarding to them of the bill of lading for the sheep, of itself constituted a sufficient delivery to entitle plaintiffs to a factor's lien from the time of such shipment, irrespective of the question whether it was the intention of Beasley & Co. to turn over the property to the plaintiffs. It is unnecessary to set out more than one of these instructions to show how erroneous was the view of the law the jury must have have imbibed from the charge of the court, although as a matter of fact the substance of this particular instruction we here quote was repeated again and again in the charge of the court. The instruction was in the following language: "If you find that there was an agreement or an arrangement between Rosenbaum Bros. & Co., the plaintiffs in this action, made prior to April 11, 1893, and in force at that time, that George M. Beasley & Co. were to purchase sheep with moneys to be advanced by the plaintiffs for the purpose of purchasing sheep, and with the further agreement that the said sheep, when purchased and when ready for market, or when directed by Rosenbaum Bros. & Co., should be shipped to them, to be sold upon commission, and the proceeds applied to pay the moneys so advanced for the purchase of said sheep, and any general balance that might be due at the time of said sale from George M. Beasley & Co. to Rosenbaum Bros. & Co., the plaintiffs, then I charge you that from the date of the delivery of said sheep on board the cars of the Northern Pacific Railroad Company, consigned to the plaintiffs in this action, the plaintiffs had a special property interest in and lien upon said sheep." It is undoubtedly the law that a delivery to a carrier may be made

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under such circumstances as to place the property completely within the control of the consignee. If this is done, the lien at once attaches. Meecham. Ag. § 1035; 1 Jones, Liens, § § 460, 461. And even if the consignor might not have intended to surrendor control to the consignee by the delivery to the carrier, yet, if he takes a bill of lading in the name of the consignee, and sends or delivers it to him, and on the strength of this particular bill of lading the factor advances him money, then, to the extent of such advances, the lien would attach. The consignee having relied on the particular bill of lading sent to him by the owner of the property in making the advance, the owner would be estopped, to the extent of such advances, from urging his secret, undisclosed purpose to the prejudice of the consignee. *Holbrook* v. *Wight*, 24 Wend. 168; *Davis* v. *Bradley*, 28 Vt. 118; *Lambeth* v. *Turnbull*, 39 Am. Dec. 536. But where, as in this case, the advances were not made on the strength of the bill of lading, the question is one of intention on the part of the owner of the property at the time of making the shipment. "A delivery of goods to a carrier is undoubtedly a delivery to the factor to whom they are consigned, if the delivery is made with the intention of passing a special property in the goods, and the consignor wholly parts with control of the goods." 1 Jones, Liens, § 462. There is no delivery to the factor unless the owner intended to part with all control over the goods at the time of the shipment, and vest that control in the factor to the extent that factors have a right to exercise control over property consigned to them for sale on commission. If these sheep had been shipped to Chicago, and a bill of lading had been taken in the name of the plaintiffs, and forwarded to them, then, in view of the course of dealing between these parties, there would probably have been a sufficient delivery to the plaintiffs to give them a factor's lien from the time of such shipment. But here the shipment was to an intermediate point, which was not the usual place of delivery to the factors under the arrangement between the parties, but merely a new feeding ground for the sheep. We think that under the

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evidence the question of delivery of possession was a question of fact. It is apparent from the instruction above quoted by us that the jury must have been led to believe that the mere fact of the shipment in the name of plaintiffs, followed by the forwarding to them of the bill of lading, was decisive on the question of plaintiff's lien as factors. This was equivalent to an instruction to the jury to find for the plaintiffs, for these facts were not in controversy. It was undisputed that Beasley & Co., had shipped the goods to Dickinson, and had taken out and forwarded to plaintiffs a bill of lading for the sheep, issued in the plaintiffs' name.

But there was still another more prejudicial error in the court's instructions to the jury. They were told that the factor's lien attached from the moment of purchase by Beasley & Co. of the sheep with the moneys of the plaintiffs, sent to them for that purpose. The instruction was not predicated on any theory of ownership of the sheep by plaintiffs, but, on the contrary, it proceeded on the theory that Beasley & Co., in buying the sheep, were buying them for themselves, to be forwarded by them as owners to plaintiffs, to be sold by plaintiffs on commission for Beasley & Co. We will refer to only one of these erroneous instructions, although there are many of the same kind to be found in the charge, which was very long, and embodied many repetitions. It is as follows: "If you find that prior to April 11, 1893, the plaintiffs, Rosenbaum Bros. & Co., and George M. Beasley & Co. had entered into an agreement whereby Rosenbaum Bros. & Co. had advanced to George M. Beasley & Co. the moneys which purchased the sheep in question in this action, upon the promise on the part of George M. Beasley & Co. that sheep should be purchased with such moneys so advanced, and if you find that the sheep in question, or any part thereof, were purchased by the firm of George M. Beasley & Co. with the money so agreed to be advanced, and if you find that there was an agreement between said firm of Rosenbaum Bros. & Co. and George M. Beasley & Co. that the sheep so purchased with the moneys advanced by

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the plaintiffs, Rosenbaum Bros. & Co., should be shipped to Rosenbaum Bros. & Co. as directed, then I charge you that Rosenbaum Bros. & Co., from the time of the purchase of said sheep under such arrangement, if any there was, had a special property in the sheep so purchased, which amounted to a lien thereon, and had a right to have said sheep come forward to them whenever they so directed." This instruction proceeded upon a radically unsound view of the law, in that it utterly eliminated from the elements which go to make up a factor's lien the indispensable element of possession, either actual or constructive. Our statute, which is merely declaratory of the common-law rule, declares that the lien of a factor is dependent on possession. Section 4442, Comp. Laws. It is urged that the court did, on the request of counsel for defendant, lay down for the guidance of the jury the correct rules of law applicable to the case. But in view of the fact that the court iterated and reiterated these erroneous views in its charge, we are unable to say that the jury gave less weight to these unsound doctrines than to the isolated enunciation of the correct doctrines, which may have been either forgotten or put aside by the jury as a statement of law, not to be followed by them in deciding the case. If there is any presumption to be indulged under the extraordinary facts of this case, it is that the jury believed that these two erroneous doctrines, which ran persistently through the charge, appearing in various guises nearly a score of times, were the rules which must control them in arriving at a verdict.

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

ON REHEARING.

It is urged in the petition for rehearing that the error in the court's charge referred to in the opinion was not prejudicial, inasmuch as the jury found specially that the plaintiffs were in possession of the sheep at the time they were attached. But, so far as we know, the very finding may have been based upon the

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erroneous instructions of the trial judge to the effect that the shipment of the sheep in the name of the plaintiffs, followed by the delivery to them of the bill of lading, constituted a delivery of possession as a matter of law. In one of the numerous charges of the same general character the court said: "If you find that the sheep in question were on or about the 11th day of April, 1893, delivered by George M. Beasley & Co. on board the cars on the track of the Northern Pacific Railroad Company at Rosebud, Montana, consigned by a bill of lading in evidence in this case to Rosenbaum Bros. & Co. at Dickinson, then I charge you that such delivery upon the cars aforesaid, and such issuing of the bill of lading, and the delivery thereof to Rosenbaum Bros. & Co., the plaintiffs in this action, constituted a delivery to them of the sheep in question, and they had a right to hold possession thereof until all moneys due by the firm of George M. Beasley & Co. for advances made to George M. Beasley & Co. in the commission business had been fully paid." The court, by this instruction, told the jury that, as a matter of law, the plaintiffs were in possession if the sheep were shipped in the plaintiffs' name, and the bill of lading was delivered to them. We are unable to say that the special finding referred to was not based upon this erroneous statement of the law. All concur.

(67 N. W. Rep. 951.)

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ANNA GREENBERG *vs.* THE UNION NAT'L BANK OF GRAND FORKS.

Opinion filed May 28th, 1896.

Mortgages—Refusal to Discharge—Recovery of Penalty.

When a party seeks to recover on statutory penalty, the statute which gives the penalty, and which alone is the source of the right to recover, must be specifically counted upon.

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

Action by Anna Greenberg against the Union National Bank of Grand Forks. Verdict for plaintiff. From an order denying a new trial, defendant appeals.

Reversed.

Cochrane & Feetham, for appellant.

The object of the statute is not only to protect the credit of the mortgagor but to protect the title to the land and enable the owner to remove all clouds from the title. *Jones* v. *Fidelity Co.*, 63 N. W. Rep. 554; *Deeter* v. *Crosley*, 26 Ia. 180; *Thomas* v. *Reynolds*, 29 Kan. 309. In this case there were two mortgagors, hence, any claim for penalty is a joint claim in favor of the mortgagors and not an individual claim in favor of either. *Clyde* v. *Johnson*, 4 N. D. 97; *Colton* v. *Mott*, 15 Wend. 619; *Edwards* v. *Hill*, 11 Ill. 23. The right to sue for this penalty is solely and exclusively of legislative creation, and the remedy can only be pursued as the statute provides. *Matter of House Ave.*, 67 Barb. 350; *Dudley* v. *Mayhew*, 3 N. Y. 9; *Heiser* v. *Mayor*, 104 N. Y. 72; *Dickinson* v. *Van Wormer*, 39 Mich. 141; Southerland on St. Cr. § 399. The complaint does not disclose a cause of action in plaintiff. *Willard* v. *Comstock*, 58 Wis. 565, 17 N. W. Rep. 402; *Arzbacher* v. *Mayer*, 10 N. W. Rep. 440; *Rainer* v. *Smizer*, 28 Mo. 312; *Clark* v. *Cable*, 21 Mo. 223; *Slutts* v. *Chafee*, 4 N. W. Rep. 763; § 4879, Comp. Laws. And the point that the complaint does not state a cause of action is not waived by failure to demur. Section 4913, Comp. Laws; *Gould* v. *Glass*, 19 Barb. 186; *Nelson*

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v. *Ladd*, 4 So. Dak. 4. Plaintiff does not count upon the statute for the penalty but asked relief in damages only, and no damages were proven. *Howser* v. *Melcher*, 40 Mich. 189; *Parker* v. *Haworth*, 18 Fed. Cases, 10,738; *Sears* v. *U. S.*, 21 Fed. Cases 12,592; *Cross* v. *U. S.*, 6 Fed. Cases, 3,434; *Reed* v. *Northfield*, 13 Pick. 99; *Smith* v. *U. S.*, 22 Fed. Cases, 13,122; *Jones* v. *Van Zandt*, 13 Fed. Cases, 7,502, 5 How. 229; *Fish* v. *Manning*, 31 Fed. Rep. 341; *Briscoe* v. *Hinman*, 4 Fed. Cases, 1887. The rule obtains through legislative enactment in Wiscon in. *Teetshorn* v. *Hull*, 30 Wis. 162; *Crumbly* v. *Bardon*, 36 N. W. Rep. 19.

J. H. Bosard, for respondent.

The defendant could have raised the question of nonjoinder of parties, plaintiff by demurrer failing so to do, the point was waived. Sections 4909, 4912 and 4913, Comp. Laws; *Thompson* v. *Reynolds*, 29 Kan. 309; *Kucera* v. *Kucera*, 57 N. W. Rep. 47; *Hudson* v. *Archer*, 55 N. W. Rep. 1099; *Linden* v. *Green*, 46 N. W. Rep. 1108; *Neville* v. *Clifford*, 55 Wis. 151, 12 N. W. Rep. 419; *Day* v. *Cole*, 22 N. W. Rep. 811; *Smith* v. *Jordan*, 13 Minn. 264; *Fisher* v. *Hall*, 41 N. Y. 129; *Tanner* v. *Davis*, 28 N. Y. 242; *Treno* v. *R. R. Co.*, 50 Cal. 223; *Asterhondt* v. *County*, 98 N. Y. 239; *Stelling* v. *Grolbrowesky*, 19 N. Y. Supp. 280. The pleader must state a case that comes within the statute, when this is done no doubt can exist but that the complaint is framed under the statute. *Clarke* v. *Muskejon*, 50 N. W. Rep. 254; *Hayes* v. *City*, 51 N. W. Rep. 1067; *Chicago* v. *Porter*, 34 N. W. Rep. 286.

BARTHOLOMEW, J. Plaintiff sued defendant in Justice Court, and for a cause of action stated that, in 1892, plaintiff and her husband executed to the defendant a mortgage on certain described real estate to secure a certain note; that such mortgage was duly recorded in the proper county; that the said note had been fully paid; that plaintiff had demanded of defendant a certificate of the discharge of said mortgage, and offered to pay the expense of executing and acknowledging the same. Plaintiff further alleged "that the defendant has neglected and refused,

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after the demand of the plaintiff, to satisfy said mortgage and discharge the same of record, whereby the plaintiff is damaged, to-wit: in the sum of one hundred dollars ($100.00.") The defendant's corporate capacity was also alleged, and judgment prayed for $100 and costs. The defendant answered, admitting the execution and delivery of the mortgage, and denying the payment of the note secured thereby. There was a jury trial, and verdict directed for plaintiff for $100. Motion for new trial was denied, and an appeal taken from such order. The errors assigned are: (1) The action of the court in directing a verdict for plaintiff; (2) the refusal of the court to direct a verdict for defendant; * * * (4) in overruling defendant's objection to receiving any evidence under the complaint, on the ground that it did not state facts sufficient to constitute a cause of action; and (5) in overruling defendant's motion for a new trial.

These assignments may be considered together. Section 4365, Comp. Laws, reads: "When any mortgage has been satisfied, the mortgagee of his assignee must, immediately on demand of the mortgagor, execute and deliver to him a certificate of the discharge thereof, and must, at the expense of the mortgagor, acknowledge the execution thereof so as to entitle it to be recorded, or he must enter satisfaction, or cause satisfaction of such mortgage to be entered of record; and any mortgagee, or assignee of such mortgage, who refuses to execute and deliver to the mortgagor the certificate of discharge, and to acknowledge the execution thereof, or to enter satisfaction or cause satisfaction to be entered of the mortgage, as provided in this chapter, is liable to the mortgagor or his grantee or heirs for all damages which he or they may sustain by reason of such refusal, and also forfeit to him or them the sum of one hundred dollars." Waiving all objections to the complaint by reason of defect of parties plaintiff, it might be regarded as sufficient to enable plaintiff to introduce evidence of damages. But no evidence of damages whatever was introduced or offered, and, when the testimony was closed, each party moved

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for a directed verdict in his favor. Defendant's motion was overruled, and plaintiff's was granted. In this there was error. No damages whatever having been proven, no judgment for damages could stand. Hence, if plaintiff recovered anything, it must be the statutory penalty. But we are agreed that the complaint was insufficient, if it be regarded as a complaint for the statutory penalty, for the reason that the complaint did not count upon or in any manner mention the statute which alone gives the penalty. The rule which requires a pleader who seeks to recover a statutory penalty to count specifically upon the statute, while it may be technical, yet has so long been the law, and is so universally accepted, that we cannot disregard it. It is the settled rule in England. *Wells* v. *Iggulden*, 3 Barn. & C. 186; *Fife* v. *Bousfield*, 6 Q. B. 100, It is the uniform rule in the Federal Courts. *Briscoe* v. *Hinman*, Fed. Cas. No. 1,887; *Cross* v. *U. S.*, Fed. Cas. No. 3,434; *Jones* v. *Van Zandt*, 5 How. 229; *Parker* v. *Haworth*, Fed. Cas. No. 10,738; *Fish* v. *Manning*, 31 Fed. 341. And, to same effect, *Reed* v. *Northfield*, 13 Pick. 94; *Howser* v. *Melcher*, 40 Mich. 189; *People* v. *Road Co.*, 64 Mich. 618, 31 N. W. 546; *Kirkpatrick* v. *Stewart*, 19 Ark. 695. And so late an authority as 18 Am. and Eng. Enc. Law, p. 278, declares: "In an action upon a penalty, the statute imposing it, and the section thereof, must be pleaded with certainty." We find no authority to the contrary. It is the statutory rule in New York (*Fish* v. *Manning*, *supra*,) and also in Wisconsin (*Teetshorn* v. *Hull*, 30 Wis. 162;) and, since January 1, 1896, has been the statutory rule in this state (Rev. Codes, § 5787.) True, this case was tried before that law went into effect; but we deem these statutes simply declaratory of a common-law rule.

Learned counsel cite *Clark* v. *Village of North Muskegon*, 88 Mich. 308, 50 N. W. 254, and *Hayes* v. *City of West Bay*, 91 Mich. 418, 51 N. W. 1067; but these cases were brought to recover damages for negligence, and do not touch the question of penalty. The cases of *Routsong* v. *Railroad Co.*, 45 Mo. 236, *Reynolds* v. *Railroad Co.*, 85 Mo. 90, and *Emerson* v. *Railway Co.*, 111 Mo.

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161, 19 S. W. 1113, are more nearly in point. They were actions brought to recover treble damages, under a statute giving that right in certain cases; and it was held unnecessary to count on the statute. But the Supreme Court of California, in speaking of statutes of that nature, said: "The statutes of this as well as those of other states present many instances in which no new right of action or remedies for private injuries are created, but the damages authorized to be recovered are by those statutes enhanced. * * * Those statutes, like the one under consideration, are not penal, but are remedial." *Jahns* v. *Nolting*, 29 Cal. 508. And see *McKay* v. *Woodle*, 6 Ired. 352; *Reed* v. *Northfield*, *supra*. It is clear, under the authorities, that the complaint in this case did not warrant a recovery of the penalty. The order appealed from is reversed, and a new trial ordered.

Reversed.

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

(67 N. W. Rep. 597.)

THE STATE OF NORTH DAKOTA *vs.* HERBERT ROOT.

Opinion filed June 3rd, 1896.

Contemptuous Language Concerning Judge—When Not Contempt.

Where language which is abusive and defamatory in character is used by an attorney at law, and applied to a Judge of the District Court in which the attorney is licensed to practice, and such language reflects in severe terms upon the official action of such judge with respect to cases then pending in said court, and also reflects upon the private character of said judge, but such language is not uttered in the courthouse, nor in the immediate view and presence of the court or any of its branches, nor uttered within the sight of hearing of the judge, but is spoken in the stores and in the streets and public places of the city where court is being held, *held*, that such language does not constitute the offense of contempt of court.

Disbarment.

Whether such language furnishes ground for disbarment proceedings not decided.

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Affidavit for Contempt—When Insufficient.

An affidavit attempting to charge a contempt of court committed by using offensive language respecting the presiding judge of said court, but which failed to allege that such language was spoken in the immediate view and presence of the court, *held*, insufficient, in substance, to charge the crime of contempt, either at common law or under the statute.

Crimininal Contempt in Presence of Judge.

Where a criminal contempt of court occurs in open court, and within the personal knowledge and observation of the presiding judge, it can be punished, not only summarily, but without the use of either pleadings or evidence, other than the evidence of the judge's senses. Rev. Codes, § § 5932, 5933, 5935.

Affidavit Charging Criminal Contempt—How Construed.

Where an affidavit in a summary proceeding is filed charging a criminal contempt, such affidavit will be tested by the rules of criminal pleading which are applicable to indictments and informations; and this rule obtains whether the prosecution is begun under the statute or not.

Summary Punishment for Contempt.

The statute governing summary criminal prosecutions for contempt of court is designed for such cases only, and is wholly independent and different from the disbarment proceedings authorized by the statute. See Rev. Codes, § § 433, 434, 5935, and following sections.

Trial for Contempt—Disbarment—Irregular Procedure.

Where appellant, upon a series of affidavits, was charged with using language which it was claimed constituted a criminal contempt of court, and, under Rev. Codes, § 5936, he was cited before the District Court by an order to show cause, not only why he should not be punished as for a contempt of court, but also why he should not be disbarred from practicing law as an attorney in said court; and where, under Art. 3, Ch. 34, Rev. Codes, the appellant was tried as and for contempt of court, and not otherwise tried, and found guilty of such contempt, and was sentenced to suffer the maximum penalties prescribed by section 5933; and in the same judgment it was adjudged that appellant be suspended from practicing law in said court indefinitely, and "until the further order of the court,"—*held* such proceedings, including the order to show cause, sentence, and judgment, were irregular, without authority of law, and highly prejudicial to the accused.

Denial of Substantial Rights.

Where appellant, on such order to show cause, came into court, and, before pleading to the facts, "attempted to except to the jurisdiction" of the trial court, but was not permitted to do so, but was required by the express mandate of the court to plead at once to the facts, by admitting or denying the facts set out in such affidavits (see section 5942,) *held* prejudicial error.

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Right to Preliminary Motions in Appellate Court, When Denied in Court Below.

Held, further, that inasmuch as appellant was compelled at once, on coming before the trial court, to answer as to the facts, he will be entitled in this court to receive the benefit of all preliminary motions which he could have properly made in the court below if the right to do so had been in fact accorded to him in that court.

Due Process of Law.

Held, further, that the fundamental errors in this proceeding could have been reached by a preliminary motion to quash, despite the fact that the statute regulating contempt proceedings does not in terms authorize such motion or any preliminary motion. The right to attack a criminal charge at the outset for insufficiency is fundamental, and to deny it to the accused is to deny him "due process of law."

Attorney Cannot be Disbarred in Summary Proceeding.

Certain contempts of court, when committed by an attorney, will furnish grounds for his suspension or disbarment from practice; but an attorney cannot be lawfully suspended or disbarred as a punishment inflicted in a summary and *quasi* criminal proceeding instituted and conducted in accordance with the statute governing prosecutions for the offense of contempt of court.

Disbarment—Statutory Trial.

Disbarment proceedings are governed by special statutory provisions; and, unless an attorney waives his rights, he cannot be lawfully disbarred or suspended from practice until he has been accorded a trial under the safeguards of this statute.

Insults and Menaces of Judge Out of Court When Cause for Suspension of an Attorney.

Professional misconduct which falls short of being a contempt of court may yet furnish grounds for the revocation of an attorney's license in a proceeding brought expressly for that purpose. Threats of assault made directly and personally to the judge when out of court, but on account of his official action, and insults and menaces offered to the judge directly and personally out of court, but on account of the judge's official action, will afford a basis for proceedings to disbar an attorney. *People* v. *Green*, (Colo.) 3 Pac. 65; *Beene* v. *State*, 22 Ark. 149; *People* v. *Green*, 9 Colo. 506, 13 Pac. 514; *Ex parte Bradley*, 7 Wall. 364.

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

Herbert Root was convicted of contempt of court, and suspended from practicing as an attorney at law, and appeals.

Reversed.

Newman, *Spalding & Phelps*, and *Herbert Root*, in *pro. per.* for appellant.

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Contempt of court is a criminal offense, and a proceeding to subject a defendant to the penalties fixed by law for contempt of court is a criminal action. Sections 5159, 7746, Rev. Codes; *State* v. *Markuson*, 64 N. W. Rep. 934; *Fisher* v. *Hayes*, 6 Fed. Rep. 63; *Durant* v. *Supervisors*, 1 Woolworth, 377; *Ex parte Kearney*, 7 Wheat, 38; *In re Mulle*, 7 Blatchf. 23. All steps taken to bring the defendant to trial must be taken with the technical exactness required in other criminal actions. Rapalje on Contempts, 174; *Bates Case*, 55 N. H. 325; *Ex parte Kilgour*, 3 Tex. App. 247; *U. S.* v. *Caldwell*, 2 Dall. 333; *Potter* v. *Low*, 16 How. Pr. 549; *Cooley* v. *State*, 65 N. W. Rep. 799. The prosecution must be based upon an indictment or information. Sec. 8, Art. 1, Const; 20 Am. L. Reg. 149; *In re Pollard*, 2 L. R. A. 106; *State* v. *Learned*, 47 Me. 426. An information or affidavit as a basis for contempt proceedings must state all the facts necessary to give the court jurisdiction to proceed for contempt. *State* v. *Markuson*, 5 N. D. 147; *State* v. *Sweetland*, 54 N. W. Rep. 415; *Batchelder* v. *Moore*, 42 Cal. 412; *Stewart* v. *State*, 39 N. E. Rep. 508. The affidavits in this case do not allege that the acts complained of were committed in the immediate view and presence of the court. Section 6402, Comp. Laws; *Jackson* v. *State*, 21 Tex. 668; *Neal* v. *State*, 9 Ark. 259; 3 Am. and Eng. Enc. L. 785; *Ex parte O'Brien*, 30 S. W. Rep. 158. If the language is not *per se* contemptuous the affidavit must show in what way it is contemptuous. *In re Wooley*, 11 Bush. 95 and 110; *People* v. *Freer*, 1 Caines, 484; 20 Am. L. Reg. 156; *Rosewater* v. *State*, 66 N. W. Rep. 640. Upon the filing by defendant of his denial of the facts charged as contempt, the court erred in calling witnesses to disprove his denial. 3 Am. and Eng. Enc. L. 793; *U. S.* v. *Dodge*, 2 Gall. 313; *Buck* v. *Buck*, 60 Ill. 105; *State* v. *Earl*, 41 Ind. 464; *Jackson* v. *Smith*, 5 Johns. 117; 20 Am. L. Reg. 150.

Herman Winterer, State's Atty, and *John F. Cowan, Atty Gen'l*, for the state.

The power to punish for contempts is inherent in courts of

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record. The legislature can not regulate the exercise of this power unless by constitutional grant. *Arnold* v. *Com.*, 80 Ky. 300, 44 Am. Rep. 480; *Ex parte Robinson*, 19 Wall. 510; *In re Wolley*, 11 Bush. 95; *State* v. *Merrill*, 16 Ark. 403; *State* v. *Frew*, 24 W. Va. 416. The courts are at liberty to follow the principles of the common law in determining what constitutes a contempt. Both direct and constructive contempts were punishable at common law. *Middlebrook* v. *State*, 43 Conn. 257; *Peo.* v. *Wilson*, 64 Ill. 195; *Whitter* v. *State*, 36 Ind. 196; *State* v. *Dist. Court*, 62 N. W. Rep. 832.

WALLIN, C. J. The record in this case shows that Herman Winterer state's attorney for Barnes County, on December 28, 1895, presented to the District Court for said county (which was then in session, at Valley City) a number of affidavits purporting to contain charges against the appellant of various criminal contempts of court, committed by him at diverse times and places. Upon filing the affidavits, the District Court issued an order to show cause, as follows: "It is ordered by the court that Herbert Root, the party named in said affidavits, be, and is hereby, ordered to show cause before this court on the 2d day of January, at 10 o'clock A. M. of that day, why he should not be punished for contempt of court, and why he should not be debarred from practicing law in this county, in this court." The order, together with said affidavits, was served upon the appellant,—and, in response thereto, he appeared before the District Court; whereupon the following proceedings were had: "On January 2, 1896, this case was called for trial. The defendant, Herbert Root, being present in court, attempted to except to the jurisdiction of the court, but was refused permission to do so until the following proceedings were had: 'Court: Mr. Root, do you admit the facts in the affidavits served upon you? Mr. Root: I do not, sir.' The state's attorney is now ordered to file interrogatories in accordance with section 5942 of the Revised Codes of 1895, specifying the facts and circumstances of the offenses charged. Thereupon the interrogatories were duly filed." For the purposes of this

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opinion, it will be unnecessary to set out the interrogatories at length. It is enough to say that they consist of pointed questions, requiring specific answers, touching the truth of the several charges as contained in said affidavits. Before answering the interrogatories, the record shows that the accused filed with the clerk, and read to the court, a motion to vacate the order to show cause. The ruling was as follows: "Motion overruled by the court, the defendant not being permitted to present any argument or explanation as to said motion; whereupon the following proceedings were had: 'Mr. Root: You will not hear any law on this? Court: No; I don't want to hear any law.'" Upon the following day (January 3d,) the defendant filed his answer to the interrogatories. Upon the issues thus joined, a trial was had, at which the prosecution called a number of witnesses, who were sworn and examined touching the subject matter of the various charges set out in the affidavits; whereupon the court, after filing findings of fact, entered judgment against the defendant, as follows: "I do hereby adjudge and consider that the defendant is guilty of contempt against this court, in this: that he has used language respecting this court in the court room, and in the presence of the court, respecting cases pending for trial in this court at the present term, such as to impair the respect due to its authority, and thereby directly tending to interrupt its proceedings, and whereby the administration of justice has been and is brought into disrepute, and the court disgraced; that the defendant has used such language aforesaid concerning this court, and respecting cases pending in this court, at the last term of the court, being the June term, 1895, of this court, in Barnes County, North Dakota, as did impair the respect due to this court and to its authority, and such as to bring the administration of this court into disrepute, and to disgrace this court; that the language aforesaid, and the conduct of the defendant as aforesaid, has been such that he is not a fit and proper person to longer practice law at this bar, until further order by this court. And I hereby adjudge and direct that the defendant be confined in the county

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jail of Barnes County, North Dakota, for a period of thirty (30) days, commencing at noon of this 4th day of January, A. D. 1896, and that he pay a fine of two hundred ($200) dollars to the clerk of this court; that in case of default made by the defendant of the payment of this fine, that he be committed to the county jail of Barnes County, North Dakota, until such fine is paid, or for a period not exceeding thirty (30) days; that defendant's imprisonment for nonpayment of said fine shall commence at the expiration of the first term or period of the defendant's imprisonment herein mentioned; and that defendant be suspended from further practicing law in this court until the further order of this court; and that a commitment be issued to carry this judgment into effect. January 4, 1896." The accused appeals to this court from said judgment, and the record sent up embraces a statement of the case, with the evidence and procedure had in the trial court.

Considering the record before us as a whole, its most striking feature lies in the fact that it attempts to fuse and mass together in one proceeding two distinct special proceedings, which are wholly independent of each other, not only with respect to the results which each is designed to accomplish, but with respect as well to the practice and procedure laid down in the statute for the government of each respectively. A proceeding for the punishment of a criminal contempt of court, whether committed in *facie curiæ*, or committed out of the view and presence of the court, is a summary proceeding of a *quasi* criminal character, in which the contemner may be punished criminally by both fine and imprisonment; while the proceeding to suspend or revoke an attorney's license, as laid down in the Code, while it is special in its character, is neither criminal nor *quasi* criminal, either in its procedure or in its consequences. The important differences in the remedies will be seen at a glance by reading and comparing the two statutes. See Rev. Codes, § 5932, *et seq.*, regulating contempts, and sections 432-437, regulating the proceeding to revoke an attorney's license. It will be noticed that, in a

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disbarment proceeding, the accused may elect whether he will demur or plead to the accusation brought against him; and, if he pleads, he is not hampered by statutory requirements compelling him to respond categorically to interrogatories framed by the prosecution, and which, peradventure, may require him to furnish damaging evidence against himself. Section 435 reads: "To the accusation he may plead or demur, and the issue joined thereon shall in all cases be tried by the court; all the evidence being reduced to writing, filed and preserved." The only judgment which can follow is a suspension or revocation of the attorney's license. An appeal will remove the whole case to this court, including the evidence, without the necessity of settling a bill or statement of the case. *Id.*, § 437. Turning to the statute regulating procedure in summary contempt cases, we shall at once discover a vitally different method of procedure, and one followed by results wholly dissimilar. Where the contempt is committed while the court is sitting, and in its immediate view and presence, no pleadings are essential, and none are required,—in cases where the facts constituting the contempt are within the personal cognizance of the presiding judge. In such cases there are no pleadings required, because there are no issues to be tried. All that is requisite to a complete record in such cases is an order of the court "stating the facts which constitute the offense, and reciting that the same occurred in such immediate view and presence, and plainly and specifically prescribing the punishment to be inflicted therefor." Rev. Codes, § 5935. This section epitomizes the settled common-law practice also. Rap. Contempts, § 93, and cases cited; 4 Enc. Pl. & Prac. p. 775, and note 4. See, also, 5 Cr. Law Mag. p. 484, and cases cited in notes.

In the case at bar, as has been seen, the trial court did not proceed upon the theory that the contemptuous language and behavior charged were committed within the sight or hearing of the presidiug Judge of the District Court. The proceeding had in the court below is only adapted to a case where the offensive behavior did not occur within the judge's personal observation.

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The judgment of conviction follows certain findings of fact made and filed with the clerk, and which findings are based upon evidence brought out at a trial of the issues formed by the pleadings. The judgment is based upon such findings. It recites that, "upon the original affidavits, the answer, and the subsequent proofs offered and made by the state's attorney, the court finds that the defendant did use contemptuous languages," etc. The record therefore precludes the idea that the conviction resulted from any contempt of court occurring in the sight or hearing of the judge. It has been suggested that the behavior of the accused upon the trial of this case below was positively contemptuous; and that such behavior was exhibited not only technically, within the view and presence of the court while sitting, but actually in the face and presence of the trial judge; and that the same was of so fragrant a character that it would justify the infliction of criminal penalties as and for a contempt of court. If it were conceded that the accused did commit such contempts, we cannot see how the fact becomes pertinent in this court, and upon this record. It is manifest that this court can consider no charges against the accused other than those appearing of record, and upon which it affirmatively appears that the accused was tried and convicted. Where, however, as in the case at bar, the fact of the commission of the offense is not within the personal observation of the judicial officer presiding over the court, it becomes necessary to bring the facts before the court by a formal accusation. This is done at common law and under the statute by an affidavit. 4 Enc. Pl. & Prac. 776, and notes. Where this course is pursued, the affidavit at once assumes great importance, as it is not only the foundation for issuing the order to show cause (Rev. Codes, § 5936,) but also constitutes—and this is its most important office—the accusation upon which the accused is to be tried for a criminal offense. Under the modern authorities, at least, the sufficiency of such accusation is to be tested by the rules governing the framing of indictments and informations. All the material facts and essential ingredients of the offense are required to be set out by

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distinct and positive averments; nor can any essential allegation be supplied by implication. *Batchelder* v. *Moore*, 42 Cal. 412; *Young* v. *Cannon*, 2 Utah, 560; *McConnell* v. *State*, 46 Ind. 298; *Stewart* v. *State*, (Ind. Sup.) 39 N. E. 508. See 5 Cr. Law Mag. 487, and cases cited in the notes. Section 5942, Rev. Codes, directs that, when the accused appears upon "an order to show cause the court or judge must, unless the accused admits the offense charged, cause interrogatories to be filed, specifying the facts and circumstances of the offense charged against him. The accused must make written answer thereto under oath." The proofs may consist of either affidavits or other proofs, but the statute contains no provision requiring the preservation of the evidence, as is done in the case of disbarment proceedings; and if the accused appeals, and desires a review of the evidence in the Supreme Court, a statement of the case, embracing the formalities prescribed by section 5466, becomes indispensable. This feature also, as has been seen, is not found in cases of appeal under the statute governing disbarment proceedings. It will be further noticed that no demurrer is mentioned in connection with a contempt proceeding, while, on the other hand, that form of pleading is expressly allowed in cases arising under the other statute.

This cursory examination of the two statutory proceedings we have been considering brings into view the very important practical differences which exist in their procedure, and particularly with reference to the various defensive measures which the accused may resort to under each respectively. In the case at bar, we have seen that the accused, as soon as he appeared in court in obedience to the order to show cause, and before pleading, "attempted to except to the jurisdiction of the court, but was refused permission to do so until the following proceedings were had: 'Mr. Root, do you admit the facts in the affidavit served upon you? Mr. Root: I do not sir. Court: The state's attorney is now ordered to file interrogatories in accordance with section 5942 of the Revised Codes of 1895.'" The interrogatories were then promptly filed. The facts will call for a ruling upon a point

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of practice arising under the proceeding for the punishment of contempts of court which has recently come into operation by the adoption of the Revised Codes. The point can be stated by a question: Can the accused, after being cited before the court by an order to show cause, based on an affidavit, be compelled forthwith to enter a plea to the facts set out in the affidavit, *i. e.* be compelled to admit or deny the offense, as provided in section 5942, without being permitted to make any preliminary attack by motion upon the regularity or sufficiency of the proceeding brought against him? The statute makes no reference in terms to any preliminary motion, but we are clearly of the opinion that elementary principles of procedure demand that such motions should be allowed before the accused is called upon to frame an issue of fact. If there is no valid criminal charge to be investigated by the court, or if the court, for any reason, is irregular in its procedure, or without jurisdiction or lawful authority to hear and determine the case, it is certainly true that the accused cannot, under established principles of the law, be forced into an investigation of questions of fact. In civil actions and in criminal actions proper, the sufficiency of a complaint or indictment can be raised by a demurrer; and, in special and summary proceedings, similar questions are commonly raised by a motion to quash or other preliminary motions. That this is the practice in all special proceedings is elementary. It must, in fact, follow necessarily from the established doctrine, that the accusation in a criminal contempt case is required to be sufficient, in substance, that the accused shall be permitted to challenge the sufficiency of the charge against him in matters of law, before being compelled to answer to matters of fact. One element essential to a conviction upon such charge would be the jurisdiction of the court which assumes to adjudicate upon the case; another, that the offense is well pleaded; another, that the facts charged are such as, under the law, would constitute a contempt of court; and many others might be mentioned. If the written accusation which is the basis

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of the charge is defective either in form or substance, we know of no means other than by motion whereby the defect can be brought to the attention of the court entertaining the case. Certainly, the Code makes no provision, in terms, for raising such questions, by motion or otherwise. It is clear to our minds, nevertheless, that the accused should not be arbitrarily compelled to join issue upon the facts without first giving him an opportunity to be heard by motion, whether such motion is leveled at matters of substance or at mere irregularities of procedure. Applying these well settled principles and rules of practice to the facts as they appear of record in this case, we shall be compelled to rule that the court below erred fundamentally, to the prejudice of the accused, in denying him the right to attack the proceedings against him by a preliminary motion. The accused attempted, before doing anything else, to challenge the jurisdiction of the court below, by an exception to such jurisdiction. He was not allowed to attack the proceedings at that stage, but was compelled, by a mandatory ruling of the court, to move forward to a later stage, and plead to the facts. He was required to say and declare at once whether he confessed the facts set out in the affidavits. The record is silent as to the particular ground or reason which the accused would have presented to the court as the basis for his attempt to challenge the jurisdiction. The groundwork of the exception, whether of fact or law, is left to conjecture. We only know that he "attempted to except to the jurisdiction of the court, but was refused permission to do so until the following proceedings were had," viz. until he pleaded to the facts set out in the affidavits. In our opinion, it is not at all important to inquire whether the groundwork of the exception to the jurisdiction of the trial court was or could have been valid in law.. The accused was confronted by a very serious charge, one branch of which was attended by criminal penalties, and the other with consequences of a disastrous character. In such a dilemma, the accused cannot be restricted to valid objections to the proceedings brought against him. It was proper to except to

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the jurisdiction then and there, and do so by a motion; and in such a motion the grounds thereof need not be specified at all. The court must at all times be prepared to vindicate its own authority to proceed in a case. In fact, the point of jurisdiction could be raised for the first time in this court. Moreover, we think that it is our duty, under the circumstances of this case, to give the accused the benefit of any motion, whether made or not, which might, under good practice, have been interposed by him before pleading to the facts.

The right to be heard, at least to the extent of presenting objections, is fundamental, and is, we think, of the very essence of "due process of law." It follows that if the accused, before pleading to the facts, had a legal right under good practice, to interpose motions of a preliminary nature, which right was denied him in the trial court, he should in this court, at least, have the benefit of all such motions, the same as if they had been made. To deny the accused such right would be manifest injustice. True, the accused was allowed at a later stage, and after being compelled to plead to the facts, to except to the jurisdiction of the trial court, and also to move to vacate the order to show cause. The record set out above discloses what occurred when these motions were made. The accused was not permitted to argue his legal propositions, nor to cite law in support of either of said motions; and the record, upon the motion to vacate the order, is as follows: "Motion overruled by the court, the defendant not being permitted to present any argument or explanation as to said motion." It may be conceded that a court, in the exercise of its discretion, can deny to counsel the privilege of arguing questions of law or fact. Such privilege is liable to abuse, and can be controlled. But we have serious doubts whether a court can so restrict counsel as not to accord to him the right to "explain" a motion to the extent of stating its groundwork. But we refer to these later proceedings only to say that, in our opinion, they do not cure the fundamental error involved in denying the accused the right to interpose preliminary objections, before being called upon to answer as to the facts.

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We will now briefly consider the record as it stood before the accused was required to plead to the facts. It consisted of five separate affidavits, made by five citizens of Barnes County, which affidavits embodied the charges against the accused, and also constituted the basis for the order to show cause. The offenses charged, or sought to be charged, in these affidavits, consisted of language attributed to the accused as being used by him, on divers occasions in the months of June, August, and December, in the year 1895, in the City of Valley City, and constituting in the aggregate some eight or nine distinct criminal offenses, if either were an offense, committed at different times and places, under varying circumstances. With the exception of one charge, which will be considered separately hereafter, all of the language as set out in the affidavits and attributed to the accused was spoken by him not only strictly out of the view and presence of the court while sitting, but away from the courthouse, and not in the presence or hearing of the presiding judge of said court. The charges are to the effect that the offensive language was uttered in the stores and in the streets and public places of Valley City. The accused, at the June term of the District Court, as well as at the December term, 1895, had been, and was when tried, actively engaged in the prosecution of a number of cases arising under the prohibitory liquor law. He seemed to be greatly displeased by the course which the court pursued with reference to such cases, and all the language set out in the affidavits had reference to such cases, and to the action of the court and judge with respect thereto. The language which the accused was charged with using was very abusive in character, and of a nature highly defamatory and slanderous. It reflected in terms of severity upon the presiding judge of the very court in which the accused was practicing as an attorney at law, and assailed the judge, not only on account of his offensive action in the liquor cases, but also attacked his private character as a citizen. We can scarcely conceive of any circumstances which could justify an attorney in the use of such language, even when out of court, and out of the

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presence or hearing of the judge to whom it was applied. But the question before this court is whether the language we have thus far considered would constitute the crime of contempt of court. We are clear that it would not. No case is cited on the part of the state to support the contention, and, after a diligent quest, we have been unable to find any modern authority to sustain the prosecution upon this feature of the case. See, for general principles of contempt, *Neel* v. *State*, 9 Ark. 259.

If we are correct in this view, it must follow that the charges we have thus far considered would, upon a motion seasonably interposed, have been stricken from the case, and not further considered in prosecuting the criminal branch of this case.

The remaining charge is embraced in the affidavit of one Irgens, which was filed with the others, on December 28, 1895. It charges the appellant with using contemptuous language towards the presiding judge of said court during the term of the District Court then pending, but omits to state the particular date or time when the offensive words were spoken. We think this omission would be fatal in an information charging this offense. Irgens was a defendant in one of the liquor cases before the court at that time. After reciting that the Honorable Roderick Rose was presiding at the time, and that a motion had been made for a continuance of his case over the term, the affidavit proceeds as follows: "That said Herbert Root approached me in the court room, in the presence of various people, and stated to me in substance, and in the presence of various bystanders: 'You fellows are damned chumps for paying out your money for attorneys to defend you. The judge will look out for you. He knows what he is here for. He understands his business. He knows what he is elected for. You fellows don't need to fear.' That the said case wherein affiant was defendant was a case brought under the prohibition law of this state. That said Root had been actively engaged, as he claimed, as a special counsel for the purpose of prosecuting the liquor cases. That the said remarks of the said Root at the said time, by reason of the circumstances, clearly

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conveyed the idea that the judge of the said court was using his official position to shield and protect and save from punishment persons who were prosecuted for violations of the prohibitory law of this state. That the said remarks were made in a tone and in a manner calculated to cast reflections upon the presiding judge, and to create the impression that the judge was corrupt, and did reflect upon the honor and dignity of the court. That the cases referred to by the said Root in the presence of affiant and others were then and there pending in said court. The said remarks were made while the court was in session, and in the court room. That jurymen and citizens were sitting around and about within hearing distance of said remarks." It will be noticed that the accused is charged with using the contemptuous words in the court room, and while the court was in session, and in the presence of divers persons and jurors, "who were sitting around and about within hearing distance." But it is not charged that the words were spoken either in the view and presence of the court while sitting, or in the sight or hearing of the judge presiding over said court; nor is the claim made even in argument that the judge personally heard the words, and there is much in the case tending to show that he did not. But the important fact is that no such averment is found in the accusation. To our minds, the omitted allegations are vital to the charge. The fact that the obnoxious words were spoken in the court room is not important, unless coupled with the fact that, at the time they were spoken, the court was sitting and discharging judicial functions, and words were spoken in the immediate view and presence of the court, and were calculated to interrupt its proceedings or impair its authority. No such charge is made, and the fact that it is charged only that the words were spoken in the presence of jurors and citizens is to our minds significant. However willing we might be to do so, we cannot, under the rules governing the statement of criminal offenses, indulge presumptions in aid of charges, and in this case infer that the offense was committed while the court was actually sitting, and in its immediate view

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and presence, when no such allegations appear in the affidavit. It is charged that the words were spoken while the court was in "session." But the expression "in session" is commonly used not only to express the idea that the judge is sitting on the bench and engaged in the discharge of official functions; the same term is quite as often employed to convey the idea that court has convened for a term, and has not yet adjourned for the term. But if the terms "sitting" and "session," as applied to courts, were precisely equivalent and interchangeable terms, the affidavit is still open to the criticism that it is not alleged that the language was used in the immediate view and presence of the court. We regard this averment essential in this offense, whether the prosecution is under the statute or not. It is obvious that language, however offensive, may be spoken even while the court is in session, and in the court room, in such a way that it would not constitute an offense committed in the immediate view and presence of the court, and tending to interrupt its proceedings.

If we are correct in our conclusion as to the Irgens affidavit, it will follow that the exception to the jurisdiction of the District Court to proceed to the trial of the contempt feature of this case was well grounded and valid. The court would certainly be without jurisdiction, in the sense of being without lawful authority to proceed with the contempt branch of the case, if there was no valid charge of contempt on file; and we hold that there was none. To prevent being misunderstood, we say expressly that it is our opinion that where it is charged that the offensive behavior was exhibited while the court was sitting, and in its immediate view and presence, the charge can be made out by proof without showing that the offensive act took place within the sight or hearing of the judge. The cases cited next below will illustrate what is meant by the expression "immediate view and presence of the judge." See *People* v. *Barrett*, 9 N. Y. Supp. 321, 56 Hun. 351, affirmed 121 N. Y. 678, 24 N. E. 1095; *In re Griffin*, City Ct. (N. Y.) 1 N. Y. Supp. 7. Under the rule applied in these cases, a contempt is established where the behavior is exhibited while

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the court is sitting in the discharge of judicial functions, if it is committed in the presence of some branch of the court when so engaged.

We are also clear that it was fundamentally erroneous and prejudicial to the appellant to require him to plead to the facts at the threshold of the case, and without allowing him to raise the preliminary objection that the proceeding brought against him was irregular and void, because it was unanthorized by any law or practice. It would have been proper practice to test the validity of the compound proceedings attempted to be brought against the accused by a preliminary motion to quash the same, and, if that had been overruled, to follow it by a motion requiring the prosecution to elect and declare at the outset upon which branch of the case it would first proceed. It cannot be overlooked that the appellant was deeply concerned in these preliminary questions. He had been cited into court for a double purpose, and was threatened by twofold penalties. He was required to show cause why, on account of the charges on file against him, he should not be punished criminally, and also why he should not suffer even more seriously by a disbarment as an attorney. Confronted by such a dilemma, he was entitled to such protection, at least, as the statute in terms affords. He should have been accorded the right to demur to the accusation in so far as the same was sought to be used as a basis for the revocation of his attorney's license; and in that branch of the case it was seriously prejudicial to compel him to answer interrogatories under oath touching the facts bearing upon the charges against him.

It is in our opinion, needless to further discuss the facts in the record. Obviously, the whole proceeding was not only unprecedented, but was in the highest degree prejudicial to the legal rights of the accused. The objections to this proceeding cannot be answered by saying that the proceedings at the trial which were actually had were those only which may be taken in a contempt case. This would not be true either in fact or in legal

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effect. The order to show cause required the accused to show cause why he should not be disbarred from practice as an attorney; and, pursuant thereto, the learned trial court, after imposing the highest penalty allowed by the statute for a criminal contempt of court, proceeded, in the same judgment to suspend the accused from practicing as an attorney in said court for an indefinite period, *i. e.* "until the further order of the court." It thus appears that, from the inception to the close of the proceedings in the District Court, the vitally important matter of the appellant's disbarment from practice was an ever present factor; and the further fact stands out prominently that the statute regulating disbarments, and surrounding an attorney with many safeguards not available in contempt proceedings, was wholly ignored. It is manifest that the court below proceeded to try and doubly punish the accused upon a wholly mistaken view of the law, namely, that when an attorney charged with a criminal contempt, and tried on such charge, and no other, is found guilty, he may at once be suspended or disbarred from practice. It is doubtless true that certain gross contempts of court, when done by an attorney, will furnish ground for prosecution for misbehavior in office, punishable by disbarment; but in all such cases the procedure in the statute must be observed. In this state there is a statute framed expressly to regulate proceedings against attorneys for disciplinary purposes, and under which an attorney's license may be suspended or revoked. Rev. Codes, § 432. See, also, *State* v. *Start*, 7 Iowa, 499; *Ex parte Smith*, 28 Ind. 47; *Withers* v. *State*, 36 Ala. 252; *Ex parte Bradley*, 7 Wall. 364. Disrespectful language used in court by counsel is at once a criminal offense, punishable summarily, and a ground for disbarment for official misconduct. 3 Am. and Eng. Enc. Law, 785; *Holman* v. *State*, 105 Ind. 513, 5 N. E. 556; *Sharon* v. *Hill*, 24 Fed. 726; 1 Am. and Eng. Enc. Law, pp. 945, 946, and notes. Insulting communications, made directly and personally to the judge, respecting his action in a pending case, are punishable as a contempt. *In re Pryor*, 18 Kan. 72. Such conduct is also

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ground of disbarment. *People* v. *Green*, (Colo.) 3 Pac. 65, also 374. Conduct which is not criminal may, nevertheless, be grounds for disbarment. *Beene* v. *State*, 22 Ark. 149; Weeks, Attys. at Law, § § 80, 81; *People* v. *Green*, 9 Colo. 506, 13 Pac. 514; *Id.*, 7 Colo. 237, 3 Pac. 65, 374; *Cramer* v. *Tittel*, (Cal.) 21 Pac. 750.

But, from our views of the law as already set forth, it becomes necessary to reverse the judgment of the trial court for irregularities of procedure highly prejudicial to the appellant, and this would be our holding in this case irrespective of the question as to the sufficiency of the affidavits to charge a criminal offense. We cannot, however, conclude this opinion without an allusion to the fact that this record furnishes ample evidence that the appellant has repeatedly assailed the official rulings of the Honorable Roderick Rose, presiding judge, of said court, with respect to the liquor actions pending in his court, and has repeatedly assailed both his official and private character. The persistence by the accused in the use of abusive and vituperative language applied to the judge, although in his absence, is, in our judgment, entirely inconsistent with the obligation of an attorney "to maintain the respect due to the courts of justice and judicial officers." Rev. Codes, § 427. Nor do we wish to be understood as holding in this case that the language charged would not, in a proper proceeding, afford sufficient ground for the disbarment of the accused, under Subd. 3, § 433, Rev. Codes. Upon this question we are not called upon now to pass, nor shall we here intimate our views upon it. The questions in the case supposed, should such a case ever arise, would involve special investigation, and the consideration of the constitutional rights of all citizens, attorneys as well as others, to criticise the action of public officials in a proper manner, and within certain legal limitations of that right, and would further and especially necessitate the inquiry as the rights of attorneys to indulge in too severe strictures upon the official conduct of judges presiding over courts in which attorneys are licensed to practice. These inquiries cannot be further prosecuted here; but on this aspect of the question,

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see *People* v. *Green*, (Colo.) 3 Pac. 65; *Beene* v. *State*, 22 Ark. 149; *People* v. *Green*, 9 Colo. 506, 13 Pac. 514; *Ex parte Bradley*, 7 Wall. 364.

The judgment will be reversed. All the judges concurring.

(67 N. W. Rep. 590.)

STATE OF NORTH DAKOTA *vs.* JACOB BRONKOL.

Opinion filed June 3rd, 1896.

Former Jeopardy.

The defendant was charged by a valid information with the commission of a criminal offense, arising under section 6933, Comp. Laws. Without being arraigned upon the information, and before pleading thereto, defendant was put upon his trial, and, after introducing its evidence, the case was rested in behalf of the state. At this stage a motion was made by defendant's counsel to discharge the defendant, and dismiss the action, for the reason that the defendant had not been arraigned upon the information, and had not pleaded thereto. The motion was not granted, but while the motion was pending, and on the application of the state's attorney, the jury was discharged; and, under the direction of the court, the defendant was arraigned on the information, and pleaded thereto a former acquittal for the same offense, and former jeopardy. The facts being conceded, the District Court overruled both of said pleas. *Held*, that such ruling was not erroneous.

Trial Before Pleading to Information a Nullity.

To proceed with a trial of the facts without a plea to the information was a fundamental error, and no conviction thus obtained could stand. The calling of the jury under such circumstances was without authority of law. Such a body of men was not a trial jury, in a legal sense. No plea having been entered, there was no issue for a jury to try; hence to discharge a jury, so called, was not only proper, but was a legal necessity; hence legal jeopardy did not attach by reason of calling such jury.

Plea of Former Acquittal When Unavailing.

There having been no verdict returned by such jury, the plea of former acquittal was properly overruled.

Selling Mortgaged Property—Intent.

Section 6933, Comp. Laws, construed. *Held*, that the statutory offense defined by the section is established by showing that a sale of mortgaged property without the consent of the mortgagee, and while the mortgage was in force, was made "willfully;" *i. e.* intentionally, and not by a mistake. The intent to defraud by such sale is not an essential ingredient of the crime.

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

Jacob Bronkol was convicted of selling mortgaged property, and appeals.

Affirmed.

W. H. Standish, for appellant.

The jury having been impaneled and sworn jeopardy attached. *People* v. *Sam Chung*, 29 Pac. Rep. 642; *Franklin* v. *State*, 11 S. E. Rep. 876; *Lee* v. *State*, 26 Ark. 260; *People* v. *Hunckeler*, 48 Cal. 331; *Foster* v. *State*, 7 So. Rep. 185; *Ex parte Snyder*, 29 Mo. App. 256; *Ex parte Ulrich*, 42 Fed. Rep. 587; *State* v. *Snyder*, 12 S. W. Rep. 369; *State* v. *Snyder*, 11 S. W. Rep. 1036; *State* v. *St. Clair*, 7 So. Rep. 713; *Boswell* v. *State*, 11 N. E. Rep. 788; *State* v. *Hayes*, 24 N. W. Rep. 575; *State* v. *Greene*, 23 N. W. Rep. 154; *Conklin* v. *State*, 41 N. W. Rep. 788; *State* v. *Lee*, 15 So. Rep. 159; *Com.* v. *Fitzpatrick*, 1 L. R. A. 451; *U. S.* v. *Molloy*, 31 Fed. Rep. 19; *Hayden* v. *State*, 18 S. W. Rep. 239; *State* v. *Cassiday*, 12 Kan. 550; *State* v. *Patterson*, 22 S. W. Rep. 696; *Dawson* v. *People*, 25 N. Y. 399; *Guenther* v. *People*, 24 N. Y. 100; *State* v. *Scott*, 65 N. W. Rep. 31; *State* v. *Bunker*, 65 N. W. Rep. 33; *State* v. *Reddington*, 64 N. W. Rep. 170. When an act has been done in ignorance of the matter of fact on which the crime is based, it is not a crime. It lacks the element of willfulness. *Foster* v. *State*, 7 So. Rep. 185; *State* v. *Preston*, 34 Wis. 682; *State* v. *Clarke*, 29 N. J. L. 96; *Newell* v. *Town*, 58 Vt. 342; *Com.* v. *Munson*, 127 Mass. 459.

J. G. Hamilton, *States Attorney*, and *John F. Cowan*, *Atty. Gen'l*, (*J. H. Bosard*, of counsel,) for respondent.

A person is in legal jeopardy when the case is submitted to the jury; after the prisoner has been arraigned, a plea of "not guilty" entered and the jury impaneled and sworn. 1 Bish. Crim. Law, 1070; *State* v. *Tatman*, 13 N. W. Rep. 632; *State* v. *Pierce*, 42 N. W. Rep. 181; *Davis* v. *State*, 38 Wis. 487. A trial without arraignment and plea is a nullity and no jeopardy attaches. *Newson* v. *State*, 2 Ga. 60; *Weaver* v. *State*, 83 Ind. 289; *Davis* v. *State*, 38

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Wis. 487; *Douglass* v. *State*, 3 Wis. 820. There must be an issue. *Grogan* v. *State*, 44 Ala. 1; *Bell* v. *State*, 44 Ala. 393; *Lee* v. *State*, 26 Ark. 260; *Ned* v. *State*, 7 Post (Ala.) 187; *Link* v. *State*, 3 Heisk. 252; *White* v. *State*, 7 Tex. App. 374; *State* v. *Smith*, 55 N. W. Rep. 198; Bish. Cr. L. 1029. When an arraignment has been made and no plea entered of record the prosecution may be discontinued without prejudice. *State* v. *McKee*, 1 Bailey, (S. C.) 651; *Clarke* v. *State*, 23 Miss. 261. Without a plea there is no issue to try. *Jefferson* v. *State*, 24 Tex. App. 535, 7 S. W. Rep. 244; *State* v. *Hunter*, 8 So. Rep. 624; *Territory* v. *Brash*, 32 Pac. Rep. 260; *Munson* v. *State*, 11 S. W. Rep. 114; *State* v. *Wilson*, 22 Pac. Rep. 622; *Bowen* v. *State*, 12 So. Rep. 808; *Parkinson* v. *People*, 135 Ill. 401, 25 N. E. Rep. 764; *State* v. *Williams*, 117 Mo. 379, (22 S. W. Rep. 1104;) *Stoneham* v. *Com.*, 10 S. E. Rep. 238; *State* v. *Montgomery*, 63 Mo. 296. All the preliminary steps necessary to the trial must be taken or jeopardy will not attach. *Weaver* v. *State*, 83 Ind. 289; *State* v. *Pierce*, 42 N. W. Rep. 181. Though the jury has been impaneled and sworn there is no jeopardy, therefore no bar to a second proceeding, unless the prior proceedings are such that a judgment upon a verdict returned would be valid. *State* v. *Pribnow*, 16 Neb. 131; *Weaver* v. *State*, 83 Ind. 289; *Peo.* v. *Larson*, 68 Cal. 18; *State* v. *Ward*, 48 Ark. 36, 2 S. W. Rep. 191; *Black* v. *State*, 91 Am. Dec. 772; *Pritchett* v. *State*, 62 Am. Dec. 468. The term "willfully" as used in connection with this crime, means that the act was designed, done purposely, and did not happen through accident or mistake. *Com.* v. *Porter*, 1 Gray. 476; 2 Bish. Cr. L. 308; *State* v. *Hughes*, 56 N. W. Rep. 982; *State* v. *Ruhnke*, 7 N. W. Rep. 264.

WALLIN, C. J. The appellant was convicted in the District Court for the offense of selling mortgaged property. The controlling facts appearing in the record of the case sent to this court may be briefly stated as follows: On November 18, 1895, the state's attorney filed an information charging the defendant with committing said offense. On December 14, 1895, a jury was impaneled, and the defendant was placed upon his trial for the

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offense charged in said information. After the case was opened by the state's attorney to the jury, the state introduced a number of witnesses to prove said charge, and said witnesses were examined in chief, and also cross-examined by the defendant; whereupon the state, after introducing all of its evidence, rested the case. The accused, by his counsel, at this stage of the proceedings, interposed a motion to dismiss said action, and discharge the defendant from custody, upon the ground and for the reason that the defendant had not at any time been arraigned upon said information, and had never been accorded an opportunity to plead to the same in any manner; whereupon the state's attorney admitted that the defendant had never been arraigned upon the information, and had never been afforded an opportunity to plead thereto. While said motion of the defendant to dismiss the action was pending and undecided, the state's attorney moved the court to "discharge the jury," and the jury was then discharged. Against the defendant's objection thereto, he was then arraigned upon said information; and, time to plead having been extended, the case was continued until December 20, 1895, at which date the accused appeared in court, and interposed a plea of former acquittal of the same offense, and also a plea of prior jeopardy. The facts occurring in court upon December 14, 1895, as above stated, were in substance the basis of fact upon which both of said pleas rested. The issues raised by said pleas were submitted to a jury, and the facts as above stated were then stipulated and admitted to be true in open court; whereupon the court instructed the jury in effect that said facts did not constitute either a former acquittal or prior jeopardy for the same offense, and that the jury should find for the state upon the issues raised by both of said pleas; and the jury so found. Defendant took an exception to such instruction. The jury was then resworn to try the defendant upon the charge contained in said information.

The information was framed under section 6933, Comp. Laws, which reads: "Every mortgagor of personal property, or his legal representatives, who, while his mortgage thereof remains in

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force and unsatisfied, willfully destroys, removes, conceals, sells or in any manner disposes of or materially injures the property or any part thereof, covered by such mortgage, without the written consent of the then holder of such mortgage, shall be deemed guilty of felony, and shall, upon conviction, be punished by imprisonment in the territorial prison for a period not exceeding three years, or in the county jail not exceeding one year, and by fine not exceeding five hundred dollars." The chattel mortgage mentioned in the information is described as a mortgage made in January, 1893, by the defendant to the State Bank of Reynolds, covering crops on certain real estate described in the mortgage, and that the defendant, while said mortgage was in force, willfully sold a part of such crop, consisting of 400 bushels of wheat, without the written consent of the holder of said mortgage, and while the same was in force. At the trial, the defendant offered in evidence another chattel mortgage, executed in January, 1892, to one Collins, to secure a debt of $300. The mortgage so offered was likewise a crop mortgage, but it covered the crops on a tract of land located some six miles distant from the land described in the mortgage set out in the information. Counsel for the state objected to the introduction of the Collins mortgage in evidence, upon the ground that it was incompetent, irrelevant, and immaterial, which objection was sustained, whereupon the defendant's counsel "offers to prove that the defendant believed that it covered the crop he is now being prosecuted for by information and trial for having sold; and that he never knew that it did not cover this crop, by virtue of the fact that it describes the same quarter section in the same section, but six miles distant, by reason of being named in the wrong town; and that this error arose wholly from the error of the man who drew the chattel mortgage covering this crop until about one month since, and that is in the fall of 1895,"—which offer was overruled, and the evidence rejected. To both of these rulings defendant's counsel properly excepted. No exception was taken to any of the instructions given to the jury by the court below

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concerning the facts and merits of the case, and all errors assigned in this court may be disposed of under two assignments, viz.: That the trial court erred in its instructions to the jury to the effect that that the pleas of prior jeopardy and formal acquittal were insufficient in law; and, second, that the court erred in excluding the Collins mortgage, and the evidence offered in connection with said mortgage, from the consideration of the jury.

In our opinion, both assignments of error are untenable. Manifestly, such proceedings as were had before the court and jury on December 14, 1895, did not result in defendant's acquittal upon the charge against him, as stated in the information. There was no acquittal in fact. The case against the defendant was not on that date, or at any time, submitted to that jury for their verdict; and no verdict of any kind was ever returned in the case against the defendant by the jury which was first impaneled. The first jury on the application of the state's attorney was, by order of the trial court, discharged, without returning a verdict. The plea of former acquittal could not have been sustained by the production of a verdict, nor was such discharge an acquittal on the merits in any sense. See Comp. Laws, § 7309; *State* v. *Priebnow*, 16 Neb. 131, 19 N. W. 628. In Wharton's treatise the rule is stated as follows: "But between the pleas of *autrefois acquit* and convict, and once in jeopardy, there is this important distinction: that the former presupposes a verdict, and the latter the discharge of the jury without a verdict." Whart. Cr. Pl. & Prac. § 491. But, as defendant's plea of former jeopardy need not rest upon a verdict, the question presented by the record is whether the proceedings had before the first jury constitute prior jeopardy as to the offense for which the accused was found guilty by another jury which was impaneled at a later date. We think the discharge of the first jury, under the circumstances stated, resulted from a cause which created a legal necessity for such discharge. It is often said in general terms that legal jeopardy attaches in criminal cases whenever, upon a valid indictment, a jury is sworn to try the accused. But to this rule, under

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modern authority, there are many exceptions, which are familiar, and need not be referred to here. See Whart. Cr. Pl. & Prac. § 508; *State* v. *Hazledahl*, 2 N. D. 521, 52 N. W. 315. The sole function of a trial jury in a criminal case is to determine an issue of fact joined between the accused and the state; and, until such issue is joined by plea to the indictment, there is no warrant in the law for either calling or swearing a jury. The statute is imperative that such issue shall be joined unless the indictment is disposed of either by motion or by demurrer; and, where the defendant stands mute, the plea of not guilty is required to be entered of record in his behalf. Comp. Laws, 7301-7311. To enter upon the trial after swearing a jury, but before the entry of a plea to the indictment, has frequently been held to be such prejudicial error as will entitle the accused to a new trial. *State* v. *Wilson*, (Kan. Sup.) 22 Pac. 622; *Davis* v. *State*, 38 Wis. 487; *Douglass* v. *State*, 3 Wis. 820; *State* v. *Pierce*, (Iowa) 42 N. W 181; *Weaver* v. *State*, 83 Ind. 289. The authorities cited also hold that a discharge of the jury for such reason does not operate as a bar to another prosecution for the same offense. It is held in Arkansas—and this would be the general rule—that to discharge the jury after a plea, the indictment being valid, would operate as a bar. *Lee* v. *State*, 26 Ark. 260. In the case from Arkansas there was no legal necessity for the discharge of the jury, the only reason being that a good indictment was erroneously supposed to be bad; hence their discharge was properly held to operate as a bar.

Nor do we discover error in the ruling of the trial court in excluding the Collins mortgage, and the evidence offered to explain it, from the consideration of the jury. The Collins mortgage, as written, described crops raised on different land, viz. crops grown on a tract six miles distant from the land described in the mortgage to the bank. On its face, the Collins mortgage was manifestly irrelevant to the issues involved, and it is conceded so to be. But counsel contends in his brief that the oral evidence offered would connect the Collins mortgage with the

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issues, and make it relevant. We think otherwise. The oral evidence, as offered, in its utmost scope, could show only that the accused intended to mortgage the same crop as that described in the chattel mortgage to the bank; and that, by a mistake of the scrivener, another tract of land was in fact described, and that such mistake was not discovered by either the defendant or Collins until after the wheat in question was sold. The evidence offered would not tend to show that Collins ever consented to a sale of the wheat in question, or ever knew it was sold; nor to show that the bank people ever heard of the Collins mortgage. The mere fact that the Collins mortgage was a prior mortgage, and was intended to cover the same grain, can certainly have no bearing on the question of the defendant's guilt or innocence. There was no offer made to follow up the evidence offered by other evidence tending to show that Collins consented to the sale of the wheat in question. Counsel argues in this court that evidence could have been offered and introduced showing that Collins, as first mortgagee, did consent to a sale of the wheat in question, and that such evidence would be relevant as tending to show that the sale of the wheat by the accused was not "willful," nor made with a fraudulent purpose. This position is untenable. We are clear that the consent of a prior mortgagee to a sale of the property covered by a later mortgage would have no tendency whatever to show that such sale was not made "willfully," and without the consent of the holder of the later mortgage. The word "willfully," as used in section 6933, Comp. Laws, as we construe it, simply means intentionally. The sale, to be criminal, under the statute, cannot be a sale made by mistake; it must be an intentional sale, —*i. e.* a willful sale; but, in our judgment, the sale need not be shown to have been made with a fraudulent purpose. We can discover no such ingredient of the offense as it is described in the statute; and the terms used by the lawmakers seem to exclude such an element. There are many statutory offenses in which the element of a criminal intent or purpose does not enter, and we think the statute in question belongs in that class. *State* v. *Welch*,

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21 Minn. 22; *State* v. *Stein*, (Minn.) 51 N. W. 474. In our judgment, to hold that the burden is upon the state to show a fraudulent purpose in addition to a willful sale would be to greatly impair the benefits sought by the statute. There is, in our judgment, little probability that injustice will result from the construction we have placed on the section, inasmuch as the punishment prescribed is so graduated that the trial court may mete out punishment in each case according to its aggravation or want of aggravation. While the punishment prescribed by the statute may be severe, it may also be merely nominal. But, as we have seen in the case at bar, the evidence offered did not go far enough to show, or tend to show, that the sale was not made for a fraudulent purpose, as well as willfully. It is not claimed even in argument that the defendant sold the wheat to procure funds to pay off the mortgage to the bank; nor do we wish to intimate an opinion that a sale for that purpose even would constitute a defense to the charge, however much it might mitigate the punishment.

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

(67 N. W. Rep. 680.)

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STATE OF NORTH DAKOTA *vs.* MYRON R. KENT.

Opinion filed June 5th, 1896.

When Trial Begins—Change of Venue.

Under section 7312, Comp. Laws, providing for a change of place of trial in certain criminal cases, a trial does not begin until the jury is impaneled: and a change of venue granted before that time is granted "before the trial is begun."

Consent of Accused to be Tried on Change of Venue in Distant County.

Where an accused charged with the crime of murder has established his right to a change of place of trial to the satisfaction of the court, he may, in open court, consent that the case be sent for trial to the District Court of some county that is not "near or adjoining' the county of original venue; and, after trial in the court to which the case is so sent by his request, he cannot be heard to object to the jurisdiction of such court.

Motion to Set Aside Information.

A motion to set aside an information cannot be made after a plea of not guilty and one trial upon that plea. Neither can the point be raised by motion in arrest. Under our statutes, a motion in arrest only reaches defects that are available on demurrer.

Correcting Erroneous Ruling Upon Challenge by the State.

While a jury was being impaneled, the state had exercised five of the six peremptory challenges allowed by law. The state challenged a proposed juror for cause. The examination of the juror disclosed that he was generally disqualified. The court, however, denied the challenge, and thereupon the state challenged the juror peremptorily. Immediately thereafter the court sustained the challenge for cause, and the juror stepped aside. Subsequently the court permitted the state to exercise another peremptory challenge. *Held* no error.

Names of Witnesses Indorsed Upon Information—Waiver of Requirement.

It is the duty of the state's attorney to indorse upon an information, at the time of filing the same, the names of all witnesses for the state known to him at that time; and ordinarily no witnesses should be permitted to testify for the state whose names are not so indorsed, unless it is clearly made to appear that such witnesses were not known to the state's attorney at the time of filing the information; but upon a second trial upon the same information this rule will not apply to witnesses for the state who testified upon the first trial, without objection on the part of the accused.

Preliminary Questions.

It is not error to permit preliminary questions to be answered when such answers lead up to or connect what follows either in the testimony of the witness under examination or any other witness who testifies in the case, even though the relevancy of such questions may not be apparent when asked.

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Corroboration of Accomplice.

An accomplice, as a witness, cannot by any means corroborate himself, within the meaning of the statute which requires the testimony of an accomplice to be corroborated in order to warrant conviction; but the state has the right to introduce, through the accomplice, all matters of probative force in the case to which he can testify, whether written or otherwise, in order to make his testimony as strong and inherently probable as the facts will warrant.

Flight of Accused—Competent to Prove.

The flight and secretion of the accused may always be shown; and, to this end, it is entirely proper to prove by the officers of the law what steps were taken by them to locate and arrest the accused.

Cross Examination of Accused.

While it is true in this jurisdiction that the cross-examination of a witness (except as to matters affecting credibility) must be confined to the subjects to which the direct examination was addressed, yet this does not limit cross-examination to the particular facts to which the witness testified on direct examination. A subject, having been once opened, may be exhausted.

Credibility of Witness—Degrading Questions.

For the purpose of affecting the credibility of a witness, it is proper to ask him on cross-examination questions the answers to which may tend to degrade, disgrace, or criminate him; but this is subject to his constitutional privilege to refuse to answer any question the answer to which will tend to criminate him.

Defendant as Witness—Cross-Examination.

A defendant in a criminal case who takes the witness stand in his own behalf is subject to the same rules of cross-examination that govern other witnesses; and he is required to answer any relevant and proper question on cross-examination that will tend to convict him of the crime for which he is being tried, even though such answer may also tend to convict him of some collateral crime.

Proof of Collateral Crimes to Show Motive.

It is proper, in a criminal case, to prove the commission by the accused of another and collateral crime, where such crime furnishes a motive for the commission of the crime for which the accused is being tried; and where the accused, as a witness for himself, has denied the existence of the motive which the evidence of the state tended to show prompted the commission of the crime for which he is being tried, it is proper to show by him, on cross-examination, the commission of the collateral crime that furnishes such motive.

Remoteness of Collateral Offense.

For the purpose of showing motive, the remoteness in point of time of the commission of the collateral crime cannot be considered; the sole question being whether it furnished an active, existing motive for the commission of the crime for which the party is on trial.

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Defendant's Privilege When Not Waived by Becoming a Witness.

A defendant in a criminal case, who becomes a witness in his own behalf, while he thereby waives his constitutional privilege of not answering proper questions that may tend to convict him of the crime for which he is on trial, does not thereby waive his privilege to decline to answer questions the answers to which may tend to convict him of collateral crimes, when such questions are asked solely to affect his credibility.

Privilege Personal—How Claimed.

A witness who desires to claim his constitutional privilege of declining to answer a question, on the ground that the answer will tend to criminate him, must make his claim in person, and under the sanctity of his oath, and with sufficient definiteness to render his claim clear to the court; otherwise, he cannot complain if his privilege is denied.

Attorney Cannot Claim Privilege.

Even when the witness is also the party defendant, he cannot claim his privilege through his attorney; but it is highly proper in such a case that the attorney suggest to the court that the witness be apprised of his constitutional rights.

Cross-Examination—Specific Acts of Misconduct.

When it is sought to impair the credibility of a witness on cross-examination by showing bad moral character, the interrogarories should be confined to specific facts, and should be so framed that the witness can squarely admit or deny. Insinuating questions, from which a possible inference of guilt as to collateral crimes might arise, are not proper.

Evidence of Collateral Crimes—Of Ancient Date.

Nor does it impair the credibilty of a witness to show the commission of a collateral crime more than twenty years before the examination. There has been ample time to repent and atone. The offense may have been forgiven and forgotten, and public interest demand that it be left buried in its seclusion.

Consideration Limited to Purpose of Evidence.

Where evidence is properly admitted in the case for one purpose, it will not be presumed, in the absence of all showing, that it was considered for a purpose for which it was not proper; particularly when the court, in its charge, directs the jury to consider it only for the proper purpose.

Remarks of Counsel.

The remarks of counsel in addressing the jury are largely within the discretion of the trial court, and no error will be declared thereon except in case of a clear abuse of discretion. Counsel should not be fetted in arguing his case to the jury. Objectionable remarks in this case, with the rulings and instructions of the court thereon, considered, and *held* not error.

Instructions.

Instructions of the court in this case examined, and *held* not vulnerable to the general objections that they "invaded the province of the jury," or were "argumentative," or "assumed that certain facts were proven" or were "prejudicial to the accused."

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Refusal of Requests Covered by General Charge.

Plaintiff in error requested that a large number of instructions be given to the jury, some of them correctly stating the law applicable to the case, and others not. They were all refused, but the court, in its charge, had fully, fairly, and correctly covered every point upon which instructions were requested. *Held*, no error in refusing the instructions requested.

Caution of Jury Not to Consider Passages Between Court and Counsel.

It is the duty of the court to properly control and restrain counsel in the matter of cross-examining witnesses. In doing so in this case, there were passages between court and counsel indicative of some feeling and ill temper. If there was anything connected with this matter prejudicial to the accused, it was fully cured by an instruction which called the attention of the jury to the specific matters, and directed them not to permit such matters to prejudice them against the accused in any manner.

Separation of Jury—Improper Influences—Burden of Proof.

Where, after the jury had been sworn and placed in charge of bailiffs, and before the case was fully submitted to them, the jurors separate without the consent of the court, under circumstances which give an opportunity for the exercise of improper influences over the jurors, prejudice to the accused will be presumed; and, when such separations are brought to the attention of the court by affidavit on motion for new trial, the burden is on the state to overcome such presumption of prejudice. But when the counter affidavits of the state fully meet every point raised in the affidavits for the motion, and show clearly that no improper influences were used or attempted, such separations furnish no ground for new trial.

Jurors Attending Church—Presumption that Discourse Produced No Impression Upon Jurors.

While the jury was so in charge of the bailiffs, and before the case was finally submitted to them, by order of the court, and with the consent of counsel on both sides, the jurors were permitted to attend church on a certain Sabbath; and a portion of them, in charge of a bailiff, did attend church. A new trial was asked upon the ground of improper influence exerted over them by reason of the nature of the sermon to which they listened; but *held*, that no prejudice could be presumed; and *held*, further, that as it is conceded that the discourse was not delivered with any intention or thought of influencing the jury, and was a proper and ordinary emanation from a Christian pulpit, even if its tendency was prejudicial to the accused he cannot be heard to complain thereof, after consenting that the jurors might attend church.

Evidence Sufficient to Sustain Verdict.

Evidence examined, and *held* amply sufficient to sustain the verdict.

Error to District Court, Cass County; *McConnell*, J.

William W. Pancoast, informed against as Myron R. Kent, was convicted of murder, and brings error.

Affirmed.

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M. A. Hildreth, Jas. E. Campbell, and *W. H. Barnett,* (*C. F. Amidon,* of counsel,) for plaintiff in error.

The change of venue from the Sixth Judicial District to the Third Judicial District, after the trial had begun, was without authority of law. Section 7312, Comp. Laws. The court was without jurisdiction, and defendant could not confer jurisdiction by consent. *Bronillett* v. *Judge,* 12 Rep. 134; *State* v. *Bulling,* 12 S. W. Rep. 356; *Hudley* v. *State,* 36 Ark. 237; *Duncan* v. *State,* 84 Ind. 204; *Keith* v. *State,* 90 Ind. 89; *App.* v. *State,* 90 Ind. 73; 9 Am. and Eng. Enc. L. 650; 10 Am. and Eng. Enc. L. 630. Constitutional rights cannot be waived. 6 Cr. L. Mag. 182; *Peo.* v. *Murray,* 5 Cr. L. Mag. 227. *State* v. *Carman,* 5 Cr. L. Mag. 560; *Peo.* v. *Lyons,* 5 Cr. L. Mag. 678. The verification to the information is void, it being on belief only. Chapter 71, Laws 1890; *State* v. *Hazledahl,* 2 N. D. 521; 16 L. R. A. 153. The law does not permit the state to call witnesses to testify whose names are not indorsed upon the information, unless they were unknown to the states attorney as witnesses when the information was filed. Chapter 71, Laws 1890; *Peo.* v. *Hall,* 12 N. W. Rep. 665; *Parks* v. *State,* 31 N. W. Rep. 5; *Peo.* v. *Quick,* 25 N. W. Rep. 302; *Logan* v. *United States,* 144 U. S. 263-310; 36 L. Ed. 439; 12 S. C. R. 617; *Peo.* v. *Dietz,* 49 N. W. Rep. 296; *U. S.* v. *Stewart,* 2 Dallas, 342; 1 L. Ed. 408; *State* v. *Stevens,* 47 N. W. Rep. 546; *Stevens* v. *State,* 28 N. W. Rep. 304; *Gandy* v. *State,* 40 N. W. Rep. 302; *State* v. *Hamilton,* 13 Nev. 386; *Peo.* v. *Howes,* 45 N. W. Rep. 961. The states attorney should make showing that he was not aware of the mistake until that time. *Binkley* v. *State,* 52 N. W. Rep. 708. An accomplice cannot corroborate himself by his own acts or declarations made after the homicide. *Peo.* v. *Bleecker,* 2 Wheelers Cr. Cases, 255; *Peo.* v. *Stanley,* 47 Cal. 113; *Peo.* v. *Moore,* 45 Cal. 19; *Peo.* v. *Pavlik,* 3 N. Y. Supp. 232; *Com.* v. *Crowninshield,* 10 Pick. 497. The testimony of Bingenheimer as to what he did in his endeavors to find defendant was improperly admitted and prejudice is presumed. *Queen* v. *Gibson,* 7 Am. Cr. Repts. 171; *Somerville* v. *State,* 6 Tex. App.

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433; *State* v. *Melrose*, 12 S. W. Rep. 250; *Peo.* v. *Pavlik*, 3 N. Y. Supp. 232; *Peo.* v. *Sharp*, 19 N. W. Rep. 168; *Lewis* v. *Com.*, 11 S. W. Rep. 27. It cannot be contended that the receiving of incompetent testimony was not injurious to the accused. No one can tell whether the jury were guided by that which was proper or improper. *State* v. *Rothschild*, 3 Am. Cr. Repts. 326; *McMillen* v. *Aitchison*, 3 N. D. 183; *Coleman* v. *Peo.*, 2 Cowens Cr. Repts. 19. The error must be shown conclusively to be innocuous else it will reverse the conviction. *Vandevoort* v. *Gould*, 36 N. Y. 639; *Peo.* v. *Haines*, 1 Cow. Cr. Repts. 71; *Peo.* v. *White*, 14 Wend. 112. The cross-examination of defendant as to other crimes, at a remote time was improper. Unless the independent offense is directly connected with the principal offense it cannot be proven as showing motive. *State* v. *LaPage*, 2 Am. Cr. Rep. 506, 57 N. H. 245, cited with approval in *State* v. *Fallon*, 2 N. D. 514; *Shaffner* v. *Com.*, 72 Pa. St. 60, 13 Am. Repts. 649. The limit to evidence of this character is that it must be sufficiently near in point of time to have a tendency to lead the guarded discretion of a reasonable and just man to a belief in the existence of this important element in the fact to be proved. *Thayer* v. *Thayer*, 101 Mass. 111, 113; *Com.* v. *Abbott*, 130 Mass. 473; *Billings* v. *State*, 12 S. W. Rep. 574. The cross-examination of defendant should have been limited to matters pertinent to the issue, or such matters as could have been proven by other witnesses. *Peo.* v. *Brown*, 72 N. Y. 571; *State* v. *Lawrence*, 57 Me. 581; *Peo.* v. *Crapo*, 76 N. Y. 291; *Clarke* v. *State*, 78 Ala. 474; 6 Am. Cr. Rep. 525; *Elliott* v. *State*, 51 N. W. Rep. 315; Thomp. on Trials, 652, 653. The point of objection to this line of cross-examination in *Territory* v. *O'Hare*, 1 N. D. 30, (44 N. W. Rep. 1003,) was that "the state cannot inquire into defendants history or attack his character unless the defendant has first put his character in issue." This was the ground upon which the objection was rested in the case of *Brandon* v. *People*, 42 N. Y. 268, and the latter case was distinguished in *Peo.* v. *Brown*, 72 N. Y. 571. The defendant was privileged from answering as to collat-

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eral crimes. Whart. Cr. Ev. § 432; *State* v. *White*, 27 Am. Repts. 142 and note. The cross-examination as to remote criminal acts was incompetent for impeaching defendants credibility, as a witness. The inquiry should have been confined to transactions comparatively recent, bearing directly upon the present character of the witness. Greenleaf Ev. § 459; Whart. Cr. Ev. § 472; *Carroll* v. *State*, 24 S. W. Rep. 100; *Holder* v. *State*, 25 S. W. Rep. 279; *Turner* v. *King*, 32 S. W. Rep. 941. A defendant cannot be asked if he has been indicted for the purpose of impeaching him. *Van Bokkelen* v. *Berdell*, 130 N. Y. 141; *Peo.* v. *Crapo*, 76 N. Y. 291; *Peo.* v. *Irving*, 95 N. Y. 541; *Peo.* v. *Noelke*, 94 N. Y. 137; *Ryan* v. *Peo.*, 79 N. Y. 594; *Bates* v. *State*, 30 S. W. Rep. 890; *Tifft* v. *Moor*, 59 Barb. 619; *Hannah* v. *McKellip*, 49 Barb. 342. A witness cannot be impeached by proof of a series of facts from the existence of which the inference of the perpetration of a crime may be drawn. Questions for the purpose of impeachment must be directed to specific acts. Whart. Cr. Ev. § 432; *Schultz* v. *Third Ave. Ry. Co.*, 89 N. Y. 242, 250; *State* v. *Punshon*, 34 S. W. Rep. 25. The fact that defendant denied all insinuations of counsel, and crimes imputed to him on cross-examination does not show that he was not prejudiced by the examination. *Bates* v. *State*, 30 S. W. Rep. 890; *Peo.* v. *Wells*, 34 Pac. Rep. 1078; *Peo.* v. *Mullings*, 23 Pac. Rep. 229; *Gale* v. *People*, 26 Mich. 158. The introduction of exhibit "P" was error. When a party on cross-examination of a witness puts questions to him that are collateral or irrelevant to the issue he makes the witness his own, and he has no right to contradict him by other testimony, but the statements of the witness in answer to such questions are conclusive against him. Greenleaf, Ev. § 449; *Stokes* v. *People*, 53 N. Y. 164; *Butler* v. *Cooper*, 42 Pac. Rep. 839; It is prejudicial error to allow counsel in argument to travel outside of the record, and indulge in the assertion of matters which have not been established by the testimony. *Graves* v. *United States*, 37 L. Ed. 1021; *Long* v. *State*, 56 Ind. 182; *Ferguson* v. *State*, 49 Ind. 33; *Coble* v. *Coble*, 28 Am. Rep. 339; *Angelo* v. *People*, 96 Ill. 209; *Brown* v. *Swineford*, 44

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Wis. 282; *Tucker* v. *Henniker*, 41 N. H. 317; *Scripps* v. *Reily*, 35 Mich. 371; *Cleveland Paper Co.* v. *Banks*, 15 Neb. 20; *Fox* v. *Peo.*, 95 Ill. 71; *Earll* v. *People*, 99 Ill. 123; *Union Cent. Ins. Co.* v. *Cheever*, 36 Ohio St. 201; *Martin* v. *Orndorff*, 22 Ia. 505; *Hatch* v. *State*, 8 Tex. App. 416; *Laubach* v. *State*, 12 Tex. App. 583; *State* v. *Smith*, 1 Am. Cr. Repts. 580; *State* v. *Johnson*, 76 Mo. 121; Kerr on Homicide, § 306. The directions of the court to the jury did not cure the error. *Yoe* v. *People*, 49 Ill. 410; *State* v. *Smith*, 75 N. C. 307; *Tucker* v. *Henniker*, 41 N. H. 317; *Hatch* v. *State*, 8 Tex. App. 416; *Festner* v. *R. R. Co.*, 17 Neb. 280; *Rolfe* v. *Rumford*, 66 Me. 564; *Walker* v. *State*, 6 Blackf. (Ind.) 2; *Deckerson* v. *Burke*, 25 Ga. 225; *Crandall* v. *People*, 2 Lans. 309; *Sullivan* v. *State*, 66 Ala. 48; *McAdory* v. *State*, 62 Ala. 154; *Bulliner* v. *Peo.*, 95 Ill. 396; *Grosse* v. *State*, 11 Tex. App. 364. The separation of the jury was prejudicial error. *Eastwood* v. *People*, 3 Parker, Cr. Rep. 25; *Com.* v. *McCall*, 1 Va. 271; *State* v. *Church*, 64 N. W. Rep. 152; *People* v. *Brannigan*, 21 Cal. 338; *Riley* v. *State*, 9 Humph. 654; *McCann* v. *State*, 9 S. and M. 465. The burden of proof is upon the state to show that the prisoner suffered no injury by reason of the separation of the jury. *Maclin* v. *State*, 44 Ark. 115; *Keenan* v. *State*, 8 Wis. 132; *State* v. *Prescott*, 7 N. H. 287; *Moss* v. *Com.*, 6 Cr. L. Mag. 88. The court has no power to authorize the separation of the jury even with the consent of the prisoner. *Peiffer* v. *Com.*, 15 Pa. St. 466; *McLain* v. *State*, 10 Yerg. 241; *Hines* v. *State*, 8 Humph. 397; *Wesley* v. *State*, 11 Humph. 502; *State* v. *Prescott*, 7 N. H. 287; *Woods* v. *State*, 43 Miss. 369; *Organ* v. *State*, 26 Miss. 83; *Eastwood* v. *People*, 3 Parker Cr. Repts. 25. An erroneous instruction cannot be corrected by another instruction which states the law correctly. *Kingen* v. *State*, 45 Ind. 518; 2 Green Cr. Rep. 721; *Kirland* v. *State*, 43 Ind. 146, 2 Green Cr. Rep. 706; *Peo.* v. *Wang*, 54 Cal. 151; *Perry* v. *Com.*, 1 Am. Cr. Repts. 272; *Peo.* v. *Bush*, 65 Cal. 129; 5 Am. Cr. Repts. 459. Where instructions are requested that correctly state the law they should be given in the form in which they are prepared. *Middle-*

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ton v. *State*, 1 Am. Cr. Repts. 194; *Hamilton* v. *People*, 1 Am. Cr. Repts. 618; *Anderson* v. *State*, 2 Am. Cr. Repts. 198; *State* v. *Stewart*, 2 Am. Cr. Repts. 603; *State* v. *Rothschild*, 3 Am. Cr. Repts. 326; *Cline* v. *State*, 5 Am. Cr. Repts. 57; *State* v. *Hecox*, 5 Am. Cr. Repts. 98; *Panton* v. *People*, 5 Am. Cr. Repts. 425; *People* v. *Bush*, 5 Am. Cr. Repts. 459; *State* v. *Moran*, 1 Green's Cr. Repts. 749; *Peo.* v. *Anderson*, 2 Green's Cr. Repts. 395.

H. G. Voss, State's Atty., J. F. Cowan, Atty. Gen'l., (*Wm. P. Miller*, of counsel,) for the state.

It is too late to raise any question of irregularity with respect to granting of the change of venue after verdict. *Ben Krebs* v. *State*, 8 Tex. App. 1; *Williams* v. *State*, 16 S. W. Rep. 816; *State* v. *Kindig*, 39 Pac. Rep. 1028; *State* v. *Gamble*, 24 S. W. Rep. 1030; *Hourigan* v. *Com.*, 23 S. W. Rep. 355; *State* v. *Dusenberry*, 20 S. W. Rep. 461; *Burrell* v. *State*, 28 N. E. Rep. 699; *State* v. *Potter*, 16 Kan. 80; *Porter* v. *State*, 5 Mo. 538. No juror was accepted by the state or defense before the order granting the change. *State* v. *Hazledahl*, 2 N. D. 521. It is the order granting the change of venue that confers jurisdiction on the court to which the case is sent. *State* v. *Dusenberry*, 20 S. W. Rep. 461. The objection to the sufficiency of the verification of the information is made too late. It being involved in the former trial of the case, it becomes *res adjudicata*, even though not particularly mentioned in the decision. *Everson* v. *Mayhew*, 85 Cal. 1; *Reclamation Dist.* v. *Goldman*, 65 Cal. 635; *Carr* v. *Qingley*, 16 Pac. Rep. 9; *Forgerson* v. *Smith*, 104 Ind. 246. Unsupported statements made by counsel, if the court in its instructions warns the jury that such unsupported statements must be disregarded by them, cannot be assigned as error. *Peo.* v. *Greenwall*, 115 N. Y. 520; *State* v. *McGahey*, 3 N. D. 293; *Miller* v. *State*, 25 S. W. Rep. 634; *Handly* v. *Com.*, 24 S. W. Rep. 609; *King* v. *State*, 24 S. W. Rep. 514; *Gibbs* v. *State*, 20 S. W. Rep. 919; *Griffin* v. *State*, 8 So. Rep. 670; *Hilton* v. *Com.*, 16 S. W. Rep. 826; *Palmer* v. *State*, 28 N. E. Rep. 130; *Sterling* v. *State*, 15 S. E. Rep.

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743; *State* v. *Spencer*, 12 So. Rep. 137; *Hemingway* v. *State*, 8 So. Rep. 317. No error was committed in permitting witnesses other than those whose names were indorsed upon the information to testify. The objection should have been taken by motion and before pleading. Sections 7283, 7284, Comp. Laws. This statute is kept alive by § 5, Ch. 71, Laws 1890. The court may in its discretion allow witnesses to testify for the state, whose names are not endorsed upon the information. Section 2. Ch. 71, Laws 1890. And this is true especially when the defendant and his counsel knew who the witnesses would be, they having testified on a former trial. *Peo.* v. *Freeland*, 6 Cal. 96; *Peo.* v. *Symonds*, 22 Cal. 349; *Peo.* v. *Lopez*, 26 Cal. 113; *State* v. *Townsend*, 35 Pac. Rep. 367; *Territory* v. *Godfrey*, 50 N. W. Rep. 481; *State* v. *Boughner*, 59 N. W. Rep. 736; *State* v. *Church*, 60 N. W. Rep. 143; *State* v. *Reddington*, 64 N. W. Rep. 170; *Simon* v. *People*, 36 N. E. Rep. 1019; *Gifford* v. *People*, 35 N. E. Rep. 754; *State* v. *Story*, 41 N. W. Rep. 12; *Kramer* v. *State*, 29 S. W. Rep. 157; *State* v. *Church*, 60 N. W. Rep. 143; *Thiede* v. *Territory*, 16 S. C. Rep. 62. The affidavits of persons to whom the jurors made statements after the verdict, as to alleged misconduct of the jury, are incompetent and cannot be considered. *State* v. *Fox*, 79 Mo. 109; *State* v. *Dunn*, 80 Mo. 681; *State* v. *Rush*, 8 S. W. Rep. 221; *Clark* v. *Creditor*, 57 Cal. 639; *Peo.* v. *Deegan*, 88 Cal. 602; *Peo.* v. *Gray*, 61 Cal. 164; *State* v. *Price*, 6 Am. Cr. Repts. 33; *Territory* v. *King*, 6 Dak. 131. The mere separation of the jury does not of itself constitute error. Section 7399, Comp. Laws; Subd. 3, § 7450, Comp. Laws; *Langford* v. *State*, 49 N. W. Rep. 766; *Peo.* v. *Bemmerley*, 98 Cal. 299; *Com.* v. *Gagle*, 18 N. E. Rep. 417; *State* v. *Harper*, 7 S. E. Rep. 730; *State* v. *Frier*, 24 S. W. Rep. 220; *Stanton* v. *State*, 13 Ark. 317; *State* v. *Kidd*, 56 N. W. Rep. 263; *People* v. *Wheatley*, 88 Cal. 114; *Peo.* v. *Kelley*, 46 Cal. 357; *Binns* v. *State*. 35 Ark. 118; *State* v. *Fairlamb*, 25 S. W. Rep. 895; *Peo.* v. *Simonds*, 22 Cal. 353. The question of fact raised by affidavits as to misconduct of the jury has been settled by the trial court, and like any other question of fact upon conflicting testimony will not be

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reviewed in this court. *Baker* v. *State*, 59 N. W. Rep. 570; *State* v. *Floyd*, 63 N. W. Rep. 1096; *Peo.* v. *Buchanan*, 39 N. E. Rep. 846; *Peo.* v. *Bemmerley*, 98 Cal. 299; *Epps* v. *State*, 102 Ind. 539; *Long* v. *State*, 95 Ind. 481; *Clayton* v. *State*, 100 Ind. 201; *Murphy* v. *State*, 61 N. W. Rep. 491; *Downer* v. *Baxter*, 30 Vt. 468; *Carleton* v. *State*, 61 N. W. Rep. 699; *State* v. *Sullivan*, 21 S. E. Rep. 4; *Peo.* v. *Hunt*, 59 Cal. 430; *Peo.* v. *Goldenson*, 76 Cal. 328; *Peo.* v. *Murray*, 85 Cal. 361. The jurors did not separate except by order of court and consent of counsel for both the state and defendant. Such separation cannot be assigned as error. *State* v. *Frier*, 24 S. W. Rep. 220; *Henning* v. *State*, 6 N. E. Rep. 803. Defendants counsel had knowledge of any alleged misconduct of the jury, and could not set by without remonstrance or affirmative action, and take the chance of securing an acquittal reserving at the same time a complete right to move for and obtain a new trial. *State* v. *Floyd*, 63 N. W. Rep. 1096; *Ty.* v. *O'Hare*, 1 N. D. 30; *Com.* v. *Martin*, 16 Pa. Co. Ct. 140; *State* v. *Harrigan*, 31 At. Rep. 1052. It was competent to inquire of Earl Kent what his mothers appearance was at the time she received the letter, delivered by Swidensky. This was part of the *res gestae*, and not as claimed by plaintiff in error the declaration of a stranger. *State* v. *Hayward*, 65 N. W. Rep. 63. The acts and declarations of Swidensky both before and after the homicide done in pursuance of the common object, purpose and plan of the conspiracy were admissable against his co-conspirator, Kent. *U. S.* v. *Lancaster*, 44 Fed. Rep. 896; *Gill* v. *State*, 27 S. W. Rep. 598; *Atkinson* v. *State*, 30 S. W. Rep. 1064; *Cline* v. *State*, 30 S. W. Rep. 801; Whart. Cr. Ev. 698. And this is true although Swidensky was not a party to the record. Whart. Cr. Ev. 700; *Peo.* v. *McKane*, 143 N. Y. 455; *State* v. *Crab*, 26 S. W. Rep. 548; *State* v. *Pratt*, 26 S. W. Rep. 556; *St. Clair* v. *U. S.*, 154 U. S. 134; *Peo.* y. *Fehrenbach*, 36 Pac. Rep. 678; *Blain* v. *State*, 26 S. W. Rep. 63; *Peo.* v. *Lane*, 36 Pac. Rep. 16; *Conde* *S*v. *tate*, 24 S. W. Rep. 415; *Peo.* v. *Collins*, 64 Cal. 293; *Harris* v. *State*, 20 S. W. Rep. 916. The order of proof was discretionary with the court. *State* v. *Flanders*, 23 S. W. Rep. 1086; *Peo.* v. *McKane*, 30

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N. Y. Supp. 95, 143 N. Y. 455; *Hall* v. *State*, 12 So. Rep. 449. All preliminary inquiries as to the surrounding of the homicide were competent. *St. Clair* v. *U. S.*, 154 U. S. 134. To work a reversal it must appear that the substantial rights of the defendant have been prejudiced by the admission of irrelevant and immaterial testimony. Section 7439, Comp. Laws; *Odette* v. *State*, 62 N. W. Rep. 1054; *State* v. *Reddington*, 64 N. W. Rep. 170; *Moore* v. *State*, 28 S. W. Rep. 686; *State*, v. *Moore* 22 S. W. Rep. 1086. The allowance of a challenge for cause interposed by the state though erroneous is not a matter of exception and ground for error, on the part of the accused. Section 7439, Comp. Laws; *Thompson* v. *Douglass*, 13 S. E. Rep. 1015; *State* v. *Ching Ling*, 18 Pac. Rep. 844; *State* v. *Carris*, 3 So. Rep. 56; *Ty.* v. *Roberts*, 22 Pac. Rep. 132; *Hayes* v. *State*, 120 U. S. 68; *Maclin* v. *State*, 44 Ark. 115; *State* v. *Waggoner*, 3 So. Rep. 119. Whatever was said by the court was invited by counsel for the defendant grossly insulting the court, and error cannot be predicated thereon. The instruction of the court that "if the court has at any time in its discretion reprimanded counsel, or if the court has seemed angry toward counsel or counsel toward the court, you will not permit any such facts to influence you in the slightest degree" cured the error if there was one. *Peo.* v. *Northey*, 77 Cal. 618; *State* v. *Whiteworth*, 29 S. W. Rep. 595; *Peo.* v. *Leach*, 40 N. E. Rep. 865; *Com.* v. *Ward*, 157 Mass. 482; *Ryan* v. *State*, 53 N. W. Rep. 836; *Bone* v. *State*, 12 S. E. Rep. 205; *State* v. *Black*, 8 So. Rep. 594; *State* v. *White*, 39 Pac. Rep. 160. The defendant having circumstantially denied the entire story of Swidensky, any testimony offered which would assist in knowing which party speaks the truth of the issue, is relevant. *Trull* v. *True*, 33 Me. 367; 3 Rice on Ev. 69; *Seller* v. *Jenkins*, 97 Ind. 430. Defendant having denied any financial connection with the bank in Ohio, which in the light of Swidensky's testimony was relevant and material, the state had a right upon cross-examination to impeach him by the letter "P." 3 Rice on Ev. 72; *Coleman* v. *People*, 58 N. Y. 555; *Keyes* v. *State*, 122 Ind. 527.

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Circumstances so trivial and remote in themselves that if individually and separately applied might justly be rejected may from their multitude and relation become important and relevant. *State* v. *Watkins*, 9 Conn. 52; Taylor on Ev. 298. Anything in the past life of the defendant which tended to disprove his denials of what Swidensky claimed the defendant had imparted to him, thereby corroborating Swidensky were relevant and material for such purpose, and also to disprove defendants denials. *Boyle* v. *State*, 105 Ind. 469; *Keyes* v. *State*, 122 Ind. 527; *Ford* v. *State*, 112 Ind. 373; *Welch* v. *State*, 104 Ind. 347; Whart. Cr. Ev. 484. Whether as to time, evidence offered to show motive is too remote, depends entirely upon the nature of the evidence. *Peo.* v. *Harris*, 136 N. Y. 423; *Moore* v. *U. S.*, 150 U. S. 57; *State* v. *Hoyt*, 46 Conn. 330; *Shailer* v. *Bumsted*, 99 Mass. 112. Relevant cross-examination competent to show motive will not be excluded though it has a tendency to show defendant guilty of another crime. *Peo.* v. *Walters*, 32 Pac. Rep. 864; *Peo.* v. *Sharp*, 107 N. Y. 467; *State* v. *Wells*, 37 Pac. Rep. 1005. However remote from the main issue in point of time, evidence tending to show motive is admissible. Its weight is for the jury. *Russell* v. *State*, 11 Tex. App. 288. Testimony is always relevant when it tends to show a motive for the crime. *Peo.* v. *Thornton*, 46 Hun. 643; *State* v. *Green*, 92 N. C. 779; *State* v. *Hoyt*, 46 Conn. 330; *Ty.* v. *Roberts*, 22 Pac. Rep. 132; *Reed* v. *State*, 68 Ala. 492. A defendant by voluntarily testifying waives all privilege, from being compelled to testify against himself, and becomes subject to cross-examination the same as any other witness. *Ty.* v. *O'Hare*, 1 N. D. 30; *Peo.* v. *Tice*, 131 N. Y. 657; *State* v. *Wells*, 37 Pac. Rep. 1005; *Brandon* v. *Peo.*, 42 N. Y. 265; *Peo.* v. *Webster*, 139 N. Y. 73, 22 N. Y. Supp. 634; *State* v. *Wentworth*, 65 Me. 234; *State* v. *Ober*, 52 N. H. 459; *State* v. *Cohn*, 9 Nev. 179; *Peo.* v. *Bussy*, 82 Mich. 49; *Thomas* v. *State*, 103 Ind. 419; *State* v. *Clinton*, 67 Mo. 380; *Peo.* v. *Rozelle*, 78 Cal. 84; *McKeone* v. *Peo.*, 6 Colo. 346; *State* v. *Phelps*, 59 N. W. Rep. 471. When the defendant is under cross-examination he may be interrogated as

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to previous arrests and convictions and even as to mere charges of crime with a view to injuring his credit. Rapalje Law of Witnesses, 337; *Peo.* v. *Foote*, 93 Mich. 38; *Peo.* v. *Robinson*, 49 N. W. Rep. 260; *State* v. *Klitzke*, 49 N. W. Rep. 54; *State* v. *Curtis*, 40 N. W. Rep. 263; *Peo.* v. *Howard*, 40 N. W. Rep. 789. By swearing to tell the truth, the whole truth and nothing but the truth, the defendant waived all right to keep anything back even in the case of questions, the answers to which would tend to criminate him. *Com.* v. *Smith*, 163 Mass. 411; *State* v. *Allen*, 107 N. C. 805; *State* v. *Allen*, 11 S. E. Rep. 1016.

BARTHOLOMEW, J. The plaintiff in error, William W. Pancoast, was informed against by the state's attorney of Morton County, under the name of Myron R. Kent; and, by such information, he was accused of the murder of one Julia C. Kent, in said county, on the 13th day of March, 1894. The information was dated on the 8th day of November, 1894. As the record refers to plaintiff in error by the nane of Kent, we shall use the same name in this opinion. A trial of the case resulted in a verdict of guilty of murder in the first degree, and the death penalty was affixed. The judgment on the verdict was brought to this court by writ of error, and was reversed, by reason of the error of the trial court in refusing, upon a proper application, to call in another judge to sit in the case, and a new trial was ordered. See 4 N. D. 577, 62 N. W. 631. In due time, after the record in the case was returned to the District Court of Morton County, the application for another judge was renewed; and Hon. William B. McConnell, Judge of the Third Judicial District, was called to sit in the case. Subsequently, proceedings were had in the District Court of Morton County, and before Judge McConnell, that resulted in a change of the place of trial from Morton County, in the Sixth Judicial District, to Cass County, in the Third District. A trial of the case in Cass County resulted in a second verdict of murder in the first degree, with the death penalty affixed. The judgment pursuant to that verdict is now before us for review. The trial of

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the case in District Court occupied some three weeks of time, and was most ably (even bitterly) contested on both sides.

There is an extended assignment of errors, all of which have been vigorously urged in this court. The first assignment of error that we shall consider relates to the jurisdiction of the District Court of Cass County to try the case. It was raised after verdict by motion in arrest. Without expressing any opinion as to whether or not it could properly be raised in that manner, we will dispose of it on its merits. The point is based upon the contention that the change of venue from Morton County was ordered after the trial had begun, and hence was unauthorized, under section 7312, Comp. Laws, which authorizes a change of venue in such cases "at any time before trial is begun," and, as the District Court of Morton County was without the power to order the change of venue at that time, the unauthorized order conferred no jurisdiction upon the District Court of Cass County. The facts were that, when the case was called for trial in Morton County, the plaintiff in error moved for change of place of trial, on the ground of bias and prejudice on the part of the inhabitants of said county. The motion was supported by affidavits, and counter affidavits were filed by the state, and oral evidence heard on the motion. The court denied the motion, but with leave to renew it later. An attempt was then made to impanel a jury, and jurors were called and examined on their *voir dire*, until the regular panel was exhausted, and no juror had been accepted. At that time the court intimated to counsel for plaintiff in error that, if the motion for change of venue was renewed, he felt inclined to grant it; whereupon plaintiff in error, both by counsel and in person, asked that the place of trial be changed to Cass County, and expressly agreed that the case should be tried in Cass County. The court, acting, we are bound to believe, upon the affidavits and evidence and the added knowledge that he had obtained in the attempt to impanel a jury, and upon the express agreement stated, ordered the place of trial changed to Cass County. We think that, so far as the simple change of venue

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was concerned, it was strictly within the statute. There was no second application for the change. It was simply a renewal of the original application, made on the suggestion of the court, and in pursuance of leave expressly reserved in the original ruling, clearly showing that such ruling was tentative only. But, further, we do not think the trial had begun, within the meaning of the statute, when the application was renewed. In construing another section of the Code of Criminal Procedure, we held, in *State* v. *Hazledahl*, 2 N. D. 521, 52 N. W. 315, that the trial began after the jury was impaneled. It is clearly in the interests of justice to persons accused of crime that this section should receive the same construction, and there is ample authority to support this ruling. *Price* v. *State*, 8 Gill, 296; *Smith* v. *State*, 44 Md. 530; *Jenks* v. *State*, 39 Ind. 1; *Weaver* v. *State*, 83 Ind. 289; *Hunnel* v. *State*, 86 Ind. 431; *Edwards* v. *State*, 25 Ark. 444. The wording of section 8111 of the Revised Codes of this state differs to such an extent from the wording of section 7312 of the Compiled Laws, under which this action was tried, that we may be required to rule differently in cases tried under the Revised Codes. We take judicial notice, however, that Cass County is not a near or adjoining county to Morton, nor was it claimed that an impartial trial could not be had in any of the intermediate counties. But the District Court of Cass County had full jurisdiction to try felonies. Plaintiff in error asked that the case be sent to that county, and expressly agreed in open court that it might be tried in such county. It is well settled by the authorities that the right to a change of venue having been established, and having thus selected the tribunal by which he would be tried, such tribunal having full jurisdiction to try offenses of the kind charged, and having been tried by that tribunal, plaintiff in error cannot, after verdict, be heard to question the jurisdiction of the court, or to allege that the change should have been to some other county. *Lightfoot* v. *Com.*, 80 Ky. 524; *Hourigan* v. *Com.*, 94 Ky. 520, 23 S. W. 355; *State* v. *Potter*, 16 Kan. 80; *State* v. *Kindig*, (Kan. Sup.) 39 Pac. 1028; *People* v. *Fredericks*, 106 Cal. 555, 39 Pac. 944; *State* v. *Gamble*, 119 Mo. 427, 24 S. W. 1030.

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When the case was called for trial in Cass County, plaintiff in error moved to set aside the information, on the ground that it was not verified as the law requires. The information was verified by the state's attorney of Morton County, to the effect that he believed it to be true. Without in any manner intimating that this was not a good verification, we think the motion came too late. Our statutes as found in the Compiled Laws of 1887, were framed when accused persons were presented by indictment, and not by information; but chapter 71 of the Laws of 1890 substitutes an information by the state's attorney for the indictment of a grand jury, and section 5 of said act declares that the proceedings under indictment should, "as near as may be, apply to prosecutions by informations." Section 7283 of the Compiled Laws specifies the ground for setting aside an indictment; and these grounds, as applied to an information, would cover a defective verification. The next section provides: "If the motion to set aside the indictment be not made, the defendant is precluded from afterwards taking the objections mentioned in the last section." The substance and almost the language of these provisions was borrowed from Minnesota. See Ch. 110, Gen. St. 1878. The Supreme Court of Minnesota, in *State* v. *Schumm* 47 Minn. 373, 50 N. W. 362, and *State* v. *Dick*, 47 Minn. 375, 50 N. W. 362, held that a motion to set aside the indictment could not be made after plea entered. In this case, plaintiff in error, prior to his first trial, was regularly arraigned, and pleaded not guilty. He has never withdrawn, or asked to withdraw, that plea for any purpose whatever, and hence the motion to set aside the information came too late. But counsel sought to save the point by motion in arrest. It has been held in Minnesota that a matter which might furnish a grouud for a motion to set aside an idictment cannot be raised by demurrer or in any manner except by such motion. *State* v. *Brecht*, 41 Minn. 50, 42 N. W. 602. By section 7452, Comp. Laws, the grounds for motion in arrest are the same as, and none other than, the grounds for a demurrer to the information, as specified in section 7292, Comp. Laws. As the objection under considera-

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tion was proper ground for motion to set aside, and was not proper ground for demurrer, it follows that it cannot be raised by motion in arrest. Learned counsel admit in argument that the point could not be raised on demurrer, and this must be so because, under our practice, a demurrer goes only to the body of the information.

In the process of impaneling the trial jury, one Holzer was called as a juror, and was challenged by the state for cause. In support of this challenge, Holzer was examined under oath as to his qualifications. His answers disclosed a state of disqualification that would, as we view it, have fully warranted the court in sustaining the challenge. The record, however, recites: "The court denies the state's challenge for cause, and the state exercises a peremptory challenge. At this time the court sustains the challenge for cause." The plaintiff in error excepted to this last ruling, on the ground that its effect was to extend to the state an additional peremptory challenge. Prior to that time the state had exhausted five of the six peremptory challenges allowed by law. Subsequently one Cruso was called as a juror, and was challenged peremptorily by the state and stood aside. Plaintiff in error excepted to this ruling, upon the ground that the state had used its sixth and last peremptory challenge upon Holzer. These exceptions cannot be sustained. Nor can we for a moment entertain the suggestion that the trial court, by reversing its ruling as to the juror Holzer, manifested any bias or favoritism towards the state. Indeed, the suggestion approaches the absurd, as, had such been the case, the court would certainly have sustained the challenge for cause in the first instance, as in fact it ought to have done. In denying the challenge the state was wronged, and in changing the ruling the state had restored to it that which it had been improperly compelled to use in rejecting Holzer. It must, we think, be conceded, that a court may, in the process of impaneling a jury, reverse its own rulings; and, the last ruling being correct, it would, indeed, be a novel doctrine that

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either party could assign as error that the court did not adhere to erroneous ruling. See *State* v. *Cohn*, 9 Nev. 179.

When the information was filed, the names of but two witnesses were indorsed thereon, and their testimony simply proved the *corpus delicti*, about which there was no controversy. Many other witnesses were called by the state and plaintiff in error, in each case, objected to such witnesses giving any testimony in the case, on the ground that their names were not indorsed on the information. Section 2, Ch. 71, Laws 1890, (being the statute authorizing prosecutions by information,) provides that the state's attorney shall indorse on the information "the names of all witnesses for the prosecution known to him at the time of filing the same; but other witnesses may testify on the trial of such cause in behalf of the prosecution thereof the same as if their names had been indorsed thereon." Similar statutory provisions, though usually more stringent in their terms, are almost universal. The practice of indorsing the names of witnesses for the prosecution upon the indictment or information has long prevailed in this country and England. The object is to apprise the accused beforehand of the names of the witnesses against him, to the end that he may investigate their characters and antecedents and be the better prepared to meet and overcome or weaken their testimony by counter testimony gathered in advance of the trial. It is repugnant to the instincts of justice that an accused should be required to battle, it may be for his life, in total ignorance of the witnesses by whose words the state expects to condemn him, and thus necessarily, wholly unprepared to subject them to those tests of accuracy and credibility so potent in the investigation of truth. In *People* v. *Hall*, 48 Mich. 482, 12 N. W. 665, the court said: "The court allowed the names of several witnesses to be added to the information during the trial, under objection, without any showing that they were not known earlier and in time to give defendant notice in season to anticipate their presence before trial. The statute is explicit that this shall be done before trial, where witnesses are

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known. Section 7938 [Comp. Laws.] This is not a mere formality; and, wherever it has been provided for by statute, it has been treated as a substantial right." See, also, *State* v. *Reddington*, (S. D.) 64 N. W, 170.

When plaintiff in error objected to the testimony of witnesses whose names were not on the information, he offered to prove that such witnesses were known to the prosecuting attorney when the information was filed, and the court heard evidence on the point. The objection was overruled. If this ruling rested only upon the evidence adduced, we should hesitate to sustain it. Indeed, it is difficult to conceive how an information can be verified by the state's attorney without his having some definite knowledge of the source or sources of evidence upon which the state relies for a conviction. But in this case there had been one trial of the case. For months plaintiff in error had known who the important witnesses for the state were, and also what their testimony was. All the purposes for which the law required their names to be indorsed on the information had been fully met. Hence there could have been no prejudicial error in the court's ruling so far as it related to witnesses that were used on the former trial. Section 7250, Comp. Laws, reads: "No indictment is insufficient, nor can the trial, judgment, or other proceedings thereon be affected, by reason of a defect or imperfection in matter of form, which does not tend to the prejudice of the substantial rights of the defendant upon the merits." Two witnesses were used by the state on the second trial whose names were not on the information, and who were not used on the first, but it is clear from the evidence that they were not known to the prosecution when the information was filed. However, had this objection been seasonably made at the first trial, it might have proved fatal. We cannot indorse counsel's position that, under our statute, all witnesses can testify, whether their names are indorsed or not. We cannot permit the latter clause of the provision to thus emasculate and destroy the former. True, the statute says, "But other witnesses may testify for the state the

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same as though their names were indorsed on the information;" but such "other" witnesses must be witnesses who were not known to the prosecutor when he filed .the information. Prosecutions by information are an innovation. The law authorizing them places a great power in the hands of one man, and that power should not be abused. Public prosecutors must treat those whom they accuse of crime with perfect fairness.

Earle Kent, the son of deceased and the accused, was a witness for the state in this case, and several questions were asked this witness, and answered, over defendant's objections, which, standing alone, would have no bearing upon any issue in the case. But all such questions were preliminary in their nature, and become competent by reason of what followed either in his own testimony or that of the witness and accomplice Swidensky. This practice is universal and absolutely necessary to the due administration of justice, and no authorities need be cited to support it. A careful examination of this evidence discloses no legal prejudice to plaintiff in error.

A large number of assignments of error are directed against the rulings of the court upon the admission of evidence during the examination of the witness Swidensky. The testimony of this witness was exceedingly important. He was the confessed accomplice, the man who fired the shot that killed Mrs. Kent. Without his testimony it is safe to say that no conviction would have been secured on the trial. His story was revolting in its details, and, if true, showed a depth of depravity, both on his part and that of the plaintiff in error, that humanity seldom reaches. In view of the prominence of this witness in the case, we will notice these assignments at some length.

Two assignments relate to questions that were asked for the purpose of showing what personal property Kent had on his farm at the time of the murder. On the former trial, Kent's absence from home at the time of the murder, and his subsequent flight and efforts to elude officers that were in pursuit of him, were attempted to be accounted for on the theory that he had embez-

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zled $300 or $400 belonging to certain insurance companies that he represented, and that he left home the day preceding the murder for the purpose of raising $300 with which to cover this shortage, and, failing in that, he fled, and tried to elude the officers, because he thought they were after him for that offense. The object of the state in asking the questions was to show that he had property out of which he could realize the sum of $300, and hence his story was false. True, this evidence might more properly have been reserved for rebuttal; but it is only in a few well recognized instances that error can be assigned upon the order of proof, certainly not in this instance.

Again, the witness was asked: "State what his [Kent's] habits were with respect to going and coming to the house and the office." This was proper. The witness testified that the conspiracy was first broached by Kent while witness was driving him from his house to his office. Kent testified to his habits in this respect, and his testimony agreed with that of the witness.

Another assignment is directed at a question that simply required the witness to state the circumstances under which he was arrested, and was clearly proper.

A number of assignments of error are directed against the little black book, known as "Exhibit C," that figured so prominently upon the former trial. It is sufficient here to say that it was a small blank book, such as is frequently carried in the pocket; and in it Swidensky swore that he had written out in full, but in the Bohemian language, and at Kent's dictation, just what he should say at the coroner's inquest concerning the manner in which Mrs. Kent met her death. He also testified that he finished the writing in the book on Sunday morning preceding the homicide, and that Kent urged him to study it until he had his story thoroughly committed to memory, and then destroy the book. But the book was on his person when he was arrested, and was taken by the sheriff. But, as the writing in the book was in the Bohemian language, the sheriff knew nothing about what it contained until months later. At the coroner's inquest held immediately after the

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murder, Swidensky did tell practically the identical story that was afterwards found to be written in the book. This book was received in evidence over the objection of the defendant. We ruled in the former opinion that the book was properly received, but counsel again attack certain questions concerning the book, with great ability and zeal; insisting that they were asked simply to corroborate Swidensky's sworn statements, and that nothing that the accomplice may have done and nothing that he may do or say after the homicide can be used to corroborate him. Counsel misapplies the law relating to the corroboration of an accomplice. True it is that no conviction can be had upon the testimony of the accomplice alone; and it matters not how inherently probable that testimony may be. It may be so connected with and related to known facts and conditions as to render fabrication impossible, and produce absolute moral conviction of its truthfulness. Still, standing alone, it cannot, under the statute, warrant conviction. It must be corroborated by some evidence. tending to connect the accused with the commission of the offense, and this evidence must come from an entirely independent source. It may be but slight, and wholly insufficient in itself to procure a conviction; yet, if it reasonably tends to connect the defendant with the commission of the offense, the statute is satisfied. But in such a case the state must still place its main dependence for conviction upon the testimony of the accomplice. The corroborating testimony required by the statute may in no manner strengthen the particular facts to which the accomplice testifies. It is the right of the prosecution to make the testimony of the accomplice as strong and as inherently probable as the case will admit; and, because one portion of his testimony may tend to make another more probable,—may strengthen and support it,—he is not thereby corroborating himself, within the meaning of the statute. All the questions asked the witness for the purpose of showing under what circumstances and when the book was taken from him, and that it was in the

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same condition when produced at the trial as when taken from him were clearly competent.

We have discussed only such assignments relating to Swidensky's testimony as are argued in the brief. Others were made, but an inspection shows them to be without merit, as counsel concedes by not arguing them.

A presumption of guilt arises from flight. This presumption will have more or less force, according to the facts and circumstances attending it. But the flight, with its attendant facts and circumstances, can alway go to the jury, under the instructions of the court as to how its effect should be weighed. Whart. Cr. Ev. § 1269, and cases cited. For the purpose of showing flight and secretion, the sheriff of Morton County was asked and permitted to answer a series of questions tending to disclose what he did by way of locating and arresting the defendant, between the time of the commission of the murder and his final arrest, on September 2d following. While learned counsel do not strenuously contend that the general purport of this examination was improper, yet he does urge that certain portions of the answers of the witness had no tendency to establish the ultimate fact sought; hence it was error to receive such portions, or permit them to stand. We may concede counsel's proposition that some portions of the testimony did not necessarily tend to show flight. For instance, the facts that the sheriff got out a large number of circulars, or sent telegrams, from which he received no results, may not strongly tend to establish flight or secretion. But we are by no means prepared to accept counsel's conclusion that this is necessarily reversible error. We do not believe there is a court of last resort in the United States that would hold to-day that the admission of improper testimony is necessarily and in every instance ground for reversal. Certainly, the authorities cited do not support the doctrine. It is true, generally speaking, and particularly in criminal cases, that prejudice will be presumed from the admission of improper testimony; and, when the influence of such testimony upon the jury is to any extent a doubtful question,

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courts can indulge in no speculations, but must conclusively presume prejudice, and correct the error. But when, from the character of the irrelevant testimony or from the record, it is clear that no prejudice could result in any conceivable view of the case, then the admission of such improper testimony should never reverse the case. This is the rule of reason and justice, as well as of authority. *McMillen* v. *Aitchison*, 3 N. D. 185, 54 N. W. 1030; *State* v. *McGahey*, 3 N. D. 293, 55 N. W. 753; *Hegar* v. *DeGroat*, 3 N. D. 354, 56 N. W. 150; *Colemant* v. *People*, 2 Cow. Cr. R. 19; *Vandervoort* v. *Gould*, 36 N. Y. 639; *Erben* v. *Lorillard*, 19 N. Y. 299. In this case the defendant himself, on the stand, testifies that he left his home, in Morton County, on the morning of the day preceding that on which the murder was committed, and for nearly six months thereafter he spent the time at out of the way places in Michigan, Nebraska, and Colorado. He also swears that during this time he passed under several different names, none of them being his real name of William W. Pancoast or his assumed name of Myron R. Kent. He also admits that he changed his locality to avoid apprehension. The flight and secretion are so indisputably established that no prejudice to defendant could possibly have resulted from permitting the sheriff to testify that he sent out circulars and telegrams in his efforts to locate and apprehend the defendant. The error, if any, was entirely harmless.

A vigorous attack is made upon certain rulings relative to the evidence of the witness Hoy. This witness was a detective, and was no doubt largely instrumental in procuring the arrest and conviction of the defendant. It is perhaps natural that counsel, in his zeal, should assail this witness with some bitterness. We have examined his testimony and the rulings thereon with utmost care, and we find absolutely no error connected therewith. Nor do we conceive that the rulings raise any questions of law whatever that are not too elementary to warrant any discussion. We mention the matter simply that counsel may understand that it was not overlooked.

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The plaintiff in error took the witness stand in his own behalf, and, in discussing the questions that arise upon the exceptions saved on his cross-examination, we must keep constantly in mind certain well settled principles. The object of a cross-examination is to break or weaken the force of the testimony given by the witness on his direct examination. To this end, it is always proper to show the relations of the witness to the case and the parties, the interest, if any, he may have in the result, his motives for testifying in any particular manner. Likewise, it is proper to show his relation to the facts, his means of knowledge, and opportunities for information, his powers of observation, and his tenacity of memory; and, subject to the constitutional privilege of a witness to refuse to answer questions the answers to which may tend to criminate him, it is proper to show collateral facts that might tend to criminate, disgrace, or degrade the witness if such other facts tend to weaken his credibility. *Territory* v. *O'Hare*, 1 N. D. 30, 44 N. W. 1003; *People* v. *Casey*, 72 N. Y. 394; *People* v. *Irving*, 95 N. Y. 541; *U. S.* v. *Wood*, (Dak.) 33 N. W. 59; *State* v. *McCartey*, 17 Minn. 76, (Gil. 54;) *Wilbur* v. *Flood*, 16 Mich. 40. It is also well established that, when a defendant in a criminal case voluntarily takes the witness stand in his own behalf, he thereby subjects himself to the same rules of cross-examination that govern other witnesses, with the exception that his privileges are to some extent curtailed, in that he is not only required to answer any relevant and proper question on cross-examination that may tend to convict him of the offense for which he is being tried, but he must also answer any such relevant and proper question that may tend to convict him of any collateral offense, when such answer also tends to convict him of the offense for which he is being tried, or bears upon any of the issues involved in such case. *Connors* v. *People*, 50 N. Y. 240; *People* v. *Howard*, 73 Mich. 10, 40 N. W. 789; *State* v. *Ober*, 13 Am. Rep. 88; *People* v. *Courtney*, 31 Hun. 199; *Chambers* v. *People*, 105 Ill. 409; *McKeone* v. *People*, 6 Colo. 346; *Fralich* v. *People*, 65 Barb. 48; *State* v. *Wentworth*, 65 Me. 234; *Hanoff* v.

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State, 37 Ohio St. 180; *State* v. *Pfefferle*, 36 Kan. 90, 12 Pac. 406; *Boyle* v. *State*, 105 Ind. 469, 5 N. E. 203; *Keyes* v. *State*, 122 Ind. 528, 23 N. E. 1097; *People* v. *Court of Oyer and Terminer of New York Co.*, 83 N. Y. 436; *People* v. *Hooghkerk*, 96 N. Y. 149; *State* v. *Red*, 53 Iowa, 69, 4 N. W. 831; *Clarke* v. *State*, 78 Ala. 474; *Cotton* v. *State*, 87 Ala. 103, 6 South, 372; *Norris* v. *State*, 87 Ala. 85, 6 South. 371. The cross-examination of plaintiff in error in this case was greatly extended, occupying several days, and covering his past life since 1873. The questions raised upon this cross-examination cover a wide range in criminal evidence, are very interesting, and not free from difficulty.

It is undisputed in this case that Julia C. Kent was murdered by the direct act of Thomas Swidensky, between 11 and 12 o'clock on the night of March 13, 1894. Death was caused by the discharge of a shotgun held, at most, but a few feet from her head. The tragedy occurred in the house where plaintiff in error and Julia C. Kent, his wife, had lived for about a year and a half then last past, on a farm about one mile and a quarter from the City of Mandan, in Morton County. Plaintiff in error was a lawyer, with an office in Mandan, and it was his general custom to go from his home to the city in the morning, and return in the evening. It was the theory of the state that plaintiff in error hired the man Swidensky to kill Mrs. Kent, or, in other words, that plaintiff in error and Swidensky entered into a conspiracy to accomplish that object. Swidensky was a Bohemian laborer, who had been in Kent's employ for some time. His testimony indicates that he is a man of considerable intelligence. He was a witness for the state, and his testimony was vital. Without it no conviction could have been expected on the testimony adduced. He testified in detail to an arrangement which he claimed was entered into between ptaintiff in error and himself, and said that, early in February preceding, Kent broached the subject to him one morning, while they were driving to Mandan; that Kent said to him, "I am going to tell you something. There is a big thing in it if you promise not to give it away." Then, as preliminary,

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Kent proceeded with a statement that he "was pretty well fixed" in Minneapolis, but lost $15,000 in a mining deal in California, through his wife's brother Frank; that his wife urged him to go into the deal, but, as soon as his money was gone, Frank Laird "was after him, to drive him out of Minneapolis." He then said to witness: "Now, Tom, I am going to get $30,000 from England, from my mother. As soon as my wife hears about it, the first thing she will want to do, she will want to go straight to Minneapolis, where her folks are, and they will want to handle my money again, and I will be in the same fix I was before." Further, witness testified: "He said, 'Tom, I will tell you what to do, and will give you $18,000 if you will help me to get rid of my wife.'" Witness refused to consider the proposition, and Kent proceeded to urge him, by representing the great financial advantage to witness. The next day, Kent approached him again, and witness still refused, saying he was "afraid they would hang him." But at every opportunity Kent continued to importune him, and developed the whole scheme by which it could be made to appear that the killing was accidental, so that Swidensky would be released after the coroner's inquest. Kent should be away, and should proceed to England, get the money, meet Swidensky at a town in the Indian Territory, and pay him the $18,000. Witness still refused, stating that he did not want to kill Mrs. Kent, that she had always been good to him, and that he was afraid. In one interview, Kent said to witness: "Kent is not my right name; my name is W. W. Pancoast. I changed my name the time I put away my first wife, and took $25,000 out of a bank in Ohio. Then I went to England. I got some of that money there, and I got it now." Then Kent said: "Tom, my wife is suspicious about something, and I cannot let it go much longer. I am afraid she will get onto it some way or other." Finally, witness says that, on the Saturday before the homicide, he accepted the the offer; and, at Kent's dictation, he wrote down in a book, while in the barn, detailed instructions as to what he was to do and say.

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Plaintiff in error, when on the witness stand, testified on his direct examination as follows: "I am the defendant here. I am the husband of Julia C. Kent. I have heard the testimony of Thomas Swidensky. I heard his testimony in regard to my having approached him some time in the month of February, 1894, while on the road to the City of Mandan, when he said I suggested the idea to him that I wanted to get rid of my wife. His statement is false. I never, at any time, place or manner, suggested to Thomas Swidensky that I wanted to get rid of my wife." Again he said: "I heard Swidensky's statement that I importuned him in the month of February to destroy my wife, assigning as a reason that she was suspicious of me, and was getting onto something, and that there was a big insurance on her life. There never was anything of that kind said or done." And, further: "Swidensky's statement that I importuned him from time to time, and finally, on the 9th of March, made a contract with him, by which he was to kill my wife, and was to receive the sum of $18,000, is false as false can be. Never was such a thing ever thought of, either in my heart, mind, or brain. * * * I also heard his statement in regard to this book, that, some time during the week preceding the homicide, I had conversations in the barn and vicinity, in which I dictated to him certain things which have been introduced here as part of this book. That statement is all false. I never was in the barn and dictated to him one word in my life concerning this or any other crime, or any other act. * * * I heard Tom's testimony that on Saturday night he finished writing this story in the cow shed, sitting on a little box, and that I dictated it to him, and that Sunday morning he finished it. That statement is false as can be. I never did such a thing. * * * I never heard of such a thing that I was to meet Tom at the Cherokee Nation, and there deliver to him $18,000, until I heard his testimony. It is false. All of his statements in regard to shooting my wife, or pretending that burglars were around the house, and that he should say that the shooting was accidental, etc., are untrue. There never was such an arrangement made."

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We think it should be conceded for these denials that they fully and fairly deny that any conspiracy, arrangement, plan, or understanding was entered into or existed between plaintiff in error and Swidensky, for killing Julia C. Kent; and, the conspiracy being thus denied, it follows that everything in Swidensky's testimony that tends to establish such conspiracy is denied. It will be conceded by the state that, in his direct examination, plaintiff in error said nothing in terms about his past life, or his connection with any bank in Ohio, or the death of his first wife, or what name he had traveled under, or where his parents resided, or when he last saw them. The cross-examination of plaintiff in error went immediately to a time when he lived in Medina, Ohio, in 1873; and the following questions were asked, all of which were objected to as incompetent, irrelevant, immaterial, and improper cross-examination, the objection being overruled in each instance: "Q. Were your parents there? A. They were living in the same county, about fifteen miles from Medina. Q. What business were you engaged in, in Medina, Ohio, in the year 1873, or about that time? A. I was interested in the First National Bank. I was one of the directors. In 1873 I was cashier. I was married at the time. Q. When did your first wife die? A. In April, 1873. Q. What month was it you left Ohio? A. * * * It was the following year, in May. Q. Did your wife die suddenly? A. She did. She was not ill but a couple of weeks, but had been ill at times for over a year. Q. What happened this week before you left Ohio? A. Nothing that I personally know of. Q. Was there anything that you heard of? A. I heard that the bank was in difficulty. Q. How long did you hear that the bank was in difficulty before you left Ohio? A. I should think it was only one day," etc. "Q. What was your name at this time,—that is, under what name were you known? A. W. W. Pancoast. Q. Where did you go when you left Ohio at this time?" This question and all that we hereafter quote were objected to on the following grounds: "That it is incompetent,

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irrelevant, immaterial, improper cross-examination, an attack on character on a collateral matter drawn out on cross-examination, and declines to answer the question, on the ground that the statements are privileged, which privilege is claimed by both counsel and defendant, and that the question is asked for the sole and exclusive purpose of prejudicing him in the eyes of the jury, and declines to answer the question on the ground that it may disgrace him." The objection was overruled in each instance. The witness answered: "I went to Toronto, Canada. Q. Where did you go then? A. I went to Liverpool. Q. Under what name were you known when you went to Liverpool? A. I assumed the name of Angel Herrick. Q. You lived under that name during your entire stay in England? A. Yes sir. Q. Is it not a fact that you went away [from Ohio] knowing that you were accused of having embezzled the funds of that bank yourself? A. I never did appropriate the funds. No sir; there was no such accusation against me. Q. Don't you know that it is true that you were accused of having taken $7,000 worth of bonds belonging to another person, and $7,000 worth of bonds of your own brother's, and made use of those bonds, never having entered the transaction upon the books of the bank, and after you went away from Medina, Ohio, you wrote a letter to your brother trying to make an explanation of your connection with that bank, and the disposition of the funds of the bank by you? A. No sir; that is not true. I can explain that." This same letter was afterwards introduced in evidence by the state, as Exhibit P, for the purpose of contradicting the witness. Again, the witness was asked, under the same objection: "Q. Now, between the period when you claim you left Ohio, in 1874, until 1879, when you say you went to Chicago, had you been back to the state of Ohio? A. No sir. Have you seen your mother at all up to 1879, between the time you left Ohio and your visit to Chicago? A. No, sir. Q. Mr. Kent, when and where did you see your parents last? A. I think it was in 1874." Much more of the cross-examination is of a similar purport, but we have quoted enough to explain our rulings. The learned counsel

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for the state claim that this cross-examination was proper for three purposes: First, to show Kent's motive for desiring to have his wife put out of the way; second, to corroborate the testimony of Swidensky as to what Kent told him; and, third, to destroy or weaken the credibility of the witness. The counsel for plaintiff in error claim that this cross-examination was proper for no purpose.

It must be conceded that, to be competent for either the first or second purposes claimed, it must be proper cross-examination; that is, it must be relevant, and must pertain to the matter about which the witness testified in his direct examination. While it would be entirely proper for the state, by witnesses for the prosecution, to show Kent's motives, and to corroborate Swidensky by any testimony competent for these purposes, yet it could not accomplish those results through this witness, unless the direct examination had opened the door. We are aware that cases may be found opposed to this statement. See *State* v. *Allen*, 107 N. C. 805, 11 S. E. 1016; *Disque* v. *State*, 49 N. J. Law, 249, 8 Atl. 281; *Com.* v. *Lannan*, 13 Allen, 563; *Com.* v. *Tolliver*, 119 Mass. 312. But in those jurisdictions the more liberal English rule of cross-examination exists, and not the strict American rule, which limits it to the particular subjects covered by the direct examination. Greenl. Ev. § 445; Whart. Law Ev. § 529; Rice, Ev. p. 585. But, while the strict rule limits the cross-examination to the subjects about which the witness testified in chief, this does not mean the particular facts to which the witness directed his testimony Any subject that has been opened may be exhausted. A defendant, on the witness stand, cannot testify to just such facts as may be in his favor, and, by stopping there, preclude inquiry into all the facts pertaining to the subject. See cases already cited. There are statutes in some of the states limiting the cross-examination of defendants in criminal cases, and, under these statutes, a stricter rule of cross-examination has been enforced by the courts. But we have no such statute in this state, and certainly the administration of justice does not require this limi-

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tation upon the ascertainment of truth. In this case, plaintiff in error, on direct examination, made his denials so broad that he necessarily denied his guilt, denied the existence of any conspiracy, and denied all the statements of Swidensky concerning the formation of a conspiracy, denied the motives as stated by Swidensky, and hence denied the statements upon which Swidensky testified those motives were based. We restate what Swidensky testified Kent said to him: "Kent is not my right name. My name is W. W. Pancoast. I changed my name the time I put away my first wife, and took $25,000 out of a bank in Ohio. Then I went to England. I got some of that money there, and I got that now. Then Mr. Kent said, 'Tom, my wife is suspicious about something, and I cannot let it go much longer. I am afraid she will get onto it some way or other.'" Here is a sworn statement of the admission of the commission of at least one heinous crime, and also a statement that his wife was suspicious of something, and that he could not let it go much longer, because he was afraid she might unearth the crime committed in Ohio. All this was denied, in effect, by the direct examination of plaintiff in error. We do not care to say in this case, and it is not necessary that we should say, that the proof that he committed the crimes alluded to would furnish any legal proof that he told Swidensky that he committed such crimes. We do not say whether such evidence would or would not weaken his denial, or corroborate Swidensky. There is a deeper question behind, and that is the question of motive. Plaintiff in error had denied what Swidensky had testified was his self-declared motive; and, the subject of motive being thus opened up, it was proper to cross-examine him upon the entire subject. And, indeed, there are authorities (and they are supported by good reasoning) which would admit a cross-examination as to motive under nothing more on the direct examination than a general denial of the crime, or even less than that. *Thomas* v. *State*, 103 Ind. 419, 2 N. E. 808; *Com.* v. *Clark*, 145 Mass. 251, 13 N. E. 888; *People* v. *Tice*, 131 N. Y. 651, 30 N. E. 494; *U. S.* v. *Mullaney*, 32 Fed. 370.

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There is ample authority for the proof of alias and collateral crimes for the purpose of showing a motive for the commission of the crime for which a defendant is being tried; the limitation being that such alias crime must bear such a relation to the crime for which the party is being tried that a court can clearly see that, if established, it will have a tendency to furnish a motive for the commission of the other crime. *People* v. *Bussey*, 82 Mich. 49, 46 N. W. 97; *Farris* v. *People*, (Ill. Sup.) 21 N. E. 821; *People* v. *Harris*, 136 N. Y. 423, 33 N. E. 65; *State* v. *Hoyt*, 46 Conn. 330; *Moore* v. *U. S.*, 150 U. S. 57, 14 Sup. Ct. 26; *Com.* v. *McCarthy*, 119 Mass. 354; *Crass* v. *State*, (Tex. Cr. App.) 20 S. W. 579; *State* v. *Cohn*, 9 Nev. 179; *State* v. *Dearborn*, 59 N. H. 348; *Oliver* v. *State*, (Tex. Cr. App.) 28 S. W. 202; *State* v. *Watkins*, 9 Conn. 52.

This case is unusual in its facts. The proof of the commission of the crime or crimes at Medina, Ohio, would not, as we view it, have had any legal tendency to furnish a motive for the murder of Julia C. Kent, but for the declared state of mind, according to Swidensky's testimony, under which Kent was laboring. It was the theory of the state that Kent believed that Mrs. Kent was suspicious of something; that he was haunted with a fear or dread that she might become cognizant of certain crimes that he had committed in Ohio; and that this fear was the motive that actuated him in conspiring for her death. Obviously, this theory of the motive would be greatly strengthened by proof that he had committed the specified crimes in Ohio. While it is true that, in the cases where proof of a collateral crime has been admitted for the purpose of showing motive, the relation between the two crimes was usually such as to indicate that the latter was committed in order to prevent an investigation into and an exposure of the former crime, that it was feared would be followed by prosecution and punished, yet we can discover no reason in principle for the limitation of the rule to that class of cases strictly. Any strong incentive must furnish an equally cogent reason for the admission of such testimony. It may be true in this case, as counsel learnedly argue, that plaintiff in error had no reasonable ground

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to apprehend prosecution for his past crimes, if any there were, as a result of his wife's suspicions or investigations. He was her husband, and had been such for nearly twelve years. He was the father of her only child, and to expose him to the world as a felon would bring disgrace upon herself and an indelible stigma upon her son. But whoever reads the record in this case, and particularly Kent's letters, will be irresistibly impressed with the thought that Kent at all times assumed high moral grounds, with an exalted standard of personal purity. There is evidence tending to show that he claimed for himself a higher social position than he was willing to concede to his wife. Under these circumstances, it would be intolerably galling to him to have his wife learn that he was in fact a felon, that he had married her under an assumed name, and that during all these years he had led a life of duplicity and hypocrisy. But courts cannot speculate as to the sufficiency of the motive. It cannot be doubted that the evidence tended to show a motive; and that motive that might be all powerful with one man might be of little or no force whatever with another, depending upon temperament and natural or acquired tendencies, and particularly upon the predisposition to commit crime.

In this connection it is proper to remark that there is an exhibit in the record (Exhibit L,) being a letter written by plaintiff in error to his wife in 1892, which clearly shows that Mrs. Kent was suspicious of her husband. The letter was in answer to one written by her, and the contents of hers can be gathered from his reply; and it is certain that Mrs. Kent had at least suggested an investigation of her husband's past life. This exhibit was properly admitted in evidence.

There is another exhibit, marked "P," which was admitted over objections. This was a letter written in——by plaintiff in error to his brother, from Ostend, Belgium. The state claims that this letter contains an admission of the crime in connection with the bank at Medina. It certainly will admit of such a construction, and as we have held that it was proper to prove that crime for the

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purpose of showing motive, and as the letter was competent, in that it tended to prove that crime, its admission was not error.

The evidence showing that Kent's parents resided near Medina, Ohio, and that Kent had not seen them since 1874, was introduced for the purpose of showing that there was some reason for his avoiding that locality, and thus indirectly furnishing proof of the crime. The inference is neither plain nor strong, and yet we cannot say that the evidence had no probative force in that direction. It may be that the public prosecutor's duty would have been fully performed without pressing these inquiries to the extent that they were pressed, but we discover no reversible error in so doing. Nor can we sanction the views of the learned counsel that these collateral crimes were too remote in time to furnish any motive for the commission of the crime here charged. Motive may or may not be affected by the lapse of time. Ordinarily, a man who had committed a murder twenty years in the past would be just as much concerned to prevent exposure and punishment for that crime as though it were but one year in the past. And in this case, if the discovery by Mrs. Kent, at the time of her death, of these dark and criminal spots in her husband's life, would have been just as galling and humiliating to him as if discovered the first year of their married life, then his motive to prevent such discovery would be just as strong at the former time as at the latter.

Having held that this cross-examination was proper for the purpose of showing motive, we might here leave this branch of the case, but the question of the propriety of such examination as affecting the credibility of the witness is squarely raised upon the record, is important in its bearing upon other matters in the case, and its decision has been urged upon us by counsel upon both sides, in arguments that evidence unusual research and care. We shall therefore proceed to state without elaboration our views upon the point.

We have already stated that, for the purpose of affecting his credibility, a witness may be asked questions the answers to which

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may tend to disgrace, degrade, and criminate him. In *People* v. *Brown*, 72 N. Y. 571, and *People* v. *Crapo*, 76 N. Y. 288, an effort seems to have been made to break away from the rule which burdens a defendant in a criminal case who becomes a witness in his own behalf with the same latitude of cross-examination which may be applied to every other witness, so far as an attack upon his credibility by proof of collateral crimes was concerned. But we discover no reason sufficiently persuasive to induce us to depart from the rule. It is said, in effect, in those cases, and is urged upon us in argument, that to prove by an ordinary witness criminal transactions in his past life has no effect other than to weaken the credibility of the witness, while to adopt the same course with a defendant not only weakens his credibility, but also tends to so prejudice him in the minds of the jury as to increase the probabilities of a verdict of guilty at their hands. But this same argument would preclude proof of any collateral crime, however relevant and pertinent to the issues in the case, because the prejudice arising from proof of the collateral crime would be just as great in one case as the other. But guarded, as a defendant in a criminal case always should be, by the instructions of the court, and as he is by his constitutional privilege to refuse to answer any question when the answer might tend to criminate him, and by the rule of law which makes his answers on collateral matters absolutely conclusive upon the opposite party, we think apprehension of injustice resulting from the enforcement of the rule has no sufficient warrant, and rests, indeed, almost exclusively in imagination. The contrary rule would present a temptation to commit perjury that few men with criminal instincts would resist.

But neither can we take the view that by becoming a witness in the case, and thus subjecting himself to a cross-examination that might tend to convict him of the crime for which he is on trial, thereby a defendant waives all protection, and has no longer any right to invoke his constitutional privilege of declining to answer questions the answers to which might criminate him. Counsel

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for the state urges this view with great plausibility, but we do not think there is an authority that supports him. It is true that in *Com.* v. *Smith*, 163 Mass., the court say, at page 432, (40 N. E. 189:) "Nor can we assent to the doctrine that the waiver by defendant of his constitutional privilege is partial only. By becoming a witness, he throws away his shield." But this language is qualified by what subsequently appears in the opinion: "If, however, he seeks the benefit of testifying, he cannot stop short with matters that are favorable to himself, but must submit to be questioned also as to relevant matters which are adverse." This brings the case in harmony with the general line of authorities already cited. We find nothing that necessarily goes further in *Com.* v. *Tolliver*, 119 Mass. 312, or *Com.* v. *Nichols*, 114 Mass. 285, or *Com.* v. *Mullen*, 97 Mass. 545. In *State* v. *Allen*, 107 N. C. 815, 11 S. E. 1016, cited by counsel, the court say: "He cannot be compelled to testify, and no inference to his detriment can be drawn from his failure to go upon the stand. When he voluntarily does so, he waives his constitutional privilege of not being required to give evidence tending to criminate himself, and, to impeach him and shake his evidence, can be asked questions as to other and distinct offenses like any other witness." This announces the general rule, and no more. Both authority and reason demand that, when a defendant in a criminal case takes the witness stand, his constitutional privilege should furnish him the same protection and immunity that it furnished any other witness. The law's solicitude that no innocent man be punished, and that every man accused of crime be tried by a jury unswayed by prejudice or passion, furnishes ample excuse for the constant tendency in many courts to strengthen the protective armor of a defendant when on the witness stand. But exact justice is better served when his credibility receives the same protection that shields that of every witness who goes into the witness box, and nothing more.

But it is urged by plaintiff in error that, regarding this cross-examination as an attack upon his credibility, his constitutional

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privilege was repeatedly denied. Our constitutional provison declares that "no person shall be compelled in any criminal case to be a witness against himself" (Const. Art. 1, § 13,) which is identical with the provision in the federal constitution, and in the constitutions of New York, California, Georgia, and perhaps some others. In considering this point, we must first determine whether or not this privilege was properly claimed. We have already quoted the form in which the claim was made. The material portion consists in the statement that the question was "an attack on character on a collateral matter drawn out on cross-examination, and declines to answer the question, on the ground that the statements are priviledged, which privilege is claimed by both counsel and the defendant." It is urged by the prosecution that this claim is too indefinite and ambiguous, and that it cannot be made by counsel, but must be made by the defendant in person. We find no instance where the claim has ever been put forward in this language, and we think counsel, in his efforts to avoid making a record that might serve as a basis for unfavorable comment to the jury, failed to make an objection upon which a court could intelligently rule. This matter of claiming the constitutional exemption is not a mere form,—not a barricade behind which a witness can take shelter at his pleasure, and without incurring the risk of some injurious consequences to himself. It is doubtless true that, when a witness declines to answer on the ground that his answer will tend to criminate him, a jury will always draw a conclusion more or less unfavorable to him by reason of his refusal. But that is the price he must pay for his protection. He can claim his privilege on no other ground, and, if he refuses to disclose that basis for his claim, he cannot be heard to complain that his claim was denied. Whether or not this claim could properly be made by counsel is a more difficult question. This privilege is a personal matter, which a witness may always waive at his pleasure. 3 Rice, Ev. § 204. And, with respect to an ordinary witness, counsel in the case can have no legal interest in the matter of his protection. It is purely a

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question between the witness and the court. *Cloyes* v. *Thayer*, 3 Hill, 564; *Southard* v. *Rexford*, 6 Cow. 254. Not only must the witness claim the privilege in person, but he must state under oath that the answer will tend to criminate him. See 1 Rose, Cr. Ev. 232 *et seq.*; *Kirschner* v. *State*, 9 Wis. 140; *People* v. *Kelly*, 24 N. Y. 74-83; *People* v. *Seaman*, (Sup.) 29 N. Y. Supp. 329-333. And this ought to be so on principle. The privilege is not given to screen the credibility of the witness. The opposite party has the absolute right to impeach that credibility in the case on trial. But he has no right to compel the witness to furnish an admission that might be used against him in a prosecution for the offense about which he is interrogated. If the witness, on his oath, declines to answer, because his answer will tend to criminate him, his credibility stands impeached before the jury, as fully as if he had answered in the affirmative; but no admission is left that could ever be used against him. In many jurisdictions it is statutory that a witness shall not be excused from answering questions, upon the ground that his answers will tend to criminate him, but that his answers cannot be used in any case against him. Of course, under such statutes, he is protected from furnishing evidence to be used against himself, but his constitutional privilege of silence is swept away.

We must not be understood to mean that, in every case where a witness under oath claims his privilege on the ground that his answer will tend to criminate him, the privilege will be granted. Ordinarily it will, and the witness cannot be required to specify in what manner his answer may be incriminating. This would be to destroy the privilege. But, when a court can discover no reasonable theory upon which the answer could be incriminating, further investigation may be made, or the privilege denied. A witness will not be permitted to make any fraudulent use of his privilege. For full discussion of this point, see 3 Rice, Ev. § 203 *et seq.* This case, however, presents a still further complication, in that the witness was also a party, and a party most vitally interested. Generally speaking, a party to an action in court

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speaks through his counsel. It is the right and duty of counsel to protect his client at every point. These considerations led the court of appeals in New York, in *People* v. *Brown*, 72 N. Y. 571, and in the Supreme Court of Iowa, in *Clifton* v. *Granger*, 86 Iowa, 573, 53 N. W. 316, to hold that this privilege could be claimed by counsel when the witness was also a party. But there is a practical difficulty in such a holding that was not discussed in either of these cases. The claim of privilege, when made by counsel alone, even when, as in this case, counsel says, "The privilege is claimed by both counsel and the defendant," is not, and cannot be, supported by the oath of the witness. This, as we have seen, is demanded both by authority and reason, and we can conceive of no sufficient ground to support an exception in favor of a party. *State* v. *Wentworth*, 65 Me. 234. No doubt, counsel have the right, in protecting their clients, to raise the point, and call the attention of the court to the matter, and demand that the witness be apprised of his rights, and given an opportunity to make the claim under oath, if he so elect. We think this would be the proper method of raising the point in these cases. Of course, the witness might do it without the intervention of counsel. A refusal of the trial court to properly instruct a witness when thus requested by his counsel might constitute reversible error. We hold, then, that the claim of privilege, by reason of the incriminating nature of the answer sought, was not made with sufficient definiteness to apprise the court of the nature of the claim; and, further, that the claim cannot be made by counsel, even when the witness is also a party.

But there are reasons why we think this cross-examination improper as affecting the credibility of the witness. The insinuating style of questioning in which the prosecution indulged should never be permitted for this purpose. That method of examination does not effect the credibility of the witness, because it neither shows him to be untruthful nor necessarily of bad moral character. The rule in these cases is somewhat strict, and necessarily so, because it is dangerous ground. Injustice

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may be done if the rule is relaxed. Where a cross-examiner seeks to impair the credibility of a witness by proof of collateral crimes, he should be confined to specific acts. He may ask the witness whether or not he committed the act, or whether he has been convicted thereof or imprisoned therefor. But, manifestly, the interrogatories should be so framed as to permit the witness to admit or deny the act itself. He should not, for impeachment purposes, be asked questions which simply suggest inference. It has repeatedly been held that a party could not be asked whether or not he had been indicted for a particular offense, on the ground that an indictment did not prove guilt. *People* v. *Crapo,* 76 N. Y. 288; *People* v. *Noelke,* 94 N. Y. 144; *People* v. *Irving,* 95 N. Y. 541; *Van Brokkelen* v. *Berdell,* 130 N. Y. 145, 29 N. E. 254. For the purpose of proving the commission of the crime for which a party is being tried, any evdence is proper that raises a legal inference, or makes it probable that the crime was committed by the accused. Not so, however, where it is sought to show a collateral crime to affect credibility. That issue is not on trial, and the jury must not be called upon to investigate it. It was not proper, then, to ask plaintiff in error in this case, when speaking about the alleged crime in connection with the bank, whether or not he was not "accused," etc., and whether or not it was not "claimed" by the bank officers, etc., because all that may have been true, and yet no such crime as claimed have been committed. This applies also to the examination relative to the death of his first wife, and the fact that he had not seen his parents since 1874. See Whart. Cr. Ev. § 432; *Schultz* v. *Railroad Co.,* 89 N. Y. 250; *State* v. *Pushon,* (Mo. Sup.) 34 S. W. 28; *Bates* v. *State,* (Ark.) 30 S. W. 890.

There is yet another objection. The collateral crimes sought to be established were too remote to necessarily show a present bad moral character. They had been committed, if at all, nearly 22 years before the trial. They may have been long since sincerely repented of and atoned for. In Greenleaf on Evidence (section 459) it is said: "The examination being governed and

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kept within bounds by the discretion of the judge, all inquiries into transactions of a remote date will, of course, be suppressed; for the interests of justice do not require that the errors of any man's life, long since repented of and forgiven by the community, should be recalled to remembrance, and their memory be perpetuated in judicial documents, at the pleasure of any future litigant. The state has a deep interest in the inducements to reformation held out by the protecting veil which is thus cast over the past offenses of the penitent. But where the inquiry relates to transactions comparatively recent, bearing directly upon the present character and moral principles of the witness, and therefore essential to the due estimation of his testimony by the jury, learned judges have of late been disposed to allow it." And see, also, *Holder* v. *State*, (Ark.) 25 S. W. 279.

Another objection absolutely fatal if this cross-examination was for the purpose of affecting credibility only was the introduction of Exhibit P. Nothing is better settled than that, where a witness is asked as to collateral crimes for this purpose, his answers are absolutely conclusive on the party asking. 3 Rice, Ev. § 222, and cases cited. Nor does it change the rule that the denial comes by the written admission of the witness. The principle is not different from introducing another witness to prove oral admissions. But, as this evidence was all properly admitted for the purpose of showing motive, it is elementary that the judgment cannot be disturbed because it was inadmissible for another purpose, unless the jury were expressly instructed that they might consider the evidence for such improper purpose. We cannot presume that any improper use was made of such evidence. Indeed, the instructions in this case rebut any such presumption, because, while the jury was repeatedly told that such evidence might be considered as bearing upon the question of motive, they were at no time instructed to consider it as bearing upon the question of the credibility of plaintiff in error. The court said in the charge: "The defendant is not being tried for any other crime or offense than that charged in the information, and it

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would not be competent evidence, and you could not consider any evidence, of the commission by the defendant of any other crime or offense, except so far as such other crime or offense, if any, tends to establish the crime of which the defendant is charged, and upon which he is being tried, or tends to establish the question of his intent or motive as to the commission of the crime in question, or tends to establish his guilty knowledge of the crime." This was equivalent to a direct instruction not to consider such testimony as affecting the credibility of the accused as a witness. See, on this subject, *Dows* v. *Glaspel*, 4 N. D. 251-267, 60 N. W. 60; *McKenzie* v. *Vandecar*, (Mich) 62 N. W. 1031.

Errors are assigned upon certain remarks made by counsel for the state in arguments to the jury, and to which exceptions were taken at the time. We had occasion in *State* v. *McGahey*, 3 N. D. 293, 55 N. W. 753, to discuss this question at some length, and we will here enter into no general discussion. It is not claimed in this case that there was a violation of any statutory limitations upon counsel. The objections are placed upon broader grounds, and, to support them, it must clearly appear that counsel have stepped beyond the bounds of any fair and reasonable criticism of the evidence, or any fair and reasonable argument based upon any theory of the case that has support in the testimony. This rule was never intended to limit counsel in any manner that could injuriously affect his case upon the merits. He is allowed a wide latitude of speech, and must be protected therein. He has a right to be heard before the jury upon every question of fact in the case, and in such decorous manner as his judgment dictates. It is his duty to use all the convincing power of which he has command, and the weapons of wit and satire and of ridicule are all available to him so long as he keeps within the record. He may draw inferences, reject theories and hypotheses, impugn motives, and question credibility, subject only to the restriction that, in so doing, he must not get clearly outside the record, and attempt to fortify his case by his own assertions of facts, unsupported by the evidence. See *Tucker* v. *Henniker*, 41 N. H. 317;

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Brown v. *Swineford*, 44 Wis. 282; *Martin* v. *State*, 63 Miss. 505; *Rolfe* v. *Rumford*, 66 Me. 564; *McDonald* v. *People*, 126 Ill. 155, 18 N. E. 817. But this matter is, and of necessity must be, largely within the discretion of the trial court, and the action of the trial court should be reversed only in cases of clear and prejudicial abuse of this discretion. *Bulliner* v. *People*, 95 Ill. 396; *Festner* v. *Railroad Co.*, 17 Neb. 280, 22 N. W. 557; *Hatch* v. *State*, 8 Tex. App. 416.

Let us apply these principles. One of the counsel for the state, Mr. Voss, said, "Kent claimed he had been short in his insurance accounts in the sum of about $300. Kent could have raised this money in half an hour's time in Mandan, if he had desired to do so;" and, again, "Kent, on the morning he went away, had ample funds in his pocket with which to pay the embezzlement;" and, again, "that the defendant had robbed a bank in Ohio, changed his name, and gone to England;" and, again, "that he assumed that every time the defendant changed his name he committed a crime;" and. finally "that one Allison had been subpœnaed by the state, had sat in the court room during the entire trial, and had not been called by the defendant to disprove Swidensky's statement that he received a letter from Allison of Steele." There is evidence upon which the first statement might be fairly based, and there is ample evidence in the record to justify the remark about robbing the bank. The assumption connected with the change of name was simply given to the jury as an assumption, and could not have misled them, and the remark respecting Mr. Allison was expressly taken from the jury in the charge; and when we also consider the fact that, in speaking of the statement of the attorney, the court told the jury to "give it no consideration except so far as it is sustained by the evidence, if at all," and again said to the jury, "You are not to consider any statement made by the attorneys on either side outside of the testimony," and when we consider also the careful manner in which the court throughout the charge guarded the jury against being influenced by anything except the evidence only, we are

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clear that there was no abuse of discretion, either in ruling upon the remarks of Mr. Voss, or those of Mr. Nye which followed, and which we will not particularly set forth.

The exceptions to the charge as given and the refusal to charge as requested need only general mention. We have, severally, studied the charge with care. It bears unmistakable evidence that the trial court fully appreciated the gravity of his duties, and the importance of the case both to the state and the accused. It is a fair judicial statement of the law applicable to the case. If it contains any errors, they are certainly not against the accused. The charge is always as favorable to him as the law would permit. We doubt not that counsel, in their intense zeal (and it is highly commendable in a capital case,) honestly urge their exceptions to the charge, and honestly believe that portions of the same were "misleading," and "invaded the province of the jury," were "argumentative," and "assumed that certain facts were proven," and were "prejudicial to the accused;" but all these claims are general in their nature, and raise no specific questions of law for discussion, but simply involve a construction of the language used. We do not look at the language from counsel's point of view. To us it seems vulnerable to none of these objections, and it would be an unwarranted use of space to reproduce the language here. Counsel contend for no principle of law in this connection which may not be conceded. It is true that a court should not sum up one side of the case only, and should not and must not argue the testimony to the jury, and should not assume that certain facts have been proven, and it is also true that a bad instruction is not generally cured by a good one on the same subject; but, as already stated, these principles were not violated by the instructions given.

Thirty-two errors are assigned upon the refusal of the court to give instructions. Their length precludes their reproduction, but they may be disposed of somewhat summarily. The abstract shows that these instructions were refused, but an inspection of the charge shows that the greater portion of them were adopted

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by the court as its own, and were given either verbatim, as requested, or in language of identical import. When this is not the case, the subject upon which the instruction is asked is always covered, and correctly covered, by the charge given. This leaves plaintiff in error no ground of complaint upon which to stand. *State* v. *McGahey*, 3 N. D. 293, 55 N. W. 753; *State* v. *La Grange*, (Iowa) 62 N. W. 664; *Davidson* v. *State*, (Ind. Sup.) 34 N. E. 972; *People* v. *Harris*, 136 N. Y. 423, 33 N. E. 65; *Com.* v. *Farrell*, (Mass.) 36 N. E. 475; *Clark* v. *State*, (Tex. Cr. App.) 26 S. W. 68; *Thompson* v. *State*, (Tex. Cr. App.) 26 S. W. 198; *State* v. *Freidrich*, (Wash.) 30 Pac. 328.

In this connection, it will be proper to notice some assignments of error based upon certain language used by the court towards senior counsel for plaintiff in error in the cross-examination of certain witnesses for the state. It is apparent from the record that the learned senior counsel was conducting the cross-examination in a manner which the trial court regarded as unfair to the witness, and incompatible with that decorum that should always attend trials in courts of justice. If such were the case, it was the right and duty of the court to correct it. And, while there is no doubt but that some sharp language was used, yet it is clear that counsel was the aggressor, and we cannot say that the court went further than was necessary to protect the witness and control the examination. Yet, in his charge to the jury, the court, by specific instruction, directed the jury not to permit any passage of words or manifestation of temper between court and counsel to prejudice them in any manner against the accused. We do not say this instruction was necessary, but it cured any possible error. *People* v. *Northey*, 77 Cal. 618, 19 Pac. 866, and 20 Pac. 129; *Com.* v. *Ward*, 157 Mass. 482, 32 N. E. 663; *Ryan* v. *State*, 83 Wis. 486, 53 N. W. 836; *State* v. *Whitworth*, (Mo. Sup.) 29 S. W. 595.

All the points presented by the motion in arrest that require special notice have already been discussed, and decided adversely to plaintiff in error. One ground much relied upon in the motion for a new trial was misconduct of the trial jury. It was desired

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by the court, and doubtless by the parties also, that great care should be exercised in keeping all improper influences from the jury. To that end, the jury, as soon as impaneled, was placed in charge of two bailiffs, and all the usual and proper rules in such cases were given. It was claimed, nevertheless, that after the jury was impaneled, and before the case was finally submitted to them (a period of about three weeks,) the jurymen did separate, without leave of court, and under such circumstances and in such situations as rendered it possible for them to be improperly influenced in the performance of their duties as jurors. These matters of separation were brought to the attention of the court by affidavits, at great length, and with great particularity. They consisted for the greater part of brief interviews by individual jurors with their respective wives, not in the immediate presence of their fellow jurors, and not always within hearing of the bailiffs. On one occasion there was another lady with the wife of one juror, and such lady also spoke to such juror. It is not claimed in these affidavits or on argument that any juror was improperly influenced, or that any attempt was made to improperly influence any juror. It was evidently the theory of plaintiff in error that, when once it was shown that an opportunity had been given for improper influence, prejudice would be presumed, and the burden thrown upon the state to overcome such presumption; and such, no doubt, is the law, at least in capital cases, and where such opportunity arises from disobedience to the court's order. See *Moss* v. *Com.*, 107 Pa. St. 267; *Goersen* v. *Com.*, 106 Pa. St. 477; *Keenan* v. *State*, 8 Wis. 132; *Maclin* v. *State*, 44 Ark. 115; *State* v. *Harrison*, 36 W. Va. 729, 15 S. E. 982; *State* v. *Dolling*, 37 Wis. 396. The state seems to have accepted that view also, and filed a large number of counter affidavits, including affidavits of eleven of the twelve jurors, and the persons who were known to have spoken to any juror at any of the alleged interviews, and also of the two bailiffs who had the jury in charge. The members of this court have severally taken the time to carefully consider these affidavits on both sides, and we are all of the opinion

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that every point made in the affidavits in support of the motion has been met by the counter affidavits in a manner which leaves no possible ground to believe that any juror was improperly influenced, or any effort made to improperly influence any juror, at any of the alleged separations.

But it is claimed that an improper influence came from another source. By leave of court, and with the full consent of counsel on both sides, the jury was permitted to attend church. Pursuant to such leave, a portion of the jury, in charge of the bailiff, attended the Episcopal Church in Fargo. There is no claim that it was known before hand that any jurors would attend that church, or anything that was said was spoken with the purpose or expectation of influencing the jury in any manner in the discharge of their duties. But it so happened that the minister upon that particular day discoursed upon the familiar subject of doubting Thomas. A large portion of the sermon has been brought upon the record. In it the minister animadverts upon the incredulity of Thomas in refusing to accept the statements of his friends and fellow disciples as to the existence of a risen Lord, and demanding ocular and manual evidence thereof. It is claimed that the whole tenor of the sermon was such as to induce the jurors to accept facts as proven on less positive and convincing evidence than they otherwise would have done. Granting this, it is difficult to perceive why the jurors' doubts would not be resolved just as readily in favor of the testimony of the defense as of the prosecution. But the whole theory is wrong. It is speculative and almost chimerical. The preacher was speaking of spiritual matters, and his whole application was spiritual. No reasonable man would be influenced in the performance of his duties as a juror in the slightest degree by what was said. Were it otherwise, we do not see how error could be assigned in this connection. Counsel for the accused, in open court, consented that the jurors might attend church. He knew they must hear something, and his consent carried with it an assent that they should hear anything that was a proper and ordinary enunciation from a Christian pulpit. They heard nothing more.

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There remains but a single further point for consideration. It was urged upon the motion for a new trial, and is urged here, that the verdict has not sufficient support in the evidence. The members of this court, knowing full well the grave results that hang upon their words, unhesitatingly declare that they have no doubt whatever upon that point. No unprejudiced person could read this record and entertain a doubt. A murder has been committed, cold, cruel, causeless, and with a deliberation of preparation, and an inexorable determination of execution, that stands almost unparalleled. An innocent woman, in the prime of life, whose misfortune it was that she had been sinned against, in her own home, at the dead of night, was killed by an assassin. Did the accused hire that assassin to commit the deed? He has been twice tried, and it has been his good fortune to be defended at all points by able and faithful attorneys. The senior counsel has clung to the fortunes of his client with an intelligent, tenacious, unselfish zeal that honors the profession to which he belongs. The first trial was held in the county where the crime was committed. An impartial jury declared the accused guilty. That verdict this court reversed, by reason of an error of law occurring at the trial. In due time another trial was had, and at a distance of 200 miles from the scene of the tragedy,—far removed from all influence of prejudice or malice. Another jury was selected, with unusual care. The case was tried by the court with absolute fairness, and again the jury declared that the accused was guilty, and that he should suffer death. If the story as detailed in evidence by the assassin, Swidensky, can be believed, no more righteous verdict was ever pronounced. This story was straightforward, probable, and consistent in all its parts, and bore much inherent evidence of its own truthfulness. By it, the accused was declared to be the party who originated the crime, and planned every ghastly detail of its execution, and promised the assassin $18,000 for its performance. All the ability and skill of counsel, aided by the powerful leverage of the self-confessed depravity of the witness, were unable to weaken this story on cross-examina-

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tion. Nor could the ingenuity of counsel weave into the case any possible motive on the part of Swidensky for the murder of Mrs. Kent, unless his story was true. It will serve no purpose to set out the corroborative testimony tending to connect the plaintiff in error with this crime. His own words and conduct condemn him.

A lawyer, a respectable citizen, possessed of property which he valued at several thousand dollars, with a wife and son, for whom, in his testimony and in certain letters in the record, he professes the most ardent attachment. He left his home on the morning of the day preceding the homicicide, to return that evening. But the next day he was with his old friend, Mr. Seavey, at West Superior, Wis.,—one who had known him only as Myron R. Kent. He told Mr. Seavey that he was on his way to England, to get a large sum of money from his mother. His old mother was in Ohio, and had lived there certainly since 1873. He had no money in England, and no expectation of any. On April 9, 1894, we find him at Trenton, Neb., writing to Mr. Seavey, using another alias, and asking for the loan of a small amount of money, still claiming that he was going to England. It was now nearly a month since he had so unceremoniously left that wife and child. He had received no word concerning them, nor does it appear that he had made any effort to let them hear from him. Did he send them the message of a husband and father through their old friend Mr. Seavey? By no means. But he wrote: "Let no living soul know where I am. I know I can trust my life in your hands." Mr. Seavy wired him: "Do you know your wife has been murdered?" He replied: "No. Comply with the request of my letter." At Trenton the officers located him, and had him arrested, ostensibly for larceny. While awaiting requisition papers, he escaped from the officers, and became a tramp across the plains of Nebraska and Colorado, stopping at a ranch in Colorado, where he worked for some time; but, learning that the Lairds (his deceased wife's brothers) knew of his locality, he immediately left, and again became a tramp, and is next heard of

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as a section hand at Arlington, Colo., where he was arrested. How it could ever be supposed that an intelligent jury would believe that a man of his financial and social standing would desert a loved wife and child, drop to the level of a fugitive felon, hiding and fleeing from place to place, and later pass unheeded the terrible news of the murder of his wife, and permit his valuable property, unwatched and uncared for, to be dissipated and lost, all because he was short a few hundred dollars with some insurance companies, passes comprehension. The verdict has ample support. The whole record presents no error.

The law demands that this judgment be affirmed. It is so ordered. All concur.

(67 N. W. Rep. 1052.)

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ROBERT COULTER *vs.* GREAT NORTHERN RAILWAY CO.

Opinion filed June 5th, 1896.

Pleading and Proof—Variance.

There is no fatal variance between pleading and proof where the complaint alleges that plaintiff was injured through defendant's negligence at a crossing of the public highway over defendant's railroad track by being there struck by one of defendants engines, and the evidence shows that the highway was not legally laid out over defendant's right of way, but that defendant, by its acts and its acquiescence in the public use of the crossing as a public highway, had made such crossing a public highway as to the public, so that it was under the same obligations to take precautions against injuring persons or property at that point as would have rested on it had the highway been laid out in strict conformity with law.

Railroad Crossing—Degree of Care.

The statutory provision of the state regulating the ringing of the bell and blowing of the whistle on approaching a public crossing are not the sole measure of the duty of a railroad company to protect persons and property at public crossings. Nor do regulations embodied in ordinances passed by city councils under statutory authority, regulating the speed of trains and the giving of signals at public crossings within city limits, constitute the sole criteria of the care to be used by such corporations in the management of their trains. The common law obligation resting upon such corporations to use proper care in the operation of their trains to protect persons and property is not diminished by such statutory provisions or ordinances.

Bill of Exceptions—Power to Settle After Appeal.

The District Judge has power to settle a bill of exceptions after an appeal has been perfected, when the original record in the case is still in the Dictrict Court.

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

Action by Robert Coulter against the Great Northern Railway Company. From a judgment for defendant, plaintiff appeals.

Reversed.

Bangs & Fisk, and *Tracy R. Bangs*, for appellant.

The crossing in question was a public crossing within the purview of section 2976 of the Revised Codes. *C. B. & Q. Ry. Co.* v. *Metcalf*, 28 L. R. A. 824; *C. & A. Ry. Co.* v. *Dillon*, 24 Ill. App. 203; *Missouri Pac. Ry. Co.* v. *Lee*, 7 S. W. Rep. 857; *Cranston* v. *N. Y. Cent. Ry. Co.*, 11 N. Y. Supp. 215, affirmed 26 N. E. Rep.

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756; *Ewen* v. *C. & N. W. Ry. Co.*, 38 Wis. 633; *Missouri Pac. Ry. Co.* v. *Bridges*, 12 S. W. Rep. 210; *Texas & Pac. Ry. Co.* v. *Neill*, 30 S. W. Rep. 369; *Webb* v. *Ry. Co.*, 57 Me. 117; *Smedis* v. *Brooklyn & C. Ry. Co.*, 8 Am. and Eng. R. R. Cases, 450. Regardless of statute it is the duty of those having charge of trains to give notice of their approach at all points of known or reasonably apprehended danger. *C. & A. Ry. Co.* v. *Dillon*, 15 N. E. Rep. 182; *Kelly* v. *So. Minn. Ry. Co.*, 9 N. W. Rep. 588; *Webb* v. *Portland & K. Ry. Co.*, 57 Me. 117; *Lillstrom* v. *N. P. Ry. Co.*, 20 L. R. A. 587; *Bertelson* v. *C. M. & St. P. Ry. Co.*, 5 Dak. 313; *Phila. & C. R. Co.* v. *Troutman*, 6 Am. and Eng. Ry. Cases, 117. It is negligence for the railroad company not to so moderate the speed of its trains that the sound of the whistle or bell can be heard in time to give effectual warning to persons upon the street. Elliott on R. & S. 607; *Con. & C.* v. *Stead*, 95 U. S. 161; *Louisville Ry. Co.* v. *Com.*, 14 Am. and Eng. Ry. Cases, 613; 4 Am and Eng. Enc. L. 933; *Phila. & C. Ry. Co.* v. *Hagen*, 86 Am. Dec. 541. Care should be commensurate with the danger to be reasonably apprehended, and this rule imposes on railroads the duty of exercising exceptional care at all crossings, because upon the crossing there is a greater reason than at other places to apprehend danger from collisions with persons and domestic animals. *Bishop* v. *Railway Co.*, 4 N. D. 540; *Houston & T. C. Ry. Co.* v. *Boozer*, 8 S. W. Rep. 119. The defendant by constructing and maintaining the crossing held out an inducement to the public to use it. *Hanks* v. *Boston & A. Ry. Co.*, 18 N. E. Rep. 218. The question of contributory negligence is a question for the jury and not for the court. *Kellogg* v. *N. Y. Cent. & H. R. R. Co.*, 79 N. Y. 76; *Hanks* v. *Ry. Co.*, 18 N. E. Rep. 218. It is only when the inference of negligence or contributory negligence is necessarily deducible from the evidence and the circumstances proven, that a court is justified in taking a case from the jury. *Hoye* v. *Ry. Co.*, 62 Wis. 666; 19 Am. and Eng. Ry. Cases, 247; *Craig* v. *Ry. Co.*, 118 Mass. 431; *Greany* v. *Ry. Co.*, 101 N. Y. 419; 24 Am. and Eng. Ry. Cases, 473; 5 N. E. Rep. 425. Failure to

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look and listen when an approaching train could not be seen is not contributory negligence. *Petty* v. *Hannibal & C. Ry. Co.*, 28 Am. and Eng. Ry. Cases, 618, 88 Mo. 306; *Hockford* v. *Ry. Co.*, 43 How. Pr. 222. It is for the jury to decide whether under the circumstances proven, plaintiffs failure to look and listen was such contributory negligence as to defeat his recovery. *C. I. Co.* v. *Stead*, 95 U. S. 161; *Hutchinson* v. *Ry. Co.* 32 Minn. 398; 21 N. W. Rep. 212; *Tyler* v. *Ry. Co.*, 137 Mass. 238; *Bower* v. *Ry. Co.*, 61 Wis. 457, 21 N. W. Rep. 536; *Funston* v. *Ry. Co.*, 61 Ia. 452, 16 N. W. Rep. 518; *Greany* v. *Ry. Co.*, 101 N. Y. 419, 5 N. E. Rep. 425; *Pearce* v. *Humphreys*, 34 Fed. Rep. 282.

M. D. Grover and *W. E. Dodge*, for respondent.

The trial court lost all power and jurisdiction over the subject matter of the controversy, and the controversy itself by the perfection of the appeal to the Supreme Court forty-two days prior to the alleged settlement and allowance of the statement of the case. Sections 5623, 5606, 5607, 5467, 5605, Rev. Codes; *Moore* v. *Booker*, 62 N. W. Rep. 607, 4 N. D. 543. When the appeal is perfected as provided by law the jurisdiction and control of the court below ceases, and no motion can be entertaind or discretionary act performed by the lower court during the pendency of the appeal. 1 Am. and Eng. Enc. L. 623; *Draper* v. *Davis*, 102 U. S. 370, 26 L. Ed. 121; *Keyser* v. *Farr*, 105 U. S. 265, 26 L. Ed. 1025; *Contes* v. *Wilkins*, 94 N. C. 174; *State* v. *Roland*, 36 La. Ann. 192; *Stone* v. *Spellman*, 16 Tex. 432; *Levi* v. *Carrick*, 15 Ia. 444. The plaintiff in his complaint did not claim the highway in question as a "street" under the statute but "another road." Section 3016, Comp. Laws; *Reynolds* v. *Great Northern Ry. Co.*, 69 Fed. Rep. 808. When a railway company is guilty of no act or omission other than such as is involved in the ordinary, usual, customary and legitimate operation and enjoyment of its property, and has violated no statutory requirement regulating or defining its duty, there is no actionable negligence. *Brown* v. *C. M. & St. P. Ry. Co.*, 22 Minn. 165; *Beisiegel* v. *N. Y. C. Ry. Co.*, 40 N. Y. 9;

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Bellefoutaine Ry. Co. v. *Hunter*, 33 Ind. 335; *Lock* v. *Ry. Co.*, 15 Minn. 350. One who approaches a dangerous crossing where one or more of his senses are rendered useless or impaired by existing conditions as an obstruction of the view, atmosphere conditions, storms, smoke, and the like, is bound as a matter of law for his own protection, not only to look and listen but to stop before going upon the railroad track to ascertain at his peril whether or not a train is approaching. *Houghton* v. *Ry. Co.*, 58 N. W. Rep. 314; *Ry. Co.* v. *Crisman*, 34 Pac. Rep. 286; *Schaefert* v. *Ry. Co.*, 17 N. W. Rep. 893; *Seefeld* v. *Ry. Co.*, 35 N. W. Rep. 278; *Kelsey* v. *Ry. Co.*, 30 S. W. Rep. 339; *Jobe* v. *Ry. Co.*, 15 So. Rep. 129; *Ellis* v. *Ry. Co.*, 21 At. Rep. 140; *Littour* v. *Ry. Co.*, 61 Fed. Rep. 591; *Shufelt* v. *Flint*, 55 N. W. Rep. 1013; *Durbin* v. *Or. Nav. Co.*, 17 Pac. Rep. 5; *Fleming* v. *Ry. Co.*, 49 Cal. 253; *Dunning* v. *Bond*, 38 Fed. Rep. 814; *Reading & C. Ry. Co.* v. *Ritchie*, 102 Pa. St. 425. The general statute conferring upon the city council control and supervision over the streets of the city, the regulation of the speed of trains and the safety of the general public at railroad crossings of said streets confers upon the city council the exclusive right to legislate upon and control the subjects enumerated. The terms "*Public Highway*" and "*Street*" are not the same technically or in legal parlance. The general statutes over the subjects enumerated are "*pro tanto*" repealed. Hence, neither the general statutes nor the common law obtain with relation to those subjects. And in the absence of any allegation or proof of a violation or disregard by the defendant of any municipal regulation on the subjects;—no actionable negligence is pleaded or proven or liability established. *State* v. *Lippincott*, 31 At. Rep. 399; *Town of Keyport* v. *Cherry*, 51 N. J. L. 417, 18 At. Rep. 299; *Cherry* v. *Board of Com'rs*, 20 At. Rep. 970; *State* v. *Jones*, 18 Tex. 874; *Cowan's Case*, 1 Overton, (Tenn.) 311; *Indianapolis* v. *Croas*, 7 Ind. 9; *Lafayette* v. *Jenners*, 10 Ind. 74; *Clark* v. *Com.*, 14 Bush. (Ky.) 166; *State* v. *Morristown*, 33 N. J. Law, 57; *People* v. *Ry. Co.*, 118 Ill. 520; Elliot on Roads and Streets, 329; *Mobile & Ohio Ry. Co.* v. *State*, 51 Miss. 137, 141; *Cleaves* v. *Jordan*, 34 Me. 9.

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Plaintiff having elected to class Ione avenue as a "public highway' and not as a "street" and all evidence tending to prove that it was a street having been seasonably objected to was properly disregarded. And had it been submitted to the jury the variance between proof and pleading would have been fatal to any verdict that might have been predicated thereon. *Hood* v. *Mfg. Co.*, 11 So. Rep. 10; *Harrold* v. *Jones*, 11 So. Rep. 747; *Ry. Co.* v. *George*, 10 So. Rep. 145; *Ry. Co.* v. *Hubbard*, 12 S. E. Rep. 1020; *Ry. Co.* v. *Mattox*, 13 So. Rep. 615; *Ry. Co.* v. *Thompkin*, 10 S. E. Rep. 356; *Derrigan* v. *Rutland*, 58 Vt. 128; *Ry. Co.* v. *Scott*, 27 S. W. Rep. 827; *Debolt* v. *Ry. Co.*, 27 S. W. Rep. 575; Shipman's Pleading, 417 and 423.

Corliss, J. From a judgment in favor of the defendant, based upon a verdict directed by the court after the plaintiff had rested, the appeal was taken which brings this case before us. The action was for damages for personal injuries received by plaintiff by being struck by one of defendant's locomotives which was drawing a passenger train on defendant's road. The accident occurred at a public crossing in the City of Grand Forks, in this state. Plaintiff was driving a team upon one of the streets of that city, and as he was attempting to cross the railroad track at the point where such street was carried over the track a moving train collided with him, causing injuries which necessitated the amputation of one of his legs. The case developed by him on the trial was sufficient to sustain a verdict in his favor. It appeared that the defendant had recognized the crossing in question as the crossing of a public highway over its track. The street leading up to the defendant's right of way on each side thereof was known as "Ione Avenue." When originally laid out, it did not cross such right of way, but merely abutted thereon on either side. The reason for this was that the person who platted the land on which this avenue was laid out had no control over the defendant's right of way, which already had been established at that point. This plat was made in 1882. But there was evidence in the case tending to prove that Ione avenue had been graded over the

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defendant's right of way the same as elsewhere, and that it had been used as a public thoroughfare for eight or ten years. It appeared that the street commissioner of Grand Forks City in 1890 and 1891 had done work on that portion of the street on defendants right of way leading up to the crossing, and that defendant had not interferred with such work, or in any manner objected to its being performed by the municipality in the exercise of its control over the public streets of the city. There was also testimony that men had been seen working on the crossing itself, and the inference that these men were in the employ of the defendant is fully justified by the evidence of the section foreman of that section of the road. He testified as follows: "Am about 30 years of age. Lived in Grand Forks 15 years. Have been in the employ of Great Northern Railway as section foreman. Know where Ione avenue, in City of Grand Forks, crosses tracks of the Great Northern Railway Company. That portion of the track was in my section as section foreman. As such foreman, and while in the employ of the Great Northern Railway Company, under direction of superior officers, I have repaired the railroad crossing at Ione avenue by putting in planks where they were worn out or broken, so as to make it passable for teams. The last time I repaired it was about four years ago. I worked on the road which I supposed was the Great Northern. That is the extent of my knowledge." It seems to be undisputed that for about three years there had been at this crossing a sign announcing that the place was a railroad crossing. There is no direct evidence that the defendant erected the sign board, but under the facts of the case the jury would have been justified in finding that this was the fact. It is evident from this brief review of the case proven by the plaintiff that the jury would have been warranted in reaching the conclusion that the defendant had invited the public to use this crossing the same as the crossing of a legally established highway over its track. To the traveler upon the highway the street at this point presented all the appearances of a lawfully established highway, and all these

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appearances the jury would have been justified in finding that the defendant was responsible for. They might have found from the evidence that it had erected the usual sign board warning the public that there was a railroad crossing at that place; that it had put in and had kept in repair the necessary planking to enable vehicles to pass over the track, and that it had permitted the public to use for several years this crossing as though it was the crossing of a legally laid out highway over its right of way. Under these circumstances it owed to the plaintiff, at the time he was struck by its engine, the same duty of using ordinary care to protect him it would have owed him had the highway been legally established over its right of way at this point. *Kelly* v. *Railway Co.*, (Minn.) 9 N. W. 588; *Lillstrom* v. *Railway Co.*, 53 Minn. 464, 55 N. W. 624; *Railroad Co.* v. *Metcalf*, (Neb.) 63 N. W. 51; *Cranston* v. *Railroad Co.*, (Sup. Ct.) 11 N. Y. Supp. 215, ffirmed in 26 N. E. 756, by the court of appeals; *Railroad Co.* v. *Lee*, (Tex. Sup.) 7 S. W. 857; *Barry* v. *Railroad Co.*, 92 N. Y. 289; *Sweeny* v. *Railroad Co.*, 10 Allen, 368; *Taylor* v. *Canal Co.*, 113 Pa. St. 162-175, 8 Atl. 43; *Byrne* v. *Railroad Co.*, 104 N. Y. 362, 10 N. E. 539; 2 Shear. and R. Neg. § 464; 1 Thomp. Neg. 416; *Webb* v. *Railroad Co.*, 57 Me. 117. See, also, *Bishop* v. *Railway Co.*, 4 N. D. 540, 62 N. W. 605. We do not care to go so far in this case as to hold that the statute relating to the ringing of the bell or the blowing of the whistle at a railroad crossing applies to the case of a crossing where there is no legally established highway, but only a highway in fact. However, there is strong authority to support this view. See *Railway Co.* v. *Dillon*, (Ill. Sup.) 15 N. E. 182; *Id.*, 24 Ill. App. 203; *Railway Co.* v. *Metcalf*, (Neb.) 63 N. W. 51; *Railway Co.* v. *Lee*, (Tex. Sup.) 7 S. W. 857. But see *Reynolds* v. *Railway Co.*, 69 Fed. 808, 16 C. C. A. 435. All we are required to decide in this case is that the facts established by the plaintiff were sufficient to carry the case to the jury and sustain a finding by them that the defendant had failed to discharge to the plaintiff the common law duty of exercising ordinary care which it owed him when he attempted to use this crossing which

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the defendant had invited the public generally to use. Having created the appearance that the crossing in question was a portion of Ione avenue, that such avenue passed entirely over its right of way, and having suffered the public for several years to act upon such appearance, it would be a monstrous doctrine that it could claim that it owed the plaintiff no common law duty while he was using this very crossing it had assured him he could use as a public highway crossing. No authority can be found to sustain such a rule of law. Indeed, it is not contended here by the defendant that the plaintiff did not make out a sufficient case of negligence against the defendant to warrant a verdict in favor of the plaintiff. But it is urged that plaintiff did not establish the cause of action set up in his complaint. The question before us is a question of variance. One cause of action, it is contended, was relied on in the pleading, and an entirely different one was proved on the trial, and this, too, against objection on the specific ground that the evidence was not within the issues. The case before us does not present those features which, when they exist, make it the duty, even of the appellate court, to amend a pleading to conform to the proof. The evidence to which we have referred was objected to on the ground that it did not tend to prove the case set forth in the complaint. The learned trial judge intimated to the plaintiff at the very commencement of the trial that he thought that plaintiff was upon dangerous ground, and that he would regard it safer for plaintiff to amend, and he offered to allow the necessary amendment to be made. But the plaintiff elected to stand upon the complaint as originally framed. It is thus apparent that the learned trial judge acted with the utmost fairness, and if we should be compelled, under the law, to affirm the judgment, the plaintiff's counsel would have only their own temerity to blame for the result.

In determining whether there was a variance between the averments of the complaint and the evidence adduced on the trial it is necessary to refer now to the allegations of that pleading. The portions of it material to this question are as follows: "That

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on the 19th day of November, 1894, within the limits of the City of Grand Forks, at a point where the defendant's railroad crosses Ione avenue, said avenue being a public highway, and in constant use as such, this plaintiff was lawfully attempting to drive his team of horses and wagon across the track of said railroad, when defendant's agents and servants carelessly and negligently ran a locomotive engine and train of cars upon said wagon, thereby injuring plaintiff, who was seated on said wagon, by violently throwing him out and against the cowcatcher attached to said locomotive and upon the ground with such force as to break, bruise, and mangle his left leg, from the effects of which injury, and as a result thereof, it was thereafter necessary to have said leg amputated, which was done in the month of March, 1895." "(3) That by reason of the facts aforesaid plaintiff has suffered great pain, and is permanently injured, maimed, and crippled for life; that he was confined to his bed by reason thereof continuously from the date of such accident until on or about the 18th day of April, 1895, and was compelled to and did expend by reason thereof the sum of two hundred dollars ($200) for medical attendance. (4) That said train was running at a dangerous, reckless, negligent, and unusual rate of speed at the time it struck said wagon, to-wit, at the rate of thirty miles an hour; and when approaching the said crossing defendant's servants and employes in charge negligently failed to give any signal or alarm by ringing the bell or blowing the whistle or otherwise, and never attempted to check or stop said train; that said injuries were caused by the careless and negligent acts of the defendant, as above stated, and without negligence on the part of this plaintiff. (5) That by reason of said injuries plaintiff has suffered damages in the sum of twenty thousand two hundred dollars ($20,200.00.") It is apparent that the pleading is not framed with reference to the statute requiring the ringing of the bell or the blowing of the whistle at crossings. The statute is not referred to. There is no averment touching the statutory duty of railroads in such cases. The whole tenor of the complaint is against the idea that the

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plaintiff was proceeding on the narrow theory of liability from violation of a statutory provision. The plaintiff was seeking to recover damages for negligence, and we would naturally expect him to so draw his complaint as to embrace the widest possible theory on which defendant could be held responsible. We cannot infer that he deliberately intended to waive his right to insist upon the discharge by defendant of its common law duty to him to use ordinary care to protect him against injury at the crossing it had invited him and others to use. On the contrary, the complaint shows that he intended to hold defendant strictly to this common law duty it owed him. The allegations of the complaint are not limited to the fact of the failure to ring the bell or blow the whistle. The pleading distinctly sets forth that the defendant failed to give any signal or alarm by ringing the bell or blowing the whistle or otherwise; and it contains the further averment that the train was being run at a negligent, dangerous, unusual, and reckless rate of speed. As we construe the pleading, it sets forth the common law duty of the defendant to exercise ordinary care at a public crossing, and its negligent discharge of such duty. At the trial such a cause of action was made out. There was, therefore, no variance between the pleading and the proof. In *Railway Co.* v. *Dillon*, (Ill. Sup.) 15 N. E. 182, the same question was involved. The court said: "It is finally urged, with great persistence, that the avenue in question is not, within the meaning of our statute, a public highway, and that, as the action is based exclusively on the statute, the failure to ring a bell or sound the whistle was violative of no duty which it imposes, and hence no cause of action is shown. We do not concur in this view. It is to be observed, in the first place, this is not a statutory action to recover the penalty which the statute prescribes for a failure to give such a signal. If it were, quite a different question would be presented. The present is a common law action, brought for the failure to perform a duty imposed by law. Under the facts disclosed by the record, we do not think it essential to the main-

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tenance of the action that this duty should necessarily arise under the statute, notwithstanding the pleader possibly may have so regarded it in framing the declaration. Without regard to the statute, it is the duty of those having charge of trains to give notice of their approach at all points of known or reasonably apprehended danger. This is almost universally done by the ringing of a bell or sounding of the whistle, and frequently both. In exceptional cases, where the highest degree of care is deemed advisable, flagging is resorted to. That these duties are enjoined by the common law is not disputed, but the claim is, as already seen, that the action is brought upon the statute, and that the plaintiff, therefore cannot avail himself of his common law rights, although the averments in the declaration are otherwise broad enough for such purpose. This, as we view it, is an entire misapprehension of the whole matter. As before indicated, the action is not brought on the statute, nor does it purport to be. While there are certain expressions in that part of the declaration which attempts to define the duty of the defendant, justifying the inference that the pleader had the statute in his mind, yet there is really nothing in it that can properly be called even a reference to the statute. Even the expressions referred to as showing the drift of the pleader's thoughts are entirely superfluous and uncalled for, and may, therefore, be treated as surplusage. As mere matter of composition, tending to perspicuity, such averments are admissable, and even commendable, if not misleading. * * * Even if the declaration in this case contained a direct reference to the statute, and it was evident that the pleader expected to rely exclusively upon it, still it would not, in our opinion, present an insuperable obstacle to a recovery on common-law grounds, if the allegations otherwise were sufficiently broad, and the evidence warranted it. In a note to Oliv. Prec. 528, where this subject is under discussion, we find the following: 'So, also, where the action is sustainable at common law, and declaration concludes against the statute or statutes,' etc., and the statutes have been misquoted or incorrectly referred to, or there is no statute in fact

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in relation to the subject, those words in the declaration shall be rejected as surplusage, and the action shall be maintained at common law. See Galt. 212; Com. Dig. 'Action upon Statute,' (C.) The general principle here announced fully answers the contention of appellant."

The complaint pointed out the precise location of the accident, and in this respect the evidence conformed to the allegation. It is only because the plaintiff employed in his complaint the words "public highway" that it is here urged that there is a fatal variance. It is said that a strictly legal public highway was not established, but that, on the contrary, it was conclusively shown that there was in that sense of the phrase no public highway where plaintiff was injured. But it was not necessary to show a strictly legal highway to make out a case within the complaint. Plaintiff's right to recover damages did not depend upon there being a legally established highway at that point. All that it was necessary for him to prove was the fact that with respect to its duty to him the defendant owed him the same measure of care at this point that it would owe him at a legally laid out public highway; that with regard to its duty to him the crossing was in all respects the same as the crossing of a lawful public highway. The plaintiff in fact proved as to the defendant that there was a public highway at this point. It was in all respects a public highway for the purposes of fixing the extent of defendant's duty to plaintiff at this crossing. Whether it was a highway in any other sense or for any other purpose was immaterial. This is not an action brought for the purpose of determining whether there is a legal highway at the place where plaintiff was injured. All he is required to prove in this case is that there was in fact a highway at this place as to plaintiff and the public. The defendant could not possibly have been misled. The exact locality was pointed out in the complaint. Defendant was notified by that pleading that the plaintiff would claim on the trial that the crossing was, as to defendant, a public highway for the purposes of determining the scope of defendant's obligation with

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respect to the precautions to be used to protect him from injury at this place. Whether it was a public highway for any other purposes it was unnecessary to prove, for such proof would not have increased one particle the obligation of the defendant to protect plaintiff from harm at this point. It is unjustifiable to place upon the words "public highway" such a meaning as will indicate a purpose on the part of the pleader to restrict himself in the proof of his cause of action. Where a railroad company has invited the public to use a crossing as part of a public highway, such crossing is, as to it, in all respects the same as a strictly legal public highway. In the language of some of the decisions the company is estopped from asserting the contrary. See *Railway Co.* v. *Lee*, (Tex. Sup.) 7 S. W. 857. When, therefore, the pleader refers to the crossing as a public highway crossing, the allegation is that, with respect to the defendant's duty to the public generally and to the plaintiff in particular, it was a public highway, and not merely that it was in all strictness a legal public highway. When these words are employed in a complaint, they must be interpreted in the light of the rule that the railroad company is liable if there is in fact a public highway at the point, just the same as though the highway had been legally laid out. Language in a pleading must have a reasonable construction. It is certainly a reasonable construction to attribute to the plaintiff, by the use of such words, a purpose to set forth the broadest claim he can make against the defendant, when the courts themselves employ such words to designate a highway which, while not legally laid out, a railroad company, by its conduct or acquiescence, has made in all respects a legal public highway for the purpose of measuring the extent of its obligations to the public. Nor will any injustice result to railroad companies under the rule of construction we here enunciate. If the precise locality is pointed out in the complaint, the defendant will never be surprised by evidence proving not a strictly legal highway, but only a highway as to the defendant with respect to his duty to the plaintiff. The exact place being designated, the

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defendant can always ascertain the facts, and be prepared to meet, so far as they can be met, all theories on which can be predicated the claim that with respect to its duty to the plaintiff the crossing was in the eye of the law a public highway. *Webb* v. *Railroad Co.*, 57 Me. 117. In that case the complaint alleged that the plaintiff was injured while passing along "a public street and highway." The question of variance was before the court. On this point the court said: "And, even if the evidence fell short of establishing a highway *de jure*, we think that upon the issue presented by these pleadings, and upon the state of facts exhibited by this report, a variance in this particular would be an immaterial one, not affecting the rights of the parties or the rules of law or evidence applicable in the trial of the cause, or the inferences to be drawn from the testimony, in any manner. Here was an avenue through which poured the whole tide of travel into and out of the city in that direction, affording the most direct route to the defendant's freight depot and grounds; used and recognized by all and sundry as a highway for years before the defendants began to run over the track of the P. S. & P. Railroad, located there." The court further remarked: "That it was not for the defendants to say in this action that there was no highway there if there was a crossing which they and all others interested permitted the public to use as such, and which was, in fact, in great and constant use. Under such circumstances the plaintiff would be there with the rights of a traveler on a highway, and, as regarded him and all others traveling there, the defendants would be subject to the same duties and liabilities as if the street had been a highway *de jure* as well as *de facto.* As regards the issue which these parties were litigating then, a variance of this description, were its existence demonstrated, would be immaterial. The defendants, upon this point, rely upon the case of *Shaw* v. *Corporation*, 8 Gray, 45. We do not question the correctness of that decision as to the materiality of the variance in that case. The variance between the declaration and the proof as to the place of the accident, changing it from the highway to a point

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without the limits of the highway, on the defendants' grounds, would necessarily change the whole course of inquiry, and affect all the inferences to be drawn as to the suitableness of the horse, the degree of skill and care in driving exercised by the plaintiff, and other matters vital to the plaintiff's suit. The reasons assigned for holding the variance to be in that case radical and essential, do not exist here. It mattered not (if the plaintiff was at the place of the accident with the rights of a traveler on a highway, and the defendants were there, subject to the duties and liabilities of a railroad crossing a highway at grade, as was assuredly the case upon the testimony adduced here) whether there was or was not error in the proceedings of the county commissioners a dozen or fifteen years before. When all parties were proceeding upon the hypothesis that there was no error, it would not change the relations of the parties in this suit to each other should it be found that all were mistaken in that particular." In *Kelly* v. *Railroad Co.*, (Minn.) 9 N. W. 588, the allegation was that plaintiff was injured where the defendant's road intersected a highway. This word "highway" is the equivalent of the words "public highway." A highway is not a highway unless it is public. The court held that under such a pleading evidence was competent which proved that defendant had recognized the crossing as a highway, and had permitted the public to treat it as such for years. The court said: "Defendant also took exception to the ruling of the court admitting evidence tending to show that the *locus in quo* had been opened, worked, and traveled continuously for ten years as a highway. This was competent evidence tending to prove the existence of a highway by common-law dedication. But the evidence was admissible upon still another ground. Even if this was not a legal highway, yet if it was openly and notoriously used as such by the public, and the defendant recognized it as such by permitting the public to use it, and by assuming to maintain a crossing at that point, they would be bound to exercise

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precisely the same precautions to keep it in repair, as if it was in fact a legal highway. *Webb* v. *Railroad Co.*, 57 Me. 117."

The chief contention made by counsel for defendant both here and in the court below was that plaintiff had alleged a public highway, which would, so far as statutory provisions were concerned, be governed by the general statutes requiring the ringing of the bell or the blowing of the whistle; but that he had proved a street within a city having control over the general subject of the regulation of the speed of trains and the giving of crossing signals within the city limits, and that, because such control had been delegated by the legislature to the governing body of such city, the general statutes were repealed as to all streets within such city, leaving the matter to such regulations as should be prescribed by the city council. The view we take of this case renders it unnecessary for us to express any opinion on this very interesting question. Whatever regulations have been established by the legislature or by the city council of Grand Forks, and whether those found in the general statutes or those embodied in city ordinances are the regulations which apply to the street in question, it nevertheless is true as a proposition of law that the common law duty of the defendant to the plaintiff was not thereby diminished in the slightest particular. It is not competent for the legislature, much less for a city council, to declare what shall constitute ordinary care in every case, irrespective of the peculiar circumstances of each case. Nor has the legislature attempted to do so, or to authorize the city council of Grand Forks City to do so. It has fixed a minimum duty by statute. Under the authorities, failure to discharge this statutory duty is evidence of negligence. Indeed, many of the cases hold that, if the statutory duty is not performed, negligence is conclusively made out. The legislature has also authorized municipal corporations to pass ordinances regulating the duties of railroads to the public within city limits. But back of all these regulations lies the question whether in each case proper care was exercised by the railroad company under the facts of the particular case. This

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is a judicial question. It is a question to be settled in each case in the same manner in which it would be settled were there no statutory or other regulations whatever on the subjects, with the single qualification that failure to comply with the provisions of statute or ordinance on this subject (whatever may be applicable) would be evidence of negligence,—perhaps conclusive evidence. That statutory or other regulations do not diminish the common law duty is well settled. *Railway Co.* v. *Netolicky*, 67 Fed. 665, 14 C. C. A. 615; *Railway Co.* v. *Ives*, 144 U. S. 408-420, 12 Sup. Ct. 679; *Shaber* v. *Railway Co.*, (Minn.) 9 N. W. 575; *Thompson* v. *Railroad Co.*, 110 N. Y. 630, 17 N. E. 690; *Vandewater* v. *Railroad Co.*, (N. Y. Ct. App.) 32 N. E. 636; *Railroad Co.* v. *Hague*, (Kan. Sup.) 38 Pac. 257; *Railroad Co.* v. *Perkins*, 125 Ill. 127, 17 N. E. 1; *Winstanley* v. *Railway Co.*, 72 Wis. 375, 39 Pac. 856; *Guggenheim* v. *Railway Co.*, 66 Mich. 150, 33 N. W. 161. These cases all hold that regulations by ordinance or statute of the speed of trains and of the giving of signals at crossings have no effect to exempt railroads from the employment of other means to protect persons and property at crossings when the exercise of due care requires the employment of other means. We might, for the purposes of this case, assume that all the statutory provisions on the subject of ringing the bell and blowing the whistle on approaching crossings were abrogated as to all streets within the city by the grant of power to the city council of Grand Forks City to legislate on the subject; and we might further assume that the council had failed to exercise this power, and yet it would be just as true that the common law obligation resting on the defendant to use due care to protect persons and property at this crossing would be in force the same as though the general statutory provisions were applicable to this particular crossing. So far as the common law duty is concerned, it is immaterial what regulations govern. Nor is it at all important whether there are any regulations whatever on the subject.

We have investigated the defendant's contention that plaintiff's contributory negligence was established as a matter of law by the

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evidence he adduced. We are unable to reach this conclusion. That question was, under the evidence, a question of fact for the jury. It would be a needless expansion of this opinion to set forth here the evidence bearing on this point.

A question of practice remains for consideration. Before the argument of this case on the merits, the defendant's counsel moved to strike out the bill of exceptions on the ground that it was settled by the District Judge after the appeal had been perfected. Notwithstanding the very ingenious argument of defendant's counsel, we are clearly of opinion that the court had power to settle the bill, although the appeal had been perfected. The act of settling a bill is not the taking of a new step in the case. It is merely the gathering up and bringing upon the record of facts which would not otherwise appear upon the record. The settlement of a bill is in furtherance of the intelligent exercise by this court of its powers of review. Without such a bill the case could not be reviewed on its merits. By settling a bill, the trial judge does not assume to perform any new judicial act in the case which can in any manner affect the decision appealed from, or to alter in any manner the condition in which the case stood at the time the appeal was taken. He merely embodies in authentic form a record of the proceedings already had, and on which his previous judicial action was predicated, to the end that the appellate court may determine whether such previous judicial action was legal or erroneous. All the adjudications seem to support our view that the trial court had full authority to settle the bill after the appeal had been perfected. *James* v. *Leport*, 19 Nev. 174, 8 Pac. 47; *Flynn* v. *Cottle*, 47 Cal. 527; *National City Bank of New York* v. *New York Gold Exch. Bank*, 97 N. Y. 645; *Colbert* v. *Rankin*, 72 Cal. 197, 13 Pac. 491; *Luyster* v. *Sniffen*, 3 How. Prac. 250; *State* v. *Town Board of Sup'rs of Delafield*, 69 Wis. 264, 34 N. W. 123; *Hunnicutt* v. *Peyton*, 102 U. S. 333. In the case of *Moore* v. *Booker*, 4 N. D. 543, 62 N. W. 607, we practically recognize this power as existing in the District Courts, but we there held that, where the original record has been transmitted to

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this court, the trial judge cannot amend a bill of exceptions without having the record sent back to him, that he may have before him the bill he desires to amend. In that case, the application was not to settle a bill before argument in this court, but to amend a bill already settled, and this, too, at a time subsequent to the argument of the case on the merits. The case did not disclose the fact that the party applying for the amendment might not, by the exercise of reasonable diligence, have ascertained the error in the bill at the time it was originally settled, or at least before final argument in this court. After a case has been submitted to this court on the merits, and the work of investigation has commenced, parties will not be allowed the privilege of amending the record except on condition of making a very satisfactory showing, and that showing must be made in this court, and this court will in all such cases determine whether, under the circumstances, the record should be sent back for correction. Such belated applications result in delay to the adverse party, whose rights and interests are not to be ignored in passing on the question whether he shall be subjected to the delay and expense consequent upon the remanding of the record for amendment; such remanding of the record for amendment usually necessitating a continuance of the case to the next term, and a new argument at that term upon, perhaps, an entirely different record. We think the trial judge had full power to settle the bill notwithstanding the fact that the appeal had been perfected, the original record in the case still being in the District Court. But for the error already alluded to, the judgment is reversed, and a new trial is ordered. All concur.

(67 N. W. Rep. 1046.)

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ALEXANDER FINLAYSON *vs.* PETER C. PETERSON.

Opinion filed June 10th, 1896.

Foreclosure of Mortgage—Notice.

Under a statute requiring publication of notice of sale on foreclosure of mortgage by advertisement to be made "for six successive weeks at least once in each week," the first publication must be made at least 42 days before the day of sale, or the foreclosure proceedings will be void.

Curative Act—Retroactive Effect.

It is not in the power of the legislature to cure by retroactive legislation the defect in foreclosure proceedings arising from the failure to publish the notice of sale for the full period of 42 days, and thus validate the void proceedings.

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

Action by Alexander Finlayson against Peter C. Peterson. Judgment for defendant, and plaintiff appeals.

Reversed.

Bangs & Fisk, and *W. H. Standish*, for appellant.

J. H. Bosard, for respondent.

CORLISS, J. The ultimate problem to be solved in this case is the legality of certain foreclosure proceedings. The plaintiff is conceded to be the owner in fee simple of the premises in question, if such proceedings are void. On the other hand, it is also agreed that her title has been destroyed, and is fully vested in the defendant, if those proceedings are valid. The only point urged against their legality is that the first notice of sale was not published at least 42 days before the day of sale. There were six different publications, and they were all exactly a week apart. But the day of sale was less than a week after the last publication. The question before us, then, is whether the statute, as it stood at the time of this foreclosure, required that full six weeks should intervene between the day of first publication and the day fixed for sale. The language of the statute is that the notice must be given "by publishing the same for six successive weeks at least once in each week." The word "for," in this statute, means

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"throughout," or "during the continuance of." 3 Cent. Dict. p. 2314, definition 15 of word "for." It is obvious that a notice of sale has not been published during the continuance of a week, when the day of sale follows the day of publication at an interval of less than a week. Five weeks added to this fragment of a week will not constitute six weeks, unless a part of a week—the added fragment—is equal to a whole week. We agree with counsel for plaintiff that the statute contains two elements. The first requires a publication "for," or "during the continuance of," six weeks, and nothing short of a publication for forty-two days will satisfy this branch of the act. The other requires at least six publications, and that one of them shall be in each of the six weeks between the first publication and the day of sale. If the statute had declared that the notice should be published once a in each of six successive weeks, its meaning would have been different. But it does not so declare. Its explicit provision is that the notice shall be published for six successive weeks. We find our construction in harmony with the views of many courts, although some of the cases cited may perhaps be regarded as not directly in point, owing to a difference in the language of some of the statutes interpreted. *Bacon* v. *Kennedy*, (Mich.) 22 N. W. 824; *Wilson* v. *Insurance Co.*, 12 C. C. A. 505; 65 Fed. 38; *Boyd* v. *McFarlin*, 58 Ga. 208; *Pratt* v. *Tinkcom*, 21 Minn. 142; *Ogden* v. *Walker*, 59 Ind. 460; *Bunce* v. *Reed*, 16 Barb. 347, 350, 351; *Brod* v. *Heymann*, 3 Abb. Prac. (N. S.) 396; *Richardson* v. *Bates*, 23 How. Prac. 516; *Parsons* v. *Lanning*, 27 N. J. Eq. 70; *Early* v. *Doe*, 16 How. 610; *In re North Whitehall Tp.*, 47 Pa. St. 156; *Security Co.*, v. *Arbuckle*, (Ind. Sup.) 24 N. E. 329; *Smith* v. *Rowles*, 85 Ind. 265; *Market Nat. Bank* v. *Pacific Nat. Bank*, 89 N. Y. 398. See, also, *Olcott* v. *Robinson*, 20 Barb. 148, and dissenting opinion in *Olcott* v. *Robinson*, 21 N. Y. 150. The following cases are more or less in defendant's favor. *Olcott* v. *Robinson*, 21 N. Y. 150; *Wood* v. *Morehouse*, 45 N. Y. 368; *Sheldon* v. *Wright*, 7 Barb. 39; *De Peyster* v. *Michael*, 6 N. Y. 467; *Chamberlain* v. *Dempsey*, 13 Abb. Prac. 421; *Pearson* v. *Bradley*, 48 Ill. 250; *State* v. *Yellow*

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Jacket Silver Min. Co., 5 Nev. 415; *Dexter* v. *Shepard*, 117 Mass. 480.

But it is urged that an act passed March 8, 1889 (chapter 38, Laws 1889,) is decisive against the plaintiff. That act declares: "Whenever in any act or statute of the Territory of Dakota providing for the publishing of notices, the phrase successive weeks is used, the term weeks shall be construed to mean calendar weeks, and the publication upon any day in such weeks shall be sufficient publication for that week, provided, that at least five days shall intervene between such publications, and all publications heretofore or hereafter, made in accordance with the provisions of this act, shall be deemed legal and valid." There is nothing in this statute which in terms relates to the time that must elapse between the first publication and the day of sale. It might be urged with much force that that act was passed to settle a somewhat mooted question,—whether each successive publication must be made on the same day of the week,—and that for this purpose, and for this purpose only, it declares that a week means a calendar week. There has been a division of judicial opinion whether the notice should be published on the same day in each week, although the weight of authority is against the necessity of publishing the notice on the same day in each week. *Ronkendorf* v. *Taylor's Lessee*, 4 Pet. 349; *Wood* v. *Knapp*, (N. Y.) 2 N. E. 632; *Bachelor* v. *Bachelor*, 1 Mass. 256; *Raum* v. *Leach*, (Minn.) 54 N. W. 1058; *Loan Soc.* v. *Thompson*, 32 Cal. 347; *Steinle* v. *Bell*, 12 Abb. Prac. (N. S.) 171. Under these decisions, it perhaps would not be necessary to publish the notice in every calendar week, provided there was one insertion in each week commencing to calculate from the day of the first publication. If a notice should be published on Friday, the first week would not expire until the next Thursday, and the new week would not begin until the next Friday. Hence a second publication on the Wednesday of the week after might be in time. And yet in such a case there would be a gap of an entire calendar week during which no publication would be made. Now, this

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statute prevents this. While it recognizes the soundness of the rule supported by the great majority of the cases, that the publication need not be made on the same day in each week, it yet limits that rule by declaring that, for the purpose of a publication once a week in each week, the word "week" means a calendar week. The result is that in cases governed by this act there must be one publication in each calendar week, no matter on what day the previous publication was made. There is also a further limitation that at least five days must intervene between every two publications. There is much force, however, in the argument that it was the purpose of the legislature to declare by this act that a publication on the last day of a calendar week should relate back to the beginning of that week, and be a publication for that week, as effectually as though the notice had been published on the first day thereof, instead of on the last. But, even assuming this to be the meaning of the statute, the defendant cannot avail himself of its provisions. It was passed four years after the foreclosure proceedings in question were consummated. If it be regarded as a legislative interpretation of the existing law, it can have no conclusive force. Construction of statutes is a judicial, and not a legislative, function. In cases of doubt a legislative construction is given some weight. But no court can allow the lawmaking power to alter by legislative enactment the meaning of a statute so as to affect vested rights. In 1885; when these foreclosure proceedings were had, the meaning of the statute under which the mortgagee foreclosed his mortgage was plain, and, as that statute required that the first publication should be made 42 days before the day fixed for sale, no subsequent law could affect the rights of the mortgagor to treat the foreclosure as void. The legislature cannot, by the device of construing a statute, alter its meaning so as to affect vested rights. But this statute is more than a mere declaration of the meaning of a prior law. It, it terms, provides that if publication has in the past been made in accordance with statute, as so interpreted, it shall be valid. In other words, the legislature has passed a curative law, and the question

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is whether it is valid as such. We think not. While fully recognizing the power of the legislature to cure defects which it is unjust for one to take advantage of, we do not believe that this case falls within the rule. There is no injustice in the mortgagor insisting that the full statutory notice be given. The law threw about him the protection of full 42 days' notice, and to have insisted on it at any time before the enactment of this new act would have involved no injustice to the purchaser. The latter would have been subrogated to the rights of the mortgagee, and the mortgagor, despite his successful assault upon the sale, must have paid the mortgage debt. The mortgage would still have been a lien on the property. So far as the sale might have resulted in a surplus, so that subrogation of the purchaser to the rights of the mortgagee would not afford him full protection, the mortgagor would be obliged to refund to the purchaser such surplus, as a condition of annulling the sale. The case is not like the case of a defective deed or a defective acknowledgment, the purchaser having paid full value for the property. Nor is it analogous to the case of a contract which a party ought in conscience to perform, although holding in his grasp against it some technical defense, as that she was a married woman, or that the agreement was not in writing. In these cases the court answers the argument that the legislature cannot disturb vested rights by the conclusive reply that no one has a vested right to be unjust, or to do a moral wrong. Mr. Cooley states this as the foundation of the doctrine that defects may be cured by retroactive legislation. He says: "As the point is put by Chief Justice Parker, of Massachusetts, a party cannot have a vested right to do wrong; or, as stated by the Supreme Court of New Jersey: 'Laws curing defects which would otherwise operate to frustrate what must be proved to be the desire of the party affected cannot be considered as taking away a vested right. Courts do not regard rights as vested, contrary to the justice and equity of the case.'" Const. Lim. p. 378, marginal paging, and 460, top paging, of second edition. We have carefully examined the whole law on this subject of

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curative legislation, and we have been unable to find an adjudication which has taken a position so extreme as we would be compelled to take, should we allow this statute to have a retroactive effect, and thus validate an absolutely void sale; it not being abhorrent to natural justice for the owner of the property, under the circumstances of this case, to insist upon his strict legal rights. We do not lay so much stress on the fact that the foreclosure sale was absolutely void, for we think that even when a proceeding of any kind is void, with the exception of a judicial proceeding void for want of jurisdiction, it is nevertheless within the power of the legislature to validate such proceeding by retroactive legislation, if it would be grossly unjust for the person against whom the healing law is directed to insist upon his purely technical rights, destitute of all equity. But the case should be a clear one. Nothing short of this should prompt a court to sustain such a law. All jurists agree that this power, while highly beneficial when kept within proper limits, is liable to great abuse; and, while some of the cases have given it very wide scope, yet the unmistakable trend both of recent judicial decisions and of recent constitutional changes is in the direction of strictly limiting this power.

We have assumed so far, in the course of this opinion, that the failure to comply with the statute requiring publication for six full weeks rendered void the sale. On this point there has been no contention between counsel, and both authority and principle speak only one voice on this branch of the case. The foreclosure was void. *Pratt* v. *Tinkcom*, 21 Minn. 142; *Parsons* v. *Lanning*, 27 N. J. Eq. 70; Wade, Notice, § 1105; *Bacon* v. *Kennedy*, (Mich.) 22 N. W. 824.

Whether the plaintiff can maintain ejectment against the defendant, or must resort to an action to redeem the property, on the theory that the defendant is a mortgagee in possession, we are not called upon to decide on this appeal. The questions before us arise upon demurrer to the complaint. The facts set forth in the complaint entitle the plaintiff to some kind of relief,

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and the general prayer for such relief as may be just and equitable will warrant the court in granting plaintiff, such relief as the facts upon the trial will show he is entitled to. The complaint seems, however, to be framed on the theory the plaintiff has a right to maintain ejectment; and if the fact is, as set forth in that pleading that defendant forcibly ejected plaintiff from the land, it may be that ejectment will lie. On that point we express no opinion. The order and judgment of the District Court are reversed, and that court will enter an order overruling the demurrer to the complaint on such terms as that court may prescribe. All concur.

(67 N. W. Rep. 953.)

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STATE *ex rel* JOHN LITTLE, *et al vs.* H. A. LANGLIE, *et al.*

Opinion filed June 10th, 1896.

Mandamus—County Seat Controversy.

Where there is no other adequate and speedy remedy to test the validity of an election held to relocate a county seat, *mandamus* to compel the county officers to hold their offices at the legal county seat is the proper remedy to determine whether the county seat has been legally changed.

Concurrent Remedy.

The statutory remedy by contest in the courts provided for by sections 1494, 1498, both inclusive, Comp. Laws, while an adequate and speedy remedy, and for that reason a remedy that would have precluded a resort to *mandamus* after the statute creating the remedy by contest was passed, had the remedy by *mandamus* not been perpetuated by statute, yet the remedy by *mandamus* was in fact perpetuated by section 1499, Comp. Laws.

Notice of Election for Relocation—Validity.

The statute relating to elections for relocation of county seats provided that, if an election was ordered, it should be the duty of the board of county commissioners, in the notices for the next general election, to notify the voters of the county to designate upon their ballots at such election the place of their choice. The notice actually given was that an election would be held for the purpose, among others, "of voting upon the question of relocating the county seat of Traill County." At the election 1,882 votes were cast on this question, and the highest number of ballots cast at such election was 1960. *Held*, that the notice was sufficient, and that, even if insufficient, the election was not void, it appearing that the voters were not misled by the defect in it.

Two-Thirds of the Votes Polled—Meaning.

The statute made it necessary that some one place should have "two-thirds of the votes polled' to work a change of the county seat to such place. *Held*, that this meant two-thirds of the votes polled on that particular question, and not two-thirds of the highest number of votes polled on some other question at the same election.

Sufficiency of Petition—Determination of County Board Final.

After a county seat election has been ordered and held, and a sufficient vote is cast in favor of some one place to work a relocation of the county seat, the question whether the petition presented to the board of county commissioners praying that such an election be held was signed by a sufficient number of voters is not open to judicial investigation, when the board has found that it was so signed.

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

Application by the state, on the relation of John Little and

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others, against H. A. Langlie and others, for *mandamus*. From an order denying a peremptory writ, relators appeal.

Affirmed.

Crum & Hanson, for appellants.

Carmody & Leslie, for respondents.

CORLISS, J. The appeal is from a final order in special proceedings. The order denied the relator's application for a peremptory writ of *mandamus*. The ostensible object of the proceeding was to compel the defendants, who held various offices in Traill County, in this state, to remove their several offices from Hillsboro to Caledonia, which was at one time the county seat of that county, and which is still the county seat thereof unless such county seat has been lawfully relocated at Hillsboro. It is therefore evident that the real purpose of the relators who are taxpayers in and residents of Traill County, is to settle the question whether there has been a legal change of the county seat of that county from Caledonia to Hillsboro.

It is first urged by respondents that *mandamus* is not the proper remedy. On that point we are clear that the law is settled against their contention. *County Seat of Linn Co.*, 15 Kan. 500; *Bennett* v. *Hetherington*, 41 Iowa, 142; *Ellis* v. *Karl*, 7 Neb. 381; *State* v. *Stockwell*, 7 Kan. 98; *Todd* v. *Rustad*, (Minn.) 46 N. W. 73; *Calaveras Co.* v. *Brockway*, 30 Cal. 325; *State* v. *Commissioners of Hamilton Co.*, 35 Kan. 640, 11 Pac. 902; *State* v. *Weld*, (Minn.) 40 N. W. 561; *State* v. *Saxton*, 11 Wis. 27; *State* v. *Avery*, 14 Wis. 122; *State* v. *Burton*, (Kan. Sup.) 27 Pac. 141; High, Extr. Rem. § 79; Merrill, Mand. § 125; 2 High, Inj. § 1257.

But it is urged that *mandamus* will not lie because there is another adequate and speedy remedy. We are referred to sections 1494-1498, Comp. Laws, which provide that the validity of a county seat election may be contested in the courts by pursuing the proceedings specified in these sections. We agree with counsel that this remedy is both adequate and speedy, but the same act which created this new remedy in terms perpetuated the

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existing remedy of *mandamus* in such cases. Section 11 of this act (chapter 54, Laws 1885) being section 1499, Comp. Laws, provides that "this act shall not be construed to affect any of the remedies or rights of action or proceedings provided for in the Code of Civil Procedure." *Mandamus* is one of such remedies. As it could be employed, before the act of 1885 was passed, to try the validity of a county seat election, it can still be resorted to for such purpose; for this is the explicit declaration of section 1499. That any taxpaper and resident could apply for the writ in the name of the state is not open to question in this state. *State* v. *Carey*, 2 N. D. 36, 49 N. W. 164.

It is claimed that Hillsboro did not receive the necessary statutory vote to make it the county seat. Section 565, Comp. Laws, under which defendants seek to sustain the validity of the election, provides that if, upon canvassing the vote so given, it shall appear that any one place "has two-thirds of the votes polled," such place shall be the county seat. It is undisputed that Hillsboro did in fact receive two-thirds of all the votes polled on the specific question as to the relocation of the county seat, and it is also uncontroverted that it did not receive two-thirds of all votes cast at the same election; the question being voted on at the general election, at which, of course, state and county officers were voted for. The highest number of votes cast for any one officer at this election was 1,960. Hillsboro received 1,291 votes, or less than two-thirds of 1,960. In our opinion the vote for Hillsboro was sufficient. The plain meaning of the statute is that the place having two-thirds of the votes polled on the particular question of relocation shall be the county seat. There is nothing in the statute indicating that, to work a change of the county seat, any one place must receive the votes of two-thirds of all the voters of the county. Ample authority supports our decision. *Armour Bros. Banking Co.* v. *Commissioners of Finney Co.*, 41 Fed. 321; *Commissioners* v. *Winkley*, 29 Kan. 36; *Gillespie* v. *Palmer*, 20 Wis. 572; *Sanford* v. *Prentice*, 28 Wis. 358; *State* v. *Echols*, (Kan. Sup.) 20 Pac. 523. The case of

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State v. *Anderson*, (Neb.) 42 N. W. 421, supports the contention of appellants' counsel. Many authorities are cited by him to sustain his contention that, to work a relocation of the county seat, under section 565, to Hillsboro, that place must have received two-thirds of all the votes cast at the election. But an examination of these cases will disclose the fact that the language of the constitutional and statutory provisions there construed was radically different from that of our statute. In those cases there was no room for construction. There was a plain statement in the law that, to carry the measure before the people, or to relocate the county seat, a majority of the electors or voters of the county or city or town must vote in favor of it. *State* v. *Winkelmeir*, 35 Mo. 103; *People* v. *Wiant*, 48 Ill. 263; *People* v. *Brown*, 11 Ill. 479; *State* v. *Babcock*, 17 Neb. 188; 22 N. W. 372; *Enyart* v. *Trustees*, 25 Ohio St. 618; *Everett* v. *Smith*, 22 Minn. 53; *Taylor* v. *Taylor*, 10 Minn. 107 (Gil. 81;) *Bayard* v. *Klinge*, 16 Minn. 249 (Gil. 221.) When a majority of the electors is spoken of, the highest number of votes cast at the election must furnish the standard for determining whether the particular measure which must have such a majority has been carried. When 1,000 votes are cast at an election, and the particular measure which must receive the votes of a majority of the electors has in its favor only 400 votes, it is obvious that it has not received the vote of the majority of such electors, although there be no votes whatever against it. But our statute contains no such language. It carefully excludes the idea that two-thirds of the electors must vote for a place to make it the county seat. When speaking of the number of signatures to the petition required, it in terms declares that such petition shall be signed by two-thirds of the qualified voters of the county. But when it specifies the vote necessary to relocate the county seat at another place, it studiously avoids the use of this explicit language which is very appropriate to express the idea that appellant's counsel contends is to be found in the statute. To our minds this fact is very significant. It discloses a purpose to avoid making it necessary

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that there should be a two-thirds vote of the electors of the county in favor of one place to change the county seat to such place. The language which is employed makes it apparent that the two-thirds vote required is a two-thirds vote on the particular question of the relocation of the county seat. The statute declares that, in the notice for the next general election, the voters are to be notified to designate upon their ballots the place of their choice. Then the statute continues, "And if upon canvassing the votes so given it shall appear that any one place has two-thirds of the votes polled such place shall be the county seat." The "votes so given" are the votes upon this particular question. If, upon the canvass of such votes, without any reference to any other vote at the same general election, it appears that any one place has two-thirds of the vote polled, it shall be the county seat. The "vote polled" is the vote polled upon that question. That is the only matter the statute is dealing with. It is utterly unjustifiable to assume that by these words the legislature meant the highest vote polled at the same election, no matter for what office or measure. The statute does not say "the highest vote polled at the same election for any office or measure," and we have no right to interpolate these words into the statute by construction. The general policy of the American people is to test the sufficiency of any vote by the vote on the particular question, and not by the vote on some other question. Unless the language is free from doubt, we have no right to spell out of the statute by a farfetched inference a purpose to depart from this general policy. It is to be observed that, whenever the lawmaking power of a state has desired to make the highest vote at the same election the standard, it has said so in unambiguous terms, as by requiring that there shall be a majority or two-thirds or three-fifths vote, as the case may be, of all the voters or electors of the city, town, or county, or by using equally explicit language.

It is next insisted that the election was void for the reason that the notice of election was not strictly in conformity with the

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statute. The statute declares that, if the board orders an election, it shall be its duty to notify the voters, in the general election notices, to designate upon their ballots at the election the place of their choice. Section 565, Comp. Laws. The portion of the notices actually given reads as follows: "Also, to vote upon the question of relocating the county seat of Traill County." This notice was a substantial compliance with the statute. It distinctly informed the voters that that question was to be voted upon, and a reference to the law would disclose the fact that each voter might, and must to make his ballot count, designate on it the place he desired to vote for as county seat. This was done by all who voted on the question, and it appears that, while the highest number of votes cast for any one office was 1,960, there was 1,882 votes cast for different places for county seat. It does not admit of doubt that the voters of Traill County were fully apprised, by the notice actually given, of the question to be voted upon, and how they should vote upon it. We recognize the greater importance of a strict compliance with the provisions of law as to notice where a special matter is to be voted upon at a general election, or some officer is to be voted for to fill a vacancy, when, but for such vacancy, there would have been no vote for a candidate for such office at the general election, or when a special election is held, as to the time and place of holding which the laws of the state furnish no notice, than where there is an election of officers at a general election whose terms of office expire under the law, so that the public have notice of such election from the statutes of the state without further notice. See *Adsit* v. *Secretary of State*, (Mich.) 48 N. W. 31-33. The rule is that if no notice of a special election, or that a special matter will be voted for at a general election, is given, and there is an inference from the vote cast that the failure to give the required notice has so operated to the prejudice of the voters that it cannot be said that there has been a fair election held with respect to the special matter, then the election to that extent is void. But as we observed before, it is conclusively shown by

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the vote on the question of relocating the county seat, in the light of the vote cast at the same time for county and state officers, that no possible injury to the voters resulted from the failure strictly to comply with the requrements of the law. As sustaining our ruling that the defect in the notice did not affect the validity of the election, see *Wheat* v. *Smith*, (Ark.) 7 S. W. 161; *State* v. *Carroll*, (R. I.) 24 Atl. 106; *Seymour* v. *City oj Tacoma*, (Wash.) 33 Pac. 1059; *Ellis* v. *Karl*, 7 Neb. 381; *State* v. *Skirving*, (Neb.) 27 N. W. 723; *Dishon* v. *Smith*, 10 Iowa, 212; *Adsit* v. *Secretary of State*, (Mich.) 48 N. W. 31; *State* v. *Lansing*, (Neb.) 64 N. W. 1104. We also think that there was such a substantial compliance with the statute as to the notice to be given that we would hold the election valid although it appeared that there was a much lighter vote on the question of relocating the county seat than for candidates for office voted for at the same election.

The only other attack on the election proceedings made by the appellants relates to the number of signatures to the petition presented to the board of county commissioners requesting that the question of relocating the county seat be submitted to the voters of the county. The statute in terms requires that the petition be signed by two-thirds of the qualified voters of the county. The petition presented to the board and upon it 864 names. There is no finding of the court that these did not constitute two-thirds of the voters of the county; nor, on the other hand, is there any finding that they did. There is a finding that the board found "that said petition was signed by the necessary number of voters and electors of said Traill County." The records of the proceedings of the board do not disclose the fact that such a finding was made in terms by the board, but it is obvious that the board must be held to have reached such a conclusion from the mere fact that they ordered the election. See *Commissioners* v. *Hall*, 70 Ind. 469. We do not think that, after an election has been held, and a sufficient vote has been cast in favor of a place to work a change of the county seat to

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such place, the question whether the petition had upon it the requisite number of names is open to judicial investigation. While a sufficient petition is undoubtedly necessary, yet the question lies deeper than that. What body is to settle this matter finally? This is the pregnant inquiry. When we consider the nature of the question to be passed upon, the peculiar facilities that county commissioners living in close contact with the people have for reaching a correct result, and the enormous expense involved in a trial of that question in court, we are impelled to the conclusion that the decision of the board is final; at least, after an election is had which demonstrates that the requisite number of voters were in favor of a change. In the case before us it appears that the voters of Traill County were almost unanimous in their desire for a change, Caledonia receiving only 218 votes out of 1,882 votes cast on that issue. The board is to receive the petition, is to pass upon its sufficiency, and is to order the election if satisfied that it is sufficient. Here is a clear submission of this question of fact to the board for adjudication. The statute contemplates that the board is to settle it one way or the other. No other body is given jurisdiction over the matter. It is left to the judgment of the board, to the end that the taxpayers shall not be burdened with the expense of an election unless there is a strong sentiment in favor of a change, and also to the end that, when there is a sufficiently widespread desire for a relocation to justify the expectation that the vote on the subject will accomplish something, and not prove futile, the citizens of the county may enjoy the right to vote on this issue. We think such a question may be safely left to the final decision of the county commissioners of a county. They are elected for a short term. They stand close to the people, and under such circumstances an abuse of the power is not to be expected. If the power is abused, the attempt of the board will prove abortive, if the voters do not desire a change. The only consequence of their wrongful action will be the expense of the election, so far as it relates to the special matter, which will be trifling, in view

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of the fact that the question is to be voted on at the general election, and in addition the increased excitement of the election owing to the additional issue before the voters for settlement. These consequences are trivial as compared with the evils flowing from the doctrine that the question whether two-thirds of the voters signed the petition is open to investigation after two-thirds of the voters have declared in favor of a change of the county seat to another place, and so open to investigation for all time.

It is to be kept in mind that, if this matter can be inquired into in the courts, the issue of fact is not settled by a reference to the poll list, as the question is not with respect to the number of voters at the time of any election, but at the time the petition is presented. Where two-thirds of the electors must vote for a measure, it is obvious that the votes cast at the election will be controlling as to the number of the electors. But the number of votes cast at any election is not and cannot be absolutely controlling as to the number of votes at another time. This may be *prima facie* evidence as to the number of qualified voters at a given time, but the investigation may and will probe deeper. It will always relate—First, to the question of the exact number of qualified voters in the county, and this involves inquiries into the original citizenship, residence, naturalization, and age of each and every voter in the county; and, second, to the same inquiry with respect to the persons whose names are upon the petition, and the additional fact whether the signatures are genuine. An exhaustive trial of these complicated facts in court would in a single instance involve the expenditure of thousands of dollars, and would occupy the attention of the courts for months. The expense would be enormous as compared with the slight additional expense to the county from ordering an election on the question of relocating the county seat, and it would have to be borne by the innocent public officers who, in changing their place of holding their public offices, would be acting in obedience to the will of the people, as expressed at an election on the

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subject, apparently regular and legal in all respects. Is it possible that, years after an election is had at which the people have spoken as decisively in favor of a change as in the case at bar, the whole subject is open to review in the courts, and that the question where the legal county seat is located may, after such a lapse of time, be made to turn on the issue of fact whether a certain person was 21 years of age at the time the petition was signed, or whether at that time he had resided long enough in a certain precinct or in the county or in the state to make him a legal voter, or whether at that time he was a citizen? If so, then the county seat of a county may be adjudged to be in another place than that at which the people by a decisive vote have located it, years after such location, by proving that a single person was only 20 years and 300 days old when the petition was presented to the board, or that he had lived in the county only 5 months and 25 days, or in the state 11 months and 25 days, at the time of the presentation of the petition to the county commissioners for action thereon. It is evident, too, that after the lapse of even a short period of time it will often become impossible to show that the petition was signed by a sufficient number of voters, although such was the fact. Suppose the petition in the case before us had been just sufficient, on the theory that every signature was that of a voter, and suppose that, on being apprised of the fact that there were doubts as to the age of one of the signers of the petition, and the board had investigated the fact, and had become satisfied that he was 21 years of age; how intolerable would be the doctrine that, nothwithstanding such investigation and decision by the board, such question of fact could be re-examined at any time, with the result of overthrowing, years afterwards, the clearly expressed will of the voters! We must assume, in cases of this kind, as in all other cases, that the board has done its duty, and has made a proper investigation. In our judgment, their conclusion as to the fact whether the petition has a sufficient number of names of voters upon it is final after the election has taken place. Able courts have taken

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the same view of the law. *Currie* v. *Paulson*, (Minn.) 45 N. W. 854; *Ellis* v. *Karl*, 7 Neb. 381; *Bennett* v. *Hetherington*, 41 Iowa, 142; *Baker* v. *Supervisors*, 40 Iowa, 226; 2 High, Inj. § § 1257, 1258. In *Currie* v. *Paulson*, Judge Mitchell, speaking for the court, places the doctrine we enunciate in this case upon a solid foundation. The question before the court in that case was whether there was a sufficient number of signatures of voters upon the petition. The court held that, in a contest of the validity of a county seat election under the statute, this question was not open to investigation. In his opinion Judge Mitchell says: "In the very nature of things, the determination of the board on this matter must be final and conclusive. It was certainly not contemplated, and contestants do not claim, that the court, upon contest, could proceed on new evidence to try *de novo* the question as to the genuineness of signatures or the qualification of the signers; for, if so, the election might be held void, although the county commissioners decided rightly upon the evidence before them. If the court is to review the determination of the commissioners at all, it must be by attempting to put itself in their place, and consider how they ought to have decided upon the evidence which they had before them. But the law makes no provisions for preserving this evidence, or making up any record of it. If, as will often be the case, the evidence is oral, there is no possible way of ascertaining what the evidence before the board was. This difficulty is illustrated by the present case, in which the trial judge assumes to find what certain witnesses swore to before the board. There are manifest reasons why the determination of the board of commissioners as to these facts should be final. It is the vote of the electors at the election, and not the signatures to the petition, which determines the location of the county seat. The main, if not sole, purpose of requiring the petition in favor of a change before ordering an election is to save the public from the expense, loss of time, and excitement incident to such an election, unless there is a reasonable probability that the required majority of electors will vote

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for the change. To go back of the action of the county board, and reverse their determination as to these facts, after the election is past, and the change carried by the popular vote, would certainly subserve no good purpose."

In *Edmonds* v. *Herbrandson*, 2 N. D. 270, 50 N. W. 970, the validity of this same county seat election was involved. But this question arose on demurrer. The plaintiff in that case alleged, and the allegation was admitted by defendants' demurrer, that Hillsboro did not receive two-thirds of the votes cast for county seat, but did receive a sufficient vote to make it the county seat under chapter 56, Laws 1890. The only question discussed in that case was whether that statute was valid. The trial court held it was, and sustained the demurrer. We came to the contrary conclusion, and reversed the judgment of the District Court. But it appears that the defendants admitted the fact that Hillsboro had not received two-thirds of the votes cast merely for the purpose of settling the constitutionality of the act of 1890. After the case had gone back to the District Court an answer was interposed, and this fact was put in issue by such answer. A question of fact is not settled by a tentative admission of it for a special purpose. It is only when judgment is entered upon the basis of such a fact that it is no longer open to controversy. Had there been judgment entered in that case by the District Court in favor of the plaintiffs on the demurrer, the matter would be *res adjudicata*. No such judgment was rendered. On the contrary, a judgment in favor of the defendants was subsequently entered, and this judgment appears from the record in this case to have been founded on the finding by the court that Hillsboro had in fact received the necessary two-thirds vote. But, even if it had not been founded upon such fact, but on a wrong theory of the law, it would be conclusive between the parties to such action, on the issue whether Hillsboro was the legal county seat, until reversed or set aside. It is possible we might legally rest our decision in this case on the conclusive force of the judgment in the case referred to, as there is much force in the contention that

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there is privity between the parties to that action and the parties to this proceeding, particularly in view of the fact that only public interests were then litigated, and the same public interests is herein involved. But we prefer to meet the issues in the case before us on the merits, to the end that citizens of the county may not feel that their interests have been trifled with by other citizens who instituted and controlled the former suit. Certain it is that there was no final judgment in that case in favor of those who instituted and prosecuted it, and without such final judgment in their favor there could be no conclusive settlement in their favor of the issue of fact raised by the answer, interposed after the case had gone back to the District Court, whether Hillsboro had received the necessary two-thirds vote. What we said in that case on the question of the number of signatures to the petition was not said with any view of settling the law whether the sufficiency of the petition could be inquired into in proceedings to test the validity of the election. No such question was before us for discussion. It was assumed, by every one in the case, for the purpose of settling on the appeal whether the act of 1890 was constitutional, that the change in the county seat could not be sustained under section 565, Comp. Laws. We cannot say, from the record before us, that the board of county commissioners ordered the election solely under the law of 1890, or under it at all. This fact is not set forth in the alternative writ, and there is no evidence in the case justifying such an inference. The petition presented did not ask that the election be ordered under that statute, or refer to it at all. The board in no manner alluded to it in ordering the election, nor is there anything in the proceedings of such board, so far as they are in evidence in this case, tending to show that the board was proceeding exclusively under the act of 1890, or, indeed, under it at all. When the board canvassed the vote and issued the certificate, it spread upon its records nothing to indicate that it made such canvass and issued such certificate on the theory that all of the election proceedings had been carried on under the statute of 1890. There is no testi-

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mony whatever in the case that either the petitioners for the election or the board of county commissioners did not proceed under section 565 of the Compiled Laws. Had it appeared in this case by competent evidence that the board was acting under the act of 1890, there would be no inference, from the fact of ordering an election, that the board had found that the petition was sufficient under section 565; the act of 1890 requiring the petition to be signed by only one-third of the voters of the county, instead of by two-thirds of such voters, as required by section 565. In the absence of evidence to that effect, we have no right to assume that the board proceeded under an unconstitutional statute when there was a valid law under which they could have proceeded.

Finding no error in the case, and being clearly of the opinion that the District Court was right in its decision that the county seat had been lawfully relocated at Hillsboro, the order denying the application for a peremptory writ of *mandamus* is affirmed. All concur.

(67 N. W. Rep. 958.)

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CHARLES A. PATTERSON *vs.* JACOB WOLLMANN.

Opinion filed June 10th, 1896.

Ferry Law—Constitutionality.

The statute authorizing boards of county commissioners of the several counties of the state to grant exclusive ferry franchises for a period of years to the highest bidder therefor is not repugnant to section 20 of the constitution, which declares that no privileges or immunities shall be granted to any citizen or class of citizens which shall not be granted to all citizens on the same terms.

Exclusive Franchise.

No one has a right to operate a public ferry for toll without authority from the state. The franchise granted by it to a person or corporation to run a ferry may be, and usually is, an exclusive franchise.

Legislative Control Absolute.

Whether the state will itself operate the public ferries within its borders, or whether it will confer this right on others, and the terms on which it will give others this special privilege, and whether an exclusive franchise shall be granted,—these and all other questions connected with the subject are absolutely within the control of the legislature.

Remedy by Injunction.

Injunction is the proper remedy to employ when one without authority of law is operating a ferry to the injury of another, who is the owner of a ferry franchise.

Legality of Grant.

Certain questions relating to the legality of the plaintiff's franchise examined, and the franchise *held* to have been legally granted to plaintiff by the board of county commissioners of the proper county.

Powers of Commissioners.

The board of county commissioners to which an unorganized county is attached for judicial purposes has no power to grant a ferry franchise between points one of which is within the unorganized, but neither of which is within the organized county, whose board granted the franchise.

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

Action by Charles A. Patterson against Jacob Wollmann for injunction. From an order denying a temporary injunction, plaintiff appeals.

Reversed.

Boucher & Philbrick, for appellant.

F. H. Register, for respondent.

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Corliss, J. The plaintiff is seeking to restrain the defendant from operating a ferry between Winona, in Emmons County, and Ft. Yates, in Boreman County, in this state. The appeal is from an order denying a motion for a temporary injunction. The application for such injunction was made upon the pleadings. We must therefore assume that all the facts set forth in the answer are true, and also those which appear upon the face of the complaint, and are not denied. The merits of the whole case are really before us. If the plaintiff is not, upon the pleadings as they stand, entitled to the temporary injunction prayed for, it is conceded that he must ultimately fail in his action. He claims an exclusive right as against the defendant to operate a ferry between the points named, under a ferry franchise granted to him for a period of years by the board of county commissioners of Emmons County, within whose territorial limits one of the landing places is located. It is settled law that the right to operate a ferry is not common to all citizens. It is a franchise emanating from the sovereign power. In the absence of a title based on prescription, no one can lawfully maintain a ferry without authority from the state. *Appeal of Douglass*, (Pa. Sup.) 12 Atl. 834; *Mills* v. *St. Clair Co.*, 8 How. 581; *McRoberts* v. *Washburne*, 10 Minn. 23 (Gil. 8;) *Stark* v. *Miller*, 3 Mo. 470; *Power* v. *Village of Athens*, 99 N. Y. 592, 2 N. E. 609; *Bridge Co.* v. *Paige*, 83 N. Y. 178; *Conway* v. *Taylor's Ex'r*, 1 Black, 603. It is upon this principle that the territorial legislature enacted sections 1361-1369, Comp. Laws, which were in force at the time the plaintiff received his grant of the ferry franchise on which he bases this action for an injunction. Under these sections power is vested in boards of county commissioners to grant to the highest bidder for a ferry privilege at a particular place a ferry lease for a term of years not exceeding 15, to be fixed by the board. They further declare that it shall be unlawful for any person to establish, maintain, or run upon any waters within the territory (now state) any ferry upon which to convey, carry, or transport any person or

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property for hire or reward without first having obtained a license as therein provided for. The ferry lease under which defendant attempts to justify his running of a ferry between the same points between which plaintiff is operating his ferry was granted by the board of county commissioners of Morton County. Neither landing place is within that county. Nor can it be claimed that the board of county commissioners of that county have any power to grant a license to run a ferry between points one of which is within Boreman County merely because the latter county is attached to Morton County for judicial purposes. Boreman County being an unorganized county, the license to be valid, must be issued by the secretary of state. Comp. Laws, § 1364. We are therefore not called upon in this case to settle the question whether, when the board of county commissioners of an organized county has granted a ferry franchise to a citizen between two points one of which is within that county and the other within another county, the board of county commissioners of the latter county can subsequently, and during the life of such franchise, grant another ferry franchise between the same places. There is much force in the position that when the grant is once made it is no longer within the power of the same or any other board of county commissioners to grant another ferry franchise within two miles of the one previously granted. Section 1361, Comp. Laws, in terms declares that, when any ferry lease has been granted, no other lease shall be granted within a distance of two miles thereof across the same stream. But it is barely possible that the legislature merely intended to give each board of county commissioners control of the ferry privileges within its county, so that such board could grant the franchise to operate a ferry from any portion of the bank of a stream within such county to the opposite bank, but not from the opposite bank to the place within such county from which he was authorized to receive passengers. See *Powers* v. *Village of Athens*, 99 N. Y. 592, 2 N. E. 609, where the court say: "We think, from all this legislation, without referring to it more minutely, it is quite clear that the

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legislature intended to place the ferries on the one side of the river under the exclusive control of the city, and on the other side under the exclusive control of the village." See, also, *Giles* v. *Groves*, 12 Adol. and E. (N. S.) 721; *Pim* v. *Curell*, 6 Mees. and W. 234; *Conway* v. *Taylor's Ex'r*, 1 Black, 603-630.

The plaintiff in this case stands, and must stand, upon the validity of his alleged franchise. If the privilege of operating a ferry between these points has been granted to him by the sovereign power, he may enjoin all persons from operating a ferry between such points to his injury, provided they are acting without authority of law. That an injunction will be awarded in such cases is recognized by all the adjudications. *Appeal of Douglass*, (Pa. Sup.) 12 Atl. 834; *Tugwell* v. *Ferry Co.*, (Tex. Sup.) 13 S. W. 654; *Carroll* v. *Campbell* (Mo.) 17 S. W. 884; *Capital City Ferry Co.* v. *Cole & Callaway Transp. Co.*, 51 Mo. App. 228; *Chard* v. *Stone*, 7 Cal. 117; *Walker* v. *Armstrong*, 2 Kan. 198; *Ferry Co.* v. *Wilson*, 28 N. J. Eq. 537; 2 High, Inj. § 927; *Conway* v. *Taylor's Ex'r*, 1 Black. 603. Nor is it necessary, to entile the owner to relief in equity, that the franchise should be an exclusive franchise in the sense that the grant of another similar franchise to be exercised and enjoyed at the same place would be void. The theory on which the low proceeds is that the defendant, who has no franchise, is acting in violation of law in operating a ferry without authority from the sovereign power, and that the owner of the franchise may complain of and restrain such illegal acts when they result in injury to his franchise, which in the eye of the law, is property. As to the one who is invading his rights without legal sanction, the franchise is an exclusive franchise, although the owner of it might not be entitled to any protection as against the granting of a similar franchise to another. There appears to be no controversy on this point. *Appeal of Douglass* (Pa. Sup.) 12 Atl. 834; *Tugwell* v. *Ferry Co.*, (Tex. Sup.) 13 S. W. 654; *Carroll* v. *Campbell*, (Mo.) 17 S. W. 884, 19 S. W. 809; *Tugwell* v. *Ferry Co.*, (Tex. Sup.) 9 S. W. 120-124. The franchise granted to the plaintiff was in terms exclusive,

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and the statute provides that no other franchise shall be granted within a distance of two miles. Comp. Laws, § 1361. It is this provision of the statute which allows, and indeed compels, the board of county commissioners to grant an exclusive franchise within the specified limits to the highest bidder, that is here challenged as obnoxious to section 20 of the constitution. That section declares that "no special privileges or immunities shall ever be granted which may not be altered, revoked or repealed by the legislative assembly, nor shall any citizen, or class of citizens, be granted privileges or immunities which upon the same terms shall not be granted to all citizens." We are clear that this section has no relation to ferry franchises. The construction we are asked by counsel for defendant to place upon this section would result in abridging the power of the state over a subject which has for more than two centuries been regarded as exclusively within the control of sovereign power. A ferry is a moving public highway upon water. The highway upon land meets at either shore with a physical obstruction in the shape of a stream of water. How shall this highway be carried over this stream? The solution of this problem is exclusively within the province of the sovereign power. In this country such power is exercised by the state legislatures. It rests with such bodies, subject to such constitutional restrictions as relate to the matter, to determine whether there shall be a bridge or an embankment of earth constructed or a ferry maintained to carry a highway over a stream. The ferry may be directly under public control or the sovereign power may authorize a person or corporation to maintain this portable highway. When the power is delegated, the grantee of the franchise discharges a public duty in operating the ferry; and in the discharge of that duty he exercises a privilege which the state may grant or withhold at pleasure. The franchise does not consist of the right to sail his boat upon the stream, or to moor it by the shore. It is the privilege of operating a floating highway, of establishing and maintaining a public thoroughfare over water, and of charging tolls for the

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facilities for passage so afforded. Whatever right is enjoyed by the citizen in this regard is derived exclusively from the sovereign power, which has full control over the whole subject. The state may exclude all persons from the business. It may run all ferries itself. The same exclusive right which it has over the subject of maintaining a highway over a stream by means of a ferry at any particular point it may vest in its grantee. That it would possess this power but for section 20 of the constitution does not admit a doubt. It has been for centuries recognized as a proper mode of exercising the power to grant ferry franchises to make such grants exclusive. The chief element in the value of a ferry franchise is its monopoly feature. Of course, such a franchise would possess some value, although there were other lawful ferries at same place. But it would be a misnomer to call the right to operate a ferry at a given point a franchise if the enjoyment of such right was open to every one on the same terms. If no exclusive right can be granted, all the sovereign power can do, if it does not itself operate all the ferries in the state, is to pass a general law prescribing the terms on which all citizens shall be allowed to maintain ferries, leaving the business open to all who see fit to engage in it. The construction of section 20 contended for by counsel for defendant imputes to the people a purpose to take from the legislature the power to vest in another the exclusive right to maintain a ferry which it is clear it could exercise itself. Such an interpretation of the organic law can be sustained only on the theory that the people, for reasons, which are not discoverable, intended to curtail the police power of the state with respect to public ferries in a very important, if not vital, particular. For centuries such police power has embraced this element of the right to grant an exclusive franchise; and it has been found that, as a general rule, the best results are obtained by granting an exclusive right. Indeed, it often is the case that on no other terms will the citizen assume the burdens incident to the operation of a ferry. There is nothing in the history of the English nation or of the American people which warrants the

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conclusion that this practice has resulted in imposing intolerable burdens upon the public, or has led to other than beneficial results. No sentiment inimical to this practice is discoverable in any of the records to which the mind naturally turns as legitimate sources of information on the question of public sentiment on the subject. Public opinion has never crystallized against grants of exclusive ferry franchises. On the contrary, the spirit of the times appears to be as favorable to the long established practice of making such grants exclusive as in the early history of English jurisprudence. These considerations are of weight in interpreting section 20 of the constitution. Unless there has been a radical change in public sentiment in the matter of exclusive ferry franchises, we must not lightly assume, from the mere use of the word "privilege" in the constitution, that the people intended to take from the legislature a very important portion of the police power relating to public ferries,—such a branch of that power as has been exercised unchallenged for more than two centuries without oppression to the people, and generally with beneficient results. It may often happen that the best facilities and service can be secured, and the most reasonable schedule of tolls be obtained, by the grant of an exclusive franchise. What the law has regard to in the establishment of ferries is the good of the public, and not the right of the citizen to embark in the business of operating a public ferry. There is no such right. There was none at common law, and there is none now, unless by the use of the word "privilege," in section 20 of the constitution, it has been conferred upon the citizens of the state. That this is not the purpose of section 20 we are clear. Indeed, the very most that could be claimed would be that, if the state should see fit to open up the business at all to private enterprise, it must be opened up to all on the same terms. It could unquestionably, even on the theory of defendant's counsel, exclude all persons from engaging in such business, and enjoy the monopoly itself. The right of the citizen to maintain a ferry does not exist. To withhold the special privilege of engaging in that business as a

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servant of the public and for the public good does not deprive him of any right recognized by the law. To grant this special privilege to another is no ground for complaint on his part. If he essays to cover his selfish desire for the privilege under the thin coat of championing the public interests against the oppression of extortionate tolls because competition is not present to control them, he is met with the conclusive answer that the whole matter of tolls is under the control of the state. No oppression will result from the monopoly. It is this fact, and the further facts that the right to operate a ferry is not a right common to all citizens, but may be granted or withheld at the pleasure of the state, and that it is always granted in consideration of public services which the grantee is under legal obligations to render,—it is these facts which have led the courts from the earliest times to except exclusive ferry franchises from the class of monopolies obnoxious to the common law. We think that under our constitution this distinction is perpetuated. We are of opinion that with respect to business enterprises the old line of delimitation is preserved, and not obliterated. This line has been so repeatedly drawn that we cannot infer a purpose to destroy this common boundary between monopolies injurious and those beneficial to society from the use of general expressions. Nothing short of explicit language will suffice to warrant such a conclusion. From the earliest times there has gone, hand in hand with the struggle against odious monopolies,—those which denied the right of the citizen to engage in those business enterprises which on principles of natural justice should be open to all,—an express recognition of the legality of those monopolies which related to business enterprises in which the citizen had no natural right to engage, as the business of operating a ferry. In the celebrated case of *Proprietors of Charles River Bridge* v. *Proprietors of Warren Bridge*, 11 Pet. 420, Mr. Justice Story has set forth this matter in very clear language. At page 607 he says: "But what is a monopoly, as understood in law? It is an exclusive right, granted to a few, of something which was before of common right. Thus a

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privilege granted by the king for the sole buying, selling, making, working, or using a thing whereby the subject in general is restrained from that liberty of manufacturing or trading which before he had, is a monopoly. 4 Bl. Comm. 159; Bac. Abr. "Prerogative," F, 4. My Lord Coke, in his Pleas of the Crown (3 Inst. 181,) has given this very definition of a monopoly, and that definition was approved by Holt and Trevy (afterwards chief justices of king's bench), arguendo as counsel in the great case of *East India Co.* v. *Sandys*, 10 Howell, St. Tr. 386. His words are that a monopoly is an 'institution by the king by his grant, commission or otherwise, to any persons or corporations of or for the sole buying, selling, making, working, or using of everything whereby any persons or corporations are sought to be restrained of any freedom or liberty they had before, or hindered in their lawful trade'; so that it is not the case of a monopoly if the subjects had not the common right or liberty before to do the act or possess and enjoy the privilege or franchise granted as a common right. *Id.* 425. And it deserves an especial remark that this doctrine was an admitted concession pervading the entire arguments of the counsel who opposed, as well as of those who maintained, the grant of the exclusive trade in the case of *East India Co.* v. *Sandy's*, 10 Howell, St. Tr. 386, a case which constitutes in a great measure this basis of the law. No sound lawyer will, I presume, assert that the grant of a right to erect a bridge over a navigable stream is a grant of a common right. Before such grant, had all the citizens of the state a right to erect bridges over navigable streams? Certainly they had not, and therefore the grant was no restriction of any common right. It was neither a monopoly, nor in a legal sense, had it any tendency to a monopoly. It took from no citizen what he possessed before, and had no tendency to take it from him. It took, indeed, from the legislature the power of granting the same identical privilege or franchise to any other persons. But this made it no more a monopoly than the grant of the public stock or funds of the state for a valuable consideration." See, also, opinion of Mr.

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Justice McLean in the same case at page 567. In the *Slaughter House Cases*, 16 Wall. 36, both Mr. Justice Field and Mr. Justice Bradley, who dissented on the ground that the statute of Louisiana, which was assailed in that case, created a monopoly, expressly recognized the distinction between a monopoly condemned by the common law and a monopoly resulting incidentally from the proper exercise of the police power by the grant of an exclusive ferry franchise. Mr. Justice Field says at page 88: "It is also sought to justify the act in question on the same principle that exclusive grants for ferries, bridges, and turnpikes are sanctioned, but it can find no support there. Those grants are of franchises of a public character appertaining to government. Their use usually requires the exercise of the sovereign right of eminent domain. It is for the government to determine when one of them shall be granted, and the conditions upon which it shall be enjoyed. It is the duty of the government to provide suitable roads, bridges, and ferries for the convenience of the public; and if it chooses to devolve this duty to any extent, or in any locality, upon particular individuals or corporations, it may, of course, stipulate for such exclusive privileges connected with the franchise as it may deem proper without encroaching upon the freedom or the just rights of others. The grant, with exclusive privileges, of a right thus appertaining to the government is a very different thing from a grant with exclusive privileges of a right to pursue one of the ordinary trades or callings of life, which is a right appertaining solely to the individual." See, also, opinion of Mr. Justice Bradley at page 111; *New Orleans Gaslight Co.* v. *Louisiana Light & Heat Producing & Manufacturing Co.*, 6 Sup. Ct. 252-257; *Gordon* v. *Association*, 12 Bush. 114; *Com.* v. *Bacon*, 13 Bush. 212; *City of Memphis* v. *Memphis Water Co.*, 5 Heisk. 525; *Crescent City Gaslight Co.* v. *New Orleans Gaslight Co.*, 27 La. Ann. 138-147; *Waterworks Co.* v. *Rivers*, 115 U. S. 674, 6 Sup. Ct. 273.

In view of this unbroken trend of judicial opinion that granting an exclusive ferry franchise is within the police power of a govern-

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ment, and is not repugnant to natural justice, or injurious to the commonwealth, we are unable to spell out of the constitution a purpose to inaugurate, without assignable reason for the change, so radical an alteration of the law,—an alteration which would seriously impair the acknowledged power of the state over a subject which has so long been within the absolute control of sovereign power. Especially are we unwilling to do this when we consider that there has never been any public sentiment against the granting of exclusive ferry franchises on the ground that such a practice was detrimental to the public interests. There are some decisions which appear to be nearly in point. In *Blair* v. *Kilpatrick*, 40 Ind. 312, the constitution of that state declared that "the general assembly shall not grant to any citizen or class of citizens privileges or immunities which upon the same terms shall not equally belong to all citizens." The contention was that the law authorizing the issue of liquor licenses was repugnant to this article of the constitution, because females were excluded from the class entitled to such licenses. The court said: "While we recognize females as falling under the designation of citizens, we do not think that the right to engage in the business of retailing intoxicating liquors is one of the rights contemplated by the section in the bill of rights which we have copied." The court referred to the section of the constitution we have quoted, and which is practically the same as section 20 of our constitution, so far as this question is concerned. See, also, *City of Laredo* v. *International Bridge & Tramway Co.*, 14 C. C. A. 1, 66 Fed. 246-248.

As the granting of exclusive ferry franchises is the proper exercise of the police power of the state, it follows that the fact that such a grant results incidentally in the establishment of a monopoly does not bring the grant within the prohibition of our constitution. It is not a business that any citizen has a natural right to pursue. The grantee is subject to the control of the state as to his charges. The franchise is given in exchange for the engagement of the grantee to perform important public

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duties,—his promise to operate a public highway over which all may pass on the same terms. The decision of the court in *State* v. *Haworth*, (Ind. Sup.) 23 N. E. 946, appears to us to be in point. Indeed, it goes further than we might feel disposed to go if the question before us was the same as the one before the Indiana Supreme Court in that case. See, also, Cooley, Const. Lim. p. 488; Tied. Lim. § 105. In the sense of an unjust discrimination there is no grant of a special privilege to a citizen when he is vested by the sovereign power with the exclusive right to exercise some public function, as the maintenance of a ferry highway, and as compensation for the burden he assumes is allowed to charge such reasonable tolls as are fixed by law. The state, having the exclusive right to serve the public and charge tolls for so doing, transfers to a single citizen this right when it grants to him a ferry franchise, burdened with all the obligations to the public which grow out of the nature of the grant and are prescribed by law. The theory of the law is that the public receive an adequate consideration for the grant of the franchise. Whatever the grantee obtains, he pays for. He is no more the recipient of a special favor from the state than one who purchases property from the state. Under the statutes in force in this state he is obliged to pay an annual rent for the right he secures, and, unlike the grantee of a monopoly of a business purely private in character, he is under obligations to the public to furnish proper facilities to operate his ferry during specified hours, and to charge no more than the tolls fixed by statute. He is not the beneficiary of an unjust and impolitic grant of an exclusive privilege to carry on a private business over which the public have no control, and in the prosecution of which no public ends are subserved, but the purchaser, at a price commensurate with the right he buys, of a portion of the sovereign prerogative of the state to operate a public highway over public waters to the exclusion of every one to whom such right has not been granted. The monopoly which he secures is not one which the common law condemned. It is not injurious to the public. It is under public control. It is paid

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for in cash, and in obligations to the public which the grantee assumes. It results as a mere incident of the exercise the of undoubted police power of the state. It deprives no citizen of any right he before enjoyed. It subjects the public to no greater charges than the state itself could exact. It merely places the grantee in the position which it is conceded the state would have occupied but for the grant. Such a monopoly, if monopoly it can be called, is not within the prohibition of our constitution. Another provision of that instrument appears to be very persuasive in support of our views. It is to be noted that section 20 does not, in terms, relate to a franchise. That word is not found in this section. When we turn to section 69, we find that the power to grant an exclusive franchise is expressly recognized. That section prohibits the grant of an exclusive franchise, and the chartering or licensing of ferries, toll bridges, or toll roads by means of a special or local law. Section 69, Subds. 16, 20. The irresistible implication is that exclusive franchises may be granted under general statutes such as the one whose constitutionality is here involved. Without attempting to mark the boundaries of the prohibition contained in section 20, it is sufficient for us to say that we are clear that it does not embrace the case of an exclusive ferry franchise.

It is urged that the lease of the plaintiff is void, because he was not the highest bidder. Defendant claims that his bid was higher than plaintiff's. Assuming this to be true, and also that defendant could raise the question in a proceeding of this character, we are yet unable to say that the board of county commissioners, in granting the franchise to plaintiff, violated the statute. It is not enough that one should be the highest bidder to entitle him to the franchise. He must also furnish security for the rent to be paid. This the plaintiff did. The record does not show that the defendant in this respect brought himself within the statute. There is no averment in the pleadings that he ever furnished or offered to furnish any security whatever. The mere fact that his bid was highest would give him no standing to claim

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that the lease should be made to him. We cannot assume, in the absence of an allegation to that effect, that the board violated the law. On the contrary, we must assume that, if the defendant was the highest bidder, he was not given the franchise because he failed to comply with the requirements of the law as to security.

We see no force in the contention that the lease was not properly executed. It was made and signed by a committee of the board which was authorized to execute it on behalf of the board, provided another bidder whose bid was higher than plaintiff's failed to furnish security by a certain time. It is undisputed that he did fail to give the security required by the statute, and that thereupon the committee executed the lease to the plaintiff. Their action in this regard was subsequently approved by the board at a meeting of the board.

The claim that the lease was void because the ferry does not connect with a public highway on either shore is without merit. There is nothing in the case warranting the statement that there is no highway within the limits within which plaintiff is authorized to operate his ferry. But, if this were true, the franchise would not be void. A riparian owner cannot operate a ferry, although the landing place is upon his own property on both sides of the stream. Gould, Waters, § 142, and cases cited. But if he has a ferry franchise, and a highway abuts upon his property on each side, it is obvious that the public can be served as well as if the road ran to the shore. A ferry franchise is not void because the public at the time it is granted may not be able as a matter of legal right to reach the landing places of the ferry on either side of the river. Necessary highways can always be established, and if the owner of the franchise refuses to connect with the public highway, but operates the ferry from his own land, and imposes an additional burden on the public for the privilege of coming upon his land to embark, the state could, in a proper proceeding, have his franchise set aside for the breach of an implied condition of the grant. Whether there is a highway with which plaintiff

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can cannect in running his ferry is a matter with which the defendant has no concern.

It is claimed that the plaintiff did not properly secure the rent he agreed to pay for the ferry lease. The bond is for $1,000, and the rent for the full term exceeds this sum. But the lease declares that the failure to pay the rent, which, under the terms of the lease, is due in semi-annual installments of $240.50 each, shall render the lease subject to annulment by the board. It is therefore obvious that the board was, so far as the amount of rent is concerned, amply secured. No more than $240.50 could ever be in default at one time, for the board had power, in case of default in the payment of the rent, to annul the lease, and grant a new one to the highest bidder, as before; thus stopping all increase of the lessee's obligation for rent. For this amount of $240.50 the bond for $1,000 was ample security. The order of the District Court is reversed, and that court is directed to enter an order granting the temporary injunction prayed for. All concur.

(67 N. W. Rep. 1040.)

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FRANK L. LOVEJOY vs. MERCHANTS' STATE BANK.

Opinion filed June 15th, 1896.

Conversion by First Mortgagee.

Where the mortgagee, holding a first mortgage, after taking possession of property under his mortgage, sells the same without foreclosure, and at private sale, such sale is a wrongful conversion of the property, and operates to extinguish the lien of the mortgage.

Measure of Damages in Conversion by Junior Incumbrances.

Where, in such case, a second mortgagee brings an action against the first mortgagee for the wrongful conversion of the property covered by the two mortgages, his measure of damages is the value of the property converted, modified by the principle of compensation for the actual injury suffered on account of the wrongful conversion.

First Mortgagee Can Recoup Value of Special Interest.

In such case the defendant is liable for the value of the property converted, but will be allowed, upon principles of equity, and to avoid circuity of action, to recoup damages to the value of his special interest in or lien upon the mortgaged property. The plaintiff can only recover to the extent of his actual loss.

Conversion Without Damage.

Where, in such case, the value of the property sold was less than the amount secured by the defendant's mortgage, and the sale was without fraud, the plaintiff can recover no damages, because he suffers none, as a result of the wrongful act of which he complains.

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

Action by Frank L. Lovejoy against the Merchants' State Bank for conversion. From a judgment for plaintiff, defendant appeals.

Reversed.

Newman, Spalding & Phelps, for appellant.

S. G. Roberts, for respondent.

WALLIN, C. J. The important facts in this case are not in dispute, and may be summarized: The defendant held a first mortgage on certain personal property to secure an indebtedness of $1.500. The mortgagor voluntarily surrendered the property

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to the mortgagee, and the latter took possession thereof under his mortgage. The defendant did not foreclose the mortgage in any manner, nor attempt to do so, but sold the mortgaged property at private sale for the sum of $1,271.10. The property was sold fairly, and for its full value. The plaintiff is a junior mortgagee, whose mortgage covered the same property, but was made and filed after the defendant's mortgage, and was, in terms, made subject to defendant's mortgage. Plaintiff's mortgage was given to secure an indebtedness of $291.66. After plaintiff's mortgage debt matured, and after defendant had sold the property at private sale, as before stated, the plaintiff demanded the possession of said property from the defendant, but such demand was not complied with. Until such demand was made, the defendant had no knowledge of the existence of plaintiff's mortgage. The plaintiff, after making the demand, brought this action for the wrongful conversion of the mortgaged property, and recovered a judgment against defendant, in the District Court, for the full amount of the debt secured by plaintiff's mortgage.

The plaintiff's theory is that the sale of the mortgaged property at private sale was a wrongful conversion of the property by the defendant, and that such wrongful conversion operated to extinguish the lien of defendant's mortgage, under the provisions of section 4342, Comp. Laws, which reads, "The sale of any personal property on which there is a lien in satisfaction of the claim secured thereby, or, in case of personal property, its wrongful conversion by the person holding the lien, extinguishes the lien." Plaintiff cites, with other authority, *Everett* v. *Buchanan*, (Dak.) 6 N. W. 439, as supporting his contention. Our views are in entire harmony with the plaintiff's contention, to the extent that the sale of the mortgaged property, without a foreclosure of the mortgage, and at private sale, was a wrongful conversion of the property by the defendant, within the meaning of the statute, and that such conversion operated to extinguish the lien of defendant's mortgage. Section 4342, *supra*, embodies an established doctrine of the common law. In selling the mortgaged

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property without a foreclosure of the lien, the defendant not only violated express legal requirements regulating foreclosure proceedings, but also wrongfully assumed to deal with the property as owner, without warrant of law. The mortgaged property was wheat, and the defendant's wrongful conversion of it by a private sale placed the plaintiff's security entirely beyond his reach, and thereby wholly destroyed the value of such security to him. For such a wrong an action at law will lie for damages. True, it might perhaps be successfully urged, as against a recovery in this action, that plaintiff, at the time of the unlawful conversion of the wheat, was not in the actual possession thereof, nor entitled to such possession, because he had neither paid nor tendered to the defendant the amount secured by defendant's prior mortgage. Without deciding whether the plaintiff was or was not, for the reasons stated, in a position to bring an action in the nature of trover for conversion, we shall proceed to dispose of the case upon other grounds. Assuming that plaintiff's action will lie for damages for the wrongful conversion, the inquiry arises as to what extent the plaintiff has been injured,—in other words, what is his measure of damages? Reverting to the situation as it existed prior to the sale, we find that the defendant was lawfully in the possession of the property, the same having been voluntarily surrendered to him by the mortgagor. At that time the plaintiff, as a junior mortgagee, was in a position to obtain the possession of the property, and could do so at any time by tendering to the defendant an amount sufficient to discharge the debt secured by the first mortgage, to-wit, $1,500. The wrongful sale deprived the plaintiff of this right, and whatever sum may be necessary to compensate the plaintiff for this injury the law will award as plaintiff's measure of damages. The true measure of damages is actual compensation for the loss suffered by reason of the wrong complained of. 3 Suth. Dam. p. 527, states the rule in conversion as follows: "If the case is such that the plaintiff can be fully compensated by a sum of money less than

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the full value of the property which was converted, the recovery will be limited to the amount that will suffice for complete indemnity. The plaintiff will be confined to compensation commensurate with the actual injury." The same author, on page 525, in speaking of cases where property is converted by lienholders, lays down the rule a follows: "A party who has a lien on, or other special interest in, property, and converts it, is liable to the owner for its value, but is entitled to recoup the value of his special property." See cases cited in note 6. It will be noticed that the rule of damages, as above quoted, presupposes that the primary measure of damages in cases of conversion of personal property is presumed to be the value of the property. This is the measure presumed under the Code (Comp, Laws §§ 4603-4605.) But this rule of damages, wherever found, and however expressed, must be interpreted with reference to the underlying principle of compensation. A plaintiff is not in every case necessarily entitled to recover the full value of property wrongfully converted by the defendant. There are many qualifications of the general rule. The case at bar, as will be seen by reference to the cases cited below, is an illustration of one of the modifications of the general rule of damages as stated in the statute.

Coming to the facts in the record, we discover that the defendant, after selling the property fairly, and for its full value, realized, as proceeds of the sale, a sum insufficient to discharge the debt secured by the first mortgage. In the absence of proof, there can be no presumption that the plaintiff, had he sold the property at public sale, could have realized a greater sum. The sum realized by the defendant was the full value of the property. It therefore appears that the plaintiff's right of redemption, which was defeated by the defendant's wrongful sale of the mortgaged property was a right of no pecuniary value to the plaintiff. As to the plaintiff, the wrong was no detriment. To have redeemed from the defendant's mortgage would have required an advance by the defendant of the sum of $1,500. Without such advance,

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the plaintiff could not lawfully have obtained possession of the property for the purposes of foreclosure, and plaintiff had no right to the possession for any other purpose. In view of the facts in this case, it conclusively appears that a redemption by the plaintiff from defendant's mortgage would have been attended by financial loss; hence to deprive him of such right certainly did not operate to his financial disadvantage. Without attempting to analyze the cases cited below, all of which will be found to be in point upon the measure of damages, it will suffice to say that the controlling principles which run through them all are these: First, that the rule of damages which declares that the value of the property wrongfully converted is presumed to be the measure of damages must be construed in the light of the principle of compensation; second, where a party, who has a lien on, or other special interest in, property, wrongfully converts it, he is liable for the value of the property, but is nevertheless, upon principles of equity, and to avoid circuity of action, entitled to recoup the value of the special property, and he may likewise mitigate the damage by limiting the plaintiff's recovery to an amount which will compensate him for the actual loss resulting from the conversion. Ample authorty for our views will be found in the cases cited: *Tobener* v. *Hassinbusch*, 56 Mo. App. 591; *Cushing* v. *Seymour*, (Minn.) 15 N. W. 249; *Wheeler* v. *Pereles* 43 Wis. 333; *Treadwell* v. *Davis*, 34 Cal. 601; *Jarvis* v. *Rogers*, 15 Mass. 389; *Kearney* v. *Clutton*, (Mich.) 59 N. W. 419; *Russell* v *Butterfield*, 21 Wend. 300; *Porter* v. *Parks*, 49 N. Y. 564; *Brink* v. *Freoff*, 40 Mich. 610; *Stearns* v. *Marsh*, 4 Denio, 227; *Belden* v. *Perkins*, 78 Ill. 449; *Fisher* v. *Brown*, 104 Mass. 259; *Faeth* v. *Leary*, (Neb.) 36 N. W. 513; Bigelow, Lead. Cas. Torts, 436; 26 Am. and Eng. Enc. Law, 823, note 1; *Manufacturing Co.* v. *Gray*, (Colo. Sup.) 34 Pac. 1000; *Rosenzweig* v. *Frazer*, 82 Ind. 342; *Shaw* v. *Ferguson*, 78 Ind. 547; *Gruman* v. *Smith*, 81 N. Y. 25; *Work* v. *Bennett*, 70 Pa. St. 484; *Whitney* v. *Beckford*, 105 Mass. 267; *Smith* v. *Savin*, 141 N. Y. 315, 36 N. E. 338; *Pyeatt* v. *Powell*, 2 C. C. A. 317, 51 Fed. Rep. 551. In the case of *Everett* v. *Buchanan*, cited by

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respondent's counsel, there was no attempt to discuss any measure of damages in cases of conversion nor was the question of damages considered in either of the cases cited in support of that opinion. That was an action of claim and delivery, and the court held that the purchaser of mortgaged property at private sale was a wrongdoer, and that he could not avail himself of the lien which his vendor once had, but which had been extinguished by the private sale. As has been seen, we fully concur in what was said in *Everett* v. *Buchanan*, concerning the effect of a private sale by the mortgagee of chattels. Such sale will extinguish the lien of the mortgage.

The questions presented in the record are of considerable nicety, and, it must be conceded, are by no means free from logical difficulties. In cases arising since the adoption of the Revised Codes, the statute may perhaps simplify the procedure in this class of cases. See Rev. Codes, § 4695. In view of what has already been said, and of the principles enunciated by the cases we have cited, it follows that the judgment of the court below should be reversed, and such reversal will be directed by this court. All the judges concurring.

(67 N. W. Rep. 956.)

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STATE *ex rel* M. F. SELLIGER *vs.* M. J. O'CONNOR.

Opinion filed June 15th, 1896.

Constitutional Law—Taxation—Interstate Commerce.

Sections 1738-1743, both inclusive, of the Revised Codes, are unconstitutional and void so far as they attempt to tax persons engaged in the occupation of offering for sale by samples in this state goods to be shipped into it from another state, to fill the orders for goods so obtained. They are void as unlawfully interfering with interstate commerce. The statutes, being void as to such persons, are void as to all others, as it cannot be assumed that the legislature would have discriminated against the business interests of the state by passing a law imposing burdens upon such interests which would not affect similar business interests of nonresidents, the precise contrary being shown by the provisions of the act.

Petition by M. F. Selliger, for a writ of *habeas corpus.*

Bangs & Fisk, for petitioner.
J. F. Philbrick, *Asst. Atty. Gen.*, for defendant.

CORLISS, J. The District Court having refused to grant the petitioner a writ of *habeas corpus*, he has applied to this court for such writ. The application was made to the full bench on notice to the assistant attorney general, who appeared, and opposed the allowance of writ on the ground that the relator's petition showed that his detention by the defendant, as sheriff of Grand Forks County, N. D., was legal. It is conceded that the relator has set forth in such petition the facts relating to his imprisonment, which would be disclosed by the sheriff's return to the writ. Our conclusion that the writ should be issued will, therefore, in effect, settled upon the merits the legality of the detention of relator by defendant. The defendant holds him in custody under a commitment based upon his conviction by a justice of the peace for a violation of the provisions of section 1738, Rev. Codes. Such violation is, by section 1742, made a misdemeanor, and punishable by fine or imprisonment, or by both. These two sections constitute part of a license law relating to the occupations of peddling and of selling goods by sample in this state. Section 1738

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provides as follows: "It shall be unlawful for any person to travel from place to place in any county within this state for the purpose of carrying to sell, or exposing or offering for sale, barter or exchange at retail, any goods, wares, merchandise, notions or other articles of trade whatsoever, except as hereinafter provided, whether by sample or otherwise, and whether such goods, wares, merchandise, notions or other articles of trade whatsoever, are delivered at the time of sale, or to be delivered at some future time, unless such person shall have first obtained a license as a peddler as hereinafter provided, but this article shall not prevent any manufacturer, mechanic, nurseryman or farmer from selling his work or production by himself, or any patent right dealer from selling his own invention, or to prevent any person from selling or offering to sell at wholesale to dealers only, any goods, wares or merchandise whatsoever, or to prevent train boys from selling to persons traveling on railroad trains, or to prevent any person who by reason of being blind or deaf and dumb is incapaticipated for hard manual labor, from selling goods, wares or merchandise on foot or with one horse and wagon, without a license." Section 1739 declares that the application for the license shall be made to the county auditor. Section 1740 fixes the fee to be paid. Section 1741 regulates the issuing of such licenses. Section 1742 prescribes the penalty for violation of the law. Whether the fee exacted as a condition of prosecuting the occupations specified in the statute can be regarded as strictly a license fee, or whether it must be held to be, in legal effect, a tax levied upon such occupations, we are not required to decide in this case. But, in view of the fact that no regulation of these occupations aside from the requirement that a fee should be paid, can be found in these sections, and that the fees exacted are larger than the expenses involved in the regulation of such occupations would seem to require, we are inclined to the view that the law can be sustained only as one providing for a tax upon such occupations. *City of St. Louis* v. *Spiegel*, 75 Mo. 146, and cases cited; *State* v. *Moore*, (N. C.) 18 S. E. 342;

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City of Burlington v. *Putman Ins. Co.*, 31 Iowa, 102; *City of St. Paul* v. *Traeger*, 25 Minn. 248; *North Hudson Co. Ry. Co.* v. *Mayor, etc., of City of Hoboken*, 41 N. J. Law, 71; Cooley, Tax'n (2d Ed.) pp. 597-599; *Mayor, etc., of City of New York* v. *Second Ave. R. Co.* 32 N. Y. 261; *Laundry License Case*, 22 Fed. 701; *Brennan* v. *City of Titusville*, 153 U. S. 289, 14 Sup. Ct. 829. Whatever its character may be, it cannot be denied that within the decision of the Federal Supreme Court in *Brennan* v. *City of Titusville*, 153 U. S. 289, 14 Sup. Ct. 829, it is, so far as it assumes to tax those who sell by sample goods in other states, to be thereafter delivered, an unlawful interference with the exclusive authority of congress to regulate interstate commerce; and therefore is to that extent void. The court in that case said that it was immaterial whether the license fee which the city ordinance (the validity of which was involved in that case) required to be paid was considered as tax or as strictly a license fee. The court held that, as it was in fact a direct burden upon interstate commerce, it could not be enforced.

The statute assailed as unconstitutional in the case at bar in terms declares that all persons who offer for sale by sample any goods, wares, merchandise, or other articles of trade must take out a license, and pay the statutory fee therefor. It is obvious that this law cannot stand as it was enacted. All persons cannot be compelled to take out such license and pay such fee. Those who offer for sale by sample goods to be shipped from other states cannot be affected by its provisions. As to them it is void as an unlawful interference with interstate commerce. On what principle can it be sustained as to others? It is plain to our minds that if, after this law is thus emasculated, we should hold it good as to others within the purview of the statute, we would leave upon the statute book a law which the legislature never intended to enact; one which they would not have enacted. The effect of ruling that the statute would be valid as to those not protected by the article of the federal constitution relating to interstate commerce would be to leave standing an act which

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would discriminate against the business interests of this state in favor of business enterprises in foreign jurisdictions. We cannot believe that such a law would have been enacted by the legislature. The legislature have declared that it is their will that this fee should be paid as a condition of engaging in the specified occupations only in case all persons save those specifically excepted should be subjected to the same burden. In *City of Titusville* v. *Brennan*, 22 At. 893, a city ordinance no broader in terms than the statute in question was held by the Supreme Court of Pennsylvania to embrace persons engaged in the business of selling by sample property in another state to be thereafter delivered. By excepting from the act certain classes, they have clearly manifested a purpose that all others should be subject to its provisions. Those who are so excepted are not those who are engaged in the business of selling by sample for foreign houses. When the legislature have declared in the most emphatic manner that these persons shall be included in the law, and that it is on that condition that the act is passed, it would be equivalent to creating a new statute by judicial decision for us to hold that it should nevertheless stand as to its other provisions after it had been adjudged void as to such persons,—a new statute, discriminating against the business interests of the state. In *Poindexter* v. *Greenhow*, 114 U. S. 270, 5 Sup. Ct. 903, 962, Mr. Justice Miller, speaking for the court, says, at page 304, 114 U. S., and pages 903, 962, 5 Sup. Ct.: "It is undoubtedly true that there may be cases where one part of a statute may be enforced as constitutional and another be declared inoperative and void because unconstitutional. But these are cases where the parts are so distinctly separable that each can stand alone, and when the court is able to see and to declare that the intention of the legislature was that the part pronounced valid should be enforceable, even though the other part should fail. To hold otherwise would be to substitute for the law intended by the legislature one they may never have been willing by itself to enact." See, also, opinion of Chief Justice Shaw in *Warren* v. *Mayor, etc.*, 2 Gray, 84; *Pollock* v.

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Trust Co., 158 U. S. 601-636, 15 Sup. Ct. 912; Cooley, Const. Lim., 177, 178, *et seq.*; *Randolph* v. *Supply Co.*, (Ala.) 17 South. 721, and cases cited. It is obvious from a study of the statute that the legislature intended that one of the conditions on which the license fee should be exacted from those who peddled or sold by sample goods already in the state was that those who solicited orders by sample for goods without the state should likewise be subject to the same burden. The portion of the act which violates the commercial article of the federal constitution is so inseparably interwoven with its other provisions as part of an indivisible scheme that we feel that it would be an unwarranted assumption of legislative power for the court to sustain those features of the law not repugnant to the federal constitution despite the fact that those other provisions of the act which are repugnant to the federal constitution must fail of legal effect. For the reasons above set forth chapter 85 of the Laws of 1895 is likewise unconstituted. The consequence is that the relator cannot be held under the statute. The conclusion we have reached renders it unnecessary for us to consider the other very interesting questions discussed.

The relator is entitled to the writ prayed for.

(67 N. W. Rep. 824.)

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INDEX.

ABUSE OF DISCRETION. See PLEADING AND PRACTICE, 80.

Where it appeared upon the trial of an action, that plaintiff had been misled by defendants conduct, so that he framed his complaint upon a wrong theory and the true theory of the controversy being exposed by defendants testimony, obtained without objection. *Held*, it was an abuse of discretion for the trial court to refuse to allow plaintiff to amend his complaint to conform to the proof. *Anderson* v. *First Nat'l Bank*, 80.

ACCEPTANCE OF CONTRACT.

1. Where defendant turned over to plaintiff certain notes of third persons which were to be accepted by plaintiff in payment of a balance due him from defendant, if approved by plaintiff. *Held*, that the duty rested on plaintiff of ascertaining whether it would accept such notes as payment and of notifying defendant of its decision within a reasonable time. *Acme Harvester Co.* v. *Axtell*, 315.

2. Whether forty days after receiving notes subject to approval, is a reasonable time within which to notify defendant that it did not approve of them is a question of fact for a jury. *Acme Harvester Co.* v. *Axtell*, 315.

3. A and L guaranteed the due performance of and compliance with all the terms of the contract whereby R was appointed agent for W. D. & Co., a corporation, on the part of R as such agent. A general agent acted for the corporation in making the contract. The guaranty contract was on the same sheet as the agency contract. The agency contract stated on its face that W. D. & Co., would not be bound thereby until the contract was accepted and approved at the home office in Chicago. *Held*, that A and L could not enforce as against W. D. & Co., certain prior parole statements of the general agent not incorporated in the written contract, which was subsequently approved by the corporation. *Wm. Deering & Co.* v. *Russell*, 319.

ADMIRALTY. See APPEAL BOND, 196.

ADMINISTRATOR. See WITNESS, 140; PERSONAL REPRESENTATIVE, 460.

AFFIDAVIT OF MERITS.

An affidavit of merits as well as a verified answer are necessary for opening a default judgment. *Sargent* v. *Kindred*, 8.

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AGENCY. See PRINCIPAL AND AGENT.

1. An agent authorized to sell property of his principal cannot sell the same to himself. The rule is the same where he is authorized to sell at a specific price and assumes to sell to himself at that price. *Anderson* v. *First Nat'l Bank*, 80.

2. An officer or agent of a corporation has no implied authority to endorse paper of the corporation for his individual use. *Security Bank* v. *Kingsland*, 263.

3. A national bank cannot engage in the business of agency. *Anderson* v. *Bank*, 451.

4. An agent authorized to sell property for his principal, cannot without the knowledge of his principal sell to himself, and where an agent does so sell to himself the principal can recover the value of the property upon the theory of conversion irrespective of the price for which the agent was authorized to sell. *Anderson* v. *Bank*, 451.

AGISTERS LIEN. See LIEN, 277.

AMENDMENTS. See PLEADING AND PRACTICE, 80.

ANSWER. See PLEADING AND PRACTICE.

1. An answer to be frivolous must be so clearly and palpably bad as to indicate bad faith on the part of the pleader. *Sifton* v. *Sifton*, 187.

2. A verified answer, with affidavit of merits must be presented on application to vacate a judgment under section 4939, Comp. Laws. *Sargent* v. *Kindred*, 8.

ANOTHER ACTION PENDING. See GARNISHMENT, 100.

APPEAL.

1. The decision of the trial judge in granting a new trial on the ground of newly discovered evidence, will seldom be disturbed on appeal. *Patch* v. *N. P. Ry. Co.*, 55.

2. Actions tried to the court without a jury under Ch. 82, Laws 1893, will be tried *de novo* on appeal, upon all the evidence together with the exceptions preserved in the record. *Taylor* v. *Taylor*, 58.

3. On a trial *de novo* all exhibits whether received or not below should be identified by the certificate of the trial judge. *Taylor* v. *Taylor*, 58.

4. In actions tried on appeal under Ch. 82, Laws 1893, the court will determine the decree to be entered, but the record will be remanded to the court below to enter the same. *Taylor* v. *Taylor*, 58.

5. A trial at law before a jury, where the jury was withdrawn at close of testimony and case submitted to the court for findings and conclusions cannot be tried *de novo* on appeal under the provisions of Ch. 82, Laws 1893. *First Nat'l Bank of D. L.* v. *Merchants Nat'l Bank*, 161.

6. The judges certificate appended to the record must certify that all evidence offered was taken down in writing and that all evidence taken is certified by the judge. *First Nat'l Bank* v. *Merchants Nat't Bank*, 161.

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APPEAL—Continued.

7. Where the certificate of the trial judge gives no guaranty that all the evidence offered is before the Supreme Court but only such as was both offered and received, the case will not be tried *de novo* on appeal. *Doran* v. *Dazey*, 172.

8. Where the certificate recited that the record contained "all the proceedings had and testimony given" on the trial of the action. And where counsel made no point of the record not being in such shape as to admit of a trial *de novo* under Ch. 82, Laws 1893. The case was considered and determined upon its merits. *Nollman & Lewis* v. *Evenson*, 346.

9. The practice on appeal in admiralty cases to the Territorial Supreme Court was not regulated by the territorial statutes but by the rules and usages of courts of admiralty. *Braithwaite* v. *Jordan*, 196.

10. An error in the charge of the court may be reviewed on appeal from the judgment, without a motion for a new trial being made. *McPherrin* v. *Jones*, 261.

11. The proper remedy for the review of errors in contempt proceedings of a civil nature is by appeal. *State* v. *Barnes*, 350.

12. Where an appeal is available, *certiorari* is not the proper remedy to correct an error of law, arising at a trial before a justice of the peace, in any case. *Lewis* v. *Gallop*, 384.

13. Where the defendant was denied the right of pleading to the jurisdiction, *held*, that on appeal he should receive the benefit of all preliminary motions which could have been properly made below. *State* v. *Root*, 487.

14. An order of the District Court dismissing an appeal from a county court does not itself accomplish the dismissal. *Field* v. *Great Western Elev. Co.*, 400.

15. An appeal will not lie from an order overruling a demurrer to written accusations filed under section 7838, Rev. Codes, for the removal of a county officer from his office for malfeasance. *Myrick* v. *McCabe*, 422.

16. Where a defendant appeared by an attorney before a justice of the peace upon the return day, and such attorney asked to have his appearance entered by the justice in his docket, and the justice refused to do so, and proceeded to enter judgment against the defendant as for a default in his appearance, *held*, that the action of the justice of the peace could have been reviewed by an appeal upon questions of law, after settling and filing a statement with the justice setting out the facts of such appearance. *Certiorari* will not lie in such a case. *Lewis* v. *Gallup*, 384.

17. An order of the District Court, entered in its minutes by the clerk of that court, directing the dismissal of an appeal taken to the District Court from a judgment entered in a county court, does not itself accomplish the dismissal of the appeal. Until a judgment in entered in the District Court upon such order, the action will be pending in the District Court; and, while the action is pending in the District Court an appeal will not lie to this court from the county court, in which the judgment was originally entered. *Field* v. *Great Western Elev. Co.*, 400.

18. The trial of causes *de novo* under Ch. 82, Laws 1893, is not the performance of any function, which does not pertain to appellate jurisdiction. *Christianson* v. *Farmers Warehouse Assn.*, 438.

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APPEAL BOND.

1. An action on appeal undertaking is not a proceeding to enforce the judgment appealed from. *Braithwaite* v. *Jordan*, 196.

2. It is no defense to an action on a statutory undertaking on appeal that the court has not fixed the amount thereof under the statute. Such provision is for the benefit of the respondent, and if he waive it, and treat the undertaking as sufficient to accomplish the purpose for which it was given, the undertaking may be enforced by him, the same as if the statute had been complied with. *Braithwaite* v. *Jordan*, 196.

3. An appeal bond held a stipulation for value and enforceable. *Braithwaite* v. *Jordan*, 196.

4. It was no defense to an action on a statutory undertaking on appeal that the court had not fixed the amount thereof. *Braithwaite* v. *Jordan*, 196.

5. Bond given to stay proceedings on appeal in admiralty, held a good common law undertaking based on sufficient consideration and therefore enforceable. *Braithwatte* v. *Jordan*, 196.

APPELLATE COURT. See SUPREME COURT.

1. This court has original jurisdiction in cases in which the writs named in the constitution may be employed to initiate such jurisdiction. But that jurisdiction is limited to cases involving the sovereignty of the state, its perogatives or franchises, or the liberty of the citizen; this court judging for itself in each case whether that case is within its jurisdiction. *State* v. *Archibald*, 359.

2. Where the appellant in a disbarment proceeding, was compelled by the trial court, to either admit or deny the charges against him, *held*, on appeal that he will be entitled in the appellate court to the benefit of all preliminary motions which he could have properly made in the court below if the right had been accorded him. *State* v. *Root*, 489.

3. This court has original jurisdiction only in the excepted cases mentioned in the constitution. But Ch. 82, Sess. Laws 1893, which provides that all cases tried below by the court shall on appeal be tried anew in this court, and final judgment rendered thereon, does not require this court to perform any functions that do not pertain to appellate jurisdiction, and said chapter is not therefore a violation of the constitutional provisions conferring appellate jurisdiction only upon this court. *Christianson* v. *Farmers Warehouse Assn.*, 438.

APPEARANCE. See ATTORNEYS AT LAW.

1. An attorney cannot withdraw his appearance in hostility to his client and without her knowledge, and bind her thereby. *Nichells* v. *Nichells*, 125.

2. A general appearance after judgment will not operate to validate a void judgment. *Stewart* v. *Parsons*, 273.

ASSESSORS. See REPEALS BY IMPLICATION, 406.

ASSIGNMENTS FOR CREDITORS.

1. The reservation of exempt property in a deed of assignment, does not render the assignment void. *Bangs* v. *Fadden*, 92.

2. Deed of assignment examined, construed, and held not to require creditors to file releases as a condition to securing benefits thereunder. *Bangs* v. *Fadden*, 92.

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ASSIGNMENTS OF ERROR.

1. Appellant must assign in his brief such errors as he desires reviewed and the assignments of error must be preceded by and predicated upon specifications of error in the bill of exceptions. *First Nat'l Bank of D. L.* v. *Merchants Nat'l Bank, D. L.* 161; *Schmitz* v. *Heger*, 165.

2. Assignments of error in the printed abstract is not a compliance with the rules of Supreme Court. *First Nat'l Bank* v. *Merchants Nat'l Bank*, 161.

ASSIGNEE OF CHOSE IN ACTION. See REAL PARTY IN INTEREST, 460.

ATTACHMENT FOR CONTEMPT. See CONTEMPT OF COURT, 147.

ATTORNEYS AT LAW.

1. An attorney who has appeared and filed an answer for defendant has no authority to withdraw such answer and appearance merely because his client has failed to pay his fee. *Nichells* v. *Nichells*, 125.

2. An attorney cannot be disbarred as a punishment for contempt. *State* v. *Root*, 487.

3. Certain contempts of court, when committed by an attorney, will furnish grounds for his suspension or disbarment from practice; but an attorney cannot be lawfully suspended or disbarred as a punishment inflicted in a summary and *quasi* criminal proceeding instituted and conducted in accordance with the statute governing prosecutions for the offense of contempt of court. *State* v. *Root*, 487.

4. Disbarment proceedings are governed by special statutory provisions; and, unless an attorney waives his rights, he cannot be lawfully disbarred or suspended from practice until he has been accorded a trial under the safeguards of this statute. *State* v. *Root*, 487.

5. Professional misconduct which falls short of being a contempt of court may yet furnish grounds for the revocation of an attorney's license in a proceeding brought expressly for that purpose. Threats of assault made directly and personally to the judge when out of court, but on account of his official action, and insults and menaces offered to the judge directly and personally out of court, but on account of the judge's official action, will afford a basis for proceedings to disbar an attorney. *People* v. *Green*, (Colo.) 3 Pac. 65; *Beene* v. *State*, 22 Ark. 149; *People* v. *Green* 9 Colo. 506, 13 Pac. 514; *Ex parte Bradley*, 7 Wall. 364; *State* v. *Root*, 487.

6. Notice to the attorney for the defendant of entry of judgment against the defendant is notice to the defendant within section 4939, Comp. Laws. *Sargent* v. *Kindred*, 472.

7. The remarks of counsel in addressing the jury are largely within the discretion of the trial court, and no error will be declared thereon except in case of a clear abuse of discretion. Counsel should not be fettered in arguing his case to the jury. Objectionable remarks in this case, with the rulings and instructions of the court thereon, considered, and *held* not error. *State* v. *Kent*, 518.

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ATTORNEYS AT LAW—Continued.

8. Even when the witness is also the party defendant, he cannot claim his privilege through his attorney; but it is highly proper in such a case that the attorney suggest to the court that the witness be apprised of his constitutional rights. *State* v. *Kent*, 518.

BILL OF EXCEPTIONS.

1. A bill of exceptions must contain specifications of error occurring at the trial. *First Nat'l Bank* v. *Merchants Nat'l Bank*, 161.

2. Where the bill of exceptions contained no specifications of error; alleged errors of law discussed in appellants brief will not be reviewed in this court. *Schmitz* v. *Heger*, 165.

3. The District Judge has power to settle a bill of exceptions after an appeal has been perfected where the original record in the case is still in the District Court. *Coulter* v. *G. N. Ry. Co.*, 568.

BILL OF LADING. See FACTORS AND BROKERS, 476.

BOND.

The bail bond of a defendant to secure his attendance upon court from day to day cannot by mere order of court entered in the minutes after defendants conviction be continued in force or made binding either on defendant or his sureties. *In re Markuson*, 180.

BOND ON APPEAL. See APPEAL BOND, 196.

BOND FOR DEED.

A bond for deed and the notes given for the purchase price of the land must be construed together as one indivisible contract. *Shelley* v. *Mikkelson*, 22.

BURDEN OF PROOF. See EVIDENCE.

CASES OVERRULED OR MODIFIED.

The language used in *Security Trust Co.* v. *Whithed*, 2 N. D. 318, should have been limited to the section of the usury law then under consideration. *Folsom* v. *Kilbourne*, 402.

CERTIORARI.

1. *Certiorari* is not the proper remedy to correct an error of law arising at a trial before a justice of the peace in any case where the ordinary remedy by appeal would be available. *Lewis* v. *Gallup*, 384.

2. *Certiorari* will not lie to review the action of a justice of the peace in refusing to enter the appearance of an attorney and entering judgment against the defendant by default. *Lewis* v. *Gallup*, 384.

CERTIFICATE OF DEPOSIT. See NEGOTIABLE INSTRUMENTS.

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CERTIFICATE OF TRIAL JUDGE. See APPEAL.

1. The judges certificate appended to the record upon an appeal under Ch. 82, Laws 1893, must not only certify that the record sent to this court contains all testimony taken at the trial, but also all evidence offered. *First Nat'l Bank* v. *Merchants Nat'l Bank*, 161.

2. Where the certificate of the trial judge gives no guaranty that all the evidence offered is before the Supreme Court but only such as was both offered and received, the case will not be tried *de novo* on appeal. *Doran* v. *Dazey*, 172.

3. Where the certificate recited that the record contained "all the proceedings had and testimony given" on the trial of the action and where counsel made no point of the record not being in such shape as to admit of a trial *de novo* under Ch. 82, Laws 1893. The case was considered and determined upon its merits. *Nollman & Lewis* v. *Evenson*, 346.

CHATTEL MORTGAGES.

1. In this state it is competent for the owner and operator of a "threshing rig" to mortgage the future earnings thereof. *Sykes* v. *Hannawalt*, 335.

2. But such mortgage must be filed for record in the same manner as a mortgage upon any other personal property, and, if not so filed, it is void as against a creditor of the mortgagor who became such in ignorance of the existence of the mortgage, after the same was executed, and before it was filed for record, relying upon the mortgagor's apparent ownership of such earnings. *Sykes* v. *Hannawalt*, 335.

3. A fraudulent intent is not a necessary ingredient of the offense of selling mortgaged property, under Comp. Laws, 6933. *State* v. *Bronkol*, 507.

CHANGE OF VENUE—See CRIMINAL LAW AND PRACTICE, 516.

CHAIN OF TITLE.

The record of an instrument out of the chain of title is not constructive notice. *Doran* v. *Dazey*, 167.

CHALLENGE OF JUROR. See CRIMINAL LAW AND PRACTICE, 516.

While a jury was being impaneled, the state had exercised five of the six peremptory challenges allowed by law. The state challenged a proposed juror for cause. The examination of the juror disclosed that he was generally disqualified. The court, however, denied the challenge, and thereupon the state challenged the juror peremptorily. Immediately thereafter the court sustained the challenge for cause, and the juror stepped aside. Subsequently the court permitted the state to exercise another peremptory challenge. *Held*, no error. *State* v. *Kent*, 516.

CITY. See MUNICIPAL CORPORATION, 173, 281.

CONSTRUCTIVE NOTICE. See NOTICE, 167.

CONSIDERATION. See CONTRACTS, 263, 191, 297, 393.

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CONSTITUTIONAL LAW.

1. The statute authorizing the several counties to grant exclusive ferry franchises for a period of years to the highest bidder, does not authorize a monopoly. *Patterson* v. *Wollmann*, 608.

2. Revised Codes, § § 1738 to 1743 are in conflict with the constitution in so far as they attempt to tax persons selling by sample goods shipped into the state from another state and being void as to such persons are void as to all others. *State* v. *O'Connor*, 629.

3. The legislature cannot cure by retroactive legislation a defect in foreclosure proceedings arising from insufficient notice of sale. *Finlayson* v. *Peterson*, 587.

4. The right to attack a criminal charge at the outset for insufficiency is fundamental and to deny it to the accused is to deny him due process of law. *State* v. *Root*, 487.

5. Laws 1893, Ch. 82, providing for a retrial on appeal of cases tried below by the court without a jury, is not a violation of the constitutional provisions conferring appellate jurisdiction only upon the Supreme Court. *Christianson* v. *Farmers Warehouse Ass'n.*, 438.

6. That an officer may be removed from office for the causes mentioned in section 197 of the constitution does not prevent the exercise of the power of removal by the trustees of public institutions. *State* v. *Archibald*, 359.

7. Whether the state will itself operate the public ferries within its borders, or whether it will confer this right on others, and the terms on which it will give others this special privilege, and whether an exclusive franchise shall be granted,—these and all other questions connected with the subject are absolutely within the control of the legislature. *Patterson* v. *Wollmann*, 608.

8. In contempt proceedings the party charged is not entitled to a jury trial. *State* v. *Markuson*, 147.

9. The minimum punishment under § 13, Ch. 110, Laws 1890, does not impair or destroy the inherent power of courts to enforce obedience to their orders; and is a valid exercise of legislative power. *State* v. *Markuson*, 147.

10. Chapter 55, Laws 1890, which delegates to boards of county commissioners the power to fix salaries of state's attorneys, is in controvention of section 173 of the constitution of North Dakota, which requires the legislative assembly "to prescribe the duties and compensation of all county, township, and district officers," and is therefore void. *Doherty* v. *Ransom County*, 1.

11. The adoption of the foregoing provision in the constitution did not in itself repeal the pre-existing statute, valid when enacted, and which gave to boards of county commissioners power to fix the salaries of state's attorneys, and such boards may continue to exercise such power until the legislative assembly prescribes such compensation by statute as required by the constitutional provision. *Doherty* v. *Ransom County*, 1.

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CONSTITUTION; CITED OR CONSTRUED.

SEC.	PAGE.	SEC.	PAGE.
173	5	87	361-368-442
2 Schedule	4	176	407
67	116	103	443
7	155	13 Art. 1	554
197	360-379	20	608-612
86	361-366-442		

CONTEMPTS. See APPEAL, HABEAS CORPUS.

1. Where a contempt proceeding is civil in its nature, it can only be reviewed by appeal as to errors committed. *State* v. *Barnes*, 350.

2. *Habeas corpus* is not a proper remedy for review of civil contempts. *State* v. *Barnes*, 350.

3. Language abusive of the judge not spoken in the court room is not a contempt. *State* v. *Root*, 487.

4. A proceeding for contempt and one for disbarment founded upon the contempt cannot be joined. *State* v. *Root*, 487.

5. An affidavit in a summary proceeding for contempt, will be construed according to the strict rules of criminal pleading. *State* v. *Root*, 487.

6. An affidavit attempting to charge a contempt of court committed by using offensive language respecting the presiding judge of said court, but which failed to allege that such language was spoken in the immediate view and presence of the court, *held*, insufficient, in substance, to charge the crime of contempt, either at common law or under the statute. *State* v. *Root*, 487.

7. Where a criminal contempt of court occurs in open court, and within the personal knowledge and observation of the presiding judge, it can be punished, not only summarily, but without the use of either pleadings or evidence, other than the evidence of the judge's senses. Rev. Codes, § § 5932, 5933, 5935. *State* v. *Root*, 487.

8. Where an affidavit in a summary proceeding is filed charging a criminal contempt, such affidavit will be tested by the rules of criminal pleading which are applicable to indictments and informations; and this rule obtains whether the prosecution is begun under the statute or not. *State* v. *Root*, 487.

9. The statute governing summary criminal prosecutions for contempt of court is designed for such cases only, and is wholly independent and different from the disbarment proceedings authorized by the statute. See Rev. Codes, § § 433, 434, 5935, and following sections. *State* v. *Root*, 487.

10. Civil and criminal contempts distinguished, following *State* v. *Davis*, 2 N. D. 461. *State* v. *Markuson*, 147.

11. The court cannot order a sentence for contempt of court to be suspended pending an appeal and to take effect when the remittitur is filed in the District Court. *In re Markuson*, 180.

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CONTEMPTS—Continued.

12. A judgment imposing a fine and imprisonment for contempt of court under § 13, Ch. 110, Laws 1890, may be reviewed by writ of error. *State* v. *Markuson*, 147.

13. What can be reviewed upon writ of error from judgment under section 13 of the prohibitory liquor law. *State* v. *Markuson*, 147.

14. A party charged with contempt is not entitled to jury trial. *State* v. *Markuson*, 147.

15. Affidavit for attachment in contempt proceeding for violation of injunction, when sufficient. *State* v. *Markuson*, 147.

16. The inherent power of courts to punish for contempt of their orders is not impaired by the minimum punishment being fixed in Ch. 110, Laws 1890. *State* v. *Markuson*, 147.

CONTRACTS. See VENDOR AND PURCHASER, BOND FOR DEED, NEGOTIABLE INSTRUMENTS, SALE, WARRANTY.

1. Equity will not specifically enforce a contract to give a minority stockholder the right to control the stock of another and vote it at a stockholders' meeting, where the sole purpose is to secure control of the corporation by the use of such stock. *Gage* v. *Fisher*, 297.

2. Therefore, when such a contract has been made, and on the strength of it the promisee has suffered to pass beyond his control stock which, in connection with stock owned by him, would have given him control of the corporation, and thereafter the promisor threatens to sell his stock to the opposing faction, and thus give them control of the corporation, and the promisee, to save himself from defeat in his project to secure control of the corporation, purchases such stock at a figure much in excess of its normal market value, such contract of purchase cannot thereafter be rescinded, but the purchaser must pay the stipulated price. *Gage* v. *Fisher*, 297.

3. A contract to allow another to control the voting of stock, based upon a promise of the one who is to control such stock to secure for the owner of the stock an office in the corporation, is illegal; and the whole contract is void, although the illegal consideration (*i. e.* the promise to secure for the owner of the stock a corporate office) constitutes only a part of the consideration for the agreement to give such promisee control of the stock. *Gage* v. *Fisher*, 297.

4. Where notes were delivered to plaintiffs agent upon an agreement that they would be accepted as payment upon approval by plaintiff, an unreasonable delay on plaintiffs part in notifying defendant of its disproval was equivalent to acceptance of the notes. *Acme H. M. Co.* v. *Axtel*, 315.

5. A contract upon consideration contrary to public policy will not be enforced. *Gage* v. *Fisher*, 297.

6. Want of consideration of a school bond may be shown. *Flagg* v. *School District*, 191.

7. A written contract supercedes all prior parole agreements not incorporated in the writing. *Deering & Co.* v. *Russell*, 319.

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CONTRACTS—Continued.

8. Under an executory contract of sale of land, where the purchaser was let into possession, with full use of the premises, but bound to pay a stipulated price therefor, and to pay each year "so much as the one-half of all crops on said land shall amount to," *held*, that no relation of landlord and tenant could arise under such contract, nor would the parties be tenants in common of the crops grown on such land by the vendee, unless the contract created such relationship by express language or necessary implication. *Moen* v. *Lillestal*, 327.

9. Contract examined, and *held* not to constitute a transfer to the vendor, or a reservation in him of any title or ownership in or lien upon the crops to be grown on the land by the vendee. *Moen* v. *Lillestal*, 327.

10. A. and L. guaranteed the due performance of and compliance with all the terms of the contract whereby R. was appointed agent for W. D. & Co., a corporation, on the part of R. as such agent. A general agent acted for the corporation in making the contract. The guaranty contract was on the same sheet with the agency contract. The agency contract stated on its face that W. D. & Co. would not be bound thereby until the contract was accepted and approved at the home office in Chicago. *Held*, that A. and L. could not enforce, as against W. D. & Co., certain prior parole statements of the general agent, not incorporated in the written contract which was subsequently approved by the corporation. *Deering & Co.* v. *Russell*, 319.

11. *Held*, further, that when the guaranty contract recited that the liability of the guarantors could not be modified or canceled, except in the manner therein specified, A. and L. could not insist upon a modification of such liability on other and excluded grounds. *Deering & Co.* v. *Russell*, 319.

12. *Held*, further, that while the agent, R., agreed by parol with the general agent that his commissions for handling a certain article should be used to reduce his prior indebtedness to W. D. & Co., W. D. & Co. was under no duty to impart this agreement to the guarantors, and their ignorance of it furnished no defense to an action on the contract of guaranty. *Deering & Co.* v. *Russell*, 319.

13. R. defaulted largely in complying with the terms of his agency contract, and turned over to W. D. & Co. an amount of notes and accounts as collateral to his indebtedness under the contract. *Held*, that W. D. & Co. was not obliged to exhaust the collaterals before proceeding against the guarantors, nor were they (the guarantors) entitled to be credited with the value of such collaterals. *Deering & Co.* v. *Russell*, 319.

14. An existing legal obligation is sufficient of itself to constitute a valuable consideration for a promise to an extent corresponding with the extent of such obligation. *First Nat. Bank* v. *Lamont*, 393.

CONTRIBUTORY NEGLIGENCE. See NEGLIGENCE, 281, 173.

CONVERSION. See TROVER AND CONVERSION.

COUNTING UPON STATUTE. See PLEADING AND PRACTICE, 483.

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COUNTIES.

1. An insufficient notice of an election on a proposition to change a county seat, does not avoid the election if no one was misled thereby. *State* v. *Langlie*, 594.

2. A notice of election upon a proposition to change the county seat held sufficient. *State* v. *Langlie*, 594.

3. The question whether the petition for an election on a proposition to change a county seat was signed by a sufficient number of voters, *held*, not open to review. *State* v. *Langlie*, 594.

4. The two-thirds vote required to change a county seat means two-thirds of the votes cast on the proposition to change the county seat. *State* v. *Langlie*, 594.

COUNTY SEAT CONTEST. See COUNTIES, MANDAMUS.

COUNTY COMMISSIONERS. See COUNTIES, 594; FERRIES, 608.

1. Duties as to giving notice of election. *State* v. *Langlie*, 594.

2. The board of county commissioners to which an unorganized county is attached for judicial purposes, has no power to grant a ferry franchise between points, one of which is within the unorganized, but neither of which is within the organized county whose board granted the franchise. *Patterson* v. *Wollmann*, 608.

3. County commissioners have no authority to fix salary of states attorney under Ch. 55, Laws 1890, said statute is void as a delegation of legislative authority. *Doherty* v. *Ransom Co.*, 1.

4. Commissioners had authority to fix salaries of states attorneys under section 431, Comp. Laws, and this statute was not repealed by the adoption of the constitution or by section 173 thereof. *Doherty* v. *Ransom Co.*, 1.

CORPORATIONS. See MUNICIPAL CORPORATIONS.

1. An officer of a corporation has no implied authority as such to indorse and deliver a promissory note owned by the corporation as security for his individual debt. *Security Bank* v. *Kingsland*, 263.

2. Equity will not specifically enforce a contract to give a minority stockholder the right to control the stock of another and to vote it at a stockholders meeting where the sole purpose is to secure control of the corporation by the use of such stock. *Gage* v. *Fisher*, 297.

COURT RULES. See APPEAL, 161, 165.

COUNTERCLAIM. See PLEADING AND PRACTICE, WARRANTY.

CRIMINAL LAW AND PRACTICE. See CONTEMPT, EVIDENCE, INSTRUCTIONS, JURY.

1. A motion in arrest of judgment only reaches defects available on demurrer. *State* v. *Kent*, 516.

2. A motion to set aside an informaton cannot be made after a plea of not guilty and one trial on that plea. *State* v. *Kent*, 516.

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CRIMINAL LAW AND PRACTICE—Continued.

3. For the purpose of showing motive, the remoteness in time of the commission of a collateral crime cannot be considered. *State* v. *Kent*, 516.

4. It is not error to refuse instructions as to matters fully and correctly covered in the general charge. *State* v. *Kent*, 516.

5. It is proper to prove the commission by the accused of another crime which might furnish a motive for the crime for which he is being tried. *State* v. *Kent*, 516.

6. Instructions examined, and *held* not to invade the province of the jury, or to assume facts as proven. *State* v. *Kent*, 516.

7. On a second trial on the same information, witnesses who testified on the first trial without objection are competent, though their names are not indorsed on the information. *State* v. *Kent*, 516.

8. Preliminary questions are admissible to connect what follows, even though the relevancy of such questions may not be apparent when asked. *State* v. *Kent*, 516.

9. Separation of the jury, after being sworn and before the case was submitted, *held* to furnish no ground for new trial. *State* v. *Kent*, 516.

10. The flight of accused may be shown, and officers may testify as to steps taken to locate the accused. *State* v. *Kent*, 516.

11. The state can introduce, through an accomplice, all matters of probative force, in order to make his testimony inherently probable. *State* v. *Kent*, 516.

12. Under Comp. Laws, § 7312, a change of venue granted before the jury is impaneled is granted before the trial is begun. *State* v. *Kent*, 516.

13. Where accused has the right to a change of venue, he may consent in open court that the case be sent to the District Court of some county that is not "near or adjoining." *State* v. *Kent*, 516.

14. Where evidence is properly admitted for one purpose, it will not be presumed that it is considered for a purpose for which it is not competent. *State* v. *Kent*, 516.

15. Alleged objectionable remarks of counsel with the rulings of the court thereon considered, and *held* not error. *State* v. *Kent*, 516.

16. The jury having returned no verdict on the prior prosecution, *held*, that a plea of former acquittal was properly overruled. *State* v. *Bronkol*, 507.

17. A plea of former acquittal is not sustained by a showing that defendant was put upon trial before first being arraigned and entering a plea. *State* v. *Bronkol*, 507.

18. Section 6933, Comp. Laws, construed *Held*, that the statutory offense defined by the section is established by showing that a sale of mortgaged property without the consent of the mortgagee, and while the mortgage was in force, was made "willfully;" *i. e.* intentionally, and not by a mistake. The intent to defraud by such sale is not an essential ingredient of the crime. *State* v. *Bronkol*, 507.

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CRIMINAL LAW AND PRACTICE—Continued.

19. Where the defendant was denied the right of pleading to the jurisdiction, *held*, that on appeal he should receive the benefit of all preliminary motions which could have been properly made below. *State* v. *Root*, 487.

20. Abusive and defamatory language concerning a judge and his official action not uttered in the court house or in the view and presence of the court, does not constitute the offense of contempt of court. *State* v. *Root*, 487.

21. An affidavit does not charge contempt where it contained no averment that the language charged, was used in the view and presence of the court. *State* v. *Root*, 487.

22. A criminal contempt within the knowledge and observation of the presiding judge, can be punished summarily without the use of either pleadings or evidence. *State* v. *Root*, 487.

23. An affidavit charging a criminal contempt will be tested by the rules of criminal pleading. *State* v. *Root*, 487.

24. The statute governing criminal prosecutions for contempt of court is designed for such cases only, and differs from a disbarment proceeding as authorized by statute. *State* v. *Root*, 487.

25. An attorney cannot be punished for criminal contempt and disbarred from practice in one and the same proceeding. *State* v. *Root*, 487.

26. The right to attack a criminal charge at the outset for insufficiency is fundamental and to deny it to the accused is to deny him due process of law. *State* v. *Root*, 487.

27. An attorney cannot be lawfully suspended or disbarred as a punishment inflicted in a summary and *quasi* criminal proceeding instituted and conducted in accordance with the statute governing prosecutions for contempt of court. *State* v. *Root*, 487.

28. Instruction of the court to disregard passages between court and counsel during trial is proper. *State* v. *Kent*, 516.

29. A defendant is subject to same rules of cross-examination as any other witness, and will be compelled to answer any proper question in cross-examination, tending to convict him of the crime for which he is being tried even though his answer may tend to convict him of some collateral crime. *State* v. *Kent*, 516.

30. The punishment of an act by the court as a contempt does not preclude the state in a proper action from punishing the same act as a crime. *State* v. *Markuson*, 147.

31. The court cannot by a mere order entered in the minutes continue in force a bail bond given by defendant for his attendance from day to day before conviction so as to bind him or his sureties after conviction. *In re Markuson*, 180.

32. After a judgment of conviction has been made and entered and sentence passed fixing date when imprisonment shall commence, the trial court has no jurisdiction by subsequent orders to postpone from time to time the date when said sentence shall begin to run. *In re Markuson*, 180.

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CURATIVE LEGISLATION.

It is not within the power of the legislature to cure by retroactive legislation the defect in foreclosure proceedings arising from the failure to publish the notice of sale for the full period of forty-two days and thus validate the void proceeding. *Finlayson* v. *Peterson*, 587.

DAMAGES.

1. A married woman who has incurred liability for medical attendance made necessary by an injury for which another is liable may recover as part of her damages a sum equal to the amount of such liability, although she has not paid for said medical attendance at the time of the trial. *Chacey* v. *City of Fargo*, 173.

2. An agent is liable for a conversion of properiy entrusted to him for sale and sold to himself, upon the basis of the value of the property at the time of the conversion irrespective of the price for which he was authorized to sell to a third person. *Anderson* v. *Bank*, 451.

3. Where a second mortgagee brings an action against the first mortgagee for the wrongful conversion of the property covered by the two mortgages, his measure of damages is the value of the property converted, modified by the principal of compensation for the actual injury suffered. *Lovejoy* v. *Merchants State Bank*, 623.

4. Where a second mortgagee sues for conversion by the first mortgagee of property covered by both mortgages—and the value of the property was less than the amount secured by the first mortgage. No damages can be recovered by the second mortgagee as none have been suffered. *Lovejoy* v. *Merchants State Bank*, 623.

DEFAULT. See JUDGMENT, PLEADING AND PRACTICE.

1. Where defendants attorney in bad faith and in hostility to his client, withdrew his answer and appearance and a default was taken against defendant for want of answer, the court having notice of the act of bad faith, *held*, that the judgment entered was illegal in its inception and should be set aside on motion of defendant. *Nichells* v. *Nichells*, 125.

2. Where a defendant has been duly and personally served with summons and thereafter a judgment by default is entered against him, his motion to set aside the default and for leave to come in and defend is an appeal to the favor of the trial court. *Stewart* v. *Parsons*, 273.

3. The appellate court will not except in case of an unsound exercise of judicial discretion by the trial court review the action of the trial court in refusing to set aside a default judgment. *Stewart* v. *Parsons*, 273,

4. In an action against husband and wife, the summons was personally served upon the husband, and a copy delivered to him for the wife. A judgment by default against the wife was held void for want of service of summons. *Stewart* v. *Parsons*, 273.

5. A motion to vacate a judgment under section 4939, Comp. Laws, must be submitted and decided within a year. But the court may direct the order granting the relief to me made and entered *nunc pro tunc* as of the time when the motion was finally submitted. *Sargent* v. *Kindred*, 472.

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DEFAULT—Continued.

6. When under Subd. 5, § 4900, Comp. Laws, (section 5260, Rev. Codes,) a party served by publication, after default, but before judgment applied for leave to serve an answer and defend in the case, and the court has held that sufficient cause had been shown, the right of the party to defend became absolute. *Smith* v. *Nicholson*, 426.

DELEGATION OF LEGISLATIVE AUTHORITY.

The power to delegate is restricted by section 173 of the state constitution. *Doherty* v. *Ransom Co.*, 1.

DISBARMENT. See ATTORNEYS AT LAW, 487.

1. Unless an attorney waives his rights he cannot be lawfully disbarred or suspended from practice until he has been accorded a trial under the safeguards of the special statute governing disbarment proceedings. *State* v. *Root*, 487.
2. Professsional misconduct which falls short of being a contempt of court, may yet furnish grounds for the revocation of an attorneys license in a proceeding brought expressly for that purpose. *State* v. *Root*, 487.
3. An attorney tried and convicted of contempt cannot be punished by disbarment. *State* v. *Root*, 487.

DISCRETION OF COURT. See PLEADING AND PRACTICE, 80; DEFAULT, 273.

DISMISSAL OF APPEAL. See PLEADING AND PRACTICE, 400.

DISTRICT ASSESSORS. See REPEALS BY IMPLICATION, 406.

DISTRICT COURT. See REMOVAL OF CAUSES, 8.

DIVORCE. See ATTORNEYS AT LAW, 125.

1. In an action for divorce for cruelty, condonation by cohabitation is not shown in the absence of an express agreement. *Taylor* v. *Taylor*, 58.
2. Where an express agreement to condone is shown, the original cause is renewed by subsequent cruelty. *Taylor* v. *Taylor*, 58.
3. A judgment as by default taken against defendant in a divorce case through fraud of her counsel will be set aside as matter of strict legal right. *Nichells* v. *Nichells*, 125.

DUE PROCESS OF LAW. See CONSTITUTIONAL LAW, 489.

ELECTION CONTEST. See COUNTY SEAT, 594; MANDAMUS.

ELECTION OF REMEDIES.

1. Where a principal waives an action for conversion of his property by his agent and sues on an implied contract of purchase, it is merely a waiver of the element of tort in the transaction. *Anderson* v. *First Nat'l Bank*, 451.
2. Where an agent authorized to sell property sells to himself, the owner can waive the tort and treat the conversion as a purchase, and recover in assumpsit. *Anderson* v. *First Nat'l Bank*, 80.

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ELECTION OF REMEDIES—Continued.

3. Where plaintiff set forth two causes of action in his complaint, when his purpose was to recover a single claim, it was proper practice for defendant to move to compel the plaintiff to elect on which theory he would claim a recovery. *Purcell* v. *Insurance Co.*, 100.

4. Defendant may in a proper case plead the same facts both as a defense and counterclaim and cannot be compelled to elect upon which he will rely. *Nollman & Lewis* v. *Evenson*, 344.

ENTRY OF JUDGMENT. See APPEAL, 400.

EQUITY. See SPECIFIC PERFORMANCE.

1. Equity will not specifically perform a contract contrary to public policy. *Gage* v. *Fisher*, 297.

2. A guarantor cannot compel the holder of his contract to exhaust his collaterals before proceeding against the guarantors. *Deering & Co.* v. *Russell*, 319.

3. An action upon notes given as purchase price for land and described in a bond for deed as the consideration therefore is an action for specific performance and triable to the court. *Shelly* v. *Mikkelson*, 22.

4. In equitable actions parties are not entitled to a jury trial. *Shelly* v. *Mikkelson*, 22.

ERROR.

1. Where appellant had been cited before the court upon an order to show cause not only why he should not be punished as for a contempt of court but also why he should not be disbarred from practice, and appellant before pleading "attempted to except to the jurisdiction of the court" but was required to plead at once to the facts, *held*, prejudicial error. *State* v. *Root*, 487.

2. A presumption of prejudice arises from an error which might operate to the injury of the party against whom it was committed. *McPherrin* v. *Jones*, 261,

ESTATES OF DECEASED PERSONS.

A gift *causa mortis* forms no part of the estate of a deceased person and the personal representative can lay no claim thereto. *Seybold* v. *Bank*, 460.

ESTOPPEL.

1. A national bank cannot plead *ultra vires*, to justify a breach of trust. *Anderson* v. *Bank*, 451.

2. After a county seat election has been ordered and held, and a sufficient vote is cast in favor of some one place to work a relocation of the county seat, the question whether the petition presented to the board of county commissioners praying that such an election be held was signed by a sufficient number of voters is not open to judicial investigation, when the board has found that it was so signed. *State* v. *Langlie*, 594.

3. A party cannot complain that all the evidence taken is not before the Supreme Court under Ch. 82, Laws 1893, when the omitted evidence was excluded upon his objection. *Taylor* v. *Taylor*, 58.

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EVIDENCE.

1. Where ones own witness disproves the case he has been called to prove, he may be asked whether he has not made to the party calling him statements conflicting with his testimony. *George* v. *Triplett*, 50.

2. Evidence. How preserved for review under the "Newman" law. *Taylor* v. *Taylor*, 58.

3. To sustain a seizure of grain under a threshers lien, the party making the seizure must establish that the grain seized was grown upon the land described in the statement for the lien. *Martin* v. *Hawthorne*, 66.

4. Evidence of waiver of proofs of loss in action on insurance policy. *Purcelll* v. *Insurance Co.*, 100

5. In an action against an insurance company upon a policy, the record of an action in another state wherein defendant made disclosure as to its liability to plaintiff is admissable. *Purcell* v. *Insurance Co.*, 100.

6. Parole evidence cannot be admitted to contradict the terms of a written contract. *Deering & Co.* v. *Russell*, 319.

7. Evidence of mistake in a written contract is only admissible when the mistake was mutual. *Deering & Co.* v. *Russell*, 319.

8. Evidence examined and found sufficient to sustain the findings. *Nollman & Lewis* v. *Evenson*, 344.

9. Incompetent evidence cannot be first objected to in the Supreme Court. *Purcell* v. *Insurance Co.*, 100.

10. A party can testify in his own behalf as to payment made to a deceased administrator in an action by his successor. *St. John* v. *Lofland*, 140.

11. Evidence that a loose plank in a sidewalk had been in such condition for a long time is admissible to show notice. *Chacey* v. *Fargo*, 173.

12. Evidence examined and held that defendant city was liable for an injury caused by a defect in a sidewalk. *Chacey* v. *Fargo*, 173.

13. A want of consideration for school district bonds may be shown by proving that the bonds were not sold either for cash or for warrants or claims actually audited and surrendered. *Flagg* v. *School District*, 191.

14. Where an officer of a corporation indorsed and delivered a note of the corporation as collateral security for his individual debt the plaintiff in order to show that it received the paper in due course of business had the burden of showing that the officer who made the loan had authority to indorse and transfer the paper as was done. *Security Bank* v. *Kingsland*, 263.

15. A presumption of prejudice arises from an error which might operate to the injury of the party against whom it was committed and the burden is on his adversary to show no injury in fact was caused by such error. *McPherrin* v. *Jones*, 261.

16. The burden of proving contributory negligence is on the defendant. *Ouverson* v. *City of Grafton*, 281.

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EVIDENCE—Continued.

17. Whether a given object standing upon the street is calculated to frighten horses of ordinary gentleness is not a question for expert testimony. *Ouverson* v. *City of Grafton*, 281.

18. Evidence that a certain steam engine was in operation an hour before the accident, and a few minutes thereafter, *held*, incompetent to establish the fact that such engine was in operation when the accident occurred. *Ouverson* v. *City of Grafton*, 281.

19. Evidence examined and found sufficient to sustain a verdict of "guilty of murder." *State* v. *Kent*, 516.

20. It is not error to permit answers to preliminary questions whose relevancy is not then apparent for the purpose of connecting what follows. *State* v. *Kent*, 516.

21. Evidence of the flight and secretion of one accused of crime is competent. It is also competent to prove by the officers what steps were taken to locate and arrest the accused. *State* v. *Kent*, 516.

22. Where jurors after being sworn in a homicide case, separate without consent of the court, under circumstances which give an opportunity for improper influences to be exercised over them; prejudice to the accused will be presumed and the burden is on the state to overcome such presumption. *State* v. *Kent*, 516.

23. An accomplice, as a witness, cannot by any means corroborate himself, within the meaning of the statute which requires the testimony of an accomplice to be corroborated in order to warrant conviction; but the state has the right to introduce, through the accomplice, all matters of probative force in the case to which he can testify, whether written or otherwise, in order to make his testimony as strong and inherently probable as the facts will warrant. *State* v. *Kent*, 516.

24. While it is true in this jurisdiction that the cross-examination of a witness (except as to matters affecting credibility) must be confined to the subjects to which the direct examination was addressed, yet this does not limit cross-examination to the particular facts to which the witness testified on direct examination. A subject, having been once opened, may be exhausted. *State* v. *Kent*, 516.

25. For the purpose of affecting the credibility of a witness, it is proper to ask him on cross-examination questions the answers to which may tend to degrade, disgrace, or criminate him; but this is subject to his constitutional privilege to refuse to answer any question the answer to which will tend to criminate him. *State* v. *Kent*, 516.

26. A defendant in a criminal case who takes the witness stand in his own behalf is subject to the same rules of cross-examination that govern other witnesses; and he is required to answer any relevant and proper question on cross-examination that will tend to convict him of the crime for which he is being tried, even though such answer may also tend to convict him of some collateral crime. *State* v. *Kent*, 516.

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EVIDENCE—Continued.

27. It is proper, in a criminal case, to prove the commission by the accused of another and collateral crime, where such crime furnishes a motive for the commission of the crime for which the accused is being tried; and where the accused, as a witness for himself, has denied the existence of the motive which the evidence of the state tended to show prompted the commission of the crime for which he is being tried, it is proper to show by him, on cross-examination, the commission of the collateral crime that furnishes such motive. *State* v. *Kent*, 516.

28. For the purpose of showing motive, the remoteness in point of time of the commission of the collateral crime cannot be considered; the sole question being whether it furnished an active, existing motive for the commission of the crime for which the party is on trial. *State* v. *Kent*, 516.

29. A defendant in a criminal case, who becomes a witness in his own behalf, while he thereby waives his constitutional privilege of not answering proper questions that may tend to convict him of the crime for which he is on trial, does not thereby waive his privilege to decline to answer questions the answers to which may tend to convict him of collateral crimes, when such questions are asked solely to affect his credibility. *State* v. *Kent*, 516.

30. A witness who desires to claim his constitutional privilege of declining to answer a question, on the ground that the answer will tend to criminate him, must make his claim in person, and under the sanctity of his oath, and with sufficient definiteness to render his claim clear to the court; otherwise, he cannot complain if his privilege is denied. *State* v. *Kent*, 516.

31. When it is sought to impair the credibility of a witness on cross-examination by showing bad moral character, the interrogatories should be confined to specific facts, and should be so framed that the witness can squarely admit or deny. Insinuating questions, from which a possible inference of guilt as to collateral crimes might arise, are not proper. *State* v. *Kent*, 516.

32. Nor does it impair the credibility of a witness to show the commission of a collateral crime more than twenty years before the examination. There has been ample time to repent and atone. The offense may have been forgiven and forgotten, and public interests demand that it be left buried in its seclusion. *State* v. *Kent*, 516.

33. Where evidence is properly admitted in the case for one purpose, it will not be presumed, in the absence of all showing, that it was considered for a purpose for which it was not proper; particularly when the court, in its charge, directs the jury to consider it only for the proper purpose. *State* v. *Kent*, 516.

EXCEPTIONS. See BILL OF EXCEPTIONS, 161, 165.

The District Court can settle a bill of exceptions after appeal when the original record is still in that court. *Coulter* v. *G. N. Ry. Co.*, 568.

EXCLUSIVE FRANCHISES. See FERRIES, 608.

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EXEMPT PROPERTY.

1. The sale of exempt property cannot operate as a fraud upon creditors. *Kvello* v. *Taylor*, 76.

2. The reservation of exemptions in a deed of assignment will not render the deed void. *Bangs* v. *Fadden*, 92.

FACTORS AND BROKERS.

A delivery of property to a carrier to be shipped to a point not the place of business of the factor, and the taking by the owner of a bill of lading in the name of such factor and forwarding it to him, are not conclusive on the question of the intent to deliver possession so as to give a lien on such property to the the factor. *Rosenbaum Bros. & Co.* v. *Hayes*, 476.

FERRIES.

1. A county to which an unorganized county is attached for judicial purposes cannot grant a ferry franchise between a point within the unorganized county and another point not within the organized county. *Patterson* v. *Wollmann*, 608.

2. The issuance of a ferry franchise by the board of county commissioners *held* regular and legal. *Patterson* v. *Wollmann*, 608.

3. The granting of an exclusive ferry franchise is not repugnant to section 20 of the constitution. *Patterson* v. *Wollmann*, 608.

FOLLOWING FUNDS. See TROVER AND CONVERSION, 460.

FORECLOSURE. See CHATTEL MORTGAGES, 623.

1. Forty-two days must elapse between the first publication and the day of sale under statute requiring publication for six successive weeks, once in each week. *Finlayson* v. *Peterson*, 587.

2. On foreclosure of a threshers lien, failure of the officer making the sale to report to the register of deeds within ten days, will not invalidate the sale. *Martin* v. *Hawthorne*, 66.

3. To uphold a threshers lien the party making the seizure must show that the grain was grown on the land described in the statement. *Martin* v. *Hawthorne*, 66.

FORMER JEOPARDY. See CRIMINAL LAW AND PRACTICE, 507.

FOREIGN GARNISHMENT. See GARNISHMENT, 100.

FRAUD.

When may be shown. *Security Bank* v. *Kingsland*, 263.

FRAUDULENT ACT OF ATTORNEY. See ATTORNEYS AT LAW, 125.

FRAUDULENT CONVEYANCES. See ASSIGNMENTS FOR CREDITORS, 92.

The assignment or conveyance of a homestead cannot operate as a fraud upon creditors. *Kvello* v. *Taylor*, 76.

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FRAUDULENT REPRESENTATIONS.

The fraudulent representations of one partner in making sale of partnership property binds all other partners. *Brundage* v. *Mellon*, 72.

GARNISHMENT.

In an action against "A" in one state, the pendency of garnishment proceedings against "A" in another state is no defense when it appears that at the time they were commenced "A" knew that the defendant in the action in which they were instituted did not own the claim against "A." *Purcell* v. *Insurance Co.*, 100.

GIFT CAUSA MORTIS.

The administrator of a donor has no right to the subject of a gift *causa mortis*, in the absence of a showing of a deficiency of assets of the estate with respect to debts. *Seybold* v. *G. F. Nat'l Bank*, 460.

GUARANTY. See NEGOTIABLE INSTRUMENTS, 414.

1. Where a guaranty contract recited that the liability of the guarantors could not be modified or canceled except in the manner therein specified, the guarantors could not insist upon a modification of their liability on other and excluded grounds. *Deering & Co.* v. *Russell*, 319.

2. Ignorance of the guarantors upon a written contract of a parole agreement between their principal and the agent of plaintiff as to the application of certain commissions, *held*, no defense to an action upon the contract of guaranty. *Deering & Co.* v. *Russell*, 319.

3. R. defaulted largely in complying with the terms of his agency contract and turned over to W. D. & Co., an amount of notes and accounts as collaleral to his indebtedness under the contract. *Held*, that W. D. & Co. was not obliged to exhaust the collaterals before proceeding against the guarantors, nor were they (the guarantors) entitled to be credited with the value of such collaterals. *Deering & Co.* v. *Russell*, 319.

HABEAS CORPUS.

An error of the trial court in punishing for a contempt, civil in character, cannot be reviewed by *habeas corpus*. *State* v. *Barnes*, 350.

HIGHWAY. See RAILROAD COMPANIES, 568.

HOMESTEAD.

1. A transfer of the homstead cannot operate as a fraud upon creditors. *Kvello* v. *Taylor*, 76.

2. A mortgage executed by the wife of a debtor jointly with him upon their homestead upon consideration of extension of time for payment of old notes, is valid and upon a sufficient consideration. *First Nat. Bank* v. *Lamont*, 393.

HOMICIDE. See CRIMINAL LAW AND PRACTICE, 516.

HUSBAND AND WIFE. See HOMESTEAD, 393.

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INDENTIFICATION OF FUNDS. See TROVER AND CONVERSION, 460.

INDORSEMENT. See NEGOTIABLE INSTRUMENTS.

1. An indorsement of commercial paper for collection does not vest such title in the indorsee as will permit him to sue it in his own name. *Seybold* v. *Bank*, 460.

2. The holder of negotiable paper by an unrestricted indorsement, is the holder of the legal title thereof and may sue it in his own name. *Seybold* v. *Bank*, 460.

INFORMATION. See CRIMINAL LAW AND PRACTICE.

1. The states attorney must indorse upon the information, at the time of filing it the names of all witnesses for the state known to him at that time. *State* v. *Kent*, 516.

2. Ordinarily no witness should be permitted to testify for the state whose name is not indorsed upon the information. *State* v. *Kent*, 516.

3. If it is made to appear that the witness was not known to the states attorney at the time of filing the information, such witness may be permitted to testify. *State* v. *Kent*, 516.

4. A motion to set aside an information cannot be made after a plea of not guilty and one trial upon that plea. Neither can the point be raised by motion in arrest. Under our statutes, a motion in arrest only reaches defects that are available on demurrer. *State* v. *Kent*, 516.

INJUNCTION.

Injunction is the proper remedy to restrain the operation of a ferry by one having no authority to operate it. *Patterson* v. *Wollmann*, 608.

INSTRUCTIONS. See VERDICT, 100.

1. Instructions asked that require the court to assume the existence of any fact in issue, are properly refused. *Kvello* v. *Taylor*, 76.

2. It is error for the court to instruct the jury that if they believe that a witness has testified falsely as to any material fact in the case, they have a right to wholly disregard his testimony except so far as it is corroborated by other credible evidence in the case either positive or circumstantial. *McPherrin* v. *Jones*, 261.

3. It is proper for the court to instruct the jury in a criminal case that any exhibitions of temper or ill will between court or counsel during the trial should not be permitted to prejudice them against the accused in any manner. *State* v. *Kent*, 516.

4. Instructions held not vulnerable to the objections that they invaded the province of the jury or were argumentative, or assumed that certain facts were proven, or were prejudicial to the accused. *State* v. *Kent* 516.

3. Where evidence is admitted in a case for special purpose, it is proper for the court to instruct the jury to consider it only for that purpose. *State* v. *Kent*, 516.

4. Requests for instructions fully and fairly covered by the general charge of the the court are properly refused. *State* v. *Kent*, 516.

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INSURANCE.

1. Evidence in an action against an insurance company on a policy *held* to show that defendant waived proofs of loss as provided for in the policy. *Purcell* v. *Insurance Co.*, 100.

2. A complaint in an action against an insurance company, *held* to state a cause of action on the policy and also upon a promise to pay a specified amount in settlement of the loss under the policy. *Purcell* v. *Insnrance Co.*, 100.

3. In an action against an insurance company upon a policy, the record of an action in another state, wherein defendant made disclosure as to its liability to plaintiff is admissible. *Purcell* v. *Insurance Co.*, 100.

4. Proofs of loss constitute notice of loss. If furnished too late to constitute notice under the terms of the policy the element of time is waived unless promptly objected to on the ground that they are not in time. *Purcell* v. *Insurance Co.*, 100.

INTERSTATE COMMERCE. See CONSTITUTIONAL LAW, 629.

JUDGE. See CONTEMPT, 487; ATTORNEYS AT LAW, EXCEPTIONS, 568.

JUDGMENT. See PLEADING AND PRACTICE, 400; DEFAULT, 472, 426; ATTORNEYS AT LAW, 472.

1. To warrant the vacation of a judgment on the ground of mistake, such mistake must consist in something having been done in the case either by the court or the party that was not intended to be done. *Sargent* v. *Kindred*, 8.

2. Where a counterclaim is plead and no reply served, judgment may be rendered thereon under Comp. Laws, § 4919. *Heebner* v. *Shepard*, 56.

3. A default judgment entered through the fraud and misconduct of defendants attorney in withdrawing his answer and appearance will be vacated as a matter of legal right. *Nichells* v. *Nichells*, 125.

4. A motion to vacate a judgment taken by default must be submitted and decided within the year. *Sargent* v. *Kindred*, 472.

JURISDICTION. See APPELLATE COURT, 359, 438.

1. The District Court has no jurisdiction by mere order entered in the minutes to convert an attendance bond into a bond to discharge defendant after conviction. *In re Markuson*, 180.

2. The trial court has no jurisdiction to postpone from time to time the date at which imprisonment shall go into effect. *In re Markuson*, 180.

3. Where it appears upon the face of the record that the petitioner is not entitled to a removal of the case to the Federal Court, because the application is not made in time, the filing of the petition does not divest the state court of jurisdiction. *State* v. *Barnes*, 350.

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JURISDICTION—Continued.

4. Where a nonresident defendant who is served in this State is entitled to have the service set aside on the ground of privilege, the service is nevertheless not a nullity; and, for the purpose of determining whether he has made a timely application to have the action removed to the Federal Court, the time within which he must apply begins to run from the time of such service. Accordingly, *held* that, defendant having waited more than 30 days after such service before making such application (the statute of this state requiring him to answer within 30 days after he is served.) his right to have the case removed was lost. The filing of the petition for removal, therefore, did not divest the state court of jurisdiction of the action. *State* v. *Barnes*, 350.

5. The Supreme Court has original jurisdiction in cases in which the writs named in the Constitution may be employed to initiate such jurisdiction. But that jurisdiction is limited to cases involving the sovereignity of the state. *State* v. *Archibald*, 359.

6. Chapter 82, Laws 1893, is not a violation of the constitutional provisions conferring appellate jurisdiction only upon the Supreme Court. *Christianson* v. *F. W. Assn.*, 438.

7. Filing petition for removal of cause to the Federal Court does not *per se* oust the state court of jurisdiction, where petitioner has invoked the jurisdiction of the state court after right of removal has attached and before the filing of his petition. *Sargent* v. *Kindred*, 8.

8. An action upon an appeal bond from Territorial District Court sitting as a Court of Admiralty, is not a proceeding to enforce the judgment in the Admiralty case within the meaning of the rule that the court in which a judgment is rendered has exclusive jurisdiction to enforce it. *Braithwaite* v. *Jordan*, 196.

9. It is no objection to the jurisdiction of the court in entertaining a common law action of debt that the plaintiff has in the Federal District Court a remedy more speedy and simple in its character and equally efficacious. *Braithwaite* v. *Jordan*, 196.

JURY. See TRIAL 147, APPEAL BOND 196, INSTRUCTIONS, CRIMINAL LAW AND PRACTICE, 516.

1. It is a question for the jury whether a steam threshing engine standing within the traveled portion of a public street in a city is an object calculated to frighten horses of ordinary gentleness. *Ouverson* v. *City of Grafton*, 281.

2. It was a question of fact for the jury whether plaintiff had not held notes turned over to it as payment an unreasonable time before making manifest his disapproval. *Acme H. M. Co.* v. *Axtell*, 315.

3. The acceptance by the purchaser of an article which does not correspond to the warranty, with knowledge of the defect, does not as a matter of law bar his right to rely upon the warranty. Whether there was a breach, and whether the purchaser has waived his right to claim damages are questions for the jury. *N. W. Cordage Co.* v. *Rice*, 432.

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JURY—Continued.

4. Where the court denied a challenge for cause by the state of a disqualified juror, and a peremptory was used upon this juror by the state—it was not error for the court to reverse its ruling thereby restoring a peremptory challenge to the state. *State* v. *Kent*, 516.

5. Separation of jury before case finally submitted to them—when prejudice presumed. *State* v. *Kent*, 516.

LANDLORD AND TENANT. See VENDOR AND PURCHASER, 327-22.

LEGISLATIVE AUTHORITY.

Legislative authority cannot be delegated. *Doherty* v. *Ransom Co.*, 1.

LICENSE. See CONSTITUTIONAL LAW, 629.

LIEN. See FACTORS AND BROKERS 476, FORECLOSURE, PLEDGE.

A lien given a stable keeper is not lost as to an attaching creditor, because the horse is temporarily in possession of the owner when it is levied upon. *Welsh* v. *Barnes*, 277.

MANDAMUS.

1. The legality of a change of county seat may be tested by mandamus, under § 1499, Comp. Laws. *State* v. *Langlie*, 594.

2. Mandamus is the proper remedy to compel one who has no color of title to an office to surrender it to one who holds the *prima facie* title to it. *State* v. *Archibald*, 359.

3. The Supreme Court has original jurisdiction in mandamus cases, but that jurisdiction it limited to cases involving the sovereignity of the state, its prerogatives or franchises or the liberty of the citizen. *State* v. *Archibald*, 359.

4. Where there is no other adequate and speedy remedy to test the validity of an election held to relocate a county seat, *mandamus* to compel the county officers to hold their offices at the legal county seat is the proper remedy to determine whether the county seat has been legally changed. *State* v. *Langlie*, 594,

5. The statutory remedy by contest in the courts provided for by sections 1491, 1498, both inclusive, Comp. Laws, while an adequate and speedy remedy, and for that reason a remedy that would have precluded a resort to *mandamus* after the statute creating the remedy by contest was passed, had the remedy by *mandamus* not been perpetuated by statute, yet the remedy by *mandamus* was in fact perpetuated by section 1499, Comp. Laws. *State* v. *Langlie*, 594.

MARRIED WOMEN.

A married woman may recover damages for medical attendance, although she has not paid for such attendance at the time of the trial. *Chacey* v. *City of Fargo*, 173.

MEDICAL ATTENDANCE. See MARRIED WOMEN, 173.

MERITS. See AFFIDAVIT OF MERITS, 8.

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MISTAKE.

1. What is a sufficient showing of mistake to justify vacation of default judgment. *Sargent* v. *Kindred*, 8.

2. Money paid by mistake may be recovered back. *Nollman & Lewis* v. *Evenson*, 344.

MONEY—IDENTIFICATION OF. See TROVER AND CONVERSION, 460.

MORTGAGES. See CHATTEL MORTGAGES, 623.

1. Penalty for refusal to execute certificate of discharge upon demand after mortgage is satisfied. *Greenberg* v. *Bank*, 483.

2. Under a statute requiring publication of notice of sale on foreclosure, the first publication must be made 42 days before the day of sale. *Finlayson* v. *Peterson*, 587.

3. A mortgage executed by the wife of the debtor jointly with him upon their homestead to secure the payment of new notes given by him as collateral to old notes on which he was liable as maker, was a valid mortgage. *First Nat'l Bank* v. *Lamont*, 393.

MOTION. See PLEADING AND PRACTICE, 8, 125, 261. CRIMINAL LAW AND PRACTICE, 516.

MUNICIPAL CORPORATIONS.

1. A city is liable for injuries received through a defective sidewalk. *Chacey* v. *City of Fargo*, 173.

2. Where the defect is a loose plank in a sidewalk it is competent to prove that the sidewalk at that place had been in bad condition for a long time, as bearing on the question of constructive notice. *Chacey* v. *City of Fargo*, 173.

3. A municipal bond providing for the payment of exchange in addition to principal and interest is not negotiable and is open to all defenses in the hands of a transferee to which it would be in the hands of the original payee. *Flagg* v. *School District*, 191.

4. A municipal corporation is liable in damages to the person injured, for negligently permitting to remain on the public streets an object calculated to frighten horses of ordinary gentleness. *Ouverson* v. *City of Grafton*, 281.

MURDER. See CRIMINAL LAW AND PRACTICE.

NATIONAL BANKS. See AGENCY, 451.

NEGOTIABLE INSTRUMENTS. See PAYMENTS, 315, HOMESTEAD, 393.

1. Where a vendor took a note for the price payable to a third person and warranted the goods, and the goods proved worthless, the breach was a defense to an action on the note by the payee. *McCormack H. M. Co.* v. *Taylor*, 53.

2. A school district bond providing for exchange in addition to interest is not negotiable in the sense that purchasers are protected against defenses thereto. *Flagg v. School District*, 191.

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NEGOTIABLE INSTRUMENTS—Continued.

3. The indorsement and delivery of a note the property of a corporation by an officer thereof to secure a personal loan to the officer is *prima facie* illegal. *Security Bank* v. *Kingsland*, 263.

4. Fraud and failure of consideration may be shown in defense of negotiable paper in hands of indorsee where the paper was not taken in due course of business. *Security Bank* v. *Kingsland*, 263.

5. The holder of the naked legal title to a negotiable instrument is entitled to sue thereon. *Seybold* v. *G. F. Nat'l Bank*, 460.

6, Where in the notes given for the loan of money, the rate per cent. of interest agreed to be paid for such loan is not separately stated, such fact alone will not make the transaction usurious and void, under section 4, Ch. 184, Laws 1890. *Folsom* v. *Kilbourne*, 402.

7. One who purchases a promissory note before maturity and for full consideration, and to whom the note is at the time indorsed by the payee and holder, takes such note in the ordinary course of business; and the fact that the purchaser took such note relying wholly upon the sufficiency of the mortgage security, or for the purpose of acquiring the mortgaged property by foreclosure, will in no legal sense affect his *bona fides*. *Christianson* v. *Farmers W. H. Association*, 438,

8. When the payee of a negotiable promissory note transfers it by indorsing thereon a guaranty of payment, the purchaser is an indorsee, within the rule protecting an innocent purchaser of such paper for value, and before maturity, against defenses good between the original parties. *Dunham* v. *Peterson*, 414.

9. One who, in the usual course of business, takes such paper in payment of an antecedent debt, is a purchaser for value, within the spirit of the rule that the business world shall be protected in dealing with such paper. *Dunham* v. *Peterson*, 414.

NEGLIGENCE. See MUNICIPAL CORPORATIONS, PROXIMATE CAUSE, DAMAGES.

1. Plaintiff was injured by stepping into a hole in the sidewalk made by the displacement of a loose plank, which was thrown out of its position by a passing bicycle just as plaintiff was about to step on it, so that she stepped into the hole instead. *Held*, that, the defendant being, under the circumstances, liable for the defective condition of the walk, it was liable for the damages sustained by the plaintiff on two principles; First, that the loose plank was one of the proximate causes of the injury; second, that when two causes combine to produce an injury to a traveler upon a public street or highway, both of which are in their nature proximate, the one being a culpable defect in the highway and the other some occurence for which neither party is responsible, the city is liable if the injury would not have been sustained but for the defect for which the city is responsible. *Chacey* v. *City of Fargo*, 173.

2. When the defect is a loose plank in the sidewalk, it is competent to prove that the sidewalk at that place had been in dilapidated condition for a long time, as bearing on the question whether the particular defect which caused the injury

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NEGLIGENCE—Continued.

had existed for a sufficient length of time to give the city constructive notice thereof; and such evidence is sufficient for that purpose. *Chacey* v. *City of Fargo*, 173.

3. When two causes unite in producing an injury,—one being the negligent act or omission of a municipality, and the other something for which neither the municipality nor the party injured was responsible,—and when the injury could not have resulted but for the negligent act or omission of the municipality, such act or omission is the proximate cause of the injury. *Ouverson* v. *City of Grafton*, 281.

4. When a horse of ordinary gentleness becomes frightened at an object negligently and wrongfully permitted to stand in the public streets of a city, and, because of such fright, becomes momentarily unmanageable, and by reason thereof an accident occurs, resulting in injury, and when no contributory negligence can be imputed to the injured party, the city is liable in damages for such injury, providing the injury be one that might reasonably be anticipated as a natural result of such negligent and wrongful act or omission; and § 4600, Comp. Laws, makes a defendant liable even when the injury is proximate, though not reasonably anticipated. *Ouverson* v. *City of Grafton*. 281.

5. A traveler is not required to forego travel on a street because he may know of an obstruction thereon, nor is he required to show that in passing he used extraordinary care to avoid the injury for which he seeks to recover. But he is required to use ordinary care, in view of all the circumstances, and, if an ordinarily prudent person would not undertake to pass the obstruction under the circumstances, then it would be contributory negligence to do so. The burden of showing contributory negligence rests upon the defendant, and, unless such negligence conclusively appears from plaintiff's testimony, the court cannot take the case from the jury. *Ouverson* v. *City of Grafton*, 281.

6. When plaintiff, at her own request, was riding with a third person, who owned and controlled the horse and conveyance, and whose judgment and capacity to drive she had no reason to doubt,—such person being in no manner under plaintiff's control, and not being a person for whom plaintiff was responsible,—the negligence of such person contributing to the injury, cannot be imputed to plaintiff to defeat a recovery. *Ouverson* v. *City of Grafton*, 281.

7. The statutory provision of the state regulating the ringing of the bell and blowing of the whistle on approaching a public crossing is not the sole measure of the duty of a railroad company to protect persons and property at public crossings. Nor do regulations embodied in ordinances passed by city councils under statutory authority, regulating the speed of trains and the giving of signals at public crossings within city limits, constitute the sole criteria of the care to be used by snch corporations in the management of their trains. The common law obligation resting upon such corporations to use proper care in the operation of their trains to protect persons and property is not diminished by such statutory provisions or ordinances. *Coulter* v. *G. N. Ry. Co.*, 568.

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NEW TRIAL. See APPEAL.

1. The decision of the trial judge in granting a new trial, will seldom be disturbed. *Patch* v. *N. P. Ry. Co.*, 55.

2. Notice of motion for a new trial and notice of intention to move should not be united in one instrument. *Anderson* v. *First Nat. Bank*, 80.

3. A trial *de novo* in the Supreme Court cannot be had excepting where the case was tried below under the provisions of Ch. 82, Laws 1893, by the court without a jury. *First Nat'l Bank* v. *Merchants Nat'l Bank*, 161.

4. A motion for a new trial is not a necessary condition precedent to a review of the courts instructions to jury. Such error may be corrected on appeal from the judgment. *McPherrin* v. *Jones*, 261.

NEWMAN LAW. See APPEAL, 172, 161, 346.

NOTICE.

1. Notice to the attorney for the defendant of entry of judgment against such defendant is notice to the defendant. *Sargent* v. *Kindred*, 472.

2. Notice of election for relocation of county seat, when sufficient. *State* v. *Langlie*, 594.

3. A person who has knowledge of facts sufficient to put a prudent man on inquiry with regard to the existence of an unrecorded deed, and fails to make such inquiry, cannot claim protection as a bona fide purchaser under the recording act. *Doran* v. *Dazey*, 167.

4. Actual knowledge of the existence on the public records of an instrument purporting to be a mortgage of the property he is about to purchase is notice to such purchaser of the existence of the original mortgage, and knowledge of such mortgage, although the same is given by one who appears by the records to have no title to the land, is sufficient to make it the duty of the purchaser to inquire whether the mortgagor who asserts in the mortgage that he owns the land, is not in fact the owner thereof. *Doran* v. *Dazey*, 167.

5. If, with such knowledge, he parts with the consideration for the land without making any investigation as to the title of the mortgagor, when such investigation would probably have led to a discovery of such title, he is chargeable with notice of it. *Doran* v. *Dazey*, 167.

6. But the mere recording of an instrument out of the chain of the title will not, of itself, constitute constructive notice of such instrument, so as to bind one who deals with the apparent owner of the land according to the record, in ignorance of the existence of such instrument. *Doran* v. *Dazey*, 167.

7. Notice to city of defect in a sidewalk, how proven. *Chacey* v. *City of Fargo*, 173.

8. The filing of a chattel mortgage upon the future earnings of a threshing machine, operates as notice to a subsequent creditor or purchaser. *Sykes* v. *Hannawalt*, 335.

9. Persons dealing with an officer of a corporation have notice of his want of power to indorse and deliver its paper as collateral to his individual debt. *Security Bank* v. *Kingsland*, 263.

10. Notice of motion for judgment for want of an answer is necessary after an appearance by defendant. *Nichells* v. *Nichells*, 125.

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NOTICE OF LOSS. See INSURANCE, 100.

PARTIES TO ACTION.

The holder of the naked legal title of a chose in action is entitled to sue thereon. *Seybold* v. *G. F. Nat'l Bank*, 460.

PARTNERSHIP.

A partner is liable for the fraudulent representations of another partner in the sale of partnership property. *Brundage* v. *Mellon*, 72.

PAYMENT.

1. When notes were turned over by defendant in settlement of a conceded balance, the same to be accepted as payment if approved by plaintiff. *Held*, that plaintiff must notify defendant of its decision within a reasonable time after the delivery of the notes. *Acme H. Co.* v. *Axtell*, 315.

PEDDLERS. See CONSTITUTIONAL LAW.

An act Ch. 142, Laws 1890, imposing a license upon peddlers is unconstitutional. *State* v. *O'Connor*, 629.

PENITENTIARY.

Compensation of the members of the board of trustees of the state penitentiary under Laws 1889, Ch. 93, determined. *State* v. *Briggs*, 69.

PLEADING AND PRACTICE.

1. The complaint in an action, against an insurance company, *held*, to state a cause of action on the policy, and also upon a promise to pay a specified amount in settlement of the loss under the policy. *Purcell* v. *Ins., Co.*, 100.

2. When plaintiff in his complaint has set forth two causes of action where his purpose is to recover only a single claim, the defendant may move to compel the plaintiff to elect on which theory he will try his case. *Purcell* v. *Ins. Co.*, 100.

3. When evidence is offered to establish a fact from which the law infers a waiver of notice of loss, and defendant does not object to the evidence as incompetent to establish such waiver under the pleadings, it is too late to raise the question for the first time in the Supreme Court that the complaint sets forth a performance of the conditions of the policy relating to the giving of notice of loss, instead of a waiver of performance of such conditions. *Purcell* v. *Ins. Co.*, 100.

4. When the attorney for defendant withdrew his answer and appearance in a case, *held*, that judgment by default could not be entered without first giving notice to defendant. *Nichells* v. *Nichells*, 125.

5. An attorney who has appeared and filed an answer for defendant has no authority to withdraw such answer merely because his client has failed to pay his fee. *Nichells* v. *Nichells*, 125.

6. A written contract, which is the basis of the action, is set out at length in the complaint, the contract embraced certain conditions precedent to be performed on plaintiff's part, and the complaint alleged that "the said plaintiff has fully performed all the conditions of said instrument on her part." The

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PLEADING AND PRACTICE—Continued.

answer embraced a general denial. On motion the District Court struck out the answer as frivolous. *Held*, that the answer raised a material issue of fact, which defendant had a legal right to have presented to a jury for determination and hence that the answer was not frivolous. Rule of *Sigmund* v. *Bank*, 59 N. W. 966, 4 N. D. 164, followed and applied. *Sifton* v. *Sifton*, 187.

7. On motion of defendant to be relieved from a judgment entered against him by default he must present a verified answer and also an affidavit of merits. *Sargent* v. *Kindred*, 8.

8. On motion for vacation of default judgment entered by mistake, the defendant must show that something was done in the case, either by the court or the party, that was not intended to be done. *Sargent* v. *Kindred*, 8.

9. On motion to set aside judgment under Sec. 4939, Comp. Laws. The record upon which the motion is heard must present facts which bring the case within the terms of the statute. *Sargent* v. *Kindred*, 8.

10. Complaint in action by sheriff against deputy sheriff for moneys collected and not turned over. Examined and sustained. *Linn* v. *Jackson*, 46.

11. Discrediting ones own witness, when permissible. *George* v. *Triplett*, 50.

12. A judgment may enter upon counterclaim for want of reply. *Heebner* v, *Shepard*, 56.

13. The action was upon two promissory notes given by defendant to plaintiff for a threshing machine sold by plaintiff to defendant. The answer admitted the execution and delivery of the notes, and in addition set out, as new matter, that thc threshing machine was sold with a warranty, and did not work as it was warranted to do, and that by reason thereof the defendant was damaged in a large sum, for which defendant demanded judgment against the plaintiff. *Held*, that such new matter constituted a counterclaim, within the meaning of the statute. *Heebner* v. *Shepard*, 56.

14. Where the trial court by its ruling excluding evidence shows that plaintiff cannot recover on his theory, he is not bound in the absence of notice to offer proof of the other allegations of his complaint. *Brundage* v. *Mellon*, 72.

15. Instructions should not assume the existence of any fact in issue. *Kvello* v. *Taylor*, 76.

16. The owner of property entrusted to an agent for sale and converted by the agent, may waive the tort and treat the conversion as a purchase and recover the value of the property and interest in assumpsit. *Anderson* v. *Bank*, 80.

17. A complaint may be amended on the trial to conform to the proof, where plaintiff was misled by defendant's conduct, thereby preparing the complaint upon an erroneous theory. *Anderson* v. *Bank*, 80.

18. Where defendants conduct misled plaintiff, so that his pleading was framed upon an erroneous theory, *held*, an abuse of discretion to refuse plaintiff permission to amend his pleading to correspond with the proofs. *Anderson* v. *Bank*, 80.

19. The trial court properly directed a verdict for plaintiff where the undisputed evidence established a liability under the complaint. *Purcell* v. *Ins. Co.*, 100.

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PLEADING AND PRACTICE—Continued.

20. A frivolous pleading may be stricken out on motion, but it must be so clearly and palpably bad as to indicate bad faith on the part of the pleader. *Sifton* v. *Sifton*, 187.

21. A motion to strike out a pleading must be determined from an inspection of the pleadings only, and hence the motion need not be aided by any proof of facts extraneous to the pleadings. *Sifton* v. *Sifton*, 187.

22. A motion to vacate judgment by default, where personal service of process was had, addresses itself to the discretion of the trial court and the exercise of that discretion will not be interfered with by the Supreme Court except in cases of its unsound use. *Stewart* v. *Parsons*, 273.

23. A judgment entered by default where there is no service of summons is void. *Stewart* v. *Parsons*, 273.

24. A general appearance after judgment will not operate to validate a void judgment. *Stewart* v. *Parson*, 273.

25. In an action against a municipal corporation for damages resulting from an obstruction standing upon the traveled portion of a public street at which a horse, behind which plaintiff was riding, became frightened and unmanageable and injury resulted. It was not necessary to allege any actual contact with such obstruction. *Ouverson* v. *City of Grafton*, 281.

26. The same facts may constitute a defense to a claim made by plaintiff, and at the same time entitle a defendant to an affirmative judgment against plaintiff in excess of the claim made by the plaintiff; and, when such is the case, a defendant may plead such facts, both as a defense and as a counterclaim, and cannot be compelled to elect upon which he will rely. *Nollman & Lewis* v. *Evenson*, 344.

27. In an action to recover upon a contract to furnish materials and labor for plastering a house, the plastering to be of a certain quality, an answer which set forth that the plastering was not such as the contract required, and that by reason of the inferior materials used and unskillful workmanship the plastering was worthless, and of no benefit to defendant whatever, states a good defense. *Nollman & Lewis* v. *Evenson*, 344.

28 In contempt proceedings the party charged with the contempt is not entitled to a trial by jury. *State* v. *Markuson*, 147.

29. An affidavit made as a basis of an order for attachment for contempt in violating an injunctional order theretofore granted in an equity case brought to abate a nuisance, is not defective because it does not allege in terms that the action is still pending at the time of making the affidavit, where it does allege that "Said injunctional order so made as aforesaid has not been dissolved or modified. *State* v. *Markuson*, 147.

30. An affidavit attempting to charge a contempt of court committed by using offensive language respecting the presiding judge of said court, but which failed to allege that such language was spoken in the immediate view and presence of the court was insufficient. *State* v. *Root*, 487.

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PLEADING AND PRACTICE—Continued.

31. An application for removal of a cause from the state to Federal Court must be filed within 30 days after the service of summons upon petitioner or the right to removal is lost. *State* v. *Barnes*, 350.

32. One who has not been allowed to intervene in an action and has made no application to be allowed to intervene, has no such relation to the action as will entitle him to petition for a removal of the case to the Federal Court. *State* v. *Barnes*, 350.

33. An order of the District Court, entered in its minutes by the clerk of that court, directing the dismissal of an appeal taken to the District Court from a judgment entered in a county court does not itself accomplish the dismissal of the appeal. *Field* v. *G. W. Elev. Co.*, 400.

34. Section 7838 of the Revised Codes considered and construed. Said section creates a remedy, and authorizes a proceeding which is summary in its nature, and of a character peculiar to itself. The statute which creates the remedy also establishes the practice which governs the proceeding to obtain the remedy. The statute does not contemplate that the proceeding shall be delayed by appeals from intermediate orders or rulings, and does not authorize any appeal before the entry of judgment. Accordingly, *held*, that an attempted appeal to this court by the accused from an order of the District Court overruling a demurrer to the written accusation will not lie. Such appeal is dismissed. *Myrick* v. *McCabe*, 422.

35. Under section 4993, Comp. Laws (section 5354, Rev. Codes,) a summons is "issued" when it is duly drawn and signed with the intention that it be served, even though it yet remained in the hands of plaintiff's attorney. *Smith* v. *Nicholson*, 426.

36. When, under Subd. 5, § 4900, Comp. Laws (section 5260, Rev. Codes) application is made by a party on whom service has been made by publication before judgment, but after he is in default, for leave to serve an answer and defend in the case, when the court holds that sufficient cause has been shown, the right of such party to defend against the claim of plaintiff and the whole thereof is absolute. *Smith* v. *Nicholson*, 426.

37. Notice to the attorney for the defendant of entry of judgment against such defendant, is notice to such defendant within Comp. Laws, § 4939. *Sargent* v. *Kindred*, 472.

38. A motion to vacate a judgment by default must be submitted and decided within the year. *Sargent* v. *Kindred*, 472.

39. The assignee of a chose in action who holds the legal title to it may maintain an action thereon as the real party in interest. *Seybold* v. *G. F. Nat'l Bank*, 460.

40. There is no fatal variance between pleading and proof when the complaint alleges that plaintiff was injured through defendant's negligence at a crossing of the public highway over defendant's railroad track by being there struck by one of defendant's engines, and the evidence shows that the highway was not legally laid out over defendant's right of way, but that defendant by its acts and its acquiescence in the public use of the crossing as a public highway, had

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PLEADING AND PRACTICE—Continued.

made such crossing a public highway as to the public, so that it was under the same obligations to take precautions against injuring persons or property at that point as would have rested on it had the highway been laid out in strict conformity with law. *Coulter* v. *G. N. Ry. Co.*, 368.

41. The District Judge has power to settle a bill of exceptions after an appeal has been perfected, when the original record in the case is still in the District Court. *Coulter* v. *G. N. Ry. Co.*, 568.

42. Injunction is the proper remedy to employ when one without authority of law is operating a ferry to the injury of another. *Patterson* v. *Wollmann*, 608.

43. Mandamus to compel the county officers to hold their offices at the legal county seat is the proper remedy to determine whether the county seat has been legally changed. *State* v. *Langlie*, 594.

44. Statutory remedy, under §§ 1494-1498, Comp. Laws, concurrent with mandamus. *State* v. *Langlie*, 594.

PLEDGE. See NEGOTIABLE INSTRUMENTS, 451, 319.

1. A sub-pledgee of commercial paper with notice that the pledgor was a pledgee thereof can take no fuller power over the paper than that possessed by the orignal pledgee. *Security Bank* v. *Kingsland*, 263.

2. The pledgee of collaterals will not be compelled to exhaust the collaterals before proceeding against the guarantors, nor are guarantors entitled to be credited with the value of such collaterals. *Deering & Co.* v. *Russell*, 319.

PRACTICE ON APPEAL. See APPEAL.

1. A bill of exceptions must contain specifications of error or it will be disregarded. *Schmitz* v. *Heger*, 165; *First Nat't Bank* v. *Merchants Nat. Bank*, 161.

2. Errors must be assigned in the brief and not in the printed abstract. *First Nat. Bank* v. *Merchants Nat'l Bank*, 161.

3. Assignments of error must be preceded by and predicated upon specifications of error in the bill of exceptions. *First Nat'l Bank* v. *Merchants Nat'l Bank*, 161; *Schmitz* v. *Heger*, 165.

4. The certificate of the trial judge to the record on appeal must show that the record contains not only all evidence taken upon the trial, but also that all evidence offered was taken down in writing, and that all evidence taken is certified by the judge. *First Nat'l Bank* v. *Merchants Nat'l Bank*, 161; *Doran* v. *Dazey*, 172; *Nollman & Lewis* v. *Evenson*, 346; *Taylor* v. *Taylor*, 58.

5. Only cases tried by the court without a jury, will be tried *de novo* on appeal. *First Nat'l Bank* v. *Merchants Nat'l Bank*, 161.

6. Actions tried under Ch. 82, Laws 1893, can be tried *de novo* on appeal on all the evidence below together with the exceptions preserved in the record and all exhibits offered. The Supreme Court will remand the record with instructions to the court below as to what judgment to enter. *Taylor* v. *Taylor*, 58; *Christianson* v. *Farmers W. H. Ass'n*, 438.

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PRACTICE ON APPEAL—Continued.

7. Notice of intention to move for a new trial and notice of motion for a new trial should not be united. *Anderson* v. *Bank*, 80.

8. The practice on appeal in admiralty cases to the Supreme Court of the territory, was not regulated by the territorial statutes, but by the rules and usages of courts of admiralty. *Braithwaite* v. *Jordan*, 196.

9. Exceptions to the court's charge may be reviewed on appeal from a judgment without motion for a new trial. *McPherrin* v. *Jones*, 261.

10. While an action is pending in the District Court an appeal will not lie to the Supreme Court from the County Court where the judgment was originally entered. *Field* v. *G. W. Elev. Co.*, 400.

PRINCIPAL AND AGENT. See AGENCY.

1. An officer or agent of a corporation has no implied authority to indorse paper of the corporation for his individual use. *Security Bank* v. *Kingsland*, 263.

2. When contract of agent cannot be enforced against the principal. *Deering & Co.* v. *Russell*, 319.

PROXIMATE CAUSE.

When two causes combine to produce an injury to a traveler upon a highway both of which are in their nature proximate, the one being a culpable defect in the highway and the other some occurence for which neither party is responsible, the municipality is responsible, provided the injury would not have been sustained but for that fact. *Chacey* v. *City of Fargo*, 173. *Ouverson* v. *City of Grafton*, 281.

PUBLIC CROSSINGS. See RAILROAD COMPANIES, 568.

RAILROAD COMPANIES. See FACTORS AND BROKERS, 476.

1. Where a highway was not legally laid out across defendant's right of way, but the defendant, by its acts and acquiescence in the public use of the crossing, had made such crossing a public highway as to the public. It was under the same obligations to take precautions against injuring persons at that point as if the highway had been legally laid out. *Coulter* v. *G. N. Ry. Co.*, 568.

2. The common law obligations resting upon railroad companies to use proper care in the operation of their trains to protect persons and property is not diminished by statutory provisions and ordinances, as to blowing whistle and ringing of bell. *Coulter* v. *G. N. Ry. Co.*, 568.

REAL PARTY IN INTEREST. See PARTIES TO ACTION, 460.

RECORDING TRANSFERS. See NOTICE, 167.

REMOVAL FROM OFFICE. See MANDAMUS, 359.

1. Section 7838 Revised Codes creates a remedy and authorizes a proceeding which is summary in its nature and of a character peculiar to itself. The statute establishes the practice which governs the proceedings under it. No appeal will lie from intermediate orders or until the entry of final judgment. *Myrick* v. *McCabe*, 422.

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REMOVAL FROM OFFICE—Continued.

2. The state hospital for the insane is by law under the general management and control of a board of five trustees, which has power to appoint the superintendent of such hospital and remove him at pleasure. The defendant having been removed by the board from the office of superintendent, and the relator having been appointed by the board to fill such office in his place, *held* that, in mandamus proceedings to compel the defendant to turn over to the relator such office, the sovereignty of the state was involved, in a direct and important sense, the right of the board of trustees to control and manage a great state institution being necessarily involved, and that therefore the Supreme Court held original jurisdiction of such proceedings. *State* v. *Archibald*, 359.

3. The grant of power to appoint to public office, where no term of office is fixed by law, carries with it as an incident the absolute power of removal at any time, without notice or charges or a hearing, and without the cause for removal being inquired into by any court. Such power vested in a board cannot be limited by any action taken by such board, whether by appointing the officer for a fixed term, or by by-laws restricting the power of removal to cases where cause of removal exists. *State* v. *Archibald*, 359.

4. A motion to remove the defendant having been made and seconded at a meeting of the board at which all the members were present, the chairman of the meeting refused to put the motion, on the ground that it was illegal. Thereupon it was put by the trustee who made the motion, and received the vote of three of the five members, the other two trustees refusing to vote. *Held*, that these proceedings were effectual to remove the defendant. *State* v. *Archibald*, 359.

5. The fact that the superintendent may be removed from office for the causes mentioned in section 197 of the constitution (assuming this to be the case) does not impair the power of the board to remove him at pleasure. *State* v. *Archibald*, 359.

REMOVAL OF CAUSES.

1. Filing petition for removal of cause from the state to Federal Court under the provisions of the "Omnibus Bill" did not *per se* oust the state court of jurisdiction, where the petitioner had invoked the jurisdiction of the state court on two occasions after the right of removal attached and before petition for removal was filed. *Sargent* v. *Kindred*, 8.

2. Where the petition for removal shows upon its face that it was not filed in time, the state court is not divested of jurisdiction. *State* v. *Barnes*, 350.

3. The defendant in this state must file his petition for removal within 30 days after the service of summons upon him or his right to removal is lost. *State* v. *Barnes*, 350.

REPEALS BY IMPLICATION. See REVISED CODES, 406.

REPLY. See PLEADING AND PRACTICE, 56.

REPORT OF SALE. See FORECLOSURE OF LIEN, 66.

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RETROACTIVE LEGISLATION. See CURATIVE LEGISLATION, 587.

REVISED CODES.

1. The broad language of the repealing act which went into effect with the Revised Codes must be so limited by the obvious purpose of the new revenue law as to leave unaffected those portions of Ch. 132, of the Laws of 1890, as relate to the office of district assessors in unorganized townships. *State* v. *Moorhouse*, 406.

2. Chapter 74, Laws 1893, provides for a revision of the statutes of the state, and for the publication of such revision in a volume to be known as the "Revised Codes," and section 7 of the act provides that the finished copies of the volume shall be delivered to the secretary of state, and thereupon the governor shall issue his proclamation announcing such delivery and his acceptance of the volume "and thirty days after the date of his proclamation said Revised Codes shall take effect and thereafter be in force and be received as evidence of the laws of this state in all the courts thereof." *Held*, that it was not only the legislative purpose to fix by said section the date at which the volume should be received as evidence, but also to fix a date when the system of laws contained in the volume should go into effect; and *held*, further, that the alterations in and additions to the laws directed to be published in said volume do not, except when otherwise provided by an emergency clause, go into effect until the completion of the events specified in said section 7. *In re Hendricks*, 114.

REVENUE LAW. See REVISED CODES, 406.

RULES OF COURT. See PRACTICE ON APPEAL, 161, 165.

SALE. See WARRANTY.

1. Where a purchaser ordered pure Manilla twine, and the seller assumed to fill the order, he must be deemed to have warranted that the article delivered was in fact pure Manilla twine. *N. W. Cordage Co.* v. *Rice*, 432.

2. The acceptance by the purchaser of an article which does not correspond to the warranty, with knowledge of the defect, does not as a matter of law bar his right to rely upon the warranty. *N. W. Cordage Co.* v. *Rice*, 432.

3. The giving by the purchaser of notes for the purchase price of an article sold upon warranty, with knowledge that the article is not as warranted—does not prejudice the rights of the purchaser to insist upon his claim for damages and where the notes are given with the understanding that such claim will be recognized by the seller. *N. W. Cordage Co.* v. *Rice*, 432.

SALE OF MORTGAGED CHATTELS. See CRIMINAL LAW AND PRACTICE, 507.

SHERIFFS. See REMOVAL FROM OFFICE, 422; PLEADING AND PRACTICE, 46.

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SPECIFIC PERFORMANCE.

1. Equity will not specifically enforce a contract to give a majority stockholder the right to control the stock of another and vote it at a stockholders meeting where the sole purpose is to secure control of the corporation by the use of such stock. *Gage* v. *Fisher*, 297.

2. In a suit for a specific performance by the vendor after the time for a delivery of a deed by him, he must tender the deed or be in a position to make it. *Shelley* v. *Mikkelson*, 22.

SPECIFICATIONS OF ERROR, See PRACTICE ON APPEAL.

STARE DECISIS. See MANDAMUS, 359.

STATUTES.

1. Statutes which impose a penalty and which alone are the source of right to recover, must be specifically counted upon in the pleading. *Greenberg* v. *Bank*, 483.

2. The broad language of the repealing act, which went into effect with the Revised Codes must be so limited by the obvious purpose of the new revenue law as to leave unaffected those portions of Ch. 132 of the Laws of 1890 as relate to the office of district assessors in unorganized townships. *State* v. *Moorhouse*, 406.

3. Time when Revised Codes took effect. *In re Hendricks*, 114.

4. Statutes valid when passed are not necessarily abrogated or repealed by a sub-subsequent constitutional provision requiring the pursuance of other and different methods or forms than those which were adequate when such law was passed. *Doherty* v. *Ransom Co.*, 1.

STATUTES CITED AND CONSTRUED.

COMPILED LAWS.

SEC.	PAGE.	SEC.	PAGE.
431	2	4663 Subd. 3	93
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STIPULATION FOR VALUE. See APPEAL BOND, 196.

SUMMONS.

A summons is issued when it is duly drawn and signed with the intention that it be served even though it yet remains in the hands of plaintiff's attorney. *Smith* v. *Nicholson*, 426.

SUPREME COURT. See APPELLATE COURT.

SUSPENSION OF SENTENCE.

After a judgment of conviction duly made and entered fixing time for sentence to commence, cannot thereafter by the court be postponed from time to time as to the date when said sentence shall begin to run. *In re Markuson*, 180.

TAXATION. See PEDDLERS, 629.

TRIAL. See PLEADING AND PRACTICE.

1. When a party may discredit his own witness. *George* v. *Triplett*, 50.

2. An instruction based upon a fact in issue is erroneous. *Kvello* v. *Taylor*, 76.

3. Trial *de novo* in Supreme Court. When. *Taylor* v. *Taylor*, 58; *First Nat. Bank* v. *Mchts. Nat. Bank*, 161.

4. Where the trial court by its ruling in excluding evidence shows that plaintiff can not recover on his theory, he is not bound in the absence of notice to offer proof of the other allegations of the complaint. *Brundage* v. *Mellon*, 72.

5. A party charged with contempt under provisions of Sec. 13, Ch. 110, Laws 1890, is not entitled to a jury trial. *State* v. *Markuson*, 147.

TROVER AND CONVERSION.

1. A sale of property by an agent to himself followed by a claim of ownership constitutes a conversion of the property. *Anderson* v. *Bank*, 451-80.

2. Where the mortgagee, holding a first mortgage, after taking possession of property under his mortgage, sells the same without foreclosure, and at private sale, such sale is a wrongful conversion of the property, and operates to extinguish the lien of the mortgage. *Lovejoy* v. *Merchants State Bank*, 623.

3. Where, in such a case, a second mortgagee brings an action against the first mortgagee for the wrongful conversion of the property covered by the two mortgages, his measure of damages is the value of the property converted, modified by the principle of compensation for the actnal injury suffered on account of the wrongful conversion. *Lovejoy* v. *Merchants State Bank*, 623.

4. In such case the defendant is liable for the value of the property converted, but will be allowed, upon principles of equity, and to avoid circuity of action, to recoup damages to the value of his special interest in or lien upon the mortgaged property. The plaintiff can only recover to the extent of his actual loss. *Lovejoy* v. *Merchants State Bank*, 623.

5. Where, in such case, the value of the property sold was less than the amount secured by the defendant's mortgage, and the sale was without fraud, the plaintiff can recover no damages, because he suffers none, as a result of the wrongful act of which he complains. *Lovejoy* v. *Merchants State Bank*, 623.

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TROVER AND CONVERSION—Continued.

6. Where an agent, without the consent of his principal sells to himself at the price he was authorized to sell to a third person, the waiver by the principal of his right to proceed as for tort founded on the conversion, and his electing to sue the agent on an implied contract of purchase by the agent, does not constitute a ratification of the original act of the agent so as to limit the recovery to the price specified. *Anderson* v. *Bank*, 451.

7. In trover to recover value of certain grain which was seized and sold by defendant under a thresher's lien, defendant to justify must show that the grain seized was grown on the land described in the affidavit for the lien. *Martin* v. *Hawthorne*, 66.

8. While the owner of the property may, so long as he can identify it, follow it through all its transformations in the hands of the person who received it in its original form, yet, when such property is turned into money, and loaned to a third person, he cannot follow such money in the hands of such third person, but must look to the obligation of such third person to the lender of the money in the hands of the lender as his (the owner's) property in still another new form. *Seybold* v. *Bank*, 460.

TRUSTEES OF STATE INSTITUTIONS.

1. Trustees of the state penitentiary are entitled to three dollars a day for attendance upon meetings of the Board for time spent in traveling to and from the place of meeting. *State* v. *Briggs*, 69.

2. The trustees of the state hospital for the insane have power to appoint the superintendent of such hospital and to remove him at pleasure. *State* v. *Archibald*, 359.

3. The power vested in the board of trustees cannot be limited by any action taken by such board whether by appointing the officer for a fixed term or by by-laws restricting the power of removal to cases where cause for removal exists. *State* v. *Archibald*, 359.

4. A majority of the board of trustees at a meeting where all are present will effectuate the removal of the superintendent. *State* v. *Archibald*, 359.

5. A superintendent for the hospital for insane was legally elected by a majority vote of the trustees. *State* v. *Archibald*, 359.

6. The fact that the superintendent may be removed from office for the causes mentioned in section 197 of the Constitution does not impair the power of the board to remove him at pleasure. *State* v. *Archibald*, 359.

ULTRA VIRES. See NATIONAL BANKS, 451.

USURY.

Where in the notes given for a loan of money and the mortgage securing the same, the rate per cent. of interest agreed to be paid for such loan is not separately stated, such fact alone will not make the transaction usurious and void, under § 4, Chap. 184, Laws N. D. 1890. Nor can a court declare such notes and mortgage void for that reason, under the provisions of section 10 of said statute, as said section was not intended to create any new penalty, or to make any contract void that was not declared usurious by the other sections in the act. *Folsom* v. *Kilbourne*, 402.

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VARIANCE. See PLEADINGS AND PRACTICE, 568.

VENDOR AND PURCHASER.

1. Right of one who after giving notes for the price of land, purchased the vendor's equity from one to whom the vendor sold it, to defend action by the vendor for the price. *Shelly* v. *Mikkelson*, 22.

2. Right of one who gave a bond for a deed on the receipt of notes for the price to thereafter sue on the notes after having conveyed his equity in the land to a third person. *Shelly* v. *Mikkelson*, 22.

3. After the time for delivery of the deed has arrived, a suit for the purchase money is necessarily an action in equity. *Shelly* v. *Mikkelson*, 22.

4. When the vendee in a land contract surrenders his contract to the vendor and the same is accepted the release of the vendor from the obligations of the contract is a sufficient consideration to support the surrender. *Kvello* v. *Taylor*, 76.

5. Under an executory contract of sale of land, where the purchaser was let into possession, with full use of the premises, but bound to pay a stipulated price therefor and to pay each year "so much as the one half of all crops on said land shall amount to." *Held*, that no relation of landlord and tenant could arise under such contract, nor would the parties be tenants in common of the crops grown on such land by the vendee. *Moen* v. *Lillestal*, 327.

6. *Held*, that under the contract for sale of land, no transfer to the vendor of the crops was made, and that he had no title ownership in or lien upon the crops to be grown on the land by the vendee. *Moen* v. *Lillestal*, 327.

VENUE. See CRIMINAL LAW AND PRACTICE, 516.

VERDICT.

It is proper for the trial court to direct a verdict for plaintiff where the undisputed evidence established a liability. *Purcell* v. *Ins. Co.*, 100.

WAIVER.

1. Waiver of right to remove cause to the Federal Court under the provisions of the "Omnibus Bill." *Sargent* v. *Kindred*, 8.

2. Where evidence is excluded from the return on appeal under Ch. 82, Laws 1893, the party upon whose objection it was excluded cannot complain. *Taylor* v. *Taylor*, 58.

3. Evidence in an action against an insurance company on a policy. *Held*, to show that defendant waived proofs of loss as provided in the policy. *Purcell* v. *Ins. Co.*, 100.

4. It is no defense to an action on a statutory undertaking on appeal that the court has not fixed the amount thereof under the statute; such provision is for the benefit of the respondent, and if he waive it and treat the undertaking as sufficient, the undertaking may be enforced by him. *Braithwaite* v. *Jordan*, 196.

5. Where an agent, entrusted with the sale of property, sells to himself his principal can waive the tort and sue in assumpsit. *Anderson* v. *Bank*, 451.

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WARRANTY. See SALE, 432.

Where a vendor takes a note for the price payable to a third person and warrants the goods and they prove worthless, the breach is a defense to an action on the note by the payee. *McCormack H. M. Co.* v. *Taylor*, 53.

WITNESS. See EVIDENCE.

1. Where the testimony of a witness disproves the case of the person calling him, the latter can ask him whether he has not made a contradictory statement. *George* v. *Triplett*, 50.

2. A party can testify in his own behalf as to payment made to a deceased administrator in an action by his successor. *St. John* v. *Lofland*, 140.

3. Where a witness has wilfully, knowingly or intentionally testified falsely his entire testimony may be rejected, except as corroborated by other credible evidence. *McPherrin* v. *Jones*, 261.

4. Names of witnesses must be indorsed on information before it is filed. *State* v. *Kent*, 516.

5. Witnesses whose names are not indorsed on the information should not be permitted to testify for the state. *State* v. *Kent*, 516.

6. The cross-examination of a witness, except as to matters affecting credibility, must be confined to the subjects to which the direct examination was addressed. *State* v. *Kent*, 516.

7. It is competent in cross-examination of a witness to ask him as affecting his credibility, questions the answers to which may tend to degrade, disgrace or criminate him, subject to his right to claim his privilege against criminating himself. *State* v. *Kent*, 516.

8. The defendant in a criminal case is subject to the same rules of cross-examination as other witnesses. He can be compelled to answer pertinent questions though they tend to convict him of a collateral crime. *State* v. *Kent*, 516.

9. It is proper to prove the commission by the accused of another and collateral crime, where such crime furnishes a motive for the commission of the crime for which the accused is being tried. *State* v. *Kent*, 516.

10. A witness must in person make the claim of privilege, that an answer will tend to criminate him. *State* v. *Kent*, 516.

11. A defendant does not waive his privilege of refusing to criminate himself as to collateral crimes by taking the witness stand in his own behalf. *State* v. *Kent*, 516.

12. Interrogatories to a witness in cross-examination tending to show bad character should be confined to specific acts which he can either admit or deny. *State* v. *Kent*, 516.

WRIT OF ERROR.

A judgment imposing a fine and imprisonment for contempt of court under Sec. 13, Ch. 110, Laws 1890, may be reviewed by writ of error. *State* v. *Markuson*, 147.

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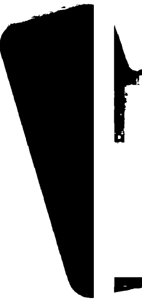

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