REPORTS OF CASES

DECIDED IN THE

SUPREME COURT

OF THE

STATE OF NORTH DAKOTA,

EDITED BY

EDGAR W. CAMP, Reporter.

VOLUME 1.

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OFFICERS OF THE COURT DURING THE PERIOD OF THESE REPORTS.

Hon. GUY C. H. CORLISS, of Grand Forks, Chief Justice.
Hon. J. M. BARTHOLOMEW, of Bismarck, and
Hon. ALFRED WALLIN, of Fargo, Judges.

R. D. HOSKINS, Bismarck, Clerk.
EDGAR W. CAMP, Jamestown, Reporter.

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

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

TABLE OF CASES REPORTED IN THIS VOLUME.

TABLE OF CASES CITED IN OPINIONS IN THIS VOLUME.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF NORTH DAKOTA

JOHN C. MILLER, as Administrator, with will annexed, of the Estate of Marie E. Sunde, deceased, Plaintiff and Appellant, *v.* HAROLD SUNDE, Defendant and Respondent.

(Opinion Filed February 5, 1890.)

1. **Transfer of Cases to Federal Court Under Omnibus Bill.**
Under § 23 of the Omnibus Bill, the federal court which might have had jurisdiction of a case under the laws of the United States, had such federal court existed at the time of the commencement of such action, becomes, upon the written request of either party for a transfer of the case, the complete successor of the territorial court in which such action was pending at the time of the admission of this state into the Union; provided, the record, which closes with the filing of the request, discloses a proper case for transfer. All proceedings in the state court thereafter are *coram non judice.*

2. **Same — Jurisdiction of State Court.**
The filing of the request in open court, the attention of the court being called thereto, works an immediate destruction of the jurisdiction of the state court, and at the same moment vests such jurisdiction in the proper federal court. The only power that remains in the state court is to perform the merely ministerial act of making the formal transfer.

3. **Same, Prior to Request for Transfer.**
The proper state court, however, is until such request the successor of the territorial court in which the case was pending.

4. **Citizenship — Administrators.**
The personal citizenship of an administrator, executor, trustee, or receiver determines the question of diverse citizenship, on which federal jurisdiction depends. Neither the fact that the representative was appointed such in the state of which the opposite party is a citizen, nor

the fact that the beneficiary whom the representative acts for may be a citizen of the same state, affects the question.

5. Void Judgment — Reversal on Point Not Raised.

A judgment shown by the record to be void will be reversed on appeal, though neither party raises the question.

APPEAL from district court, Cass county; Hon. WILLIAM B. MCCONNELL, Judge.

Taylor Crum, for appellant; *Thomas & Davis*, for respondent.

The authorities cited by counsel upon the points considered by the court are all mentioned in the following opinion:

CORLISS, C. J. The pretended judgment in this case must be reversed, because the district court had lost jurisdiction of the case at the time the judgment was rendered. The action was pending in the territorial district court at the time of the admission of this state into the Union. Under the enabling act, commonly designated as the "Omnibus Bill," the United States district and circuit courts established by that act are made the successors of the territorial district courts as to all cases pending in such courts at the time of the admission; provided, the case is one of which the federal court might have had jurisdiction, under the laws of the United States, had such court existed at the time of the commencement of the action. § 23.

The mere fact that the federal court might have had jurisdiction is the test. The case, however, is not transferred by force of the statute merely, but only on written request of one of the parties to the action, filed in the proper court. Such a request was filed, in this case, in the state district court, by the defendant and respondent, before judgment was rendered; and accompanying this request was the respondent's affidavit, showing that the plaintiff, both at the time of the commencement of the action and at the time of filing the request, was a citizen of the state of Minnesota, and that the defendant was, when the action was commenced, a citizen of the territory of Dakota, and was, at the time the request was made, a citizen of the state of North Dakota. These facts made the federal circuit court the successor of the territorial district court; and the request, when

presented in open court, *eo instanti* divested the state court of all jurisdiction. The proceedings thereafter were *coram non judice*. The refusal to make the transfer could not avert the force of the statute, when coupled with the request. The jurisdiction of the court was instantly swept away. The only power that remained was to perform the merely ministerial act of making the formal transfer. Railroad Co. v. Dunn, 122 U. S. 513, 7 Sup. Ct. Rep. 1262; Stone v. South Carolina, 117 U. S. 432, 6 Sup. Ct. Rep. 799; Carson v. Hyatt, 118, U. S. 279, 6 Sup. Ct. Rep, 1050; Crehore v. Railway Co. 131 U. S. 240, 9 Sup. Ct. Rep. 692.

While it was at first supposed that a state court could determine for itself the question of diverse citizenship, (Dunne v. Railroad Co. 27 N. W. Rep. 448, and cases cited,) it is now settled law that when a *prima facie* case for removal is presented the state court instantly loses jurisdiction; that it has no power to determine the fact of diverse citizenship; and that any action on its part will be without jurisdiction, even though the case is not in fact transferable, and the petition for removal is false. The record closes when the application for removal is made. The power of the state court is destroyed, and the jurisdiction of the federal court attaches at once; and the question of fact on which that jurisdiction ultimately depends must be determined in that court, and its decision on that point is binding on the state court. Railroad Co. v. Dunn, 122 U. S. 513, 7 Sup. Ct. Rep. 1262. The federal court either holds the case or remands it, as its determination of the question of diverse citizenship is in favor of or against its jurisdiction. It is singular that any other view was ever entertained. The supremacy of the laws of the United States might in this regard be utterly destroyed by the hostile action of the courts of a subordinate sovereignty, if the fact on which the operation of these laws to give the federal courts jurisdiction depended rested for its final determination on the decision of the tribunals of such subordinate sovereignty.

The fact that the plaintiff was appointed administrator in the territory of Dakota, and is now administrator in this state, does not alter the case. The question is one of personal citizenship. The individual can have no official citizenship. He is not, as

administrator, a citizen of this state, although appointed and acting here. He is a citizen of Minnesota, and this is the decisive test. The authorities are unanimous on this point. Amory v. Amory, 95 U. S. 186; Davies v. Lathrop, 12 Fed. Rep. 358; Rice v. Houston, 13 Wall. 66; Knapp v. Railroad Co. 20 Wall. 117. Nor can it be said that the citizenship of the next of kin of the decedent, and not the citizenship of the administrator, is the test. Although an executor, administrator, trustee, or receiver sues in a representative capacity, yet his citizenship, irrespective of that of the beneficiaries, determines the question of jurisdiction. Coal Co. v. Blatchford, 11 Wall. 172: Gray v. Davis, 1 Woods, 420; Knapp v. Railroad Co., 20 Wall, 117; Rice v. Houston, 13 Wall. 66. The cases of Browne v. Strode, 5 Cranch, 303: McNutt v. Bland, 2 How. 10; and Williams v. Ritchey, 3 Dill. 406, were all cases where the party whose citizenship was held not to be decisive was only a formal party plaintiff. Distinguishing the first two of these cases from a case like the one at bar, the United States supreme court, in Coal Co. v. Blatchford, 11 Wall. 172, said: "The nominal plaintiffs in those cases were not trustees, and held nothing for the use or benefit of the real parties in interest. They could not, as is said in McNutt v. Bland, *supra*, prevent the institution or prosecution of the actions, or exercise any control over them."

It is immaterial whether the appellant is in a position to raise this question of jurisdiction. This court will reverse a judgment shown by the record to be void, although the point is not raised at all. Robinson v. Navigation Co., 112 N. Y. 315, 19 N. E. Rep. 625.

The language of the enabling act providing for the transfer of cases is different from that of the statute regulating the removal of cases, but the effect of the two statutes is the same. The intent of each is to divest one court of jurisdiction, and confer such jurisdiction on another court, under certain circumstances. The operation of such a statute cannot be be made to depend upon the volition of the tribunal from which the case is to be taken. Such a construction would make the statute self-destructive. When a request for a transfer is made,

the federal court instantly becomes the perfect successor of the territorial court, by mere force of the statute. The title of the federal court to the case is inchoate before request; but, whenever a request is made, its title at that moment becomes complete. The inheritance cannot at the same time be the property of two different heirs,—the state court and the federal court. Until request, the state court is the successor of the territorial court in such cases, as well as in all other cases. It rests with either party to say whether the federal court shall succeed to what would otherwise be the inheritance of the state court. Either party may make the request. That request, when properly made, is, in and of itself, the death of the old jurisdiction and the birth of the new. The judgment of the district court is reversed, and that court is directed to transfer this case to the federal circuit court, as requested. All concur.

REPORTER: See also the following cases, arising under the Omnibus Bill: Dorne v. Richmond, (S. D.) 44 N. W. Rep. 1021; same case in 43 Fed. Rep. 690; Herman v. McKinney, 43 Fed. Rep. 689; U. S. v. Taylor, 44 Fed. Rep. 2; Nickerson v. Crook, 45 Fed. Rep. 658; Gull River Lumber Co. v. School Dist. No. 39, *infra*; Murray v. Bluebird Min. Co., 45 Fed. Rep. 387; Dunton v. Muth, id. ib. 390; Carr v. Fife, 44 id. 713.

STATE OF NORTH DAKOTA, *ex rel.*, FRANK OHLQUIST, Plaintiff, *v.* JAMES K. SWAN, as Sheriff of Grand Forks County, Defendant.

1. Intoxicating Liquors — Article 20 of the Constitution of North Dakota.

When a party was held by a magistrate for a violation of the laws against selling intoxicating liquor as a beverage without license, in force on that subject when the constitution was adopted, and committed, in default of bail, and brought before this court on *habeas corpus* proceedings, claiming that he was unlawfully restrained of his liberty, because all pre-existing laws against selling intoxicating liquor without license were repealed by article 20 of the constitution, (being prohibition article,) as being repugnant thereto, *held* that, if article 20 of the constitution be self-executing and operative, it repeals the pre-existing license law, including penalties.

2. Article 20 Not Self-Executing.

But, *held, further*, that said article is not self-executing; that it cannot be enforced by the penalties in the former license law; that the provision in that article 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," clearly indicates the intent of the constitutional convention that supplemental legislation should be the means of enforcing said article.

3. Article 20 Does Not Repeal License Law.

Further, that, until such supplemental legislation is had, article 20, while prohibitory in form, is in fact only a declaration of principles, and without force to repeal the prior license law; and hence relator's restraint is not unlawful.

(January Term 1890.)

APPLICATION for writ of *habeas corpus*.

Messrs. Bangs and Fisk for the relator argued: § 217 of the Constitution of this State repealed all laws licensing the sale of intoxicating liquors, because the license laws made to regulate traffic in such liquors are repugnant to the prohibition established by the Constitution; citing § 24 of the Enabling Act; § 2 of the schedule of the State Constitution; Norton v. Taxing Dist. of Brownsville, 9 Sup. Ct. Reporter 322; State v. Hanley, 25 Minn. 429; Ty. *ex rel.*, McMahon, v. O'Connor, 41 N. W. Rep. 753.

Messrs. Greene and Hildreth, also for the relator, argued: The Enabling Act and the State Constitution expressly repeal the entire system of Territorial laws regulating the traffic in alcoholic liquors; citing United States v. Tynen, 11 Wall. 88; Fraser v. Alexander, 75 Cal. 153; Norris v. Crocker, 13 How. (U. S.) 429.

The penalties for violating the license law cannot survive that law; citing Maryland v. R. R. Co., 3 How. 534; Van Inwogen v. Chicago, 61 Ill. 31; United States v. Tynen, *supra*.

John M. Cochrane, states attorney of Grand Forks county, for the respondent, argued: That the Constitution is not in conflict with the license laws; citing Ty. v. O'Connor, *supra*, and Ty. v. Pratt, 43 N. W. Rep. 714; Prohibitory Amendment Cases, 24 Kan. 723.

Even if part of the license law of 1879 is repealed by the Constitution part of it remains in force.

Until some act is passed pursuant to article 20, of the Constitution, the license laws remain in force; citing Allbyer v. State, 10 O. St. 588; Cooley's Const. Lim. 76; Black on Const. Prohibition 181, and many other cases.

George F. Goodwin, Attorney General, and Jesse A. Frye, states attorney for Stutsman county, also for the respondent, argued: Article 20 of the Constitution is in full force and effect: §§ 11 and 20 of the schedule. That article is a complete law and is self-executing: Cooley Const. Lim. 220; Cooley Const. Lim. 99 to 103.

Section 2 of the Schedule continued in force that part of the license laws fixing penalties; citing Benner v. Porter, 9 How. 239; State *ex rel.*, Hunt v. Meadows, 1 Kan. 90; Franklin v. Westfall, 27 Kan. 614; State v. Wilcox, 19 Am. Rep. 536; Prohibitory Amendment Cases, *supra.*

Even if article 20 repeals the whole system of license law, still said article makes the sale of such liquors a crime, a misdemeanor, and such crime is punishable under § 6213 of the Compiled Laws.

BARTHOLOMEW, J. On the 22d day of January, 1890, the relator, Frank Ohlquist, applied to this court for a writ of *habeas corpus*, alleging that he was unlawfully restrained of his liberty by James K. Swan, sheriff of Grand Forks county. The petition states that the relator was duly arrested on January 21, 1890, upon a warrant issued by a justice of the peace of Grand Forks county, upon a complaint charging the relator with having, on the 10th day of January, 1890, sold intoxicating liquors in said county, in quantities less than five gallons, without having first obtained a license and given a bond therefor, as provided in § 1, c. 26, Laws Dak. 1879; that upon the hearing before said justice the relator was duly held to appear before the district court of said county, and admitted to bail for such appearance in the sum of $500. The relator, failing to give such bail, was by such justice duly committed to the custody of the respondent, as sheriff of said county. Relator, in his petition, claims that his imprisonment is illegal because—*First*, the

complaint upon which the warrant was issued does not state facts sufficient to constitute a public offense; and, *second*, that chapter 26, Laws 1879, for the violation of which relator is restrained of his liberty, is in conflict with article 20 of the constitution of the state of North Dakota, and consequently repealed thereby. The writ was issued January 22, 1890. On the 30th day of January, 1890, respondent made return to said writ, admitting the restraint, and alleging the arrest and proceedings before the magistrate in justification thereof. Relator moved to quash the return.

The decision of the question hinges upon the effect, if any, that article 20 of the constitution has upon pre-existing statutes. The act of congress known as the Omnibus Bill, and under which North Dakota became a state, contains the following: "And all laws in force, made by said territories at the time of their admission into the Union, shall be in force in said states, except as modified or changed by this act, or by the constitution of the states respectively." Omnibus Bill, § 24. § 2 of the schedule of the constitution of this state reads as follows: "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 limitation, or be altered or repealed." From the first organization of the territory of Dakota it was the policy of its citizens to restrain the sale of intoxicating liquors. The earlier enactments on this subject are codified as chapter 35, Pol. Code 1877, which is a complete license law. The first section is as follows: "It shall be unlawful for any person, by himself, by agent, or otherwise, to sell in any quantity intoxicating liquors, to be drank in, upon, or about the premises where sold, or to sell such intoxicating liquors to be drank in any adjoining room, building, or premises, or other places of popular resort, connected with said premises where sold, without having first obtained a license and given bond as hereinafter provided." § 10 of that act recites the penalties for a violation thereof, declaring such violation a misdemeanor punishable by fine of not less than $20 nor more than $150. In 1879 the territorial legislature passed a new and complete act upon this subject, known as "Chapter 26, Laws 1879," and being the law

under which relator is charged. The act is very similar to chapter 35, Pol. Code 1877. The first section of the former law, before quoted, is changed by inserting an additional provision, making it unlawful to sell intoxicating liquors, for any purpose, in any quantity less than five gallons, without first obtaining a license, etc.; and the penalty for a violation of the law is increased to not less than $100 nor more than $300 for each and every offense, or imprisonment not exceeding 60 days in the county jail, or both, in the discretion of the court. See § 11 c. 26 Laws 1879. In 1887, chapter 70, Laws 1887, known as the "Local Option Law," was passed by the territorial legislature. By the provision of that law the people of any county could, by a majority vote, absolutely prohibit the issuance of any license to sell liquors in such county; and § 5 of that act provided that, "in addition to the penalties now prescribed by law, any person or persons who may sell any intoxicating liquors without a license having been duly granted as provided by law, or where the license is granted in violation of this act, shall be restrained from so doing by proper injunction," etc. The supreme court of Dakota territory in Territory v. Pratt, 43 N. W. Rep. 711, and in Territory v. O'Connor 41 N. W. Rep. 746, held that chapter 70 continued in force all the penalties contained in chapter 26 Laws 1879, and that the injunctional feature was additional and cumulative. The same legislature that enacted the local option law, evidently fearing that the position might be taken that the penalties prescribed in chapter 26, Laws 1879, pre-supposed the power to obtain a license, amended the first section of said chapter 26 to read as follows: "It shall be unlawful for any person, by himself, by agent, or otherwise, to sell, in any quantities, intoxicating liquors to be drank in, upon, or about the premises where sold, or to sell such intoxicating liquors to be drank in any adjoining room, building or premises, or other place of popular resort connected with such premises where sold, or to sell such intoxicating liquors, for any purpose, in any quantity less than five gallons, without first having obtained a license and given a bond as hereinafter provided; provided, that intoxicating liquors shall not be sold in any quantity, where no license is granted by the board of county

commissioners, except as provided for in § 13,"—with another proviso immaterial to this case. § 13 of said act relates to druggists.

From this legislation it is apparent that the original determination of the citizens of Dakota territory to restrict the liquor traffic has constantly augmented, and such augmentation is seen in the increased restriction and increased penalties with which they have hedged the traffic about. No backward step has been taken. Such was the state of the law on that subject when the constitutional convention of North Dakota met, in July, 1889. That convention, with full knowledge of the past legislation, crystalized what it believed to be the desire of the people of North Dakota into article 20 of the proposed constitution, which is as follows: "No person, association, or corporation shall, within this state, manufacture, for sale or gift, any intoxicating liquors; and no person, association, or corporation shall import any of the same, for sale or gift, or keep or sell, or offer the same for sale or gift, barter or trade, as a beverage. 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." This article was adopted as a portion of the constitution. Relator takes the broad position that chapter 26 of the Laws of 1879, as amended, is repugnant to the above article, and under § 2 of the schedule said chapter is no longer in force, or at least that said chapter is "changed" and "modified" by said article, in so far as it provides for the issuance of license, and hence cannot stand under the provision of the Omnibus Bill as a licensing statute; and further, as the evident intent and purpose of said chapter 26 was to establish a license system, that when said system is abrogated all penalties for its violation necessarily fall with it. The position of relator leads to the inevitable conclusion that there is to-day, in North Dakota, no law by which the open and notorious sale of intoxicating liquors for any purpose, and in any quantity, can be punished. We may go further. Article 20 provides that the "legislative assembly shall by law prescribe regulations for the enforcement of this article, and shall thereby provide suitable penalties for the violation there-

of." The obligation thrown upon the legislature is a moral obligation only. Cooley, Const. Lim. (4th Ed.) 100. It follows, then, on relator's theory, that the constitutional convention, which sought to give the state absolute prohibition, in fact gave it untrammeled liquor traffic, and provided that such untrammeled traffic should continue indefinitely, unless some legislature, to be elected in the future, should voluntarily elect to check the flood of intoxicants that the constitution turned loose upon the state. Such a conclusion is so at variance with all past legislation on the subject, so at variance with the declared wish of the voters of the state, so at variance with the intent and expectation of the framers of our constitution, that this court ought not to reach it, unless forced thereto by the clear rules of construction, or the obvious meaning of the language employed. It is clear that if chapter 26, Laws 1879, be repealed, such repeal is by implication, and not by express terms. Repeals by implication are not favored in law. Gordon v. People, 44 Mich. 485, 7 N. W. Rep. 69; Connors v. Iron Co., 54 Mich. 168, 19 N. W. Rep. 938; Phillips v. Council Bluffs, 63 Iowa, 576, 19 N. W. Rep. 672. Still, it is a well-settled rule that where the subsequent statute covers the same ground, and the entire ground, covered by the prior statute, and is a complete law in itself, that the subsequent statute repeals the former by implication. U. S. v. Tynen, 11 Wall. 88; Fraser v. Alexander, 75 Cal. 153, 16 Pac. Rep. 757; Schneider v. Staples, 28 N. W. Rep. 145. It is equally well settled that if such subsequent statute do not cover the entire ground covered by the former, or be not a complete law in itself, no repeal by implication will follow. Breitung v. Lindauer, 37 Mich. 217; U. S. v. Tynen, *supra*.

In the light of these elementary principles, we will examine the question of the repeal of the license law in force when North Dakota became a state. Our statutory definition of "law" is in substance in accord with that by Sir William Blackstone, to-wit, "a rule of civil conduct, prescribed by the supreme power in a state, commanding what is right and prohibiting what is wrong." 1 Blackstone Comm. 53. And Blackstone, in his introduction to his Commentaries, (book 1, p. 53,) says: "It remains, therefore, only to consider in what manner the law is said to ascer-

tain the boundaries of right and wrong, and the methods which it takes to command the one and prohibit the other. For this purpose every law may be said to consist of several parts: One declaratory, whereby the rights to be observed, and the wrongs to be eschewed, are clearly defined and laid down; another directory, whereby the subject is instructed and enjoined to observe those rights, and abstain from the commission of those wrongs; a third remedial, whereby a method is pointed out to recover a man's private rights, or redress his private wrongs; to which may be added a fourth, usually termed the 'sanction' or 'vindicatory' branch of the law, whereby it is signified what evil or penalty shall be incurred by such as commit any public wrongs, and transgress or neglect their duty." And again, on page 57, he says: "Of all the parts of a law, the most effectual is the vindicatory; for it is but lost labor to say, 'Do this, or avoid that,' unless we also declare, 'This shall be the consequence of your non-compliance.' We must therefore observe that the main strength and force of a law consists in the penalty annexed to it. Herein is to be found the principal obligation of human laws." Measured by this standard, it is very clear that article 20 does not constitute a law. The "main strength and force" and "principal obligation" are wanting. The article contains only the declaratory and directory portion of the law, and lacks the remedial and vindicatory. It is evident that, were we still a territory, and had a subsequent legislature passed an act containing just what is found in article 20, and no more, such act would be powerless to repeal any existing statute on the subject, particularly where the legislature that passed the act publicly proclaimed its futility, by requesting a subsequent legislature to give the act life and force. It remains, then, to be seen whether article 20 can have greater repealing force as a constitutional provision than it would have as a statute.

In Cooley, Const. Lim. (5th Ed.) 98 *et seq.*, it is said: "But, although none of the provisions of a constitution are to be looked upon as immaterial, or merely advisory, there are some which, from the nature of the case, are as incapable of compulsory enforcement as are directory provisions in general. The

reason is that, while the purpose may be to establish rights or to impose duties, they do not, in and of themselves, constitute a sufficient rule by means of which such right may be protected, or such duty enforced. In such cases, before the constitutional provision can be made effectual, supplemental legislation must be had; and the provision may be in its nature mandatory to the legislature to enact the needful legislation, though back of it there lies no authority to enforce the command. Sometimes the constitution in terms requires the legislature to enact laws on a particular subject; and here it is obvious that the requirement has only a moral force. The legislature ought to obey it; but the right intended to be given is only assured when the legislation is voluntarily enacted. Illustrations may be found in constitutional provisions requiring the legislature to provide by law uniform and just rules for the assessment and collection of taxes. These must lie dormant until the legislation is had. They do not displace the law previously in force, though the purpose may be manifest to do away with it by the legislation required. * * * * * A constitutional provision may be said to be self-executing if it supplies a sufficient rule by means of which the right given may be enjoyed and protected, or the duty imposed may be enforced; and it is not self-executing when it merely indicates principles, without laying down rules by means of which those principles may be given the force of law. Thus a constitution may very clearly require county and town government; but if it fails to indicate its range, and to provide proper machinery, it is not in this particular self-executing, and legislation is essential. Rights in such a case may lie dormant until statutes shall provide for them, though, in so far as any distinct provision is made which by itself is capable of enforcement, it is law, and all supplementary legislation must be in harmony with it." Cooley on Principles of Constitutional Law, speaking of the thirteenth amendment to the federal constitution, prohibiting slavery and involuntary servitude, says, on page 219: "The same amendment also provides that 'congress shall have power to enforce this article by appropriate legislation.' Whether this provision has any importance must depend upon whether the prohibitory

clause itself falls short of furnishing a complete and sufficient protection. A constitutional provision is sometimes, of itself, a complete law for the accomplishment of the purpose for which it was established, and sometimes it merely declares a principle which will be dormant until legislation is had to give it effect. When the former is the case, the provision is sometimes spoken of as 'self-executing.' Nearly all the provisions of the federal constitution which confer legislative or judicial power are inoperative for the practical purposes intended, until legislation under them has given the means, and pointed out the methods, by which the powers shall be exercised. * * * A prohibition of a power in the federal constitution defeats any attempt of its exercise; and any court, state or federal, that may have cognizance of a case in which the power can come in controversy, whether directly or incidentally, must take notice of and act upon the prohibition. Thus the mere declaration that 'no bill of attainder shall be passed' has been found ample to protect all the people against legislative punishment in cases not within their proper cognizance, though no legislation has ever been had looking to its enforcement. The case of the prohibition of the laws impairing the obligation of contracts is a still more strong illustration of the force of certain provisions standing independently. In a multitude of forms, laws have appeared which were supposed to violate this provision; and in no case has a court, either state or national, had any difficulty in dealing with it, or in declaring the law null if it was believed to be within the prohibition. Such a provision may well be declared self-enacting. It is a complete and perfect law in itself, which all courts must take notice of, and enforce, whenever a disregard of it comes to their judicial notice, without any statute requiring or expressly permitting it." Williams v. Mayor, 2 Mich. 560, was an action brought to restrain the collection of an assessment imposed, by order of the mayor and board of aldermen of Detroit, upon a certain lot; and the first ground urged for the restraint was that such an assessment was unconstitutional and void. The court, on page 565, says: "§ 11, art. 14, reads as follows: 'The legislature shall provide an uniform rule of taxation, except on property paying specific tax, and taxes shall be levied on such property

as shall be prescribed by law.' It is insisted that the assessment in question was not made under any uniform rule of taxation provided by the legislature, and that it was therefore void. It is not now necessary to determine what is the true import of the first clause of this section. No new rule of taxation had been provided by the legislature when the assessment was made, and it is not pretended that this provision of the constitution executes itself." And an assessment under the old law was held proper.

In People v. Bradley, 60 Ill. 390, this same principle was discussed. In that state a court had been established by statute, known as the "Recorder's Court of the City of Chicago," with its jurisdiction defined, judge, clerk, juries, and officers provided for. The constitution of 1870 continued this court as the "Criminal Court of Cook County," but with a change of judges, and enlarged geographical jurisdiction, but with a portion of the jurisdiction of the former court expressly denied, and none of the jurisdiction of that court expressly conferred. The case was *habeas corpus*, issued from the criminal court of Cook county. It was urged that this court was without authority to issue that writ; but the supreme court, after quoting the constitutional provision, say: "This provision, as clearly appears from the context, was intended to be self-executing, and operate upon the court in question immediately upon the constitution being adopted. * * * In short, all the machinery through which the functions of the criminal court are exercised is afforded by the statute creating the recorder's court, or else such functions must be considered as dormant until the means for their exercise shall be provided by legislation." In Nevada a law of 1861 provided for a homestead that should be exempt. A subsequent constitution declared "a homestead, as provided by law, shall be exempt from forced sale under any process of law," etc. There was also a clause similar to § 2 of schedule to our constitution. Property had been levied upon by a sheriff that was claimed as a homestead, and the position taken by the officer was that the constitutional provision repealed the former law, and, as no homestead had been provided by legislation subsequent to the adoption of the constitution, that therefore the

homestead right was gone. The court, in discussing the case, say: "If it requires future action of the legislature to provide what a homestead shall be, then this section of the constitution is inoperative to protect a homestead until such act is passed. It appears strange to us that it should be contended that this clause of the constitution is legislation so completely covering the whole ground of homestead exemption as to suspend all former laws on that subject, and at the same time that it is so incomplete as to be wholly inoperative." Goldman v. Clark, 1 Nev. 610.

We are, then, inevitably led to this position: Whether or not article 20 of our constitution repealed chapter 26 of the Laws of 1879 depends upon whether or not said article is self-executing, and this latter position, in turn, depends upon whether or not the legal machinery exists for its enforcement. On the argument both parties contended that the article was self-executing, but from widely different views as to the result. Relator claims it to be self-executing, and as a result the repeal of the entire license system, including penalties, follows. Respondent claims it was self-executing, but did not repeal the license law, except as to selling as a beverage, or, at most, repealed only the sections providing for license, and that the remaining provisions, being not inconsistent, stood, and that article 20 attached to it, for its own enforcement, the penalties of the old law, and in that form stood a complete penal law. Counsel for relator cites on this point Norton v. Taxing District, etc., 9 Sup. Ct. Rep. 322. The case went up from Tennessee. The constitution of 1834 of that state gave the legislature "power to authorize the several counties and incorporated towns in this state to impose taxes for county and corporation purposes, respectively, in such manner as shall be prescribed by law; and all property shall be taxed according to its value, upon the principles established in regard to state taxation." Article 2, § 29. Under that constitution the legislature authorized the city of Brownsville, by act of Feb. 8, 1870, by a majority vote, to issue bonds and subscribe to the stock of railroad corporations. At an election held for that purpose all the votes cast were in favor of the proposition. But before the bonds were issued, or the election held, the state

adopted an amendment to the constitution which added to the language before quoted the following: "But the credit of no county, city, or town shall be given or loaned to, or in aid of, any person, company, association, or corporation, except upon an election to be first held by the qualified voters of such county, city, or town, and the assent of three-fourths of the votes cast at said election." The constitution also contained the provision similar to § 2 of the schedule of our constitution. The supreme court of the United States, by Chief Justice Fuller, said: "It is clear that the inhibition imposed by § 29 of the constitution of 1870 operates directly upon municipalities themselves, and is absolute and self-executing; and, although power is reserved to the legislature to enable them to give or loan their credit, and to become stockholders, upon the assent of three-fourths of the votes cast at an election to be held by the qualified voters, the county, city, or town is destitute of the power to do so until legislation authorizing such election, and action thereupon is had." Then, after citing various authorities, he says: "These cases sufficiently illustrate the distinction between the operation of a constitutional limitation upon the power of the legislature and of a constitutional inhibition upon the municipality itself. In the former case past legislative action is not necessarily affected, while in the latter it is annulled. * * * * * The inhibition being self-executing, and operating directly upon the municipality, and not in itself enabling the latter to proceed in accordance with the prescribed limitation, further legislation is necessary before the municipality can act." In this case it is apparent that the Constitution of 1870 acted directly upon the municipalities themselves, and was self-executing, because there then existed, in full force, all the legal machinery necessary to compel obedience on the part of the city. Any tax-payer of the city could go into a court of equity and restrain the issuance of any bonds contrary to the provisions of the new constitution. Hence, being effective, the old law was repealed, not amended, and no bonds would issue under the old law; and the power of the city to issue bonds was in abeyance, and so far not self-executing, until the legislature should give the power in accordance

with the constitution of 1870. Relator also cites on this point State v. Tonks, (R. I.) 5 Atl. Rep. 636. The opinion is short and unsatisfactory. The court hold that the prohibition amendment in that state repealed the prior license law. We have no means at hand of knowing in what respects, if any, that amendment and the prior laws differ from article 20 of our constitution and our prior laws, but assume that they are practically identical. The question of the self-executing character of the amendment was not presented to or considered by the court. The thirteenth amendment to the federal constitution, prohibiting slavery and involuntary servitude, provided that congress should enact laws for its enforcement, but was nevertheless held self-executing, at least in part; and that must be true, because, immediately upon adoption of that amendment, any person held in violation of its terms had all the legal means of redress that he would have in case of any other unlawful restraint of his liberty. All the legal machinery was at hand. Mr. Cooley, speaking on this same point, well says: "And, while courts shall be in existence competent to issue the writ of *habeas corpus*, and to administer common-law remedies, it seems difficult to imagine a case of attempt at a violation or evasion of this declaration of universal liberty that shall be wanting in appropriate redress." Cooley, Const. Law, 221. But it was feared that in some portion of our land it might be necessary to reinforce the common-law remedies by penalties to be inflicted for any violation of the principles of that amendment, and congress was authorized to provide therefor, and no such penalties could be inflicted until congress took the contemplated action.

We recognize the well-settled principle that when, by constitutional provisions, any personal or private right is granted to the citizen, such right is placed beyond the reach of legislative interference, the bill of rights of all the state constitutions furnishing numerous examples of this class; and the reason is plain. The common-law is the ever ready and efficient means of enforcing private rights and redressing private wrongs. But we are considering in this case a constitutional provision that confers no affirmative rights, but, on the contrary, restricts the right of a citizen, and is strictly prohibitory in its nature;

and there is no action known to the law by which any private party could enforce its provisions. Those provisions can be enforced only by penalties for their violation,—penalties prescribed by the legislative power of the state. If such penalties do not exist, then article 20 is barren of the elements of a complete law, and, while prohibitory in form, is in fact simply a declaration of principles. In this connection we must briefly notice respondent's position. He is sustained by the Kansas Prohibition Cases, 24 Kan. 700. We will not stop to refine upon the differences between the Kansas prohibition clause and our own; but we hold that, if article 20 of our constitution be self-executing, then chapter 26, Laws 1879, falls in its entirety. This is in accord with the clear weight of authorities. See U. S. v. Tynen, *supra;* Fraser v. Alexander, *supra;* State v. Tonks, *supra;* and also, as very pertinent to this point, see comments of Justice Brewer in the Kansas Prohibition Cases, page 724. The whole scope and purpose of said chapter 26 was to provide a license law for selling intoxicants as a beverage. It is idle to say that such law would have been enacted to authorize such sales for medicinal, sacramental, and scientific purposes, and still more idle to say that the penalties would have been inflicted for such sales without license. Chapter 26 must all stand or all fall. It falls, if article 20 be self-executing. But to say that that article receives life through the penalties in said chapter 26, immediately destroys those penalties, and leaves the prohibition powerless of enforcement. Another and all-sufficient reason why we cannot attach such penalties to article 20 is that it was never so intended by the constitution makers. They expressly provided that future legislation should provide the regulations for the enforcement, and penalties for the violation, of said article. That intention must be respected. It follows that said article is not self-executing, no common-law or statutory provision existing for its enforcement, hence it remains dormant, as a restriction upon the citizens, until given life by subsequent legislation, and has no force as a repealing measure, and chapter 26 of the Laws of 1879 stands in its entirety.

We must not be understood to hold that article 20 does not

act at once upon the legislature. It does so act. The moral obligation in that direction is complete, and no other or greater can ever be imposed upon a legislative body. For non-action there would be no remedy; but if the legislature act at all it must act in the line directed by the constitution, or its action will be void. People v. McRoberts, 62 Ill. 38; People v. Rumsey, 64 Ill. 44.

Relator was properly held by the magistrate, and must be remanded to the custody of the respondent; and it is so ordered. All concur.

REPORTER: See also State v. Dorr, 19 Atl. Rep. 171; S. C. 82 Me. 212.

EDWARD L. BAKER ET AL., Plaintiffs and Appellants, *v.* LUCIUS D. MARSH ET AL., Defendants and Respondents.

1. **Mortgages — Foreclosure — Sale.**

Where a debt is secured by mortgage on several parcels of lands, and the court finds that the mortgagee is entitled to a sale thereof, it has no authority to except any part thereof from the decree of sale, though the value of the remainder is greater than the amount of the debt.

(Opinion Filed February 5, 1890.]

APPEAL from district court, Barnes county; Hon. WILLIAM H. FRANCIS, Judge.

Action by Edward L. Baker and others, trustees of the estate of Robert H. Baker, deceased, against Lucius D. Marsh, as administrator of John Marsh, deceased, John Kurtz, Phebe Marsh, and others, to foreclose a mortgage on three parcels of land executed by John Marsh and John Kurtz to Robert H. Baker. One of these parcels of land had been conveyed to Phebe Marsh subsequent to the mortgage, and improvements had been made thereon by her. The case was referred, for the taking of testimony and ascertaining the value of the premises. The value of the two parcels was found to be greater than the mortgage debt. The court found that plaintiffs were entitled to the sale of all the premises, but decreed that the two parcels be sold, and the other be excepted from the sale; and plaintiffs appeal.

A. C. Labrie, (*Stone, Newman & Resser*, of counsel,) for appellants. *Herman Winterer*, for respondents.

PER CURIAM. This action was brought to foreclose a mortgage. Judgment in the court below was rendered in favor of the plaintiffs, decreeing the foreclosure of the mortgage, and the sale of only a portion of the mortgaged premises. On what theory the trial court discharged a portion of the mortgaged property from the lien of the mortgage, we fail to understand. The creditor has a right to resort to his entire security in a legal manner, and to deprive him of that right is judicial confiscation. The judgment of the district court is reversed, and that court is directed to enter judgment of foreclosure and sale, as prayed for in the complaint. All the judges concur.

AMELIA J. BOWMAN as Administratrix, etc., Plaintiff and Respondent, *v.* M. EPPINGER, Defendant and Appellant.

1. **Demurrer Ore Tenus; Defective Complaint Cured by Evidenc Not Objected To.**

   A general objection to the introduction of any evidence under a complaint, on the ground that the facts therein stated do not constitute a cause of action, will not be considered, on appeal, when evidence was received, without specific objection, to prove the allegations wanting in the complaint.

2. **Objection to Order of Proof Properly Overruled.**

   Objections to evidence that go simply to the order of proof, or sufficiency of proof, are properly overruled.

3. **Motion for Verdict Denied; Error Waived by Introducing Testimony Unless Motion Renewed.**

   After plaintiff rested in chief, defendent moved the court to instruct the jury to return a verdict for the defendent, and the motion was overruled; and subsequently defendant put in his evidence. *Held*, that error cannot be assigned on the ruling on the motion for verdict, as the error, if any, was waived by defendant by subsequently introducing his testimony; and, *held, further*, that, if defendant, desired to preserve the point, he must renew his motion for verdict upon all the evidence in the case.

4. **When Court Should Direct Verdict.**

   The existance of any legal evidence in the record, upon which a verdict for the party holding the burden of proof can be based, is a ques-

tion of law for the court; and it is error to refuse an instruction asked by defendant, after the testimony is closed, directing a verdict in his favor, when upon the evidence in the record, a verdict for plaintiff must properly be set aside on application.

(Opinion Filed April 1, 1890.)

APPEAL from district court, Stutsman county; Hon. RODERICK ROSE, Judge.

This was an action for money loaned. It appeared from the evidence that one Newhauser procured the loan, and the contention of plaintiff was that he procured it as agent for defendant. The defendant contended that Newhauser had no authority as agent to borrow money.

S. L. Glaspell, Esq., for the appellant, argued that the evidence failed to show that plaintiff was administratrix; citing Wittman v. Watry, 37 Wis. 238; that Newhauser, as general manager of defendant's business, had no implied authority to borrow money, citing Mechem on Agency, § 399; Bickford v. Menier, 107 N. Y. 490; Bank v. Ins. Co., 103 U. S. 783; Wood v. Goodbridge, 52 Am. Dec. 771; Spooner v. Thompson, 48 Vt. 259; that the evidence of Newhauser's authority was limited to his own representations and to statements of others that he had at other times borrowed money for defendant; that such evidence was improperly admitted, it not being shown that defendant was cognizant of such acts, citing Compiled Laws, § 3981; Graves v. Horton, 35 N. W. Rep. 568; Law v. Stokes, 90 Am. Dec. 655.

Messrs. Nickeus & Baldwin, for respondent, argued that Newhauser was in the habit of borrowing money to use in defendant's business, and of repaying it with checks signed with defendant's name, which were afterwards returned to defendant after they had been cashed. That plaintiff having relied upon these facts as showing the agent's authority, the defendant is estopped to deny such authority, citing Kingsley v. Fitts, 51 Vt. 414; 1 Am. Dec. 425; and other cases.

A petition for a rehearing filed by respondent was denied.

BARTHOLOMEW, J. Plaintiff sued as administratrix and alleged—*First*, her representative capacity; *second*, "that on the 9th day of December, 1887, she loaned the defendant, for his accommodation, through his agent, Ferdinand Newhauser, and

at the request of the defendant, and without any time being agreed upon for payment," a certain sum of money; *third*, demand of payment, and refusal. The answer puts in issue every allegation of the complaint.

After the jury had been sworn, and when the first witness was produced, the defendant objected "to the introduction of any evidence under the complaint in this action; for the reason that the facts therein stated do not constitute a cause of action." The objection was overruled, and this ruling is assigned as error. The ruling cannot be reviewed: for the reason that proof was introduced tending to establish the facts not alleged, and no objection was made to such proof because of such insufficient allegation. Learned counsel probably had in mind the fact that there was no specific allegation that plaintiff loaned the money as administratrix. When proof of that fact was offered, he should have made his objection for that reason. His general objection does not reach the point, and the proof being received without objection cures the defect in pleading, if any. Thoreson v. Harvester Works, 29 Minn. 341, 13 N. W. Rep. 156; Isaacson v. Railroad Co., 27 Minn. 463, 8 N. W. Rep. 600.

Thirteen errors are assigned upon the rulings of the court on defendant's objections to testimony. These errors need not be reviewed in detail or the evidence reproduced. They are all comprehended in one of two classes: First, where plaintiff sought to prove specific acts or statements of the alleged agent, Newhauser, before the agency had been established. These went simply to the order of proof, and were clearly within the discretion of the court. Com. v. Dam, 107 Mass. 210; Hutchins v. Kimmell, 31 Mich. 126. The second class were instances where plaintiff sought to prove that Newhauser had borrowed money of other parties for defendant with a view to showing authority in Newhauser to borrow money. It was the expectation of the learned judge of the district that these transactions would be brought to the subsequent knowledge of defendant; and, indeed, such was the effort of plaintiff's counsel. Under such circumstances, the objections went to the sufficiency and not to the competency of the proof, and were properly overruled.

When plaintiff rested in chief, defendant moved the court to instruct the jury to return a verdict for defendant, assigning as reasons therefor that "there is no evidence showing that Ferdinand Newhauser had any authority from defendant to borrow money on his credit, and that there is no evidence in the case showing that defendant authorized, or had any notice or knowledge of the fact of this loan, nor authorized the same, directly or indirectly." The motion was overruled, and this ruling is assigned as error. When his motion was overruled, defendant proceeded to introduce his testimony, and make his case. Granting that it was error to deny this motion, yet, as defendant subsequently put in his evidence, and as the entire case was given to the jury, and found for plaintiff, the former error is cured. Railway Co. v. Cummings, 106 U. S. 700, 1 Sup. Ct. Rep. 493; Insurance Co. v. Crandal, 7 Sup. Ct. Rep. 685; Association v. Willard, 48 Cal. 617; Bradley v. Poole, 98 Mass. 169. This rule is not uniform. The contrary is held in New Jersey and apparently in some other states; but we deem the proposition sustained by the better authorities, and certainly the better reason. All the authorities denying this rule hold that, if the defect in plaintiff's proofs be supplied by the subsequent testimony introduced by defendant, the error in ruling upon the motion is cured. The difficulty with that position, in practice, is that, whenever the ruling upon such motion comes up for review in an appellate court, such court is compelled to explore the subsequent record to discover whether or not the defect has been cured. When the defendant, at the close of plaintiff's evidence, moves for a verdict, and such motion is overruled, and the defendant elects to put in his testimony, it is only reasonable that he should be required to renew his motion upon all the evidence, if he deem the defect not supplied; and, upon the ruling upon the latter motion, the entire case could properly be reviewed. We have discussed the foregoing assignment because it is properly presented on the record, and because we wished to settle the rule in a matter that arises so frequently under our practice.

When the evidence was closed, defendant again asked the court to instruct the jury to return a verdict for the defendant.

The instruction was refused, and the point was saved, and is here assigned as error. The assignment is well taken. While it is true that trial courts should exercise great caution in taking a case from the jury on the facts, and while it should only be done in cases where a verdict for the opposite party must properly be set aside on application, yet the question of the existence in the record of any legal evidence—not a *scintilla*, merely—upon which a verdict for the party holding the burden of proof could be based, is always a question of law; and, in a proper case, the court should not hesitate to declare the law upon this point as readily as upon any other. Thomp. Trials, §§ 2247–2249, Wagon Co. v. Matthiessen, 14 N. W. Rep. 107; S. C. 3 Dak. 233.

The evidence is all in the record. The members of this court have separately and carefully examined it; and we are agreed that, taking from the record defendant's sworn denials, and admitting all of plaintiff's evidence to be true, yet there exists no legal evidence upon which an agency to borrow money, or an estoppel to deny such agency, can be based. It will serve no good purpose to set out the testimony. No express authority is claimed. Plaintiff relies solely upon implied authority arising from the acts of the pretended agent, Newhauser. Admitting that Newhauser did borrow money from another party, ostensibly for the use of defendant—and that is far from certain on the record—and admitting that such loan was paid by check drawn by Newhauser in defendant's name, still there is no legal evidence that defendant knew of such transactions, or of any facts or circumstances from which he could reasonably infer the same. Nor is there any evidence that defendant ever received any benefit whatever, directly or indirectly, from the loan in this case, or any other loan which Newhauser pretended to make for his benefit. Reversed, with costs, and a new trial ordered. All concur.

GOOSE RIVER BANK, Plaintiff and Appellant, *v.* WILLOW LAKE SCHOOL TOWNSHIP of Steele county, Defendant and Respondent.

1. Teacher's Certificate; Warrant Issued to Teacher Having No Certificate Void.

Every contract relating to the employment of a teacher who does not hold a lawful certificate of qualification is void by the express terms of the statute, and every warrant issued in payment of services of such teacher is without consideration and void.

2. School Warrants Not Negotiable.

School township warrants are not negotiable instruments, in the sense that their negotiation will cut off defenses to them existing against them in the hands of the payee.

3. Same; Township Not Estopped by Representations of Its Officers.

The officers of a school township cannot estop the township by a representation, express or implied, that the facts to authorize the issue of a lawful warrant exist.

4. Prohibited Contract; Retention of Fruits of, Does Not Render Municipality Liable.

Where a contract is expressly prohibited or declared void by statute, retention of the fruits of such contract will not subject a municipality to liability under the contract or on a *quantum meruit*.

5. Same; Teacher Making Such Contract Has No Standing in Court.

A person who assists a public officer in depriving the public of the benefits of a statutory protection designed to guard the people against unfit and incompetent teachers has no standing in court, and his assignee will receive no greater consideration.

(Opinion Filed April 1, 1890.]

APPEAL from district court, Steele county; Hon. RODERICK ROSE, Judge.

This was an an action on three warrants issued by defendant in payment of wages of a teacher. The defense was that the teacher held no certificate, and that therefore the warrants were void.

A. B. Levisee, Esq., for the appellant, argued: That defendant is estopped to make the defense which it pleads, the plain-

tiff being a *bona fide* purchaser for value; citing Comrs. v. January, 94 U. S. 202; Kenicott v. Supervisors, 16 Wall. 452; and other cases.

Messrs. E. J. & J. P. McMahon and J. E. Robinson, for respondent, maintained that the warrants not being negotiable, the doctrine of estoppel does not apply; citing School Dist. v. Stough. 4 Neb. 357; 13 Gray, 318; and 56 Me. 315.

CORLISS, C. J. The judgment in favor of the defendant must be affirmed. The action was upon three school township warrants, issued by the officers of the defendant. These warrants are void. They were issued to pay for the services of a teacher who held no lawful certificate of qualification. No such person can be employed to teach. The statute so declares, and any contract made in violation of this provision is void by the express terms of the same act. § 1723, Comp. Laws. There was therefore no consideration for these warrants. The teacher had no claim against the defendant, because the statute declares she should not be employed to teach, and every act in violation of this provision was a nullity, so far as the liability of the defendant is concerned. The plaintiff cannot claim protection as an innocent purchaser for value. That such instruments are not negotiable in the sense that their negotiation will cut off defenses is the voice of all the decisions. Wall v. Monroe Co., 103 U. S. 74; Mayor v. Ray, 19 Wall. 468; 1 Dill. Mun. Corp. (3d Ed.) § 503; Miner v. Vedder, (Mich.) 33 N. W. Rep. 47. The purchaser buys at his peril. Nor is the doctrine of estoppel applicable. Could town officers in this manner estop a municipal corporation, void acts—acts void because expressly forbidden by the sovereign—would have validity, and the will of the legislature would be nullified by the conduct or statement of mere municipal agents. The cases cited on this point have no bearing on this question. No decision can be found holding that a void warrant receives life from the false statement of such an agent, under the circumstances existing in this case. Unless we were willing to leave such corporations to the mercy of dishonest agents, we would not follow such a case could one be found. If an agent can estop the township by a false statement that the teacher has received the certificate, he can estop it also by a

false statement that the person to whom the warrant was issued has rendered services in teaching, when in fact such person has not rendered any services at all. The question was directly presented in Mayor v. Ray, 19 Wall. 468. In view of the earnestness with which this claim of estoppel was urged, we will quote briefly from this opinion, as accurately expressing our views. Speaking of a similar evidence of indebtedness, the court say: "But every holder of a city order or certificate knows that, to be valid or genuine at all, it must have been issued as a voucher for city indebtedness. It could not be lawfully issued for any other purpose. He must take it, therefore, subject to the risk that it has been lawfully and properly issued. His claim to be a *bona fide* holder will always be subject to this qualification. The face of the paper itself is notice to him that its validity depends upon the regularity of its issue. The officers of the city have no authority to issue it for any illegal or improper purpose, and their acts cannot create an estoppel against the city itself, its tax-payers, or people." To same effect Wall v. Monroe Co., 103 U. S. 74; Bank v. School Dist., 42 N. W. Rep. 767; 1 Dill. Mun. Corp. (3d Ed.) § 504.

There is no force in the position that the defendant, having received the benefit of the teacher's services, is liable. Such a doctrine would defeat the policy of the law, which is to give the people of the state the benefit of trained and competent teachers. The law recognizes only one evidence that that policy has been regarded—the certificate of qualification. If the defendant could be made liable by the mere receipt of the benefit of the services rendered, the law prohibiting the employment of teachers without certificates, and declaring void all contracts made in contravention of that provision, would be, in effect, repealed, and the protection of the people against incompetent and unfit teachers, which such statute was enacted to accomplish, would be destroyed. Where a contract is void because of the express declaration of a statute, or because prohibited in terms, the retention by a municipality of the fruits of such a contract will not subject it to liability, either under the contract or upon a *quantum meruit*. Dickinson v. City of Poughkeepsie, 75 N. Y. 65; McBrien v. City of Grand Rapids, 22 N. W. Rep.

206; Thomas v. Richmond, 12 Wall. 349; Argenti v. San Francisco, 16 Cal. 255; City of Litchfield v. Ballou, 114 U. S. 190, 5 Sup. Ct. Rep. 820. See, also, Tube Works Co. v. City of Chamberlain, 37 N. W. Rep. 762; S. C. 5 Dak. 54 This is particularly true in a case like the one at bar, where no person can teach without the certificate, without being actually or legally in collusion with local officers to defeat a wise and salutary statute enacted as a barrier against the employment of unqualified teachers. The person who teaches without the certificate has violated the letter and the spirit of the law. The wrong done is without remedy. The people who have thus had this barrier torn from about them have no redress. Shall the wrong-doer be compensated for aiding the school township officers in breaking down this barrier, thus depriving the people of the protection of this important law? In this connection the language of the court in Thomas v. Richmond, 12 Wall. 349, is very applicable: "The issuing of bills as a currency by such a corporation, without authority, is not only contrary to positive law, but, being *ultra vires*, is an abuse of the public franchises which have been conferred upon it, and the receiver of the bill, being chargeable with notice of the wrong, is *in pari delicto* with the officers, and should have no remedy, even for money had and received, against the corporation upon which he has aided in inflicting the wrong. The protection of public corporations from such unauthorized acts of their officers and agents is a matter of public policy, in which the whole community is concerned, and those who aid in such transactions must do so at their peril." In City of Litchfield v. Ballou, 114 U. S. 190, 5 Sup. Ct. Rep. 820, the same court said: "The money received on the bonds having been expended with other funds raised by taxation in erecting the water works of the city, to impose the amount thereof as a lien upon these public works would be equally a violation of the constitutional prohibition as to raise against the city an implied *assumpsit* for money had and received. The holders of the bonds and agents of the city are *participes criminis* in the act of violating that prohibition, and equity will no more raise a resulting trust in favor of the bondholders than the law will raise an implied *assumpsit* against a public policy so

strongly declared." The judgment of the district court is affirmed. All concur.

REPORTER: See also Farmers & M.'s Bank v. School Dist., 6 Dak. 255; McGuire v. City, id. ib. 346.

TERRITORY OF DAKOTA, Defendant in Error, *v.* MAURICE O'HARE, Plaintiff in Error.

1. **Criminal Procedure — Calling Jury.**

In a criminal case, where the jury was called and sworn singly, and without calling twelve jurors into the box, and where the parties were required to exhaust all challenges to individual jurors as each juror appeared, and before proceeding further with the call, *held* not error.

2. **Same; Calling From List — Error; Waivable, How.**

Where the clerk of the district court, in calling names for a trial jury, did not obtain the names from any jury-box, and did not use either a jury-box or ballots in calling the jury, but called off the names of those who served as jurors from a list of names before him, *held*, it was error. *Held, further*, that, had the attention of the trial court been called to such irregularity before the trial began, it would have been its imperative duty to have promptly dismissed from the trial panel all jurors who were so drawn. But where, in a criminal case, such irregularities of the clerk were discovered by the defendant's counsel while they were going on, and before the trial began, but he made no objection based on such irregularities, but, on the contrary, kept silent as to the same until after a verdict was returned into court, *held*, that the irregularity was waived. *Held, further*, that such irregularity was of a character which might be waived without impairing defendant's right of trial by jury. *Held, further*, that it was too late to take advantage of such irregularity upon a motion for a new trial, where defendant's attorney had such previous knowledge of the irregularity, but reserved his knowledge thereof, and brings it before the court for the first time, and by affidavit, upon a motion for a new trial.

3. **Same; Overruling Challenge for Cause When Peremptory Challenges Unexhausted Not Reversible Error.**

Where it is conceded that defendant's challenge of a juror for cause in a criminal case was improperly overruled, but it did not appear affirmatively from the record that, at the time the jury was completed and accepted, defendant has exhausted his peremptory challenges, *held*, that defendant was not in a position to take advantage of such erroneous ruling. In such case, the court will assume that the juror, if objec-

tionable to defendant, could have been gotten rid of by a peremptory challenge.

4. Introduction of Handwriting Solely for Comparison Not Admissible in Territorial Courts.

Where letters purporting to have been written by the defendant were offered in evidence by defendant for the sole purpose of comparison of the handwriting with disputed writings put in evidence by the territory, and which letters were excluded, *held*, not error. Writings not in evidence for other purposes cannot be compared with disputed writings, under the common-law rule adopted by the supreme court of the United States. The trial court, in making such ruling, was a territorial court of subordinate jurisdiction, and, as such, was bound by the federal precedents. Should the same question arise in a case commenced after this state was admitted into the Union, we shall feel at liberty to establish a more liberal rule, if we shall then deem it expedient so to do.

5. Handwriting — Expert Testimony.

The testimony of an expert in handwriting was excluded by the trial court. The expert testified that he was acquainted with defendant's handwriting, but, being examined by the court, he testified that he had seen defendant write but once, and that was during the noon recess of the court, at which time he had, at the request of the defendant's counsel, seen defendant write, for the sole purpose of becoming a witness. *Held*, not error.

6. Criminal Procedure — Cross-Examination of Defendant.

Where, in a criminal case, defendant, at his own request, had taken the stand as a witness in his own behalf, and, on cross-examination, was required to testify as to his antecedents, and, in so doing, stated that he had passed under names other than his own, and had been in jail at different times and places, such testimony being objected to as irrelevant, and not proper cross-examination—no question of privilege having been presented, *held*, not error. A defendant, under such circumstances, occupies no better position than any other witness; hence, within the bounds of a sound judicial discretion, may be cross-examined as to specific collateral facts for the sole purpose of affecting his credibility. This is the rule as established by a decided preponderance of authority; but a different rule prevails in certain states, as in Oregon, California, and Missouri, where statutes have restricted the right of cross-examination to matters drawn out in chief.

7. Same; Charging Jury as to Evidence.

Where the trial court, in a criminal case, in delivering its charge to the jury, makes an argumentative comparison upon the relative credibility of the principal witness for the defense, and the principal witness for the prosecution, where their testimony is vital, and diametri-

cally in conflict, and in so doing disparages the credibility of such witness for the defense, and also conveys to the jury in plain, though indirect, terms, that the court entertains strong suspicions of the credibility of such witness for the defense, *held*, error which must reverse the judgment. *Held, further*, that such error is not cured by repeated statements in the charge that the jury are the exclusive judges of the weight of evidence, and the credibility of witnesses. Subdivision 6, § 343, Code Crim. Proc., which declares that, in charging the jury in criminal trials, the judge "may state the testimony, * * * but must not charge the jury in respect to matters of fact," has, as to criminal trials, abrogated the common-law rule, under which judges were permitted to give juries their own views and opinions upon the weight of the evidence and the credibility of the witnesses.

(Opinion Filed April 1, 1890.)

ERROR to district court, Traill county; Hon. WILLIAM B. MCCONNELL, Judge.

Taylor Crum, for the plaintiff in error, argued: Twelve names must be drawn by the clerk, and defendant allowed to examine the twelve before exercising the right of peremptory challenge; citing People v. Scoggins, 37 Cal. 676; People v. Iams, 57 Cal. 115; Lamb v. State, 36 Wis. 424. A writing known to be in the handwriting of a party may be introduced for the purpose of comparison. Georgia, etc., Co. v. Gibson, 52 Georgia, 640; Chance v. Ry. Co., 32 Ind. 472; Macomber v. Scott, 10 Kan. 336; Page v. Homans, 14 Me. 478; Sweetser v. Lowell, 33 Me. 446; Vinton v. Peck, 14 Mich. 295; Yates v. Yates, 76 N. C. 143; Murphy v. Hagerman, Wright, 293, (Ohio); McCorkle v. Binns, 5 Binn. 340, (Pa.); State v. Hopkins, 50 Vt. 316; Bird v. Miller, 1 McMull. 120, (S. C.) The courts are divided on this proposition. Unless defendant puts his character in issue, the state cannot inquire into his history, nor attack his character. State v. LePage, 24 Am. Rep. 75; People v. Daniels, 11 Pac. Rep. 655; Coleman v. People, 55 N. Y. 89; Gale v. People, 26 Mich. 159; State v. Huff, 11 Nev. 26; State v. Lurch, 6 Pac. Rep. 410; State v. Porter, 75 Mo. 171; State v. Carson, 66 Me. 116; State v. Rainsburger, 31 N. W. 866; Philadelphia, etc., Ry. Co. v. Stimson, 14 Peters, 448.

As to the fifteenth exception to the charge, stated in the opinion, counsel cited: Thorp v. Goewey, 85 Ill. 612; Evans v.

George, 80 Ill. 51; Frame v. Badger, 79 Ill. 441; Bulen v. Granger, 29 N. W. 719; Unruh v. State, 4 N. E. 453.

Geo. F. Goodwin, attorney general, and *F. W. Ames*, states attorney for Traill county for the defendant in error: The objection to want of box and ballots was waived because not made till jury was complete. People v. Stonecifer, 6 Cal. 405; Thrall v. Smiley, 9 id. 537; People v. Ransom, 7 Wend. 417; Com. v. Norfolk, 5 Mass. 435. Jurors in criminal cases should be separately accepted and sworn: Thompson on Trials, §§ 91–2; State v. Potter, 18 Conn. 166; State v. Pierce, 8 Iowa, 231; Com. v. Rogers, 7 Met. 500; Walker v. Collier, 37 Ill. 362; State v. Roderigas, 7 Nev. 328; Horbach v. State, 43 Texas, 242; Smith v. Brown, 8 Kan. 608; Schufflin v. State, 20 Ohio St. 233; State v. Brown, 12 Minn. 538. An erroneous overruling of challenge for cause is not reversible error unless defendant had exhausted his peremptory challenges. Anarchist Case, 12 N. E. 989; Loggins v. State, 12 Tex. App. 65; People v. McGungill, 41 Cal. 429; State v. Elliott, 45 Iowa, 486; People v. Teatrusky, 2 N. Y. Crim. Rep. 450; Territory v. Campbell, 22 Pac. 121. That defendant was properly cross-examined as to his history and character: State v. Cox, 67 Mo. 392; Southworth v. Bennett, 58 N. Y. 659; State v. Pfefferle, 12 Pac. 406; Anarchists' Case, 12 N. E. 989; Boyle v. State, 5 id. 203; People v. Cummins, 11 N. W. 184; Territory v. Davis, 10 Pac. 359; Hanson v. Com., 11 S. W. 286; People v. Johnson, 50 Cal. 571. The extent of such cross-examination is in the discretion of the trial court: Disque v. State, 8 Atl. 281; People v. Clark, 8 N. E. 38; State v. Pfefferle, *supra*. Specimens of chirography are not admissible in evidence merely for purposes of comparison: Strother v. Lucas, 6 Peters 763; 9 Am. & Eng. Encyc. Law, 283–290. Unsigned letters are admissible, if traceable to the writer; Bartlett v. Mayo, 33 Me. 518. As to the fifteenth exception to the charge, they cited: Thompson on Charging Jury, § 37; People v. Cronin, 34 Cal. 191.

In opening the state's case, its attorney spoke as follows: "This is the third time that the grand jurors of this county have returned an indictment for the crime of murder. In

the former cases, the victim, the accused, the witnesses, and all connected with the trial, were residents here, and well known to the people of the county; in this case, the defendant, and most of the witnesses, and the deceased, are strangers to us all. Yet this investigation is of as much moment, to the people of this county, as though this crime were directed against one of our own citizens." To these remarks the defendant's counsel excepted.

To the point that such remarks were improper, counsel for plaintiff in error cited: State v. Williams, 18 N. W. 682; Cleveland Paper Co. v. Bangs, 16 N. W. 833; Brown v. Swineford, 28 Am. Rep. 582; McDonald v. People, 18 N. E. 817; Hall v. Wolf, 16 N. W. 710; People v. Montague, 39 id. 588; Sasse v. State, 32 id. 849. Counsel for the state, contra, cited: Thompson on Trials, §§ 964, 977; Heyl v. State, 109 Ind. 589; People v. Gibbs, 38 N. W. 257; Boldt v. State, 35 id. 935; State v. Calhoun, 34 id. 194; State v. Winter, 34 id. 476; People v. Greenwall, 22 N. E. 180; Anarchists' Case, 12 id. 993.

WALLIN, J. The defendant (plaintiff in error) was convicted of the crime of murdering one Casey, and is now incarcerated at Bismarck under sentence of imprisonment for life. On April 24, 1889, motions for a new trial and in arrest of judgment were overruled by the district court. A bill of exceptions, embracing the evidence and the proceedings had at the trial, was settled in the court below; and the whole record is now before this court for review.

The errors assigned are numerous, and we will first consider those which relate to the formation of the trial jury. The mode of impaneling the jury was the following: Names were called by the clerk; and, as jurors appeared, one at a time, they were sworn individually to try the case, and without calling twelve men into the jury-box. After the panel had been completed, it was sworn collectively, by administering the same form of oath as that which had previously been administered to the jurors individually. We find no warrant in the statute governing criminal trials for swearing the jury collectively, but no exception appears to have been taken to the second swearing of the jury, and we are unable to see how such an irregularity did or could preju-

dice the defendant. After the jury had been called and sworn individually as jurors, but before the oath had been administered to the panel as a body, objection was made by defendant's counsel "to the manner of selecting the jury." It appears that the trial court considered it very important that the specific ground of this objection should distinctly appear; and, accordingly, in settling the bill of exceptions, the trial court not only stated the ground of the objection, with the ruling thereon, and the exception allowed thereto, but superadded an explanation which serves the double purpose of showing affirmatively what the ground of the objection was, and also excluding negatively all other grounds. The following is the record: "When the jurors were called and sworn individually, there was no objection made or exception taken to the manner of impaneling them until after the jury was completed, and the jurors had been sworn, individually, to try the case, when the defendant excepted to the manner of selecting the jury. Afterwards the court ordered the jury to be sworn as a panel, in the same manner as though it was administered to them as individual jurors." To which record the court appended the following: "When the defendant excepted to the manner of selecting the jury, as stated and referred to in the foregoing remarks of the court, it was to the fact of the jurors being called and sworn singly by the court; and to this fact an exception was allowed, as indicated in the remarks of the court." Conceding, without deciding the point, that this objection had not been constructively waived by the fact that the defendant's counsel had remained silent, and allowed the process of impaneling the jury, one at a time, to go forward to completion without objection, we will consider the objection upon its merits. The subject of challenging jurors is wholly a matter of statutory regulation. In criminal cases, it is provided that "before a juror is called the defendant must be informed by the court, or under its direction, that, if he intends to challenge an individual juror, he must do so when the juror appears, and before he is sworn." Also, that "a challenge to an individual juror is either (1) peremptory; or (2) for cause." "It must be taken when the juror appears and before he is sworn." Code Crim. Proc. §§ 322–324. It is quite clear to us that these

sections of the Code, with others of similar import in the context, which we need not cite, expressly require that all challenges to individual jurors, whether peremptory or for cause, must be taken when the individual juror appears, and before he is sworn as a juror. The language of the statute is identical with the provisions of a statute of the state of Minnesota, under which the supreme court of that state holds that "all challenges by either party to an individual juror, whether for cause or peremptory, should be interposed and determined when he is called, and in the prescribed order, before proceeding further in the call." State v. Armington, 25 Minn. 29; State v. Brown, 12 Minn. 538, (Gil. 448.) People v. Scoggins, 37 Cal. 676, is cited as authority for the proposition that twelve men must be called into a jury-box before a defendant in a criminal cause can be called upon to exercise his right of challenge. The case is instructive, and we can and do adopt much of its reasoning as applicable to our own criminal code; but the case is not in point as supporting the construction contended for by defendant's counsel. In California, there is a section of the statute relating to civil actions which expressly requires the clerk to "draw from the box twelve names," etc. § 159, civil practice act. In deciding the case above cited, the California court attempted to harmonize the civil and criminal statutes of that state relating to the formation of trial juries, and the decision turns upon the construction given by the court to the clause of the statute which expressly requires the clerk to "draw from the box twelve names." The statutes of the territory of Dakota did not contain this special statutory provision. § 243, Code Civil Proc., it must be conceded, is somewhat ambiguous in this: that it apparently recognizes two modes of impaneling a jury for the trial of civil actions. It seems to contemplate that in some cases the right of peremptory challenge will not be exercised until the trial panel is full; and, by clear inference from the language, there are other cases contemplated when that right may be exercised before the panel is completed. We are not called upon in this case to harmonize these ambiguous provisions of the Civil Code with the statute regulating the formation of trial juries in criminal actions, nor shall we attempt to do so. The provisions of

the Criminal Code are too clear for doubt. We therefore hold that the district court did not err in swearing each juror individually, as he appeared, and before proceeding further with the call.

Another assignment of error is as follows: "The court erred in allowing the clerk to call the names of the jury-men without any box or ballots, either as provided by law or otherwise." But for the affidavit of Taylor Crum, Esq., defendant's counsel, hereinafter set out in full, this assignment of error would be summarily disposed of, by stating the fact that the record in this case contains no evidence whatever that any objection was made, ruling had, or exception taken during the trial, or at any time, based upon any alleged irregularity of the clerk in calling names of jurors from a list of names before him not drawn from the jury-box. The bill of exceptions was settled long after the motions for a new trial and in arrest of judgment were made and overruled. The affidavit of counsel referred to was incorporated with the bill and is now before us. It made its first appearance in the case, and was filed with the clerk, on the day the motion for a new trial was determined, which was some six days after the verdict was returned into court. It is manifest that the very particular language used by the learned judge who presided at the trial, and subsequently settled the bill of exceptions—which language we have already quoted from the record—was employed with the intention and purpose of placing upon the record an authoritative negative of the plain inference to be drawn from the language of the affidavit, viz., the inference that defendant's said counsel did, upon discovering the irregularities of the clerk in drawing the jury as detailed in the affidavit, proceed to make an objection to the court, and based it upon the irregularities specified in the affidavit. In view of the conflict of matters of fact between the plain inference to be drawn from the averments in the affidavit and the record of the proceedings had at the trial as settled by the court below, we cannot, as a court of review, do otherwise than assume, for the purpose of this case, that the record imports verity, and must prevail as against the affidavit of counsel. Our conclusion, therefore, upon this assignment of error will be

based upon the record, showing that no objection was made by the defendant or his counsel to the manner of selecting the jury, which was based upon the irregularities detailed in the affidavit. The affidavit is as follows: "Taylor Crum, being duly sworn, says that he was present, as counsel for the defendant, on his trial on an indictment for murder, on the 16th day of April, 1889; that when the case was called for trial only fourteen of the regular panel were in court, all others being excused by the court. A jury composed of such part of the regular panel called for civil actions, and in part of persons summoned from the body of the county to complete such panel, were present in the court room; that, upon proceeding to the formation of the trial jury, the clerk did not prepare separate ballots, containing the names of persons returned as jurors, either as provided by law or otherwise; that no ballots were folded and deposited in a sufficient box, or any box, either as provided by law or otherwise; that no box was shaken or closed, so as to intermingle any ballots; that the clerk did not, without looking at any ballots, draw them from any box, either as provided by law or otherwise; that the clerk had no box or other receptacle whatever, of any kind whatever; that no ballots whatever, of any kind whatever, nor any separate pieces of paper whatever, were prepared by the clerk, or any other person; that the clerk called out, from his mind, or from a list of names before him, and not otherwise, one by one, the names of persons to act as trial jurors, some of whom were on the regular panel summoned for civil actions, and others specially summoned from the body of the county to complete such panel; that in the formation of the trial jury there was no compliance, in any respect whatever, with the provisions of law relative to the formation of the trial jury, as provided in §§ 7324, 7326, 7331, and 7332, Comp. Laws Dak. being chapter 7, tit. 7, Code Crim. Proc. Dak.; that upon discovery of the proceedings, and before the commencement of the trial, and before the trial jury had been collectively sworn to try the case, defendant, by his counsel, objected to the manner of calling the jury, and thereby challenged the array of trial jury, which objection or challenge was overruled." The

irregularities of the clerk in calling the jury, as charged in the affidavit, are not disputed; and we shall assume that they occurred as stated in the affidavit. Such facts, supplemented by statements of fact contained in the bill of exceptions, may be profitably recapitulated here. They are briefly as follows: *First*, the irregularities of the clerk in calling the jury did occur substantially as set out in the affidavit of counsel; *second*, defendant's counsel was present as senior counsel, and discovered said irregularities while they were going on, and before the jury was collectively sworn; *third*, that, upon discovering such irregularities, defendant's counsel objected to the "manner of selecting the jury," but did not base his objection in whole or in part, upon the irregularities set out in the affidavit, but based his said objection upon another and independent ground; *fourth*, said irregularities were not in any manner brought to the attention of the district court until after the verdict, nor until said affidavit was presented to that court as a part of defendant's application for a new trial. We look in vain through the record for any evidence that defendant did, at the time he discovered the irregularities described in his affidavit, or at any time, "challenge the array," as is erroneously stated in the affidavit. A challenge to the array, under the statute, is known as a "challenge to the panel." Such challenge must be in writing, specifying the facts, and cannot be taken after a juror is sworn. At the time the irregularities were going on which are complained of, it was too late to challenge the array. Code Crim. Proc. § 315. No such challenge was made. Applying established principles governing the formation of trial juries, both in civil and criminal cases, it would have been the manifest duty of the trial court, if its attention had been called to the flagrantly illegal mode of impaneling the jury adopted in this case, to promptly dismiss all jurors thus unlawfully called into the jury-box. No court would have ventured to proceed with the trial, under such circumstances, if it had known of the irregularities of the clerk before the trial began. But, in the case at bar, as before shown, defendant's counsel discovered the clerk in the commission of the acts complained of, and suppressed, or did not make known to the court, his knowledge of

the same until after the verdict, and then brought the irregularities to the attention of the court by his own affidavit made in support of a motion for a new trial. The facts disclosed by the affidavit, supplemented by other facts contained in the bill of exceptions, call only for the application of principles long ago laid up among the fundamentals of the law of procedure. . The defendant must be held to have waived the irregularities of which he now by his counsel so eloquently complains. This principle of waiver is settled by an overwhelming array of authority. Thomp. & M. Juries, §§ 278, 296, and notes. Also 1 Thomp. Trials, § 113, and note 1, p. 111; Clough v. State, 7 Neb. 320; U. S. v. Gale, 109 U. S. 65, 3 Sup. Ct. Rep. 1; Thrall v. Smiley, 9 Cal. 529; People v. Coffman, 24 Cal. 230; Com. v. Justices, etc., 5 Mass. 435. We quote from the opinion in the case of People v. Coffman, *supra*: "The defendant was indicted for the murder of one Deady, and was convicted of murder in the first degree in the district court of El Dorado county. The defendant moved for a new trial, and in arrest of judgment, both of which motions were overruled; and, judgment having been rendered upon the verdict, defendant appeals. One of the errors assigned by the defendant is the illegality of the manner of impaneling the trial jury; and, to show such illegality, he relies wholly upon the affidavit of the clerk of the district court, which states that, after the regularly summoned jury had been exhausted without completing the jury, the court ordered ten special jurors to be summoned, and a jury was completed by calling the special jurors from the list, without having their names written upon the ballots, and drawn from a box. The affidavit was filed at the time of filing the motions for a new trial and in arrest of judgment. The statement in the record, however, respecting the impaneling of the jury, is as follows: 'This cause coming on for trial, the following named citizens were duly accepted, impaneled, and sworn as the jury to try the cause, to-wit.' And following this, are the names of twelve jurors. It does not appear from the record of the proceedings, nor from the statement on appeal, that any irregularity occurred in drawing or impaneling the jury; nor does it appear therefrom, or from said affidavit, that the defendant at the time pointed out any irregular-

ity, or objected to any of the proceedings, in drawing or impaneling the jury. The defendant is entitled to have all the formalities observed that are prescribed by law for the summoning, drawing, and impaneling of the jury, and, if any omission or irregularity in that respect occurs, he is entitled to have the same corrected; and, if not so corrected upon its being pointed out by the defendant, it is error. But, as most of those proceedings are merely formal, and do not affect the substantial rights of the defendant, if he omits at the proper time to interpose his objections to any irregularity, he is deemed to have waived them. They cannot be raised for the first time on a motion for a new trial. He will not be permitted to take the chances of a trial before a jury that he knows has not been impaneled in strict conformity to law, and, after an adverse verdict, to move to set it aside on account of an irregularity that he can fairly be deemed to have assented to. This doctrine has been announced by this court in respect to grand and trial jurors. People v. Roberts, 6 Cal. 215; People v. Chung Lit, 17 Cal. 321; People v. Romero, 18 Cal. 89."

Among the jurors was one Anderson, who was examined as to his qualifications as a juror, and was "challenged for cause by defendant's counsel." The challenge was defective as being inexact in form, in this: It did not state the ground of the challenge, nor specify whether it was interposed for general disqualification, or whether it was for implied bias or for actual bias. Authority could readily be found which would have warranted the trial court in overruling a challenge thus loosely and informally made, but it does not appear that the district court considered the form of the challenge; and we prefer to place our decision upon this point upon another ground. The examination of the juror, as made by both counsel and the court, would have been proper upon a challenge for actual bias. The challenge was overruled, and an exception was taken to the ruling. The record is wholly silent as to whether the defendant did at any time use any of the numerous peremptory challenges allowed by statute to a defendant in a capital case. Consequently, it does not appear affirmatively that defendant's peremptory challenges were exhausted at the time the challenge

for cause as to Anderson was overruled. Error is not presumed, but must appear affirmatively. If defendant's peremptory challenges were unexhausted at the time his challenge for cause was overruled, Anderson could, if objectionable to defendant, have been gotten rid of by peremptory challenge. Under these circumstances, this court will not consider the error assigned in overruling the challenge for cause, because it does not appear that defendant was prejudiced by such ruling. By a decided preponderance of authority, the rule is established that no advantage can be taken of the improper overruling of a challenge for cause to an individual juror where the party ruled against has not previously exhausted his right of peremptory challenge. Robinson v. Randall, 82 Ill. 522; Wilson v. People, 94 Ill. 299; Anarchists' Case, 12 N. E. Rep. 866; State v. Elliott, 45 Iowa, 486; State v. Davis, 41 Iowa 311; People v. McGungill, 41 Cal. 429.

It appears from the testimony of a witness for the prosecution, Dinan, that he was detained as a witness, and was confined as a prisoner in the county jail while the defendant was there awaiting trial. Dinan testified that while both were in jail the defendant handed to him two unsigned written documents, (Exhibits C and D,) which are as follows: Exhibit C, "If you can help me out of this I can raise you some money. What good will it do for you to testify against me?" Exhibit D, "It is getting late in the season. Why in hell don't you go before cold weather sets in?" Defendant's counsel objected to the introduction of these exhibits on the ground that it did not appear that they were signed by the defendant, nor that the witness Dinan was acquainted with defendant's handwriting. The objection was overruled, and defendant excepted. This was not error, as the testimony was competent *prima facie*, independent of any question of handwriting, on the ground that the writings were adopted by the defendant as his own when he personally handed them to the witness. Exhibits C and D were also shown by other testimony to be in defendant's handwriting. But the defendant has the right to show by proper evidence that the exhibits were not in his handwriting. This was attempted to be done by placing upon the stand a witness who produced letters

(Exhibits G and H) purporting to be written by the defendant, and which the witness stated he had received by due course of mail. The letters had no relevancy to the issues in the case. The letters were offered in evidence by defendant's counsel "solely for the purpose of comparison." The court ruled out the letters, and defendant excepted to the ruling. This was not error. The territorial district courts were inferior courts, and bound by precedents made by the United States supreme court, which court holds that, to be admissible for purposes of comparison, a paper must not only be admitted or proved to be in the handwriting of a party whose writing is in dispute, but it must also be a paper "in evidence for some other purpose in the cause." The letters were not in evidence for any purpose, and hence under this rule, which is a strict rule of the common law, the letters were properly excluded. Moore v. U. S., 91 U. S. 270; Strother v. Lucas, 6 Pet. 763; Vinton v. Peck, 14 Mich. 287. In England, and in many of the states, the common-law rule has been expanded by legislation so as to allow comparison to be made of handwriting which is admitted, or proven to the satisfaction of the court to be genuine, whether in evidence for other purposes or not. Again, it is true that a large number of the states have, without legislation, adopted the more liberal rule by judicial decisions. See collection of authorities in 9 Amer. & Eng. Cyclop. Law 283-289. Should the question come before this court in an action arising since the state was admitted into the Union, we should then feel at liberty to adopt a rule for this state untrammeled by our decision in the present case. Defendant's counsel next made the following offer: "At which time defendant, by his counsel, offers to show, by expert testimony and comparison of handwriting, that the paper writings marked 'Exhibits C and D' are not in the handwriting of the defendant, by comparison of handwriting known to be his, which offer is denied by the court, to which ruling defendant, by his counsel, duly excepts." It does not appear by this offer of testimony what particular writing was referred to as writing "known" to be in defendant's handwriting. No specimen of handwriting was shown in connection with the offer; nor was it stated by counsel that the writing to which he referred was a writing then

in evidence, or to be put in evidence. For reasons given in Moore vs. U. S., *supra*, the ruling was not error.

The next witness was one Torson, who testified that he was a lawyer, and had been a teacher of penmanship, and had seen defendant write. He was examined by the court as follows: "I understand, Mr. Torson, that it was at noon, since recess, that you saw him write." Answer. Yes, sir. (Exhibits C and D shown witness.) Question. You may state whether or not, in your opinion, the defendant, Maurice O'Hare, wrote those exhibits? (The counsel for the territory objects to this question on the ground that it is incompetent, irrelevant and immaterial. Objection sustained by the court, to which ruling defendant, by his counsel, duly excepts.) By the court. I understand you, Mr. Torson, you never saw the defendant write until since the adjournment at noon-time? A. No, sir; that is the first time I saw him write. Q. And that upon the request of defendant's counsel? A. Yes, sir." This ruling was correct, as the law is well settled that, where the knowledge of the handwriting has been obtained by the witness from seeing the party write for that purpose, after the commencement of the suit, the evidence is held inadmissible. See note 2, 1 Greenl. Ev. § 577; Reese v. Reese, 99 Pa. St. 89; 9 Amer. & Eng. Cyclop. Law, 277, note 3.

Defendant voluntarily took the stand as a witness in his own behalf, and testified at large upon the issues. Upon cross-examination, he was required to testify to his antecedents, and in doing so stated that he had passed under the name of "Sullivan" at Fargo, and had been in jail at Fargo and at Stillwater, Minn. This testimony was objected to by defendant's counsel as irrelevant, and not proper cross-examination. The objection was overruled, and the ruling is assigned as error. It is well settled that witnesses who are not parties may, for purposes of impeachment, and within the sound discretion of the trial court, be required to testify as to facts, tending to degrade them, which are collateral to the issue. U. S. v. Wood, 33 N. W. Rep. 59, citing Shepard v. Parker, 36 N. Y. 517; La Beau v. People, 34 N. Y. 233; Real v. People, 42 N. Y. 270; Wilbur v. Flood, 16 Mich. 40; Foster v. People, 18 Mich. 265; State v.

McCartney, 17 Minn. 76, (Gil. 54.) By the great weight of authority, the same rule obtains as to parties where, as in Dakota territory, the statute permits parties to testify as witnesses, and does not limit the right of cross-examination. People v. Giblin, (N. Y.) 21 N. E. Rep. 1062. The question of privilege is not presented in the case at bar, as the witness did not claim his privilege. See People v. Brown, 72 N. Y. 571; Yanke v. State, 51 Wis. 464, 8 N. W. Rep. 276; McBride v. Wallace, 29 N. W. Rep. 75; People v. Cummins, 11 N. W. Rep. 184; Anarchists' Case, 12 N. E. Rep. opinion page 979. In State v. Pfefferle, (Kan.) 12 Pac. Rep. 406, the court says: "Where a defendant in a criminal case takes the witness stand to testify in his own behalf, he assumes the character of a witness, and is entitled to the same privileges and subject to the same treatment, and to be contradicted, discredited, or impeached, the same as any ot her witness." See People v. Clark, (N. Y.) 8 N. E. Rep. 38; State v. Clinton, 67 Mo. 380; State v. Cox, id. 392. Since the above-cited Missouri cases were decided, a statute has limited the right of cross-examination in that state. Formerly, there was a statute in Michigan as follows: "The defendant shall be at liberty to make a statement to the court or jury, and may be cross-examined upon any such statement." Sess. Laws 1861, p. 169. The case of Gale v. People, 26 Mich. 157, was a decision made under the Michigan statute above referred to, but the case is not authority here, as we have no similar statute. Under a later statute, the rule in Michigan is the same as that adopted by the court below. People v. Cummins, *supra*. The cases cited in the brief of defendant's counsel, upon this point, from the states of California, Michigan, Missouri, and Oregon are, respectively, adjudications made upon local statutes restricting the common-law right of cross-examination upon collateral matters for purposes of impeachment. We hold that the right of cross-examination as to outside matters of fact, which affect the general character of the witness, and tend to degrade him, and affect his credibility, is within the limits of a sound judicial discretion, a salutary rule. We find no abuse of judicial discre-

tion in this matter in the record, and therefore overrule defendant's assignment of error upon this point.

Another error assigned relates to the refusal of the district court, on request of defendant's counsel so to do, to interpose and stop a certain line of remarks which were made by the district attorney to the jury in opening the case for the territory. We have carefully examined the record bearing upon this point, and are satisfied that the language of the district attorney did not transcend the bounds of either law or propriety, and that the re-refusal of the court to intervene was not error.

We shall notice but one exception to the charge of the court to the jury, namely, defendant's fifteenth exception to the charge, which reads as follows: "There is no person in this case that tempts to speak of the killing of this man, except two—I mean, as to the direct, positive testimony. Those are the man Dinan and the man Brown. In considering the evidence of Dinan you are to take into consideration all the facts and circumstances of the case, so far as you can—his history; his appearance upon the stand; every element in his character as touching upon his honesty, upon his truthfulness; whether or not, in the past, he has been convicted of crime; whether or not he has been punished; whether or not he has been reformed; whether or not he has been leading an honest life at the time of this transaction. All of these are matters to be considered for the purpose of enabling you to say whether or not, when he testifies in this case, he is telling the truth, or whether he is testifying from motives of revenge, or what his motives are. What is said of him would be true of any other witness. It appears in the case that he was at one time in the penitentiary in Missouri, as he says to you. About all that is known of his former history is what he gives himself; but he tells you that he has been in the penitentiary, and he tells you the crime that he was in for—attempt to rob. All that you know as to whether that is true or not, or whether he was in the penitentiary, or the length of time, is his own statement. In considering the testimony of a person who has been convicted of a crime you should take into account his character, the crime of which he is charged, and the object of the law in convicting men, which is, in the first place, to protect society, and

at the same time, if it is possible, to reform the man. Undoubtedly, it was the law of the jurisdiction that convicted this man to protect society, as to that crime; and it was, at the same time, its object to reform him. It is for you to say, under his history, so far as you know it, whether or not he has convinced you that one object of the law has been gained in his reformation, or whether it has had no effect, and whether or not he is unworthy of belief. The reason I speak of this more particularly at this time is as bearing on the character and weight of his testimony, and also that of another witness, of which I shall now speak. I allude to the witness Brown. Here is a man who comes into court; says that he has been charged with the crime of murder in a foreign jurisdiction—in the state of Minnesota; that he had been convicted of murder and that he has been sentenced to death. The object of the law in convicting men and making them suffer the death penalty, is to protect society, and for the reason that there is no further need of trying to reform them; that they are so far gone that, for the protection of society, they should be executed. Hence the law steps in and says that, if they commit certain crimes, death shall follow. I call your attention to that for the purpose of assisting you in weighing the testimony of the man Brown, in determining whether or not the testimony of a man who is convicted of murder—a man who is under sentence of death —is of such a character and such a kind as to invite your credit. In order to so determine, you may consider whether he has shown any signs of penitence, any signs of humiliation, any signs of obedience to law and order, or whether his testimony is brazen, bold effrontery, for the purpose of screening another, or for the purpose of adding one more crime to the list of those he has already committed. I say, these are circumstances for you to take into consideration. I invite your attention to them simply as circumstances that you have a right to take into consideration and view in weighing his testimony. Then, after you have viewed it in the situation in which it is placed before you, if it is entitled to credit, you have a right to credit it all. You have a right to believe every word this man Brown has spoken. You have a right to discredit it. You have a right to treat that witness as he stands, in the eyes of the law, before you, in his true

character, and it is then for you to say whether or not he is entitled to belief. A great deal that I have said in reference to those two witnesses can be said as to any other witnesses without repeating it." To which charge of the court defendant, at the proper time, excepted.

After repeated perusals, and a very careful consideration of the charge as a whole, we are unanimously of the opinion, and shall so hold, that the language embraced within the fifteenth exception above quoted was an invasion of the substantial legal rights of the defendant, and, as such, reversible error. It is quite clear to us that the statement in general terms, which was reiterated in the charge, to the effect that the jury were the exclusive judges of the facts, and of the credibility of witnesses, did not operate to obliterate the impression conveyed to the jury by the strong and unmistakable language employed by the trial court, when speaking particularly of the testimony of the witness Brown as contrasted with that of the witness Dinan. The language now under review was, we do not doubt, intended by the learned judge who used it to be fair and impartial, but, in our opinion, the effect of such language was quite the reverse of fair and impartial. As we construe the words in question, they constitute an argumentative and persistent attack from the bench upon the credibility of defendant's principal witness, Brown. If Brown's testimony was true, the defendant was innocent of the charge. While in prison under sentence of death for a murder committed in the state of Minnesota, Brown volunteered to give his deposition in defendant's behalf; and it was taken by a commissioner appointed by the trial court, and read to the jury. Under such solemn circumstances, Brown testified in substance and in detail, that he was present at the killing of Casey; that he (Brown) shot and killed Casey, and, further, that he did not see the defendant there when the homicide occurred. In that portion of the charge in question the trial court pointedly calls attention to, and exhaustively considers, the question of the credibility of the witness Dinan, who swore that he saw the accused shoot Casey, and the testimony of the witness Brown, who testified that he alone killed the deceased. The life of the defendant

was involved in the issue, and the verdict must have turned upon the question of the relative credibility of these two witnesses. Under our system of criminal trials, the jury are the sole judges of the weight of testimony and credibility of witnesses. Under the law the defendant had the unassailable, conceded right to the unbiased judgment of the jury upon the vital question of the credence to be given to Brown's version of the homicide, without having the question practically determined for the jury, adversely to the defendant, by oblique allusions and argumentative comments from the bench, whereby Brown's testimony was held up for observation in terms which unfavorably contrasted the character and credibility of Brown with that of Dinan. The court stated, in effect, that Dinan, in legal contemplation, was a man not yet sunk so low as to be beyond reformation, and therefore that it was permissible at least to give the testimony of Dinan the credit due to the testimony of an honest man. No such charitable suggestion was made as to the case of Brown. For purposes of an argumentative contrast to Brown's disadvantage the court adverted to the elementary doctrine of the text-writers, viz., that the law, in punishing criminals, had a twofold object in view—one object being to protect society, and the other to reform the criminal; and almost in the same breath they were told that Brown was, in the eye of the law beyond reformation, having been sentenced to suffer death. The court said: "The object of the law in convicting men, and making them suffer the death penalty, is to protect society, and for the reason that there is no further need of trying to reform them; that they are so far gone that for the protection of society they should be executed. Hence the law steps in, and says that if they commit certain crimes death shall follow." The court continues: "I call your attention to that for the purpose of assisting you in weighing the testimony of the man Brown, in determining whether or not the testimony of a man who is convicted of murder—a man who is under sentence of death— is of such a character and of such a kind, as to invite your credit; and, in order to so determine, you may consider whether or not he has shown any signs of obedience to law and order, any signs of penitence, any signs of humiliation, or whether his testimony is

bold, brazen effrontery, for the purpose of screening another, or for the purpose of adding one more crime to the list of those he has committed." We note here that it did not appear in the case that Brown had committed any "list of crimes," or any crime save one. But the language last quoted made the question of Brown's reformation depend upon his having shown evidence of "penitence, any signs of humiliation, any signs of obedience to law and order." Certain it is that no such evidence of Brown's reformation is contained in the record, and equally certain that no such evidence, if offered, would have been competent. The jury might well conclude, from this feature of the charge, that, in the absence of any of the required evidence of Brown's reformation, they would be justified in concluding that Brown had not in fact reformed, and consequently was unworthy of belief. It followed in natural and logical sequence for the court to say, as it did say, in that immediate connection, that the jury "might consider whether Brown's testimony is bold and brazen effrontery, for the purpose of screening another, or for the purpose of adding one more crime to the list of those he he has already committed." We think that it would have been much more fair and impartial if the trial court had somewhere thrown into its remarks to the jury, by way of counterpoise, some suggestion or theory of Brown's evidence which would have been consistent with its truthfulness. It strikes this court quite forcibly that it would have been only fair to the defendant if the district court had suggested, as an aid to the jury, a hypothetical question something like the following: Whether it was probable that a man in Brown's position, standing upon the confines of the grave, and about to be ushered into the presence of a God whose commands he had ruthlessly broken, with no perceptible selfish interest to spur him to the deed, would be likely to publish to the world a false accusation of murder against himself, and then, to bolster such false accusation, commit the additional crime of perjury, by calling upon the name of his Creator and Final Judge to witness that his false charge of murder against himself was true. Such a view as that suggested above would, in the opinion of this court, not have been too far-fetched, and would have been a theory of Brown's testimony, to say the least, as in-

trinsically probable, as a theory, as that advanced in the other direction by the trial court, viz., whether or not such testimony was "bold and brazen effrontery."

We will conclude our comments upon this branch of the case by saying, briefly, that, where a trial court assumes to remark upon the weight of testimony, or upon testimony affecting the credibility of witnesses, it is treading upon delicate and dangerous ground, and cannot be too cautious about revealing its own opinion to the jury. If hypothetical suggestions are made at all to aid a jury in weighing the testimony, or in estimating the credibility of a witness, such suggestions should be impartial, and not look in one direction only. The statute regulating instructions in criminal cases allows the judge to "state the testimony," but declares that he "must not charge the jury in respect to matters of fact." See § 343, Code Crim. Proc. To say to the jury that the testimony of a material witness is unworthy of belief, whether the statement is made directly or by way of inference, is indirectly charging the jury as to matters of fact, and contrary to the spirit of the statute. The court can state the testimony, but is forbidden to charge or advise as to the facts. A different rule prevailed at the common law, and in some of the states; but the statute has changed the common-law rule in this jurisdiction. The authorities cited below are from jurisdictions where the matter of charging the jury is regulated by enactments similar to our own, and will fully sustain our views upon this branch of the case. See cases collated in 2 Thomp. Trials, §§ 2285-2287. See Thomp. Char. Jur. § 36. See, also, Dingman v. State, (Wis.) 4 N. W. Rep. 668; Lampe v. Kennedy. (Wis.) 18 N. W. Rep. 730; People v. Lyons, 49 Mich. 78, 13 N. W. Rep. 365; Mawrich v. Elsey, 47 Mich. 10, 10 N. W. Rep. 57.

We will conclude this opinion by saying that it behooves this court, as a court of last resort, in deciding the first criminal case ever brought before it for review, and that a case of homicide, not to allow a prejudicial charge upon the facts, such as we conceive that given in this case to have been, to pass unchallenged, and thereby become a precedent. Our duty is, on the contrary, to make sure, at this early date in the history of

the jurisprudence of the state of North Dakota, to uphold with a strong hand the safeguards of life and liberty which the law throws around all who invoke its protection. The judgment is reversed, and a new trial granted.

THOMAS HENNESSY, Plaintiff and Appellant, *v.* ALEXANDER GRIGGS, JACOB S. ESHELMAN, and DAKOTA GAS AND FUEL COMPANY, Defendants and Respondents.

1. Partnership — Corporation — Parol Evidence to Vary Written Agreement.

Three parties—G., E., and H.—formed a copartnership under the name of "The Dakota Gas & Fuel Company." The copartnership articles provided that the partnership capital should be $50,000—G. to furnish $5,000, E. to furnish $10,000, and H. $10,000—the remaining $25,000 to be held by G., to be by him negotiated, and raised from outside parties; and, further, that all profits should be divided between the parties in proportion to the capital furnished and held by each, and on the basis of a capital of $50,000, and that, as soon as might be, said parties should incorporate under the same name, for the same purposes, and all the partnership effects should be assigned to the corporation, and that the capital stock should be not less than $50,000, and should be held and divided among said parties in the same proportion as the capital of said copartnership. *Held*, (1) that the articles contemplated that the capital to be furnished as specified should be actual capital, and that parol evidence to show that said capital was to be nominal only was properly disregarded; (2) that plaintiff H., having joined with G. and E. and two other parties in executing and filing articles of incorporation, whereby they became a body corporate under the name and for the purposes provided in the copartnership articles, as between said parties, and under the copartnership articles, the existence of the corporation worked *eo instanti* the dissolution of the partnership, and that, although the articles of incorporation provided for five incorporators, instead of three, and fixed the capital stock at $100,000, yet, as H. was one of the incorporators, he is conclusively held to have assented thereto, and cannot be heard to say that the corporation so formed is not the corporation provided for by the copartnership articles, particularly when such changes could in no manner affect his interest in or control over such corporation; (3) that, while H. was a necessary party to a transfer of the firm property to the corporation, yet a transfer thereof by G. and E. cannot, in equity, be avoided by H. because he wrongfully refused to join therein; (4) that, as all the capital stock of the corporation would

belong to the same parties who furnished the firm capital, and in the same proportion, it was competent for said corporation to assess its capital stock for an amount sufficient to pay the debts incurred by the firm in procuring the property that was transferred to the corporation, so long as such assessment was less than the amount that each party was originally required to furnish under the copartnership articles, none of said parties having actually paid in their firm capital, and said parties would not be entitled to said stock without paying such assessment: and plaintiff H. would not be entitled to paid-up non-assessable stock unless he had paid in the full amount as required by the copartnership articles.

(Opinion Filed April 1, 1890.]

APPEAL from district court, Grand Forks county; Hon. C. F. TEMPLETON, Judge.

Action in equity by Thomas Hennessy against Alexander Griggs, Jacob S. Eshelman, and the Dakota Gas & Fuel Company. The decree dismissed plaintiff's complaint, and he appeals.

Bosard & Corliss, R. E. Noyes, W. P. Langdon and P. J. McLaughlin, for the appellant, argued that the corporation formed was not the company contemplated in the articles of partnership; citing, Jones v. Cowing, 82 N. Y. 449; Bellows v. President, etc., 3 Mason, 31; The Georgia Co. v. Casselberry, 43 Ga. 187; White v. Newport Co., 1 Pick. 215; Matthews v. Stanford 17 Ga. 543; Thrasher v. Pike Co. R. R. Co., 25 Ill. 393; Childs v. Smith, 55 Barb. 45.

The transfer of the partnership property to the corporation was not made in manner provided in articles of partnership; the ratification of it by the court was equivalent to decree for specific performance, which should be refused in such a case because it would be unfair if the stock is assessable. Keen v. Hamilton, 4 Peters, 311; Cathcart v. Robinson, 5 id. 264; Jackson v. Ashton, 11 id. 229.

The instruments are too vague to justify a decree tantamount to a decree for specific performance. Stanton v. Miller, 58 N. Y. 192; Shakespeare v. Markham, 72 N. Y. 400; Pomeroy on Spec. Perf. 222.

The plaintiff is not estopped by his conduct, 7 Am. & Eng. Encyc. Law, 12-17; Ins. Co. v. Mowry, 96 U. S. 544; White v. Ashton, 51 N. Y. 280.

The acts of the copartners show that the capital was nominal or to be paid by services, and the circumstances under which the partnership agreement was made should have been taken into consideration. Lindley on Partnership, 408; Bowler v. Gleason, 2 Atl. Rep. 885; Grieb v. Cole, 27 N. W. 579; Foster v. Schmeer, 15 Pac. Rep. 626.

C. Wellington, for the respondent, argued: That there was no latent ambiguity in the contract of partnership, and that, therefore, oral testimony to explain it was inadmissible. Gove v. Gowne, 3 N. E. Rep. 463; Brady v. Cassidy, 6 Cent. Rep. 76; Norton v. Woodruff, 2 N. Y. 153; Giles v. Comstock, 4 ib. 270.

Plaintiff is estopped from demanding non-assessable stock. He induced respondents to believe that he would carry into effect the partnership agreement to organize a corporation; he joined them in the organization of it. Their money is invested on the belief that he would comply with the terms of the contract; the plaintiff does not assert his claim till the assertion will injure them. Simpson v. Pearson, 31 Ind. 1; Horn v. Cole, 51 N. H. 287; Douglas v. Scott, 5 Ohio 195; Morris Canal Co. v. Lewis, 12 N. J. Eq. 323; Chapman v. Chapman, 59 Penn. St. 214; Continental Bank v. Bank, 50 N. Y. 575.

BARTHOLOMEW, J. On November 26, 1886, and as a result of certain parol negotiations theretofore had, the plaintiff, Hennessy, and the defendants Griggs and Eshelman, entered into a written agreement of copartnership, as follows: "This contract of copartnership, made and entered into between Alexander Griggs, J. S. Eshelman, and Thomas Hennessy, all of the city of Grand Forks, county of Grand Forks, and territory of Dakota, witnesseth: That the parties aforesaid have, and by these presents do, enter into and form a copartnership under the name and style of the 'Dakota Gas and Fuel Company.' The principal place of business of said copartnership shall be the city of Grand Forks; and the nature of the business to be transacted shall be the manufacture and sale of gas and coke, also dealing in and selling of fuel of all kinds. The capital of said copartnership shall consist of $50,000—Alexander Griggs to furnish $5,000; Thomas Hennessy, $10,000; and J. S. Eshelman, $10,000; the remaining $25,000 to be held by Griggs, to be by

him negotiated and raised to and from certain persons in St. Paul, Minn. It is further agreed that Alexander Griggs shall be the general manager of said copartnership, and, as such, authorized to bind the same in all business transactions, and sign the name thereof to all contracts within the scope of the aforesaid contemplated business, and in the name of the said copartnership to purchase all necessary real estate whereon to erect suitable buildings and appurtenances for the manufacture of gas and coke, and for storing and selling fuel of all kinds. That the profits, if any, of said copartnership shall be divided *pro rata* according to the capital furnished and held by each member thereof; it being understood and agreed that such division shall be based on a capital of $50,000, and the amount of $25,000 shall be taken into account, to the full amount thereof in making such division. And it is further agreed that the said copartnership, as soon as may be, shall proceed to incorporate under the laws of Dakota, and by the corporate name of Dakota Gas and Fuel Company, for the purposes hereinbefore set forth, and when such incorporation is complete the said copartnership shall assign, transfer, and set over to said incorporation all property, both real and personal, and all its rights, contracts, interests, and accumulations; and, in order to carry the same into effect, the said Griggs and Eshelman and Hennessy are hereby authorized, so far as may be necessary, to make such assignment and transfer in the name of said copartnership. The capital stock shall be at least 500 shares of $100 each, to be held and divided among the parties hereto in the same proportion as the capital of said copartnership. In witness whereof the said parties have hereunto set their hands this 26th day of November, 1886. ALEX. GRIGGS. THOMAS HENNESSY. J. S. ESHELMAN."

Under this agreement, the co-partnership proceeded to obtain from the city of Grand Forks the necessary franchise for the construction and maintenance of a gas-plant, and also a contract for lighting said city for a term of years, and contracts with various private parties; and in the summer of 1887 they began the work of erecting suitable buildings and tanks upon certain land, the title to which was in the defendant Griggs, and of laying gas-mains, erecting posts, and doing generally whatever was

necessary to constitute a gas plant; the plaintiff, Hennessy, who was a skilled plumber and gas-fitter, acting as superintendent of said works. On October 17, 1887, said Hennessy, Griggs and Eshelman, with William Budge and W. J. Murphy, executed and acknowledged certain articles of incorporation, which were duly filed, and the said parties became a body corporate as the Dakota Gas & Fuel Company; said corporation being formed to carry on the business begun by said copartnership, and succeeding to all the rights thereof. The capital stock of the company was $100,000, divided into shares of $100 each. After the formation of the corporation, Griggs, without the knowledge and consent of plaintiff, conveyed to said corporation the land on which the gas-works had been erected, and which was valued at $3,000; and on November 15, 1887, Griggs and Eshelman, without the consent of plaintiff, pretended to convey to said company all the property and effects of the copartnership by assignment in writing, as follows: "Whereas, by the terms of the articles of copartnership of the Dakota Gas and Fuel Company, made and entered into on the 26th day of November, A. D. 1886, by and between Alex. Griggs, Thomas Hennessy, and J. S. Eshelman, as members thereof, it was stipulated and agreed 'that, as soon as may be, the said copartners shall proceed to incorporate under the laws of Dakota, and by the corporate name of 'The Dakota Gas and Fuel Company,' and that when such incorporation is complete the said copartnership shall assign, transfer, and set over to said corporation all of its rights, property, both real and personal, and all of its contracts, interests, and accumulations;' and whereas, the said incorporation named as aforesaid is now complete, and incorporated under the name aforesaid, and as specified in said copartnership agreement: Now, therefore, in compliance with the agreement aforesaid, and in consideration that the said corporation, as party of the second part, expressly assumes and agrees to pay all debts contracted heretofore by said copartnership, party of the first part, and further agrees to carry into effect, and fully perform, all contracts and agreements made and entered into by said first party heretofore, and further assumes all of the existing obligations of said first party, and agrees to hold harmless and

free from all liability said first party, and its individual members, by reason of any such contract, agreement, or obligation, the said first party does hereby assign, set over and transfer to said second party all of its rights and interests in any property, whether the same be real or personal, now owned or claimed by said party of the first part, both legal and equitable, and all of its right, title, and interest in and to a certain agreement entered into and made by and between the city of Grand Forks and said first party, and dated the 7th day of December, A. D. 1886, together with all claims thereunder, and all privileges, rights and immunities heretofore granted the said first party by said city of Grand Forks, whether by ordinance or otherwise. In witness whereof the name of said first party is subscribed hereunto this 15th day of November, A. D. 1887. THE DAKOTA GAS & FUEL COMPANY. By ALEX. GRIGGS. THE DAKOTA GAS & FUEL COMPANY. By J. S. ESHELMAN. Signed and delivered in presence of WM. DALLA CHALK, HENRY EVANS."

Plaintiff demanded of the corporation that it deliver to him $20,000 of the shares of its capital stock, paid up, and non-assessable. This the corporation refused to do, but offered to deliver to him said amount of stock provided he would pay the assessment of 40 per cent. which had been assessed against all of the stock of the corporation. Thereupon plaintiff brought this action, asking to have the conveyances to the corporation set aside and canceled, and that said corporation be required to reconvey said real estate to said copartnership, and that a receiver be appointed to take charge of the partnership property, and that the same be sold, and, after payment of all partnership debts, that the balance be divided between the copartners according to their respective rights. The findings of fact by the trial court are very full, and seem to cover every point in the case. Many errors are assigned on these findings as not being supported by the evidence, but, from an examination of the testimony, we conclude all of the findings to which exceptions were entered have reasonable support, and cannot be disturbed by this court. From its findings of fact the trial court declared as conclusions of law that the plaintiff and Griggs and Eshelman had, at the time of the attempted transfer to the cor-

poration, the legal title as copartners, to the gas-plant, and the contract and franchise with the city, and all the property described in the pleadings, except the realty; that the copartnership contract is plain and unambiguous, and the parol evidence to explain its provisions must be disregarded; that the conveyance of the real estate by Griggs to the corporation was in pursuance of the contract of copartnership, and vested the title to said realty in the corporation; that the assignment made by Griggs and Eshelman to the corporation, made November 15, 1887, was made in compliance with the copartnership contract, and to carry the same into effect, and that by virtue of said assignment and said contract the corporation became the equitable owner of the property described; that the plaintiff was estopped from claiming as against said corporation any right or interest in said property, real or personal, except the right to 200 shares of stock upon payment of the same assessment, and performance of like conditions, as the other stockholders were required to keep and perform. If these conclusions are correct, the judgment must, of course, be affirmed.

Among other things, the copartnership contract provided that "the capital of said copartnership shall consist of $50,000—Alexander Griggs to furnish $5,000; Thomas Hennessy, $10,000; and J. S. Eshelman, $10,000; the remaining $25,000 to be held by Griggs, to be by him negotiated and raised to and from certain persons in St. Paul, Minn." It is not just clear what was meant by negotiating partnership capital. Had the contract been speaking of corporation stock, it would be perfectly clear. But the parol evidence introduced did not tend in any manner to explain that portion of the contract. Hence such evidence was properly disregarded. This obscurity is largely swept away when we consider the other provisions of the contract, which provided that all profits of the copartnership should be divided *pro rata* according to the capital furnished and held by each member thereof, and that the stock of the corporation, which was to be formed "as soon as may be," should "be held and divided among the parties hereto in the same proportien as the capital stock of said copartnership." The purport of the language was to give the defendant Griggs control of the ma-

jority of the stock of the corporation; and, no doubt, such was the intention of the parties.

The corporation expended over $40,000 in the purchase of materials, and construction of the works. This money the court finds was furnished by Griggs and Eshelman, but it is found by the court to be a debt of the copartnership. Plaintiff, Hennessy, never paid in any money to the firm capital. His theory of the case is that the copartnership capital to be furnished by Griggs, Eshelman, and Hennessy was nominal only; that in fact said parties were to pay in no money, but that their services as copartners were to be received as such capital; that the works were to be constructed with the $25,000 to be raised from outside parties by Griggs, and when the corporation should be formed the copartners would receive their shares of capital stock, paid up, and non-assessable, without the expenditure of any money whatever. But such is not the contract. The capital was to be furnished; that is, supplied, provided, paid in. The services rendered by plaintiff were only such as the law required of a partner; and, in the absence of an express contract, no compensation therefor could be claimed.

Plaintiff became one of the incorporators of the corporation defendant. That corporation was formed under the articles of copartnership, and in pursuance thereof, and was formed to succeed the copartnership in all things, property, franchise, business, contracts, obligations, and liabilities. The two could not co-exist; and, as between the partners and the incorporators, the existence of the corporation worked *eo instanti* the dissolution of the copartnership. There no longer existed any rights or obligations which the partners, as such, could enforce, the one against the other. Nor can plaintiff be heard to say that the corporation defendant is not the corporation contemplated by the copartnership articles, because the capital stock is greater, and the incorporators five, instead of three. He signed the articles of incorporation fixing the amount of capital stock, and specially naming the five persons as incorporators and directors. He must be held to have assented to such alteration. Nor could his rights be in any manner injuriously affected thereby. If he performed the contract on his part, he was still

entitled to the same proportion of the capital stock, to-wit, one-fifth. His voice in the corporation would be just as potent. The authorities cited by appellant on this point are not applicable to this case. The nearest case cited is James v. Cowing, 82 N. Y. 449. In that case, certain railway bonds were secured by mortgage, and the mortgage provided for forclosure, and that the property might be bought in by the trustee for the bondholders, and a new corporation formed as therein provided. The foreclosure was had and the property bid in as provided; but, instead of forming the new corporation, the trustee, at the request of a majority of the bondholders, sold the property at auction, and it was bought by another corporation, of far greater magnitude than the one contemplated in the mortgage. One of the bondholders brought action against the trustee for his share of the property thus wrongfully sold. It was contended that the corporation that purchased the property was substantially the corporation for which provision was made in the mortgage, but the court say: "It is easy to see that the position of the plaintiff in that company might well be something entirely and destructively different from his situation in the new corporation contemplated in the mortgage." An inspection of the contract and the articles of incorporation show just the reverse to be true in this case. In Lindley, Partn. 408, it is said: "Any article, however express, may be abandoned by consent of all parties; and this consent may be evidenced, not only by express words, but by conduct." Plaintiff could not have evidenced his consent to the change in the corporation in a more forcible manner than by signing the articles of incorporation in which these changes were embodied.

Under the partnership contract, all the effects of the partnership were to be assigned to the corporation. Granted that plaintiff was a necessary party to a transfer of the legal title to such property, yet equity, looking ever to the substance, regards that as done that ought to be done; and the full and equitable title is in the corporation. The transfer executed by Griggs and Eshelman cannot, in equity, be defeated because plaintiff wrongfully refused to join therein. Nothing remains in the copartnership; and the corporation, by accepting such

transfer, and claiming thereunder, are conclusively held to have assented to the same, and are bound for all the debts and obligations of the late firm. Crawford v. Edwards, 33 Mich. 354. But the court found that the value of the property so transferred was greatly in excess of the debts of the firm; that the franchise alone was worth $35,000 to the owner of the gas-plant —and the plaintiff claims that the corporation is receiving this entire excess of firm assets over liabilities without paying any consideration therefor, and that thereby he, as a member of the copartnership, is being defrauded. The proposition will not bear investigation. All the accumulations of the firm were to be divided among the parties, in proportion to the capital furnished and held by each, on the basis of a capital of $50,000. Plaintiff, if he furnished his capital, would be entitled to one-fifth of the accumulations. If he furnished no capital, he would be entitled to nothing, and could not be defrauded. If he furnished his proportion of capital, he would be entitled to one-fifth of the capital stock; and this proportion could not be affected by the number of stockholders, or amount of capital stock. If plaintiff, as a copartner, should receive from the corporation one-fifth of the excess as above stated, then, as a stockholder, he would be required to pay one-fifth of such excess. His estate would not be affected to the extent of a penny by the transfer. If he takes the stock, he gets the full benefit of the excess in the value of the stock. Counsel contend, however, that, if the obligation did exist to pay in the capital, and if plaintiff failed to do so, still that is a debt to the firm, and that, as between him and the corporation, the plaintiff is entitled to his stock, nothwithstanding. If plaintiff once owed the debt to the firm, he now owes it to the corporation, as the corporation now owns all the effects of the firm; and, as the payment of his proportion of the firm capital was a condition precedent to any right on plaintiff's part to demand stock, the corporation can properly withhold the stock until such payment is made. As the entire corporate stock was absorbed by the parties who were to furnish the capital of the firm, and as, at the time the corporation was formed, the cost of the works had not equaled the capital stock, the money that had been ad-

vanced by Griggs and Eshelman was treated as a partnership debt, and it was determined to assess the stock only in an amount sufficient to pay such indebtedness. By this arrangement, plaintiff could get his stock for $2,000 less money than under the original contract. Of this, however, he ought not to complain.

Lastly, it was claimed that plaintiff was entitled to paid-up, non-assessable stock. Had plaintiff paid in his full amount of partnership capital, perhaps his position would be correct. We do not decide the point. It will be ample time for him to resist further assessments when he shall have paid up to the amount of his original agreement. Affirmed. All concur.

CORLISS, C. J., having been of counsel, did not sit; RODERICK ROSE, district judge, sitting in his place.

GEORGE R. NEWELL, R. B. LANGDON and C. S. LANGDON, Partners as GEO. R. NEWELL & CO., Plaintiffs and Appellants, *v.* EVER WAGNESS, Sheriff of Ramsey County, Defendant and Respondent.

1. **Conveyance by Insolvent; Secret Trust.**

L., a merchant, was embarrassed financially, and was being pressed by his creditors with demands which he was unable to pay. The plaintiffs, among others, were creditors of L., and were urging him to satisfy their claim. Under these circumstances L. executed and delivered to plaintiffs a bill of sale, absolute on its face, and which purported to sell and convey to plaintiffs all the merchandise then in L.'s store, and all other property in and about the store, including book-accounts and bills receivable. L., at the same time, leased the store-room to plaintiffs, and plaintiffs caused the bill of sale and lease to be filed for record with the register of deeds. At the time the bill of sale and lease were made, and as a part of the same transaction, plaintiffs agreed with L., by an agreement not reduced to writing, that plaintiffs should convert the property described in the bill of sale into money, and out of the money so obtained plaintiffs were to pay their own claim against L., and that of one other creditor. In pursuance of these agreements the plaintiffs took the property described in the bill of sale into their possession. Two days after the plaintiffs took possession of the property it was attached by certain other creditors of L. *Held*, that the parol agreement reserved a trust in the property in favor of L., and not being

apparent in the bill of sale, was secret, and consequently the transaction was against public policy, and fraudulent in law, and therefore void as to attaching creditors.

(Opinion Filed April 1, 1890.)

APPEAL from district court, Ramsey county; Hon. CHARLES F. TEMPLETON, Judge.

Messrs. Miller, Cleland & Cleland, for the appellants, contended that the transfer of the goods mentioned hereafter in the opinion was in the nature of a pledge; that plaintiffs never claimed to be absolute owners thereof, never sold or disposed of any of them prior to the levy of the attachment by the defendant. The recording of a bill of sale, there being no statute requiring it or authorizing it, is of no effect and is not an assertion of title. Booth v. Kehoe, 71 N. Y. 341.

If, though absolute in form, the transfer to the plaintiffs was intended as security only, and was so treated by them it was valid. Smith v. Beattie, 15 N. Y. 542; Despard v. Wallbridge, 15 id. 374.

J. F. McGee and D. E. Morgan, for respondent, argued: That plaintiffs having obtained title by a bill of sale, absolute in its terms, must stand on that bill and cannot now claim as pledgees. Blakeslee v. Rossman, 43 Wis. 116; Stein v. Munch, 24 Minn. 390; Robinson v. Elliott, 22 Wall. 513; Janvrin v. Fogg, 49 N. H. 340.

WALLIN, J. This is an action of claim and delivery, whereby plaintiffs seek to recover a stock of merchandise, including safe, store fixtures, book-accounts, and bills receivable, seized by defendant as sheriff, under writs of attachment issued in actions instituted by the creditors of one T. T. Lee. The case was tried without a jury, and the district court filed its findings of fact and conclusions of law, and directed that judgment be entered for a return of the property to the defendant, or, in case a return could not be had, for the value thereof to the amount of the attachment liens. Among the facts found by the trial court are the following: That at the time in question defendant was sheriff of Ramsey county, and as such sheriff, on December 8,

1888, seized the property in question while it was in plaintiffs' possession, upon writs of attachment issued in actions instituted against one T. T. Lee by the creditors of Lee; that on December 6, 1888, said Lee was the owner of and in the actual possession of said property, the same being situated in the lower story of a store building then owned by Lee at Devil's Lake, Ramsey county, Dak.; that on said 6th day of December, besides debts due the attachment creditors, Lee was indebted to the plaintiffs in the sum of $2,959.07, which amount was unsecured, and indebted to the Merchants' National Bank of Devil's Lake in the sum of $2,486.04, which last mentioned indebtedness was secured by mortgage upon the store building of said Lee, the upper rooms of which building were the home of Lee and his family; that on said December 6th, and long prior thereto, said Lee was insolvent, and was being pressed for payment by various creditors; that the plaintiffs well knew that Lee was insolvent, and was being pressed for payment by his creditors, and had such knowledge at the time they took possession of the property under a bill of sale and lease from Lee as hereinafter stated; that on the 6th day of December one W. S. Stockdale, an agent of plaintiffs, was at Devil's Lake, and then and there, in plaintiffs' behalf, took the entire property in plaintiffs' possession, the same being delivered to plaintiffs by Lee; that as a part of the same transaction, whereby the plaintiffs obtained possession of the property, Lee executed a lease of the store in which the goods were situated to plaintiffs, and also, for an expressed consideration of $5,800, made, executed and delivered a bill of sale of all of said merchandise and property, absolute in form, to the plaintiffs; that the plaintiffs continued in possession of said property in said store until the seizure was made under the writs of attachment upon the 8th day of December, as before stated.

The trial court also finds the following facts: "That at the time of the execution and delivery of the above bill of sale, and as a part of the same contract, it was orally and privately agreed between the plaintiffs and the said Lee that said bill of sale, and the property described therein, was to be received by said Newell & Co. merely as security for the amount due from said

Lee to the plaintiffs, which amounted at that time to about $2,900; and also as a part of the same agreement and contract, but also resting in parol, the said Newell & Co. agreed with said Lee to convert said property into cash, and after paying their own claim against said Lee to pay a mortgage on the homestead of said Lee, amounting to $2,486.04, which was then held by the Merchants' National Bank of Devil's Lake, and after making such payments return the surplus to said Lee; that the plaintiffs at once, after the making of the above contract, and under and pursuant to the terms thereof, took possession of all of the property above described, and retained such possession until dispossessed by the defendant under the attachment above mentioned; that the plaintiffs caused said bill of sale to be filed for record in the office of the register of deeds of Ramsey county, Dak., on the 7th day of December, 1888, at 8 o'clock A. M.; that said bill of sale has ever since said date remained on file in said office; that said bill of sale was reported by the R. G. Dun & Co. Commercial Agency on the day or the day after said bill of sale was so filed for record; that the attachment creditors, Tarbox, Schliek & Co., learned of the existence of said bill of sale from the report of said R. G. Dun & Co., about the date of said bill of sale, and also learned of the existence of said bill of sale from letters written from Devil's Lake to said Dun & Co.; that the attachment creditors, Wyman, Mullin & Co., learned of the existence of said bill of sale on the date the same was filed for record, from a telegram from their attorney at Devil's Lake; that there was no evidence offered on the trial to show that the attaching creditors mentioned in the defendant's answer knew of the existence of the oral agreement which accompanied said bill of sale; that said Lee, at the time said bill of sale was executed, and as a part of the same transaction, by a written lease, leased his store building in Devil's Lake, Dak., in which the property described in the bill of sale was located, to the plaintiffs for the period of three months, with the privilege of one year, for $30 per month; that said lease was filed in the office of the register of deeds of Ramsey county, Dak., at the same time the bill of sale was filed; the property described in the above bill of sale was all the property, real or personal, owned by said Lee on the

date of said bill of sale, which was not exempt from execution, except one quarter section of land, worth about $500, which land is subject to two mortgages, amounting in the aggregate to $665; that at the time when said Lee entered into the above-mentioned contract with the plaintiffs he had fully determined to stop business and surrender said property therein described to the plaintiffs for the purpose stated in the oral agreement which accompanied said bill of sale; that the store building used by said Lee as a store on the 6th day of December, 1888, was at said time the homestead of said Lee, and was exempt from execution; that said Newell & Co., on the 6th day of December, 1888, and for some time prior thereto, knew that said building was the homestead of said Lee; that said homestead on said last-mentioned date was of the value of $3,000, and was ample security for the mortgage of $2,486.04 held by the Merchants' National Bank of Devil's Lake against the same, and was so considered by said bank, and said bank on said 6th day of December, 1888, so informed the plaintiffs and said Lee; that the provision made by said Lee and the plaintiffs in the oral agreement above mentioned, by which the mortgage to said bank was to be paid out of the proceeds of the sale of the property described in said bill of sale, was made at the suggestion of W. S. Stockdale, the agent of the plaintiffs, and who represented the plaintiffs in making the contract of December 6, 1888, with Lee. There was no evidence offered to show that the bank was insisting upon payment of its mortgage, and the cashier of said bank notified said Stockdale and Lee, before and after said bill of sale was made, that the bank considered the real estate covered by its mortgage ample security for its debt, and would not become a party to the transaction or contract of December 6, 1888, and would take no step that would in any way disturb its mortgage lien, but the bank did not object to being paid as provided by said Stockdale and Lee; that the value of the stock of merchandise and fixtures mentioned in the bill of sale on December 6, 1888, was $2,700; that the value of the book-accounts and bills receivable mentioned in the bill of sale on December 6, 1888, was $6,700, and the cash value of the same on that day was $6,000; that $500 of said bills receivable was held by the First National

Bank of Devil's Lake as collateral security to a loan of $290, which loan was also secured on the quarter section of land hereinbefore mentioned; that $1,400 of said bills receivable, was held by the Merchants' National Bank of Devil's Lake as collateral security to the mortgage debt hereinbefore mentioned against the homestead of said Lee; that the face value of the book accounts and bills receivable, above mentioned, on December 6, 1888, was $12,330.61; that the transaction of December 6, 1888, between Lee and the plaintiffs was made with the intent to hinder and delay the creditors of said Lee; that the amount of the defendant's attachment liens is $2,536.19, for which amount judgment was entered in said case on December 7, 1888; that the whole transaction between Lee and the plaintiffs was evidenced by the written bill of sale, lease, and oral agreement hereinbefore stated, and there were no other writings ever made in connection with said transaction; that the plaintiffs, to prove the terms of the contract of December 6, 1888, between themselves and Lee, introduced the bill of sale and lease above mentioned, and proved the oral agreement above mentioned."

The evidence is before us, and we have carefully examined the same, and find that the findings of fact are amply sustained by the testimony. The plaintiffs put in evidence all the circumstances of the transaction whereby Lee turned over to plaintiffs all of his merchandise, store fixtures, book-accounts, and bills receivable then in his store, and also the fact that an absolute bill of sale was made to them by Lee as a part of the transaction, and that plaintiffs filed the same for record; also that plaintiffs by written lease, leased the store of Lee; and finally the plaintiffs' witness, one Stockdale, who represented the plaintiffs in the transaction in question, testifies to the making of the contemporaneous parol agreement whereby Lee directed the plaintiffs to convert the property into cash, and with the proceeds pay certain debts of Lee's, and turn over the surplus to Lee. On his direct examination Stockdale testifies as follows: "I was to take possession of the stock of goods, and take possession of all the stuff, and dispose of the property to the best advantage that I could, and pay off our claim, and the claim of the bank here, and turn over the balance to Mr. Lee.

I was acting in this matter for the plaintiffs." On cross-examination Stockdale testifies: "The agreement between Lee and I was not in writing. It was an oral agreement, outside of the bill of sale." And further testified: "Of course I did not know what disposition we would make of the goods, and if they had to be sold at retail it would take some time. Question. What was the arrangement at that time as to how the goods were to be sold—in a lump? Answer. The goods were to be sold out and converted into cash. There was no particular understanding, because we did not know what was the best way to do for a certainty." The district court found, as a conclusion of law, that "the contract of December 6, 1888, between Lee and the plaintiffs, was fraudulent in law, and void as to the creditors of Lee." We hold that this conclusion was sound, and could not have been otherwise, upon the findings and upon the conceded facts of the case. Such a transfer of property as that disclosed by the evidence and findings is of a character which, on grounds of public policy, the law denounces as constructively fraudulent and void as to creditors. The question of the existence or non-existence of an actual purpose to defraud creditors does not enter, as an essential factor, in disposing of the question presented in the record, and we shall therefore, in this opinion, not find it necessary to enter upon that aspect of the case. The transfer of the property in question presents a case of "constructive fraud"—sometimes called "legal fraud." See Civil Code, § 884; Comp. Laws, § 3508. The case of Coburn v. Pickering, 3 N. H. 415, is a leading case. The court say: "A sale of goods, in order to be considered as made *bona fide* with respect to creditors, must be made without any trust whatever, either express or implied. This is the doctrine of Twyne's Case, 3 Coke, 80*b*, and we are not aware that the soundness of it has ever been questioned. It is not permitted to a debtor to convey away his goods by sale with any secret understanding between him and the vendee that the goods, shall be holden for the benefit of the vendor in any way whatever. The nature of the benefit reserved in the sale is immaterial. * * * All conveyances, with secret reservations for the benefit of the vendor, tend directly to

hinder and delay creditors. They hold out false colors and false appearances, and mislead and deceive creditors. They give to the property of the vendor the appearance of belonging wholly to another, when in truth he has an interest in it concealed under the trust. It is for this reason that a trust of this kind is in law a fraud. As the obvious tendency of these reservations and trusts is to deceive and defraud creditors, it has not been deemed necessary to stop to inquire into the particular views or motives of individuals in each case; but all courts, relying on the presumption that every man intends the probable consequences of his acts, have at once pronounced all these trusts to be fraudulent, not only within the meaning of the 13 Eliz. c. 5, but at common law." See Parker v. Pattee, 4 N. H. 176; Smith v. Lowell, 6 N. H. 68; Winkley v. Hill, 9 N. H. 31; Tifft v. Walker, 10 N. H. 100; Smith v. Conkwright, 28 Minn. 23; 8 N. W. Rep. 876; Switz v. Bruce, 20 N. W. Rep. 639. In McCulloch v. Hutchinson, 7 Watts, 434, the court say: "A bill of sale by a debtor to one preferred creditor, purporting on its face to be an absolute conveyance of the goods of the debtor at a fixed price, but in reality accompanied with a secret trust that the creditor shall hold and dispose of the goods for the discharge of a debt much less in amount, and pay over the balance to the debtor, is manifestly a contrivance by which other creditors may be hindered and prevented in the recovery of their debts. It is the secrecy of this trust—a trust incompatible with that which appears on the face of the transaction—that constitutes its illegality." See, also, King v. Cantrel, 4 Ired. 251; North v. Belden, 13 Conn. 376; Bryant v. Young, 21 Ala. 264; Sims v. Gaines, 64 Ala. 392; Chenery v. Palmer, 6 Cal. 119. The doctrine has become elementary, and applies as well to transfers of real estate as to transfer of goods and chattels. See Bump, Fraud. Conv. 216, and cases cited. The supreme court of the United States in Lukins v. Aird, 6 Wall. 78, state the law as follows: "It is not important to inquire whether, as a matter of fact, the defendant had a purpose to defraud the creditors of Aird; for the fraud in this case is an inference of law, on which the court is as much bound to pronounce the conveyances in question void as to creditors as if the fraudulent intent were directly

proved." The case of Bank v. Comfort, decided by the supreme court of Dakota territory, reported in 28 N. W. Rep. 855, is in point. It is quite true that this case, as claimed by plaintiffs' counsel, is not precisely like the case at bar in its facts. The two cases, are, however, quite similar in their general features, and in certain aspects are identical. In both cases the creditors were seeking to collect a claim from a merchant in embarrassed circumstances; and to make such collection, among other things done, a bill of sale was executed and delivered to the creditors, purporting to convey to the creditors an absolute title of all the goods, etc., in the store. In both cases, there was a secret agreement, resting in parol, which differed radically from the terms of the bill of sale, and whereby the creditors held the goods only in trust, to be converted into money, which money was to be turned over to the debtor after deducting therefrom the amount of the creditors' claim. It is with reference to this conflict between the unwritten and the written terms of the transaction that the court say: "Any secret reservation in trust for the grantor, not apparent on the face of the papers, but resting wholly in parol, renders the entire transaction void, as against creditors injured thereby."

Plaintiffs' counsel argue that the rights of the plaintiffs to the property in question as between plaintiffs and the attaching creditors, must be ascertained and determined, not by the terms of the bill of sale, but entirely by the terms of the secret agreement resting in parol. Counsel insists that, under the parol agreement, plaintiffs, with respect to the property in suit, occupied either the position of mortgagees of chattels in possession or that of pledgees. Answering this argument, it will suffice to say that we do not find a *scintilla* of testimony in this record tending to show that the plaintiffs and Lee ever agreed to place the plaintiffs in the position of either mortgagees or pledgees of the goods. On the contrary, the evidence tends to show that, as between Lee and the plaintiffs, the latter held the goods neither as pledgees nor as mortgagees, but as trustees. The law will not allow plaintiffs to shift their legal position to escape the consequences of their own voluntary acts. The bill of sale, in connection with the secret trust arrangement, consti-

tutes a fraud in law, and the consequences of such fraud cannot be avoided by an attempt to ignore the terms of the bill of sale. In Wisconsin, where a mortgagee took possession of mortgaged property under a mortgage which was constructively fradulent, by reason of a secret trust in favor of the mortgagor, the mortgagee, after taking possession under his mortgage, claimed that it did not matter that the mortgage was fraudulent in its inception, since he had the actual possession, and that he could hold the goods either as a payment or as a pledge to secure his claim. The reasoning of the case applies as well to a fraudulent bill of sale as to a fradulent mortgage. We quote from the opinion: "As a matter of fact and of law, the mortgagees took possession under the mortgage, as was their right as between them and the mortgagor. We do not hold that the holder of a chattel mortgage may not relinquish his right under it, and accept the mortgaged goods from the mortgagor in payment of his debt or as a pledge. Such a transaction might be upheld in a proper case. But we do hold that such a shifting of title must be open, express, and explicit—as open, express and explicit as the mortgage itself; and that one who takes possession of chattels, apparently under a mortgage, cannot, when the mortgage fails him, shift his right of possession, by vague evidence of implied understanding, to payment of his debt or to a pledge for it. Both debtor and creditor must expressly be parties to either payment or pledge. But either must be established by the acts of the parties at the time, as expressly and satisfactorily as payment or pledge in any other case. Here there is no such evidence." Blakeslee v. Rossman, 43 Wis. 116. See, also, Stein v. Munch, 24 Minn. 390. We have carefully examined the plaintiffs' assignments of error relating to the admission of testimony, and find that the ruling of the trial court was proper, in view of the issue of actual fraud made by the pleadings; but whether such rulings were proper or otherwise could not have affected the determination of the case in this court, as we have deemed it proper to dispose of the case wholly upon the ground of constructive fraud. The order of the dis-

trict court denying the plaintiffs' motion for a new trial was correct, and the same is affirmed. All concur.

CHARLES M. TAYLOR, Plaintiff and Respondent, *v.* THOMAS C. RICE, Defendant and Appellant.

1. Action to Recover Attached Property Claimed to be Exempt; Debt Incurred Under False Pretenses.

In an action of claim and delivery, brought against a sheriff, the defendant justified his seizure and detention of the property under two certain writs of attachment in his hands against the property of plaintiff; and, anticipating that plaintiff would claim such property exempt from seizure under the general exemption law of the state, defendant alleged, further, that the debts sought to be recovered in the actions in which the attachments were issued were debts incurred by plaintiff under false pretenses, setting forth such false pretenses. *Held* a good defense, under § 5139, Comp. Laws. *Held, further*, that the refusal of the court to allow defendant to prove the false pretenses as alleged was reversible error.

(Opinion Filed April 1, 1890.)

APPEAL from district court, Dickey county; Hon. RODERICK ROSE, Judge.

Action by Charles M. Taylor against Thomas C. Rice in claim and delivery. Verdict and judgment for plaintiff. Motion for new trial overruled, and defendant appeals.

E. P. Perry for Appellant; *Messrs. Thomas & Davis* of Counsel.

No brief or argument for respondent.

BARTHOLOMEW, J. This was an action known under our statute as claim and delivery, and was commenced December 9, 1887. Plaintiff claimed to be the owner and entitled to the immediate possession of certain personal property valued at $1,000, which he alleged defendant wrongfully detained after proper demand made. Defendant answered, in substance, that he was sheriff of Dickey county, Dakota territory; that as such sheriff he received for service two certain writs of attachment against the property of plaintiff, one for the sum of $94.65, in favor of

James Winsley, and one for $82.60, in favor of Randall Bros.; that under and by virtue of said writs he seized the property in question as the property of plaintiff, to satisfy the judgments that might be rendered against the plaintiff herein, in the actions in which said writs of attachment were issued; that the action in favor of James Winsley was commenced in the district court of said county on November 25, 1887, and the attachment in that case was levied on November 26, 1887; that the action in favor of Randall Bros. was commenced in justice's court in said county on December 5, 1887, and the attachment therein was levied the same day. Defendant further alleged that the debt due from plaintiff herein to James Winsley was incurred for property obtained by said plaintiff from said Winsley by false pretenses; that plaintiff falsely and fraudulently represented to Winsley that he had a large ranch, consisting of over 100 head of cattle, 200 tons of hay, and a number of head of horses, and other property far in excess of his liabilities and exemptions, and was solvent; that said Winsley relied upon said representations, but that the same were false, and were so known to be false by plaintiff when made. The same allegations were repeated as to Randall Bros. It was alleged as to both claims that when plaintiff received the goods from said parties he promised in each case to pay for said goods, without any intention of performing his said promises. The reply admitted the regularity of the attachment proceedings in each case, and admitted the levies, but alleged that plaintiff served upon defendant notice that he claimed all of said property as exempt from seizure under attachment, together with a duly verified schedule of his assets; that an appraisement was accordingly had of his said assets; and that the value thereof, as appraised, did not reach the limit of exemptions allowed by law; and that, after such appraisement was returned to defendant, plaintiff demanded said property so attached, and defendant refused to surrender the same. The reply denied the fraud and false pretenses as set up in the answer.

Subdivision 3, § 4995, Comp. Laws, gives, as one of the grounds of attachment in this state, "that the debt was incurred for property obtained under false pretenses." Section 5139, Comp. Laws, reads as follows: "No exemptions, except the ab-

solute exemptions, shall be allowed any person against an execution or other process issued upon a debt incurred for property obtained under false pretenses." § 5127 defines absolute exemptions. None of the property here involved is claimed under that head. Plaintiff proved his ownership, and the value of the property, and his claim of exemptions and appraisement as alleged, and his damages, and rested his case. Defendant then placed a member of the firm of Randall Bros. on the stand, and made the following offer: "We propose and offer to prove now, by the witness Lovell I. Randall and other witnesses, that when the goods were obtained from Marcellus E. Randall and Lovell I. Randall, as copartners, by the plaintiff in this action, upon which the attachment was issued, that he represented to Randall Bros., at that time, in order to obtain the credit, that he owned a ranch in the hills west of here, consisting of over 100 head of cattle, 200 head of horses, and other property; that he had a farm near Casselton, and owned a large amount of property there, and that he had a large crop, consisting of 7,000 bushels of wheat—that is growing or harvested—and that he was solvent, and abundantly able to pay; that upon these representations these parties sold to him goods—Messrs. Randall Bros. to the amount of $84, and James Winsley to the amount of $94; that all of these representations were false. We offer to prove that he then was not worth anything; that he had no property of his own but what was incumbered, and that he obtained these credits through these representations; that they relied upon these representations in extending to him these credits. These things we now offer to prove in this case, if we are allowed to. And, further, that, according to his representations, at that time he owned a large amount of personal property over and above his liabilities and exemptions, and we offer to prove the same facts in relation to the claim of James Winsley against the plaintiff in this case." The record then recites: "By the court. Offer refused." "Exception entered by the defendant to the refusal of the court." Defendant introduced some evidence on the point that the notice of claim of exemptions was not given within the statutory time. When defendant rested, the court, on plaintiff's re-

quest, directed the jury to return a verdict for plaintiff, leaving them to find the value of the property and the damages, which the jury accordingly did. Counsel for appellant in their brief in this case say that the only point relied upon is the refusal of the court to permit the defendant to introduce the offered proof. As respondent has filed no brief, and made no appearance in this court, we have nothing to indicate to us, in the slightest degree, the ground upon which the court below based its decision. It does not appear that plaintiff made any objection, general or specific, to the proposed testimony. Defendant attempted to set forth facts in his answer which, if true, were a legal justification of his possession and detention of the property. We think those facts were sufficiently pleaded. Stanhope v. Swafford, 42 N. W. Rep. 450. At any rate, the answer was in no manner attacked by plaintiff. On the contrary, he joined issue, by reply, with the allegations of the answer under which defendant justified. Defendant had the burden of proof as to such allegations. The offered testimony certainly tended to prove these facts. It was not necessary, before such facts could be shown, that they should have appeared in the writs under which defendant justified. Rogers v. Brackett, 34 Minn. 279, 25 N. W. Rep. 601. It may be that defendant had levied upon property largely in excess of what he should have taken under his writs, but that question is not in this case. As this record is presented to us, we must reverse this case, and order a new trial. Reversed. All concur.

JOHN W. JASPER, Plaintiff and Respondent, *v.* ARTHUR H. HAZEN, Defendant and Appellant.

1. **Trustee; Intent to Defraud; Involuntary Trustee.**
When one receives a deed absolute in form, but intended as security only, and with a promise to reconvey upon payment, he becomes trustee for the grantor to the extent of grantor's interest therein. Likewise, when one receives property as security only, and under a promise to return the same on certain contingencies, he becomas a trustee for the owner; and, if said promises were made with intent to defraud, and with no intent to fulfill, yet the only effect of such deception

was to render such party an involuntary trustee as defined by § 3920, Comp. Laws.

2. Same; Plaintiff Charging Defendant as Trustee.

When it is alleged that said property, both real and personal, had been wrongfully sold by such trustee, and that the products raised on said farm by such trustee for a period of three years had also been wrongfully sold, and action is brought to recover the value of both the property and products, the plaintiff charges such party as trustee, and cannot be heard to say that the trust was never opened, or the trust relation active.

3. Same; Same; Plaintiff's Remedy is in Equity.

Plaintiff's remedy in such case is in equity. No action can be maintained at law by the *cestui que trust* against the trustee while the trust remains open, unless the exact amount due the *cestui que trust* has been in some manner liquidated, and no act remains to be performed except payment.

(Opinion Filed April 1, 1890.)

APPEAL from district court, Cass county; Hon. WILLIAM B. MCCONNELL, Judge.

Action by John W. Jasper against Arthur H. Hazen, to recover the value of certain real estate, and of the products thereof, and of certain personal property of which plaintiff claimed to be the owner, and which it was alleged defendant wrongfully disposed of, and converted to his own use. Trial to a jury. Verdict and judgment for plaintiff. Motion for a new trial denied, and defendant appeals.

Messrs. Thomas & Davis, for Appellant: Redress for violation of trust, where the trust is still unsettled, is not obtainable by an action at law; citing Duval v. Craig, 2 Wheat. 45; Norton v. Ray, 139 Mass., 230. No action at law being maintainable, the complaint should have been dismissed; Supervisors v. Decker, 30 Wis., 624.

Messrs, Greene & Hildreth, for respondent, argued: That the pleadings and evidence showed that a trust relation was agreed upon between the parties, but was never opened; that every act of appellant was in violation of that agreement; that where the property of a *cestui que trust* is transferred by the trustee to a *bona fide* purchaser without notice of the rights of the *cestui*

que trust the latter has an action at law against the trustee for damages commensurate with the value of the property so wrongfully sold; citing Mercier v. Hemme, 50 Cal. 607; Smith et al. v. Frost, 70 N. Y., 69; May v. Le Claire, 11 Wall. 217; Oliver v. Piatt, 3 How. 653. If a trustee does a wrongful act with reference to the trust property he consents to be treated as a trespasser or a debtor, at the election of his *cestui que trust.* Gunther v. James, 9 Cal. 644.

If a trustee disposes of trust property he may be sued in damages; 31 Cal. 24.

Where the grantee has wrongfully conveyed the property, the grantor may claim the proceeds of the sale or the value of the land at the time when the grantor's right to have it restored to him is established. Mecham v. Forrester, 52 N. Y., 277; Enos v. Sutherland, 11 Mich. 538; and an action at law may be maintained for money had and received. Van Dusen v. Worrell, 4 Abb. Ct. of App. 473; Jones on Mort., vol. 1, §341. Where fraud is charged against the trustee courts of law and equity have concurrent jurisdiction. Snell's Prin. of Eq., 384; Flint & P. M. Ry. Co. v. Gorden, 41 Mich. 420; Lewis v. Cocks, 23 Wall. 466; Allen v. Waldo, 47 Mich. 516; Kerr on Fraud and Mistake, 44.

BARTHOLOMEW, J. The facts will be best understood from a summary of the pleadings. The complaint states that on March 20, 1885, plaintiff was the owner of a certain quarter section of land in Cass county which was free from incumbrance except two mortgages in favor of the Northwestern Trust Company for $1,100; that on that date plaintiff was arrested on a criminal charge, and bail for his appearance before the examining magistrate was fixed at $500; that defendant agreed with plaintiff that, if plaintiff would execute to defendant a warranty deed of his said land, he (defendant) would furnish said bail, and, upon plaintiff's appearance in compliance with said bail-bond, defendant would reconvey said land to plaintiff; that plaintiff relied upon such agreement, and executed to defendant a warranty deed of said premises, but for no other consideration, and upon no other condition, than the foregoing; that defendant did furnish such bail, and plaintiff duly appeared and exonerated the

same; that, upon his hearing before the magistrate, plaintiff was held to answer to the district court, and his bail fixed at $1,500, and in default thereof plaintiff was committed to the county jail of Cass county; that thereupon plaintiff demanded of defendant a reconveyance of said land, which defendant declined to make, but promised to meet plaintiff further in regard thereto; that about April 20, 1885, the defendant visited plaintiff in jail, as aforesaid, and knowing that plaintiff could not be discharged in time to work said land, which constituted plaintiff's farm, he agreed with plaintiff that, if plaintiff would, during his imprisonment, let defendant have possession and charge of said farm, and the personal property thereon, and leave the deed in his hands, and permit him, as agent or trustee for plaintiff, to have charge of all his business, iucluding the working of said farm, with the teams and machinery thereon belonging to plaintiff, he (defendant) would make more money for plaintiff than could be made by renting the farm to others, and that he (the defendant) would cause to be paid off and discharged the mortgage thereon, and would reconvey the same to plaintiff when plaintiff should be released, and, after deducting a reasonable sum for his services, would surrender to plaintiff all the said perfonal property, and all the proceeds realized by him, as such agent or trustee from said business, and account to plaintiff for all his doings in the premises; that plaintiff believed defendant was acting in good faith, and by reason of said representations, and for no other consideration, assented to allow said deed to remain in defendant's possession, and to let defendant have possession of the farm and personal property thereon, and gave to defendant the entire management of his business during his imprisonment; that in June, 1885, plaintiff was convicted and sentenced, and imprisoned under said sentence until March 16, 1888; that, in the spring of 1885, defendant took possession of said farm, and used the same until the fall of 1887, when he conveyed it away by warranty deed, and wrongfully, and in violation of his trust, converted the proceeds to his own use, and that all the promises and agreements made by defendant relative to the reconveyance of said land were made and given with intent to cheat and de-

fraud plaintiff, and to enable defendant to convert the same to his own use; that said farm was worth $2,100 over and above the incumbrances; that plaintiff endeavored at different times during his imprisonment to ascertain from said defendant the condition of said farm, and the crops thereon, but defendant failed to give any information respecting the same; that after his discharge, and before action brought, plaintiff demanded of defendant an accounting and settlement of his transactions relative to said farm, and demanded a reconveyance of said farm to him, or the proceeds of the sale thereof, all of which defendant refused to render. The second cause of action renews all the agreements and pledges of defendant as set forth in the first count, and alleges that by reason of said pledges, and for no other consideration, he permitted defendant to take charge of all his affairs, including the working of the farm, relying upon his promise that he would redeliver to plaintiff all of said personalty, after deducting a reasonable amount for his services; that he would pay plaintiff the profits realized from the use of the farm, and his management thereof, as trustee; that, during the farming seasons of 1885, 1886 and 1887, defendant had the use and charge of said farm, and also stock and machinery thereon, of the aggregate value of $1,275; that the profits realized from said farm over and above the necessary expenses incurred amounted to $3,600; that prior to plaintiff's discharge, and contrary to, and in violation of, his said trust, and with intent to cheat, and defraud plaintiff, defendant sold and disposed of said personal property, and did unlawfully and wrongfully sell, dispose of, and convert to his own use the products and profits realized and raised from said farm; that demand was duly made upon defendant for the sum so converted and payment refused. The third count is for the conversion of a note.

The answer denies that the deed was given to secure liability on the bail-bond, and sets up that, when plaintiff applied to defendant for bail, defendant refused to take said land as security, but offered to buy the land, and give plaintiff $500 over and above all incumbrances, except $70 of accrued interest—the $500 to be held to secure the liability on the bail bond; that plaintiff accepted this proposition, and executed the deed accordingly, and to

secure the defendant against the accumulated interest, plaintiff gave defendant a bill of sale of a yoke of oxen, which defendant agreed to reconvey on payment of said $70. The answer then states the payment of the $500 on plaintiff's orders, and according to his directions; alleges that the land was not worth more than $500 over and above the incumbrances assumed, and that on April 16, 1885, defendant conveyed an undivided one-half interest in said land to Emmett E. Hazen for $300. The answer to the second cause of action states that on April 20, 1885, plaintiff sold and transferred the personal property to defendant in consideration that defendant would pay off the incumbrances thereon, which defendant did; alleges the value of said property to have been $300; and denies that any profits were realized from said farm, in the seasons of 1885, 1886, and 1887, over and above the cost of management and working the same. The third count is denied, except the demand.

When the jury was called, and before any evidence was introduced, defendant objected to any evidence under the complaint, for the reason that it appeared on the face thereof that the action was for damages growing out of a breach of trust which was still open, and no action at law would lie until the trust was closed, and a definite amount fixed by an accounting, either by the court or parties. The objection was overruled, and the point saved. After the testimony was closed defendant requested the court to treat the case as an equity case, and submit to the jury such interrogatories as were deemed proper to aid the court in finding the facts, and that the whole case be not submitted for a general verdict. This was also denied, and the point saved. The case was given to the jury by a general charge, and verdict returned for plaintiff. In his objections to judgment and motion for new trial, and on all possible occasions, defendant presented the point that this was an equity case, and could not be submitted to a jury for a general verdict; and that is the first point requiring our attention.

Plaintiff swears that defendant was to pay his attorney's fees, (no amount being fixed,) and was to pay incumbrances on land and on personalty, and was to hold both real and personal property as security for such advances, but was to repay him-

self from proceeds of crop. Defendant was also to have a reasonable sum for services. The learned counsel for respondent contend with much earnestness that this presents a case where one, for the purpose of getting property in his possession, fraudulently pretended to assume the position of trustee, and that, having obtained possession of the property, he proceeded to carry out his original fraudulent design, and wrongfully and unlawfully converted the property, and that an action at law will lie as for deceit. The point is not free from difficulty, and is somewhat involved on authority. While plaintiff asks a money judgment only, yet his whole complaint is based upon an accounting; and it is plain no recovery can be had without such accounting. If the deed, absolute on its face, was in fact held by defendant as security, plaintiff had the right to establish such fact by parol, and the fact once established made defendant a trustee; and the fact that defendant acted in bad faith or fraudulently in inducing plaintiff to leave the deed in his hands, instead of defeating such trusteeship, would, in and of itself, constitute defendant a trustee. § 3920 Comp. Laws. Likewise as to the personalty. If defendant received the same under the agreement, as plaintiff alleges it was made, then clearly he was a voluntary trustee, under § 3912, id. If, on the other hand, defendant's object was to defraud, then he became an involuntary trustee under said § 3920. Under any theory of plaintiff's complaint or proofs, defendant held the property both real, and personal, in trust. By seeking to recover the net value of the products raised on the farm for three years by defendant, plaintiff insists on holding defendant to the duties and responsibilities of a trustee. Plaintiff's testimony also shows that defendant advanced money for his benefit, and agreed to pay off incumbrances. Plaintiff is not, therefore, in a position to say that the trust never was opened, or the trust relation active. A trustee is held to the utmost good faith in all dealings with the trust property. He is bound to the *cestui que trust* for the payment of every farthing properly due, as proceeds or products of trust property; and a trustee *ex maleficio*, which is simply the involuntary trustee of our Code, is not different in this respect.

It is contended, however, that there has been a fraudulent breach of the trust by a conversion of the trust property, and that the value thereof may be recovered in an action at law against the trustee. This was done in Smith v. Frost, 70 N. Y. 65. A careful analysis of that case shows, however, that the defendant was at most a naked trustee, and that when demand was made upon him for the trust property there remained nothing to be done except the simple act of delivery. No question of redemption, or of accounting, or of adjustment of any kind, could possibly enter into the case. In Bridge Co. v. Van Etten, 36 Mich. 210, it was held that an action at law was properly brought against corporation officers, after they had ceased to be such, for money of the corporation wrongfully converted to their own use. The court say: "Officers of a corporation undoubtedly act in a fiduciary capacity, and may be called to account in equity as trustees. * * * But when they have ceased to be officers, and the only complaint made against them is of an appropriation of the corporate funds to their own use, and no discovery is sought, the reasons for seeking the aid of equity which commonly exist in cases of breach of trust are wholly wanting." In that case there were allegations that the defendants fraudulently, and with intent to cheat and defraud, procured themselves to be made officers. But the court say this is of no force or value. Lathrop v. Bampton, 31 Cal. 17, was an action in equity brought on behalf of the *cestui que trust* against the executor of the trustee, whose estate was insolvent; and plaintiff prayed a decree that defendant be required to pay over the full amount of the trust fund before paying any amount to general creditors. But, as neither the trust fund, nor any of the proceeds thereof, could be traced into the hands of the executor, the court held that the remedy of the plaintiff was at law, as a general creditor, and on rehearing placed their decision upon the ground that the bill could not be construed as a bill for an accounting. Mercier v. Hemme, 50 Cal. 607, and Frue v. Loring, 120 Mass. 507, have a bearing in the same direction. In some of the foregoing cases, expressions are found broad enough to fully sustain respondent's contention; but the cases did not call for such unqualified state-

ments, and we are satisfied the authorities do not warrant them. The elementary principles governing cases of this character will be found fully stated in Pom. Eq. Jur. §§ 1079, 1080, 1421. Johnson v. Johnson, 120 Mass. 466, was an action at law by a *cestui que trust* against the trustee's executor to recover the amount due the *cestui que trust* as shown by the final account of the trustee duly filed and allowed. The action was sustained, the court saying: "It is well settled that a *cestui que trust* cannot bring an action at law against a trustee to recover for money had and received while the trust is still open; but when the trust has been closed and settled, the amount due the *cestui que trust* established and made certain, and nothing remains to be done but to pay over money, such an action may be maintained." In Davis v. Coburn, 128 Mass. 382, it is said: "The plaintiff seeks to recover of the defendant as trustee under an express trust to invest and account for the proceeds of certain gold dust sent to him by the plaintiff's intestate. This trust was found by the judge who presided at the trial in the superior court to have been created and accepted. But it appeared in evidence that when the gold dust was received by the defendant the plaintiff's intestate was indebted to the defendant, and that no account has been rendered of the trust, and no settlement of the amount due under it has been made, either by computation or by adjustment. Under these circumstances, the only remedy for the *cestui que trust* is by a bill in equity. An action at law does not lie in his favor against the trustee while the trust is open." In Norton v. Ray, 139 Mass. 230, the trustee of real estate conveyed the land contrary to the terms of the trust, and the *cestui que trust* sued at law for the value of the land so conveyed. The court held that plaintiff's only remedy was in equity, and that the case did not come within the decisions allowing actions at law for a liquidated sum due a *cestui que trust*. Wingate v. Ferris, 50 Cal. 105, has many points in common with this case. Plaintiff was the owner of a steamboat, claimed to be worth $10,000, which had been seized on legal process, and was about to be sold for a debt of $300. Defendant agreed to bid the property in, and hold it in trust for plaintiff, and allow plaintiff to redeem on paying the sum bid, with interest, and reason-

able compensation for defendant's services in that behalf. Defendant purchased the property for $1,200, and in violation of his trust sold it, whereby plaintiff alleged he had been damaged in the sum of $9,027, and brought action therefor at law. Defendant denied that he bought the property in trust for plaintiff. The case was tried to a jury without objection by either party. Subsequently the trial court granted a new trial, and in so doing used the following language, which was approved by the supreme court on appeal from the order granting the new trial: "The remedy of the plaintiff against the defendant is not in law * * * * * but in a court of equity; * * * * * and the remedy is to redeem the property if it is in the hands of the trustee, or to compel the trustee to account for it if he has sold it to a *bona fide* subsequent purchaser without notice. * * * Defendant, it appears, sold the property. No action has been brought to set aside the sale. Plaintiff * * * complains of the conduct of his trustee, but has not availed himself of his remedy, to compel him to account to him concerning the trust." In Heyland v. Badger, 35 Cal. 405, plaintiff mortgaged certain hay to defendant. Defendant, without any attempt at foreclosure, sold the property, and the mortgagor sued at law for the value of the hay, without tender of the amount secured by the mortgage, and the court held that the action would not lie, and that plaintiff's only remedy was in equity, to redeem. See also, Sandfoss v. Jones, 35 Cal. 481; Judd v. Dike, 30 Minn. 380, 15 N. W. Rep. 672. In this case there has been no offer made to reimburse defendant for the money plaintiff swears was paid and to be paid by defendant for plaintiff's benefit, and for which the property was held as security; no offer made to refund the amount of incumbrances on the property that was paid by defendant; no tender of any sum by way of compensation to defendant for his services in and about the trust property; no ascertainment or pretended ascertainment, of defendant's expenditures in raising the crops. But plaintiff assumes a balance, and sues the defendant at law in an action that can only be determined on plaintiff's theory after a full accounting by the trustee on all these points. No case will be found sustaining this

practice. Plaintiff's remedy is in equity. A trustee cannot be sued at law while the trust remains open, unless the exact amount due the *cestui qui trust* has been, in some manner liquidated, and no act remains to be performed except payment. For the error in refusing to try the case as an equity case, and in submitting it to a jury for a general verdict the judgment must be reversed, and a new trial ordered in accordance with this opinion. All concur.

TERRITORY OF DAKOTA, *ex rel.* CHARLES S. WALLACE and JAMES M. MARTIN, as Assignee of DANIEL H. WALLACE, Plaintiff, *v.* GEORGE H. WOODBURY, JULIUS J. EDDY, and DEFOREST C. BUCK, Constituting the Board of County Commissioners of Stutsman County, Dakota Territory, Defendants.

1. **Mandamus; Granting of, to What Extent Discretionary.**

The granting or withholding of the writ of *mandamus* rests in a measure in the discretion of the court, but that discretion may not be capriciously exercised. Where justice will be subserved by temporarily withholding the writ, and injustice might result from its immediate issue, the court will refuse to issue it until a different case can be presented. Judgment against a county having been affirmed by territorial supreme court, and an appeal having been taken to the federal supreme court, but no stay of execution procured, this court, in the exercise of its discretion in *mandamus* cases, will regard the policy of this jurisdiction, that an appeal to a state court by a municipal corporation shall operate as a stay without an undertaking, and in effect give the stay by withholding *mandamus* to compel the levy of a tax to pay the judgment until final decision in the federal supreme court.

(Opinion Filed April 1, 1890.)

APPLICATION for an original writ of *mandamus*.

The case was argued by W. E. Dodge, for relators, and by Jesse A. Frye, states attorney for Stutsman county, for defendants. In the supreme court of the territory of Dakota, briefs had been filed by Dodge & Camp and John S. Watson, for relators, and by Roderick Rose, then district attorney, for the

defendants. The latter contended that the granting of relief by mandamus rests in the discretion of the court; citing 4 Hill 583; 13 Barb. 450; 1 Cow. 501; 2 Johns. 207.

CORLISS, C. J. This proceeding was instituted in the territorial supreme court to compel the defendants to levy a tax to pay a certain judgment recovered against the county of Stutsman. We are not called upon in this case to determine the question of our original jurisdiction of the writs specified in the constition, or the extent of such jurisdiction, if any. We take this case as the successor of the territorial supreme court. We are not asked to initiate jurisdiction by the writ of *mandamus*. The jurisdiction has already attached, and it is the duty of this court, as the successor of the territorial supreme court, to pass upon the merits of this proceeding. The relators ask for a peremptory writ, admitting the truth of all the facts set forth in the original and amended return, which will control the court in the disposition of this matter. On the other hand, the defendants move to quash the alternative writ. This motion we think should be granted. The writ of *mandamus* is not a writ of right. Its allowance rests in the discretion of the court. That discretion, however, is not to be capriciously exercised. High, Extr. Rem. §§ 6, 9; Devereaux v. City of Brownsville, 29 Fed. Rep. 742–751; People v. Common Council, 78 N. Y. 56–61. If to refuse to issue the writ would result in a denial of justice no court can, in the rightful exercise of discretion, withhold it. But where the temporary denial of the writ will not only not work injustice, but on the other hand will prevent possible irremediable injustice, no court should look merely to the bare question of technical legal right, and ignore the facts presenting a clear case for the exercise of its equitable discretion to withhold the remedy until the granting of it cannot possibly result in ultimate wrong. Said the court in State v. Graves, 19 Md. 351, speaking of *mandamus:* "Not a writ of right, it is granted, not as of course, but only at the discretion of the court to whom the application is made, and this discretion will not be exercised in favor of applicants, unless some just or useful purpose may be answered by the writ." No just purpose would be answered by the issuance of the writ under the facts in this case.

On the contrary, it might result in a wrong which could never be redressed. The judgment of the district court on which this proceeding is founded was on appeal affirmed by the supreme court of the territory, and it is undisputed that an appeal in good faith has been taken from such judgment of affirmance to the federal supreme court, and is now pending in that court. On this second appeal the defendants failed to procure a stay of proceedings to enforce the judgment appealed from, and it is simply for this reason that the plaintiffs in the judgment have even a technical right to the writ. It is well settled that the writ of *mandamus* in this class of cases is a remedy in the nature of an execution for the purpose of collecting the judgment. U. S. v. County Court, 122 U. S. 306, 7 Sup. Ct. Rep. 1171, and cases cited. But it is the policy of this jurisdiction that no security need be given to obtain a stay of execution pending an appeal, where the appellant, as in this case, is a municipal corporation. The reason is obvious. No security on appeal could make the judgment any more secure. There is no danger that the delay in the right to enforce it occasioned by the appeal will lessen the chances of collecting it. Were the pending appeal an appeal to this court, it would of itself stay the execution of the judgment, and be a complete answer to this application. Comp. Laws, § 5229.

Keeping this policy of the law in view, and giving it full effect, as is our duty to do, we hold that while the appeal to the federal supreme court did not operate as a stay to the extent that it did not debar the plaintiffs in the judgment from resorting to any strictly legal process to enforce the judgment, which would issue as a matter of right, (such as a writ of execution,) yet whenever a discretionary process is prayed for (as is the writ of *mandamus*) the policy of this state that a mere appeal in such a case should operate as a stay must control the discretion of the court, and direct its exercise in the line of that policy, in effect giving the stay by withholding the writ pending the appeal. Especially should this be done when the plaintiffs are not thereby placed in any different position from that which they would have occupied had a stay-bond been given, when they run no risk of losing their claim pending the appeal, but when, on

the contrary, the county, should the writ be granted and the amount of the judgment be collected before decision on appeal, might, in case of reversal, find itself without power to compel a restitution of the money paid, because of the insolvency, existing or intervening, of the persons to whom the payment should be made. "Cases may therefore arise where the applicant for relief has an undoubted legal right, for which *mandamus* is the appropriate remedy, but where the court may, in the exercise of a wise judicial discretion, still refuse the relief." High, Extr. Rem. § 9. We do not go so far as this statement of the doctrine would warrant us in going. We merely refuse to grant the writ until the final decision in the federal supreme court. Until that time the right to the writ is in equity imperfect. There is a possibility that the judgment sought to be enforced thereby will be reversed. The equitable defense to this application is that the proceedings are *in fieri*, and the relator's right inchoate, so long as there is an appeal pending. Said the court in Devereaux v. City of Brownsville, 29 Fed. Rep. 742-751: "The court does not grant or refuse the writ upon purely legal considerations. If the defendant has any equitable defense against it he may set it up in his answer to the rule to show cause or alternative writ, and it will authorize the court to refuse the peremptory writ." The alternative writ is quashed, but without prejudice to the right of the parties to apply for a new writ after the final decision of the appeal by the federal supreme court. All concur.

STATE OF NORTH DAKOTA, Plaintiff, *v.* NELSON COUNTY, Defendant.

1. **Constitutional Law; Seed-Grain Bonding Law Valid.**
   An act approved February 14, 1890, entitled "An act authorizing counties to issue bonds to procure seed-grain for needy farmers resident therein," examined and held to be valid, and not an abuse of legislative powers, in that it authorizes the issue of bonds and taxation for a public purpose. *Held, further*, that the act is not an infringement of § 185 of the state constitution, in this: that it is a measure intended for the "necessary support of the poor."

2. Same; Original Jurisdiction of Supreme Court.

In the exercise of its original jurisdiction, under § 87 of the state constitution, the supreme court, exercising its discretion, will issue the writs of *habeas corpus*, *mandamus*, *quo warranto*, *certiorari* and injunction only when applied for as prerogative writs; and where the question presented is *publici juris*, and one affecting the sovereignty of the state, its franchises or prerogatives, or the liberties of the people. To invoke the original jurisdiction of this court, the interest of the state must be primary and proximate, and not secondary and remote. This court will judge for itself whether the wrong complained of is one which requires the interposition of this court to protect the prerogatives and franchises of the state in its sovereign character. In all cases where the original jurisdiction of this court is invoked, except in *habeas corpus* cases, the attorney general shall proceed only on leave, based upon a *prima facie* showing that the case is one of which it is proper for this court to take cognizance. In ordinary cases, this court will not exercise its original jurisdiction to restrain local taxation for any reason. The proper jurisdiction for that purpose is lodged in the district courts. *Held*, this being an application made by the attorney general in behalf of the state to enjoin the issue of bonds upon the alleged ground that the statute authorizing the bonds is unconstitutional, that the question is one of local concern, and affects only the county of Nelson and its tax-payers, and hence the case does not fall within the limited class of cases in which this court will exercise original jurisdiction. *Held*, that the writ of injunction is denied upon the ground that the statute in question is valid law, and also upon the ground that the question presented is one of merely local concern, and hence is not a proper case to call for the issuing of a writ out of this court.

(Opinion Filed April 21, 1890.)

THIS is a proceeding brought in the supreme court by application made for leave to file an information in order to procure an injunction restraining defendant from issuing seed-grain bonds.

No briefs were filed.

George F. Goodwin, Attorney General, and *Burke Corbett*, for the motion. *M. N. Johnson*, States Attorney, and *F. R. Fulton*, opposed.

WALLIN, J. Upon the return of an order to show cause, application is made to this court for leave to file an information as a foundation for issuing a writ of injunction out of this court prohibiting the county of Nelson and its officials from issuing

seed-grain bonds, under an act of the state legislature, approved February 14, 1890, and entitled: "An act authorizing counties to issue bonds to procure seed-grain for needy farmers resident therein." The information is based upon the complaint of one John Birkholz, which alleges—"*First.* That the above-named complainant, John Birkholz, is a tax-payer of the county of Nelson, the respondent above named. *Second.* That said respondent is a political or public corporation, duly organized under existing laws. *Third.* That J. W. Forbes is the duly elected and qualified chairman of the board of county commissioners, and N. F. Webb is the duly-elected county auditor of Nelson county, and as such officers are respectively discharging the duties thereof. *Fourth.* That the above-named respondent on the 26th day of March, 1890, acting through its board of county commissioners and the county auditor of said county, pursuant to a petition signed by 100 freeholders resident in said county, adopted and passed a resolution at a meeting of said board, and thereby resolved to issue the bonds of the said county in the sum of twenty thousand dollars ($20,000), payable in ten (10) years, and bearing interest at the rate of seven (7) per cent. per annum, payable semi-annually, claiming their right to so do under an act of the legislative assembly entitled 'An act authorizing counties to issue bonds to procure seed-grain for needy farmers resident therein,' approved February 14, 1890, and acts amendatory thereto; that in pursuance to said resolution said respondent, acting through its auditor and the chairman of its board of county commissioners, have taken such steps as are requisite and necessary in the premises to and are about to issue bonds for said amount, in pursuance of said resolution, claiming their right to do so under the act aforesaid. *Fifth.* That if said bonds are issued they will become the obligation of the county. In order to meet the payment of the interest thereon, and the payment of the principal of the same, it will be necessary to levy taxes from year to year against the tax-paying people of said county, and the proceeds of said bonds, when issued and sold by the said county, will be diverted to and used for the purpose of buying said grain, to be distributed to private individuals, indigent and poor farmers resident in said county.

Sixth. That the act of the legislative assembly aforesaid, under which said respondent claims its right to issue said bonds, is in contravention of § 185 of the constitution of the state of North Dakota, which said section reads as follows: '§ 185. Neither the state, nor any county, city, township, town, school-district, or any other political subdivision, shall loan or give its credit, or make donations to or in aid of any individual, association or corporation, except for necessary support of the poor, nor subscribe to or become the owner of the capital stock of any association or corporation, nor shall the state engage in work of internal improvement, unless authorized by a two-thirds vote of the people.' Wherefore your complainants pray your honorable court that an order in the nature of a rule to show cause be issued to the said respondent, its officers, agents, and servants, to be and appear before your honors, at Fargo, in the county of Cass and state of North Dakota, at the opening of court thereof on Wednesday, the 2d day of April, A. D. 1890, and then and there show cause, if any reason it has, why an injunction should not be issued restraining respondent from issuing the bonds aforesaid."

It clearly appears from the complaint that the county of Nelson has, under the provisions of the seed-grain act in question, taken all of the requisite preliminary steps, and is about to issue the bonds of the county, and sell the same; and will apply the proceeds of such sale to the purchase of seed-grain for such farmers of that county, as come within the terms of the seed-grain law, and who make application for the seed-grain under oath, and in manner and form as prescribed by the law. It is conceded that all action taken by the defendants is warranted by the express terms of the law; nor is it pretended that the bonds if issued, will create a county indebtedness exceeding in amount the limit prescribed by the constitution of the state. Under such circumstances, the writ of injunction will be refused, as a matter of course, unless the statute under which the bonds are intended to be issued is itself unconstitutional or void for some reason. The question presented must turn upon the validity of the seed-grain statute.

The statute has twenty sections, but it will suffice to give the substance of such of its provisions as bear upon its validity as

a law. § 1 provides as follows: "In any county of the state where the crops for any preceding year have been a total or partial failure by reason of drought, hail or other cause, it shall be lawful for the board of county commissioners of such county to issue the bonds of the county under and pursuant to the provisions of this act, and, with the proceeds derived from the sale thereof to purchase seed-grain for the inhabitants thereof who are in need of seed-grain, and who are unable to procure the same, whenever said board shall be petitioned in writing so to do by not less than 100 freeholders resident in the county; and said board, at a meeting called as hereinafter provided, to consider said petition, shall, by a majority vote determine that the prayer of the petitioners shall be granted; provided, that all such petitions shall be filed with the county auditor or county clerk on or before the 28th day of February; and thereupon it shall be the duty of said officer to forthwith call a meeting of the board of county commissioners of his county to consider said petition; and provided further, that the total amount of bonds issued by any county under the provisions of this act shall not, with the then existing indebtedness of the county, exceed the limit of indebtedness fixed by the constitution in such case." § 4 provides: "The proceeds arising from the sale of said bonds shall be paid by the purchaser thereof to the county treasurer of the county, or to his authorized agent at the time of the delivery thereof, and such proceeds shall be paid out only on the order of the board of county commissioners." § 6 provides that, "for the purpose of securing prompt payment of the principal and interest of said bonds there shall be levied by the board of county commissioners, at the time and in the manner that other taxes are levied, such sums as shall be sufficient to pay such interest, and in addition thereto a sinking fund tax shall be annually levied sufficient to pay and retire said bonds at their maturity, and it shall be the duty of the county treasurer to pay promptly the interest upon said bonds as the same shall fall due. No tax or fund provided for the payment of such bonds, either principal or interest, shall at any time be used for any other purpose." § 7 is as follows: "The fund arising from the sale of said bonds shall be applied exclusively by said board for

the purchase of seed grain for residents of the county who are poor and unable to procure the same; provided, that no more than 150 bushels of wheat, or its equivalent in any grain, shall be furnished to any one person." § 8 provides that "all persons entitled to or wishing to avail themselves of the benefit of this act shall file, with the county auditor or county clerk of the county where said applicant resides, on or before the 1st day of March, an application duly sworn to before said county auditor or clerk, or some other officer authorized to administer oaths. Said application shall contain a true statement of the number of acres the applicant has plowed or prepared for seeding; how many acres the applicant intends to have plowed and prepared for seeding; how many bushels and what kind of grain he will require to seed the ground so prepared as aforesaid; how many bushels of grain the applicant harvested in the preceding year; that the applicant has not procured, and is not able to procure, the necessary seed-grain for the current year; that he desires the same for seed, and no other purpose; and that he will not sell or dispose of the same, or any part thereof, but will use the same, and the whole thereof, in seeding the land so prepared, or to be prepared for crop." § 9 provides that the commissioners shall examine all applications and determine "who are entitled to the benefits thereof, and the amount to which each applicant is entitled." § 10 provides that the applicants under the act shall, before receiving the seed grain, sign a "contract in duplicate, attested by the county auditor or county clerk, to the effect that said applicant, for and in consideration of ——— bushels of seed-grain received from ——— county, promises to pay to said county ——— dollars, the amount of the cost of the seed grain; that said sum shall be taxable against all the real and personal property of said applicant; that such tax shall be levied by the county auditor or county clerk of his county, and collected as other taxes are collected under the laws of this state; that the amount of such indebtedness shall become due and payable on the 1st day of October, in the year in which said seed-grain is furnished, together with the interest on such amount from the 1st day of April of that year at the rate of 7 per cent. per annum; and, if said in-

debtedness be not paid on or before the 20th day of October of that year, it shall then be the duty of the county auditor or county clerk of the said county to cause the amount of said indebtedness to be entered upon the tax-list of said county for that year as a tax on the land on which said seed-wheat was sown, and upon any other land owned by the applicant, to be collected as other taxes are; and the sum so entered and levied shall be a lien upon the real estate owned by such person until said indebtedness is fully paid, when it shall be the duty of the proper officer to cancel the same."

The objects and purposes contemplated by the statute may be readily gathered from the above extracts, and they are clear and unmistakable in their character. The legislature by this enactment, so far as it can do so, has clothed the several counties of the state where there has been a preceding crop failure with authority to lend their aid in procuring seed-grain to such of their citizens as are engaged in farming pursuits, who make it appear, in manner and form as detailed by the law, that they are unable to procure such seed-grain by any other means. The law empowers the counties to lend their aid out of money to be obtained by the issue and sale of county bonds, such bonds to be paid, principal and interest, from funds obtained by means of a general tax levy upon all of the taxable property situated within the counties that issue such bonds. Two features of this statute stand out in conspicuous prominence. *First.* All benefits obtainable under the act are confined to persons engaged in the pursuit of farming, and among farmers only those who propose to continue the business of farming after the aid in contemplation has been received by them. *Second.* No part of the fund is intended to be used in support or aiding such indigent persons as have already become a county charge, viz., paupers.

The objections which may be made to the validity of this statute are twofold: *First*, it may be claimed that the tax authorized by the statute is not for a public purpose, hence not a valid tax; *second*, it may be contended that, under § 185 of the state constitution, counties are expressly forbidden to make donations, or lend their aid to either

corporations or individuals, hence that the proposed aid is unconstitutional, as repugnant to said section. The courts of this country, and of all countries where constitutional liberty exists, agree with the elementary writers upon the science of government that it is essential to the validity of a tax that it be laid for a public purpose. Difficulty has frequently arisen in discriminating between public and private objects; but where the object is primarily to foster private enterprises, and the only benefit to be derived by the public is incidental and secondary, the tax will be annulled by the courts as an abuse of the legislative prerogative. In the first instance the duty devolves upon the legislative branch of the government to determine whether a proposed tax is or is not for a public purpose; and courts are loth to interpose and declare any tax unlawful, and will only do so in case of a palpable disregard of the wise limitations, express and implied, restricting the power of taxation. But where the legislature assumes, in the guise of taxation, to compel A. to advance his private means to aid B. in the prosecution of a purely private enterprise, the courts will not hesitate to perform the duty of declaring such tax void, as subversive of fundamental and vested individual rights, and will do so even in cases where there is no express constitutional inhibition. The power of confiscation does not exist in the legislature. The cases cited below are but a few of the numberless cases which have applied these principles to statutes imposing pretended taxes. Association v. Topeka, 20 Wall. 655; Bank v. City of Iola, 2 Dill. 353; City of Parkersburg v. Brown, 106 U. S. 487, 1 Sup. Ct. Rep. 442; Cole v. City of LaGrange, 113 U. S. 1, 5 Sup. Ct. Rep. 416; Allen v. Jay, 60 Me. 124; Lowell v. Boston, 111 Mass. 453; State v. Osawkee Tp., 14 Kan. 422; Coates v. Campbell, (Minn.) 35 N. W. Rep. 366; Cooley, Const. Lim. (marg.) p. 487; Cooley, Tax'n, (2d Ed.) pp. 55, 126.

Under these authorities, the test to be applied to the seed-grain statute is this: Is the tax provided for in the statute laid for a public purpose? If this question is answered in the negative, the statute must be declared null and void, without reference to § 185 of the state constitution, to which the attention of the court has been particularly directed. The statute makes

provision for levying a general tax, in counties issuing the bonds, for the benefit of a numerous body of citizens, who, without fault of theirs, and solely by reason of successive crop failures, are now reduced to extremities, and are in fact impoverished to such an extent that they are, for the present time, wholly without the ability to obtain the grain necessary for seeding the lands from which they derive the necessaries of life. It is agreed on all sides that this class of citizens, having already exhausted their private credit, must have friendly aid from some source in procuring seed-grain, if they put in crops this year. The legislature, by this statute, has devised a measure which seems well adapted to meet the exigency, and promises to to give the needed relief, with little prospect of ultimate loss to the county treasuries. It is reasonable to anticipate that the beneficiaries of the act will be enabled to tide over their present embarrassments, and, through the aid granted them by this statute, a wide spread calamity, both public and private, will be averted. The crisis in the development of the state which renders some measure of wholesale relief imperatively necessary is fully recognized by all well-informed citizens of the state, and this court will be justified in taking judicial notice of the existing *status*. The stubborn fact exists that a class of citizens, numbered by many thousands, is in such present straits from poverty, that unless succored by some comprehensive measure of relief they will become a public burden, in other words, paupers, dependent upon counties where they reside for support. It is to avert such a wide-spread disaster that the the seed-grain statute was enacted, and it should be interpreted in the light of the public danger which was the occasion of its passage. "The support of paupers, and the giving of assistance to those who by reason of age, infirmity, or disability are likely to become such, is, by the practice and the common consent of civilized countries, a public purpose." Cooley Tax'n (2d Ed.) pp. 124, 125. "The relief of the poor—the care of those who are unable to care for themselves—is among the unquestioned objects of public duty." Opinion of Brewer, J., in State v. Osawkee Tp., 14 Kan. 424. If the destitute farmers of the frontier of North Dakota were now actually in the alms-houses of the various

counties in which they reside, all the adjudications of the courts, state and federal, upon this subject, could be marshaled as precedents in support of any taxation, however onerous, which might become necessary for their support. But is it not competent for the legislature, representing the tax-payers, in the exercise of its discretion, and within the limits of county indebtedness prescribed by the state constitution to clothe county commissioners with authority to be exercised at their discretion, to make small loans, secured by prospective crops, to those whose condition is so impoverished and desperate as to reasonably justify the fear that, unless they receive help, they and their families will become a charge upon the counties in which they live?

We have carefully examined the authorities above cited, and many others of similar import, and while fully assenting to the principles enunciated by the cases, viz., that all taxation must be for a public purpose, we do not, with the single exception of the Kansas case, regard them as parallel cases, and applicable to the question presented in the case at bar. As we view the matter, the tax in question is for a public purpose, *i. e.*, a tax for the "necessary support of the poor." The case of State v. Osawkee Tp., *supra*, asserts a doctrine which would defeat the tax in question. This court has great respect for the court which promulgated that decision, and the most sincere admiration for the distinguished jurist now upon the supreme bench of the nation, who wrote the opinion in that case. Nevertheless we cannot yield our assent to the reasoning of the case, leading to the conclusion that a loan of aid to an impoverished class, not yet in the poor house, is necessarily a tax for a private purpose. In our view, it is not certain, or even probable, in the light of subsequent experience in the west, that the court of last resort in the state of Kansas would enunciate the doctrine of that case at the present day. The decision was made fifteen years ago. While the fundamental principles which underlie legislation and taxation have not changed in the interval, it is also true that the development of the western states has been attended with difficulties and adverse conditions which have made it necessary to broaden the application of fundamental principles to meet the new necessities of those states. Under

the stress of adversity peculiar to the condition of the frontier farmer, there has come to be an expansion of the legal meaning of the term "poor" sufficient to embrace a class of destitute citizens who have not yet become a public charge. The main features of the seed-grain statute are neither new nor novel. It was borrowed from territorial legislation, and long prior to that the state of Minnesota, in aid of agricultural settlers upon its western frontier, enacted a series of statutes which are open to every criticism which can be made upon the statute under consideration. Chapter 43, Laws Dak. 1889. See also, pp. 1024-1030, Gen. St. Minn. 1878.

The legislature of Minnesota has frequently, and by a variety of laws, extended aid to the frontier farmers of that state, who, far from being paupers, were yet reduced to extremities, by reason of continued crop failures resulting from hailstorms, successive seasons of drought, and from the ravages of grasshoppers. Under one law, towns are authorized to vote a tax to defray the expense of destroying grasshoppers; under another statute, the governor, state auditor, and state treasurer were authorized to borrow $100,000 on state bonds, to be issued by them, and the proceeds were to be expended in the purchase of seed-grain for the needy farmers. Again, and at the same session, the same state officials were empowered to issue additional bonds to the same amount, to pay a debt contracted for a similar purpose, upon warrants of the state auditor. § 6 of the Minnesota act of 1878, c. 93, provides as follows: "The credit of the state is hereby pledged to the payment of the interest and principal of the bonds mentioned in this act, as the same may become due." By another section the state auditor is authorized and required to levy an annual tax necessary to meet the interest and principal of the debt created by these bonds. Many of the features of the two seed-grain statutes passed at the first session of the legislature of this state are borrowed from Minnesota. In principle, the legislation of the two states is identical. The aid extended is furnished in the form of a loan to individual farmers, secured on their crops, but to be met primarily by taxation. The destitute communities of farmers who were thus assisted in a neighboring state

were enabled thereby to tide over their temporary necessities, and are now self-supporting.

This review of legislation in aid of destitute farmers will serve to illustrate the well-known fact that legislation under the pressure of a public sentiment, born of stern necessity, will adapt itself to new exigencies, even if in doing so a sanction is given to a broader application of elementary principles of government than have before been recognized and applied by the court in adjudicated cases. It is the boast of the common law that it is elastic, and can be adjusted to the development of new social and business conditions. Can a statute enacted for such broadly humane and charitable purposes be annulled by another branch of the government as an abuse of legislative discretion? We think otherwise. Great deference is due from the courts to the legislative branch of the state government, and it is axiomatic that in cases of doubt the courts will never interfere to annul a statute. Cooley, Const. Lim. marg. p. 487.

It will be presumed that the legislature, in passing the seed-grain statute, acted upon the fullest knowledge of the necessities of the situation, and also presumed that, they have passed the statute after due deliberation and with the clearest apprehension of the scope and purpose of the language used in § 185 of the state constitution. That section is not only restrictive upon counties, but it is also permissive. It permits counties to lend aid for "the necessary support of the poor." To our mind, the restrictive words of that section were intended to prevent the loan of aid either to individuals or corporations, for the purpose of fostering business enterprises, either of a public or private nature; but that the people who adopted the constitution, as well as those who framed the instrument, expressly intended by the language of that section to grant a power affirmatively to the municipal corporations named in § 185, to lend their aid and make donations for the "necessary support of the poor." The attention of the court has been directed to the constitutions of nineteen of the states, in which the language of § 185 is used verbatim, except only that in the states of North and South Dakota the words above quoted are interpolated. Why was this peculiar language introduced into the constitutions of North

and South Dakota, when nothing of the kind was found in that of the other seventeen states? Why did not the conventions which formed the organic law for North and South Dakota simply copy the language which, with this exception, is borrowed from the other constitutions, without inserting the excepting clause under consideration? To our mind, the answer to these questions is found in the peculiar and alarming condition of the people of Dakota territory in the year 1889, when the two Dakotas assumed the responsibilities of statehood. Such conditions had not before existed, and hence the constitutions of other states had made no provisions to meet such necessities. When the two states formed and adopted their constitutions the fact was well known and recognized by the people of Dakota that the condition of many farming communities was such that some comprehensive measure for their relief was an imperative necessity. In such a conjuncture the words were interpolated into § 185 of the constitution, which permit counties to loan their aid for the "necessary support of the poor." No constitutional grant of power was necessary to give the new governments authority to provide for the support of paupers in the poor-houses. That power is inherent, and exists in all governments as among their implied powers and duties. By universal consent, taxes are valid when laid for the support of paupers, or those likely to become paupers. There was no necessity and no reason for inserting a provision in the state constitutions of North and South Dakota authorizing counties to loan their aid to maintain the alms-houses. It would be absurd to assume that the framers of the constitutions and the people who adopted them intended by this provision to enable local municipalities to issue and sell bonds, and loan the proceeds to the inmates of the poor-houses; yet the power to loan aid in "support of the poor" is given. In our opinion, this power is conferred in the organic law expressly to meet the exigencies of the situation then existing, and that it is our duty to give it that effect. We believe, and so hold, that the class referred to in the exception contained in § 185 of the state constitution is the poor and destitute farmers of the state, and that the first legislature which met after the state was admitted, has, by the seed-grain statute, put a proper con-

struction upon the language in question. We therefore refuse to grant the writ applied for, and hold that the seed-grain statute is a valid enactment.

But our refusal to issue the writ can be placed upon still another ground. This case furnishes the first instance of an application to this court to put forth its original jurisdiction by issuing a writ except in a single *habeas corpus* case. We deem it expedient, therefore, to now indicate briefly the circumstances under which this court, in the exercise of a discretion vested in it will deem it its duty to take original cognizance of cases. § 87 of the constitution of the state authorizes this court to "issue writs of *habeas corpus, mandamus, quo warranto, certiorari*, and injunction." In the exercise of its appellate and supervisory powers over inferior courts the supreme court may have occasion from time to time to issue certain of the writs above enumerated, but such writs will not issue out of this court, in the exercise of its original jurisdiction, except in a limited class of cases, and such as are not ordinarily of frequent occurrence. All of the original and remedial writs which can be issued out of this court, under the constitution, may, under § 103 of the state constitution, be issued, not only by the district courts, but the judges thereof. We think the intention was to devolve upon the district courts, which are readily accessible, and at all times open for public business, the duty of assuming original cognizance of all ordinary cases which are remediable by means of the writs aforesaid; and to confer upon the supreme court, in the exercise of a discretion vested in it, the duty of taking original cognizance only in the limited class of cases where the writs, except the writ of *habeas corpus*, are sought for on motion of the attorney general as prerogative writs. Except in cases of *habeas corpus*, leave to file an information must be obtained by the attorney general. 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 its people. In such cases the court will judge for itself whether the wrong complained of is one which demands the interposition of this court. The constitution of this state, with respect to the original jur-

isdiction of the supreme court, is substantially the same as that of the state of Wisconsin; and the interpretation given by the supreme court of that state to that part of its state constitution meets with the full approval of this court. See Attorney Gen. v. Railroad Cos. 35 Wis. 425; Attorney Gen. v. City of Eau Claire, 37 Wis. 400; Wheeler v. Irrigation Co., 9 Colo. 248, 11 Pac. Rep. 103. The case at bar affects only the local concerns of the county of Nelson and its tax-payers, and hence does not fall within the limited class of cases indicated above, and in which alone this court will assume original jurisdiction. It follows that for this reason, also, the writ must be denied. All concur.

JOHN FARRINGTON, Trustee, Plaintiff and Respondent *v.* THE NEW ENGLAND INVESTMENT COMPANY and OLE SERUMGARD, County Treasurer of Ramsey County, D. T., Defendants and Appellants.

1. **Taxation—Assessment—Resignation of Assessor; Roll Not Verified.**

   In an action in equity brought to cancel certain tax certificates and annul tax proceeding, *held*, that a county assessment made by the proper assessor, in the proper time and manner, on the proper blank forms for listing and assessing property, but not copied into the assessment roll until after such assessor had resigned, was not void in equity when it appears that said assessment was in fact copied accurately into the assessment roll, and there is no showing that said assessment was in any manner unfair or inequitable. *Held, further*, that the absence of any verification of such assessment roll did not invalidate the assessment in equity.

2. **Same; Proceedings Presumed Legal.**

   Presumptions are in favor of the legality of tax proceedings; and a levy properly made will, in equity, be held void only when it clearly appears that such levy was for purposes not authorized by law.

3. **Assessor; Power to Appoint Deputy—Assessment Not Made by Proper Officer Void.**

   The duties of an assessor in fixing values upon property are judicial in their nature, and cannot be performed by deputy, in the absence of an express statute. The city assessor of a city organized under chapter 24 of the Political Code of Dakota Territory has no authority to appoint a deputy; and an assessment of the property of such city by a

pretended deputy assessor, which was never in any manner adopted or ratified by the city assessor, is a nullity, and no tax can be predicated thereon.

4. Same; When Court Will Restrain Tax Proceedings.

Courts of equity should, in general, interfere to restrain the collection of a tax, or annul tax proceedings, only where it appears either that the property sought to be taxed is exempt from taxation, or that the tax itself is not warranted by law, or the persons assuming to assess and levy the same are without authority so to do, or where the proper taxing officials have acted fraudulently; and, in addition, plaintiff must bring himself within some recognized head of equity jurisdiction; and in the absence of statutory provisions regulating the subject, as a condition to relief in equity, the applicant must pay or tender the amount of taxes properly chargeable against his property.

5. Same; Court Should Enter Judgment for Amount of Legal Tax.

Held, further, that such action, in this state, comes within the provisions of section 1643 of the Compiled Laws, and that, instead of requiring the payment of the legal charges as a condition precedent to relief in equity, it becomes the duty of the trial court to enter judgment against the applicant for the amount of such legal taxes.

WALLIN, J., dissents.

(Opinion Filed April 1, 1890.]

APPEAL from district court, Ramsey county; Hon. WM. B. MCCONNELL, Judge.

This case was argued before the supreme court of Dakota Territory and the judgment of the district court was there affirmed. A re-argument was granted, pending which the territorial courts were succeeded by those of the states and this case passed to the supreme court of North Dakota.

J. F. McGee, for the appellants, argued: That the complaint did not state a cause of action, because it did not allege payment or tender of the taxes due; that the omission of the assessor's oath from the roll was not fatal to the validity of the tax. Counsel did not discuss in his brief the effect of the resignation of the county assessor before the completion of the roll, nor the legality of the city assessment made by a so-called deputy assessor. The findings of the district court do not show that the city assessment was made by a "deputy" assessor, but that fact only

appears from the evidence printed in the appellant's abstract and quoted in his brief.

W. E. Dodge, for respondent, argued: That the law does not require payment or tender of a void tax, as a condition precedent to relief from the tax; citing, Hart v. Henderson, 17 Mich. 218; Marsh v. Supervisors, 42 Wis. 502; Weller v. St. Paul, 5 Minn. 70; Cooley on Taxation, p. 552.

A partial judgment for the payment of taxes will never be rendered unless the record shows what is the amount due; citing, Hebard v. Ashland Co., 55 Wis. 145; Desty on Taxation, vol. 2, p. 905; State v. Cooper, 18 N. W. 438; Boeck v. Merriam, 4 N. W. 962. That the failure of the assessor to return the roll on or before the first Monday in July was fatal to the tax; citing, Cooley, p. 415; Painter v. Hall, 75 Ind. 209; Mix v. People, 72 Ill. 241; Henry v. Chester, 15 Vt. 468. That there is no such officer as "deputy assessor" of Devil's Lake city, therefore the assessment made by such "deputy assessor" was void.

BARTHOLOMEW, J. In 1885 the plaintiff, John Farrington, as trustee for the St. Paul, Minneapolis & Manitoba Railway Company, owned a large number of town lots in the city of Devil's Lake, in Ramsey county. At the regular tax-sale in the year 1886, said lots were sold for the delinquent taxes of 1885, as the same appeared on the books of the treasurer of said county. The sale was made by one John W. Maher, who, as treasurer of Ramsey county, was the predecessor in office of the defendant, Ole Serumgard. The lots were purchased by, and the certificates of sale issued by said Maher, to the defendant the New England Investment Company. It is to declare said tax void, and to cancel said certificates, that this action is brought. The lots were sold for both county and city taxes; both taxes being included in one certificate.

The complaint after the formal allegations as to parties plaintiff and defendant, and a description of the property affected, alleges: "That in the year 1885 the officers of said county of Ramsey, and the officers of said city of Devil's Lake, a municipal corporation situated in said county, which officers were authorized by the laws of this territory to assess

property therein for the purposes of taxation, and to levy taxes thereon, pretended to assess all the said parcels of land for the purposes of taxation, and pretended to levy certain taxes thereon, to-wit, territorial, county, city, and other taxes, for that year, amounting in the aggregate to the sum of $1,530.97;" that all of the taxes so assessed against said lands in the year 1885 were null and void, and of no force, for the following reasons: That the board of county commissioners of said county of Ramsey did not, on the first Monday of September, 1885, meet and levy the taxes for the current fiscal year in manner and form as provided by § 35, chapter 28, of the Political Code, nor otherwise, and that in the pretended assessment of taxes was illegally included a pretended road and bridge tax of one mill on the dollar; that the city of Devil's Lake is organized under chapter 24 of the Political Code, and that in said pretended assessment there was a pretended tax levied of seven mills on the dollar claimed to have been levied by the trustees of the city of Devil's Lake for municipal purposes, and claimed to have been certified to the county treasurer as delinquent, and that this tax is wholly illegal and void for the following reasons: The board of trustees of said city did not determine and levy the amount of general tax for the year 1885 in manner and form as required by § 30, chapter 24, of the Political Code, or otherwise; that said board did not prescribe rules and regulations for the assessment of property, as prescribed by § 31 of said chapter, or otherwise; that the assessor for the city of Devil's Lake did not assess said property under the rules and regulations prescribed by the board of trustees of said city, or otherwise, nor did he make return of any assessment roll to said board during said year, as required by said § 31, nor otherwise; that the trustees of said city did not deliver a tax duplicate to the collector of said Ramsey county as provided in § 36 of said chapter, or otherwise, nor did they in any manner delegate to said county collector any authority whatsoever for the collection of said pretended delinquent taxes by sale of real estate or otherwise; that the county assessor of Ramsey county did not personally inspect or examine any of said parcels of land for the purpose of ascertaining the actual character or value of the land, but set the same down in

the assessment roll, in an arbitrary manner, without regard to value, and thereby plaintiff's lots were unfairly and unjustly assessed at a much higher valuation than other lands of the same value in the same locality; that the assessor did not take and subscribe an oath, and annex it to said assessment roll, as provided by § 12, c. 28, Pol. Code, nor did he subscribe and annex to said roll any oath whatever; that the county clerk failed to make and carry out the lists as provided by § 37 of said chapter, or to deliver any duplicate list to the treasurer as prescribed by § 38 of said chapter, or substantially as so required; that the county commissioners did not attach to said list their warrant, under their hands and official seals as provided by § 40 of said chapter, or substantially so; that the treasurer did not publish the tax-sale notice for three consecutive weeks, beginning the first week in September, and did not post such notice upon the court-house door or elsewhere as provided by law. And stating further, that the lands were sold at the tax-sale in 1886 for said pretended taxes, and that unless such sale, and the certificates issued thereon, were canceled and annulled, said Serumgard would issue deeds to said lands, and thereby cast a cloud upon plaintiff's title, and greatly impair the value of the land, and numerous suits concerning the title to said lands will necessarily follow. And relief was prayed accordingly, and an injunction issued. The answer admits the corporate and official capacity of the parties, admits the assessment and levy of the taxes and the sale of the lands, but denies all allegations of omissions and irregularities on the part of the taxing officers and boards. There is a stipulation in the case that the pleadings are to be considered as amended to correspond with the proofs. No amendments were ever, in fact, made under the stipulation; and we must not be expected in another case to give effect to such a stipulation, as the precise issues in a case should be presented to this court in some form other than by way of evidence.

The trial court made 19 findings of fact, nearly all of which are excepted to by defendants as not being supported by the testimony. We will give them, in substance: The *first* finds the title of the lands to be in plaintiff. The *second* finds that the

defendant Serumgard sold the lands at the annual tax-sale in October, 1886, for alleged delinquent taxes of 1885, to the defendant, the New England Investment Company, and that the charge for which said lands were then sold included an alleged tax of 14.4 mills levied by the county commissioners, and an alleged tax of 7 mills claimed to have been levied by the trustees of the city of Devil's Lake, with the penalties and interest. There is an evident mistake as to Serumgard. The lands were sold by Maher. Serumgard did not become treasurer of Ramsey county until January, 1887. The *fourth* finding states that the only levy of taxes made, or attempted to be made, by the county commissioners of Ramsey county, in the year 1885 was on September 7, 1885, and consisted of the following items only: Territorial tax, 2.4 mills; general county tax, 6 mills; county road and bridge tax, 1 mill; interest on county bonds, 2 mills; county special tax, 1 mill; county school tax, 2 mills. All of which were included in and constituted said levy. *Fifth.* "The assessor of said Ramsey county did not make out and deliver to the county clerk an assessment roll, on or before the first Monday of July, 1885. The only record evidence of an assessment in said county for the year 1885 is in a book containing certain descriptions of property and values, marked 'Assessor's Book for 1885,' which was written up by one Elmsley, an employe of the county assessor, and completed about July 15, 1885." *Sixth.* "The so-called assessor's book was unverified and unauthenticated by any oath, affidavit, or indorsement of the county assessor of said county, or by any mark or indorsement showing that it was ever delivered to or filed with the county clerk of said county. The oath attached to said assessor's book was executed by a former county assessor, who resigned and was succeeded by another before said assessor's book was written; and said oath was afterwards, and just prior to the trial of this action, pinned into said book by the clerk of said county, where it now appears." *Seventh.* The tax-list made by the county clerk did not contain a list of the lots of plaintiff, commencing with the lowest and ending with the highest number, with the amount of tax assessed against each lot, but several of the plaintiff's lots were lumped together in said list; from two to ten being joined

in one item of tax. *Eighth.* The duplicate tax-list was not delivered to the treasurer until November 6, 1885. *Ninth.* The only notice of sale published by the treasurer in 1886 for delinquent taxes of 1885 did not describe the plaintiff's lots in severalty, but lumped them, in groups of two to ten each, opposite one item of tax. *Tenth.* Said notice entirely omitted certain lots that were sold. The *eleventh* finding states that the board of trustees of the city of Devil's Lake did not, on or before the third Tuesday in May, 1885, or at any other time during said year, determine the general amount of tax for that year. The *twelfth* finds that said board did not during said year promulgate any rules for the assessment of property, or the guidance of the assessor. *Thirteenth.* The assessor of said city did not make return of any assessment roll to said board on or before the second Tuesday in June of said year, or on or before the meeting of such board of equalization. The *fourteenth* states that no notice was given that the assessment roll was returned and open for inspection. An assessment roll was made by said assessor without rules or regulations by the board of trustees, but the same was unverified by the oath of the assessor, and subsequently lost or destroyed; and the court was unable to say, from the evidence, whether the same was ever returned to the board of trustees. The *fifteenth* finding states that the city tax of seven mills on the dollar, for which plaintiff's lots were sold, was never levied by the trustees; the only levy for that year being a levy of four mills, made before any assessment or assessment roll was made. The *sixteenth* states that no delinquent tax-list for 1885 was certified by the board of trustees, or other officer of the city of Devil's Lake, to the county treasurer, and said treasurer had no warrant or other authority directing or requiring him to sell plaintiff's lands, or any of them. The other findings do not bear on the issues now involved.

We will review the evidence pertaining to all findings which affect the assessment, levy, and equalization of the taxes, county and city, and those only, because the decision of this case must depend upon the existence or non-existence of a valid tax against plaintiff's property in the year 1885. Respondent attacks the validity of the tax, and the burden is upon him to es-

tablish its invalidity; and it is not enough, for the purposes of this case, that the court may not be able to say from the evidence that the tax is valid. The presumption is that the tax is valid, and this presumption necessarily extends to every act upon which the tax in any measure depends. The court must be able, upon the evidence, to pronounce judgment against its validity. St. Peter's Church v. Scott Co., 12 Minn. 395, (Gil. 280;) Towle v. Holt, 15 N. W. Rep. 203; Miller v. Hurford, 12 N. W. Rep. 832; Stockle v. Silsbee, 41 Mich. 615; Perkins v. Nugent, 45 Mich. 157, 7 N. W. Rep. 757. All the findings of the trial court pertaining to the assessment of the county tax are excepted to as not supported by the evidence. While the record in the case is long and somewhat confused, yet there is absolutely no conflict in the testimony; hence we are not called upon to pass upon any finding that is based upon conflicting evidence. It is true we find in the record instances where witnesses who confessedly had no personal knowledge upon the subjects were allowed to presume or suppose that certain things were done by certain parties at certain times. But in each instance we have the positive and direct testimony of the parties who performed the several acts as to the persons by whom, and times when, such acts were performed; and, as opposed to this positive testimony, we find nothing that rises to the dignity of a conflict. It is simply a question of the correctness of findings upon undisputed testimony. We have given the evidence much consideration, as well, in this case, to distinguish the issues, as to learn the facts; and, quoting as little of the testimony as is compatible with an understanding of our views, we will briefly state what facts are established upon the points that we deem material, as heretofore indicated.

First, as to the county assessment: One Reed was county assessor in 1885. Reed testifies that at the proper time he personally assessed and valued the taxable property of the county, including the property of plaintiff; that in making such assessment he used the ordinary blank for that purpose, giving the name of the owner, with the description and valuation of the property; that after he had thus completed the assessment of all property in the county, and had commenced to transcribe

the same into a book known as the "Assessment Roll," and on the 27th day of June, 1885, he resigned. Prior to his resignation, he deposited with the county clerk the book known as the "Assessment Roll," with a small amount of the assessment transcribed therein, and all of the sheets on which the original assessment had been made; and with said sheets, and intending, as he says, to authenticate them, he deposited an oath, in the exact form prescribed by law, to be attached to the assessment roll proper. All these sheets are in evidence in this case. It also appears that as soon as it could be done after Reed's resignation was filed, and on July 1, 1885, the county commissioners were assembled, Reed's resignation was accepted, and one Ferguson appointed; that the county clerk delivered to Ferguson the assessment sheets deposited by Reed, and Ferguson employed one Elmsley to transcribe the taxes into the assessment roll, and said taxes were so transcribed, exactly as they appeared on the assessment sheets, under the supervision of the assessor, and he testifies to the correctness of the work, and the said roll was completed, and in the hands of the county commissioners, when they sat as a board of equalization. The record shows that the county commissioners met as a board of equalization on July 6th, (Monday,) and held sessions on that day, and on the 7th, 8th, 9th, and 10th. On July 10, 1885, plaintiff, by his agent and attorney, appeared before said board, sitting as a board of equalization, and asked a reduction of the valuation placed upon his said property, which was refused. The county levy was made on Monday, September 7, 1885, substantially as found by the trial court.

Before stating the facts pertaining to the city taxes, we will state our conclusions upon the assessment and levy of the county taxes. The assessment was made by the proper county assessor, and in all respects as required by law. This fact is not questioned, but the contention is that no assessment roll was ever completed or filed as required by law. That the exact requirements of the statute were not met, will be admitted; but were the departures more than irregularities? Could respondent, by any possibility, have been prejudiced thereby? The assessments were made upon the usual and proper forms upon

which tax-payers' statements are entered. Those statements were acurately copied into the roll. Had Reed not resigned, and had the same statements been copied by the same clerk, and the same roll been placed before the board of equalization, could any objection have been raised thereto save the want of verification? Again, can it be that the caprice of the resignation, or the misfortune of the death, of an assessor, at such a time prior to the first Monday of July in any year so as to render a new assessment by that date an impossibility, must inevitably deprive the state and county of its revenue for that year? We find no authority that would warrant a court of equity in adopting a rule so technical. An unauthorized party had attached to the assessment roll the oath that Reed filed with his assessment sheet. Its presence was without effect, and the roll was unverified. But, under statutes of the same import as ours, it has been repeatedly held that the fact that no oath was attached to or is returned with the roll would not warrant a court of equity in interfering in any manner with the tax proceedings. See on this point Land Co. v. City of Crete, (Neb.) 7 N. W. Rep. 859; Wood v. Helmer, (Neb.) 4 N. W. Rep. 968; Boeck v. Merriam, id. 962; Frost v. Flick, 1 Dak. 131; Challiss v. Commissioners, 15 Kan. 49; Fifield v. Marinette Co., (Wis.) 22 N. W. Rep. 705; Wisconsin Cent. Ry. Co. v. Lincoln Co., (Wis.) 30 N. W. Rep. 619. It also appears that plaintiff filed his petition before the board of equalization, asking to have his assessment reduced. No claim of fraud is made either against the assessment or equalization. Under the authorities, respondent cannot be heard to say in this case that his property was assessed too high, or that the roll was not returned in time to enable him to appear before the board of equalization. Welty, Assessm. § 10; Hutchinson v. Board, (Iowa,) 23 N. W. Rep. 249; Henkle v. Town of Keota, (Iowa,) 27 N. W. Rep. 250; Insurance Co. v. Pollak, 75 Ill. 294; State v. Jersey City, 28 N. J. Law, 500. But counsel for respondent vigorously attacks the levy. It was made at the proper time, by the proper officials, and is clearly correct as to territorial tax, general county fund tax, and interest on bonds. There was also levied a special tax of one mill. The evidence does not clearly disclose the purpose

or object of such levy. The levy of such special tax is authorized by statutes under different conditions, which may or may not have existed. The burden was upon plaintiff, and the record contains no evidence showing such special levy to have been illegal or unauthorized. There was also levied, for "county road and bridge tax, 1 mill." It is objected that no such tax is known to the law. The law authorizes a road tax of two mills, and a bridge tax of two mills. What possible injury could flow from a levy of one mill for both taxes is not apparent to us. This objection, in an equity case, seems hypercritical in the extreme. Section 1751 of the Compiled Laws directs the county clerk, in making up the taxes, to levy a tax of two mills on the dollar for school purposes. It seems the county commissioners included this tax in their levy. The finding of the trial court, however, expressly excludes from the tax for which plaintiff's lands were sold any school tax other than two mills. The law would admit of no less, and the point need not be further considered. No other objection is made to the levy, and we hold that neither the county assessment nor county levy is shown to be invalid. We need, therefore, follow the alleged irregularities and omissions no further; for, whatever may be their character, they can effect only the question of the legality of the sale, and that question is not, under the authorities hereinafter cited, properly in the case.

The facts relating to the city assessment, in addition to those stated in the eleventh and twelfth findings, below, were as follows: One Coolin was the duly elected city assessor of Devil's Lake in the year 1885. One Ferguson—the same who subsequently succeeded Reed as county assessor—purporting to act as deputy city assessor, made an assessment of the taxable property of the city of Devil's Lake, and completed an assessment roll, and returned it to the city council. The statute requires that the assessment shall be made by the assessor. There is no provision in our statutes under which the city assessor of Devil's Lake could have any authority for the appointment of a deputy. It is reasonably certain from the evidence that City Assessor Coolin never adopted the assessment made by Ferguson as his assessment, or had any knowledge or information concerning it

whatever. The acts of an assessor are certainly of the first importance to the tax-payer; and his acts, while acting as such assessor, are judicial in their character. 1 Desty, Tax'n, 493, 542; Cooley, Tax'n, 551, and cases cited. The tax-payer is entitled to the best judgment of the assessor in fixing the value of his property. Snell v. Fort Dodge, 45 Iowa, 566. And an assessment can only be made by the officer designated by law to make it. Welty, Assessm. § 10, and cases cited. We cannot regard Ferguson as an officer *de facto*, because he was acting under color of no office. There could be no such officer as deputy assessor *de facto*, because there existed no such office *de jure*. 1 Desty, Tax'n, 508, 509; Bailey v. Fisher, 38 Iowa, 229; Norton v. Shelby Co., 118 U. S. 425, 6 Sup. Ct. Rep. 1121. It follows that Ferguson was without authority to make an assessment, and any tax based upon such an assessment was necessarily illegal and void. There existed, then, a valid tax against respondent's property of 14.4 mills, and a claim of a further tax of 7 mills, which was invalid. The county clerk had delivered to the treasurer no duplicate list, as provided by law. The city authorities had failed to certify to the county treasurer a list of delinquent city taxes as provided by law. Said county treasurer, under a notice not properly describing respondent's property, and entirely omitting some portions of it, proceeded to sell said property, and issued certificates of sale, including in one certificate both taxes. This action is brought to cancel such certificates. On the other hand, respondent's lands were not exempt from taxation. The officers who imposed the county tax were fully authorized so to do. The levy is within the limit fixed by law. There is no claim that any officer or board has in any manner acted fraudulently in connection with these tax proceedings. Respondent has never paid, or offered to pay, any taxes whatever on his property for the year 1885. There is no support whatever in the evidence for the claim that these taxes were unjust or inequitable, and there is no such finding. Counsel for appellant urges that, under this state of facts, respondent has no standing in a court of equity—*First*, because he has not brought himself within the rules prescribed by courts of equity upon which they will in any case interfere with tax proceedings

for the purpose of preventing or removing a cloud upon title, and, *second*, that, even if respondent be within the general rule, still he is entitled to no relief because he has failed to do equity, by paying or tendering the amount of taxes properly chargeable against his property.

We find these propositions so often discussed in the same case, and so intimately connected, that we cite the authorities indiscriminately upon the two points. It will be noticed that this is not an action to restrain the collection of a tax. It is an action, brought after tax-sale, to declare the tax void, and cancel the certificates issued thereon. It has been frequently held, however, that the same equitable rules apply in both cases. See City of Lawrence v. Killam, 11 Kan. (2d Ed.) 375; Stebbins v. Challiss, 15 Kan. 55; Wood v. Helmer, (Neb.) 4 N. W. Rep. 968. The general rule pertaining to the interference of equity with tax proceedings is stated by High, Inj. §§ 485, 486, as follows: "It may be laid down as a general rule that equity will not interfere by injunction with the collection of a tax which is alleged to be illegal or void merely because of its illegality, hardship, or irregularity, but there must be some special circumstances attending the threatened injury to distinguish it from a mere trespass, and thus to bring the case within some recognized head of equity jurisprudence; otherwise the person aggrieved will be left to his remedy at law. * * * Nor will equity interfere by injunction with the enforcement or collection of taxes because of irregularities, illegalities, or errors in the assessment of the tax, or in the proceedings incident to its collection, or in the execution of the power conferred upon taxing officers, but in all such cases the tax-payer seeking relief will be left to pursue his remedy at law; and where it does not appear that the established principle of taxation has been violated, or that actual and substantial injustice will result from the operation of the tax, or that it was for an unauthorized purpose, equity will not restrain the execution of a deed of land sold for taxes on the ground that the proceedings were irregular, or even void, in some particulars."

In Michigan the rule is thus stated: "Equity will not interfere to restrain the collection of the public revenue for mere

irregularities. Either it should appear that the property is exempt from taxation, or that the levy is without legal power, or that the persons imposing it were unauthorized, or that they have proceeded fraudulently." Mining Co. v. Auditor General, 37 Mich. 391. In that case it was claimed that the assessment roll was not completed until after the time allowed for review by the supervisors. In Burt v. Wadsworth, 39 Mich. 126, the chairman of the board of supervisors did not sign the certificate of equalization, and no certificate was attached to the tax-roll; and the same rule was announced, and relief refused.

In Illinois the leading case is Railroad Co. v. Frary, 22 Ill. 34. Chief Justice Caton then announced the rule of non-interference by courts of equity in its full scope, and, speaking of the exceptions to the rule, he says: "They are confined almost, if not entirely, to cases where the tax itself is not authorized by law; or, if the tax itself is authorized, it is assessed upon property not subject to the tax." And see Du Page Co. v. Jenks, 65 Ill. 286; Swinney v. Beard, 71 Ill. 27; Nunda v. Crystal Lake, 79 Ill. 314; Trust Co. v. Weber, 96 Ill. 357; Moore v. Wayman, 107 Ill. 192.

In Warden v. Supervisors, 14 Wis. 618, it is said: "It will not be enough to show that the taxes are irregular, or even void. Courts of equity do not sit to remove and correct errors and mistakes of law. To be entitled to their assistance, the party applying therefor must show that he is in danger of losing a substantial right, and that he is in no fault."

In City of Lawrence v. Killam, 11 Kan. 375, the court, by Brewer, J., say: "Where a definite portion of the tax is legal, and the balance illegal, equity will refuse to interfere, unless that which is legal be first paid."

In Challiss v. Commissioners, 15 Kan. 49, it was held that "an injunction will not lie to restrain a tax proceeding without a prior payment or tender of all legal taxes." And in Knox v. Dunn, 22 Kan. 683, the same was held in an action to quiet title as against a tax-certificate holder. And see Pritchard v. Madren, 24 Kan. 486; Wilder v. Cockshutt, 25 Kan. 504; Cartwright v. McFadden, 24 Kan. 662; Miller v. Ziegler, 31 Kan. 420, 2 Pac. Rep. 601.

In Land Co. v. City of Crete (Neb.) 7 N. W. Rep. 859, it is held: "An injunction to restrain the collection of a tax will not be granted unless the tax complained of is either void, or its enforcement decidedly inequitable." And further: "A formal assessment, although not made in the mode contemplated by the law, if not inequitable, will support a levy otherwise legal." In this case it was alleged that no assessment whatever was made of plaintiff's property for the year 1874 as required by law. Instead of valuing the property according to his own judgment of its worth, the city assessor adopted a valuation made by a precinct assessor when assessing under a state law for general revenue, and returned it to the city council as his own valuation, and that this pretended assessment placed an excessive valuation on plaintiff's property, and would thereby cause plaintiff to pay more than his just proportion of taxes, and that said council never sat as a board of equalization, and plaintiff had no opportunity to show that pretended assessment was too high, and that no oath was attached to the assessment roll. Plaintiff's bill was dismissed, with costs. See also, Dundy v. Richardson Co., 8 Neb. 508, 1 N. W. Rep. 565.

Wood v. Helmer, *supra*, was an action brought to cancel tax certificates on the sole ground that the assessment roll was not verified. Plaintiff neither paid, nor offered to pay, the taxes justly chargeable against the land. It was held that there was no equity in the petition, and judgment dismissing it was affirmed; and the court say: "But, if the owner of the land does not wish to take the hazard of an adverse title being made to his land by tax-deed, the legality of which remains undetermined, and files his petition in equity to enjoin the execution of such deed, he must do equity, by paying, or offering to pay, his just proportion of the public burdens." And to precisely the same effect is Boeck v. Merriam, 4 N. W. Rep. 962.

In Morrison v. Hershire, 32 Iowa 271, the court say: "We understand that it is a settled rule in equity that, where a party is in conscience bound to pay a certain sum of money which, together with an amount he is not legally bound to pay, is brought as a legal claim against him, equity will not restrain the collection of the whole unless he pay or offer to pay, by tender, the sum

which he justly and legally owes." And see cases there cited. See, also, Parsons v. Childs, 36 Iowa 108, and Snell v. City of Fort Dodge, 45 Iowa, 564. Harrison v. Haas, 25 Ind. 281, and Roseberry v. Huff, 27 Ind. 12, are strong cases requiring the payment of all just taxes as a condition precedent to any relief at the hands of a court of equity. In the former case, it is said a court of equity "will not so much as lift a finger to remove a cloud while a moral obligation remains undisturbed."

In Frost v. Flick, 1 Dak. 131, the supreme court of the territory of Dakota gave full and emphatic endorsement to the rule of equitable non-interference except in cases where the tax is illegal or unauthorized, or where the property is exempt from taxation, or where fraud has been practiced by the taxing officers.

Clarke v. Ganz, 21 Minn. 387, was an action brought to restrain the collection of a tax on personal property on the ground that it had been illegally assessed. A demurrer to the complaint was sustained. The supreme court declined to consider the question of the legality or illegality of the assessment, holding that, under the equitable rule as laid down in High, Inj., which they quote and approve, equity could not interfere in either case. The court further say: "In some of the states, exceptions have been allowed to this rule. There is so much diversity in the decisons allowing these exceptions that it is hardly profitable to discuss them, especially as none of them have any principle of equity jurisprudence to sustain them." In that case, too, it was alleged that the collector was about to sell plaintiffs' property, "thereby subjecting the plaintiffs to great injury, costs, and expense, and involving them in expensive and vexatious litigation and a multiplicity of suits, in order to keep control of their property, and prevent an unjust sacrifice thereof." Say the court: "This quoted part of the complaint does not state any traversable facts, but only an inference or prediction as to what will be the consequences of the threatened levy. If such statements will make a case for injunction, it can be made in every case." The corresponding allegations in this case are of exactly the same nature, and are fully disposed of by the Minnesota case.

But see on same point Association v. Austin, 46 Cal. 416; Desty, Tax'n, 901, and cases cited.

The rule of non-interference by courts of equity in tax proceedings has been repeatedly recognized and enforced in New York. See cases collected in Susquehanna Bank v. Supervisors, 25 N. Y. 313. In State Railroad Tax Cases, 92 U. S. 575, it is said in the head-notes: "While this court does not lay down any absolute rule limiting the powers of a court of equity in restraining the collection of taxes, it declares that it is essential that every case be brought within some of the recognized rules of equity jurisprudence, and that neither illegality or irregularity in the proceedings, nor error or excess in the valuation, nor the hardship or injustice of the law, provided it be constitutional, nor any grievance which can be remedied by a suit at law, either before or after the payment of a tax, will authorize an injunction against its collection." And again: "No injunction, preliminary or final, can be granted to stay collection of taxes until it is shown that all the taxes conceded to be due, or which the court can see ought to be paid, or which can be shown to be due by affidavits, have been paid or tendered without demanding a receipt in full." See, also, Dows v. Chicago, 11 Wall. 108; Hannewinkle v. Georgetown, 15 Wall. 548; Cummings v. Bank, 101 U. S. 153.

Cases may be found holding opinions more or less opposed to the doctrine of the foregoing cases. Upon this subject, Mr. High says: "Upon the other hand, the decisions are neither few in number, nor wanting in respectability, which have inclined to a departure from the doctrine of non-interference in equity with the collection of taxes; and it will be found, as we proceed, that the courts have in many instances extended preventive relief by injunction against the exercise of the taxing power in cases where such relief was unwarranted either upon principle or upon the clear weight of authority." High, Inj. § 484.

Courts of equity should, in general, extend the strong arm of their preventive power to restrain the collection of a tax or annul tax proceedings only where the property sought to be taxed is exempt from taxation or the tax itself is not war-

ranted by law, or the persons assuming to assess and levy the same are without authority so to do, or where the proper taxing officials have acted fraudulently; and, in addition, plaintiff must bring himself within some recognized rule of equity jurisprudence; and, in the absence of statutory provisions regulating the subject, as a condition to relief in equity, the applicant must pay or tender the amount of taxes properly chargeable against his property. The rule as thus established works the tax-payer no wrong, and preserves the revenues of the state. Injustice could scarcely go further than to permit property which asks and receives the protection of the laws—property which unhesitatingly absorbs the full benefit of the expenditures and improvements made possible by public revenue—to escape its equitable contribution to the public burden because some official, through inefficiency or inadvertance, had failed, in time, manner, or form, in the performance of his duties. It is common knowledge that in a new state, with unsettled and shifting revenue laws, depending for their execution upon parties not familiar with fine distinctions or technical terms, grave mistakes and omissions must be, and are, of frequent occurrence. To depart from this salutary rule of non-interference would necessarily bring financial confusion, if not destruction, upon a large portion of the taxing municipalities within the state, and upon the state itself. We can only make the departure when we are ready to invite the result. In courts of law the rules are wholly different. In possessory actions between the holder of the tax-title and the patent title, where the interests of private parties alone are involved, and where the rule of *caveat emptor* applies in all its strictness, courts of law are scrupulously careful that no man be deprived of his property through tax proceedings that are not in all respects in substantial compliance with the statutory requirements.

Applying the principles hereinbefore enumerated to the facts in this case, we find that the plaintiff has invoked the equity powers of the court by a complaint that shows that a cloud has been cast upon the title to the real estate therein described by the issuance to the defendant corporation, by the treasurer of said county, of tax certificates, upon plaintiff's lands, issued

upon a tax sale based upon a tax in part absolutely void, for the want of an assessment. In the absence of a statute regulating the subject, a court of equity would not grant the relief prayed for by plaintiff until he has paid or tendered the full amount of legal taxes, to-wit: the county taxes of 1885, together with the amount that has accumulated thereon since said taxes became delinquent. But we hold that this case falls within the provisions of § 1643 of the Compiled Laws, and, consequently, in lieu of requiring the plaintiff to pay in money the amount due as a condition of granting the relief prayed, that it was the duty of the trial court, under the evidence, to have entered a judgment against the plaintiff, and in favor of the New England Investment Company, for the sum legally accruing upon the county taxes; that said § 1643 was enacted for the better protection of the public revenue; and that, in a case coming within its provisions, said section is mandatory upon the court, and it becomes its duty to enter up judgment for the amount of the legal tax, and such judgment in no manner depends upon the request of either party to the action. No such judgment was entered in this case by the trial court, but a decree was entered granting the relief prayed for unconditionally. The judgment of the district court was in part proper, but in other respects improper, and hence should be, and is hereby reversed; and the district court is directed to enter such judgment of reversal, and said court is further directed to enter a judgment against the plaintiff as trustee, and in favor of the New England Investment Company, for amount due on the county tax of 1885, said amount to be ascertained by reference, or in such manner as to said court may seem proper. And, in computing said amount, the said county tax, by which we include the entire tax levied by the county commissioners, should be regarded as delinquent and unpaid from and after the first Monday in February, 1886, and the interest and penalties thereon should be computed thereon from that time to the date of such judgment as provided by statute in cases of delinquent taxes. And said court is further directed to enter a judgment canceling the tax certificates in question, and forever enjoining the county treasurer of Ramsey county, and his successors in office, from executing any tax deed or deeds, based

upon said certificates or upon said tax-sale, for the lands in question, or any part thereof; the action to be without costs to either party in either court. Reversed.

WALLIN, J., dissenting.

ADOLPHUS H. BODE, Trustee, Plaintiff and Respondent, *v.* THE NEW ENGLAND INVESTMENT COMPANY and OLE SERUMGARD, County Treasurer of Ramsey County, D. T. Defendants and Appellants.

1. **Order Overruling Demurrer with Leave to Amend is not Final Judgment.**

In a former action a demurrer was interposed to the answer, and upon argument thereon the district court made the following order: "It is ordered that said demurrer be, and the same is hereby, overruled. It is further ordered that said demurrer be, and the same is hereby, sustained to the plaintiff's complaint, and that said action be, and the same is hereby, dismissed, with costs to be taxed, unless the plaintiff amends his complaint within twenty days from the date hereof." *Held*, that such order was not a final judgment *in præsenti*, but, on the contrary, was an order that judgment might be entered *in futuro* upon a specified contingency. *Held, further*, that such an order could not be converted into a final judgment by the mere voluntary act of the clerk of the district court, who copied it into the judgment docket without being directed so to do by the court and without any proof being made that the specified contingency upon which judgment could be entered had occurred.

2. **Former Action Pleaded in Bar; Defendants in the Actions Different and not in Privity.**

In the former action, which is pleaded in bar to this action, the plaintiff sued the county of Ramsey and the city of Devil's Lake in equity, and asked that the county be enjoined from selling plaintiff's lands for the tax of 1885 thereon, and that such tax be annulled and canceled of record. *Held*, that, if final judgment had been regularly entered in such former action for the relief demanded therein, such judgment would not have been effectual to prevent the sale of the lands for taxes, for the reason that the duty of selling lands for delinquent taxes, under the law, devolves upon the county treasurer alone, and the county, as such, has no power to make such sale. *Held, further*, that such judgment would have been ineffectual to compel the cancellation

of the tax proceedings of 1885, for the reason that the records containing such proceedings were not within the possession of either of the defendants in the former action, but were in the official custody of certain county and city officers, who were not before the court in the former action. *Held, further*, that no final judgment which could be entered in the former action would operate as a bar to this action, for the reason that the parties defendant were wholly different in the two actions, and were not in privity with each other.

3. Decision in Farrington Case Followed.

The decision of the case of Farrington v. These Defendants, *ante*, p. 102, (decided by this court,) will govern in this case; and, following the rule established in the Farrington case, the judgment of the district court is reversed.

(Opinion Filed April 1, 1890.)

APPEAL from district court, Ramsey county; Hon. WM. B. MCCONNELL, Judge.

This case was argued before the supreme court of Dakota Territory, and an opinion was handed down. (See 42 N. W. 658.) Afterwards a rehearing was ordered and the case was, on the admission of the state of North Dakota, transferred to this court.

J. F. McGee, for the appellants, argued: That the writing quoted in the following opinion was a judgment; citing, Freeman on Judgments §§ 15 and 16; Rogers v. Gosnell, 51 Mo. 468; Hunniston v. Stainthorp, 2 Wall. 106.

Counsel for appellant did not discuss in his brief the effect of the difference in parties defendant in the two cases.

W. E. Dodge, for the respondent, argued: That the writing quoted in the opinion was not a final judgment; citing, Freeman on Judgments, § 34. He did not discuss the effect of the difference in parties defendant in the two cases.

WALLIN, J. This is an action for equitable relief, in which the plaintiff asks to have certain taxes levied upon plaintiff's land by the county of Ramsey and city of Devil's Lake, in 1885, set aside as void, and the record thereof canceled and annulled, and also that the tax certificates describing said lands, issued by the county treasurer, at the tax-sale of 1886, to the

defendant the New England Investment Company, be canceled and set aside as void. The grounds of relief as set forth in the complaint are, in substance, as follows: *First*, that the plaintiff's lands are exempt from all direct taxation under the provisions of chapter 99, Laws 1883, commonly known as the "Gross Earnings Law;" *second*, that, if said lands were taxable as other lands are taxed, the proceedings of the taxing officers in attempting to assess and levy the tax of 1885 were illegal and void, and consequently that the county treasurer was without jurisdiction to sell the lands at said tax-sale. The defendants answered, denying that there were any errors or irregularities in said proceedings which would render them void. As a separate defense to this action the defendants pleaded a former recovery, in the language following: "That on the 31st day of August, 1886, the above-named plaintiff brought an action in the above-entitled court against the county of Ramsey and the city of Devil's Lake, in the territory of Dakota, on the same cause of action set forth in the complaint herein; and in said action such proceedings were had that on the 4th day of September, 1886, said county of Ramsey and city of Devil's Lake recovered judgment against the above-named plaintiff on said cause of action, and upon the merits thereof, dismissing said action, and awarding said county of Ramsey and city of Devil's Lake their costs and disbursements in said action, which said judgment is in full force and effect and unappealed from and which judgment was duly filed and entered in the office of the clerk of the above-entitled court on the 27th day of October, 1886."

The testimony admitted upon the trial of this action shows that the plaintiff, prior to the commencement of this action, instituted the action pleaded in bar for the purpose of setting aside and canceling the said tax levies of 1885, and to enjoin the county of Ramsey from selling plaintiff's said lands at the tax-sale of 1886. In the former action plaintiff alleged as a sole ground for relief that the lands in question were exempt from taxation for the same reasons which are set out in the complaint in this action. In the former action the defendants answered to the complaint, and plaintiff demurred to the answer for insufficiency. Argument upon the issues presented by the de-

murrer was had; and the trial court determined said issues, and made its order thereon as follows: "It is ordered that said demurrer be, and the same is hereby overruled. It is further ordered that the said demurrer be, and the same is hereby sustained to the plaintiff's complaint in said action, and that said action be, and the same is hereby dismissed, with costs to be taxed, unless the plaintiff amends his complaint within twenty days from the date hereof." It was admitted upon the trial of this case that the complaint in the former action was not amended. It was claimed in the court below that the order upon the demurrer aforesaid was a final judgment upon the merits, and constituted a bar to the present action. The court below held that it was not a final judgment, and the ruling is assigned as error in this court. We hold that said order was not a final judgment, and was not intended to be final by the district court, and further, that if it had been a final judgment, the same would not be a bar to the present action. Our reasons are as follows:

The trial court, among other findings of fact, found that "the order pleaded in defendants' answer was never succeeded by a final judgment in said action based thereon." So far as it is a matter of fact, the evidence justifies this finding of the district court. It appears that the order (so-called "judgment") was filed with the court more than 20 days subsequent to its date, and on October 27, 1886. The clerk of the district court testified with respect to the order as follows: "It is the original of the page I have read from the judgment docket." It nowhere appears from the testimony, and was not claimed upon the argument in this court that the clerk of the district court ever at any time was directed by the district court, or by the attorneys in the former action, to transcribe the order in question into the judgment docket or other record book in his office. So far as appears from the testimony, the act of copying the order into the judgment docket was purely a voluntary act on the part of the clerk of the district court, and was therefore unauthorized, unless it was the duty of the clerk, under the law, to record such an order at length in the docket. We think it was not his duty to do so. It does not appear that the order was ever entered in

the judgment book, which is the record in which judgments are required by statute to be entered. Comp. Laws, §§ 5101, 5102. The statute requires that the docket entry of judgment shall refer to the "page in the judgment book where the same is entered." Section 5105, id. No such reference is found in the docket entry of the order in question, and hence we conclude that the instrument was never copied into the judgment book.

The date of transcribing the order into the docket does not affirmatively appear from the testimony, but a very strong presumption arises that it was not done until the matter of the taxation of the costs referred to in the order was first disposed of. The order contemplates that at a time subsequent to its date the costs of the action were to be taxed and inserted in a judgment which is directed to be entered in the future on a certain contingency. The process of taxing costs includes notice to the defeated party, and hence clerks of courts do not, ordinarily, enter a judgment until the costs are taxed. There is no ground in the record for supposing that the clerk departed from the ordinary practice in this case. The record shows that costs were not taxed; but it appears that the defendants, without notice to plaintiff's counsel, filed an instrument waiving costs with the clerk of the district court on the 8th day of June, 1888, which date is long subsequent to that of commencing the present action. In the absence of countervailing evidence, the presumption from the record is that the clerk followed the usual practice in the district court, and entered the order, as a judgment, promptly upon the filing of the waiver of costs in his office, and did not do so before that event. This being the case, there certainly was no judgment entered in the former action prior to the commencement of this action. It may be argued that the entry of a judgment is not essential to its validity. The statute requires that such entry shall be made; but whether an ordinary judgment must be entered before it takes effect as such is foreign to the question before us, for the reason that the order under consideration is not, and does not purport to be, a final judgment. In form, it is primarily an order made upon an issue of law raised by a demurrer. After disposing of the question raised by the demurrer, the court directs the en-

try of a judgment of dismissal, with costs "to be taxed," but in the same sentence makes the entry of such judgment conditional, as follows: "Unless the plaintiff amends his complaint within twenty days from the date hereof." It is obvious that such language does not import a judgment *in præsenti;* nor does the language go further than to direct the entry of judgment *in futuro* upon the happening of a specific contingency. Would any lawyer contend that a mere ministerial officer of the court could convert such an order into a final judgment by the mechanical operation of transcribing it into a record? The most favorable construction of the order which its language permits is one which would allow the instrument to be converted into a final judgment after the lapse of twenty days from its date, and upon due proof to the court that the complaint had not in the interval been amended. The pleadings and records in the former action were put in evidence without objection, and no such proof appears; and no claim is made in this court that any such proof was presented to the trial court, or to the clerk thereof, at any time. How does it come about that a mere conditional order for the entry of a final judgment has itself become a final judgment? "A judgment is the final determination of the rights of the parties in the action." Comp. Laws, § 5024. It must be signed by the judge or the court. § 5095, id. We conclude from these premises that the order in question was not a final judgment, in either form or substance; and, consequently, if it had been properly entered as a judgment prior to the commencement of this action—and it appears that it was not—that it would not operate as a bar to this action.

But the order is not a bar for still another reason. It is this: The defendants in the two actions are wholly different, and they are not in privity with each other. In the first action Ramsey county and the city of Devil's Lake, as corporations, were the only defendants. In this the county treasurer and the purchaser of the lands at the tax-sale of 1886 are the only defendants. The relief sought in the two actions is not the same. The purpose of the first action was to cancel and set aside the tax proceedings of 1885, and to enjoin the county of Ramsey from selling the lands at tax-sale. In the present action the plaintiff is seeking

to cancel the tax certificates delivered to the New England Investment Company at the tax-sale of 1886, and also vacate of record the tax proceedings on which the sale was made. It seems clear that, inasmuch as the county treasurer was not a party to the former action, that, if that action had culminated in a judgment for the plaintiff adjudging that the tax of 1885 on plaintiff's lands be canceled and set aside, and further directing that Ramsey county be enjoined from selling the plaintiff's lands for such taxes, such judgment would have been inoperative, and wholly ineffectual to accomplish either or any purpose sought to be accomplished by such judgment. Under the revenue laws of the territory, county treasurers, after receiving the tax duplicate, and while collecting the tax by distraint of personal property or sale of real estate, act under statutes which regulate and prescribe their duties, and which are mandatory upon them as tax collectors. While in the discharge of their duties as tax collectors, county treasurers act independently, and are beyond any interference or supervisory control by the county commissioners. The treasurer and his official sureties are responsible for the collection of the tax which appears upon the duly-authenticated tax duplicate, and if such tax is not voluntarily paid the payment must be enforced in the manner directed by the statute. It follows from these provisions of the revenue laws that the county of Ramsey would have been powerless, even if directed so to do by the judgment of the district court, to have prevented its treasurer from selling the plaintiff's lands for the taxes in question. The terms of the statute requiring the treasurer to sell lands for delinquent taxes are imperative, and no legal power exists, except in a competent court, to interfere with or prevent the sale. Nor could a court enjoin such sale without first obtaining jurisdiction of the person of the officer who is required to make the sale, viz., the county treasurer. It is equally clear that, had a decree been made in the former action directing the cancellation and annulment of the tax proceedings and levies of 1885, the same would have been idle and inoperative. The records of the tax assessments and levies in question were contained in record books in the official custody of certain city and county officials, who were strangers to the

former action. Such officials were bound by strict legal enactments to safely keep such records; and, in the performance of such duty, they might lawfully resist any attempt which might be made by the defendants in the former action to cancel, annul, or in any manner efface the evidence of the tax levies and assessments in question. It was quite unnecessary to enjoin the defendants in the former action from selling plaintiff's lands for the taxes in question, as they did not, nor did either of them, have the power to do so. Our conclusion upon this feature of the case is that necessary parties defendant were omitted in the former action, and that the defendants in the present action are not in privity with the defendants in the former action. In this conclusion we do not decide that the county and city would not have been proper parties in the former action. On the contrary, we think that the two corporations as such, would have been proper parties thereto if they had been joined as co-defendants with the necessary parties who were omitted.

We deem it not improper to add here, as a matter of history, that this case was originally appealed to the supreme court of the territory of Dakota, and was decided by that court. Bode v. New England Investment Co., 42 N. W. Rep. 658. Subsequent to its decision, upon application of defendants' counsel, a rehearing was granted, but such rehearing was never had in the territorial court, and the case came to us as a part of our inheritance from the territory and was reheard here. The territorial court did not discuss the question as to whether or not there was a final judgment, in fact or in law, in the former action, but expressly avoided doing so, and assumed, for the purposes of the decision, that the alleged judgment was a judgment, and was final, and then proceeded to hold that the same was not a bar to this action, because it was not an adjudication which involved the merits of this action. We reach the same result, practically, but prefer to rest our decision upon the preliminary questions presented by the record.

The questions involved in this action, upon the merits, are identical with those presented in the case of Farrington, Trustee, v. the Defendants in this action, *ante*, 102, (decided at the present term.) The disposition of this case will be governed

by and follow the decision in the Farrington Case; and under the ruling in that case, the judgment of the court below, rendered in this action, must be, and is hereby, reversed, and the district court is directed to enter such judgment of reversal; and said court is further directed to enter a judgment against the plaintiff as trustee, and in favor of the New England Investment Company, for the amount due on the county tax of 1885, said amount to be ascertained by reference, or in such manner as to said court may seem proper. And, in computing said amount, the said county tax, by which we include the entire tax levied by the county commissioners against the plaintiff's land, should be regarded as delinquent and unpaid from and after the first Monday in February, 1886, and the interest and penalty thereon should be computed thereon from that time to the date of such judgment, as provided by statute in the cases of delinquent taxes. And said court is further directed to enter a judgment herein cancelling the tax certificates in question, and forever enjoining the county treasurer of Ramsey county, and his successors in office, from executing any tax deed or deeds, based upon said tax certificates or said tax-sale, for the lands in question, or any part thereof. The action to be without cost to either party in either court.

CORLISS, C. J., concurs in the disposition of the case upon the ground that there is no privity between parties defendant in the two actions.

REPORTER: The proposition that the lands in question were exempted from direct taxation by the gross-earnings law was not insisted upon by plaintiff in this court.

EDWIN MORRIS, Plaintiff and Appellant, *v.* SALMON I. BEECHER, CHARLES R. DEAN, EUGENE V. MCKNIGHT, GEORGE S. BARNES, ELIZABETH MCKNIGHT, *et al.*, Defendants and Respondents.

1. **Mortgages — Satisfaction; Reinstatement; Priority.**
Mortgagee in a lost, and for that reason unrecorded, mortgage, having executed and recorded an instrument certifying that such mortgage had been paid and satisfied, cannot reinstate the prior lien of his mortgage as against an innocent assignee for value of a second mortgage, who buys relying upon the satisfaction as an extinguishment of the prior mortgage, although the mortgagees in the second mortgage knew of the unrecorded mortgage, and took their lien expressly subject to it.

2. **Same; Notice.**
The fact that, about the time of the execution and recording of the satisfaction, another mortgage for about the same amount as the unrecorded mortgage, given to the same mortgagee, by one who had assumed the unrecorded mortgage, but given subsequently to the second mortgage, was executed and recorded, is not sufficient to put the purchaser of the second mortgage upon inquiry as to whether the unrecorded mortgage had in fact been paid and satisfied, as against the recorded satisfaction given by the first mortgagee, although such substituted mortgage recites that the property is free from all incumbrances.

(Opinion Filed May 12, 1890.)

APPEAL from district court, Cass county; Hon. WM. B. MCCONNELL, Judge.

W. P. Miller and Ball & Smith, for the appellant, argued: When a new mortgage is substituted for an old one, in ignorance of an intervening lien, the old mortgage may be restored and given its original priority; citing, Jones on Mtgs. vol. 2, § 971; Bruce v. Nelson, 35 Iowa 157; Rump v. Gerkins, 59 Cal. 496; Geib v. Reynolds, 28 N. W. Rep. 923; Pomeroy's Equity, vol. 2, § 849; Fergusson v. Glassford, 35 N. W. Rep. 820. Beecher and Dean contracted for a lien inferior to that of plaintiff, and therefore have no equity superior to plaintiff's rights. Barnes took his assignment from Beecher subject to all equities existing against the latter; citing, Westerbrook v.

Gleson, 79 N. Y. 23; Jones v. Smith, 22 Mich. 360; Pom. Eq. vol. 1, § 704–9, 733; Oster v. Mickley, 28 N. Rep. 710; Hostetter v. Alexander, 22 Minn. 559. The exception to this rule in favor of assignee of mortgage securing a negotiable note does not apply here because the note secured was non-negotiable. The language of the recorded release of the first mortgage (quoted in the opinion below) was sufficient to put Barnes upon inquiry; and he was bound by all that the record disclosed; citing, Jones on Mtgs. §§ 557–63; Youngs v. Wilson, 27 N. Y. 351. The new mortgage to Morris was recorded before the assignment to Barnes was recorded, and thereby Barnes was shut out. Decker v. Boice, 83 N. Y. 215. The record of the Beecher & Dean mortgage was not constructive notice to Morris. Jones on Mtgs. §§ 723, 982, 624.

Messrs. Francis & Southard, (Thomas & Davis of counsel,) for respondents, argued: A mortgage released in ignorance of an intervening right, cannot be restored to its former priority against such as have in good faith acquired rights on the faith of the release; citing, Pom. Eq., vol. 2, §§ 776–83; Jones on Mtgs. § 966.

CORLISS, C. J. This controversy presents conflicting claims of the plaintiff, and of the defendant Elizabeth McKnight to certain real estate. Each asserts title under foreclosure of a different mortgage upon the same land. The effort of each, therefore, is to sustain the priority of the mortgage under which he or she claims title. The plaintiff in 1881 was the owner of the property in question. On the 27th of June of that year he conveyed the same to Beecher & Dean, taking back a purchase-money mortgage for $4,500 upon the land, which, however, was never recorded, having been subsequently lost. Beecher & Dean on the 14th of September, 1882, conveyed the premises to Eugene McKnight, who assumed this unrecorded mortgage, and gave back to Beecher & Dean a purchase-money mortgage, which in express terms was made subject to the unrecorded mortgage. Dean thereafter assigned to Beecher his interest in the mortgage given to Beecher & Dean. Eugene McKnight having bought the land subject to the unrecorded

mortgage, and having assumed the same, and the mortgagee therein, the plaintiff in this action, being without satisfactory evidence of his mortgage lien, it was agreed that McKnight should give this plaintiff another mortgage on the land as a substitute for the lost mortgage, "and to stand in place thereof, and to evidence the existence thereof." This new mortgage was not given or received in satisfaction of the lost mortgage. This mortgage was in the ordinary form, to secure $4,815, and contained no reference to the lost mortgage; nor was there anything on the face of it to show that it was given merely as a substitute for such lost mortgage. It in fact appeared to be a new and independent lien on the property. It is under the foreclosure of this mortgage that plaintiff claims title. At the same time, and as part of the same transaction, plaintiff executed and delivered to McKnight an instrument which was recorded August 11, 1884, and, as the decision of this cause depends in the main upon the construction of this paper, we deem it best to set it forth fully: "I, Edwin Morris, mortgagee, do hereby certify that a certain indenture of mortgage, bearing date the 20th day of June, in the year of our Lord one thousand eight hundred and eighty-one, made and executed by Salmon I. Beecher and Charles R. Dean, upon section seven, (7) township one hundred and thirty-nine (139) north, of range fifty (50) west, in the county of Cass, and territory of Dakota, and due on the 20th day of June, in the year of our Lord one thousand eight hundred and eighty-four. It is the intention of this instrument to satisfy a certain mortgage for forty-five hundred ($4,500) dollars, and bearing seven per cent. interest, given by Salmon I. Beecher and Charles R. Dean, on or about June 20th, 1881, to Edwin Morris, which said mortgage has been lost or mislaid; and I, Edwin Morris, mortgagee, guarantee Eugene V. McKnight, his heirs and assigns, against all loss or damage that may at any time be sustained by him, his heirs or assigns, by reason of said mortgage aforesaid, redeemed, paid off, satisfied and discharged. Dated the 14th day of July, 1884. Edwin Morris. [Seal.]"

The plaintiff at the time of accepting the new mortgage and executing this instrument did not in fact know of the existence

of the recorded mortgage to Beecher & Dean. Beecher, being the sole owner of this mortgage by assignment from Dean of his interest, transferred the mortgage to George S. Barnes on the 3d of September, 1885. Barnes paid full value for the mortgage, and bought it in good faith, relying, through his counsel, Hon. A. D. Thomas, on the apparent satisfaction and payment of the lost mortgage, as evidenced by the instrument from plaintiff to McKnight. The record disclosed that the first mortgage had in fact been paid and satisfied, and therefore that the mortgage which he was about to purchase, although formerly a second mortgage, had become, by this instrument, a first lien on the premises. It is immaterial whether this instrument was such a paper as was entitled to record, or whether its record operated as constructive notice. Judge Thomas and Mr. Barnes agree that the whole matter was left to the former to determine what was the condition of the record, and Judge Thomas positively swears that he in fact saw and examined the record of this instrument, and was satisfied from such examination that the lost mortgage had been satisfied, and that the mortgage which Barnes contemplated purchasing was a first lien on the property; and he so advised Mr. Barnes. The finding of the court in this regard is amply sustained by the evidence. If the instrument was calculated to and did mislead Judge Thomas, who was attorney for Mr. Barnes in the transaction, the case is the same as though Barnes himself had been personally misled. It is insisted that Barnes took subject to all equities as against the mortgage in the hands of Dean, who, it is unquestioned, held the mortgage subject to the right of the plaintiff to have the lost mortgage reinstated and established against him (Dean) as a prior lien. But a paramount principle makes ineffectual this doctrine under the facts of this case. Equitable estoppel seals the plaintiff's lips, and declares to him that he shall not invoke the rule that the purchaser must abide by the case of the person from whom he buys, because, by his written declaration that the lost mortgage had been paid and satisfied, he inveigled Barnes into purchasing the Beecher & Dean mortgage as a first lien on the property. He held out to him that it was a first lien, because he asserted that

the only prior lien was both paid and satisfied. Whether Barnes took subject to the prior equity in favor of the plaintiff we do not decide, for, assuming that he did, the plaintiff has by his own solemn act estopped himself from insisting on the priority of lien. Simpson v. Del Hoyo, 94 N. Y. 189, and cases cited; McNeil v. Bank, 46 N. Y. 325. Certainly the plaintiff is in no better position than he would have been had he personally stated to Barnes that his (plaintiff's) mortgage had been paid and satisfied, and Barnes, relying on that statement, and of course inferring from it that the mortgage he was about to purchase had become a first lien, had bought the mortgage for value and in good faith. Equity will listen to no plea against the words of a suitor, misleading another to his detriment, if the admission could be retracted. It is under the Beecher & Dean mortgage that defendant Elizabeth McKnight claims title.

It was urged that the fact that there appeared to have been recorded, about the same time this satisfaction was recorded, another mortgage to the same mortgagee as in the lost mortgage, and for about the same amount, was sufficient to put Barnes on inquiry as to whether the new mortgage and satisfaction together did not, in reality, constitute mere record evidence of a lost security, which it was never intended to cancel or release. In the first place, the mortgage is for several hundred dollars more than the lost mortgage, which is in no manner referred to therein, as would naturally have been done if it had been the design of the parties merely to create an evidence of a lost security. The mortgagor is not the same person in the two mortgages; and, although the new mortgage recites that the property is free from incumbrances, yet this cannot be held to be sufficient to make it the duty of Barnes or his attorney to inquire whether it was not intended as a mere evidence of the lost mortgage, because the mortgagee in the new mortgage had precluded all necessity for inquiring by executing with his own hand, and placing upon the public record, a statement that the lost mortgage had not only been satisfied, but also paid. He was guilty of gross negligence in making and recording such a statement without examining the record, to ascertain whether there was not an intervening incumbrance, which an innocent

purchaser might subsequently buy as a first lien, relying on the statements that the prior lien had been paid and satisfied. It is true that the recording of a subsequent lien is no notice to a prior incumbrancer; but it is difficult to see how this principle will permit a prior mortgagee to cancel the record of his mortgage without examining the records, and then insist upon the mortgage as a prior lien as against an innocent purchaser of a second mortgage, who relies upon the satisfaction as giving the mortgage he is about to purchase priority of lien. One who loans money on real estate, relying on a satisfaction of a mortgage thereon made by the record owner of the mortgage, which, however, had been previously assigned, the instrument not being recorded, is protected. Bacon v. Van Schoonhoven, 87 N. Y. 446. Clearly he would be protected where the satisfaction is made by one who is both on the record and in fact the owner of the mortgage satisfied. The assignee of a second mortgage, who so relies upon such a satisfaction, is as much entitled to protection as one who makes a loan on the property. The only difference is that one makes a loan on a second mortgage believing it to be a first lien, and the other buys a second mortgage believing it to be a paramount incumbrance. They are both deceived by the act of the first mortgagee, and therefore they are both equally entitled to protection as against his mortgage. The authorities fully sustain the conclusion we have reached. Ferguson v. Glassford, (Mich.) 35 N. W. Rep. 820; Sheldon v. Holmes, 58 Mich. 138, 24 N. W. Rep. 795; Lewis v. Kirk, 28 Kan. 497; Cornog v. Fuller, 30 Iowa, 212; Girardin v. Lampe, 58 Wis. 272, 16 N. W. Rep. 614; Van Keuren v. Corkins, 66 N. Y. 77; Clark, v. Mackin, 95 N. Y. 347. This last case is in point, the purchaser who was protected being a purchaser of a second mortgage, who bought the mortgage as a first lien on the strength of a satisfaction of a prior mortgage. But the case at bar is stronger; for there the satisfaction was executed by the mortgagee after he had assigned the mortgage, the assignment not being recorded, while in the case at bar the owner of the mortgage executed and recorded the satisfaction himself. In Clark v. Mackin the owner of the first lien by his negligence rendered it possible for an innocent person to be deceived by another,

whereas in the case at bar the owner himself made the statement which was calculated to and did mislead the innocent purchaser Barnes.

But we have discussed the case on a theory more favorable to the plaintiff than the facts would warrant. We have assumed that he is endeavoring by this action to reinstate his unrecorded mortgage, and have it declared a paramount lien. But the plaintiff is not in position to litigate that question, under the facts of the case. He has foreclosed what he claims was merely a substitute for the unrecorded mortgage, and is claiming title under that foreclosure, and asks to have that title quieted as against a title resting upon the prior recorded mortgage. Whatever right he would possess to have his old lost mortgage re-established, and the satisfaction thereof annulled, his rights, so long as he claims under the substituted mortgage, are inferior to those of the defendant, who derives title from the mortgage, which is a superior lien to such substituted mortgage. We do not hold that, if the element of estoppel were out of the case, it would not be competent for him to yet foreclose his lost mortgage, and in that action ask to have the equities and priorities of all parties determined. But we do decide that he cannot, without claiming under that mortgage, and without bringing an action to have it reinstated or foreclosed, insist upon any rights under it when his title rests solely upon a substituted mortgage, particularly in view of the fact that he has foreclosed his substituted mortgage by advertisement. A foreclosure of a mortgage satisfied of record in that manner being unauthorized and void, plaintiff could not have foreclosed his unrecorded mortgage by advertisement. Benson v. Markoe, (Minn.) 42 N. W. Rep. 787. The lien of the lost mortgage was destroyed by the satisfaction. A new lien was taken. Nevertheless equity would as between the parties, and as to all parties who had notice, cancel the satisfaction and revive the old lien. This relief would result in the destruction of the substituted mortgage, and put the parties back where they were before it was given. But this equity cannot do for the purpose of strengthening a title based upon a substituted mortgage. The party to secure the benefit of this equitable

right must claim under the original mortgage. He must ask to have it restored in an action brought for that purpose, or instituted to forclose it, or after he has obtained title under foreclosure of it. Equity can merely decree the re-establishment of the lost lien, or, when it has been foreclosed, give the title under it the same precedence it would have possessed had the lien never been satisfied. But the courts will not decree that the creditor who forecloses has secured by foreclosure of an inferior lien the same title he would have received had he enforced his superior lien. The judgment of the district court is affirmed.

WALLIN, J., having been of counsel, did not sit; TEMPLETON, J., of the first judicial district, sitting by request.

NORTHWESTERN FUEL COMPANY, Plaintiff and Appellant, *v.* HENRY A. BRUNS, Defendant and Respondent.

1. **Written Contract — Parol Evidence.**

Defendant having written plaintiff asking if it could furnish defendant coal at same prices and terms as previous season, if he used about one-half to two-thirds of amount used the previous season, and plaintiff having, by letter, in answer to this inquiry, offered to sell at the price of $3.50 per ton, and defendant having thereafter, by letter, accepted the offer, *held*, that parol evidence to show that, intermediate plaintiff's offer and defendant's acceptance, the parties fixed the amount of coal to be delivered at the full amount used by defendant the season before, instead of one-half to two-thirds, as stated in defendant's letter, was inadmissible, because it varied the terms of the written contract.

(Opinion Filed May 6, 1890.)

APPEAL from district court, Cass county; Hon. WM. B. MCCONNELL, Judge.

Alf E. Boyesen, for appellant, cited, upon the proposition stated in the foregoing syllabus the following authorities: 2 Phil. Evidence, 668–9; Naumberg v. Young, 44 N. J. L. 331; Hei v. Heller, 53 Wis. 415; La Farge v. Rickert, 5 Wend. 187; Creery v. Holly, 14 Wend. 26; Stone v. Harmon, 31 Minn. 512.

R. R. Briggs, for respondent, cited: Parsons on Cont. vol. 2, p. 502; Jones on Commercial and Trade Cont. p. 280; Hub-

bard v. Marshall, 50 Wis. at p. 325; Bradstreet v. Rich, 72 Me. at p. 237; Kal. Nor. Mfg. Co. v. MacAlister, 40 Mich. 88; Wharton on Evidence, §§ 1015-16; Chapin v. Dobson, 78 N. Y. 79; Abbott's Trial Evidence, p. 294; Domestic Sewing Machine Co. v. Anderson, 28 Minn. 57; Bonney v. Morrell, 57 Me. 372.

CORLISS, C. J. This litigation was instituted to recover the price of coal sold and delivered to defendant by plaintiff. The claim was not disputed, but defendant sought to recoup damages for a breach of the contract under which the coal was furnished. During the winter of 1885-86, plaintiff had supplied defendant with the coal used by him in conducting his hotel at Moorhead, Minn. On the 21st of September, 1886, defendant wrote the plaintiff the following letter of inquiry: "Please ship me at once, one car of Willow Bank, one car of Yough., from Duluth. Will you make me the same prices and terms as a year ago, if I use about one-half to two-thirds of what I did last season?" To this letter the plaintiff wrote, September 22d, the following reply, which was received by defendant in due course of mail: "Your favor of the 21st inst. received, and we have entered your order for one car Willow Bank and one car Youghiogheny coal. In reply to your inquiry, would say we will make you price of $3.50 per ton on cars at Duluth for Willow Bank or Youghiogheny coal; but the terms must be cash between the 1st and 10th of month succeeding shipment, as we cannot accept paper on these prices." On October 16th, defendant mailed to plaintiff a letter of acceptance, which closed the correspondence between the parties: "Please ship me, by St. P., M. & M., one car Yough. coal. If your letter of the 22d ult. requires an acceptance, I herewith accept your offer." Intermediate the writing of this last letter by defendant, and the other letter from plaintiff, to which it was an answer, defendant had a conversation in which, he testified, it was agreed between himself and the representative of plaintiff that he should take, at the price named in plaintiff's letter to defendant of September 22d, the amount of coal purchased by him the year before of plaintiff. This amount was not at the time of this conversation definitely known to either party, but it is undisputed that it was in fact 951 tons. This conversation is denied by the agent of the plaintiff with

whom defendant claimed it was had, but the jury have found this question of fact in favor of defendant. The jury were instructed that, if this talk was had, and the amount of coal to be delivered under this contract was then agreed upon, then, in fixing the defendant's damages for failure to deliver all of the coal under the contract, the jury must consider the plaintiff as bound to deliver 951 tons. Plaintiff insists that the contract was all in writing; that under it plaintiff was bound to furnish not to exceed two-thirds of 951 tons, or 634 tons; that it was error to admit the testimony of defendant as to the conversation in which defendant claimed the amount to be furnished was agreed upon; and that it was error to direct the jury to find damages on the basis of an obligation resting upon plaintiff to deliver 951 tons in case they found the defendant's testimony in this regard to be true.

This presents a case in which it becomes necessary to determine whether the general rule excluding parol evidence to affect a written agreement is applicable. We think it is. The letter from defendant to plaintiff, and from plaintiff in reply, together constituted, in effect a complete proposition for an agreement to be accepted or rejected. There was a request for a proposition on certain conditions, and the plaintiff, by reply, submitted its proposition in view of those conditions. The parties, therefore, stood in the position of having drawn, but not signed, a proposed agreement, when the conversation as to the amount of the coal to be furnished was had. This conversation was at variance with the terms of this written but unsigned proposed agreement, and it was the duty of the defendant to see to it that this parol change was interpolated into the contract before finally assenting to it. This he did not do. He signed it as it was, by writing the letter of acceptance. This accepted an offer to furnish coal at a certain price, which offer was made on condition that the amount was to be about one-half to two-thirds of the amount supplied defendant by plaintiff the season before. It did not accept an offer to furnish 951 tons of coal, nor was the contract silent as to the amount. If, after submission of a written agreement for approval the parties agree to change any of the terms of the writing, the change

must be made in the writing, or it will be held to embrace the true agreement of the parties. In attempts to mete out justice in individual cases, so many distinctions have been made, in order to escape the force of the doctrine excluding all oral stipulations not embraced in a written contract, that the proper application of the rule has become a problem so difficult of solution that the value of the rule has been seriously impaired. The uncertainty which has resulted has given rise to much litigation in which each party has been sanguine of success because precedents to support each theory could be found. This is to be deplored, and it is wise that this court should at the outset uphold this principle in its full integrity. We are of the opinion that the court erred in admitting the testimony as to amount of coal to be furnished, and in submitting the same to the jury; and for this error the judgment of the district court is reversed, and a new trial ordered. All concur.

E. CONRAD MOE, Plaintiff and Appellant *v.* Z. B. JOB, Defendant and Respondent.

1. **Instructions Held Proper.**

   Instruction of court that there was no evidence contradicting testimony of defendant as to a certain fact *held* proper.

2. **Servant's Tort; Evidence of Principal's Orders to Servants.**

   Defendant having been sued for damages caused by fire alleged to have been set out by his servants or agents *held* proper to prove defendant's orders to his hired men not to set any fires.

(Opinion Filed May 6, 1890.)

APPEAL from district court, Cass county; Hon. WILLIAM B. MCCONNELL, Judge.

Action for damages from fire claimed to have been set out by defendant on his own land. Plaintiff testified that he traced the fire back from his field to the defendant's land; that he saw smoke on defendant's land September 20; the plaintiff's property was destroyed on the 20th and 22d; that he saw smoke on

Job's land Sept. 22. William Hermanson testified that on the 20th day of September he saw two men go to that point on defendant's land to which plaintiff said that he traced the fire. The two men were then working at the fire. Witness did not see them start it. They stopped work because it began to rain. Defendant's horse came after them and they went to defendant's house. Witness saw smoke at the same point after the men had left.

The deposition of Luke Holman was read in evidence for the defendant, but in the abstract nothing of it appears except two questions, with the objections and rulings, but without the answers.

Messrs. Greene & Hildreth, for the appellant, argued: That the court erred in charging that there was no evidence that respondent set the fire or authorized it; that there was circumstantial evidence from which the jury might have found otherwise; citing, Field v. N. Y. R. R. Co., 32 N. Y. 339; Kaisen v. Milwaukee, etc., R. R. Co., 29 Minn. 12; Adams v. Roberts, 2 How. U. S. 486; Jewell vs. Jewell, 1 id. 219; Greenleaf v. Birth, 9 Pet. 292. That Holman's testimony was incompetent, and immaterial, and hearsay; citing, King v. Frost, 28 Minn. 417; Carrig v. Oakes, 110 Mass. 144; Pickering v. Cambridge, 144 id. 244.

Messrs Ball & Smith for the respondent.

CORLISS, C. J. The plaintiff and appellant is seeking by this suit to recover damages sustained by him by reason of the destruction of his grain by fire. He claims that the fire was set by the defendant, or his agents or servants on defendant's land, and spread to the farm of the plaintiff, where it burned his grain. The jury rendered a verdict for defendant, and the plaintiff asks this court to review the proceedings in the court below. It is said that the evidence is insufficient to support the verdict. To sustain this claim, we must hold that the trial court should have directed a verdict for the plaintiff. We have carefully examined the evidence, and without discussing it, we are clearly of the opinion that for the court to have directed a verdict for the plaintiff would have been unwarranted. The

appellant complains of a portion of the charge to the jury in which the trial judge said that defendant had testified that he did not set the fire, or authorize it to be set, and that there was no evidence to dispute such testimony. We find no error in this instruction, under the facts of the case. The plaintiff's evidence all pointed to a certain place on the defendant's farm as the source of the fire. While it appeared that the defendant had set other fires on the farm at different points, yet there was nothing in the case to show that any one of these fires was the author of the fire which burned plaintiff's property. On the contrary, the testimony was positive that there was no trace of fire between the point B, from which the fire started, and the other points, C and E, at which fires were set out by defendant. A. W. Linton, called as a witness on behalf of plaintiff, said: "There were no traces of fire between C and B." William Hermanson, another witness on behalf of plaintiff, testified: "The ground was not burnt over between B and C. Saw no stubble on Mr. Job's premises burned over, except between B and the north-west corner of the section." This is the direction the fire spread from B, in communicating with plaintiff's farm. There was no direct evidence that defendant set the fire at this place. The witness Hermanson says: "On Thursday, about 10 o'clock in the morning, I saw two men go over to B or C. I didn't see them start the fire there the first time on the start, but I see two men working at the fire." He does not pretend to identify the defendant as one of the men, but says that defendant's buggy drove over to that point, and one of the men got into it, and the other walked behind, and that they all went towards defendant's house. There was therefore no evidence on which the jury could base a finding that defendant himself set the fire. Nor was there anything in the case to show that he expressly authorized the fire to be set. There was no error in allowing the witness Holman to testify to orders which he heard defendant give about setting fire. It was not an attempt to prove the unsworn narration by the witness of a past event. It tended to establish as a fact that defendant had not expressly authorized the setting of a fire at that point, but that, on the contrary, he had expressly forbidden it. We have examined the other ques-

tions raised, but find no error in the record. The judgment of the district court is therefore affirmed. All concur.

WALLIN, J., having been of counsel, did not sit; ROSE, J., of the fifth judicial district, sitting by request.

THOMAS J. DEVORE, Plaintiff and Respondent, *v.* THOMAS S. WOODRUFF, Defendant and Appellant.

1. **Deed — Agreement to Reconvey — Effect of Dependent on Intention.**

   A separate agreement was executed between grantor and grantee in a deed, by which latter agreed to reconvey to former on payment of a specified sum. *Held*, that such separate agreement did not show conclusively that such deed was executed to secure a debt, but that the question whether the transaction was a sale with an optional right of purchase, or a mortgage, was one of fact resting upon the intention of the parties, to be determined from all the evidence in the case.

2. **Partners; Action at Law Between.**

   An action at law will not lie in favor of one partner, against his co-partner, to recover the profits made by the latter on sale of property formerly belonging to the firm, but procured to be transferred by defendant from the firm to himself, through a third person, and afterwards by him sold at an advance; no settlement of the partnership accounts and transactions having been had.

(Opinion Filed May 6, 1890.)

APPEAL from district court, Cass county; Hon. WILLIAM B. MCCONNELL, Judge.

Messrs. Greene & Hildreth, for appellant, argued: That as to all transactions involved in this action the parties were partners; that the plaintiff had never demanded an accounting or dissolution, therefore this action at law for damages cannot be maintained; citing, Haskell v. Adams, 7 Pick. 59; Williams v. Henshaw, 12 id. 378; Carey v. Bruth, 2 Caines, 293; Bates on Partnership, vol. 2, § 849; Nugent v. Locke, 4 Cal. 320.

That as to the land near Fargo, there was no proof of indebtedness from defendant to plaintiff; if there was such indebtedness, it was extinguished by the deed from defendant to plaintiff; citing, Hayes v. Carr, 83 Ind. 275; Conroy's Executors v. Alexander, 7 Cranch, 218; Flagg v. Mann, 14 Pick. 467; Jones

on Mtgs., §§ 259, 261; Smith v. Crosby, 47 Wis. 160. The transfer, with privilege of repurchase, was a sale on condition. Sacton v. Hitchcock, 47 Barb. 220; Sentland v. Sentland, 3 Mich. 482; Coe v. Cassidy, 6 Daly, 645; Turner v. Kerr, 44 Wis. 433; Lee v. Kilburn, 3 Gray, 594; Baker v. Thresher, 4 Denio, 493; Hilliard on Mtgs., vol. 1, p. 96; Kent, vol. 4, p. 147; Holmes v. Grant, 8 Paige, 243; Woodward v. Pickett, 8 Gray, 617; Henly v. Houghtaling, 41 Cal. 22; McNamara v. Culver, 22 Kan. 661; Garsert v. Boyk, 1 Mont. 240; Horback v. Hill, 112 U. S. 144.

Messrs. Ball & Smith, for the respondent, argued: That the partnership had been dissolved by mutual consent, and by a completion of the business for which it was formed. Rohrer v. Drake, 33 Minn. 408. The partnership affairs have all been settled. One partner can sue another, even on an obligation pertaining to the partnership business, if the obligation can be determined without going into the partnership accounts. Croter v. Benninger, 45 N. Y. 545; Clark v. Mills, 13 Pac. Rep. 569. In this case an adjustment of the partnership affairs may be effected in an action at law. Thompson v. Lowe, 12 N. E. Rep. 486. Where fraud exists action may be maintained against a copartner before final settlement. Sprout v. Crowley, 30 Wis. 187. Where one partner lends another the means to pay latter's share of capital, it has been held not a partnership transaction. Bull v. Coe, 18 Pac. Rep. 808; Wetherbee v. Potter, 99 Mass. 354; Dunphy v. Ryan, 116 U. S. 491.

Under code system of pleading, the court can give relief, irrespective of the prayer of the complaint, and if appellant had asked for an accounting he could have had it; but he, without objection, proceeded to trial by jury, and thereafter abandoned his demand for an accounting. Washburn v. Mendenhall, 21 Minn. 332.

The deed and agreement to reconvey amounted to a mortgage. Cornell v. Hall, 22 Mich. 377; Smith v. Crosby, 47 Wis. 160; Jones on Mtgs., §§ 258–61; Montgomery v. Chadwick, 7 Iowa, 114.

CORLISS, C. J. In January, 1882, plaintiff and defendant entered into an oral agreement under which plaintiff, who resided

in the east, and had some capital, was to furnish money to purchase real estate in the west for speculation; the defendant agreeing to make the purchases, and do all things necessary in the business, without compensation for his time and expenses—the two dividing the profits of the venture between them. This general statement of the compact between the parties is sufficient to present the first question to be considered on this appeal. In the court below, the plaintiff recovered judgment against defendant for over $9,000, and a part of this recovery is based on a written agreement between the parties growing out of the following facts: In the course of their dealings defendant purchased an eighty-acre tract of land near the city of Fargo, and took the deed thereof in the names of himself and the plaintiff. All the money that was paid on this purchase was furnished by the plaintiff, being $7,100; and the balance of the purchase money, $2,500, was secured by their joint note and mortgage. Subsequently, and in October, 1882, the defendant executed to plaintiff a warranty deed for his half interest, in the legal title to this property, and as part of the same transaction the plaintiff signed and delivered to defendant an agreement which is, in substance, as follows: "Agreement made and entered into this 7th day of October, 1882, by and between Thomas J. Devore, * * * party of the first part, and Thomas S. Woodruff, * * * party of the second part. Whereas, the party of the second part has purchased for himself and party of the first part [certain lands described,] paying therefore $7,100 of moneys of party of the first part therefor, executing a mortgage for balance of purchase money in the sum of $2,500, with interest from June 7th, 1882, making the total amount of said purchase $9,600, now this agreement witnesseth that the party of the second part, for the purpose of securing the party of the first part for the moneys paid by him upon this purchase, has this day deeded his interest in said eighty acres of land to said party of the first part for the nominal sum of one dollar, the party of the first part agreeing to assume the payment of the mortgage and note jointly executed by party of the first part and party of the second part, made payable to C. D. Boughton, of Fargo, for the sum of twenty-five hundred dollars, and

interest from June 7, 1882. And it is further agreed, by the party of the first part that, in consideration of the sum of one dollar to him in hand paid by the party of the second part, the receipt whereof is hereby acknowledged, said party of the second part shall have the right at any time, upon making tender to the party of the first part, his heirs, executors, or administrators, of the sum of forty-eight hundred dollars, together with legal interest thereon, to be computed from and after one year from the date of the purchase of said eighty acres, to-wit: June 7, 1883, to receive from the party of the first part, his heirs, executors, or administrators, a good and sufficient deed of general warranty of the undivided one-half of said eighty acres of land, * * * * * * * * And it is further agreed that party of the first part, his heirs, executors, or administrators, shall not sell or dispose of said eighty acres of land without the consent in writing of party of the second part first obtained thereto. And it is further agreed that, should an opportunity present itself to sell said eighty acres of land at such an advance as shall be agreed upon, that the rights of party of the second part to become the purchaser thereof shall in no way be prejudiced, but his rights shall be and remain the same as an owner of an undivided one-half of said eighty acres, upon payment to party of the first part, his heirs, executors, or administrators, of the said sum of forty-eight hundred dollars, with interest from June 7, 1883, as aforesaid; this contract to be and remain in force for the period of five years. In witness whereof the party of the first part hath hereunto set his hand and seal this 7th day of October, A. D. 1882."

On the trial the court charged, as a matter of law, this transaction established a liability against the defendant for the sum of $4,800 and interest. This is assigned as error. Assuming without deciding, that under the original agreement between the parties the defendant was liable to plaintiff for one-half of the purchase price of the property, it is still clear that the parties could, by settlement, extinguish that liability; and this is what defendant insists was done when the deed and contract were executed. The trial court held that the papers conclu-

sively showed an intention to secure to plaintiff this sum of $4,800 claimed to be owing him from defendant. In this we think the court erred. That the parties could enter into a contract to deed the property to plaintiff absolutely, giving the defendant a mere option to repurchase one-half thereof, cannot be doubted. If this transaction can be said to be clear on its face, this is its proper interpretation. It will be noticed, in the agreement already set forth, the plaintiff agrees to assume the payment of the note and mortgage executed by him and defendant jointly to secure the unpaid purchase price of the property. He certainly did not intend by this agreement to release defendant from liability to the holder of such note and mortgage, as that he could not do without the consent of such holder. It cannot be said that he intended to take upon himself the payment of this whole mortgage debt as between himself and defendant, and yet hold defendant to his liability to pay one-half of the purchase price of the property of which it formed part. If the debt of defendant to plaintiff for one-half of the money advanced by the latter to the former was to stand, plaintiff would not have agreed with defendant that he would assume and pay defendant's one-half of the mortgage debt; for, if it was the intention to continue the old relation between the parties, the plaintiff would have left his relations with defendant untouched as to the mortgage debt, and taken the deed merely as security for what he had actually paid. It is singular that the plaintiff, intending to hold defendant to his liability for his half of the purchase price, $4,800, should, in the transaction which it is claimed evinces such intention, take upon himself the burden of defendant's half of the mortgage debt of $2,500.

We think this assumption strongly indicates a design on the part of both plaintiff and defendant to abandon their old relations with reference to the property, and abrogate existing liability by the substitution of a new arrangement establishing new relations, and that these new relations were those of grantor and grantee, with an option in the grantor to repurchase the property at any time within five years on payment of $4,800 and interest. It is significant that the instrument declares that, in case the parties agree to sell the property for a higher price to

some third person, the rights of the defendant shall be in no way prejudiced. What rights? Those of an owner? Not at all. The express language of the contract is that those rights are defendant's rights "to become a purchaser thereof." These rights "shall in no way be prejudiced." His rights are not, by the terms of the contract, to be those of an owner absolutely, but only an owner "upon payment" of the $4,800 and interest to plaintiff; and, at the end of the instrument, it is declared that this contract shall "be and remain in force for the period of five years." This final clause strongly indicates that it was the intention of the parties that, at the end of that period, not that defendant's debt of $4,800 to plaintiff would be extinguished, and a mortgage turned into a deed by mere lapse of time, but that then should expire defendant's optional right to buy the property at that figure; there resting upon him, however, no obligation to make the payment. It is true that the contract declares that the deed was made for securing plaintiff for the moneys paid by him upon the purchase. But it appears to us that this particular portion of the instrument, when construed with the other provisions thereof, may with as much reason be regarded as expressing an intention to secure plaintiff for moneys he had invested in the property, by giving him the absolute ownership thereof, subject to an optional right in the defendant to repurchase a one-half interest therein, as, on the other hand, evincing a design merely to secure a debt. The instrument does not, in express terms, purport to secure a debt from defendant to plaintiff, nor even to secure moneys advanced by the latter to the former or on his account. It simply declares the object of the deed to be the securing of moneys paid by plaintiff on the purchase; he having paid everything, and obtained the ownership of only a half interest in the property. The following authorities would seem to warrant the court in holding that the deed and instrument on their face show an intention to sell, and give the grantor an optional right to repurchase, although we do not so decide on this appeal: Randall v. Sanders, 87 N. Y. 578; Smith v. Crosby, 47 Wis. 160, 2 N. W. Rep. 104; Buse v. Page, 32 Minn. 111, 19 N. W. Rep. 736, and 20 N. W. Rep. 95; Conway's Ex'rs v. Alexander, 7 Cranch, 218; Flagg v. Mann, 14

Pick. 467; Voss v. Eller, (Ind.) 10 N. E. Rep. 74; Rogers v. Beach, 17 N. E. Rep. 609; Wallace v. Johnstone, 129 U. S. 58, 9 Sup. Ct. Rep. 243; Elston v. Chamberlain, 21 Pac. Rep. 259; Gassert v. Boyk, 19 Pac. Rep. 281. It is sufficient on this appeal to say that the most favorable view to the plaintiff is that the instrument is ambiguous, and the question whether security was intended—the papers, on their face, not clearly showing a purpose to give security—was a question of fact, resting ultimately on the intention of the parties, to be ascertained, not only from the writings, but from all the other evidence in the case. Whether the papers, on their face, show an absolute sale, with an optional right to repurchase, or are ambiguous, parol evidence is equally admissible to show that security for a debt was in fact intended. While strongly of the opinion that the deed and instrument, when construed by themselves, disclose a design to establish the relation of grantor and grantee, with an optional right in the latter to purchase within five years at a certain price, and not an intention to secure a debt, we do not decide that question, but prefer to put our ruling on the other ground, that the instrument does not clearly show that security was intended, and the question was one of fact for the jury; the defendant having testified that the transaction was not for security, but an absolute settlement and extinguishment of their old relations. Wallace v. Johnstone, 129 U. S. 58, 9 Sup. Ct. Rep. 243; Flagg v. Mann, 14 Pick. 467; Ullman v. Jasper, 7 S. W. Rep. 763. We believe that, under the evidence in this case, the question whether security or settlement was intended is to be determined, not for or against either party, as a matter of law, from the deed and instrument alone, but as a question of fact to be decided, according to the intention of the parties, from all the evidence in the case.

The other ground of recovery was the profit realized by defendant on sale by him of certain Bismarck property belonging to the firm; which, after sale to a third party, he repurchased in his own name, and sold again at an advance. Whatever liability on the part of the defendant to plaintiff growing out of this transaction there may be, the matter is so connected with the partnership dealings that no separate debt arose in favor of

the former to the latter. The theory on which defendant would be bound to account to the plaintiff for the profits realized on sale after he had taken the title in his own name is that the property remained partnership property, in the eye of the law, notwithstanding the transfer of the title from the partnership to the defendant through a third person. The reason lying at the foundation of the doctrine that one partner cannot sue a co-partner on account of partnership matters is the impossibility of settling the accounts of the partners in a legal action, and therefore, the impossibility of determining in that action whether the defendant partner is at all indebted to the plaintiff partner on a full settlement of their accounts. The law will not pick out an isolated partnership transaction, and predicate a liability on that alone when it is possible that on a full accounting between the partners the balance is the other way. This principle applies with full force to this case. There have been numerous and complicated partnership transactions between the parties. It does not in any manner appear that the partners have ever had a full settlement of their accounts. Their minds have never met on the basis of a conceded balance. It does not even appear that all matters save this particular Bismarck deal have ever been adjusted. The complaint is fatal to such a theory of the case, and the evidence does not change the situation of the parties in this respect. It is, undoubtedly, thoroughly established, that, where there is only a single transaction, no accounting is necessary, but suit may be brought at law by one of two partners against the other to recover the amount due him arising from the single venture. 2 Bates, Partn. § 865, and cases; Pettengill v. Jones, 28 Kan. 749; Sikes v. Work, 6 Gray, 433; Wheeler v. Arnold, 30 Mich. 304; Kutz v. Driebelbis, 17 Atl. Rep. 609. The decision in Clark v. Mills, (Kan.) 13 Pac. Rep. 569, while an extreme case, will not sustain this action. In that case the dealings between the partners embraced only a few items, and there were no such transactions as to make a settlement difficult. There were no firm debts or credits, and all the affairs of the partnership had been adjusted except an accounting between them. The rule in Thompson v. Lowe, (Ind.) 12 N. E. Rep. 476, certainly is not favorable to plaintiff,

although cited by him. The opinion enunciates the doctrine fatal to his recovery at law before an accounting has been had: "Courts will not ordinarily entertain matters relating to partnership accounts between partners until, by its judgment or decree, a final adjustment of the partnership business can be effected." The authorities fully sustain our decision that the plaintiff could not recover on the Bismarck deal until all the affairs of the partnership had been adjusted, and a balance reached; and in that case his action would not be to recover the profits of this particular transaction, but the final balance due him on settlement of all the paatnership dealings, of which this particular transaction was only a single item. 2 Bates, Partn. §§ 849–861, and cases cited; Arnold v. Arnold, 90 N. Y. 580; Ross v. Cornell, 45 Cal. 133; Bowzer v. Stoughton (Ill.) 9 N. E. Rep. 208.

We would say, further, as to the 80-acre tract near Fargo, that, if plaintiff's contention with reference to it is true—if it was in fact partnership property—then all dealings between the parties, as partners, with reference to this property, must go into the accounting between them, and the liability of either to the other is the balance which can be shown in favor of either after all partnership matters have been fully adjusted. The judgment is reversed and a new trial ordered. All concur.

WALLIN, J., having been of counsel in this case did not sit; TEMPLETON J., of the first district, sitting in his place.

THE TRAVELERS INSURANCE COMPANY, Plaintiff and Respondent *v.* THE CALIFORNIA INSURANCE COMPANY of San Francisco, and the PHENIX INSURANCE COMPANY, Defendants and Appellants.

1. Limitation of Time to Bring Action on Policy of Insurance.

Where a policy of fire insurance provides that action thereon must be brought within a specified time after the loss occurs, the limitation runs from the date of the fire, although, under other provisions of the policy the cause of action does not accrue until some time after the fire.

2. Mortgagee to Whom Loss Payable May Sue Alone on Policy.

A mortgagee, to whom policy to mortgagor is made payable, may sue alone where his claim exceeds the amount of the insurance.

3. Reinsurance; When Insured May Sue Reinsurer.

A mere contract of reinsurance creates no privity between the original insured and the reinsurer; but where the loss or risk is expressly assumed by another company, the original insured may sue upon such contract as having been made for his benefit.

(Opinion Filed May 6, 1890.)

APPEAL from district court, Cass county; Hon. WM. B. MCCONNELL, Judge.

Action by mortgagee on a policy of insurance issued to mortgagor, loss, if any, payable to mortgagee, by defendant California Insurance company. Complaint alleged that the risk of the California Company was reinsured and assumed by defendant Phenix Company. Defendants demurred (but not separately) on ground that complaint stated no cause of action. Demurrer overruled; the ruling was excepted to and the defendants answered admitting that the Phenix Company reinsured and assumed the risk. Verdict and judgment for plaintiff.

W. L. Wilder and Messrs. Miller, Cleland & Cleland for appellants, argued: That the complaint failed to show any liability on the part of the Phenix Company. Johannes v. Phenix Co., 15 Ins. Law Jour. 449; Doyle v. Phenix Co., 44 Cal. 264; Johnson v. Home Ins. Co., 6 Pac. Rep. 727, and other cases. That action was barred by the limitation contained in the policy. Riddlesberger v. Hartford Ins. Co., 7 Wallace, 386; Arthur v. Homestead Ins. Co., 78 N. Y. 462; Laughlin v. Union Central Life Ins. Co., 11 Fed. Rep. 280; Garretson v. Hawkeye Ins. Co., 65 Iowa, 468; Ripley v. Ætna Ins. Co., 30 N. Y. 164.

Alf E. Boyesen, for the respondent, argued: That time for beginning action does not begin to run until sixty days after proofs of loss are furnished; citing, Ellis v. Council Bluffs Ins. Co., 20 N. W. 782; Frienzen v. Allemania Ins. Co., 30 Fed. Rep. 353; Mix v. Andes Ins. Co., 9 Hun, 397; Major v. Hamilton Ins. Co., 16 W. Va. 658; Steen v. Niagara Ins. Co., 89 N. Y.

315; Spare v. Home Mutual Ins. Co., 17 Fed. 569; Longhurst v. Star Ins. Co. 19 Iowa, 364.

CORLISS, C. J. The alleged liability of the defendant, the California Insurance Company of San Francisco, rests upon a fire insurance policy issued by it covering buildings owned by one E. C. Sprague; and the other defendant, the Phenix Insurance Company, is sought to be held by virtue of a contract between it and its co-defendant whereby it reinsured the risk, and assumed the same. If this contract were strictly one of reinsurance, there would be no such privity between the original insured and the reinsurer as would create a liability on the part of the latter to the former. Strong v. Insurance Co., 62 Mo. 289; Insurance Co. v. Cashow, 41 Md. 59; Herckenrath v. Insurance Co., 3 Barb. Ch. 63; Com. Mut. Ins. Co. v. Detroit F. & M. Ins. Co., 38 Ohio St. 11-16; Gantt v. Insurance Co. 68 Mo. 533. This doctrine has been embodied in our Code. § 4186 Comp. Laws. But this contract appears to have been more than one of reinsurance. The Phenix Company assumed the risk, and there is respectable authority holding that under such an agreement the original insured may sue directly the company that assumes the loss. Johannes v. Insurance Co., (Wis.) 27 N. W. Rep. 414; Glen v. Insurance Co., 56 N. Y. 379; Fischer v. Insurance Co., 69 N. Y. 161. No question having been made in the court as to the liability of the Phenix Company directly to the insured we will not discuss the point any further.

The plaintiff sues as the mortgagee of the insured, whose debt exceeds the amount due under the policy. The policy makes the loss payable to the mortgagee as its interest may appear. It is not claimed that the mortgagee cannot maintain this action without joining with it the insured as a party plaintiff. That the mortgagee may sue alone, where his claim exceeds the amount of the insurance, has the support of several cases. Hammel v. Insurance Co., 50 Wis. 240, 6 N. W. Rep. 805; Core v. Insurance Co., 60 N. Y. 619; Martin v. Insurance Co., 38 N. J. Law, 140; Coates v. Insurance Co., 58 Md. 172. If the owner lays claim to any part of the insurance money, the company may protect itself by interpleader. But the better

practice is for the mortgagor and mortgagee both to sue. See Winne v. Insurance Co., 91 N. Y. 185; Appleton Iron Co. v. British America Assur. Co., 46 Wis. 23, 1 N. W. Rep. 9.

The defendants claim that the cause of action was destroyed by the lapse of time before the commencement of the action. The policy contains the usual limitation clause providing that no action shall be maintained upon the policy "unless commenced within twelve months next after the loss shall have occurred," and that the lapse of that time shall be taken as conclusive evidence against the validity of any claim under the policy. The loss occurred May 24, 1885, and this action was not brought until March 24, 1887. It is claimed by plaintiff, however, that proofs of loss were not furnished until April 1, 1886, and that the twelve-months limitation did not commence to run before that date, and therefore the action was brought in time. This presents the question of the construction of such limitation clauses, which has often vexed the courts. It is undoubtedly true that a majority of the adjudications so interpret these limitations as to allow the full time to sue after the right of action has accrued, although more than the limited time has elapsed since the loss occurred. We cannot assent to the doctrine of these cases. They rest upon the alleged necessity of harmonizing conflicting provisions. In these cases, as in this, the policies provided that the loss should not be payable until a specified number of days after the proofs of loss. There is no conflict between such a provision and another part of the same policy requiring the action to be brought in twelve months, or any other time, after loss shall have occurred, provided, of course, a reasonable time is left after the cause of action has become perfect in which to sue. The error which appears to this court to lie at the foundation of these decisions is the assumption that the insurance company intended to give the insured the full time specified, during every moment of which he might institute his action. What right has any tribunal to find hidden somewhere in the contract a privilege to have the full time to sue after the cause of action has accrued, when the policy gives it only from the time the loss occurs? There are two distinct provisions—one that the insured shall not sue before a cer-

tain time, and another that he shall not sue after a certain time. These do not clash. They merely necessitate the construction that the intention was to give the insured such period in which to maintain his action after he could sue as would be left after deducting from the time limited the time which must elapse before the right to sue could accrue.

But we find in these cases this extraordinary reasoning: They assert that this doctrine will often kill the action before it could have life. The answer is short and simple. Every limitation in a contract is void which does not leave the plaintiff a reasonable time in which to sue after his right to sue has become perfect. When an insurance company has declared that a suit must be brought within forty days after loss has occurred, and that no action shall be maintained until thirty days after proof of loss, the duty of the court is not to interpolate into the contract a provision that the limitation runs from the date the cause of action accrues in place of one expunged by the same process, to-wit: the provision that the time runs from the time the loss occurs, which is the date of the fire; but the court should invoke against the company the rule that a right of action shall not, in effect, be destroyed by a limitation which leaves the plaintiff an unreasonably short time to sue after his cause of action has accrued, and declare the limitation clause void. If other provisions of the policy make it appear that in every case a reasonable time will not be left after the right to sue has become perfect, the limitation is void. If, acting in good faith, and with all proper diligence, it transpires in any particular case that other provisions of the policy to be complied with as conditions precedent to a right of action could not be performed in time to leave a reasonable time thereafter in which to sue, the limitation is inoperative in such a case; and, if the company has induced the insured to believe that the loss will be paid, or that the limitation will not be insisted on, until it is too late to sue, the limitation is waived. Thus the insured is fully protected by the application of known and established principles. The contract is construed as it is written, and the time when the limitations begin to run, if at all, is fixed, and not uncertain. In Johnson v. Insurance Co., 91 Ill. 92, the lim-

itation provision required the action to be brought within twelve months after the "loss occurred," and it was declared that no action should be commenced until sixty days after proof of loss. Said the court: "The two clauses, considered together, obviously provide that the company shall have sixty days within which to make payment after notice and proof of loss, but in no event should a suit or action be commenced after the expiration of twelve months from the date of the fire producing the loss. Any other meaning attached to the language, it seems to us, would be strained, unreasonable, and in direct violation of the plain intention of the parties clearly expressed." To same effect are Insurance Co. v. Wells, (Va.) 3 S. E. Rep. 349; Chambers v. Insurance Co., 51 Conn. 17. Chandler v. Insurance Co., 21 Minn. 85, apparently supports this view. There were two distinct clauses in the limitation provision of the policy in that case, one of which clearly contemplated that the insured should have twelve months after the cause of action accrued, and the other of which declared that the action must be brought within twelve months after the loss had occurred. The court held that the limitation began to run from the date when the right to sue became perfect, on the ground that the clauses were inconsistent, and therefore that must prevail which was most favorable to the insured. But, by holding that the two clauses were inconsistent, it necessarily adjudged that the clause which required the action to be brought within the time specified after the loss had occurred referred to the date of the fire, and did not refer to the accruing of the cause of action as the date from which such language would make the limitation run, as that was what the other clause was construed to, and clearly did, mean. The court in Semmes v. Insurance Co., 13 Wall. 10, appears to have adopted the same construction, although this precise question was not in the case; the court saying: "It is not said, as in a statute, that a plaintiff shall have twelve months from the time his cause of action accrued to commence suit, but twelve months from the time of loss, yet by another condition the loss is not payable until sixty days after it shall have been ascertained and proved. The condition is that no suit or action shall be sustainable un-

less commenced within the time of twelve months next after the loss shall occur," etc. The whole trend of this opinion, and the decision of the court, show that such a provision was regarded, not as giving the insured a specific time during all of which he might sue, but simply as fixing a period beyond which he could not sue.

It appears that a former suit, brought within a year after the loss occurred, was dismissed, and this action instituted after the year had elapsed. But it is well settled that the bringing of an action within the time limited, and which is afterwards dismissed, will not save the second action, commenced subsequently to the expiration of the time, from the operation of the limitation. O'Laughlin v. Insurance Co., 11 Fed. Rep. 280; Riddlesbarger v. Insurance Co., 7 Wall. 386; Wilson v. Insurance Co., 27 Vt. 99; Arthur v. Insurance Co., 78 N. Y. 462. To the former action the defendant pleaded as a defense that it was prematurely brought, in that sixty days had not elapsed since the receipt by it of proofs of loss. This defense the company had a perfect right to make without waiving the limitation clause. See Arthur v. Insurance Co., 78 N. Y. 462. The two provisions are independent of each other. If the insured places himself in a position where he cannot sue within the time limited without suing prematurely, and cannot, on the other hand, wait until he has a right to sue after making proofs of loss without having his claim destroyed by the limitation provision, it is his own fault; and the company had an undoubted right to urge the defense that the action was prematurely brought without being held to waive the other defense to the second action, commenced too late. Moreover, the time had not run when the first action was brought, and the limitation defense could, therefore, not have been interposed to that action. It cannot be said that the defendant, the California Company has estopped itself from setting up the defense by holding out to the insured the hope of a settlement without suit. Assuming that all that was said and done by its own agent, and also by the agent of the Phenix Company, was sufficient to justify the insured in refraining from suing, there came a time when he became satisfied that the companies did not intend to pay; and

this was in December, 1885, five months before his right to sue was extinguished. Certainly after that time nothing was said or done by either company to lead the insured to believe that payment without suit was intended. In this connection the case of Garido v. Insurance Co., (Cal.) 8 Pac. Rep. 512, is important. In this case the year's limitation expired February 15, 1881. Negotiations for settlement were continued until January 21, 1881, when insured was informed that the company would not pay. In answer to the claim of waiver, the court said that he had ample time in which to bring his action after the company had ceased to lead him to believe that suit would not be necessary. It will be noticed that in that case the insured had only twenty-five days left, whereas in the case at bar he had five months. To same effect is Garretson v. Insurance Co., (Iowa,) 21 N. W. Rep. 781. There is nothing in the sickness of the insured and his family to excuse his delay. In fact, none even of the statutory exceptions are applicable to a limitation by contract, and the time runs on in spite of them. O'Laughlin v. Insurance Co., 11 Fed. Rep. 280; Williams v. Insurance Co., 20 Vt. 222; Suggs v. Insurance Co., (Tex.) 9 S. W. Rep. 676; Wilkinson v. Insurance Co., 72 N. Y. 500; Riddlesbarger v. Insurance Co., 7 Wall. 386.

No question is made as to the validity of the limitation clause in the policy. Such provisions are valid in the absence of a statute. This is settled law. Our statute relates to such provisions (section 3582, Comp. Laws;) but it is conceded that the statute has no application to the facts of this case, because the contract was a Minnesota contract, insuring property there, made there, and to be performed there. The limitation was valid in that state, and it in terms extinguished the right, and did not merely bar the remedy. May, Ins. § 432; Williams v. Insurance Co., 20 Vt. 222; Suggs v. Insurance Co., (Tex.) 9 S. W. Rep. 676.

As the plaintiff may be able on a new trial to show that the limitation was waived, we will not direct judgment against him, but reverse the judgment of the district court, and order a new trial. All concur.

WALLIN, J., having been of counsel, did not sit in the above

case; TEMPLETON, J., of the first judicial district, taking his place.

WILLIAM SHORT, Plaintiff and Respondent, *v.* NORTHERN PACIFIC ELEVATOR COMPANY, Defendant and Appellant.

1. **Agents' Admissions; When Not Binding on Principal.**
Plaintiff had grounds for suspicion that one M. had stolen a quantity of plaintiff's grain from his granary, and had subsequently delivered such grain to the defendant at its elevator, at La Moure, and within twenty-four hours after M. had actually delivered certain grain at said elevator, and received tickets therefor, plaintiff visited the elevator at La Moure, and there saw L, engaged in buying grain for defendant, and issuing tickets for the same, and in receiving such grain into the defendant's elevator. Under these circumstances, and in response to inquiries made of L. by plaintiff, L. stated to plaintiff, in substance, that, several hours prior to the time of such conversation, L. had purchased of M., and given him defendant's elevator tickets therefor, a quantity of grain corresponding in kind and amount to that supposed to have been stolen from the plaintiff. *Held*, in an action against the defendant for the value of the grain, that said statements and admissions made by L. as to receiving the grain, and issuing tickets therefor, were inadmissible because not a part of the *res gestæ*, and their admission in evidence was error. The statements of L. were made concerning a transaction which was within the scope of L.'s authority as agent, but such transaction was closed, and entirely completed, some hours prior to the time at which L. narrated the facts to the plaintiff. The declarations and admissions of L. were not made while the wheat was being received into the elevator; nor were the declarations made spontaneously, and so connected with the principal transaction as to spring from and form a part thereof. Such declarations by the agent were not a necessary part of the duty intrusted to him, and cannot, therefore, bind the principal, in the absence of authority from the principal to make such declarations. Evidence examined, and found not to show that L. had authority from defendant to make the declarations and admissions which were admitted in evidence.

(Opinion Filed May 6, 1890.)

APPEAL from district court, La Moure county; Hon. RODERICK ROSE, Judge.

This action was commenced in justice court in La Moure county in 1888, was tried *de novo* on appeal in district court of

La Moure county and was taken on appeal to supreme court of Dakota territory. Pending in that court when North Dakota was admitted, the case was transferred to this court.

Messrs. Thomas and Davis, for appellant, cited: First National Bank v. North, 41 N. W. Rep. 736; Dodge v. Childs, 16 Pac. Rep. 815; Vicksburg & M. R. Co. v. O'Brien, 119 U. S. 99; Stone v. N. W. S. Co., 36 N. W. Rep. 248; Tuthill S. Co. v. Shaver W. Co., 35 Fed. Rep. 644.

J. M. Bartholomew, (in whose place Messrs. Nickeus and Baldwin were substituted as attorneys for respondent,) in his brief filed in the territorial supreme court, cited: N. Y. & Col. M. Syn. Co. vs. Rogers, 16 Pac. Rep. 719; Williamson v. Ry. Co. 10 N. E. Rep. 790; Armil v. Ry. Co., 30 N. W. Rep. 42; State v. Jones, 64 Iowa 349; American Fur Co. v. U. S., 2 Pet. 358; Abbott's Trial Evidence, 44; Bank v. Stewart, 114 U. S. 224; Bank v. Fields, 2 Hill 445; McGinnis v. Adriatic Mills, 116 Mass. 177.

WALLIN, J. The plaintiff sues the defendant to recover the value of 49 bushels and 50 pounds of No. 1 hard wheat which he alleges was stolen from him by one Gregg McCann on the 15th day of November, 1883, and thereafter delivered to the defendant; that the defendant mixed said wheat with its own grain, and converted the same to its own use. The defendant's answer was a general denial.

At the trial, William Short, the plaintiff, testified in his own behalf as follows: "A neighbor and myself went to my granary for a load of grain, and there saw wheat spilled on the ground, and that a good load had been taken out of the granary. We saw a wagon track, which we followed up, and traced into the town of La Moure. We tracked the wagon by the broken hoof of one of the horses. Gregg McCann owned the horse. We followed the track to McCann's place, and thence into the town of La Moure—a distance of fifteen miles in all. Then, Mr. Lighthall, I ask him— Defendant's Counsel. We object to anything that Mr. Lighthall said. Plaintiff's Counsel. Question: Who was Mr. Lighthall? Answer. The elevator man at La Moure. Q. You went to the elevator with this man you

have mentioned? A. Yes, sir. We found Mr. Lighthall there. He was buying and taking wheat for this elevator company. * * * Q. When you got to the elevator, did you see anybody exercising authority there, in purchasing and taking in grain, besides Mr. Lighthall? A. No, sir. Q. Did you speak to him about this grain? (Objected to by defendant on the ground that no authority on the part of Lighthall to speak for defendant has been shown; that his statements offered to be proved relate to a closed and past transaction, are hearsay, and incompetent. Objection overruled, and defendant duly excepted.) A. Yes, sir. Q. What did he say? (Defendant objected same as last above. Same ruling, and defendant excepted.) A. He said he had received grain from this McCann the night before—some time before; that he had received forty-nine bushels and fifty pounds. Q. Did you make a demand on him for wheat delivered by McCann? (Objected to by defendant as incompetent; that no authority on the part of Lighthall has been shown to entertain such a demand upon the defendant. Objection overruled, and defendant excepted.) A. I did afterwards. Q. Have you ever had any pay, or the wheat returned which is mentioned in the complaint? A. No, sir." On cross-examination witness stated that he traced the wagon track into town, and up to a point within ten rods of the defendant's elevator. Witness further stated: "I do not know what Mr. Lighthall's authority was as agent of the defendant. All that I know is what I saw him do. The only thing I saw him do was to receive wheat, and issue tickets for wheat received." It appeared that there was no other elevator at La Moure. This constitutes the substance of the evidence relative to points controverted in this court. Defendant offered no testimony. Both parties rested the case. The defendant thereupon moved the court to direct a verdict in favor of the defendant upon the grounds: "*First*, there is no competent evidence before the court or jury showing that the defendant ever received any wheat, the property of the plaintiff; *second*, that it is not shown that the plaintiff ever demanded this wheat from the defendant, or any authorized agent of the defendant, and, further, that it is not shown that defendant, upon due demand, refused to de-

liver this wheat." Motion denied and defendant duly excepted. A bill of exception was settled, and a motion for a new trial was denied whereupon judgment was entered for plaintiff, and defendant appealed. Among the errors assigned in this court are the following: (1) The court erred in admitting, against defendant's objection and exception, (*a*) evidence of the statements of one Lighthall that defendant had received a quantity of wheat from Gregg McCann; and (*b*) evidence of a demand of the wheat in question made upon said Lighthall. (2) The court erred in refusing to direct the jury to find in favor of defendant.

To recover in the action, it was necessary that the plaintiff should show, by evidence legally competent, that a certain quantity of wheat belonging to the plaintiff had been delivered to the defendant at its elevator in La Moure, and that upon demand therefor the defendant had failed to return the wheat, or account for its value. The only evidence in the case which was offered to establish the delivery of the wheat to defendant was certain statements and declarations testified to by the plaintiff as having been made by one Lighthall in a certain conversation between plaintiff and Lighthall had at defendant's elevator, and hereinbefore set out in the evidence. It does not appear distinctly from the testimony at what precise time the conversation in question was had with reference to the time when McCann delivered the wheat to Lighthall at the elevator, but it was had some hours subsequent to the close of the wheat transaction between McCann and Lighthall, and twenty-four hours after such wheat transaction with McCann was completed. It is important to inquire what relation Lighthall sustained to the defendant when he made the statements testified to by the plaintiff, and which are relied on by the plaintiff, to fix defendant's liability as a principal. The only evidence in the case shedding any light on this inquiry comes from the plaintiff, who testifies upon the point as follows: "I do not know what Mr. Lighthall's authority was as agent of the defendant. All I know is what I saw him him do. The only things I saw him do was to receive wheat and issue tickets for wheat received." Plaintiff further testifies that when he visited the elevator, and had the conversation referred to, Lighthall was then engaged in buying and taking in grain, and

that plaintiff at that time saw no other person exercising authority at the defendant's elevator. It appears from the testimony that plaintiff, having ground for suspicion that one Gregg McCann had stolen a wagon load of grain from his granary, and sold it to defendant at its elevator in La Moure, went to the elevator and was then and there informed by Lighthall that he (Lighthall) had within the preceding twenty-four hours received of McCann a quantity of wheat, and had issued tickets to McCann for the same. The admissions and declarations of Lighthall were received in evidence against the objections of the defendant, and the rulings of the trial court thereon were duly excepted to. We think the rulings were erroneous, and that the defendant's motion, made after the testimony was closed, to direct a verdict for defendant, should have been granted. See Bowman v. Eppinger, *ante* p. 21, (44 N. W. 1000,) and authorities cited.

It is elementary that a principal in a transaction may, by his admissions or confessions made at any time, either before or after the event, render himself liable for the legal consequences of his acts, both in civil and criminal cases; but the legal liability of a principal for the acts of an agent cannot be fixed by the declarations or statements of the agent except in certain well-defined classes of cases. "It must be remembered," says Greenleaf, "that the admission of the agent cannot always be assimilated to the admissions of the principal. The party's own admission, whenever made, may be given in evidence against him; but the admission or declaration of his agent binds him only when it is made, during the continuance of the agency, in regard to a transaction then depending, *et dum fervit opus*. It is because it is a verbal act, and part of the *res gestæ*, that it is admissible at all, and therefore it is not necessary to call the agent himself to prove it." 1 Greenl. Ev. § 113. Mr. Justice Story, in his work on Agency, (section 134), states the rule as follows: "Where the acts of the agent will bind the principal, there his representations, declarations, and admissions respecting the subject-matter will also bind him, if made at the same time, and constituting a part of the *res gestæ*." In Packet Co. v. Clough, 20 Wall. 540, the Supreme court of the United

States had occasion to refer to the rule as stated by Judge Story, and said: "A close attention to this rule, which is of universal acceptance, will solve almost every difficulty. But an act done by an agent cannot be varied, qualified, or explained, either by his declarations, which amount to no more than a mere narrative of a past occurrence, or by an isolated conversation held, or an isolated act done, at a later period. The reason is that the agent to do the act is not authorized to narrate what he has done, or how he has done it, and his declaration is no part of the *res gestæ*." See Railroad vs. O'Brien, 119 U. S. 99. 7 Sup. Ct. Rep. 118. Mechem, in his treatise on Agency, (section 714,) in stating the grounds of the doctrine, uses the following language: "The reason is that, while the agent was authorized to act or speak at the time and within the scope of his authority, he is not authorized at a subsequent time to narrate what he had done, or how he did it." The following cases sustain and illustrate the strict rule: Randall v. Telegraph Co. 54 Wis. 140, 11 N. W. Rep. 419; First Nat. Bank v. Ocean Nat. Bank, 60 N. Y. 278; Waldele v. Railway Co., 95 N. Y. 274; Lund v. Tyngsborough, 9 Cush. 36; McDermott v. Railway Co., 73 Mo. 516; also Durkee v. Railroad Co. 11 Pac. Rep. 130; Bank v. North, 6 Dak. 136, 41 N. W. 736.

Applying the rule as stated by these authorities to the facts of this case we have no difficulty in reaching the conclusion that Lighthall's statements and declarations, which were made to the plaintiff some hours after the transaction with McCann had closed, and after McCann had departed, did not constitute any part of the act of receiving the wheat into the defendant's elevator, and were not contemporaneous with the act; but, on the contrary, such declarations were a mere isolated narrative of a closed and past transaction, and hence were not a part of the *res gestæ*, and therefore were inadmissible in evidence under the rule. But the strict rule has been relaxed somewhat in a number of the later American cases; and, aside from federal courts, the tendency in some of the states is to regard the mere point of time as less material, and to treat the declarations as admissible as part of the *res gestæ* if they spring directly from the transaction in controversy, and tend to

qualify, characterize, or explain it. According to the doctrine of these cases, each transaction is to be characterized by its own facts, without conclusive regard to a fixed interval of time, and with more regard to the question whether the declarations or admissions seem to have been voluntarily and spontaneously made under the immediate influence of the principal transaction, and are so connected with it as to characterize or explain it, and made under such circumstances as to exclude the possibility of a design to mistake the fact. See People v. Vernon, 35 Cal. 49; O'Connor v. Railway Co., 27 Minn. 166, 6 N. W. Rep. 481; Keyser v. Railway Co., 33 N. W. Rep. 867; Pilkenton v. Railway Co., 7 S. W. Rep. 805; Cleveland v. Newsom, 45 Mich. 62, 7 N. W. Rep. 222. See, also, dissenting opinion by Mr. Justice Field in Railroad Co. v. O'Brien, *supra*, citing the case of Railway Co. v. Coyle, 55 Pa. St. 402. But, under the rule as enunciated in the cases last cited, the declarations of Lighthall are inadmissible, and cannot bind the defendant. The statements were not volunteered, nor were they so closely connected with the principal transaction as to spring spontaneously from it, and characterize it. On the contrary, the declarations of Lighthall were made from his memory of a past event, just as they might and doubtless would have been made if the same inquiries had been made of him weeks or months after they were actually made. Under the evidence, it is obvious that the duties which were delegated to Lighthall could be fully performed without conferring upon him authority to bind the defendant by admissions having reference to matters not depending, but closed and completed before the admissions were made.

But the claim is made by counsel that the declarations and admissions of Lighthall, if not admissible in evidence as a part of the *res gestæ*, were yet competent upon another and independent ground. We quote from the brief of appellant's counsel: "The agent, Lighthall, had charge of that elevator, exclusive control of the business connected therewith. The inquiries were addressed to him while actually employed in that business, by one who had a right to the information sought. The inquiries were made at the earliest possible moment. The agent was

authorized, not by express authority, but in the usual course of business, to give information upon just such points. The inquiries were made within a few hours after the wheat was received, and, it is fair to presume, while it remained in his possession." The difficulty with this proposition is that, in all of its material features, it is wholly without support in the testimony. There is literally no evidence in the record tending to show that Lighthall "had charge of that elevator." Much less is there evidence that he had "exclusive control of the business connected therewith." It is not incompatible with the evidence that Lighthall acted in a purely subordinate capacity, and that other officers and agents of defendant had the general supervision of defendant's business at said elevator. It is certain, at all events, that no testimony was put in the record, tending to show any general agency in Lighthall. The testimony shows that his duties were special and circumscribed. Nor is it true that there is any evidence sustaining the claim of counsel that Lighthall had authority "in the usual course of business," to give information upon "just such points." No evidence was offered showing what the usual course of business was at that elevator or at any elevator. In the absence of proof, the court cannot arbitrarily assume the existence of any particular course of business at any elevator with reference to giving information to the public concerning transactions which are closed and completed before the inquiries are made. The statements in question may have been, and doubtless were, true, as a matter of fact. But, as a court of law, we must determine whether the statements were legally competent as evidence. If they were inadmissable under rules of evidence firmly established, and resting upon well-approved considerations of public policy, and expediency, they must be excluded, whether true or untrue.

For the reasons and upon the grounds already stated, we must hold that it was prejudicial error to admit the evidence against defendant's objections, which were seasonably made thereto. It seems probable that competent evidence to sustain the allegations of the complaint can be readily obtained, and we therefore direct that an order be entered setting aside the verdict, and reversing the judgment herein, and granting a new

trial of the action. The costs of this court will abide the event of the suit. All concur.

BARTHOLOMEW, J., having been of counsel, did not sit; TEMPLETON, judge of the first judicial district, sitting by request.

W. E. JOHNSON, Plaintiff and Respondent, *v.* DAKOTA FIRE & MARINE INSURANCE COMPANY, Defendant and Appellant.

1. **Insurance — Limitation of Time to Bring Action On.**
A stipulation in an insurance policy issued in Dakota territory, upon property therein, which limits the time within which an action may be brought upon the policy to the period of six months from the date of loss, is void. Such stipulation would be upheld at common law, but is void under the statute. § 3582, Comp. Laws.

2. **Same — Statements Contained in Application Material.**
Where a written application signed by the insured declared that "the statements made by me, and answers to questions above given, are true, and a warranty on my part, and are the basis upon which I ask hail insurance by the Dakota Fire & Marine Insurance Company on the crops herein described," and where the policy refers to such language as follows: "Assured's application, of even number and date herewith, on file in the office of the company in Chamberlain, Dakota, is hereby referred to as a part hereof, and is a warranty on the part of the assured, and the basis on which this insurance is written"—and where the policy further declares "that any misrepresentation or false statement or concealment of facts in the application, or if the property is or becomes incumbered, shall operate to render the policy void"—*held*, that such statements, if not intrinsically material, have been made so by the express agreement of the parties, and such agreement must prevail, under Comp. Laws, § 4163, which provides: "A policy may declare that a violation of specified provisions thereof shall avoid it; otherwise the breach of an immaterial provision does not avoid the policy."

3. **Same; Same—Error of Soliciting Agent Chargeable to Insurer; How Proved.**
Where the agent who solicits insurance, either by his direction or act, makes out an application for insurance incorrectly, notwithstanding all the facts are stated to him truthfully by the applicant, the error or fraud will not defeat the policy, and is chargeable to the insurer, and not to the insured. *Held, further*, that parol evidence is admissible to show that the application was filled up by the agent, and that

the answers of the applicant were falsified by the agent without the applicant's knowledge.

4. Same; Insured Charged With Notice by Possession of Copy of Application.

Where a policy of insurance, with a copy of the application indorsed thereon, was sent by the company to the insured, and was in the possession of the latter for several months before the loss occurred, *held*, that the insured was chargeable in law with knowledge of the contents of both the policy and the application, and the circumstance that the assured did not actually read or know the contents of the application, or know that a copy of the application was indorsed on the policy, would make no difference. The paper being his own contract, and in his actual custody, he will be presumed to know all of its contents, even where the copy on the back was not referred to in the body as being indorsed on the back.

5. Same; By Silence After Notice Insured Participates in Agent's Fraud.

Under such circumstances, where a fraud is practiced by the agent upon both the insured and the insurer, and where such fraud would be readily detected by the insured upon reading the copy of the application indorsed on the policy, the insured will be estopped from denying knowledge of the fraud. It was the duty of the insured, upon receiving the policy, to proceed at once to have the same corrected or rescinded. He did not do so. *Held*, that by such silence when he should have spoken, the insured constructively became a participant in the original fraud of the agent, and thereby forfeited his rights under the policy. Such policy was defeated in its very inception, and it never attached to the risk which it covered. See Comp. Laws, § 4164.

Same; Same — Forfeiture Waived by Demanding Judgment for Premium Note.

At the time of the service of defendant's answer to the plaintiff's complaint in this action, the defendant had full knowledge of all the facts constituting the grounds of forfeiture of said policy by the plaintiff; and with such knowledge, and by way of counter-claim in its answer defendant seeks to recover from the plaintiff the amount of the premium note given by said plaintiff as a consideration for the issuance of said policy. *Held*, that pleading such counter-claim operated as a waiver of the forfeiture of the policy. The policy was not void, but was voidable at the option of the insurer. After knowledge of the forfeiture, defendant saw fit to demand judgment for its premium. This was equivalent to an independent action for the premium, and waived the forfeiture. If the answer had not, among other defenses, pleaded a forfeiture which went to the inception of the policy, and which would,

if established, defeat the premium note, the case would have been otherwise.

Same; Failure to Furnish Proofs of Loss.

Where the plaintiff was bound by the terms of his policy, in the event of a loss, to furnish the insurer certain proofs of loss, but wholly failed to furnish the prescribed proofs or any proofs of loss, either within the time limited by the policy, or within a reasonable time thereafter, or at all, *held*, that, by reason of such default and omission, the plaintiff forfeited his right to recover under the policy.

Same; Same; Waiver of Such Proofs.

Evidence to establish a waiver of such forfeiture examined, and *held* sufficient to constitute a waiver.

(Opinion Filed May 6, 1890.)

APPEAL from district court, Grand Forks county; Hon. CHARLES F. TEMPLETON, Judge.

Messrs. Dillon & Preston for appellant, cited upon the proposition stated in paragraph 3 of the foregoing syllabus the following cases: Globe Ins. Co. v. Wolf, 95 U. S. 329; Ins. Co. v. Norton, 96 id. 240; Am. Ins. Co. v. McWharter, 11 Ins. Law Journal, 147; Susquehanna Ins. Co. v. Swank, 12 Ins. Law Journal, 625; Ryan v. Worlds Ins. Co., 41 Conn. 68; N. Y. Life Ins. Co. v. Fletcher, 117 U. S. 519. As to paragraph No. 4 they cited: Am. Ins. Co. v. Neiberger, 74 Mo. 167; Richardson v. Maine Ins. Co., 46 Me. 394; Smith v. Con. Ins. Co., 43 N. W. 810.

In opposition to the rule declared in paragraph 6 they cited: Smith v. State Ins. Co., 21 N. W. 145; May on Ins. 507; Davidson v. Young, 38 Ill. 152; Flower v. Elwood, 66 Ill. 447; Powell v. Rogers, 105 Ill. 318; N. W. Ins. Co. v. Amenman, 10 N. E. 225; Shimp v. Cedar Rapids Ins. Co. 16 N. W. 229.

J. H. Bosard (P. J. McLaughlin, of counsel,) for respondent, cited, in opposition to the rule declared in paragraph 2 of the syllabus, the following: Cont. Ins. Co. v. Rogers, 119 Ill. 474, (S. C. 59 Am. Rep. 810); Alabama, etc. Co. v. Johnson, 2 So. Rep. 125; May on Ins. §§ 181-4; Phenix Ins. Co. vs. Raddin, 120 U. S. 183; Moulor v. Am. Ins. Co., 111 U. S. 335; Southern Ins. Co. v. Booker, 24 Am. Rep. 344; May on Ins. §§ 156, 162-5; Car-

son v. Jersey City, etc., Co., 14 Vroom. 300; Bank v. Hartford Ins. Co., 95 U. S. 673; Lynchburg, etc., Co. v. West, 76 Va. 575, (S. C. 44 Am. Rep. 177;) Waterbury v. Dak., etc., Ins. Co., 43 N. W. Rep. 697; Fitch v. Am., etc., Co., 59 N. Y. 557; Washington Ins. Co. v. Raney, 10 Kan. 525; Schwarzbach v. Ohio, etc., Co., 25 W. Va. 622, (S. C. 52 Am. Rep. 227;) Helbing v. Svea, Ins. Co., 54 Cal. 156, (S. C. 35 Am. Rep. 72;) Price v. Phenix Ins. Co., 17 Minn. 497; Campbell v. N. E., etc., Co., 98 Mass. 381; M. & M. Ins. Co. v. Schroeder, 18 Bradw. 216; Elliott v. Ins. Co., 13 Gray 139; Anderson v. Sup. Grand Lodge, etc., 17 Atl. Rep. 119; Clapp v. Mass. Benefit Assn., 16 N. E. 433.

In support of the rule stated in paragraph 3 they cited among other cases: Andes Ins. Co. v. Fish, 77 Ill. 620; Kausel v. Farmers etc. Co., 16 N. W. 430; Ins. Co. v. Wilkinson, 13 Wall. 222; Jewett v. Carter, 132 Mass. 135; Ins. Co. v. Allen, 10 N. E., 85; Sullivan v. Ins. Co., 8 Pac. Rep. 112; Planters Ins. Co. v. Baxter, 25 Am. Rep. 780; Gans v. St. P. F. & M. Ins. Co., 43 Wis. 108; Manhattan Ins. Co. v. Weile, 26 Am. Rep. 364; Rowley v. Empire Ins. Co., 36 N. Y. 550; Com. Union Ins. Co. v. Elliott, 13 Atl. Rep. 970; Miller v. Phenix etc., Co., 14 N. E. 271. In support of the sixth paragraph they cited: Phenix etc., Co. v. Raddin, 120 U. S. 183; Wilson v. M. F. etc. Co., 30 N. W. 401; Masonic etc., Asso. v. Beck, 77 Ind. 203, (S. C. 40 Am. Rep. 295;) Stone v. Hawkeye Ins. Co., 28 N. W. 147; Smith v. St. P. F. & M. Co. 13 N. W. 355; Phenix Ins. Co. v. Lansing, 20 N. W. 22; Frost v. Saratoga etc., Co., 5 Denio 154; Fitzgerald v. Hartford etc., Co., 13 Atl. 673; Knickerbocker Ins. Co v. Norton, 96 U. S. 234. As to the waiver of proofs of loss they cited: Brink v. Hanover Ins. Co., 80 N. Y. 108; Ins. Co. v. Norton, 96 U. S. 284; Travelers Ins. Co. v. Edwards, 122 id. 457; Cleaver v. Traders Ins. Co. 39 N. W. 571; Badger v. Glens Falls Ins. Co. 49 Wis. 389.

WALLIN, J. This action is based upon a hail insurance policy issued by the defendant from its office at Chamberlain, Dak., and sent from there by mail to the plaintiff. The policy bears date May 13, 1885, and was issued in consideration of the receipt of a premium note for $70, executed by the plaintiff

and delivered to the defendant, and falling due October 1, 1885. In consideration of this note the policy declares that the defendant "does insure W. E. Johnson for the term of six months, from the 6th day of May, 1885, to the 6th day of November, 1885, at 12 o'clock noon, against loss or damage by hail to 100 acres growing crops, the property of assured, located and described as follows." It is conceded that "on the 15th and 28th days of July, 1885," the grain in question was damaged by hail to the amount of $1,375.04, and that plaintiff is entitled to that amount, less the accrued amount of the premium note, if entitled to recover at all.

By its answer, defendant admits issuing the policy upon the plaintiff's written application therefor annexed to the complaint, that no part of the loss has been paid, and that the premium note was not due when the loss occurred. "And for further answer defendant alleges that said policy of insurance contained the following covenant, viz.: 'Now, therefore, the capital stock and securities of said company shall be subject to make good unto the said assured, at the specified rate and terms of Schedule No. 2, on the back hereof, at 70 cents per acre, his, her, or their heirs, executors, administrators, or assigns, all such immediate loss or damages as may occur by hail to growing crops as above specified, described and located, and as set forth in the application for this insurance, but not exceeding the cash value thereof, nor the interest of the assured in the property, nor the average yield per acre, as provided herein, for the term of six months, from the 6th day of May, 1885, at noon, to the 6th day of November, 1885, at noon, and to be paid according to the terms and conditions hereof, but not until requisite proofs, duly sworn and certified to by the assured and one disinterested party, are received at the office of the company in Chamberlain, Dakota. But in no case will this company be liable for any loss or damage that may occur seven days after the crops hereby insured shall have matured.' That the plaintiff has wholly failed to make any proofs of loss certified and sworn to by assured and one disinterested party, and that the plaintiff has not in any manner furnished to this defendant, at any time before the commencement of this suit, at the office of the company in

Chamberlain, Dak., or at any other place, any proofs of loss whatever, and has wholly failed to comply with the provisions of the policy. And for further answer defendant alleges that it is provided in said policy of insurance that, 'when a loss shall have occurred, assured agrees to make and send by registered mail a statement thereof, not sooner than five and not later than ten days thereafter, if the crops are yet green. If ripe such notice must be mailed not later than the day following the loss.' Defendant avers that the plaintiff failed to make or send by registered mail a statement of his loss within the time mentioned, not sooner than five days and not later than ten days thereafter, nor did plaintiff in any manner send by registered mail a statement of said loss, showing that the grain was ripe, within the day following the loss; that the said plaintiff wholly failed to furnish the said information by registered mail within the time provided by said policy, or at any other time.

And defendant, further answering, alleges that the said policy of insurance contained the following covenant and agreement: 'It is also mutually agreed and made a part of this contract that no suit or action for the recovery of any claim for loss or damage under this policy shall be sustained in any court of law or equity until after an award, on demand of either party, shall have been made by arbitration in the manner hereinbefore provided, nor unless such suit or action shall be commenced before the expiration of six months next ensuing after the loss; and, unless such suit or action shall be commenced within the said time, the lapse of time shall be taken and deemed as conclusive evidence against the validity of such claim, any statute to the contrary notwithstanding.' That this action was not commenced within six months from the date upon which said alleged loss occurred; that the said suit was commenced on March 24, 1888. And defendant for further answer alleges that the policy of insurance so issued, contained the following covenant, viz: 'Assured's application, of even number and date herewith, on file in the office of the company, in Chamberlain, Dakota, is hereby referred to as a part hereof, and is a warranty on the part of assured, and the basis upon which this insurance

is written.' That said application referred to in said policy contained the following provision: 'The statements above made by me, and answers to the questions above given, are true, and a warranty on my part, and are the basis upon which I ask hail insurance, by the Dakota Fire & Marine Insurance Company, on the crops herein described.' Defendant avers that said application contained the following questions and answers, viz: 'Are your lands incumbered? If yes, for how much? Answer. $300. What is the land worth per acre? A. $20. Are the crops on the above-described land mortgaged or otherwise incumbered? If so, for how much? A. No.' Defendant avers that each of said questions and answers was material information to be known by the defendant, in order to determine the desirability of the risk, and the rate of premium to be paid therefor. And defendant, upon information and belief, avers that the said land was incumbered in excess of $300, and that the said land was not worth $20 per acre, or in any sum greater than $10 per acre, and that the crop described on said land was mortgaged and incumbered, and that defendant made false answers to each of said questions; that in truth and fact the said real estate was mortgaged by two mortgages, amounting to something like $1,110, prior to 1884, and that said real estate was also mortgaged to F. R. Fulton, about November, 1884, in an amount greatly in excess of $300, all of which was in full force at the time of issuing of said policy; that in truth and in fact there was a chattel mortgage upon said grain to F. R. Fulton, to secure a sum of about $700, which mortgage was a lien upon said growing grain, and that there were other chattel mortgages upon said grain in force at the time of issuing said policy; that by reason of such false statements the said policy was void. And defendant for further answer, and by way of counter-claim, alleges that on the dates hereinafter mentioned the defendant was and is a corporation organized under the laws of the territory of Dakota; that on the 1st day of June, 1885, the said plaintiff, W. E: Johnson, made, executed, and delivered to this defendant his certain promissory note in words and figures as follows, viz: '$70. For value received, I promise to pay to the Dakota Fire & Marine Insurance Company or order

seventy dollars, at their office in Chamberlain, Dakota, on the 1st day of October, 1885, with interest at the rate of ten per cent. per annum, without interest if paid thirty days before due. Dated this 1st day of June, 1885, W. E. JOHNSON. Whole number of acres insured is one hundred. Quarter section No. 20, twp. No. 154, range No. 54, county of Grand Forks. P. O. Larimore. Strong & Treat, Agts. No. 514.' That the defendant is now the owner and holder of said promissory note, and that the amount is now due and wholly unpaid. Wherefore defendant demands judgment against the plaintiff for his costs and disbursements, and for judgment upon said promissory note in the sum of $70, with interest at ten per cent. from June 1, 1885."

The action was tried by the court without a jury, and the trial court made and filed its findings of fact and law upon which judgment was entered in favor of the plaintiff for the amount of the claim, less the sum due on the premium note, which is pleaded as a counter-claim. Defendant appeals from the judgment. A bill of exceptions was settled, and a motion for a new trial was denied. The findings of fact are as follows: "That the defendant made, issued, and delivered to the plaintiff its insurance policy as set forth in the complaint herein and that the application for said insurance policy, signed by the plaintiff, is the application set forth in said complaint, and attached thereto as part thereof, and marked 'Exhibit B.' That the following answer to the following question in the said application was at the time the same was written untrue and false, to-wit: 'Question. Are your lands incumbered? If yes, for how much? Answer. Three hundred dollars.' That the said lands were at the same time incumbered for an amount exceeding one thousand dollars; that the following answer to the following question in said application was at the same time untrue and false, to-wit: 'Question. Are the crops on the above-described land mortgaged or otherwise incumbered? If so, for how much? Answer. No.' That the crops on the said land were in fact at said time mortgaged for a greater sum than seven hundred dollars; that one Strong was the agent of the defendant for the purpose of taking applications for hail insurance in Grand Forks county, Dak., and forwarding the same to the defendant company at the time

this application was taken; that the answers to said questions were inserted in said application by the said Strong; that the plaintiff answered truthfully each of said questions, but that said questions were erroneously and incorrectly inserted in said application by said Strong before the signing of said application; that after the said application had been written out the same was signed by the plaintiff without reading the same, or requesting the same to be read to him; that at same time plaintiff could readily read and write; that defendant company did not have any knowledge or notice of the acts of Strong or of the plaintiff in the making out of said application, and did not know that said application had been read by or in the hearing of said plaintiff, except such notice and knowledge as would be imputed to the defendant by the notice to and knowledge of Strong, its said agent, who had notice and knowledge of said facts; that upon the receiving of the said application the defendant accepted the same, and sent its policy directly to the plaintiff, with a correct copy of the application indorsed upon the back of said policy, and that in issuing said policy defendant relied solely upon the application in the form as it actually existed, and in the form in which it was signed by plaintiff; that the plaintiff knew that said Strong could not issue not issue policies, and knew that the defendant would act upon the application in the form in which he signed it, and that the said Strong would send the application as it existed to the company, and also knew that the company would send the policy, in the event that they accepted the application, directly to the plaintiff; that the plaintiff received said policy, with a copy of the application indorsed on the back thereof, during the latter part of May, 1885, and retained the same up to the date of bringing suit, and did not at any time before or after the loss make any objection to the application as copied on the back of said policy, or ask any corrections to be made in said application; that the plaintiff read a portion of his policy soon after the same was received, and discovered that the property was not correctly described, and thereupon took the same to an attorney, and took advice upon the validity of the policy on account of the said misdescription; that the plaintiff never made

any proof of loss which was required by the terms of said policy; that the defendant has waived proofs of loss by refusing to pay the said loss upon other grounds, and by a failure to make objection promptly and specifically upon the ground of failure of proof; that on the 15th and 28th days of July, 1885, the said 100 acres of wheat was damaged by hail, and that the plaintiff's loss sustained thereby is in the sum of $1,375.04; that there is due the defendant upon the promissory note described in the counter-claim the sum of $98.50; that the plaintiff made and sent by registered mail to the defendant a statement of each of said losses, on the 15th and 28th days of July, 1885, not sooner than five nor later than ten days thereafter, respectively; and that said wheat at the time of each of said losses was yet green and not ripe; that the defendant has never made any written request that the plaintiff submit the amount of the losses, or any of them, to arbitration, but that the plaintiff, on or about the 7th day of August, 1885, made to the defendant a written request that the amount of said losses be submitted to appraisers, but that said defendant neglected to submit said losses to appraisers, and did not comply with the written request of said plaintiff in that regard; that the loss herein sued upon occurred in July, 1885; that this action was not commenced against the defendant until March, 1888; that there is no notice upon the face of the policy calling the plaintiff's attention to the fact that a copy of the application is indorsed upon the back thereof, nor did plaintiff have actual notice that a copy of said application was indorsed upon the back of said policy until after this suit was brought; that immediately upon signing said application the same was delivered by the plaintiff to the said Strong, and by him forwarded to the defendant; that, at the time of the service of defendant's answer to the plaintiff's complaint in this action, the defendant had full knowledge of all the facts constituting the grounds of forfeiture of said policy and with such knowledge, by the way of counter-claim in their said answer, defendant seeks to recover from the plaintiff the amount of the premium note given by said plaintiff as a consideration for the issuance of said policy, and by so doing has waived all forfeiture of said policy."

The appellant assigns the following errors: "(1) The court erred in permitting the plaintiff to testify, over the objection of the defendant, that he answered each of the questions in the application truthfully, and that Strong falsely inserted the answers in the application, and in allowing plaintiff to vary the terms of a written application by oral testimony. (2) The court erred in permitting the plaintiff to answer the following question over the objection of the defendant: 'Question. Now, you may state if anything was said by you to Mr. Strong on this subject of incumbrance upon your land prior to making out and signing this application?' (3) The court erred in denying defendant's written motion for judgment upon the evidence. (4) That upon the findings of the court the plaintiff is not entitled to judgment, and the court erred in rendering judgment upon said findings. (5) The court erred in denying defendant's motion for a new trial."

We have carefully examined the testimony contained in the record, and find that the findings of fact as made by the trial court are amply sustained by the evidence. The policy provides that "no suit or action for the recovery of any claim for loss or damage under this policy shall be sustained in any court of law or equity unless such suit or action shall be commenced before the expiration of six months next ensuing after the loss." This action was not brought within the time limited, and would have been barred at common law for that reason, but the stipulation limiting the time is void under a provision of our Civil Code. Comp. Laws, § 3582. There is no substantial conflict in the testimony. The main questions arise upon evidence not controverted, and upon the facts as found by the trial court. Do such facts and such evidence warrant the judgment in plaintiff's favor? This question is far from being one of easy solution in view of the irreconcilable conflict found in the authorities bearing upon the various points involved.

It is conceded that the answers contained in plaintiff's written application for the insurance, which relate to incumbrances upon the land and upon the crop insured, are untrue; but the learned counsel for the respondent contends that such answers relate to matters wholly immaterial, and, as counsel claims, do

not constitute substantial warranties. It certainly is not apparent to this court that representations as to incumbrances, which in fire risks are conceded to be important and material, are equally so when the insurance is a hail risk. Nevertheless we must hold that the parties have a right to make a stipulation to the effect that any given representation as to a matter of fact made as a basis for the contract shall be deemed a warranty, and a material part of the contract. The application declares that "the statements made by me, and answers to questions above given, are true, and a warranty on my part, and are the basis upon which I ask hail insurance by the Dakota Fire & Marine Insurance Company on the crops herein described." The policy in question expressly refers to the above in the following language: "Assured's application, of even number and date herewith, on file in the office of the company in Chamberlain, Dakota, is hereby referred to as a part hereof, and is a warranty on the part of the assured, and the basis upon which this insurance is written." The statements contained in the application with respect to the incumbrances are therefore expressly made a part of the contract. The policy also declares "that any misrepresentation or false statement or concealment of facts in the application shall operate to render the policy void." Under these clear stipulations of the contract it does not, in our opinion, matter whether the representations in the application as to the incumbrances on the property are or are not material in fact. If not intrinsically material, they have been made so by express agreement of the parties; and that agreement, under the provisions of the Code, must prevail. Section 4163, Comp. Laws, reads as follows: "A policy may declare that a violation of specified provisions thereof shall avoid it; otherwise the breach of an immaterial provision does not avoid the policy." See id. § 4159, and Wood, Ins. § 137.

But it is further contended by respondent's counsel that defendant is estopped from claiming a forfeiture of the policy on account of the false answers as to incumbrances contained in the application for the reason that such answers were wholly unauthorized by the plaintiff, and were falsely written into the application by E. E. Strong, the soliciting agent, despite the

fact that he (Strong) was fully and truthfully informed by the plaintiff as to the incumbrances. The fact of deception practiced by the agent is not questioned; but who shall shoulder the consequences of such deceptions? is a question much mooted in the adjudicated cases, and one which has given this court no little difficulty. For whom was Strong acting, and who was he representing, when soliciting and taking plaintiff's application for the insurance? The earlier cases held quite uniformly that, where the insured signed a written application as a basis for the contract of insurance, he adopted all of its contents, and was bound by it, and that if, by his request or permission, the solicitor of the insurance acted for him in filling out the application, such solicitor was so far forth the agent of the insured, and not the agent of the company. Some courts still adhere to this holding, but the decided weight of authorities is to the contrary. Wood, Ins. § 139, and authorities cited in note 1; Miller v. Insurance Co., 31 Iowa, 216; Insurance Co. v. Eddy, 55 Ill. 213; Insurance Co. v. Wilkinson, 13 Wall. 222; Insurance Co. v. Mahone, 21 Wall. 152; Eams v. Insurance Co., 94 U. S. 621; Rowley v. Insurance Co., 36 N. Y. 550; May, Ins. § 143, and authorities cited; Kausal v. Association, 31 Minn. 17, 16 N. W. Rep. 430. In the case last above cited the supreme court of Minnesota uses the following language, which voices the result of the later authorities: "Agents for an insurance company, authorized to procure applications for insurance, and to forward them to the company for acceptance, must be deemed the agents of the insurers in all that they do in preparing the application, or in any representations they may make as to the character or effect of the statements therein contained. Hence, when such agent, either by his direction or direct act, makes out an application incorrectly, notwithstanding all the facts are stated to him by the applicant, the error is chargeable to the insurer, and not to the insured. This is the rule in case of 'mutual' as well as 'stock' or 'proprietary' companies. The rule is not affected or changed by a stipulation inserted in the policy subsequently issued that the acts of such agent in making out the application shall be deemed the acts of the insured, and not of the insurer. Such stipulation does not convert acts

done for the insurer into the acts of the insured. The admission of the verbal testimony to show that the application was filled up by the agent of the company, and that the facts were correctly stated to him, but that he, without the knowledge of the insured, misstated them in the application, is not in violation of the rule that verbal testimony is not admissable to vary a written contract. It proceeds upon the ground that the contents of the paper was not the statement of the applicant, and that the insurance company, by the acts of their agents, is estopped to set up that it is the representation of the insured." A line of cases hold that, where the solicitor of insurance is expressly limited in his authority, in the manner of taking the application, and where such limitation is brought home to the knowledge of the insured at the time the application is signed, the insured is bound by the limitation. Appellant's counsel labor to show that this case comes within the principle of such cases. We cannot assent to this view of the facts. It is true that defendant's agent, who took the risk in question, had only the authority to solicit the risk, and procure and forward the application of the plaintiff, and that the plaintiff fully understood that such was the nature and limit of the agent's powers in the premises. But there is nothing in this case tending to show that there was any restrictions whatever upon the agent's authority in the matters intrusted to his charge, viz., the matter of soliciting and procuring the application for the insurance in question. As to such duties the agent had, *prima facie*, plenary powers co-extensive with the matter intrusted to him, and such powers cannot be narrowed by limitations not communicated to the insured. See May, Ins. § 144, note 1; Miller v. Insurance Co., 31 Iowa, 232.

The defendant sent its policy direct to the plaintiff, and the latter had possession of it some months prior to the loss. A copy of the application, containing the false answers as written by the agent, was indorsed upon the back of the policy, but such indorsement was not referred to in the body of the policy. The trial court found that the plaintiff did not at any time object to the answers as stated in the application, or request the defendant to correct the same. The evidence, however, is con-

clusive that the plaintiff did not in fact know that a copy of the application was indorsed upon his policy, nor discover the errors in the application respecting the incumbrances, until the day preceding the trial. Under these circumstances, the question arises whether the plaintiff, despite the contrary fact, is not conclusively presumed to have read and become acquainted with the contents of the policy, including the copy of his application for insurance indorsed on the policy. If such is the presumption of law, then the further question arises whether the plaintiff is guilty of such laches in not seeking a correction or reformation of the contract as will defeat his recovery upon the policy. It is well settled that, where an insurance policy is delivered to the applicant, he is presumed to know its contents, and cannot evade a forfeiture for a violation of its provisions on the ground that he never read it. Wood, Ins. § 503; Smith v. Insurance Co. (Dak.) 43 N. W. Rep. 810; Hankins v. Insurance Co. (Wis.) 35 N. W. Rep. 34; Cleaver v. Insurance Co., (Mich.) 32 N. W. Rep. 660. And where a paper is physically annexed to the policy, or indorsed thereon, and adopted in the policy as a part thereof, the same will form a part of the insurance contract. Wood, Ins. § 137, notes 1, 2, 3; also § 149, id.; Murdock v. Insurance Co., 2 N. Y. 210; Duncan v. Insurance Co., 6 Wend. 488; Emerson v. Murray, 4 N. H. 171; Roberts v. Insurance Co., 3 Hill, 501. The case of Insurance Co. v. Fletcher, 117 U. S. 519, 6 Sup. Ct. Rep. 837, very closely resembles the case at bar as to the feature under consideration. Mr. Justice Field, in delivering the opinion of the court, said: "There is another view of this case equally fatal to a recovery. Assuming that the answers of the assured were falsified, as alleged, the fact would be at once disclosed by the copy of the application annexed to the policy, to which his attention was called. He would have discovered by inspection that a fraud had been perpetrated not only upon himself, but upon the company, and it would have been his duty to make the fact known to the company. He could not hold the policy without approving the action of the agents, and thus becoming a participant in the fraud committed. The retention of the policy was an approval of the application, and of its statements." Citing Insurance Co. v.

Neiberger, 74 Mo. 167; Richardson v. Insurance Co., 46 Me. 394. The application was made a part of the policy in express terms, and a copy thereof was indorsed upon the policy. This juxtaposition of the application with reference to the policy makes the application a part of the policy, within the rule established by the authorities above cited. Upon receiving the policy with copy indorsed thereon, the plaintiff is legally chargeable with notice and knowledge of the entire terms of the insurance contract, and he is estopped from denying such knowledge. It was the plaintiff's duty to have taken steps at once, upon receiving the policy, to have the same corrected or rescinded. He did not do so, and, by his silence when required to speak, he became constructively a participant in the original fraud of the agent, and thereby forfeited his right under the policy; and, unless defendant has waived such forfeiture, the plaintiff must fail to recover.

Applying the law to the facts, the policy in question was defeated in its very inception; and, by reason of plaintiff's silence as to the fraud, the policy never attached to the risk. Comp. Laws, § 4164. But a forfeiture may be waived by a party entitled to its benefit. In this case there is no claim of an express waiver. The trial court found "that, at the time of the service of defendant's answer to the plaintiff's complaint in this action, the defendant had full knowledge of all the facts constituting the grounds of forfeiture of said policy, and, with such knowledge, and by way of counter-claim in its said answer, defendant seeks to recover from the plaintiff the amount of the premium note given by said plaintiff as a consideration for the issuance of said policy, and by so doing has waived all forfeiture of said policy." We think this conclusion of the trial court is correct. To counter-claim upon a premium note is equivalent to an independent action by the defendant against the plaintiff to recover the stipulated consideration for carrying the risk. After full knowledge that the claim was fraudulent in its inception, and consequently that the policy was voidable at the option of the company, the latter saw fit to make demand of its premium by a counter-claim in the answer. It is well settled by the adjudications that the receipt of premium after knowledge of forfeiture operates to waive the

forfeiture, also that an extension of time upon a premium note after the due-day of the note has the same effect upon a forfeiture caused by non-payment of the note at maturity. We think that this case comes within the principle of these cases. The demand for judgment upon a note given for the premium is a formal recognition by the defendant, made after full knowledge of the facts which would defeat the policy in its inception, of the original binding force of the contract. The assertion of the demand assumes the original validity of the policy, and such assumption is made after knowledge that the policy was voidable for a fraud which would defeat both the note and the policy at defendant's option. We hold that this waives the forfeiture caused by the silence of the plaintiff as to the false answers in the application.

The case would have been widely different if the defendant had elected to stand only on the other defense pleaded in the answer to the complaint. The defense that the plaintiff sued too late, or that the requisite notice of loss, or preliminary proofs of loss. were not furnished, are all and singular such defenses as do not go to the original validity of the note and policy, and, whether any and all of such defenses are true or untrue, would not affect the validity of the note or the policy as original contracts. It follows that pleading the counter-claim would have been entirely proper, if set up only in connection with the last-mentioned defenses, and would not have operated to estop the defendant of availing itself of such defenses. But the defendant has not seen fit to pursue that course, and must accept the consequences of the election it has made to sue for the premium with full knowledge of the forfeiture of the policy for fraud in its inception.

The policy provides that the loss will be paid according to the terms and conditions of the policy, "but not until requisite proofs, duly certified and sworn to by assured and one disinterested party, are received at the office of the company in Chamberlain, Dakota." The insurance was for the term of "six months, from the 6th day of May, 1885, at noon, to the 6th day of November, 1885, at noon." The policy further provides: "All loss and damage under this policy shall be due and payable

between the 20th day of November and the first day of December of the year in which the loss occurs." The fourth finding of fact is as follows: "That the plaintiff never made any proof of loss which was required by the terms of said policy." The fifth finding is as follows: "That the defendant has waived proofs of loss by refusal to pay the said loss upon other grounds, and by a failure to make objection promptly and specifically upon the ground of failure of proof." It is elementary that where an insurance policy requires the insured, in the event of a loss, to furnish certain preliminary proofs of loss, a failure to do so, unless waived, will operate to defeat a recovery under the policy. The time within which proofs are to be furnished is not stated, in terms, in the policy under consideration. Such proofs must therefore, under the law, be furnished within a reasonable time, in view of all of the circumstances of the case. Defendant's counsel claims that the time within which the proofs are to be furnished is practically settled by the policy, in view of the fact that all claims for damages become "due and payable" between November 20th and December 1st of the year in which the loss occurs. This position seems to be reasonable and well taken. It would certainly be unreasonable to hold that the defendant who is entitled to receive the proofs of loss before paying the loss, should not be entitled to receive such proofs until subsequent to the date when the loss would be absolutely due and payable by the terms of the policy. But aside from this, in view of the perishable nature of the insured property, we should hold, under a hail insurance policy upon growing grain which requires proofs to be furnished as a condition precedent to the payment of the loss, that such proofs must be furnished within a reasonable time after the loss, and within time to enable the company to examine the property, and determine upon the amount of its liability, if liable, before the grain disappeared as a result of natural causes. In this case the hail-storms which did the damage occurred in the month of July. It would be obviously unreasonable to hold that the time for furnishing proofs of loss could be prolonged after November 20th of the same year. After that date the proofs would be of no value; for it would then be too late in the season to investigate the loss

with any reasonable prospect of reaching a sound conclusion as to the fact or as to the extent of any loss which might have occurred in the preceding month of July. We therefore hold that the time for furnishing proof of loss in this case expired at or prior to November 20, 1885.

It is not claimed that the defendant, either expressly or by conduct, waived the proofs of loss, or that anything was said or done by any of the defendant's agents calculated to mislead the plaintiff, or put him off his guard as to the duty of furnishing the required proofs of loss until more than four months after the loss occurred, and not until December, 1885, at which date the letters were written which are now claimed as a waiver. The letters are as follows:

"Exhibit A. Larimore, Dakota, Dec. 16, 1885. The Dakota Fire and Marine Insurance Co., Chamberlain—Gentlemen: At the instance of Mr. W. E. Johnson, I write you in reference to his policy No. 514 for hail insurance in your company. Mr. Johnson has complied with the conditions imposed by your agent when here, and sent in his papers quite a long time ago. He also saw your general manager, Mr. English, in Grand Forks, about November 10th last, who promised to let him hear from the company upon his return. No word has yet been received by Mr. J., and the time, December 1st, wherein the policy promised final settlement for any loss shall be made, has passed. Mr. Johnson is thus kept in ignorance of your intentions, and is without a word of any kind from you. He desires me to say, if settlement for his loss is not made before January 1st prox., he will enter suit to bring about the same. Very respectfully, W. N. ROACH."

"Exhibit B. Chamberlain, Dakota, Dec. 22, 1885. W. N. Roach, Esq., Larimore, Dakota—Dear Sir: Replying to yours of the 16th inst. in regard to loss under policy 514, issued to W. E. Johnson, we beg to say we are in possession of some facts in regard to this insurance which, unexplained, would lead us to reject the loss, and resist its payment in court, if necessary, though this position we do not yet take, and hope we shall not be compelled to. Will give you definite answer as soon as, in due course of mail, we can receive answer to letter already

written for further information in reference to this case. We do not ask you to wait on us, but suggest that, upon receipt of information above referred to, if our attorney advises us that we are probably liable, or even that he is in doubt as to our liability, we shall at once adjust and pay the loss. Yours. truly, A. G. KELLAM."

Exhibit B is relied upon as the sole evidence of waiver. It was written more than four months subsequent to the loss, and more than one month, under our construction of the policy, after the time limited for furnishing the proofs had expired. The record does not disclose a case where defective proofs of loss have been forwarded to the company, and retained without objection, nor a case of mere delay, followed by a tardy furnishing of the proofs, but a case of an entire failure to make out or furnish the stipulated proofs within the time, or at all. Plaintiff's counsel cite Brink v. Insurance Co., 80 N. Y. 108; Titus v. Insurance Co., 81 N. Y. 410; O'Brien v. Insurance Co., 52 Mich. 131, 17 N. W. Rep. 726; Insurance Co. v. Kranich, 36 Mich. 289, and other authorities, sustaining the now well-established doctrine that after as well as before a breach in the condition of a policy of insurance requiring proofs of loss the company may waive the forfeiture caused by such breach either by "an express waiver, or by acts or conduct from which an intention to waive is expressly inferable." Brink v. Insurance Company, *supra*. And such waiver can be made without a new consideration, and by conduct which does not amount to an estoppel. Id. But in all of the cases cited, and in all others examined by the court where a waiver of forfeiture caused by non-service of proofs of loss has been held sufficient, there has been present the element of repudiation by the company of all liability under the policy for some reason other than the omission to furnish proofs of loss. Where, aside from non-production of proofs of loss, the company repudiates all liability, it would be useless and unavailing to furnish the proofs; and in such cases the insured is excused for their non-production. We are of the opinion that § 4179, Comp. Laws, declaring that "delays in the presentation to an insurer of notice or proof of loss, is waived, if caused by any act of his, or if he omits to make

objections promptly and specifically upon the ground," does not change or enlarge the well-settled rule at common law, and has no application to a case of non-service of proofs of loss. We are therefore of the opinion that the trial court was mistaken in assuming that plaintiff's omission to serve proofs of loss was waived by defendant's failure to make objection promptly and specifically on that ground.

The remaining question is this: Has defendant waived the forfeiture caused by the omission to furnish proofs of loss by its acts or conduct since the forfeiture occurred? The position is taken by plaintiff's counsel that the correspondence between plaintiff's agent and defendant, found in Exhibits A and B, contains evidence of the waiver of the forfeiture caused by non-service of the proofs of loss. We think counsel are correct in this position. In the letter of December 22, 1885, allusion is made to certain facts within defendant's knowledge which, if unexplained, would lead defendant to reject the loss, and resist its payment in court. What particular facts are here referred to does not appear by the letter, or elsewhere in the record. But it is quite clear that such facts could have nothing to do with the non-service of proofs of loss. No letter of inquiry would have been necessary to elicit further information concerning the fact of non-service of proofs of loss. That fact was well known to defendant when the letter, Exhibit B, was written, and was of a nature not susceptible of explanation, but was a fact complete in itself without explanation. On December 22d, when defendant's letter was written, it was already too late, under the policy, to furnish the proofs of loss, and none had been furnished. This default was fatal to plaintiff's claim, if defendant saw fit to insist upon it. Whether this forfeiture would or would not be insisted upon as an excuse for non-payment of the loss was a question turning upon defendant's views of duty and of business policy, and was not a matter concerning which defendant would need new light or information to be sought for and obtained by correspondence. Again, it appears from defendant's letter that the defendant was intending to submit the question of its liability to its attorney as soon as, in due course of mail, it should receive cer-

tain information for which it had written. But, as we have seen, further information was not required to enable an attorney to form an intelligent opinion as to the question of defendant's liability, so far as the non-service of proofs of loss would affect the question of liability.

Our conclusion is that defendant had written for, and was in quest of, information relating to some matters in regard to the insurance other than the non-service of proofs of loss. This view is strengthened by the unqualified promise contained in defendant's letter to "at once adjust and pay the loss" if the information already written for should turn out to be of a nature which should create a doubt of defendant's non-liability in the mind of its attorney. But it appears by the letter of December 22, 1885, that defendant was at that time already in "possession of some facts in relation to this insurance" which would lead the defendant to "reject the loss and resist its payment in court," unless such facts should be explained by information already written for, and expected to reach the defendant by due course of mail, if it came at all. Furthermore, by this letter defendant promised to give plaintiff a definite answer "in reference to the case," as soon as, "in due course of mail," the defendant received an answer to its letter of inquiry. Suit was not brought upon the claim for more than two years after the date of defendant's letter, but in that interval of time the defendant did not see fit to communicate with the plaintiff, nor send its promised "definite answer" to plaintiff's demand of payment. From defendant's long silence, we infer that its original conclusion to reject the claim, which had been reached in December, 1885, had not been changed by any fact that came to its knowledge after that date, in reply to its letter of inquiry or otherwise. Briefly summed up, the position is as follows: Defendant, on or prior to December 22, 1885, had conditionally decided to reject the claim on certain grounds which it did not disclose to plaintiff, but which grounds had nothing whatever to do with the non-service of proofs of loss, and on said date defendant refused payment of the claim on such other grounds. The refusal to pay on other grounds brings the case within the rule of the authorities already cited. The court is of the opin-

ion that the whole tenor of the letter of December 22d, including defendant's conditional promise to "adjust and pay the loss," was calculated to induce the plaintiff to believe, and did induce him to believe, that the forfeiture as to proofs of loss would not be insisted upon by the defendant. This introduces an element of estoppel, and the court hold that defendant is estopped by its letter from setting up the forfeiture. Good faith on defendant's part required that defendant should have either remained silent, or informed plaintiff that it would, if sued, insist upon this forfeiture, if such was in fact, its purpose. By so doing, plaintiff might have avoided the large expense incident to the prosecution of a suit based upon the loss. Plaintiff's letter of December 16th was a demand of payment of the loss, and contained a distinct notification to defendant that suit would be entered on the claim if it was not settled before January 1, 1886. If defendant intended to allege the then existing forfeiture as to proofs of loss as a defense to an action upon the policy, good faith demanded that it should inform the plaintiff of its purpose, or keep silent. It was bad faith on defendant's part to so couch its reply to plaintiff's letter as to lead plaintiff to believe that this particular defense, which then existed, would not be pleaded. This brings the case within the rule of Brink v. Insurance Co., *supra*. It follows that the defendant is estopped from pleading the forfeiture as to proofs of loss. The judgment should be affirmed. It is so ordered. All concur.

CORLISS, C. J., having been of counsel, did not sit; RODERICK ROSE, judge of the fifth judicial district, sitting by request.

Rehearing denied.

THE STATE OF NORTH DAKOTA *ex rel.* E. O. FAUSSETT, Plaintiff and Respondent, *v.* THOMAS J. HARRIS, as County Auditor of Ransom County, North Dakota, and L. B. CHAMBERLAIN, W. H. WHITE, F. A. BLOOD, T. J. WALKER, and JAMES K. BANKS, as Board of County Commissioners of Ransom County, North Dakota, Defendants and Appellants.

1. **Office of County Assessor Abolished — Office of District Assessor Created.**

   Section 30 of the revenue law, approved March 11, 1890, abolished the office of county assessor, and created the new office of district assessor the instant the statute took effect.

2. **Same; Same; Commissioners May Fill Vacancy Existing Prior to Election.**

   The vacancy in said office which the county commissioners are authorized to fill by section 30 is the vacancy existing before the election of any officer to fill the office, as well as a vacancy created after the office has once been filled.

3. **Office Not Established by Constitution May be Abolished at any Time.**

   Section 10 of the schedule to the constitution, providing that "the county and precinct officers shall hold their offices for the term for which they were elected," does not prohibit the legislature from abolishing the office of county assessor before the expiration of the term of the county assessor in office when the constitution took effect, the same being a legislative office.

(Opinion Filed May 13, 1890.)

APPEAL from district court, Ransom county; Hon. W. S. LAUDER, Judge.

Writ of *mandamus* granted the plaintiff, and defendant appeals.

Geo. F. Goodwin, attorney general, for appellants, argued: That the revenue law of 1890 abolished the office of county assessor; created the office of district assessor; as soon as the act went into effect there was a vacancy in the office of district assessor, which could be filled by appointment: Mechem on Public Officers, § 132; Driscoll v. Jones, 44 N. W. Rep. 726; People v. Fisher, 24 Wend. 219, and that the revenue law was not in this

particular in conflict with section 10 of the schedule of the state constitution: State v. Telbord, 1 Nev. 240; State, *ex rel* v. Ransom, 70 Mo. 78; State v. McGovney, 92 Mo. 428.

L. W. Gammons, with whom were Austin & Harper, for respondent, cited: 9 How. 242; 44 N. W. 726; 11 Wend. 132; 12 Cal. 378; 5 Kan. 426; 6 Cow. 643; 9 id. 640; 2 Denio, 281; 11 Wend. 151; Broom, Legal Maxims, 414. "An elective office which has never been filled cannot be vacant:" 91 N. Y. 634; 7 Pac. Rep. 261.

CORLISS, C. J. A peremptory writ of *mandamus* having been awarded the relator in the trial court, defendants bring the case before this court by appeal. Relator was county assessor of Ransom county at the time of the adoption of the constitution of this state. His term of office as fixed by the territorial laws would not expire until January, 1891. On the 18th day of April, 1890, the board of county commissioners of Ransom county, claiming to act under the provisions of § 30, of the revenue law, approved March 11, 1890, appointed district assessors for each of the five commissioner districts of that county; and these appointees were about to enter upon the duties of their office when these proceedings were instituted to compel the county auditor and board of county commissioners to furnish relator the necessary books, blanks, etc., to make aesessment of property in the county, they having refused to so supply him on proper demand. They seem to justify their refusal on the ground that by the revenue law the office of county assessor was abolished, and that, since the appointment by the board of an assessessor for each of the commissioner districts of the county, these assessors are the only officers having any authority under the law to make the assessment that was formerly made by the county assessor. Relator first claims that the revenue law did not contemplate the appointment of any assessor under its provisions before the expiration of his term of office. But was there any such office left to fill after the enactment of this statute? Section 30 of that act provides for the office of district assessor. All counties and parts of counties, not organized into civil townships, are to be divided into assessor districts, which

shall be the same as the commissioner districts of the several counties. It was over the territory of the different counties not embraced in any organized civil township that the jurisdiction of the county assessor extended. It swept over all such territory within the county. But under § 30 of the revenue law the same territory is subdivided and placed under the jurisdiction of several assessors, each officer having a separate district, whose boundaries coincide with those of a particular commissioner district. It is therefore obvious that the two offices cannot co-exist. There cannot be two officers each having authority to assess the same property as the basis of the same tax. One officer might be authorized to assess for one tax, and another for a different tax. But the assessment of the county assessor, and the assessment of the district assessor are each the basis of all taxes, and therefore of the same taxes. In cases of difference as to values, and there would be many such cases, which assessment would control? Which would be the valid assessment? Would each be valid in part, and, if so, what part?

These inquiries show into what inextricable confusion the collection of the public revenue would be thrown should it be decided that these two necessarily inconsistent offices could coexist. The office of district assessor, created by the revenue law, displaces the office of county assessor, because the two cannot stand together. But it is said that this portion of the revenue law was not to take effect until after the expiration of the term of office of the county assessors in office when the state was admitted into the Union. By an emergency clause, the act went into operation upon its approval. There is nothing in the language of the act to indicate that the provision relating to the office of district assessor should be held in abeyance until the expiration of the term of office of the county assessors. The act in its full scope became a law upon its approval. It was true that, a new office having been created, no district assessor could have been placed in the office to exercise its functions until after the fall election, had not the statute in express terms provided that boards of county commissioners might by appointment fill any vacancy in the office. We are here met by the ar-

gument on the part of the relator that this refers only to such a vacancy as may exist after the office has been once filled by election; and in this connection we are referred to § 1385 of the Compiled Laws, which enumerates the events which cause vacancies in the office, and it is urged that this section is a legislative definition of the word "vacancy," and that the legislature must be presumed to have used it in the sense of this definition when they employed it in the revenue law. How it can be said that that section is a definition of the word it is difficult to understand. Its full scope is the statement of causes which will create vacancy. It does not purport to exclude all other causes. Certainly, the legislature may provide that a vacancy in fact shall, in contemplation of law, be a vacancy to be filled in a manner prescribed. While we hold in mind the statute enumerating the cases in which a vacancy may exist, we must not lose sight of the fact that the legislature intended, as is shown by the emergency clause, that the revenue law should take effect in time to make it possible for the tax proceedings for 1890 to be initiated under its provisions. They intended that all of its machinery should go into immediate operation; that the assessors whose offices it created should make the assessment under it for this year. It was with this design before them that they provided for the filling of the vacancy in that office, knowing that if the district assessor was to make the assessment there would be a vacancy in the office until it could be filled by election in the fall. It was such a vacancy, as well as the vacancy which might after election be created under the statute, that the legislature referred to when they declared that any vacancy might be filled by the county commissioners. This interpretation respects the will of the legislature, evinced by the emergency clause, that the new system should go into effect in time to permit all the tax proceedings for 1890, from the first steps of assessment, to be taken under that act; and it would be a strained construction to hold that the initiation of the tax proceedings under that system was to be left to an officer acting under the old system, when by prescribing the manner of filling a vacancy the legislature had made it possible to fill the new office it had thus created in time for the officers so appointed to

make the assessment this year. The decision in Driscoll v. Jones, (S. Dak.) 44 N. W. Rep. 726, places the same interpretation on the word "vacancy" under very similar facts, and under the same statute relied upon by relator to support his contention. See, also, Walsh v. Com., 89 Pa. St. 419; State v. Boone Co., 50 Mo. 317; Stocking v. State., 7 Ind. 329; State v. Irwin, 5 Nev. 111; and concurring opinion of Thornton, J., in Rosborough v. Boardman, 67 Cal. 116, 7 Pac. Rep. 261.

But it is further insisted by relator that section 10 of the schedule has made the office of county assessor a constitutional office, and has therefore placed the office beyond the power of the legislature during the balance of his term. The portion of the section material to this point provides that, notwithstanding the adoption of the constitution, "the county and precinct officers shall hold their offices for the term for which they were elected." It will be observed that this declares no settled policy of the state with reference to these offices. It does not purport to regulate permanently the term of any office, or permanently place that term of the office itself beyond the control of the legislature. The office is not imbedded in the constitution, as is the case with respect to the offices named in section 173 of the constitution. These are constitutional offices. The other offices, including that of county assessor, are offices which, under the express provisions of section 173, the legislature may abolish by creating other offices to take their place. "The legislative assembly shall provide by law for such other county, township, and district officers as may be deemed necessary," etc. The most that can be claimed, and, in fact, all that is claimed, by relator, is not that the office or term of office is permanently removed from legislative interference, but that the sovereign people have hedged about with constitutional protection these particular persons holding the office of county assessor at the time we attained the dignity of self-government. Sovereign states are not wont to protect particular persons from removal from office by the legislature during their term of office, and yet leave the office and the right of future incumbents entirely to the control of the law-making power. Unless the office is permanently removed from legislative control—unless all incumbents are to be

protected—it cannot be inferred that it was the will of the people to single out the first incumbent, and save him alone from removal. Finding, as we do, that the office of county assessor may be abolished at any time after the expiration of the term of the incumbent in office at the time of statehood, we cannot assent to the view that section 10 of the schedule has placed the office beyond the power of the legislature for the balance of the unexpired term when the constitution took effect. The case of State v. Tilford, 1 Nev. 240, is directly in point. The question there presented was as to the continuance in office of the members of the board of education for Storey county, whose term of office had not expired when the state of Nevada came into the Union. The legislature had abolished the office by conferring all the powers of that board upon other officers. But it was urged, as in the case before this court, that the office was, for the unexpired term, placed by the constitution beyond the reach of the legislature, the constitution providing as follows: "All county officers under the laws of the territory of Nevada, at the time when the constitution shall take effect, * * * shall continue in office until the first Monday of January, A. D. 1867, and until their successors are elected and qualified." Const. Nev. art. 17, § 13. The court said: "It may be contended that, as the constitution retains all county officers in office until 1867, it amounts to a prohibition on the legislature from abolishing any county office which was in existence when the constitution was adopted, before January, 1867. A sufficient answer to that proposition is that the constitution provides in section 25 of article 4 that 'the legislature shall establish a system of county and township government, which shall be uniform throughout the state.'"

Reasoning upon the same line, we say that the constitution has, in express terms, vested in the legislature the power and made it their duty to provide by law for such other county officers than those named in section 173 (and county assessors are not therein named) as may be deemed necessary; and section 10 is to be read with the qualification that the officer shall hold the office subject to the power of the legislature to abolish the office. It was the thirteenth section of the seventeenth

article of the Nevada constitution which it was insisted continued the members of the board of education in office against the act of the legislature which destroyed their office. Said the court: "We hold that the general language of the thirteenth section of the seventeenth article is subject to this modification: that it provides for the continuance in office of all county officers whose offices may not be legally abolished before the first Monday of January, 1867." We hold that all provisions of the revenue law went into operation at the same time, i. e., March 11, 1890; that that law abolished the office of county assessor by creating the new office of district assessor; that there was a vacancy in that office, within the meaning of the law, at the time the board of county commissioners of Ransom county made the appointment of district assessors; that the assessment must be made by the district assessor, and not by the relator, as the office of county assessor has been destroyed, and he is consequently no longer a public officer. He cannot hold and exercise the functions of an office that has ceased to exist. The order and judgment appealed from are reversed. All concur.

RED RIVER VALLEY BANK, Plaintiff and Appellant, *v.* GEORGE R. FREEMAN, Defendant and Respondent.

1. Assignments for Benefit of Creditors — Reservation of Exemptions.

Under the statute regulating assignments for the benefit of creditors, defendant in due form made a voluntary assignment of all of his property for the benefit of his creditors, "except such property only as is exempt by law from attachment and execution, as provided by sections 323, 324 and 325 of the Code of Civil Procedure." In proper time defendant filed a duly-verified inventory, showing a schedule of his property claimed by him as absolutely exempt under section 323, id.; also a schedule of his personal property, valued at $1,499.77, claimed as additional exemptions under section 324, id.; and a final schedule of all of his property not claimed as exempt property. *Held*, that such assignment was not *prima facie* fraudulent in law, under section 2023 of the Civil Code; nor void on its face, as against non-assenting creditors, under subdivision 3, § 2030, id.

2. Same; Same; Debtor Entitled to "Additional Exemptions."

Held, further, that a debtor making such assignment, who claims additional exemption of personal property to an amount not exceeding $1,500 in value, is entitled to such exemptions; and, when the debtor's duly-verified inventory embraces a schedule of such additional exemptions, that such inventory and schedule, in the absence of fraud, is sufficient, *prima facie*, as a claim by the debtor of such additional exemptions.

3. Same; Duty of Assignee.

Held, further, that, under the statute regulating such assignments all property not exempt from execution passes to the assignee, and that it becomes his duty, as assignee, to follow and take into his possession all of the debtor's non-exempt property, not voluntarily turned over to him by the assignor. Such voluntary assignment creates a trust, and district courts, sitting as courts of equity, have, under the statute, and by virtue of their inherent powers, jurisdiction over the subject-matter of the trust; and such courts will, on proper application, put forth their equity powers to aid the administration of the trust.

4. Same; Reservation of Exemptions not Ground for Attachment.

Held, further, that, in the absence of actual fraud, attachment will not lie against an assignor, for the sole reason that in making an assignment for the benefit of creditors he reserves all his property "exempt from execution."

5. Appealable Order.

An order vacating an attachment is an appealable order.

(Opinion Filed June 3, 1890.)

APPEAL from district court, Cass county; Hon. WILLIAM B. MCCONNELL, Judge.

Appeal from an order vacating an attachment.

Messrs. Francis & Southard and Stone, Newman & Resser, for the appellant: The property excepted and reserved from assignment was not exempt and rendered the assignment void: Comp Laws, §§ 4663, 4667, Art. 2, Chap. 13. The statutes allowing exemptions do not apply to cases of voluntary assignment. The assignment being void and fraudulent in law, furnishes ground for attachments: Noble v. Holmes, 5 Hill, 194; Van Etten v. Hurst, 6 id. 311; Thurber v. Blank, 50 N. Y. 80; Richardson v. Rogers, 45 Mich. 591; Comp. Laws, § 4995.

Messrs. B. F. Spaulding and A. C. Davis for respondent: The exemption laws should be liberally construed, and the assignment law failing to make provision for selection of exemptions the court will devise a mode. The assignment was valid: Cribben v. Ellis, 34 N. W. 154; Perry v. Vezina, 18 id. 657; Hildebrand v. Bowman, 100 Pa. St. 580; Richardson v. Marquese, 42 Am. Rep. 353; Derby v. Weyrick, 30 id. 827; Bank v. Peterson, 35 N. W. 47; Muhr v. Pinover, 10 Atl. Rep. 289; Severson v. Porter, 40 N. W. 577; Burrill on Assignments, (4th Ed.) 137–40.

WALLIN, J. On the 11th day of March, 1890, defendant, under the statute regulating assignments, made a general assignment for the benefit of his creditors, and made, executed, and delivered to one Edward R. Sherburne, as his assignee, a written instrument of assignment in due form, in which instrument said Sherburne joined. On the same day the said instrument was duly filed and recorded. The writing purported to convey, and did convey, to the assignee all of the assignor's property, real and personal, in trust for his creditors, without any preference or reservation whatever, "except such property only as is exempt by law from attachment and execution, as provided by sections 323, 324, and 325 of the Code of Civil Procedure." Within the time limited by statute, the defendant duly filed an inventory of his property, embracing a schedule of the property which was conveyed in trust to the assignee; also a schedule of certain property claimed and conceded to be absolutely exempt by statute from seizure and sale on legal process; and a final schedule of other personal property of the defendant, which was itemized and valued by him at the sum of $1,499.77, which last-mentioned property was not assigned, but was reserved and claimed by defendant as exempt property, under the statute exempting additional personal property to an amount not exceeding $1,500 in value. To the inventory was added an affidavit made by the defendant, stating "that said inventory and schedules are in all respects just and true, according to the best of his knowledge and belief." The assignee qualified in due time and took possession of the property conveyed to him in trust. On March 29, 1890, all the property in question, except

that absolutely exempt, was seized by the sheriff of Cass county under a warrant of attachment issued at the instance of the plaintiff. The only ground of the attachment is stated in the affidavit as follows: "And that said defendant has assigned and disposed of his property with the intent to defraud his creditors." On April 1, 1890, the defendant, joining with the assignee, moved in the district court to vacate said attachment. The motion was granted, and said court, on the same day, by its order, directed the sheriff to release the property. An exception was allowed to the order vacating the attachment, and the order is assigned as error in this court. Upon the hearing of the motion to vacate the attachment, counsel filed a stipulation, embracing the agreed facts upon which the motion was heard and determined. The stipulation contained a narrative of the principal features of defendant's assignment for the benefit of his creditors.

The facts concerning the same are not controverted, and have already been stated in substance. It is admitted that the assignment proceeding furnishes the only foundation for the attachment. Plaintiff's counsel have not claimed that the record contains any evidence whatever of a fraudulent intent, or actual fraud, on defendant's part in making his assignment. Nor is it claimed that the defendant or the assignee has omitted any act or formality required by the statute regulating such assignments. Plaintiff's only claim and contention is that the assignment is made void in law and upon its face, because it in terms reserves to the debtor's use a portion of his property before the debts are paid, viz., personal property of the value of $1,499.77, which the defendant schedules and reserves in his inventory as exempt under the statute awarding additional exemptions to the amount of $1,500. In support of this claim, plaintiff cites subdivision 3, § 4663, Comp. Laws; § 4656, id. In other words, plaintiff's position is that, where an insolvent debtor makes a voluntary assignment for the benefit of his creditors, under the statute providing for such assignments, he is not entitled to the additional exemptions secured by statute to an execution or attachment debtor. Plaintiff's counsel relies upon the statutes regulating exemptions in favor of the debtor where his property is

seized under legal process, and calls attention to the fact that in such cases the debtor is required to take certain steps prescribed by statute in order to secure his exemptions. Under the statute such debtor must list all of his property under oath, and it must be appraised by a board of three appraisers, and then the exemptions must be selected by the debtor. And counsel argue that inasmuch as the machinery for securing exemptions to an execution or attachment debtor is wholly wanting in the statute providing for voluntary assignments, it necessarily follows that the exemptions themselves do not exist in such cases.

We think the position taken by counsel is untenable. To sustain such a view of the law would involve an extremely harsh, as well as very narrow, construction of a statute which in its essential characteristics is highly beneficial, and one which has uniformly received a liberal construction at the hands of the courts. It is true that the statutes providing for voluntary assignments for the benefit of creditors does not itself attempt to grant to debtors specific exemptions; but, on the contrary, the statute everywhere takes for granted and assumes that certain of the debtor's property is already exempt, and beyond the reach of any creditor, by force or other statutes. But the statute regulating assignments repeatedly makes reference to the debtor's exemptions, and carefully guards such exemptions. "Property exempt from execution" does not "pass to the assignee" where the instrument of assignment is silent concerning the same; much less, therefore will such property pass where it is expressly reserved in the instrument. Comp. Laws, § 4677.

Section 5128, id., embraces a clear expression of the legislative will to the effect that debtors shall not be stripped of all their property, but at their election may hold, in addition to absolute exemptions, $1,500 worth of personal property as against creditors. The ordinary mode whereby the creditor lays hands on the property of the debtor is by attachment or execution, and in cases of such seizures of the debtor's effects the legislature has been careful to guard and hedge about the debtor's exempt property in such a way that it will be secured to him and his family. In cases of voluntary assignments, no

such scrupulous care has been evinced. It was not anticipated by the law-makers that, in a case where the debtor without fraud voluntarily turns over to his creditors, for equal division among them all of his property, reserving only such property as the law has placed beyond the reach of creditors, many safeguards were necessary to protect exemptions, and hence but few were provided. But the assignment law not only recognizes the debtor's right to reserve property assumed to be exempt from execution, (subdivision 3, § 4663, id.,) but goes further, and requires the assignor to embrace in a sworn inventory a list of all the assignor's property which was exempt at the date of the assignment, (subdivision 6. § 4667, id) This presents a mode, though an incomplete one, whereby an insolvent debtor may, under the statute, indicate and select an amount of property which he claims to be beyond the reach of creditors as exempt property. It is true that such mode of selecting the debtor's exemptions is *ex parte*, and could not prevail in a case where it appeared, upon proper investigation, that the selection so made was fraudulent or without warrant of law. But, inasmuch as such selections are made under the terms of the assignment statute, the courts will not regard them as *prima facie* illegal. What the statute expressly directs debtor to do, cannot, when done, constitute a legal fraud.

The same question presented in this case has been passed upon by the courts of many of the states, and we have found no modern case going to the length claimed by plaintiff's counsel. In Wisconsin it is ruled, in a similar case, that, "if more was retained than allowed by the statutes, the excess could be recovered by the assignee under direction of the court." Severson v. Porter, 40 N. W. Rep. 577. Again, in the same state, where it is held that a firm, as such, is not entitled to any exemptions, a certain firm made an assigment of all its property for the benefit of its creditors, "except such as may be exempt from seizure on attachment or execution by the laws of the state of Wisconsin." It was held that such exemption was inoperative,—"all the property of the firm passed to the assignee,"—and such a reservation did not operate to render the assignment void. Bank v. Hinman, 21 N. W. Rep. 280, citing other Wisconsin cases. The same doctrine

is announced in Nebraska. Lininger v. Raymond, 9 Neb. 40, 2 N. W. Rep. 359.

Applying the principles of the cases last referred to—as we should do in a proper case—it would not follow that a debtor who, in making a voluntary assignment for the benefit of his creditors without fraud, reserved property as exempt to which he was not entitled, would thereby defeat and invalidate the assignment. In the Nebraska case the court say: "Under the statute the entire proceedings are under the supervision and control of the district court, or the judge thereof, and it is the duty of the court or judge, upon proper application to see that the assignee properly discharges the duties of his trust." This language can be adopted by us, and will be equally appropriate when used in the case at bar. Section 4675, Comp. Laws, declares that "all proceedings under this title shall be subject to the order and supervision of the judge of the district court of the county in which such assignment was made." The statute devolves upon the judge of the district court duties and powers which can only be put forth by a court of chancery, and hence the statute would be construed to mean the district court, as well as the judge thereof, whenever such construction became necessary to administer a trust, and carry out the objects of the statute. Under the statute, and in virtue of the inherent powers of the district court as a court of equity, that tribunal would readily find all proper and necessary machinery requisite to administer the trust created by an assignment for the benefit of creditors. It could readily find the means and agencies necessary to protect the interests of creditors, and also those of the debtor. If it should appear in any case that a debtor had not turned over to his assignee "all property not exempt from execution," the court, on proper application therefor, would, under the authorities, find appropriate means of reaching such property if within the jurisdiction of the court. And if it became necessary to do so, a court of equity would devise the means and agencies necessary to separate, identify, and turn over to the debtor any exemptions which a debtor might elect to reserve, not exceeding in amount his legal exemptions. In Brooks v. Nichols, 17 Mich. 38, the court

say: "The assignment passes for the benefit of creditors the same interest precisely which an officer would seize by virtue of execution, and there is no more difficulty in making the selection of exempt property in the one case than in the other." In Indiana, the statute regulating assignments required the assignor to turn over all of his property to the assignee, and the latter was required to have it all valued by appraisers, and, after the apprasal, the assignee was required to redeliver to the debtor as exempt property an amount not exceeding $300 in value. In a case under such statute, the debtor did not by his assignment turn over or assign all of his property, but held back certain effects, claiming them as exempt, and the court say: "A reservation in good faith, in an assignment by the assignor of 'so much property as may be exempt from execution,' will not avoid the deed." Garnor v. Frederick, 18 Ind. 507.

We quote with approval the language of an early Michigan case, Hollister v. Loud, 2 Mich. 310: "Another ground of objection is that the assignors reserved from the general mass of the property such of it as was by law exempt from levy and sale on execution. This question has been raised under the statute of 13 Eliz. It is the settled law in England that, to make a voluntary conveyance void as to creditors, it must embrace property subject to be taken on execution for the payment of debts. It is held there (as it must be here) that the statute was not intended to enlarge the remedies of creditors. That would be a strange anomaly (says Judge Story in 1 Eq. Jur. § 367) to declare that to be a fraud upon creditors which in no respect varied their rights or remedies. We cannot perceive why this same doctrine should not apply as conclusively to a conveyance which withholds property from creditors which is not subject to execution, and which is expressly and in all contingencies saved to the debtor by statute law. As to the property which was for the time being withheld, and which was allowed to the assignors by the assignees, as being exempt by law, we say, if the property was not exempt, it, at the least, was assigned, and vested in the trustees. The assignees must settle that question with the assignors. The creditors will hold them responsible, if the property was not exempt. It was not done secretly; the parties

attempted to act under the law." So with, respect to this case, it may be observed that defendant assigned to the assignee all of his property "not exempt." This would empower the assignee to follow and take possession of any property belonging to the defendant not exempt from execution, and it would be his duty to so do.

Counsel for respondent cite, from Maryland court of appeals, Muhr v. Pinover, 10 Atl. Rep. 289. The case is on all fours with that under consideration, and the opinion forcibly expresses our own views of what the law of this case is and should be. The court say: "The debtor in this case, being in failing circumstances, made an assignment of all of his property, except so much thereof as is exempt by law from execution, for the benefit of his creditors; and the question is whether the reservation of property exempt from execution makes the assignment fraudulent and void as to creditors. If it does, it must be because such a reservation operates in some way to hinder, delay, or defraud the creditors of their just demands against the debtor. An assignor has no right, of course, to reserve any part of his property for the benefit of himself or of his family which, by any process at law or in equity, could be made liable for the payment of his debts. But when the law itself exempts certain property of the debtor from execution, property in regard to which the creditors can have no interest or concern, and which cannot be made subject to the payment of their demands, we do not see on what grounds the reservation of such property can be said to be in fraud of creditors. It certainly does not operate in any manner to delay, hinder, or defraud them of their rights, because it does not in any way interfere with their remedies, nor does it take from them any property of the assignor which could be sold for the payment of their claims.

This seems too plain for argument. To make such assignment void, there must be a reservation of property which could be made subject to the payment of the debts of the assignor; and with the exception of Sugg v. Tillman, 2 Swan, 208, and which was subsequently qualified by Farquharson v. McDonald, 2 Heisk. 404, the decisions in this country are uniform in regard to the question. Heckman v. Messinger, 49 Pa. St.

465; Mulford v. Shirk, 26, Pa. St. 473; Dow v. Platner, 16 N. Y. 562; Smith v. Mitchell, 12 Mich. 180; Brooks v. Nichols, 17 Mich. 38; Simpson v. Robert, 35 Ga. 180; Bank v. Cox, 6 Me. 395. But then it is said the act of 1861 exempts the property of the debtor only from sale under execution, and makes no provision for the exemption of property under an assignment for the benefit of creditors. This may be so, but the act of 1861 was passed in pursuance of the state constitution, which provides that 'laws shall be passed by the general assembly to protect from execution a reasonable amount of the property of the debtor, not exceeding in value the sum of five hundred dollars.' The object of the law was to prevent a debtor from being stripped of all his property, and it ought to be liberally construed. As his property could be taken and sold only by way of execution, it provided in terms for the exemption in such cases. By the terms of the act, the debtor may select property to the value of $100, to be ascertained by three appraisers to be summoned and sworn by the officer levying the execution. And if the property cannot be divided so as to set apart a portion of it, of the value of $100, without loss and injury to all parties concerned, then the property is to be sold, and the debtor is to be awarded $100 of the proceeds of sale. Now, an assignee for the benefit of creditors is in equity a trustee for all parties in interest; and, although the act of 1861 makes no provision by means of which the property exempt may be ascertained under a voluntary assignment, yet we see no reason why this may not be done under the supervision of a court of equity, on application of the assignee, or of any other party in interest. No provision is made by the act where the debtor applies for the benefit of the insolvent laws, and yet in such cases the exemption is made under the direction of the insolvent court. Construing the act of 1861 in connection with the provisions in the constitution, it is clear, we think, the legislature meant to exempt, under all circumstances, the property of the debtor, of the value of $100, from the claims and demands of his creditors. It would be, it seems to us, a narrow construction to declare an assignment for the benefit of creditors fraudulent and void merely because the debtor received from its op-

eration property which the law itself exempts from execution."

The question of the appealability of an order of the district court vacating an attachment is discussed in the brief of appellant's counsel, but is not mentioned by respondent. We hold that such an order is appealable. Section 5236, Comp. Laws, subd. 3, has been recently examined by the supreme court of South Dakota, and held to authorize the appeal. Bank v. Carroll, 44 N. W. Rep. 723; Couldren v. Caughey, 29 Wis. 320; Rice v. Jerenson, 54 Wis. 250, 11 N. W. Rep. 549. The order of the district court vacating the attachment is affirmed. All concur.

EBEN D. JORDAN, JAMES C. JORDAN and EBEN D. JORDAN, JR., Co-Partners as JORDAN, MARSH & COMPANY, Plaintiffs and Respondents, *v.* SIMON H. FRANK, Defendant and Appellant.

1. Attachment Papers Not Part of Pleadings.

Attachment proceedings are incidental to the main case, and form no part of the pleadings proper; and it is error to render judgment on the pleadings while a material issue raised by the complaint and answer remains untried.

(Opinion Filed June 3, 1890.)

APPEAL from district court, Cass county; Hon. WILLIAM B. MCCONNELL, Judge.

W. B. Douglass and Messrs. Ball & Smith, for appellants, cited: Harrison v. King, 9 Ohio St. 388; Gowan v. Hanson, 55 Wis. 341.

H. F. Miller, and Messrs. Miller, Cleland & Cleland, for the respondent, cited, upon the point stated in the foregoing syllabus: Rollins v. Kohn, 66 Wis. 658; Sackett v. Partridge, 4 Iowa 416; Churchill v. Fullrain, 8 id. 46; Wade on Attachments, vol. 1, page 298.

BARTHOLOMEW, J. On December 27, 1887, plaintiffs commenced this action, alleging an indebtedness on account for goods sold and delivered in the sum of $3,136.91, and that said amount was due and payable. The action was aided by attach-

ment. The writ of attachment was issued upon the affidavit of H. F. Miller, attorney for plaintiff, setting forth the statutory ground of defendant's non-residence, and reiterating the statement that the debt was due. The warrant of attachment was delivered to the sheriff of Cass county on December 27, 1887, and on the same day an *alias* warrant was delivered to the sheriff of Richland county. Both writs were served by attaching all of the property of the defendant in the respective counties. No motion was ever made, or proceedings of any kind had, to discharge such attachments. In due time the defendant answered, setting forth that the sum of $1,364.69 of said account was not due when the action was commenced, and would not be due until the following January, and that to that extent the action was prematurely brought. Afterwards, and on December 3, 1888, plaintiffs served upon defendant a notice of motion for judgment on the pleadings in the action, stating that said "motion would be based upon the pleadings upon file, and served in the case, and on the record of the case." The notice stated that the motion would be made on December 12, 1888. The record shows no further proceedings until January 26, 1889, when the judge of the district court issued an order on defendant to show cause on January 29, 1889, why the plaintiff should not be granted leave to file an additional affidavit for attachment in the case. Attached to the order were copies of two affidavits; the first being another affidavit by H. F. Miller, Esq., who made the original affidavit. In this affidavit Mr. Miller states that defendant, by his answer, claims that a certain portion of the debt sued for was not due when the action was brought, and that he had taken testimony tending to prove the same, and that affiant had learned since the service of said answer, that at the time the action was brought the defendant had sold, conveyed, and incumbered his property with intent to cheat and defraud his creditors. The second affidavit was made by Eben D. Jordan, Jr., one of the plaintiffs, dated December 18, 1888, and reaffirms the statement that defendant had fraudulently disposed of his property when the action was commenced, as stated by Mr. Miller.

The order to show cause was heard on March 17, 1889, and

the court made the following order: "It is hereby ordered that plaintiffs have leave to file this affidavit of Eben D. Jordan, Jr., made on the 18th day of December, 1888, in the office of the clerk of this court, as and for an additional affidavit for attachment, with the same force and effect as if filed with the original affidavit for attachment, filed December 27, 1887." To this order the defendant at the time duly entered his objections, which were overruled, and an exception saved. Immediately thereafter, plaintiffs' motion for judgment on the pleadings was sustained; the court stating in the order for judgment that the motion was heard "on the complaint and affidavit for attachment made by H. F. Miller, attorney for plaintiffs, on the 27th day of December, A. D. 1887, and the affidavit for attachment made by Eben D. Jordan, Jr., on the 18th day of December, A. D. 1888, and filed by leave of court granted, and upon the answer of the defendant to the complaint, and upon the warrant of attachment and the entire record of the proceedings in said action, so far as they appear of record in this court." To the judgment, exceptions were duly entered and saved. The errors here assigned are the action of the court in permitting the affidavit of Eben D. Jordan, Jr., to be filed, and in considering the same in passing upon the motion for judgment, and in rendering judgment for the amount denied to be due under the answer.

At the time the additional affidavit was permitted to be filed, the property of the appellant had already been in the custody of the law for more than a year. The warrants of attachment originally issued had completely fulfilled their purposes. No additional affidavit, and no number of affidavits, could add to the efficiency of the warrant. Hence the filing of such affidavit for the purposes alleged in the order could work no advantage to respondents, and no prejudice to appellant. We do not decide whether or not such additional affidavit was permissible under our statute, because, if permitting it to be filed was error, still it was without prejudice. But the court not only permitted it to be filed, but made it retroactive. The only effect of the order was not to aid the attachment, but to avoid the answer. Under our practice (Comp. Laws, § 5014) an action may be commenced on a claim not due, and an attachment issued against

the property of a debtor, where it is alleged that a defendant has disposed of his property as stated in the additional affidavit. It was evidently the theory of the learned judge who heard the case that such affidavit, made retroactive as it was, brought the action within the terms of said § 5014 *ab initio*, and that plaintiff was entitled to judgment notwithstanding the answer. In this the trial court was wrong. No judgment should have been rendered for the full amount of the claim. Plaintiff alleged in his complaint that the debt was due and payable. That allegation was material. Without it the complaint would have been demurrable. The denial of that allegation in the answer formed a material issue. The complaint had never been amended or changed, and that issue had never been tried. The plaintiff, on his motion for judgment, must recover on the allegations of his complaint, or the admissions of the defendant. The additional affidavit was not filed in aid of the complaint, nor was it competent for that purpose.

The attachment proceedings are incidental and provisional. They form no part of the pleadings proper. Harrison v. King, 9 Ohio St. 395; Wap. Attachm. 81. In states where the affidavit for attachment and the complaint are separate, we find no case where a complaint has been aided by the statements in the affidavit; and, indeed, this must be so, because the summons, which is the writ which gives the court jurisdiction to hear the case, requires the defendant to answer the complaint. He is not allowed in the main action to traverse the allegations in the affidavit. Churchill v. Fullraim, 8 Iowa, 46. If defendant desires to discharge the attachment, he can attack the affidavit as directed by statute; otherwise the allegations remain undisturbed. No obligation rests upon him to refute them; and, unlike the allegations of the complaint, they do not stand admitted because not denied. It is clear that the judgment was based on the additional affidavit. As that affidavit formed no part of the pleadings, and as its allegations were not admitted, its consideration was error.

The judgment of the lower court is reversed, with costs, and the case remanded, with leave to plaintiff to apply to the court for an order requiring the defendant to satisfy the amount of

the claim admitted by the answer to be due, in accordance with the provisions of § 5023, Comp. Laws, should plaintiff be so advised. The issue raised by the pleadings will stand for disposition, in all respects, as though no judgment had ever been rendered. All concur.

WALLIN, J., having been of counsel, did not sit; TEMPLETON, district judge, sitting by request.

JOHN W. JASPER, Plaintiff and Appellant, *v.* ARTHUR H. HAZEN, Defendant and Respondent.

1. Costs in Supreme Court—How Taxed.

An appeal from the taxation of costs by the clerk of the supreme court will not be considered, as the rule of the court prescribes that costs of said court, in cases originating in a lower court, shall be taxed below after *remittitur* sent down.

(Opinion Filed, May 12, 1890.)

MOTION to retax costs in supreme court.

Messrs. *Greene & Hildreth*, for appellant; *A. C. Davis*, for respondent. No briefs filed.

WALLIN, J. This is an attempted appeal from the taxation of costs herein as made on April 22, 1890, by the clerk of this court. The appeal will not be considered. In the opinion of this court existing statutes contemplate that in cases originating in courts below all costs and disbursements shall be taxed in the lower court; and that it will facilitate the due administration of the law to require suitors in cases coming to this court for review to tax the costs of this court below after the *remittitur* has gone down. The rules adopted by the late supreme court of Dakota territory, which permitted the clerk of that court to tax costs, are abrogated by a rule of this court made at the present term, which is as follows: "Ordered, that the rules of the late supreme court of Dakota territory be, and the same are, annulled and set aside so far as such rules require or permit the clerk of this court to tax and allow costs and disbursement in cases which originate in other courts and come to this court for review.

Hereafter the costs and disbursements of this court, in such cases, shall be taxed in the court below after the *remittitur* is sent down to such court. This order is to apply to actions now pending in this court, as well as to future cases." For the reasons above given, we expressly refrain from passing upon any of the questions presented in the appeal papers. It is proper to say, perhaps, that the present members of this court are of the opinion that the item of $118 should be allowed, and that the item af $4.90, for filing abstracts and briefs, should be reduced to the amount allowed for filing nine abstracts and nine briefs on each side, or to twenty-seven, all told. We are of the opinion that the item of $47.30 should be disallowed. In the absence of a special order directing the clerk to send up a transcript, the original papers should have been transmitted to this court. Under § 5217 of the Comp. Laws, the statute, except in cases where a special order is made, abrogates the rule of court requiring the clerk of the district court to send up transcripts in all cases. All concur.

THE NASHUA SAVINGS BANK, of Nashua, New Hampshire, a Corporation Organized Under the Laws of the State of New Hampshire, Plaintiff and Respondent, *v.* FRANK L. LOVEJOY, CARRIE E. LOVEJOY, and R. P. RUSSELL, Defendants; R. P. RUSSELL, Appellant.

1. **Defective Summons; Irregularity Waived.**

Defendants Carrie E. Lovejoy and R. P. Russell were non-residents, and service was attempted to be made on them by publishing the summons, and by mailing a copy of the summons to them with a copy of the complaint attached thereto. The summons, as published and mailed, was irregular in this: It omitted from its title the name of defendant Frank L. Lovejoy. Russell received the summons as published, by mail, and with it a copy of the original complaint on file, which embraced the names of all of the three defendants. Defendant Russell duly appeared by his attorneys, who served a written notice of appearance on the attorneys for the plaintiff, and demanded that a copy of plaintiff's complaint be served upon them. The notice of appearance on behalf of Russell was entitled, as was the summons which was published and mailed, *i. e.*, such notice omitted from the title of

the action the name of Frank L. Lovejoy as a defendant. In reponse to the notice of appearance served in behalf of the defendant Russell, the attorneys for plaintiff served upon Russell's attorney a true copy of the original complaint on file, properly entitled with the names of all three defendants in this action. Russell's attorneys retained the copy of the complaint, and did not move to correct the irregularity, nor to strike out the complaint for inconsistency with the summons as published. *Held*, that the defect was not jurisdictional. The irregularity was waived by omitting to take proper steps to correct the complaint or strike it out. Russell, having made default, and not having answered or demurred to the complaint, could not be then heard to object to the entry of judgment upon the ground that he had not been served with the summons, or appeared voluntarily in the action.

(Opinion Filed, June 3, 1890.)

APPEAL from district court, Cass county; Hon. WM. B. MCCONNELL, Judge.

Messrs. Francis and Southard, for appellant, cited: Williad v. Massani, 1 Cow. 37; Blanchard v. Strait, 8 How. Pr. 85; Allen v. Allen, 14 How. Pr. 249; Van Wyck v. Hardy, 20 How. Pr. 222.

Messrs. Miller, Cleland & Cleland, for respondent, argued: That the court below had power to correct the defect in the summons and that if not corrected the irregularity did not invalidate the judgment, citing: Kirk v. Murphy, 67 Am. Dec. 640; Van Wyck v. Hardy, 39 How. Pr. 392; Witte v. Meyer, 11 Wis. 295; Gribbon v. Freel, 93 N. Y. 93; Jansen v. Mundt, 30 N. W. Rep. 53. Where summons and complaint are both served a variance between them is an irregularity that cannot be taken advantage of by defendant: City v. Bonesteel, 22 Wis. 252. Omission to insert in summons to non-resident the name of resident co-defendant does not render the summons void: Lewis v. Grace, 44 Ala. 307; Boardman v. Parrish, 56 id. 54; Bogue v. Prentis, 47 Mich. 124. If summons was not void defendant after having permitted judgment to be taken against him cannot set up the irregularity: Baker v. Thompson, 56 Ala. 164; Gould v. Casteel, 47 Mich. 604. Appearance on appeal is a waiver of defect in summons: Ruthe v. Green Bay, etc., Co. 37 Wis. 344; Handy v. Ins. Co. 37 Ohio St. 366.

WALLIN, J. In this action judgment was entered by default granting plaintiff certain equitable relief prayed for in the

complaint. All defendants were interested in the subject-matter of the action, and were necessary parties thereto. On December 27, 1888, personal service was had at Fargo, D. T., upon said defendant, Frank L. Lovejoy. The original complaint was filed with the clerk of the district court on January 29, 1889. It appearing by affidavit that defendants Carrie E. Lovejoy and R. P. Russell were non-residents, and that their address was Minneapolis, Minn., the district court, by its order on file and dated January 19, 1889, directed that service of the summons be made upon said non-resident defendants, by mail, and by publication of the summons in manner and form as prescribed by statute; whereupon a summons was published for the requisite period of time, and a copy of the summons as published with a copy of the original complaint annexed, was duly mailed to and received by defendant R. P. Russell. The summons as published, and as mailed to and received by Russell was properly entitled, except that the name of the defendant Frank L. Lovejoy was omitted therefrom. On April 13, 1889, the defendant R. P. Russell, by his said attorneys, appeared, and served a written notice of appearance on plaintiff's attorneys, in which they demanded that plaintiff serve upon them, at their office in Fargo, a copy of the complaint. The notice of appearance corresponded as to its title with the summons as published and mailed in this, that the title of such notice of appearance omitted the name of the defendant, Frank L. Lovejoy; but in all other respects such notice was entitled as was the complaint on file, and as was the summons personally served on Frank L. Lovejoy, and filed with the complaint. Subsequently, and on April 27, 1889, the plaintiff's attorneys served upon Messrs. Francis & Southard, as the attorneys of Russell, pursuant to their demand, a copy of the original complaint in this action, which copy, like the original, embraced the names of all the three defendants herein. The copy of the complaint served upon the attorneys of said Russell was retained by them, and was not returned to the plaintiff's attorneys, and no motion was ever made to amend or correct the title of the complaint or summons, and no motion was ever made to strike out the complaint for non-conformity with the summons.

After all defendants were in default for want of an answer or demurrer, the attorneys of plaintiff served due notice upon Russell's attorney that, upon June 10, 1889, at 10 A. M., they would apply to the district court for judgment in this action, as demanded in the complaint; and at the time stated in such notice the defendant Russell, by his said attorneys, (appearing specially for such purpose only,) appeared before the district court, and "moved the court to dismiss the application for judgment in the above entitled action in so far as said Russell may be affected, upon the ground and for the reason, that there has been no service of any summons in said action upon him, or appearance entered by him therein." This motion was denied by the district court, and judgment for plaintiff was entered against all the defendants herein. Russell alone appeals, and the denial of his said motion is the only error assigned in this court.

Counsel for Russell contend that the district court did not acquire jurisdiction of his person in this action, either by the service of a summons upon him or by his voluntary appearance in the action. We think the position is untenable. It is true that the summons, as advertised, and as received by Russell, erroneously omitted from the title of the action the name of defendant Frank L. Lovejoy, and it is also true that Russell's notice of appearance, as made by his attorneys, corresponded with respect to its title to the title of the action as appeared in the summons as published and mailed; but it is equally true that a copy of the original complaint, containing the names of all defendants in this action, was annexed to the summons mailed to and received by Russell, and after Russell's attorneys had served notice of appearance, and demanded the service of a copy of the complaint upon them, the plaintiff's attorneys, in due time, served on the attorneys of Russell another copy of the original complaint, entitled with the names of all three of the defendants. By the service of a copy of the original complaint, made in response to Russell's demand that a copy of plaintiff's complaint be served upon his attorneys, Russell was informed by plaintiff that the plaintiff relied upon the complaint which was served on Russell's attorneys, as its complaint in the action in

which Russell had formerly appeared and demanded service of a copy of the complaint. It is quite true that the copy of the complaint as served was inconsistent with the summons as advertised, for the reason that it embraced the name of the defendant Frank L. Lovejoy, which name was omitted from the title of the summons as advertised, but in all other respects the two were identical as to title. This discrepancy doubtless presented a proper case for a motion, in Russell's behalf, to strike out the complaint for non-conformity with the summons, and such motion, if seasonably made, would have prevailed. Nevertheless, it would have been within the discretion of the trial court, upon the hearing of such a motion, to have given plaintiff leave, with or without terms, to amend the summons by adding the omitted name thereto. Such discretion would not be reviewable. But Russell's attorneys neglected to move in his behalf to correct the irregularities in the title of the action, and elected to retain the complaint, which was served as and for the plaintiff's complaint, in the action in which a copy of the complaint was demanded. The complaint as served on Russell's attorneys, set out a cause of action in favor of the plaintiff, and in which Russell was described as a co-defendant, and it moreover appeared, by the averments of the complaint, that Russell's interests were more or less involved in the relief demanded, and in the subject-matter of the action, in connection with the rights and interests of other parties to the action.

The complaint was not answered, or demurred to. On the contrary, Russell defaulted, and did not again appear except specially to object to the entry of judgment against him. We are of the opinion that Russell's retention of the copy of the complaint without objection, and without attempting to correct the same, operated to waive the irregularity in the title of the action, and that they were bound by the complaint as served. The point of appellant's contention is extremely technical, and one which does not go to the jurisdiction. Such objections are not favored by the courts. Courts are created for the purpose of enforcing and protecting rights, not for the purpose of seizing technical and immaterial defects to defeat them. An equitable judgment will not be set aside for mere irregularities not

affecting substantial rights. The Code of Civil Procedure is decisive of the point involved.

Section 142 provides that "the court may, before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process or proceeding by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect." Section 145 provides: "The court shall, in every stage of action, disregard an error or defect in the pleadings or proceedings which shall not affect the substantial rights of the adverse party, and no judgment shall be reversed or affected by reason of such error or defect." We think the case presented by this record clearly comes within the letter as well as within the spirit of the provisions of the sections of the Code above cited. The judgment must be affirmed, and it is so ordered. All concur.

A petition for a rehearing was denied on September 2, 1890.

JOSEPH E. PENFIELD, Plaintiff and Appellant, *v.* CHARLEMAGNE TOWER, JR., RICHARD H. LEE, and JULIUS A. BAILEY, as Trustees of the Residuary Estate of CHARLEMAGNE TOWER, Deceased, Defendants and Respondents.

1. Express Trust Suspends Power to Alienate — Validity, by What Law Governed.

An active or express trust suspends the absolute power of alienation during its continuance, and such a trust is therefore void when it is to continue for longer than lives in being at the death of the testator. The absolute power of alienation in this state cannot be suspended for longer than the continuance of the lives in being at the testator's death, except as provided in § 2745 of the Compiled Laws. The power to change the trust property from real to personal estate will not save the trust from the condemnation of the statute. The validity of a trust as to real estate is to be determined by the laws of its *situs*: as to personal property, by the laws of the domicile of the testator at the time of his death.

2. Equitable Conversion; Trust in Personalty Governed by Lex Domicilii.

Where the will directs the sale of real estate expressly, or by clear implication, or where a sale is absolutely necessary to the execution of

the provisions of the will, such real estate is equitably converted into personalty from the time of the testator's death; and as to such real estate, the trust is a trust of personal property, and its validity is to be determined, not by the laws of the *situs* of the real property, but by the laws of the jurisdiction in which the testator was domiciled at the time of his death.

3. **Same; No Conversion in This Case.**

Provisions of the will examined and *held* not to create an equitable conversion of real property into personalty.

4. **Void Trust; Power of Sale Under.**

A power of sale dependent on a void trust falls with the trust.

(Opinion Filed June 3, 1890.)

APPEAL from district court, Cass county; Hon. WILLIAM B. MCCONNELL, Judge.

G. H. Phelps for appellant, (Messrs. Burnham and Tillotson of counsel) argued: That the will did not direct a conversion of the real property into personalty; that there was no express direction to sell the realty; nor does it express any clear intention that the realty should be converted. That the test is: Has the will absolutely directed that the real estate be turned into personal; Pomeroy's Equity, §§ 1159–60; Hobson v. Hale, 95 N. Y. 88; Brewer v. Brewer, 18 N. Y. Supreme Ct. 147; Parker v. Linden 113 N. Y. 28; Scholle v. Scholle, id. ib. 261; Hunt's Appeal, 105 Pa. St. 128; Lindley's Appeal, 102 id. 235; Lynn v. Gephart, 27 Md. 547; Cook v. Cook, 20 N. J. Eq. 375, Parker v. Glover, Atl. Rep. 217; Green v. Johnson, 4 Bush 164; King v. King, 13 R. I. 501; Hammond v. Putnam, 110 Mass. 232; Shaw v. Chambers, 48 Mich. 355; Dodge v. Williams, 46 Wis. 70; Redfield on Wills, vol. 1, p. 433 and vol 2, p. 125; Ford v. Ford, 33 N. W. 188; Jones v. Thockmorton, 57 Cal. 368.

S. G. Roberts, for respondent: Argued that the power of alienation was not suspended by the will, because the real estate is devised to the trustees with power to convey; that the will clearly expresses an intention that the realty be converted. Lent v. Howard, 89 N. Y. 169; Page's Estate, 75 Pa. St. 87; Craig v. Leslie, 3 Wheaton, 563.

CORLISS, C. J. The disposition of this case depends upon the validity of a trust attempted to be created by the will of

Charlemagne Tower, so far as real estate situated in this state is concerned. The plaintiff by this action seeks to recover $250 paid by him to defendants under a contract for the sale and purchase of real estate owned by Charlemagne Tower in his life-time, the defendants acting as trustees under his will in making the contract, and agreeing to refund to plaintiff the money in case they could not convey a perfect title. A deed having been tendered by defendants, as trustees, plaintiff refused to accept the same, claiming that while the deed was sufficient in form to transfer the title of the testator, the defendants had no authority to execute a deed of the property, for the reason that the trust which the will purports to create is void, as to real estate in this jurisdiction because in contravention of the statute against perpetuities. For this reason the plaintiff insists that he has a right to recover the $250 paid. The facts are all presented in the complaint. Defendants demurred, and had judgment on the demurrer in the court below, the court holding the trust to be valid. Was this error? The testator has assumed to create a trust as to his residuary estate in favor of his widow, children, and grandchildren. The will makes specific provisions as to the distribution of the income among the beneficiaries under the trust, which however are immaterial so far as the question presented by this appeal is concerned. This trust is to continue until the period for distribution of his estate shall arrive. That period is at the expiration of twenty-one years from and after the death of the last survivor of his children and grandchildren living at the time of his death. There is a provision that, in case it is unlawful to suspend the power of alienation twenty-one years after the death of all the children and grandchildren of the testator living at the time of his death, then the period of distribution shall be twenty-one years after the death of the last survivor of his children and grandchildren living at the date of his will. This provision was unnecessary. The common-law rule regulating perpetuities permits the tying up of property for lives in being at the death of the testator, and twenty-one years in addition. It does not limit the lives to those of persons in being at the date of the will.

McArthur v. Scott, 113 U. S. 340, 5 Sup. Ct. Rep. 652; Lang v. Wilbraham, 2 Duer, 171; Hosea v. Jacobs, 98 Mass. 65; Lang v. Ropke, 5 Sandf. 363; 4 Kent, Comm. 283, note 1. Said the court in McArthur v. Scott: "By the law of England the question of remoteness depends upon the state of facts at the time of the testator's death, though differing from that existing at the date of the will." The trust created by this will is perfectly good at common law. The law was finally settled in Cadell v. Palmer, 1 Clark & F. 372. In this case the house of lords decided that the true limit of the rule against perpetuities was "a life or lives in being and twenty-one years afterwards, without reference to the infancy of any person whatever." To same effect are Barnum v. Barnum, 26 Md. 119; McArthur v. Scott, *supra*; 1 Jarm. Wills, 508-517; Waldo v. Cummings, 45 Ill. 421; Philadelphia v. Girard's Heirs, 45 Pa., St. 9; Toms v. Williams, 41 Mich. 552, 2 N. W. Rep. 814; Wilson v. Odell, 58 Mich. 536, 25 N. W. Rep. 506; Hale v. Hale, 17 N. E. Rep. 470; Brown v. Brown, (Tenn.) 6 S. W. Rep. 869. The law allows the power of alienation to be suspended beyond this period during the time of gestation in cases of an infant *en ventre sa mere*. Waldo v. Cummings, 45 Ill. 421; Jarm. Wills, 415-517. And there may be added two periods of gestation. Says Mr. Jarman: "A possible addition of the period of gestation to a life and twenty-one years, occurs in the ordinary case of a devise or bequest to A, (a male) for life, and after his death to such of his children as shall attain the age of twenty-one years, or indeed in the case of a devise or bequest simply to the children of A. (a male) who shall attain majority, though not preceded by a life interest. In either case A. may survive the testator, and leave a wife *enciente*, and as such child would not acquire a vested interest until his majority, the vesting would be postponed until the period of twenty-one years beyond a life in being, with the addition, it might be, of nine or ten months; and if to either of these hypothetical cases we add the circumstance that A., the parent, were, as of course he might be, an infant *en ventre sa mere* at the testator's decease there would be gained a double period for gestation, namely, one at the commencement and an-

other at the intermediate part of the period of postponement. To treat the period of gestation, however, as an adjunct to the lives, is not, perhaps, quite correct. It seems more proper to say that the rule admits of the absolute ownership being suspended for a life or lives in being, and twenty-one years afterwards, and that for the purposes of the rule a child *en ventre sa mere* is considered as a life in being." It is only in cases of gestation that the period of twenty-one years can be extended. In Cadell v. Palmer, 1 Clark & F. 372, in the house of lords, it was declared to be the unanimous opinion of the judges that there cannot be added to the period of twenty-one years an absolute period equal to the ordinary or longest period of gestation irrespective of the existence of gestation, but that the time can be enlarged only in those cases in which gestation exists. This is the settled law. But the period of twenty-one years is an absolute period, and the lives during which the absolute period of disposition is suspended are not necessarily the lives of the persons who are interested in the property. Said the court in McArthur v. Scott, 113 U. S. 340, 5 Sup. Ct. Rep. 652: "The rule of the common law by which an estate devised must at all events vest within a life or lives in being, and twenty-one years afterwards, has reference to time and not to persons. Even the life or lives in being have no reference to the persons who are to take, for the testator is allowed to select as the measure of time the lives of any persons now in existence; and the twenty-one years afterwards are not regulated by the birth or the coming of age of any person, for they begin not with a birth, but with a death, and are twenty-one years in gross, without regard to the life or the coming of age of any person soever." Every attempt to tie up the absolute ownership of property except as permitted by these rules is without effect in law.

The provisions of the will in question do not fall without the scope of these rules, and are therefore valid at common law, the law which it is admitted obtains in Pennsylvania, the domicile of the testator at the time of his death. Is the trust so far as the real estate in this state is concerned to be governed by the laws of this state or of Pennsylvania? Under the statute of this state the trust is void. By § 2717 of the Compiled Laws it is

provided that "the absolute power of alienation cannot be suspended by any limitation or condition whatever for a longer period than during the continuance of the lives of persons in being at the creation of the limitation or condition, except in the single case mentioned in § 2745." This case is not material to the question before the court. Section 2718 declares that "every future interest is void in its creation which by any possibility may suspend the absolute power of alienation for a longer period than is prescribed in this chapter. Such power of alienation is suspended when there are no persons in being by whom an absolute interest in possession can be conveyed." Are there, during the existence of this trust for twenty-one years beyond lives in being at the time of its creation, persons in being by whom a absolute interest in possession can be conveyed? Clearly not. The beneficiaries take no interest or estate in the land. They may merely enforce the performance of the trust in equity. The whole estate is vested in the trustees. § 2804, Comp. Laws. There is no title in any one save the trustees that can be conveyed, and the trustees can make no conveyance in contravention of the trust. Every such conveyance is void. § 2810, id. The trust is indestructible during its continuance, even with the consent of all the trustees and all of the beneficiaries. Douglas v. Cruger, 80 N. Y. 15. Our statutes were taken from that state. In construing the statutes of New York with reference to this point, the court in that case said: "The trustee having no power to convey the land, his conveyance, otherwise absolutely void, could not be rendered valid by an order of the court obtained upon the joint petition of himself and Mrs. Cruger. The supreme court has not the power to destroy a valid trust. The purpose of the statute was to make these trust-estates and trust-interests indestructible and absolutely inalienable during the existence of the trust, and if they could be rendered alienable by the order of the court the whole scheme of the statute would be greatly impaired, and its purpose thwarted." See, also, Cruger v. Jones, 18 Barb. 467; Lent v. Howard, 89 N. Y. 169. It has been repeatedly held under the same statutes in New York that a trust suspends the absolute power of alienation of real estate and the absolute ownership of personal property.

Radley v. Kuhn, 97 N. Y. 26; Everitt v. Everitt, 29 N. Y. 71; Smith v. Edwards, 88 N. Y. 102; Shipman v. Rollins, 98 N. Y. 311; Knox v. Jones, 47 N. Y. 390; De Wolf v. Lawson, (Wis.) 21 N. W. Rep. 615; Simpson v. Cook, 24 Minn. 180-184. It is not merely future estates which are void. Every estate, present or future, which suspends the absolute power of alienation, is void. Hawley v. James, 16 Wend. 61-163; Coster v. Lorillard, 14 Wend. 265-305.

But it is insisted that all the real estate owned by the testator at the time of his death was, by the will, equitably converted into personalty; that, under § 3364 of the Compiled Laws, it is therefore to be deemed personalty from the death of the testator, and that a will of personal property is to be governed as to the validity of the trust it creates, by the law of the testator's domicile, under § 3397 of the Compiled Laws; and that by the laws of that domicile (Pennsylvania) the trust is valid. Section 3364 declares that "when a will directs the conversion of real property into money, such property and all its proceeds must be deemed personal property from the time of the testator's death." Section 3397 provides that the validity and interpretation of a will relating to personal property, is to be governed by the laws of the testator's domicile. These statutes are merely declaratory of long-established rules. It is conceded that the will, if it is a will of real property—is to be governed by the laws of this state, as to the validity of the trust, so far as that trust affects land within the state. Section 3397 expressly declares this rule. If then the will equitably converts into personalty all the testator's real estate within this jurisdiction, it is to be governed by the laws of Pennsylvania. If it is so governed, the trust is valid. The same rule as to perpetuities applies to personal property, as to real estate, in the absence of a statute. The absolute ownership of personal property may, at common law, be suspended for the same period as real estate. Waldo v. Cummings, 45 Ill. 421; 1 Jarm. Wills, 519. Jarman says: "To the test of the rule settled by Cadell v. Palmer, every gift of real or personal estate, by will or otherwise, must be brought." In Waldo v. Cummings the court, after referring to authorities, say: "These authorities leave no doubt that chat-

tels may be devised for a life or lives in being, and twenty-one years afterwards, and in some cases nine months longer, provided at the end of that time the property is required to vest absolutely in some person then in being capable of disposing of the title to the same."

Did the will equitably convert the testator's real estate into personalty? The doctrine of equitable conversion has its origin in the maxim of equity, that that is regarded as done which should be done. It is only an application of that maxim to a certain class of facts. The future duty is the present deed. Duty is the foundation of the doctrine. Equity anticipates the accomplishment of a fact only when and because there is an obligation resting upon some one to create that fact. A direction to sell land, and convert its proceeds into money, imposes a duty. That direction may be expressed in explicit language, or it may be inferred. The duty may arise, also, because a sale and conversion are indispensable to the execution of the testator's scheme. In such a case the main end includes all means necessary to its accomplishment. A direction to sell is implied, because without a sale the will cannot be executed as written. This is the philosophy of the doctrine of equitable conversion; and it is therefore evident that if a sale is not absolutely indispensable, and if any discretion as to the fact of sale is vested in the grantee of the power of sale, no equitable conversion results. The power of sale must be construed as a direction to sell, or there is no conversion. Our statute, therefore, employs the phraseology, "When a will directs the conversion," etc. That statute, as we have said before, is a mere declaration of an established principle; and the framers of it were very happy in choosing the word "direct" to express this principle. Whatever conflicts there may be among the adjudications on this question in the application of the doctrine to different states of facts, that conflict does not affect the doctrine itself. There is no division with respect to it. There is not a liberal doctrine and a strict doctrine. There is only a single ultimate inquiry in each case, is the sale an absolute duty? There is really no conflict among the authorities with respect to the scope of this doctrine. Courts have differed in applying it. So have they differed in their

statement of the doctrine; but it will be found that beneath the superficial disagreement there is harmony. It has been said that some courts hold that, although the testator's design that there should be a sale is not expressed, and although a sale is not necessary, yet if, on a view of all of the provisions of the will, it is apparent that a sale was intended, this is sufficient to constitute an equitable conversion. This statement embodies no modification of the doctrine. It merely declares what indeed is elementary — that the intention of the testator controls. When once it is ascertained from the will that it was his intention that his real estate should be sold, that intention is of as binding force upon the trustees and the courts as though expressed in the form of a direction. The doctrine of equitable conversion does not concern itself ultimately with the language in which the purpose that there should be a sale is couched. Is it the testator's will that there should be a conversion? This is the final and decisive inquiry. Forms of expression are important only as they indicate such a design. A positive direction is satisfactory evidence that a sale is willed. Absolute necessity for a sale to carry into effect the provisions of the testament establishes the purpose of the testator with equal clearness.

But there are other tests than these. The very foundation of the doctrine demonstrates that, however the intention is disclosed, it operates as an equitable conversion; for that must be done which is seen to be the testator's will, however expressed. As it must be done, equity makes present the future, and regards the deed to be performed as an accomplished fact. In no case has the rule been expressed with more felicity and clearness than in Scholle v. Scholle, 113 N. Y. 261-270, 21 N. E. Rep. 84: "To justify such a conversion there must be a positive direction to convert, which, though not expressed, may be implied; but, in the latter case, only when the design and purpose of the testator is unequivocal, and the implication so strong as to leave no substantial doubt. Hobson v. Hale, 95 N. Y. 598. Where, however, only a power of sale is given, without explicit and imperative direction for its exercise, and the intention of the testator in the disposition of his estate can be carried out, although no conversion is adjudged, the land will pass as such, and not be

changed into personalty." This is an accurate and comprehensive statement of the doctrine. The direction may be expressed. It may be implied. It may necessarily result from the other provisions of the will because indispensible to their execution. In the last case the conversion results on the principle that the testator must have intended that everything should be done essential to the execution of his scheme. A review of the authorities will be of little value in the determination of this question, because no two wills present the same features. See, however, Hobson v. Hale, 95 N. Y. 596; White v. Howard, 46 N. Y. 144; Gourley v. Campbell, 66 N. Y. 169; Chamberlain v. Taylor, 105 N. Y. 185, 11 N. E. Rep. 625; Hunt's Appeal, 105 Pa. St. 129; Lindley's Appeal, 102 Pa. St. 235; Cook v. Cook, 20 N. J. Eq. 375; King v. King, 13 R. I. 501; Com. v. Gordon, (Pa.) 7 Atl. Rep. 229.

We will now examine the will to ascertain whether there is a direction to sell by implication, there being no express direction, and a sale not being absolutely essential to the execution of the testator's purposes. After directing the payment of his debts and funeral expenses, and after making certain bequests, and giving his wife the use of certain real property, the testator gives, devises, and bequeaths to three trustees all the remainder of his property and estate, real, personal, and mixed, in trust, to take possession of, and hold, manage, and appropriate the same, and to collect all the rents, issues, profits, income, dividends, and gains thereof, "and to invest and keep invested the same, and every part of the capital thereof, so as to make the same as productive as reasonably may be." He directs the trustees to preserve such investments and securities as he might leave so long as they deem prudent, and to make such new investments as they deem advisable and advantageous to his estate, giving them unlimited discretion to select any investments or securities, except two specified classes of securities, "with full power also, to the said trustees, to change any such investments, whether left by me or made by them, and to convert and reinvest the proceeds, whenever and as often as they, in their judgment and discretion, may think most to the advantage of my estate." The income is to be paid to certain bene-

ficiaries, and when the period for distribution arrives the testator provides for such distribution as follows: "And at such period I direct the division of all the capital of my residuary estate among all my lineal descendants then living, to each an equal share thereof," etc. That the testator intended that a portion of his real estate should not necessarily be sold is evident from the provisions of his will directing that the rents and royalties from his coal-lands shall be deemed a part of the capital of his estate, thus clearly showing that he contemplated their continuing unchanged subject to the trust. He also declares that such lands shall not be sold while they produce rents or royalties unless exceptionally full prices shall be obtained therefor, or unless for some reason it becomes unwise for the trustees to retain the lands as part of the estate. As to these lands, it is evident that an out and out conversion was not only not thought of, but on the contrary was expressly provided against. This fact is important in view of the contention that by using the word "capital" in referring to his residuary estate the testator has employed a word which describes personal property only. If the word does not, as used by the testator, embrace real estate, then these coal-lands are not included in the residuary estate, and are not therefore subject to the trust, although in express terms subjected to it. The word "capital" as used necessarily relates to both real and personal property, and that it was the design of the testator to have it refer to both kinds of property is manifest from the fact that he uses it as synonymous with the word "principal." In several places he speaks of the "capital or principal" of his residuary estate. This phrase "capital or principal" is used in the same sense as the word "capital," as appears from the context. The word means merely the *corpus* of the residuary estate, whether consisting of real or personal property, as contradistinguished from the income thereof.

In the management of the estate by the trustees the testator manifests but a single controlling solicitude. His scheme is to have the *corpus* of his residuary estate so handled and invested as to produce the greatest income consistent with safety, and he even evinces a willingness to risk somewhat the princi-

pal for the sake of a greater income by enlarging the class of investments which his trustees may make. They may continue his old investments if they will best subserve this controlling purpose. They may make such new investments as will conduce to this main end. Whether the investments shall be in real estate or shall consist of securities is immaterial. It is somewhat significant that the testator directs his trustees to hold his residuary estate, a portion of which consisted of real property, and to collect the rents, issues, and profits thereof; and they are further directed to preserve such investments and securities as he shall leave standing in his name so long as they deem prudent. The word "investments" is doubtless used in its broadest sense, embracing all kinds of property in which his wealth might be invested, either originally or by subsequent change. It is true that when the period for distribution arrives he directs that the capital of his residuary estate shall be divided. But this does not necessarily mean a division of the estate as personal property. "The words 'divide equally' are alike applicable to real and personal property, and may very appropriately be used in reference to both." Hobson v. Hale, 95 N. Y. 596–602. Jarman says that the inference in favor of conversion "is not necessarily to be drawn from a trust to divide into several shares, even though the trustees have an express power of sale." 2 Wills, 177. We are clearly of the opinion that the main scheme of the testator was such investment of the *corpus* of his residuary estate as would result in the largest income, and that the power of sale was merely ancillary to that purpose. The trustees were given power to sell in furtherance of that scheme, and they were vested with a discretion, not only as to the time and terms of sale, but as to the fact of sale itself, in order that this prominent feature of the will might be fully carried into effect. To hold that he had directed a sale of all his real estate, and thus placed the matter beyond the control of the trustees, would conflict with the dominent purpose of the will that any investment, whether consisting of real or personal property, which was more profitable than any other investment that could be made, should stand as to all the property the trustees found in that form when the trust devolved upon them.

What is the master spirit of the testament? That all the land should be sold irrespective of the question of the profit flowing from the investment; or that all land should be held and sold only in furtherance of the leading purpose to subordinate the character of the investments to the question of largest possible profits, consistent with reasonable safety? Clearly the latter.

We cannot better express our conception of the testator's design, so far as this problem is concerned, than by quoting the language in which the counsel for the appellant in his very able and learned brief has stated that purpose: "The greatest amount of profit consistent with safety is the essential idea in the directions relating to investment, and in aid of which the power of sale is given." Certainly the direction by implication to sell, there being no express direction and no absolute necessity for a sale, cannot be said to be sufficiently clear to bring it within the rule which requires the implication to be "so strong as to leave no substantial doubt." Scholle v. Scholle, 113 N. Y. 261-270, 21 N. E. Rep. 84. "No express provision being made in the will for the conversion of the realty into personalty, every intendment is antagonistic to such an intention." Hobson v. Hale, 95 N. Y. 596-605. We therefore hold that the real estate was not equitably converted into personalty; that the trust as to the real property within this state is to be construed by the laws of this state; and that under those laws it is void because it unlawfully suspends the absolute power of alienation. The power of sale was given only for the purpose of the trust. The trust being void the power of sale falls with it. When the grantee of a power has no beneficial interest in the execution of the power it can be exercised only for the very purpose for which it was created. Hetzel v. Barber, 69 N. Y. 13; Benedict v. Webb, 98 N. Y. 460. This last case is peculiarly in point. The court said: "It is conceded that the validity of the title tendered to the defendant pursuant to the contract depends upon the question whether the power of sale contained in the will was a valid authority, and justified the executor in making the contract. This in turn depends upon the validity of the trust created by the will in the executor. If the trust is valid we think there is no substantial objection to the title tendered. If, however, it is invalid

we are of the opinion that the power of sale for the purpose of a division as provided in the will falls with it, and cannot be executed as a separate and independent provision."

But it is further insisted that under the authority to sell conferred upon the trustees the absolute power of alienation is not suspended at all; that there are always some persons in being by whom an absolute interest in possession can be conveyed. This, in a measure, is true, so far as the particular real estate left by the testator is concerned. But it is not true with respect to the trust property. Whether that property is real or personal, it is not during the trust subject to disposition as property owned absolutely. The power of disposition is limited. It cannot be sold as property free from a trust. The common law contemplates a sale by an owner of both the legal and equitable title, after the prescribed period. The rule forbidding perpetuities relates to personal as well as real property, and certainly the reason for the rule embraces both kinds of property. In this age it is even more important that the sale of personal property, which constitutes the greater portion of our wealth and the chief subject of trade, should be unfettered than that real estate should be subject to free disposition. If a trust of personal property cannot endure for longer than lives in being and twenty-one years and the period of gestation thereafter, is a trust of real estate, which is subject to the same rule, rendered valid by the mere power in the trustee to convert one kind of trust property into another, the property all the time remaining under the trust? If the bare authority to alter the nature of the trust property could save the trust from the condemnation of the doctrine against perpetuities, then a trust of real estate to endure forever could be made valid by a discretionary power in the trustee to change the *corpus* of the trust-estate from real to personal property. The authorities are clear on this point, and they hold that a discretionary power to change the nature of the property will not make real estate subject to a trust susceptible of that alienation, the absolute power of which the common law and the statute against perpetuities declare shall not be suspended beyond a certain period. Brewer v. Brewer, 11 Hun, 147; affirmed in 72 N. Y. 603; Hobson v. Hale, 95 N. Y. 588-609;

Hawley v. James, 5 Paige, 330, 444, 16 Wend. 61, 163; Savage v. Burnham, 17 N. Y. 561-572; Ford v. Ford, (Wis.) 33 N. W. Rep. 188; Palms v. Palms, 36 N. W. Rep. 419-441. Our statute embodies this doctrine. Section 2744 of the Compiled Laws provides that "the suspension of all power to alienate the subject of a trust, other than a power to exchange it for other property to be held upon the same trust, or to sell and invest the proceeds to be held upon the same trust, is a suspension of the power of alienation, within the meaning of § 2717." It follows that the defendants as trustees had no power to sell, and, being unable to give a good title, they are bound under the contract to refund the money paid by plaintiff, and the demurrer should therefore have been overruled. The order and judgment of the district court are reversed, with costs to the appellant, and judgment is directed for the plaintiff upon the demurrer, unless defendant within twenty days from the filing of the *remittitur* in that court withdraws his demurrer, and serves an answer. All concur.

HATTIE R. PICKERT, Plaintiff and Respondent, *v.* FRED RUGG, E. J. MCMAHON and BEN WALDEN, Defendants and Appellants.

1. **Charge of the Court.**

   Instructions of trial judge to jury *held* correct under the evidence.

2. **Conversion—Damages—Highest Market Value.**

   To entitle a person to recover the highest market value between the time of the conversion of property and of the rendering of the verdict, he must affirmatively show such facts as establish clearly that he has commenced and prosecuted his action with reasonable diligence. No presumption will be indulged in his favor, and the statute will be strictly construed against him.

3. **Same; Same; Same; Reasonable Diligence in Bringing Action.**

   Delay of eleven months in bringing his action, *held* fatal to plaintiff's claim that he had prosecuted his action with reasonable diligence, within the meaning of § 4603, subd. 2, Comp. Laws, giving him the highest market value between the conversion and the verdict, when the action has been prosecuted with reasonable diligence.

4. Insufficiency of Evidence—Specification of Particulars.
Sufficiency of the evidence to support the verdict cannot be assailed in the supreme court when in neither the notice of intention to move for a new trial nor the bill of exceptions are the particulars specified wherein the evidence is alleged to be insufficient.

(Opinion Filed September 2, 1890.)

APPEAL from district court, Griggs county; Hon. RODERICK ROSE, Judge.

Messrs. *E. J. & J. P. McMahon* and *J. E. Robinson*, for appellants; *A. C. Davis*, for respondent.

CORLISS, C. J. The plaintiff has been so far successful in her effort to recover the value of wheat unlawfully taken from her possession. The wheat in question was seized by the defendant Walden, as sheriff, under an attachment against Rozell Pickert, the father and general agent of the plaintiff. Defendant McMahon appears to have directed the seizure, acting as attorney for the plaintiff in the action in which the attachment was issued. Defendants do not pretend that they could or do justify under the attachment against plaintiff's father. They do not question plaintiff's ownership of the wheat, but they insist that their liability for the tort was settled by the plaintiff, through her alleged agent, Mr. White. It is against the charge of the trial court on the scope of his powers as agent that the first assignment of error is directed. The court, in substance, charged that the jury must find whether White was the general agent of plaintiff, and whether he had power to settle the plaintiff's cause of action for the conversion of her wheat. Certainly the defendant cannot complain of the submission to the jury of the question whether White was the general agent of the plaintiff. He derived all his authority from the father of plaintiff, who was plaintiff's general agent. There was nothing to show that the general agent could delegate his powers to White. The case is not brought within the provisions of § 4003, Comp. Laws, and any other delegation of power is forbidden by that section. White testified as to his authority as follows: "I have never seen the plaintiff. I was general superintendent of her farm and farming operations during part of the year 1887. All my dealings on the part of the plaintiff have been through her fa-

ther. He acted as her general agent, and gave me chief control under him. My duties were the general supervision of the farm. My authority simply consisted in threshing this wheat, and hauling it to market, and everything of that kind. I had no authority to settle any bills or anything of that kind; but had authority to settle the Rugg account, if I could. I received instructions by telegram from Mr. Pickert to arrange the claim, but not to pay any costs." It is obvious that White had no such general authority in the management of plaintiff's business as would authorize him to compromise a cause of action in her favor arising from the conversion of her property. Nor did the court err, as against defendants, in submitting to the jury the question of White's special authority to settle plaintiff's claim against defendants. Rozell Pickert, plaintiff's general agent, denied that he gave him any such authority. He said: "I never gave White any authority to settle any suits at all. I simply stated in a telegram to White that I would pay these bills to Hope, without costs." Giving White's testimony the most favorable construction, it appears that the fact of special authority to him was a controverted one, and was therefore properly submitted to the jury. But White does not claim that he had any authority to settle plaintiff's claim against defendants for conversion. His power was limited to the adjustment of the Rugg account, which appears to be a claim, not against plaintiff, but against her father.

The third exception to the charge is to that portion of it which, it is claimed, assumes that defendants are liable for the balance of the wheat taken by them, after deducting the amount necessary to settle the Rugg claim and another claim, on which some of plaintiff's wheat was attached, known as the "Starling claim." We find no error in this. The amount of wheat taken, according to the testimony on the part of the plaintiff, was 6,000 bushels. Assuming all that defendants claim as to the amount of wheat necessary to pay these two claims, and that White, with full power, did settle them by turning over a sufficient amount of the wheat attached, there still remained to be accounted for over 2,000 bushels. It was with reference to this testimony that the court charged the jury that they must de-

duct the wheat taken for settlement from whatever amount of wheat the jury should find the defendants had seized. As the verdict was for only $300, it is apparent that the jury have not found for an amount in excess of the value of the balance of the wheat taken according to plaintiff's showing, after deducting all that it is claimed was turned over by plaintiff's agent in settlement of these accounts.

The point that the evidence is insufficient to sustain the verdict is not before us, the defendant not being in position to raise it, because neither in his notice of intention to move for a new trial nor in his bill of exceptions did he specify the particulars in which the evidence is alleged to be insufficient. Comp. Laws, §§ 5081, 5090.

The fifth assignment of error presents the question of the proper measue of damages in actions for conversion. The court instructed the jury that the plaintiff was entitled to recover the highest market price at any time between the conversion and the verdict. This is declared to be the rule, under certain circumstances, by section 4603, subd. 2, Comp. Laws: "The detriment caused by the wrongful conversion of personal property is presumed to be (1) the value of the property at the time of the conversion, with interest from that time; or, (2) where the action has been prosecuted with reasonable diligence, the highest market value of the property at any time between the conversion and the verdict, without interest, at the option of the injured party." The second subdivision of the foregoing section was interpolated into it by amendment in 1885, (Laws 1885, c. 42.) Prior to that time our Code had established the rule which has the sanction of the best-considered adjudications, and which accords most perfectly with the policy of the law in awarding damages, where the doctrine of exemplary damages has no application—full compensation, without punishment. That rule was embodied in § 1980 of the Civil Code, (§ 4613, Comp. Laws,) which provides: "In estimating damages, the value of property to a buyer or owner thereof deprived of its possession is deemed to be the price at which he might have bought an equivalent thing in the market nearest to the place where the property ought to have been put into his possession, and at such time

after the breach of duty upon which his right to damages is founded as would suffice, with reasonable diligence, for him to make such purchase."

This legislation, and the decisions with which it is in line, ordain the only philosophically correct, the only reasonable, the only just, the only consistent rule of damages in such cases. It recognizes and gives full effect to another doctrine supported by precedent and by reason, *i. e.*, that the party injured must use reasonable diligence to reduce his damages to the lowest possible amount. He cannot consistently allow them to become augmented, and charge the wrong-doer with the excess. This principle is frequently applied in cases where a person injured has suffered his injuries to become aggravated by failing to exercise reasonable care. But the rule is of universal application. 1 Suth. Dam. 237, 238, and cases in note; Wright v. Bank, 110 N. Y. 237, 18 N. E. Rep. 79. A person whose property has been wrongfully taken from him may and should go into the market, within a reasonable time, and purchase like property. He owes this duty to the wrong-doer under the law. It is in his power in this manner to place himself in the position, so far as the future is concerned, which he could have occupied had not the wrong been committed. For the loss to the owner of a chance to sell at the highest intermediate price between the conversion and a reasonable time thereafter, or to compensate him for being compelled to buy at an enhanced price, many of the cases impose upon the wrong-doer, in the owner's favor, the duty of paying this highest intermediate price. But the owner should be granted no greater right, after he has had a reasonable time in which to secure in the market property like that which has been wrested or withheld from him, than he would have possessed had this possession never been disturbed. He should, as to future fluctuations in price, be in no better position than would have been occupied by him had not his rights to the property been interfered with. Had his control of the property not been interfered with, he would have risked loss by depreciation in value, while waiting for a better price. He certainly should not enjoy all the benefits of an advance in value without incurring risk from reduction; and yet precisely this unfair advantage the doctrine of

the highest market value between the conversion and the verdict gives him, and gives him, too, at the expense of the defendant, who may possibly, but not probably, dispose of the property at that value, and thus escape without loss, but who will very likely never receive the price which this rule entitles the owner to recover from him. This doctrine punishes the defendant, and accords to the owner more than fair compensation for his loss. The cases which enunciate the rule that the owner of property of fluctuating value may recover the highest market price within a reasonable time after the conversion are numerous. Gallagher v. Jones, 129 U. S. 193, 9 Sup. Ct. Rep. 335; Baker v. Drake, 53 N. Y. 211; Gruman v. Smith, 81 N. Y. 25; Wright v. Bank, 110 N. Y. 237, 18 N. E. Rep. 79; Brewster v. Van Liew, 119 Ill. 561, 8 N. E. Rep. 842; Ball v. Campbell, 30 Kan. 180, 2 Pac. Rep. 165; Page v. Fowler, 39 Cal. 412.

The rule fixed by our statute, as amended in 1885, will work out absurd results. If suit for conversion be brought immediately after the conversion, and prosecuted with all possible dispatch, the plaintiff may recover the highest market price on the very day of trial, although, from an overcrowded calendar or insufficient judicial facilities, the trial of the cause may be delayed for a period of several years, and notwithstanding the fact that continually from the time of the conversion down to the day of trial, when it suddenly increases in value, the property has been worth much less than when it was taken, and, on the other hand, if the value of the converted property should rise to the highest point so soon after the conversion that the plaintiff would have no opportunity to purchase like property at the value of the converted property when converted, yet, if the owner should unreasonably delay the commencement or the prosecution of his action, he could recover only the value at the time of the taking, although it will not afford him full remuneration, and although in justice he is more entitled to the highest market value in the latter case, where it is denied to him, than in the former case, where it is awarded to him, and although, further, there is no connection between his diligence or want of diligence in prosecuting his suit and indemnity for his loss. In the first case the statutory rule works injustice to the defendant, and in the latter case to

the plaintiff. The supreme court of California criticised the rule established in this state by the amendment of 1885, in the case of Page v. Fowler, 39 Cal. 412. The reasoning of the court is unanswerable: "In many of the cases it is said that the plaintiff will be allowed the highest price intermediate the taking and the trial, if the suit has been commenced within reasonable time, and prosecuted without unreasonable delay, and no intimation is made as to what the rule would be if the suit were not commenced within a reasonable time; but it is evident that the question of damages ought to be the same in either case. The time of the commencement of the action or trial would not seem to have any natural or logical connection or relation to the question of damages; and the question as to whether a suit was or was not commenced within a reasonable time would rarely, if ever, depend upon any fact which would affect the indemnity to which the plaintiff is entitled. The reasonable time mentioned in the cases cannot mean a reasonable time within which to commence the action independently of the question of damages. It must mean a time within which it would be reasonable to allow the plaintiff to take the highest market price as the measure of his damage. In other words, the rule deducible from the authorities is that, in cases affecting property of a fluctuating value where exemplary damages are not allowed, the correct measure of damages is the highest market value within a reasonable time after the property was taken, with interest computed from the time such value was estimated." This opinion was rendered in 1870, and in 1872, in the face of it, California adopted by statutory enactment the same rule as that which has obtained in this jurisdiction since the amendment of 1885. That this rule will work gross injustice is shown by the facts of the California case, and by the fact that, while the wheat in the case at bar was worth 60 cents a bushel when taken, the plaintiff recovered $1.23 a bushel for it under this rule.

What we have said with reference to this rule, touching the injustice it will frequently work, has been said with a view of demonstrating the importance of giving it a strict construction. While the question of reasonable diligence is sometimes a question of fact, yet this court will determine, in the first instance,

whether a suitor has prosecuted his action with such reasonable diligence as entitles him to recover the highest market value between the conversion and the verdict, and he must present a clear case to bring himself within the rule. Whenever the decision depends upon disputed facts, these facts must of course be submitted to a jury, under proper instructions. But what facts constitute this reasonable diligence the court will ordinarily determine, as a question of law; and the court will not aid the litigant in securing the benefit of this rule by indulging any presumption in his favor that he has either commenced or prosecuted his action with reasonable diligence. The burden is on him to establish the facts which, as a matter of law, show that he has exercised such diligence. The undisputed facts in the case are fatal to any pretense of reasonable diligence. The property was converted in November, 1887, and suit was not brought until October, 1888. The property converted was wheat, the value of which is subject to considerable fluctuation. It is true that the statute does not, in so many words, require the plaintiff to institute as well as prosecute his action with reasonable diligence; but the commencement as well as the carrying out of the litigation is clearly within the spirit, and we think also with the letter, of the statute. The policy of the act could be practically defeated if the suitor could wait until nearly the expiration of the statutory time within which he must bring his action without being chargeable with a want of reasonable diligence in the prosecution of his action. In fact the prosecution of an action includes the commencement as well as the conducting of an action, and it was in this sense that the word was employed by the legislature. The action not having been prosecuted with reasonable diligence, the plaintiff was not entitled to recover the highest intermediate market value, and for error of the court in this respect the judgment is reversed, and a new trial ordered. All concur.

THOMAS A. JACKSON, Plaintiff and Appellant, *v.* LA MOURE COUNTY, Defendant and Respondent.

1. **Title to Northern Pacific Indemnity Lands.**

Title to the indemnity lands in the grant to the Northern Pacific Railroad Company does not pass from the United States until the selection of such lands by the company with the approval of the secretary of the interior. Until such approval such lands are not subject to taxation.

2. **Action to Remove Cloud Brought by One Having no Title.**

One in possession of real estate, but having no legal or equitable title thereto, cannot maintain an action to remove a cloud upon the title.

(Opinion Filed September 2, 1890.)

APPEAL from district court, Stutsman county; Hon. RODERICK ROSE, Judge.

C. W. Davis, for appellant, *N. B. Wilkinson*, for respondent.

CORLISS, C. J. The tax proceedings to enjoin which this action was instituted were clearly void. The land attempted to be taxed was not subject to taxation. It was property of the United States. Van Brocklin v. Anderson, 117 U. S. 151, 6 Sup. Ct. Rep. 670; Tucker v. Ferguson, 22 Wall. 527. The exemption of such property from taxation by the states rests upon the doctrine that there must inhere in every government the power to perpetuate itself. The supremacy of the federal government could be annihilated by hostile taxation by the states of federal agencies and property. With respect to property, the power to tax, save as limited by constitutional inhibition, acknowledges no restraint. All federal agencies and property might be thus transferred to the coffers of the states, were they subject to taxation. The land in question was embraced within the territory of the indemnity lands of the Northern Pacific Railroad Company, and was such land as the company might, under its grant, select to make good its losses of land within the "place" limits by reason of prior settlement, or for any reason. It is, however, averred in the complaint, and admitted by the demurrer, that the company has never made the selection of the

land in question, or of any part thereof, and that the United States still holds the legal title to the land. Under these facts the property was not subject to taxation. Wisconsin Cent. R. Co. v. Price Co., 10 Sup. Ct. Rep. 341. Even selection by the company, without the approval of the secretary of the interior, would not have divested the government of its title to the land. It was so held in the case cited. The company in that case had, in fact, made selections of the lands sought to be taxed, but the secretary had refused to approve the selection, insisting that the company was not entitled to such lands, claiming that it had already secured more than it could rightfully hold under the grant. The secretary was in error. The company was in fact entitled to as much indemnity lands as it had selected. But the supreme court held that, as the secretary had refused to approve the selection, no title whatever had passed, and the lands were not therefore taxable, notwithstanding the fact that the secretary's refusal was unjustifiable.

The soundness of this decision cannot be assailed. There is a well-defined difference between "indemnity" lands and "place" lands. The latter become instantly fixed by the adoption of the line of the road. The odd-numbered sections to the amount of twenty sections a mile on each side of the road were granted to the Northern Pacific Railroad Company by the act of congress. The language of the grant is that there be and "are hereby granted." The moment the route of the railroad had been deffinitely established these sections were susceptible of identification, and *eo instanti*, the grant attached to them, the translation of title dating back to the date of the grant: Wisconsin Cent. R. R. Co. v. Price Co., 10 Sup. Ct. Rep. 341; Railway Co. v. Baldwin, 103 U. S. 426; Barney v. Railroad Co., 117 U. S. 228, 6 Sup. Ct. Rep. 654; Denny v. Dodson, 32 Fed. Rep. 899; Railroad Co. v. Majors, 2 Pac. Rep. 322. But the indemnity lands cannot be ascertained by the mere location of the road. They are substitutes for granted lands lost, and it is therefore important that the fact of such loss from the attaching superior pre-emption or other rights to any portion of the "place" lands should be ascertained by the interior department before allowing the company to make selection for indemnity;

and it is also necessary for that department to determine whether the lands which the company desires to select for indemnity are open to selection; whether there is not some prior claim upon them in behalf of settlers or others. It is therefore entirely proper that the secretary of the interior should have the right to approve or disapprove of the selection before it becomes final. This is clearly the meaning of the provision of the grant to the Northern Pacific, which declares that the indemnity lands shall be selected by the company "under the direction of the secretary of the interior." 13 St. U. S. c. 217, p. 365, § 3; Elling v. Thexton, 16 Pac. Rep. 931; St. Paul, etc., R. Co. v. Winona, etc., R. Co., 112 U. S. 720, 5 Sup. Ct. Rep. 334. The statute must have the same construction that would be given it if the word "approval" had been used in place of the word "direction." The title to the indemnity lands does not pass until the selection has been made. Ryan v. Railroad Co., 99 U. S. 382; St. Paul, etc., Railroad Co. v. Winona, etc., Railroad Co., 112 U. S. 720, 5 Sup. Ct. Rep. 334; Barney v. Railroad Co., 117 U. S. 228, 6 Sup. Ct. Rep. 654; Sioux City, etc., R. Co. v. Chicago, etc., R. Co., 117 U. S. 406, 6 Sup. Ct. Rep. 790; Wisconsin Cent. R. Co. v. Price Co., 10 Sup. Ct. Rep. 341. Under this last decision the approval of the secretary of the interior is essential to selection. Without it there is no selection in fact. In the language of the opinion in that case, "until the selections were approved there were no selections in fact, only preliminary proceedings taken for that purpose, and the indemnity lands remained unaffected in the title." The same facts which show that the land was exempt from taxation are fatal to the plaintiff's right to maintain this action. The title never having passed from the government, the railway company had none to convey. Plaintiff does not pretend that he has any title except in so far as § 5 of the act of congress, approved March 3, 1887, (24 St. 556,) may confer upon him some kind of title. That section provides, in substance, that the purchaser of such land from the company, having failed to secure any title because the company had none to transfer, may make payment to the United States for such land at the ordinary government price for like lands, and thereupon a pat-

ent shall issue to him. This statute certainly does not confer upon him the legal title to the land. That still remains in the United States. Nor is it easy to perceive how the statute can be said to vest in the plaintiff an equitable title to the land. He is a mere settler, with a right to purchase on making a certain payment. It is not pretended that that payment had been made at the time this action was commenced. The plaintiff then had neither a patent nor a right to a patent. He was not in possession under a contract binding the owner of the land to convey to him the legal title. The government had not obligated itself to make such conveyance. It had granted to the plaintiff a concession which it could at any time withdraw. Whatever privilege he held under this act, the government was under no obligation, moral or legal, to continue to respect. He was the recipient of an indulgence—a favor; but in no sense could he claim to be the owner of any right enforceable in a court of law or equity. The vendee in a contract for the sale of real estate is, in equity, regarded as the owner, and is therefore said to hold the equitable title because he can compel the vendor to perform his contract. There rests upon the vendor an obligation to perform it which equity will enforce. The plaintiff in this case occupies no such position. He has a mere privilege. If he avails himself of it by the payment of money, he will then become the owner of the equitable title to the land, and possibly secure a standing in equity to remove a cloud upon his equitable interest. But we do not decide whether an equitable title is sufficient to warrant the maintenance of an action to remove a cloud therefrom. There is certainly authority for such a doctrine. See Hart v. Bloomfield, (Miss.) 5 South. Rep. 620; Slaon v. Sloan, (Fla.) id. 603; 3 Pom. Eq. Jur. § 1399, note 4; Bryan v. Winburn, 43 Ark. 28; Lamb v. Farrell, 21 Fed. Rep. 5; Emery v. Cochran, 82 Ill. 65; Langdon v. Templeton, 17 Atl. Rep. 839. On the other hand there is much which inclines to the more strict rule which requires a legal title to support such an action. See Frost v. Spitley, 121 U. S. 552, 7 Sup. Ct. Rep. 1129; Thomas v. White, 2 Ohio St. 548; Holland v. Challen, 110 U. S. 15, 3 Sup. Ct. Rep. 495.

It is further insisted that under the decisions in Railroad Co.

v. Rockne, 115 U. S. 600, 6 Sup. Ct. Rep. 201, and Wisconsin Cent. R. Co. v. Price Co., 10 Sup. Ct. Rep. 341, the railroad company could have maintained this action had it not executed a deed of the property to the plaintiff, and that therefore the plaintiff can maintain the action because he has succeeded to the interest of the company in the property. In the case of Wisconsin Cent. R. Co. v. Price Co., it appeared that the plaintiff, at the time of instituting its action to set aside the tax-proceeding, was the owner of the legal title, although, when the tax proceedings were initiated, such title was still in the state in trust. The land grant of the plaintiff in that case was made by the United States to the state in trust, and, intermediate the levy of the tax and the commencement of the action to annul the tax proceedings, the state executed to the plaintiff a patent for the land in question. This patent was by a state statute *prima facie* evidence of title in the grantee, and the trial court found as a fact that the plaintiff was the owner of the legal title, and this finding was in no manner challenged. The fact, therefore, was undisputed that the plaintiff, when the suit was brought, was the absolute owner in fee of the land over which the cloud rested. In the Rockne Case, the court held, not that the legal title was in the railroad, but that the interest of the company, whether legal or equitable, was subject to a lien in favor of the United States for the unpaid survey fee, and that therefore the land was exempt from taxation by the state; that the tax proceedings, if valid, might result in the destruction of this lien by a sale of the absolute title should the taxes remain unpaid. It is apparent in this case that the court regarded the interest of the company in the land as equivalent at least to an equitable title. Said the court on this point: "The government was as to those costs in the position of a trustee in a conveyance to secure the payment of money." And in Denny v. Dodson, 32 Fed. Rep. 899 Mr. Justice Field, speaking of the statute giving this lien, and of the decision in the Rockne Case, says: "The law was therefore, in effect, an assertion of a lien upon the title papers, and upon the lands, for expenses necessarily incurred for their identification and survey, and in the preparation of conveyances by the government; and the decision of the court

[*i. e.*, the Rockne Case] was, in substance, that such a lier would not be made available against any taxation or sales thereunder. Notwithstanding the expression referred to, it is not believed that the court intended to hold that a legal title to the lands had not passed by the grant to the company, and thus overrule or qualify a long line of decisions announced after the most mature consideration, and discredit the security which, only a few weeks before, congress had authorized by mortgage on the lands to raise funds to construct the road, but only to declare that the power of disposition by the grantee was stayed by the government until the payment of the costs mentioned was made, and the right of the government to enforce such payment could not be defeated by the tax laws of the territory." It thus appears that in the Rockne Case the plaintiff was the owner of at least the equitable title to the land, and, in the other case, of the fee simple, when the suit to remove the cloud was instituted. The cases are not, therefore, in point.

We hold that the tax proceedings are void under the allegations of the complaint, but that the plaintiff has no such interest in the property as entitles him to maintain this action. The order and judgment of the district court sustaining the demurrer are therefore affimed. All concur.

BARTHOLOMEW, J., having been of counsel, did not sit upon the hearing of the above case, nor participate in the decision herein given.

P. P. PERSONS and Others, Plaintiffs and Appellants *v.* JOHN SIMONS, Defendant and Respondent.

1. Appealable Order; Order Denying Motion for Judgment is Not.

An order of the district court refusing an application for judgment upon the findings of a jury is not an appealable order, within the meaning of subdivision 1, § 5236, Comp. Laws 1887, which subdivision is as follows: "An order affecting a substantial right, made in any action, when such order in effect determines the action, and prevents a judgment from which an appeal might be taken." Such an order neither determines an action nor any issue in an action, nor is it the le-

gal effect of such an order to prevent the entry of a judgment from which an appeal might be taken.

2. **Same; Same; Not Even if Court Refuses to Order Judgment for Either Party.**

Held, further, that the order is not rendered appealable by the fact that the district court had previously denied defendant's application for judgment on the findings of the jury.

(Opinion Filed October 20, 1890.)

APPEAL from district court, Stutsman county; Hon. RODERICK ROSE, Judge.

George K. Andrus, Edgar W. Camp and Messrs. Scott and Remington, for appellants, cited: Belt v. Davis, 1 Cal. 136; Hill v. Sherwood, 33 id. 478; U. S. v. Schooner Peggy, 1 Cranch 193; Powell on Appellate Proceedings, sec. 111; Lamphear v. Lamphry, 4 Mass. 108; Tappen v. Buren, 5 id. 195; Hayne on New Trial and Appeal, § 184.

Herman Winterer and Frank J. Young (J. B. and W. H. Sanborn of counsel) for respondent, filed no printed brief.

WALLIN, J. After a trial had in this action the jury returned a general verdict, and, in addition thereto, returned answers to certain interrogations submitted to them by the trial court. Subsequently, the defendant, assuming that the findings of the jury were in his favor, moved for judgment upon such findings. The motion was denied. Thereafter the plaintiff, assuming that the findings of the jury entitled them to a judgment, moved the district court upon such findings for judgment in favor of the plaintiffs. The latter motion was likewise denied by the court, and, from the order denying the same, plaintiffs appeal to this court. The refusal of the district court to grant plaintiffs' application for judgment upon the findings is assigned as error by the plaintiffs. No judgment has been entered in the action. In this court a preliminary motion is made by respondent to dismiss the appeal, upon the ground, among others, that an order refusing to enter judgment upon a verdict is not an appealable order. The motion raises a question going to the jurisdiction of the court to consider the merits. If the order is not appealable, this court has not acquired jurisdiction to pass upon any

error assigned upon the record which comes up with the order. Appellants claim that the appeal is properly taken, under subdivision 1, § 5236, Comp. Laws, which reads as follows: "An order affecting a substantial right, made in any action, when such order in effect determines the action, and prevents a judgment from which an appeal might be taken." We think the order in question is not appealable under subdivision 1, above quoted. It is true that the order is one "affecting a substantial right." But, to be appealable, the order must not merely affect a substantial right; it must, in addition thereto, be an order which in effect determines the action," and must also be an order which "prevents a judgment from which an appeal might be taken." The order sought to be appealed from is, in its legal effect, only a refusal of the district court to enter judgment in plaintiffs' favor at the time the application was made, and upon the particular grounds upon which the plaintiffs moved, viz., upon the findings of the jury.

As we view the matter, there are two elements lacking in this order which are essential to the appealability under subdivision 1, § 5236, Comp. Laws: *First.* The order in question does not "in effect determine the action;" nor does it purport to pass upon or adjudicate any of the issues involved in the case. *Second.* The order is not one which can be construed in such a way as to "prevent a judgment in the action from which an appeal might be taken." The subdivision of the statute under which the appeal is sought to be sustained is identical in language with the statute of Wisconsin regulating appeals from the circuit to the supreme court of that state; and the subdivision above quoted has been frequently construed by the supreme court of Wisconsin with reference to orders of the circuit court directing and refusing to direct the entry of judgment upon verdicts. For reasons which meet with our full approval, the holdings of the supreme court of Wisconsin have, without exception, been against the appealability of such orders. In Murray v. Scribner, (Wis.) 35 N. W. Rep. 311, the court say: "An order for final judgment of plaintiff, and denying defendant's motion for judgment, being a mere interlocutory order, is not appealable, under Rev. St. Wis. § 3069;" citing other cases from Wisconsin.

In School District v. Kemen, (Wis.) 32 N. W. Rep. 42, the court say: "If the appeal be regarded as from an order for judgment, instead of a judgment, (which seems to be the view taken of it by counsel for the plaintiff,) it must still be dismissed. A mere order for judgment is not appealable." In Treat v. Hiles, (Wis.) 44 N. W. Rep. 1088, the court say: "For the same reason, the rule is applicable to an order denying a motion for judgment on a verdict. Such an order does not prevent a judgment for the other party, from which the moving party may appeal, or an order for a new trial, from which he may also appeal. Indeed, the result of a verdict necessarily is a judgment of some sort for one party or the other, or a new trial; and on an appeal by the aggrieved party, whether from the judgment or the order for a new trial, the court will determine whether such party is entitled to judgment on the verdict. Neither does an order denying a motion for judgment on the verdict involve the merits of the action, within the meaning of subdivision 4 of the same section. It is practically a ruling by the court on the trial, with the same incidents which attach to a ruling sustaining a demurrer *ore tenus*, or admitting or rejecting testimony, and the like. * * * It must be held that the order denying defendant's motion for judgment is not appealable, and hence the appeal therefrom must be dismissed." The case under consideration comes squarely within the rule of the Wisconsin cases, and within the language of the statute. It follows that the motion to dismiss the appeal must be granted. So ordered. All concur.

THE STATE OF NORTH DAKOTA *ex rel.* MARSHALL C. GOODSILL, Plaintiff, *v.* THOMAS J. WOODMANSEE, Defendant.

1. Constitutional Law — Section 27 of State Bank Act Valid.

Section 27, c. 23, Laws N. Dak. 1890, entitled "An act to provide for the organization and government of state banks," which prohibits all persons from doing a banking business in this state, except corporations which are organized under said chapter, examined and held to be constitutional. Said section does not contravene either § 1 of arti-

cle 1 of the state constitution or § 1 of the 14th amendment to the fedearl constitution.

2. **Same; Same; Police Power.**
Said § 27 is upheld as a proper exercise by the legislature of that branch of the internal police power of the state which relates to the public safety.

3. **Same; Same; Bill to Embrace but One Subject.**
Held, further, that said § 27 is not a violation of § 61 of the state constitution, which provides that "no bill shall embrace more than one subject, which shall be expressed in its title; but a bill which violates this provision shall be invalidated thereby only as to so much thereof as shall not be so expressed."

(Opinion Filed October 20, 1890.)

HABEAS CORPUS.

W. H. Francis and A. C. Davis, for plaintiff, filed a brief containing points and authorities without argument. Mr. Francis presented the case to the court in an exhaustive oral argument. The points and authorities were as follows: Section 27 of the State Bank Law of 1890 amounts to a palpable and arbitrary interference with the right of personal liberty: People v. Marx, 99 N. Y. 377; *in re* Jacobs, 98 id. 98; B. Un. Co. v. C. C. Co., 111 U. S. 146; Yick Wo v. Hopkins, 118 id. 356; People v. Common Council, 38 N. W. 470; Millett v. People, 117 Ill. 302 (S. C. 7 N. E. 631;) People v. Gillson, 109 N. Y. 389. Said section is utterly foreign to the purpose of the act as indicated by its title: Eaton v. Walker, 43 N. W. 638; State v. Houdley, 22 Pac. 99; Dolese v. Pierce, 16 N. E. 218; Donnersberger v. Prendergast, 21 id. 1; People v. Hamill, 17 id. 799.

George F. Goodwin, attorney general, for defendant, argued: That it is within the power of the legislature to restrict the right to engage in the business of banking: Morse on Banks, § 13; Bank v. Earle, 13 Pet. 519. That the law is not in conflict with the constitution of the United States: Slaughter House Cases, 83 U. S. 394; N. O. Gaslight Co. v. La H. & L. Co., 115 id. 650; Boyd v. Alabama, 94 id. 645. Similar acts have been sustained in other states. Rennington v. Forward, 7 Wend. 276; Attorney General v. Utica Ins. Co., 2 Johns. ch. 371;

State v. Stebbins, 1 Steward, 312; Austin v. State, 10 Mo. 591; Myers v. Irvine, 2 Serg. & R. 368. The provision of the constitution that "no bill shall embrace more than one subject," must receive a liberal construction: Cooley Con. Lim. 146; Johnson v. Higgins, 3 Metc. (Ky.) 566. "Where the title of the act expresses a general subject, all matters fairly and reasonably connected with it, and all measures which will or may facilitate its accomplishment, are proper to be incorporated in the act and are germane to the title." *In re* Knaust, 101 N. Y. 194; People v. Briggs, 50 N. Y. 553; *In re* Comrs. 10 Alt Rep. 363; State v. Judge, 2 Iowa, 280; State v. Cassidy, 22 Minn. 312; People v. Mahoney, 13 Mich. 481; City v. Huegele, 18 N. E. 172; People v. Blue Mountain Joe, 21 id. 923; Fahy v. State, 11 S. W. 108; Black v. State, 66 Ala. 494; Blood v. Mercelliott, 53 Pa. St. 392; Poffinbarger v. Smith, 43 N. W. 1150.

WALLIN, J. Defendant's return to the writ shows that the relator is detained in defendant's custody, as sheriff of Kidder county, by virtue of a certain warrant of commitment for the alleged offense of doing business as an individual banker, contrary to the provisions of § 27 of the act entitled "An act to provide for the organization and government of state banks." Chapter 23, Laws of N. Dak. 1890, p. 106. Section 27 of the act reads as follows: "It shall be unlawful for any individual, firm, or corporation to continue to transact a banking business, or to receive deposits for a period longer than six months immediately after the passage and approval of this act, without first having complied with and organized under the provisions of this act. Any person violating the provisions of this section, either individually or as an interested party, in any association or corporation, shall be guilty of a misdemeanor, and, on conviction thereof, be fined not less than five hundred (500) dollars, nor more than $1,000, or imprisonment in the county jail not less than ninety days, or either, or both, at the discretion of the court." The other provisions of the statute need not be quoted. For the purposes of this case, it will suffice to state that the statute contains thirty sections, which, taken together, provide fully and minutely for the organization and government of banking corporations in this state. By its terms, the business of con-

ducting banks of discount, deposit, and exchange is made an exclusive corporate franchise; and all other kinds of banks, whether conducted by individual firms or other corporations, are forbidden, under the penalties prescribed by § 27 of the act. The statute throws around the business of banking in North Dakota numerous restraints, checks, and regulations which do not exist at common law. Many, if not all, of the features of the statute were borrowed from the existing laws of the United States regulating the organization and government of national banks, and similar enactments have likewise been passed by the legislatures of many of the states.

While not assailing the whole act as unconstitutional, the relator contends that § 27, above quoted, so far as it concerns individuals or firms doing business without incorporation, contravenes both the federal and state constitutions. Counsel for relator cite § 1 of article 1 of the state constitution, and also § 1 of the fourteenth amendment of the constitution of the United States, and claim that the relator's constitutional rights and personal liberty, as secured by these organic acts, have been ruthlessly violated and taken away by § 27 of the statute, for the reason that the section, among other things, prohibits individuals from carrying on the business of banking in a private capacity, and punishes all who violate the prohibition. This contention of the relator was urged with great learning and ability by the eminent counsel representing the prisoner, but we find no support in the authorities cited for the relator for the contention. It is true that it has been held that the provision relative to personal liberty found in our constitution might be violated by the enactment of a statute which operated to deprive a citizen of the right to pursue a lawful trade or avocation. *In re* Jacobs, 98 N. Y. 98; People v. Marx, 99 N. Y. 377, 2 N. E. Rep. 29. But, on the other hand, it is conceded that the business of banking, by reason of its very intimate relations to the fiscal affairs of the people, and the revenues of the state, is and has ever been considered a proper subject of legislative control, and strictly within the domain of the internal police power of every state. As a matter of fact, we have been unable to find an authority, and we have searched diligently, which has ever

questioned the right of the legislature in the exercise of police power to regulate, restrain and govern the business of banking. The relator, however, complains that § 27 does not merely regulate; it goes further, and prohibits individuals from banking in a private capacity. But the prohibition of private banking necessarily results from the inauguration of a banking system for the state, in which the business is made an exclusive corporate franchise; *i. e.*, a business which can be carried on only by those who become incorporated, and are willing to subject their business to the restraints and safeguards found in the banking law under which they acquire the right to carry on such business. It would avail little, in our view of the matter, to provide salutary rules and wholesome safeguards for the business of banking when carried on by a corporation, if at the same time private persons, firms and corporations are permitted to carry on the business unhampered by such restrictions and safeguards. But, as a matter of precedent and authority, the legislative prerogative, in the exercise of its police power in promoting the public safety, not only to regulate and restrict the business of banking, but also to grant the right to one class, and to prohibit to others, or even to forbid it altogether, has never been questioned in the courts, and the legislatures of other states have frequently exercised the right of supreme control over the business.

Morse, in his treatise on Banking, (2d Ed. p. 1), uses the following language: "At common law the right of banking pertains equally to every member of the community. Its free exercise can be restricted only by legislative enactment; but that it legally can be thus restricted has never been questioned. After laws upon the subject have been passed, the business must be undertaken and conducted in strict accordance with all the provisions contained in them. It is not in its nature a corporate franchise, though it may be made such by legislation, and individuals may be prohibited from transacting it, either altogether in all its departments or partially in any specified ones. A law which forbids the carrying on of 'any kind of banking business' is a total prohibition against each particular department of the business, though conducted singly, and may be infringed equally

by exercising any separate one of the various banking functions as by exercising all." See, also, the following authorities: People v. Barton, 6 Cow. 290; People v. Insurance Co., 15 Johns. 358; People v. Brewster. 4 Wend. 498; Pennington v. Townsend, 7 Wend. 276; Hallett v. Harrower, 33 Barb. 537; Nance v. Hemphill, 1 Ala. 551; Austin v. State, 10 Mo. 591. It is clear from these citations that the matter of regulating and prohibiting private banking, and all banking not expressly authorized by law, is strictly within the legislative discretion, under that branch of the police power relating to the public safety, and that the courts will not interfere and declare such legislation unconstitutional as an evasion of individual rights.

The relator further contends that said § 27 is unconstitutional for the reason that it violates the provisions of § 61 of the state constitution, which reads as follows: "No bill shall embrace more than one subject, which shall be expressed in its title; but a bill which violates this provision shall be invalidated thereby only as to so much thereof as shall not be so expressed." Relator's contention is that § 27, in prohibiting and punishing private banking, does not relate to the subject-matter of the act as expressed in its title. There is absolutely nothing in this point. The subject of the law, as expressed in the title, is "State Banks;" but that subject includes and comprehends not only state banks, but all other banking in the state which is related to state banking. In creating state banks, and providing for their government, the law makes the business of banking a corporate franchise; and to prohibit and punish all other banking is, in our opinion, strictly auxiliary to that subject-matter. Similar constitutional provisions may be found in most, if not all, of the states, some of the states using the word "object" instead of "subject," as it appears in our constitution. This provision is intended to forestall what Judge Cooley denominates "log-rolling" legislation, and prevent legislation not fully understood by members of the legislature, as well as to prevent all surprises or misapprehensions on the part of the public. But it has been uniformly held that such provisions should receive a reasonable and not a technical construction, and that no matter should be held to invalidate a

statute so long as such matter related exclusively to the same subject, or was germane or auxiliary thereto. The provision has been before the court in numberless cases, and while the construction has been uniform, the application has covered so wide a scope of legislation, and subjects so variant, that the cases seem confused and inconsistent, and no great benefit can arise from a citation of authorities. But see, however, as fully sustaining our views in this case, the following authorities: Cooley, Const. Lim. (5th Ed.) 176; People v. Parks, 58 Cal. 635; Davis v. State, 61 Amer. Dec. 331, and note; Fahey v. State, 27 Tex. App. 146, 11 S. W. Rep. 108; O'Leary v. County of Cook, 28 Ill. 538; Allegheny County Home's Case, 77 Pa. St. 77. It is perfectly clear to us that the statute in question is vulnerable to neither objection urged against it. Relator is therefore remanded to the custody of the respondent, as such sheriff, to be held under the terms of his original commitment. All concur.

JORGEN J. GRAM, Plaintiff and Respondent, *v.* NORTHERN PACIIFC RAILROAD COMPANY, Defendant and Appellant.

1. **Damage by Fire; Proximate Cause Question for Jury.**
In an action for damages caused by a fire which escaped from one of defendant's trains, and ignited upon defendant's right of way, and which spread over adjoining land, and finally destroyed plaintiff's property, *held*, that whether the fire started by the defendant was the proximate cause of the injury complained of, or whether such injury was the result of another and independant cause, were, under the evidence, questions of fact for the jury, and the court did not err in submitting such question to the jury, with proper directions as to the law. This is true where the wind shifts or increases in violence after the fire starts, and before the damage is done.

2. **Prairie Fire; Evidence of Cause.**
Where the undisputed evidence shows that the fire which consumed plaintiff's property started on defendant's right of way, about one rod to leeward of the railroad track, and that such fire sprang up immediately after a train passed the point where the fire originated, and there was no other visible cause for the fire; and no other agency likely to set fires observed in that immediate locality where the fire started, *held*, that the evidence was sufficient to justify the jury in finding the

primary fact that defendant's train threw out and started the fire in question.

3. Party Using Right of Way Liable for Negligent Acts Done Thereon—Evidence of User.

Where the answer admits that the defendant at the time in question owned and operated the railroad in question, and where the only question at issue was as to the width of the right of way of such railroad, *held*, that oral evidence was properly introduced to show the width of the strip of land upon each side of the track which defendant was occupying and using for right of way purposes, at or just prior to the date of the fire in question. *Held, further*, that defendant would be responsible for any act of negligence committed by it on the right of way which it was in possession of, and actually using for right of way purposes, whether it was or was not at the time seized of the title of such right of way, or whether it had or had not the right to the possession thereof.

4. Pleading—Contributory Negligence—Harmless Error—Negligence per se.

Where the complaint omitted to allege due care on the part of the plaintiff, and defendant's counsel objected to the introduction of any evidence in support of the complaint for that reason, claiming that such omission was fatal, and that the complaint did not state a cause of action by reason of such omission, and that the trial court overruled the objection, *held*, that such ruling was not error; but, upon such complaint, evidence was introduced against defendant's objection tending to show that the plaintiff had established a fire-break, and had acted prudently and with due care to prevent fires from coming upon his premises. *Held*, that while such evidence was not necessary on plaintiff's part to make out a *prima facie* case, the introduction of such evidence was not error which could prejudice the defendant's case, and hence the court will not grant a new trial, for the reason that such unnecessary evidence was introduced. *Held, further*, that, if the plaintiff had not established any fire-break, such omission would not constitute negligence *per se;* but that in such case the question of whether such supposed omission would or would not constitute negligence would be a question of fact for the jury to determine under proper directions from the trial court. The question in such case would turn upon the inquiry as to whether or not the omission under the circumstances amounted to negligence. Such a question usually would be one of pure fact.

5. Negligence of Railroad Company—Inflammable Material on Right of Way.

The defendant requested the trial court to give the jury the following instruction. "If you find from the evidence that the defendant

permitted combustible materials to grow and accumulate upon its right of way, and that engines used upon the line of said railroad were furnished with the best known appliances to prevent the escape of fire, and that such appliances were upon September 21, 1885, in good order and that the fire was accidentally and not negligently communicated to the combustible material on its right of way, and from there to plaintiff's property, the defendant is not liable in this action." The request was refused. *Held*, that such refusal was not error. Due care in providing appliances, and in operating a train, does not relieve a railroad company from liability for a loss by fire which originated from sparks accidentally thrown out upon inflammable material negligently permitted to accumulate and remain upon the right of way. Due care in one direction does not excuse negligence in another.

(Opinion Filed October 9, 1890.)

APPEAL from district court, Stutsman county; Hon. RODERICK ROSE, Judge.

John S. Watson, for appellant: Complaint was defective because it did not negative contributory negligence on the part of plaintiff: Wanner v. N. Y. C. R. R. Co., 44 N. Y. 465; Wilson v. Charlestown, 8 Allen 137; Wheelock v. Boston, 105 Mass. 203; Lake v. Miller, 25 Mich. 274; Moore v. Central, etc., 24 N. J. L. 268; Murphy v. Chicago, etc., 45 Iowa 661; Penn. Co. v. Galentine, 7 A. & E. R. R. cases, p. 517; Thompson on Neg. p. 152. That the wind shifted after the fire started, and that but for such change of direction the plaintiff's property would not have been destroyed, so that there was an independent cause intervening between the cause complained of and the result: Pa. Co. v. Whitlock, 22 Am. & Eng. R. R. Cases, 629 and note; Pielke v. Chicago, etc., 41 N. W. 669; Rorer on R. R., vol. 2, 806-8; Fent v. R. R., 59 Ill. 350; Toledo v. Muthersbaugh, 71 id. 572.

S. L. Glaspell, for respondent: Contributory negligence is purely a matter of defense: Saunders v. Reister, 1 Dak. 151; Mares v. N. P., 3 id. 336 & U. S. S. C., 31 L. Coop. ed. 296; Beach on Contrib. Neg., § 157. That the fire caught on the right of way was sufficiently shown; Ry. Co. v. Benson, 32 Am. & Eng. R. R. Cases 330. The injury to plaintiff was the ordinary and usual result of the fire, and the circumstance of the changing wind being perfectly natural, might, and should have been, anticipated: Cooley on Torts, pp. 68, 71. The

question whether or not the fire set out was the proximate cause of the injury was one of fact for the jury: Krippner v. Biebl, 9 N. W. 671; Sutherland on Dam., vol. 1, p. 25; Atkinson v. Goodrich, 18 N. W. 764.

WALLIN, J. This action was brought to recover damages for the destruction of certain personal property by a prairie fire alleged to have been negligently started by one of defendant's locomotive engines. The fire occurred on September 21, 1885, and was started about 2:30 P. M. on the east side of, and about one rod from, defendant's railroad track; and, after spreading over about four miles of intervening prairie, reached plaintiff's premises, and destroyed his property, about 5 o'clock P. M. of the same day. The acts of negligence charged in the complaint are briefly as follows: *First.* Faulty construction of one of defendant's engines, and its negligent and unskillful management, by reason whereof fire was allowed to escape. *Second.* The use of lignite coal as fuel to generate steam, which, it was claimed, necessarily resulted in large pieces of burning cinders being emitted from the smokestack. *Third.* The existence by sufferance of the defendant of large quantities of dry grass and weeds, and other dry and combustible material upon its right of way at and near the point where the fire started. No evidence was offered by the plaintiff in support of either the first or second ground of negligence, as above stated, and hence we shall consider only the third or last ground.

The facts as to the time, place, and circumstances under which the fire originated are not controverted in the testimony; nor do counsel appear to differ in regard to the same. The undisputed evidence tends to show that about 2:30 o'clock P. M. of the day of the fire, while one of defendant's trains was going north on defendant's line of railroad, and immediately after it had passed a point on section 24, township 142, range 65, a few rods north of a certain crossing, a fire was seen to spring up suddenly, and without visible cause other than that of the passing train, on the east side of the track, and about one rod distant therefrom. When the fire started, a strong wind was blowing from the northwest, and it continued to blow from the northwest until about 4 P. M., when it shifted a little to the north, and was blowing

from the last-mentioned quarter at about 5 P. M., at which time the fire, which had been running rapidly before the wind, struck and consumed plaintiff's property. Plaintiff's premises are on section 34, township 142, range 64, and consequently are located about 4½ miles southeast of the initial point of the fire. The course or path of the fire was continuous and unbroken from where it originated to the plaintiff's premises. *i. e.*, from northwest to southeast; but the ravages of the fire were temporarily arrested at several intervening points, and its direction diverted for short distances by farms, plowed ground, and fire-breaks. There is evidence tending to show that, in one place, the fire, on striking an obstacle which it could not leap over, divided—one part going north of and away from plaintiff's property; and the other branch of the same fire moving south, and around obstacles, and thereby reaching plaintiff's place, and doing the damage. Defendant's counsel, at the close of the plaintiff's testimony, requested the court to direct a verdict in defendant's favor. This was refused, and the ruling is assigned as error. We think the ruling was clearly correct.

Appellant's counsel ingeniously argues that the loss suffered by the plaintiff was not a result which could be reasonably contemplated, or one which naturally flowed from the act of negligence complained of, for the reason, as counsel claims, that the plaintiff's loss was caused by an independent agency, viz., by a change of wind from northwest to north, or nearly north, which it appears occurred shortly before the fire reached plaintiff's premises. But whether such slight change of wind did or could, as an independent agency, operate to bring about the loss which the plaintiff has suffered was a matter of pure fact for the jury to decide, and was not a matter of law to be determined by the court. The witnesses who gave their opinions upon the question did not agree as to whether the change of wind did or did not bring about the plaintiff's loss. The question was one about which intelligent men might reasonably and honestly differ, and therefore the trial court very properly declined to invade the province of the jury, and arbitrarily determine a matter of mere fact. In its charge to the jury the trial court said: "In order that the plaintiff may recover in this action, the jury must be-

lieve from the evidence, not only that the defendant negligently started the fire, but also that the fire so started by defendant was the proximate, and not the remote, cause of the injury complained of. If you find from the evidence that a prairie fire other than that started by defendant was burning on the north of plaintiff's property at the same time that the fire is claimed to have been started by defendant's locomotive engine, north of Buchanan station, and that both of said fires, being driven by the wind in the direction of plaintiff's property, were united and joined into one fire before the same swept down upon and destroyed plaintiff's property, then the defendant would not be liable in this action." And in another part of the charge the court said that the jury were to consider "whether the fire so kindled was the direct and proximate cause of the fire which burned plaintiff's property, or whether some other fire, other than that which defendant kindled, was the fire which burned plaintiff's property, or whether some other cause intervening between the fire which defendant kindled and the one which burned plaintiff's property was the one which caused him the damage of which he complains." Again, the court said to the jury that "if the fire so set or kindled by defendant was not the proximate cause of plaintiff's injury, because of some other intervening cause, or because it was not the same fire that caused plaintiff's injury, then you must also find for the defendant." To our mind, the testimony adduced in the case gives very little countenance to the theory of counsel of an independent agency or intervening cause which led to the injury; and we are quite clear that, if there was any foundation for the theory to be found in the evidence, the question presented was one of fact to be determined by the jury, aided by proper instructions from the court. In view of the testimony, we think the trial court sufficiently elucidated the law or doctrine of an independent agency, and very properly submitted that feature to the jury. Where doubt arises as to whether damages are proximate or remote, the issue should be presented to the jury by proper instructions. Clemens v. Railroad Co., 53 Mo. 366; Kellogg v. Railroad Co., 26 Wis. 223; Higgins v. Dewey, 107 Mass. 494.

The evidence that the fire which spread and did the damages

complained of was thrown out from one of defendant's passing trains, and ignited in dry grass about one rod east of and to the leeward of the track, was, though purely circumstantial, legally competent, and, not being disputed, was sufficient to warrant the jury in finding that the defendant's engine started the fire. Karsen v. Railroad Co., 29 Minn. 12, 11 N. W. Rep. 122, and authorities there cited. But defendant's counsel claims that there is no competent evidence in the record that any fire which was emitted from the passing train fell upon or caught in grass standing upon the defendant's right of way, and that there is no competent evidence to show that defendant owned or used a right of way of any width. It is admitted by the answer that, at all times mentioned in the complaint, the defendant owned the line of railroad in question, and operated the same by the use of the usual locomotive engines and rolling stock; and defendant's own witnesses state that defendant ran trains over said railroad on the day of the fire, and that a train passed the point where the fire started about the time when other testimony shows that the fire sprang up. But the complaint alleges, in substance, that, at the time in question, the defendant owned and used a right of way about fifty feet in width, on each side of its said railroad, and that the fire which did the damage started upon such right of way. This averment of the complaint is denied, and, except so far as it may be admitted by the answer, the burden rests with the plaintiff to establish its truth; but, as we have seen, in its answer to the complaint, the defendant admits of record that, at all times mentioned in the complaint, it was the owner of the railroad in question. This is, in effect, an admission that it owns the right of way, inasmuch as a right of way is inseparable from, and constitutes an essential part of, every railroad. This admission takes the question of ownership out of the case, and leaves only the question of the width of defendant's right of way at issue. Appellant's counsel concedes that, under the statute, defendant might lawfully condemn for right of way purposes a strip of land fifty feet wide on each side of its track, but insists upon the fact that plaintiff offered no written or documentary evidence of any condemnation of or of title to the right of way in question.

We are inclined to think, but do not so decide in this case, as it is unnecessary to do so, that the court would have been warranted in holding under the admissions in the answer, and in the absence of evidence to the contrary, that the right of way which the defendant owned was at least of the width which defendant might lawfully condemn for railroad purposes. But there was competent and uncontroverted evidence tending to show the width of the right of way at or near the point where the fire started, which the defendant was using for railroad purposes, and long had been using for such purposes. One Keeler, a witness for plaintiff, being on the stand, was asked: "Question. How much ground was the defendant using for a right of way through the section at that time? Answer. Well, I can certainly say that they used 300 feet, if not a trifle more." The witness further testified that "he based this statement upon throwing out of dirt from their cuts, and from their taking in dirt from their fillings, and by their railroad-crossing sign-posts, and their mile posts, and a well they (the railroad) had dug, or attempted to dig, about fifty feet from the track on the east side of the track on the same section, and probably sixty rods north of the location of this fire. That summer, prior to September 21st—the date of the fire—I frequently saw the ground used for a right of way." No attempt was made to contradict this testimony, but appellant's counsel, in his brief, says, "The best evidence was the recorded title," etc., and that no foundation was laid for what counsel calls "secondary evidence." The admission of this testimony is assigned as error. We think the evidence clearly competent to prove the only question at issue upon this branch of the case, namely, as to the width of the right of way which defendant was using at and near the point where the fire originated. The practical question was and is whether, at the time the fire was thrown out by defendant's train, it fell upon and ignited dry grass standing upon right of way then in use as such by the defendant. It is moreover perfectly clear to this court that defendant's liability for the alleged negligence does not at all depend either upon its ownership, or its right to the possession of the strip of land upon which the fire originated. If at that time the defendant was actually using the land for its

right-of-way purposes, it would be none the less liable, if it was a mere trespasser upon such land. We find no error in the ruling of the trial court admitting this evidence.

The trial court refused to sustain defendant's objection, made at the beginning of the trial, to the introduction of any evidence in support of the complaint, for the reason, as defendant's counsel claims in his brief, that the averment and proof of the absence of negligence on plaintiff's part was an essential part of plaintiff's case. The ruling is assigned as error here. We hold that the ruling was not error. Respectable authority can be found sustaining defendant's position, but the decided weight of recent precedents justifies the ruling of the trial court. Railroad Co. v. Gladmon, 15 Wall. 401; Railroad Co. v. Horst, 93 U. S. 291; Hocum v. Weitherick, 22 Minn. 152; Wilson v. Railroad Co., 26 Minn. 278, 3 N. W. Rep. 333; Robinson v. Railroad Co., 48 Cal. 409; Potter v. Railroad Co., 20 Wis. 533; Mares v. Railroad Co., (Dak.) 21 N. W. Rep. 5; South-West Va. Imp. Co. v. Andrew, (Va.) 9 S. E. Rep. 1015; Hickman v. Railroad Co., (Miss.) 5 South. Rep. 225; Thompson v. Railroad Co., 51 Mo. 190.

Testimony was introduced by the plaintiff, against the objection of defendant, tending to show that the plaintiff had, as a matter of fact, established a fire-break around the property which was destroyed. This ruling is claimed to be error. We think otherwise. It is true that it was not technically necessary for the plaintiff to either allege or prove the absence of contributory negligence in order to make out a *prima facie* case, but the admission of such testimony under the circumstances could not prejudice the defendant's case, and we cannot therefore undo the results of the trial for that reason. If plaintiff had not established a fire-break around his premises, such omission would not constitute negligence *per se;* but in such case the question of whether or not such omission would constitute contributory negligence would be a question for the jury to decide under proper directions from the court. Karsen v. Railroad Co., 29 Minn. 12, 11 N. W. Rep. 122; Kellogg v. Railroad Co., 26 Wis. 223; Erd v. Railroad Co., 41 Wis. 65. We do not think the later Wisconsin case cited by counsel for the appellant (*i. e.*, Murphy v. Railroad Co., 45 Wis. 222) overrules the authority of

the previously-decided cases, so far as the point here involved is concerned. In the case under consideration, the trial court defined "due care," and fully and fairly submitted to the jury the question of whether plaintiff's own lack of due care contributed to the injury of which he complained. The court, in speaking of this point, said to the jury: "If you further find that plaintiff contributed to said loss in any way by his own negligence, then your verdict must be for the defendant." And further on in its charge the court used the following language: "If you find from all the evidence in the case that the fire which plaintiff claims that defendant set, and which injured him, would not have occurred if the plaintiff had used the care in the protection of his property which a man of ordinary prudence would have used under the circumstances, then the plaintiff cannot recover," etc.

Counsel ignore, or at least do not discuss, in their briefs any feature of the negligence charged save that relating to the condition of defendant's right of way at the point where the fire started, with respect to the inflammable material which it is alleged was suffered to stand and remain thereon. The evidence in support of this species of negligence was all introduced by the plaintiff, and being undisputed was sufficient to warrant the jury in finding the defendant guilty of negligence. One witness testified as follows: "On that trip, I passed or saw, a train of cars of the defendant. It was a mixed train of cars, and had an engine. I did not meet the train. I saw it about a half a mile away, when the fire started from the train. I seen the fire start. I was about a half mile distant. The fire was started near the railroad-crossing known as the 'Gilmore Crossing.' I drove right to the place where the fire started, and drove to the station, and I saw the fire coming to the south-east, with a high wind. The fire started about a rod north of the crossing, and about a rod from the track on the east side of the track on section 24. As soon as the train left the place where the fire started, I saw the fire flash up, and everything was in a blaze, and at a high wind. The fire started in the grass and weeds on the east side of the track. The grass and weeds in which the fire started were from six to twelve inches high. I was familiar with that locality, and the lay of the land

there. The grass and weeds were dead. It had frosted, and they were in good condition to burn everywhere in the neighborhood. There had been no grass or weeds cut on the right of way at this particular place. They were high and dry. Had been so since the early part of September. They had not been cut down there, or mowed off and destroyed. It was quite windy. The wind was from the north-west, and blowing south-east. The fire was traveling south-east, very fast, when I last saw it, traveling in the direction of Gram's house. There was no plowing there within 100 yards on either side of this point, and there was not, to my knowledge, any fire protection of any kind." The witness further testified that the grass and weeds extended from the track east, clear out on the prairie, and that the adjoining land-owners had not cut or mowed down any grass on their land, and their land was in the same condition as the right of way as to dry grass and weeds. Another witness testified: "I don't know exactly where the fire started, but in that place there is a small slough, and the grass ran up to the track, nearly. The grass there was heavy, very dry, and would burn. Had been in that condition for two or three weeks prior to that time. No effort had been made, that I know of, to plow any fire-breaks within fifty feet of the railroad tracks. Had such been done I would have been apt to have known it." Other witnesses observed the same fire, and testified as to its continuous course, and saw it when it struck and destroyed plaintiff's property. This evidence stands undisputed, and under the authorities certainly tended to show that defendant was negligent, as charged in the complaint, as to keeping its right of way clear from combustible material, and that fire from a passing train caught in such dry material upon the right of way and spread until the damage was done. There is much conflict of authority, but the trial court, we think, stated the better law applicable to this feature of the case in the following instructions: "You are instructed that it was not negligence *per se* in the defendant to suffer such natural accumulation of dry grass and other combustible matter on the sides of its track as was liable to be ignited by sparks of fire from its engines, unless it was to such an extent as would not be permitted or done by a cautious

and prudent man upon his own premises, if exposed to the same hazard from fire, were the combustibles accumulated upon the defendant's right of way." This instruction, in our opinion, embodies the most reasonable rule of law applicable to right-of-way fires, and one which seems to be fair to both sides. See authorities above; also Railroad Co. v. Salmon, 39 N. J. Law, 299; Railroad Co. v. Stanford, 12 Kan. 379; Webb v. Railroad Co., 49 N. Y. 420; Railroad Co. v. Crawford, 24 Ohio St. 631.

The requests presented by defendant's counsel, and which were refused by the trial court, are numerous and voluminous, and we think that it is unnecessary to quote them at length in this opinion. Such portions of the requests as were unobjectionable were given in the charge to the trial jury, and have been already adverted to. Those which were refused seem to us to have been properly refused under the rule of law as laid down by the authorities cited. One of the defendant's requests was as follows: "If you find from the evidence that the defendant permitted combustible materials to grow and accumulate upon its right of way, and that engines used upon the line of said railroad were furnished with the best known appliances to prevent the escape of fire, and that such appliances were on September 21, 1885, in good order, and that fire was accidentally and not negligently communicated to the combustible materials on its right of way, and from there to plaintiff's property, the defendant is not liable in this action." Overlooking merely verbal objections, this request embodies a proposition directly the opposite of our views of the law. In our opinion, due care in operating the train in all respects will not relieve the company from responsibility for a loss from fire which originated upon a right of way covered with inflammable material in which the fire ignites, and which is, by the negligence of the company, permitted to accumulate and remain upon the right of way. Due care in one direction cannot excuse negligence in another direction.

At the opening of the argument in this case respondent's counsel moved the court to "dismiss the appeal," and affirm the judgment of the court below, for the reason, as counsel claims, that the bill of exceptions, which is in fact annexed to the judgment

roll, was not settled in time, and was, for divers reasons suggested by counsel, never legally settled nor certified by the court below, and hence, as counsel argues, should not be considered by this court as a bill of exceptions within the meaning of the law. Counsel further argues that the motion for a new trial, which appears to have been made and overruled, cannot be reviewed, because the motion was based wholly upon such bill of exceptions, and must fall with the bill. No reason is suggested by respondent's counsel, either in his brief or upon the oral argument of the motion, why the appeal should be dismissed, hence the motion must be denied. The motion was misconceived. If, as counsel claims, the bill of exceptions was never legally settled nor certified, it would properly constitute no part of the judgment roll. Under such circumstances, a motion would lie to purge the record by striking out or suppressing the extraneous document. No such motion was made or argued in this case, and hence the entire record, as contained in the judgment roll, remains intact, and must be considered in disposing of the case upon the merits. Upon the merits of the case, the judgment of the district court is affirmed. All concur.

MARY SLATTERY, an Infant, by MICHAEL P. SLATTERY, her Guardian, Plaintiff and Appellant, *v.* FRANK DONNELLY, Defendant and Respondent.

1. Evidence Examined; Case Should Have Gone to the Jury.

In this action, after a trial by jury, and at the close of plaintiff's testimony, the defendant moved the trial court to direct a verdict in defendant's favor, which motion was granted, and plaintiff duly excepted to the order. Evidence examined. *Held*, that the order directing a verdict was substantial error to plaintiff's prejudice, and that a new trial must be granted for the reason that the evidence reasonably tended to sustain the allegations of the complaint, and hence such evidence should have been submitted to the jury.

(Opinion Filed November 29, 1890.)

APPEAL from district court, Burleigh county; Hon. WILLIAM H. FRANCIS, Judge.

Louis Hanitch, for appellant; *George W. Newton*, for respondent.

WALLIN, J. This action was brought to recover damages for the conversion of a certain piano, which plaintiff alleges she owned at the time the same was siezed and converted by the defendant. The seizure was sought to be justified by the defendant on the ground that it was made by defendant, as sheriff, under final process against Michael P. Slattery, the father of the plaintiff. The ownership of the piano was the sole issue. The case was tried to a jury, and, at the close of the plaintiff's case, defendant moved the trial court to direct a verdict in his favor on the ground that the facts proved failed to establish a cause of action against the defendant, and that there is no proof of the delivery of the property by the father to the plaintiff. The motion was granted, to which ruling the plaintiff duly excepted. A bill of exceptions embracing the evidence and the rulings of the trial court was settled, and a motion for a new trial was denied. The ruling directing a verdict, and the ruling denying plaintiff's motion for a new trial, are assigned as error in this court. The testimony tends to show the following state of facts: In the year 1881, and ever since, Michael P. Slattery resided with his family at the city of Bismarck; that his family consisted of a wife and several children; that one of his children was Mary Slattery, the plaintiff herein; that he owned the house in which he resided; that in November of that year Michael P. Slattery went to Ireland on a visit, and there received from his father, for the education of his children, and especially for his daughter Mary, (the plaintiff,) the sum of $500; that he returned from Ireland to Bismarck, and, some time in May, 1882, began to negotiate for the purchase of the piano in question; that he informed the plaintiff that he would purchase said piano for her, and did purchase the same for her in August or September, 1882; that his daughter, the plaintiff, was home when the piano was delivered at the house; that the father informed the plaintiff that the piano was hers, and she was afterwards instructed to perform on the piano; that she always claimed it as her piano, and the father and mother both said it was her piano, and the mother knew that it was to be purchased for her; that at the time of the purchase Michael P. Slattery was solvent, and

in good circumstances. The learned counsel for the respondent contends that the evidence adduced fails to establish the fact that the piano was purchased out of a trust fund created by plaintiff's grandfather. In this we can agree with counsel; but we are quite clear that all of the testimony tended strongly to show that plaintiff's father bought the piano out of his own resources, with the avowed purpose and design of giving it to the plaintiff as a present, and did carry out his intention, and deliver the piano to the plaintiff as a gift at a time when he was entirely solvent, and hence could lawfully make such a gift. Whether the gift was perfected by delivery, and whether the transaction was *bona fide*, or otherwise, were questions of pure fact, and hence they should have been submitted to the jury. We shall uphold the established practice under which a trial court may direct a verdict in cases where there is no competent evidence reasonably tending to sustain the issues of fact. The rule is highly salutary, but in the present case we find that it was not properly exercised. We hold that the order directing a verdict for defendant was error affecting the substantial rights of the plaintiff, and for such error the judgment must be reversed, and a new trial granted. It will be so ordered. All concur.

EDWIN MORRIS, Plaintiff and Respondent, *v.* ELIZABETH MCKNIGHT and EUGENE V. MCKNIGHT, Defendants and Appellants.

1. **Foreclosure Proceedings Void on Their Face No Cloud.**
   An action in equity to set aside foreclosure proceedings as constituting a cloud on plaintiff's title cannot be maintained where such foreclosure proceedings were void on the face of the record.

2. **Assignee of Mortgagee — Foreclosing by Advertisement.**
   To enable a party, claiming as assignee of mortgagor, to foreclose a mortgage upon real estate in this state by advertisement, the record must satisfactorily show the legal title to the mortgage to be in the assignee.

3. **Same; Record Not Showing Legal Title in Mortgagee, Foreclosure Void.**
   Where a mortgage upon real estate was executed to "Beecher & Dean," and subsequently one Charles R. Dean assigned his interest in

such mortgage to one Salmon I. Beecher, which assignment was duly recorded, and thereafter Salmon I. Beecher assigned said mortgage to George S. Barnes, which assignment was also duly recorded, and said Barnes assigned to Elizabeth McKnight, and which last assignment was also recorded, and said Elizabeth McKnight proceeded to foreclose by advertisement, *held*, that the record did not show that the legal title to said mortgage had ever passed from "Beecher & Dean," and such foreclosure was void on the face of the record.

TEMPLETON, J., dissenting.

(Opinion Filed, June 3, 1890.)

APPEAL from district court, Cass county; Hon. WILLIAM B. MCCONNELL, Judge.

Action in equity to cancel of record and declare illegal and void a certain proceeding by advertisement for the foreclosure of a mortgage on real estate as constituting a cloud upon plaintiffs' title. Decree for plaintiff granting the relief prayed, and defendants appeal.

Messrs. Francis and Southard (A. C. Davis of counsel), for appellants, on the points ruled by the court, cited: Civil Code, §§ 2011 and 2012; Cox v. Clift, 2 N. Y. 118; Look v. Kenney, 128 Mass. 284; Hayes v. Frey, 11 N. W. Rep. 695; Holcombe v. Richards, 35 id. 714; Miller v. Clark, 23 id. 35; Lee v. Clary, 38 Mich. 223; Niles v. Ransford, 1 Mich. 338; Morrison v. Mendenhall, 18 Minn. 232.

Messrs. Ball and Smith, for the respondent, argued that inasmuch as by § 612 of the Code of Civil Procedure certain affidavits are made *prima facie* evidence of the facts therein contained, this case was one for the interference of equity; a deed issued on such a foreclosure proceeding would be *prima facie* good, and where tax deeds are made *prima facie* evidence of the regularity of the assessment, etc., equity will in proper case direct the cancellation of the tax certificate: Weller v. St. Paul, 5 Minn. 95.

BARTHOLOMEW, J. There is, in this case, no controversy as to the facts, both parties accepting the findings of the court. These are, in substance, that plaintiff is the owner of the land in controversy subject to a certain mortgage dated September 14,

1882, executed by the defendant, Eugene V. McKnight, the then owner of the land, to "Beecher & Dean," and subject to the rights of the defendant Elizabeth McKnight, as the assignee of said mortgage, or by virtue of the foreclosure thereof; that the mortgage given by said Eugene V. McKnight to "Beecher & Dean" contained the usual power of sale; that the same was recorded in Cass county, October 3, 1882; that on January 4, 1884, one Charles R. Dean assigned in writing all his interest in said mortgage to one Salmon I. Beecher, which assignment was duly recorded in said county January 9, 1884; that on September 3, 1885, Salmon I. Beecher, by writing indorsed on said mortgage, duly assigned the same to one G. S. Barnes, and this assignment was duly recorded in said county November 13, 1885; that on September 29, 1885, George S. Barnes, by written instrument, duly assigned said mortgage to the defendant Elizabeth McKnight, and that said assignment was duly recorded in said county November 13, 1885; that the foregoing are the only assignments that were ever made relating to or affecting said mortgage or the notes secured thereby. Elizabeth McKnight proceeded to foreclose by advertisement. Her notice contained the necessary statutory requirements, and alleged that the interest of said Dean in said mortgage was assigned to said Beecher, and said mortgage was assigned by said Beecher to George S. Barnes, and by George S. Barnes to Elizabeth McKnight. The notice was published in the proper county for the proper time, and on January 29, 1886, said land was sold under said mortgage, in pursuance of said notice, by the deputy sheriff of Cass county, and bought by Elizabeth McKnight, and the usual certificate issued to her and said notice of certificate duly recorded in said county. On these facts the court found the foreclosure proceedings to be void, and canceled the certificate as constituting a cloud on plaintiff's title. The trial court held that as no assignment of the mortgage had ever been executed by "Beecher & Dean," or, so far as the record showed, with their knowledge or consent, or that of either of them, there was nothing to show that they had ever parted with their title to or interest in the mortgage, and hence that plaintiff could not acquire any interest which Beecher &

Dean might have as mortgagees by redeeming from the foreclosure sale to Elizabeth McKnight; that in order to pass title to real estate by foreclosure by advertisement, the record must show a chain of title from the mortgagor to the purchaser at the foreclosure sale, and that the record in this case showed no such chain, hence the foreclosue was invalid; but that the same constituted a cloud on plaintiff's title, and should be vacated and canceled.

Appellants' cousel contend in this court that the trial court, in canceling the foreclosure proceedings under the circumstances, disregarded the well-established rule in equity, and which is also a statutory rule in this state, (Civil Code, §§ 2011, 2012,) to the effect that a court of equity will not entertain an action to cancel an instrument invalid on its face, or upon the face of another instrument necessary to the use of the former in evidence, for the reason that an instrument which thus carries its own infirmity on its face cannot constitute a cloud. The argument is this: Title under the forclosure can only be asserted by tracing back through the assignments of the mortgage. Under the ruling such assignments are held to be insufficient in law to sustain the foreclosure by Elizabeth McKnight. Hence, every effort to assert the title exhibits its invalidy. We see no escape from this position, and, while the rule itself has been severely criticised, (see 3 Pom. Eq. Jur. p. 437,) yet, as it has legislative sanction in this state, we cannot regard the criticism. For the reason above stated a reversal will be necessary, but in order to definitely determine the rights of the parties respectively, we must notice the other points in the case.

It is contended that the court erred in holding that the record must show a legal chain of title from the mortgagor to the foreclosure purchaser. In the broad sense of the words, perhaps, the position of counsel is correct, but, in the sense in which the court used the language, we deem the rule most salutary, and it is not without support in the authorities. Our statute (§ 5412, Comp. Laws, subd. 3) provides, as a condition precedent to foreclosure by advertisement, "that the mortgage containing such such power of sale has been duly recorded, and, if it shall have been assigned, that all the assignments thereof have been

duly recorded in the county where such mortgaged premises are situated." The statutes of Wisconsin, Michigan, and Minnesota are, in effect, precisely like our own. Hayes v. Frey, (Wis.) 11 N. W. Rep. 695; Miller v. Clark, (Mich,) 23 N. W. Rep. 35; Lee v. Clary, 38 Mich. 223; and Holcombe v. Richards, (Minn.) 35 N. W. Rep. 714, cited by appellant, are cases upholding foreclosures by advertisement made by foreign executors or administrators when no evidence of their appointment was of record in the county where the mortgaged premises were situated. The opinions go upon the ground that the executor or administrator holds the legal title to the mortgage, not by assignment, but by operation of the law, and the power of sale extends to such representatives by express words contained in the power.

The supreme court of Michigan, in Miller v. Clark, use this language: "The assignments which are required to be recorded are those which are executed by the voluntary act of the party, and this does not apply to cases where the title is transferred by operation of law, the object of the statute being to restrict the execution of the power to the owner of the legal title to the instrument; hence, the executor or administrator of the owner of the mortgage can, as owner of the legal title, execute the power, and proceed in that manner to foreclose the mortgage." In Morrison v. Mendenhall, 18 Minn. 232, (Gil. 212,) the court upheld a foreclosure where an assignment of the mortgage had been made by an attorney in fact whose authority was not of record. The mortgage was partnership property. The partnership consisted of three persons, one of whom was made managing partner by the articles of copartnership. The assignment was executed by the managing partner for himself, and by one other partner for himself, and by the managing partner as attorney in fact for the absent partner. The transfer was made in the usual course of firm business, and the court upheld it. But in that case the court, after quoting the statute, say: "The manifest purpose of this requirement of the statute was to make the contents of the mortgage, and, so far as the statute goes, to make the title to the mortgage, matters of record. This mode of foreclusure being altogether *in pais*, and having been devised (as it undoubtedly was) to avoid the delay and expense of judi-

cial proceedings, it was for obvious reasons important, not only to the parties to the mortgage itself, and to the assignee, but to subsequent incumbrancers, creditors, and contemplating purchasers, that some permanent and accessible evidence of the existence and contents of the mortgage and of the title to the same should be provided." Again, in Benson v. Markoe, 42 N. W. Rep. (Minn.) 787, speaking of this same statute, this language appears: "The statute authorizing this method of foreclosure evidently designs that there shall be of record a legal mortgage, and that the record shall be so complete as to satisfactorily show the right of the mortgagee or his assigns to invoke its aid." From the adjudicated cases and the wording of the statute we conclude that when a party seeks to foreclose a mortgage in this state by advertisement, claiming such right as assignee, the record must show complete legal title to such mortgage in such assignee; otherwise such foreclosure will be a nullity. Any other rule would discourage bidding at such foreclosure sales, and result in the sacrifice of property, and the title so conveyed would remain under suspicion, and values be thereby depreciated. A still more unfortunate result would be the fact that the mortgagor and those claiming under him could not with safety redeem from such sales. Either the right to redeem must be abandoned or a redemption made with the risk of finding the legal title to the mortgage in some person other than the pretended assignee.

One further question remains. Does the record in this case show such chain of title? We think not. The mortgage run to "Beecher & Dean." It is not shown even that such parties were copartners, nor is the Christian name of either developed by the mortgage. It is held in Sherry v. Gilmore, 58 Wis. 332, 17 N. W. Rep. 252, where a tax-deed named Gilmore & Ware as grantee, that "the grantee in the tax-deed in question is so described as to indicate a partnership, and the evidence shows that, at the time of the delivery of the deed, the defendants were partners, using the firm name of "Gilmore & Ware." A firm name is always held sufficient to designate the true name of all the persons composing the firm, and is always used in transaction of the business of the firm." The point was made in that

case that the deed was void for want of a grantee, and an objection made to the introduction of the deed on that ground. We understand the case to hold that the words "Gilmore & Ware" sufficiently indicate a firm composed of two persons, the name of one being Gilmore, and the other Ware. That would of course indicate lawful grantees, and furnish the basis on which such grantees could be identified by evidence *aliunde*, as was done in that case. We do not think that the case holds that the use of a firm name is in itself sufficient to establish the identity of the individual partners, and distinguish them from the rest of the world. In all cases of this kind to which our attention has been called, the court has required extrinsic evidence to establish the identity of the grantees. See Lumber Co. v. Ashworth, 26 Kan. 212; Shaw v. Loud, 12 Mass. 446; Newton v. McKay, 29 Mich. 1. There was in this case an assignment from Charles R. Dean to Salmon I. Beecher and another from Salmon I. Beecher to G. S. Barnes, both assignments purporting to convey an interest in the mortgage. But there is nothing in either assignment showing that either said Salmon I. Beecher or said Charles R. Dean is, or pretends to be, the Beecher or the Dean named as a grantee in the mortgage. However persuasive the circumstances may be of the existence of such fact, we do not think the law presumes it from the circumstances. On the other hand, it is said: The law will not presume that an assignment of an instrument will be made by a stranger to it. This is doubtless correct also. The law indulges no presumption in either direction, but simply requires the party upon whom rests the burden to make certain that which upon the record is uncertain. For the reasons above stated the attempted foreclosure in this case was a nullity, and the trial court was correct in so holding. But, as the invalidity of the proceedings is apparent on the face of the record, no action can be maintained to set them aside, and for that reason the case is reversed and remanded, with instructions to the district court to dismiss the complaint.

WALLIN, J., having been of counsel, did not sit. TEMPLETON, judge of the first judicial district, sitting by request, dissents.

STATE OF NORTH DAKOTA, Defendant in Error, *v.* JOAKIM BAUER, Plaintiff in Error.

1. County Commissioner; Excessive Fees; Charge for Use of Team.

B., a county commissioner, was indicted and convicted for "taking excessive fees." The indictment was framed under § 6303, Comp. Laws, which is as follows: "Every executive officer who asks or receives any emolument, gratuity, or reward, or any promise of any emolument, gratuity, or reward, excepting such as may be authorized by law, for doing an official act, is guilty of a misdemeanor." At the trial the following facts were established by undisputed evidence: At the date alleged, B. was a county commissioner, and, on that date, presented a bill to the county board of his county for a gross sum. The bill was allowed by the board, and ordered paid, and, on the same day, a warrant issued to B. for the amount of his bill, and was paid to B. out of the county treasury. The record book describes the bill as being rendered "for Com. services and work." The bill as allowed and paid embraced the following items, viz.: (1) "April 29th, county committee work to Hankinson and Lidgerwood, three days with team, $18." (2) "May 11th; committee work to Dwight, one day with team, $6." (3) "May 13th, committee work to Moreton, one day with team, $6." No evidence was offered explanatory of the above-mentioned items in the bill, the prosecution claiming that where it appeared that such claims were in fact presented by and paid to an executive officer, that the offense defined in the statute was made out. At the close of the case for the state, defendant moved the trial court to advise the jury that the evidence was "insufficient to warrant a conviction." The motion was denied. *Held* to be error.

2. Same — Charge for Official Services.

Among the instructions to the jury was the following, which is approved by this court: "The statute with regard to fees of county commissioners is plain, and not ambiguous. There is no chance for different persons to place different constructions upon the statute. The only fees they are allowed to charge is three dollars per day for the time engaged in their official duties, and also five cents per mile for travel, and, if he has made any other charges, those are illegal."

3, Same; Charge for Team Not a Charge for Official Services.

The following instructions were also given to the jury, and excepted to by defendant: "Now the particular charge upon which the prosecution in this case relies for a conviction is that this defendant, while acting as county commissioner, and in the performance of his official duties, charged for the use of his team, or for the use of a team. Now,

gentlemen, if you find, under the evidence in this case, beyond a reasonable doubt, that this defendant made a charge, and received compensation accordingly from the county, for the use of his team while he was engaged in the performance of his official duty, it is your duty to return a verdict of guilty." *Held* error.

4. Same; Same; Lumping Items in Bill.

Applying the law governing the compensation allowed commissioners to the several items of the bill above set out, it appears, upon the face of each item, that a portion thereof is for official services, viz., "committee work," and another portion of each item is a claim (whether legal or not) against the county for strictly private and non-official services, to-wit, a claim for the use of a team for a specified number of days. Deducting the legal *per diem* for official services due B., the balance of the claim is, on its face, and in fact, for the use of a team a specified number of days. *Held*, that the claim for the use of the team, as asked for and received by B., does not constitute an offense, under § 6303, *supra*. Such a claim is not a demand by an executive officer for "any emolument, gratuity, or reward" for "doing any official act." The act of furnishing a team is not an act enjoined by law, and hence is not an official act; nor does lumping a private claim for the use of a team with a claim for fees change the essential character of the claim. Such a claim is, and must remain, a mere demand of payment for a strictly private and non-official service.

5. Same; Same; Section 6303 Compiled Laws.

It is conceded that these claims against the county were not asked for by B. as an incentive or inducement to the performance of any official act. *Held*, that this fact is also fatal to the case of the prosecution. We hold that § 6303 was intended to provide for cases not covered by § 6300, viz., for cases where the bribe is not asked for or received to influence official discretion, but is asked for and received as an incentive or inducement to do an official act which is lawful in itself, and does not involve the exercise of official discretion in the sense intended in § 6300. Section 6303 was not, in our opinion, intended to include the offense of demanding and receiving extortionate fees where the officer asks for such fees as legal fees.

6. Is County Liable to Commissioner for Hire of His Team?

We are concerned in this case only with the criminal aspects, and do not pass upon the validity of the claim for the use of the team as a civil liability.

(Opinion Filed November 29, 1890.)

ERROR to district court, Richland county; Hon. CHARLES F. TEMPLETON, judge.

Messrs. McCumber & Bogart for plaintiff, in error: Section 6303 of the Compiled Laws relates to the taking of emolument, gratuity or reward in the nature of a bribe, and does not reach

the demand or reception of excessive fees except when taken as a bribe, and the indictment should allege that the asking or receiving was an inducement for the act done: People v. Kalloch, 60 Cal. 116; Hutchinson v. State, 36 Texas 293; Lawson's Crim. Def., vol. 4, p. 286.

George F. Goodwin, attorney-general, and W. E. Purcell, states attorney, of Richland county, for the defendant in error: Section 6303 applies to all cases where excessive fees are asked or taken.

WALLIN, J. The indictment under which plaintiff in error was tried and convicted is framed under § 6303, Comp. Laws, which is as follows: "Every executive officer who asks or receives any emolument, gratuity, or reward, or any promise of any emolument, gratuity or reward, excepting such as may be authorized by law, for doing any official act, is guilty of a misdemeanor." After a verdict of guilty, a bill of exceptions was allowed embracing the evidence, rulings, and exceptions and defendant moved thereon for a new trial. The motion was denied, whereupon a writ of error issued, and the whole record is brought up for review. In the view taken by this court of the whole case, it will be unnecessary to set out the testimony or the several rulings made thereon, in detail. According to the theory of the evidence advanced by the prosecution, the following facts were established at the trial, viz: That plaintiff in error, on May 25, 1889, was a county commissioner of Richland county, and, on that day, he presented a bill against said county to the county board for $107.80, which bill was audited, ordered paid, and, on the same day, was paid in due course to plaintiff in error out of the county treasury. The record of the proceedings of the board describes the bill as a bill for "Com. services and work." The bill was made up of a number of items. The following items embraced in the bill, are claimed to be illegal demands against the county, and the theory of the prosecution is that the act of asking for and receiving pay for such items constitutes the crime defined in said section of the statute: (1) "April 29th, county committee work to Hankinson and Lidgerwood, three days with team, $18." (2) "May 11th, committee work to Dwight, one day with team, $6." (3) "May

13th, committee work to Moreton, one day with team, $6." No oral or other evidence was offered explanatory of these bills; the prosecution claiming that such bills, when presented by and paid to an executive officer, constituted the crime, and no further testimony was needed. At the close of the testimony for the state, defendant moved the court to advise the jury "that the evidence adduced on behalf of the state is insufficient in law to warrant a conviction." The motion was denied, and defendant excepted to the ruling. For reason hereafter given, we hold that such ruling was prejudicial error.

Among the instructions given in the charge to the jury, and duly excepted to, were the following: (4) "Now in this indictment the word 'fee' is used instead of the word 'emolument.' I charge you, as a matter of law, that the fact that the exact wording of the statute has not been followed is immaterial. That the word 'emolument' is sufficiently broad to include the word 'fee' or the word 'compensation.' Therefore, the indictment in that respect is sufficient." (6.) "Now the particular charge upon which the prosecution in this case relies for a conviction is that this defendant, while acting as county commissioner, and in the performance of his official duties, charged for the use his team, or for the use of a team." (7) "Now, gentleman, if you find under the evidence in this case, beyond a reasonable doubt, that this defendant made a charge and received compensation accordingly from the county, for the use of his team while he was engaged in the performance of his official duty, it is your duty to return a verdict of guilty. The statutes with regard to the fees of county commissioners is plain, and not ambiguous. There is no chance for different persons to place different constructions upon the statute. The only fees they are allowed to charge, so far as I now remember the law, is three dollars per day for the time engaged in their official duties, and also five cents per mile for travel, and, if he has made any other charges those are illegal." (9) "Now, gentlemen of the jury, that is all there is in this case. The question as to this defendant's intent, whether he honestly and actually believed he had the right to make these charges, is not a matter for you to determine. You should not take that into

consideration in this case. That is a matter which will be brought to the attention of the court should a verdict of guilty be found, and which it would be proper for the court to take into consideration in pronouncing judgment upon the verdict."

In the instruction numbered 7, the law governing the compensation which county commissioners may lawfully demand and receive for their official services was correctly stated to the jury, and it was quite proper to state to the jury, as was done, that any amounts received for official services in excess of the statutory fees were illegal. But the learned court, in our view of the statute under which the indictment is framed, erred to defendant's prejudice in using the following language: "Now, gentlemen, if you find, under the evidence in this case, beyond a reasonable doubt, that this defendant made a charge, and received compensation accordingly from the county, for the use of his team while he was engaged in the performance of his official duty, it is your duty to return a verdict of guilty." This language construes the statute under consideration in such a way as to make the act of demanding and receiving pay upon a purely private and strictly non-official claim a criminal act. We are clear that the statute has no such meaning. It is true, in this case, that the claim for the use of the defendant's team was lumped with the defendant's claim for his *per diem* while engaged in official duty as a commissioner of the county board; and likewise true that the bill showed on its face that the teams were used concurrently, and for the same number of days charged for by defendant for official services. Such irregular mode of presenting and allowing a claim not itemized may be punishable under other sections of the Code; but we are quite sure that the manner of making out and presenting a claim cannot change its essential nature, nor convert a demand for the use of a team into a criminal demand for a "gratuity" for "doing an official act." The claim for the use of a team is based on valuable services, which services are separate in kind, and private in nature, and hence the claim is not a demand for an excess of fees. Neither is it a demand for "doing an official act." Much less is it a demand of a gratuity or reward for doing an official act for which the law allows a fee or compensation, which ele-

ment would be necessary to constitute an offence under the statute. It does not appear by the evidence whether the team in question was furnished by the defendant for his own convenience in reaching points where he was called in the discharge of official duties, or whether the team was used by the county in prosecuting public work; but, however used or furnished, the fact stands out that neither furnishing the team, nor its use, nor demanding or receiving compensation therefor, is or can be an official act. If it were, the non-performance of such official act would be criminal if done under the circumstances stated in § 6304, which section reads as follows: "Every executive officer who asks or receives any emolument, gratuity, or reward, or any promise of any emolument, gratuity or reward for omitting or deferring the performance of any official duty, is guilty of a misdemeanor." It follows from the views above expressed that the charge of the trial court was error, and that such error was highly prejudicial to the defendant.

The decision may likewise rest upon other grounds. In this case it is not alleged or claimed that the defendant asked for or received any emolument, gratuity, or reward as an inducement to the performance of an official act. This, we think, is essential. Section 6303, as well as the chapter in which it is found, was taken almost literally from the Code of California, and the statute has been construed by the supreme court of that state in People v. Kalloch, 60 Cal. 116. Speaking of this statute, the court says: "The object of the statute is to prevent improper influences being brought to bear upon official action, and, the indictment failing to allege that the promise was an inducement to the act, is fatally defective." We think § 6303 was not intended to define or punish the offense of claiming or receiving extortionate fees. The reverse is fairly implied from the clause, "excepting such as may be authorized by law." Money demanded "for doing an official act," which money is not authorized by law to be paid for doing the act, cannot be a demand for a fee, and can only be a demand for a bonus, "gratuity," or "reward," different from and in excess of fees. Section 6300 was framed to define and punish the heinous offense of bribery when committed by officers who, in the exercise of official dis-

cretion, are authorized to vote, give opinions, or perform other executive functions involving official discretion, and with respect to matters pending before them, or which may be brought before them. This offense was a grave offense at common law, and is made felony, and very severely punished by said section. On the other hand, § 6303 defines a mere misdemeanor and one which does not include the moral turpitude involved in the act of corrupting and perverting official discretion. The acts referred to in § 6303 are, in themselves, necessarily lawful, official acts, and, as to such acts, the statute, for good reasons, declares that the officer who performs them shall not be stimulated or induced to act by any "emolument," "gratuity," or "reward," outside of fees. From this it follows that § 6303 is not a duplicate of § 6300, as suggested by counsel's brief, but, on the contrary, refers to another class of offenses, viz., to cases where an executive officer who is not intrusted with official discretion asks or receives a bonus, not as a fee, but as a gratuity independent of fees, and as an extra inducement for the performance of an official act, which act is in itself lawful. The question of the legality of the claim for the use of the team, as a valid contract, enforceable against the county, is not now before us, and we do not pass upon it. But the facts surrounding this case seem to warrant us in saying that "it is a well-established and salutary doctrine that he who is intrusted with the business of others cannot be allowed to make such business an object of pecuniary profit to himself." See 1 Dill. Mun. Corp. § 444. Upon the grounds above stated, the judgment of the court below must be reversed, and the action dismissed. Such will be the order. All concur.

MICHAEL O'HARA, Plaintiff and Respondent, *v.* THE TOWN OF PARK RIVER, Defendant and Appellant.

1. **Municipal Corporation — Publication of Ordinance.**
   Under the provisions in the general town incorporation law, (§ 1043, Comp. Laws,) which provides that "every by-law, ordinance, or regulation, unless in case of emergency, shall be published in a newspaper in

said town, if one be printed therein, or posted in five public places, at least ten days before the same shall take effect," a by-law passed by the town trustees, but never published or posted, in a case where no emergency is alleged or shown, is of no force or effect, even as to such persons as have notice of its passage by the trustees. Either publication or posting is a prerequisite to a binding enactment.

2. Same; Salary of Officer.

When the compensation of a town marshal is fixed at a certain amount per month, the fact that such marshal renders his bills for services and receives his pay for two months, at a rate less than the rate fixed by law, will not preclude such officer from claiming the full pay allowed by law for the subsequent months.

3. Same; Payment of Less than Legal Salary Accepted.

But the fact that such officer rendered his bills for two months, even though for an amount less than that prescribed by law, and that such bills were allowed and paid as rendered, and such payment received without objection or protest, amounts to an adjudication of the claim for services for the time covered by the bills rendered, which, in the absence of accident, surprise, or mistake of fact, cannot be reopened.

(Opinion Filed November 29, 1890.)

APPEAL from district court, Walsh county; Hon. CHARLES F. TEMPLETON, Judge.

H. A. Libby, for the appellant: Plaintiff accepted salary under the ordinance, which he now claims was invalid; by such acceptance his salary was fixed: Thomas v. St. Clair Co. Supervisors, 8 N. W. 45; Brick v. Plymouth Co. 19 id. 304; Bryan v. Des Moines, 51 Iowa, 590. Fixing the salary at $25 a month was the same as fixing it at $300 a year, for the board had no power to change the salary during the term for which the officer was elected; therefore acceptance of one month's salary as fixed by the board, was a ratification and acceptance of the ordinance fixing the salary for the year: Iron Cliffs Co. v. Gingrass, 48 Mich. 413; City of Wyandotte v. Drennan, 9 N. W. 500; Doolan v. Manitowoc, 4 id. 475. Plaintiff is estopped from asking more than he accepted: Cont. Nat. Bk. v. Bank, 50 N. Y. 575.

H. W. Phelps, for respondent: Consent of appellant could not do away with the requirement that the ordinance be published: Everett v. Buchanan, 8 N. W. 35. An officer cannot

bind himself to accept a smaller salary than the law allows. Purdy v. Independence, 39 N. W. 641. The plaintiff was not estopped, nor did he ratify or accept the ordinance by accepting salary for a time, at the rate fixed by the ordinance: Clarke v. Milwaukee Co. 9 N. W. 782; O'Herrin v. Milwaukee Co. 30 id. 239.

BARTHOLOMEW, J. This action was brought by plaintiff to recover a balance of salary claimed to be due as marshal of the defendant town. The case was tried to the court The complaint, after alleging the incorporation of the defendant under the general laws of the territory of Dakota, set out a by-law of defendant, known as "By-law No. 9," duly passed and adopted in February, 1885, and duly published, fixing the salary of the marshal at "the sum of $50 per month, payable at the end of each month," and alleged that said by-law had never been repealed or amended; alleged that on the 7th day of May, 1888, plaintiff was duly elected marshal of said town, and duly qualified and served as such from said May 7, 1888, to May 6, 1889, and earned the sum of $600 as salary, no part of which has been paid, except the sum of $55; that on May 20, 1889, plaintiff duly presented to the board of trustees his bill of $545, balance due on salary, which said board allowed at the sum of $245 only, and on condition that plaintiff would accept the same in full of all claims against said town, which amount plaintiff refused to accept, and judgment is asked for such balance with interest from May 6, 1889. The answer alleged that in the latter part of 1887 there was a vacancy in the office of marshal of said town, and that plaintiff applied to be appointed to fill such vacancy, and stated that, if so appointed and elected at the next ensuing election, he would perform the duties of said office for $25 per month, and that thereupon the board of trustees of said town appointed plaintiff to fill said vacancy, and on January 21, 1888, and in presence of said marshal, passed an ordinance fixing the salary of marshal at $25 per month; that, during all the time that he served by appointment, and for the first two months that he served under an election, said marshal drew his salary at the rate of $25 per month upon his bills duly rendered and allowed. The court found the alle-

gations of the complaint to be true; and also found that the plaintiff was present at a meeting of defendant's board of trustees on January 21, 1888, at which meeting a resolution was passed purporting to fix the salary of marshal of said town at $25 per month, and that for the months of May and June after his election the marshal drew his salary on his bills rendered, at the rate of $25 per month. Judgment was rendered for plaintiff for $545 and interest from May 20, 1889.

It does not appear in the findings, but is admitted by both parties, that the resolution or by-law reducing the salary of the marshal was never published or posted. The defendant town was incorporated under the general town incorporation law, being article 2 c. 11, Pol. Code, (Comp. Laws, §§ 1022-1094 inclusive.) Section 1069 is as follows: "The trustees, assessor, treasurer, marshal, and justices of the peace shall respectively receive for their services such compensation as the board of trustees in their by-laws may decide." And it is provided in § 1043 that "every by-law, ordinance, or regulation, unless in case of emergency, shall be published in a newspaper in such town, if one be published therein, or posted in five public places, at least ten days before the same shall take effect." This is not a case where knowledge on the part of plaintiff of the action of the trustees could obviate the necessity of publication or posting. One or the other of those things was a necessary prerequisite to a completed enactment, except in cases of emergency, and nothing of that kind is found or appears in this case. The proposed by-law never reached the conditions of completion, and as a corporate regulation it never had any existence, and can receive no consideration. The original by-law fixing the salary of the marshal at $50 per month remained in full force during the whole term of plaintiff's incumbency.

It is claimed, however, that, as plaintiff was present when the defendant's board of trustees attempted to reduce the salary, and as he claimed and received his salary at the reduced figure during the whole of his appointive term, and for the first two months of his elective term, he thereby elected to receive such reduced salary for his full term, and is now estopped from claiming anything further: The compensation of the marshal as fixed by the

by-law No. 9 was a monthly compensation. It was subject to change at the end of any month. The receipt of a less sum than the by-law allowed, for any one month, cannot be construed as an election to receive the same amount for any subsequent month. All the cases that we find, where the acceptance of any specified sum at the end of a month or a quarter has been held to be an acceptance of the same rate for a year, are cases where an annual salary was an entirety, and could not be changed dur- the year, but was made payable monthly or quarterly, as the case might be.

The court below allowed plaintiff to recover at the rate of $50 per month for the entire year, including the two months for which he had rendered his bills and received his pay at the rate of $25 per month, but crediting the defendant with the amounts so paid. We think plaintiff should recover nothing for those two months, and the judgment should be modified accordingly. It is true that a party cannot before election to office bind himself by an agreement to receive less salary, if elected, for the performance of the duties of such office than the law fixes. Purdy v. City of Independence, 39 N. W. 641. But after the performance of the services, the party may receive less compensation therefor than the legal salary if he choose so to do. And where he renders a bill purporting to cover such services, and the whole thereof, and such bill is allowed and paid as rendered, and payment accepted without objection or protest, it amounts to an adjudication, and, in the absence of surprise, accident or mistake of fact, cannot be reopened. Parties cannot so divide their claims and present them by installments. Harding v. County of Montgomery, 55 Iowa, 41, 7 N. W. Rep. 396; Love v. Mayor, etc., 40 N. J. Law, 456; Thomas v. St. Clair Co., 45 Mich. 479, 8 N. W. Rep. 45. The cases of Clarke v. Milwaukee Co., 53 Wis. 65, 9 N. W. Rep. 782 and O'Herrin v. Milwaukee Co., 30 N. W. Rep. 239, announce no different rule. In those cases certain sums were paid and receipted for, but no bills were rendered or any acts done from which the court could gather the assent of the plaintiffs to receive their reduced salary. The judgment in this case should have been for the sum of $495, with interest from May 20, 1889, and the district court is di-

rected to modify its judgment accordingly. The respondent will recover his costs. Modified and affirmed. All concur.

CORLISS, C. J., having been of counsel, did not sit upon the hearing of the said case; Judge MORGAN, of the second judicial district sitting by request.

THOMAS J. LARISON, Plaintiff and Appellant, *v.* DWIGHT L. WILBUR and JOHNSON NICKEUS, Defendants and Respondents.

1. Written Contract Not Invalidated by Prior Void Parol Contract.

Where plaintiff, who held the patent title to certain real estate acquired by him under the pre-emption laws of the United States, entered into a contract, otherwise valid, for the sale and conveyance of such real estate, such contract was not invalidated by the fact that prior thereto, and not before plaintiff acquired his title, or filed his declaratory statement, a parol contract had been entered into by the same parties to the same effect.

2. Pre-Emption; Question of Forfeiture Can Only be Raised by United States.

As against all the world, except the United States, plaintiff had perfect title to said land, with good authority to sell and convey the same, and the question of forfeiture, by reason of the existence of said prior parol contract, under § 2262, Rev. St. U. S., can be raised only by the United States. Such forfeiture may be waived. This court cannot anticipate the action of the federal officers in that respect.

(Opinion Filed November 29, 1890.)

APPEAL from district court, Stutsman county; Hon. RODERICK ROSE, Judge.

S. L. Glaspell and *John S. Watson*, for Appellant.

The oral contract made before the plaintiff made final entry was confessedly void, but the written contract made afterwards entirely supersedes the former: § 3545 Compiled Laws. The inhibition of the United States Statutes applies only while the land belongs to the government: Sutphen v. Sutphen, 2 Pac. Rep. 100. The second contract is not connected with the illegal act,

is founded on new consideration, and is valid: Armstrong v. Soler, 11 Wheat. 258; Fidler v. Norton, 30 N. W. 135. The question of forfeiture by the illegal oral agreement is one for the government only to raise: Woodbury v. Dorman, 15 Minn. 272; Richards v. Snyder, 6 Pac. Rep. 186; Snow v. Flannery, 10 Iowa 318. The defendants are not in position to allege that the contract was against public policy: U. P. Ry. Co. v. Durant, 95 U. S. 576.

Messrs. Nickeus & Wilbur for the respondents: The written contract was simply the oral contract reduced to writing, hence tainted with the same disease: Lamb v. Davenport, 18 Wall. 307; Greenhood on Public Policy, 574-5; Craig v. State, 4 Pet. 436; Hunt v. Kinckerbocker, 5 Johns. 327; Hall v. Coppell, 7 Wall. 542; Whett v. Buss, 57 Mass. 448; White v. Russell, 17 Mass. 257; Belding v. Pitkin, 2 Caines, 147; Holman v. Johnson, Cowper, 334; Gray v. Hook, 4 N. Y. 449; Woodworth v. Beimet, 43 id. 273.

BARTHOLOMEW, J. Plaintiff in his complaint alleged that on and prior to November 12, 1884, he was the owner in fee of certain real estate situated in Benson county, in the then territory of Dakota; that he held a patent for such land from the United States, and that on said November 12, 1884, entered into an agreement with defendants under the name of D. L. Wilbur, trustee, for the sale of said lands as follows: "This agreement made and entered into this 12th day of November, A. D. 1884, by and between Thomas J. Larison and Catherine A. Larison, his wife, of Benson county, D. T., of the first part, and D. L. Wilbur, trustee, of Stutsman county, and territory of Dakota, of the second part: That for and in the consideration of the sum of forty-two hundred dollars, to be paid as hereinafter mentioned, said parties of the first part agree to sell and convey, by good and sufficient warranty deed, to said second party, the east half of the south-east quarter and the east one-half of the north-east quarter of section sixteen, in township number one hundred and fifty-three north, and range number sixty-seven west, of the 5th principal meridian, D. T. The said deed shall be subject to a mortgage of three hundred dollars given

by said Larison to Mrs. B. B. Hotchkiss. Said second party agrees to make payments as follows: The sum of eighteen hundred and ninety-five dollars on and before the execution of this contract, the receipt of which is hereby acknowledged; the sum of thirteen hundred dollars on or before the first day of January, 1885; and the sum of thirteen hundred and one dollars on or before the first day of February, 1885, with interest thereon at the rate of ten per cent. per annum before and after maturity. Said Larison agrees to furnish an abstract of title to said land, showing good title in himself, and that same is free and clear of all incumbrance, except the mortgage of three hundred dollars, above referred to. Said first parties agree to execute said deed within twenty days from this date, and deposit the same in the First National Bank of Lincoln, Illinois, to be delivered to said second party by said bank when the conditions of this contract are completed by said second party. THOMAS J. LARISON. D. L. WILBUR, Trustee."

He then alleged the payment and receipt of a certain amount on the contract, and a full performance on his part of all the terms of said contract, including a tender of the deed, but that defendants had failed and refused to accept said deed, or pay for said land, according to the terms of said contract, and a decree was prayed enforcing the balance due under the contract with certain special and specific relief. The defendants Wilbur and Nickeus answered as follows: *First.* They deny each and every allegation in said complaint, save such allegations thereof as are hereinafter specifically admitted. *Second.* They admit that on and before the 13th day of November, 1884, the plaintiff was and now is the owner of the E. ½ of the S. E. ¼, and the E. ½ of of the N. E. ¼ of section 16, in township 153 north, of range 67 west. *Third.* In answer to paragraph 3 of plaintiff's complaint, defendants aver on or about July 20, 1883, defendants Hager, Cross, Wilbur, and Nickeus entered into an oral contract, but not as partners, with the plaintiff herein, whereby he agreed to pre-empt, prove up, and deed all of the said tract of land mentioned and described in said complaint, to-wit, the E. ½ of the S. E. ¼, and the E. ½ of the N. E. ¼ of section 16, in township 153 north, of range 67 west, to these defendants and

the said George W. Cross and Fred D. Hager, for the sum of $4,500, $1,500 of which has been paid. That on or about the said 20th day of July, 1883, and for a long time subsequent thereto—the exact date these defendants are unable to state—the said tract of land belonged to the United States government; that is to say, the plaintiff herein had not filed his declaratory statement for said tract, nor did he enter and pay the government for said land until the summer of 1884, as these defendants are informed and believe, and that, prior to the date of plaintiff's entry of said land, these defendants had paid him on said contract about $1,000; that the written instrument set out in paragraph 3 of plaintiff's complaint is the oral agreement hereinbefore mentioned reduced to writing. *Fourth.* That all of the transactions hereinbefore set out in plaintiff's complaint and in this answer were in fraud of the United States land laws, and therefore null and void. Wherefore defendants pray that the contract entered into by the plaintiff and defendants be declared null and void, and plaintiff's complaint be dismissed, and for the costs of this action. To this answer plaintiff demurred on the ground that the answer did not state facts sufficient to constitute a defense. This demurrer was overruled, and this ruling of the court is assigned as error. The complaint sets out in *hæc verba* a contract of sale November 12, 1884, whereby plaintiff agrees to sell and convey to defendants, and defendants agree to purchase from plaintiff, the land therein described on the terms and conditions therein specified. The execution of this contract is admitted by the answer. The parties named in this contract are Thomas J. Larison and Catherine A. Larison, of the first part, and D. L. Wilbur, trustee, of the second part.

The answer sets up a parol contract for the sale and purchase of the same lands made more than a year before between Thomas J. Larison and the defendants individually. The terms of this parol contract are fully set forth, and the answer alleges that the written instrument set out in the complaint is this parol contract reduced to writing. There is a demurrer to the answer, and hence both contracts stand admitted as pleaded. Both standing admitted, the question whether or not they are the same contract is a conclusion of law, and not admitted by the de-

murrer. An inspection of the pleadings show clearly that the two contracts, while pertaining to the same subject-matter, and seeking to reach substantially the same result, are, nevertheless, distinct and separate contracts. The original parol contract, made on the 3d day of June, 1883, at a time when plaintiff had no title to the land, but simply contemplated filing upon it as a pre-emption, was clearly a violation of § 2262, Rev. St. U. S., and as such was void. Mellison v. Allen, 30 Kan. 382, 2 Pac. Rep. 97, and cases cited. It was void not because it was wrong in itself, or involved any moral turpitude, but because it was prohibited on grounds of government policy. The prohibition was temporary in its nature. When the pre-emption right should ripen into patent title, the prohibition would be swept away. The parties to that parol contract evidently comprehended their legal rights and disabilities perfectly. They must have understood that the parol contract was of no binding force, because when plaintiff had procured the patent title, and thus removed the inhibition of the statute, the parties again met—plaintiff in person, and D. L. Wilbur, trustee, representing the defendants, (and his authority to do so is not questioned)—and executed the written contract of November 12, 1884, on which plaintiff bases his right of recovery. The contention of the parties involves the one question, whether or not this written contract is so connected with the former contract, so impregnated with that illegality, as to bring it within that class of cases which a court of equity refuses to lend its aid in enforcing. The learned judge of the district court evidently thought that it was, and so held the answer good. We are unable to reach the same conclusion. We recognize the doctrine contended for by respondent that if this written contract is based upon any promise growing out of the illegal contract, or if the illegal contract is in any way or to any extent the consideration for the written contract, or if the written contract cannot be enforced without connecting it with, or calling to its aid, the illegal contract, then it should not be enforced in a court of equity.

In our view it is idle to say that the parties never made but one contract, that their minds never met after June 3, 1883. When the parties voluntarily and understandingly executed and

acknowledged the contract of Nov. 12, 1884, we are bound to conclusively presume that their minds met then and there. We next notice that this written contract is complete and perfect in all its parts. There is nothing that will warrant us in saying that the new contract was made because the parties considered themselves bound by the old one. It is evident that they knew they were not bound. The written contract was made because the one party desired to sell and the other to purchase the land. The consideration was complete on both sides. So far as the record shows, it was just the contract these parties would have made had they never had any prior negotiations; and, had that been the case, no question of the legality or sufficiency of this contract would ever have been raised. It seems evident that the legal contract did not grow out of the illegal; that the illegal was in no sense the consideration for the legal; and that the legal can be enforced without any connection with or reference to the illegal. We are not prepared to hold that because, at a time when they could not legally do so, these parties contracted relative to a certain subject-matter, therefore they are forever barred from contracting with each other relative to that same subject-matter. The contrary doctrine has been announced time and again by the courts with reference to what are known as "Sunday contracts." We think this case covered in all its points by the case of Sutphen v. Sutphen, 30 Kan. 510, 2 Pac. Rep. 100. That was a stronger case for defendant than is this. That case was between father and son. The father had a homestead filing. Before final proof he entered into a parol contract with the son for the conveyance of the homestead land to the son for a specific consideration, portion of which was paid down in the cancellation of an indebtedness from the father to the son. After final proof the father, without any further contract, deeded to the son, when another payment was made, and the balance left to be paid in the future. This balance not being paid, the father brought suit to recover it, and the son set up as a defense the illegality of the transaction. The supreme court of Kansas, by Brewer, J., said: "Doubtless the original contract made before plaintiff had perfected his title to his land was void. But when the deed was made the father had a right to

convey. * * * * * And when, without further stipulation or new arrangement, the father executed a conveyance to the son, the fair interpretation is that it was in execution of that prior contract; that it was a present affirmation of its validity, a new contract, so to speak—a sale upon the time and terms theretofore agreed upon." It requires no interpretation in this case to establish the new contract. Its execution at a time when it was not inhibited stands admitted. A distinction is claimed between lands held as a homestead or as a pre-emption. In either case any contract to convey before final proof renders it impossible to make final proof without committing perjury; yet § 2262, Rev. St. U. S., provides for forfeiture in case of pre-emption except in favor of *bona fide* purchasers for value, while no such consequences follow in case of a homestead, and defendants claim that they cannot safely take the land because it is subject to forfeiture. But such is not the case if they are in good faith purchasers, and, if they are not, they are in no condition to seek protection from a court of equity. But, in any event, this question of forfeiture is not in the case. Plaintiff had a good title as against all the world except the United States, with a perfect right to sell and convey. The question of forfeiture can only be raised by the general government. Snow v. Flannery, 10 Iowa, 318; Richards v. Snyder, 6 Pac. Rep. 186; Railroad Co. v. Durant, 95 U. S. 576. Granting that the right of forfeiture exists, we cannot anticipate the action of the United States. The forfeiture may be waived. In any event defendants are fully protected under their covenants of warranty. A question of practice was raised in this court, but a ruling on the question cannot affect the result, and the condition of the record is so unsatisfactory that this court is in doubt as to the exact view of the question taken by the trial court, and therefore we decline to pass upon the question. For the error in overruling the demurrer to the answer, the judgment must be reversed and remanded, with directions to the trial court to reverse its judgment and sustain the demurrer. All concur.

THOMAS LAVIN, Plaintiff and Respondent, *v.* CLAYTON E. BRADLEY, Defendant, ANNA G. CLAYTON and WILLIAM E. CLAYTON, Defendants and Appellants.

1. Seed Lien—Description of Land.

Under the statute authorizing a seed lien, (Comp. Laws, § 5490,) the "account in writing" must embrace a description of the land on which the seed has been or is to be planted. Where such description of the land was omitted, *held*, fatal to the lien.

2. Same; Pleading in Action to Foreclose.

In an action to foreclose such lien, where the complaint shows affirmatively that the land is not described in the account in writing which was filed, *held*, that such complaint does not state a cause of action so far as the lien is concerned, and that an order of the district court overruling a demurrer thereto will be reversed.

3. Same; Court Will Not Amend Claim of Lien.

Held, further, that a court of equity will not reform such "account in writing" to make it conform to an oral understanding between the parties to the seed-lien transaction by inserting a proper description of the land therein. The lien arises on the statute, and does not depend for its existence upon a contract. Such lien can only be acquired by a substantial compliance with the statute which authorizes the lien.

4. Same; Same; Not Even if Error Was Caused by Fraud of Lienee.

Held, further, that the fact that a description of a different tract of land from that upon which the seed was sown was inserted through either the design or inadvertance of the party to whom the seed was furnished will make no difference with the rule above laid down.

(Opinion Filed November 29, 1890.)

APPEAL from district court, Traill county; Hon. WM. B. MCCONNELL, Judge.

F. W. Ames, for appellants, cited: Mushlett v. Silverman, 50 N. Y. 360; Malter v. Falcon M. Co., 2 Pac. Rep. 50; Beals v. Cong. B'nai Jeshuran, 1 E. D. Smith, 657; Rugg v. Hoover, 10 N. W. 473; Hooper v. Flood, 54 Cal. 218; McElivee v. Sandford, 53 How. Pr. 90; Valentine v. Ransom, 10 N. W. 338; Penrose v. Calkins, 19 Pac. 641; Lindley v. Cross,

31 Ind. 109 (S. C. 99 Am. Dec. 610)—all to the point that to secure a statutory lien, a full compliance with the statute is necessary. That the court cannot reform the notice of lien: Goss v. Strelitz, 54 Cal. 640; Lindley v. Cross, *supra*.

A. B. Levisee, for the respondent: Equity relieves against mistake, not only in cases of contract, but in other cases: Hutchinson v. Ainsworth, 15 Pac. 82; Ross v. Williams, id. ib. 47; Gebel v. Weiss, 8 Atl. Rep. 889; Burgess v. Graffan, 10 Fed. 216: The strict rule applied in descriptions in mechanics' liens is not proper here, because the seed lien does not affect realty.

WALLIN, J. This is an action to foreclose a seed lien sought to be enforced under Comp. Laws. §§ 5490–5495, (Sess. Laws 1887, c. 150.) The complaint is as follows:

"(1) That the defendant Clayton E. Bradley on the 30th day of March, 1889, executed and delivered to this plaintiff his certain promissory note bearing said date, whereby he promised to pay to this plaintiff, or to his order, on or before the 1st day of October, 1889, three hundred and thirty dollars, with 10 per cent. annual interest thereon from the date thereof.

"(2) That plaintiff is still the holder and owner of said note which is now past due and wholly unpaid.

"(3) That the consideration of said note was three hundred bushels of seed wheat sold and delivered by this plaintiff to said Clayton E. Bradley for the express purpose of seeding a certain half section of land, which he then spoke of as the land which he had recently purchased from Clayton, and as the Clayton farm, or the Clayton tract, to-wit, the north half of section thirty-two of township one hundred and forty-seven of range fifty-one, the same lying and being in the county of Traill, aforesaid, for the crop of 1889.

"(4) That within thirty days after the sale and delivery of said seed wheat as above set forth, to-wit, on the 30th day of March, A. D. 1889, this plaintiff, for the purpose of securing the payment of the price of said seed wheat, prepared and filed a notice of said lien, which notice is in the words and figures as follows:

"'A.

"'Clayton E. Bradley to Thomas Lavin, Dr. March 30th, 1889. To 300 bushels of seed wheat, at $1.10 bushel, $330.

"'SEED LIEN.

"'Territory of Dakota, county of Traill—ss: Thomas Lavin, being sworn, says that on the 30th day of March, A. D. 1889, he made and entered into a contract with Clayton E. Bradley of the township of Ervin, county of Traill, territory of Dakota, to furnish and deliver to said Clayton E. Bradley three hundred bushels of seed wheat of the value of $330, for seeding purposes only, for the year 1889, and that said seed wheat was sown on the north half of section twenty-two, township one hundred and forty-six, range fifty-one, in Norway township, Traill county, Dakota territory; that under and by virtue of said contract the said seed wheat so furnished was of the value of three hundred and thirty dollars, as specified in the annexed account, marked "A," at the respective dates, and at and for the respective prices specified in said account; that said account is a just, true, and full statement of the seed wheat so furnished to the said Clayton E. Bradley, under said contract, for seeding purposes, and growing of crops for the year 1889 aforesaid, and that there is due and owing thereon to Thomas Lavin, after allowing all credits, the sum of three hundred and thirty dollars, for which a seed lien is hereby claimed in favor of the said Thomas Lavin upon said crop, including the land upon which the same is, under chapter 119 of the 17th session of the legislative assembly of 1887, of the territory of Dakota. THOMAS LAVIN.

"'Subscribed and sworn to before me this 30th day of March, A. D. 1889. F. W. AMES, Notary Public, Traill County, D. T. [Seal.]

"'Territory of Dakota, County of Traill—ss.: Clayton E. Bradley, being duly sworn, on oath says, that he made a contract, as stated in the written affidavit, and purchased the wheat as therein set forth, at the time and prices set out in the account hereto annexed, and the same is to be sown on land therein described. CLAYTON E. BRADLEY.

"'Subscribed and sworn to before me this 30th day of March,

A. D. 1889. F. W. AMES, Notary Public, Traill County, D. T. [Seal.]'

"That the said seed lien was duly filed in the office of the register of deeds in and for the county of Traill aforesaid, on the 2d day of April, 1889.

"(5) Plaintiff resides about twelve miles from the Clayton farm or tract on which said Bradley intended to sow said wheat, and plaintiff did not personally know the description of said lands. The said notice of seed lien was drawn at Mayville, about twenty-five miles from the county-seat, and plaintiff had no opportunity to ascertain the correct description of said land, by consulting the records, without incurring the delay, trouble, and expense of a trip to the county-seat expressly for that purpose. Plaintiff was therefore compelled to rely on the defendant Bradley for a description of the land to be sown, and said Bradley by error or design gave the description incorporated in said lien as above set forth, instead of giving the true one, to-wit, the north half of section 32, township 147, of range 51.

"(6) That said Clayton E. Bradley sowed the said seed wheat on the north half of section 32, and the crop of wheat grown on said land in the season of 1889, and all of it, was the product of the seed furnished by this plaintiff, as above stated, the said defendant Bradley; and said defendant Bradley did not sow or plant any wheat on said section 22, township 146.

"(7) That said defendants Anna G. and William E. Clayton were well and fully informed of the fact that this plaintiff had furnished the said Clayton E. Bradley the seed to sow the crop grown on the north half of said section 32, in the year 1889, and that said defendants at all times, from seed-time to harvesting of said crop, well knew that this plaintiff claimed a seed lien on said crop, and was equitably entitled thereto.

"(8) That said Anna G. and William E. Clayton, nor either of them, have not been in any respect misled or deceived by any error, defect, or misdescription in said seed-lien notice, nor have their interests, or the interests of either of them, been, in any respect or degree, prejudiced by any such error, defect, or misdescription.

"(9) That the said Clayton E. Bradley is totally insolvent, and absconded from the state of North Dakota about the 1st day of July, 1889; and that this plaintiff has no visible means or prospect of recovering his said claim against him except by virtue of said seed lien.

"(10) That the said defendants Anna G. and William E. Clayton, without the consent or approval of this plaintiff, have illegally and wrongfully taken possession of and have appropriated to their own use and benefit the entire crop of wheat grown on the north half of section 32 of township 147 of range 51, and wrongfully and illegally detain the possession thereof, and every part thereof, from this plaintiff, to his injury and damage to the full amount of his claim, principal and interest, as herein set forth.

"(11) That there is now due the plaintiff on his said claim the principal sum of $330, and 10 per cent. annual interest thereon, from the 30th day of March, 1889, to this date, to-wit, $30.70, making total amount now due, besides costs, $360.70.

"Wherefore the plaintiff prays: (1) That he have judgment against the defendant Clayton E. Bradley, for three hundred and sixty dollars and seventy cents, with 10 per cent. annual interest thereon from the 5th day of March, 1890, until fully paid. (2) That he be allowed a seed lien on all the crop of wheat grown on the north half of section 32, of township No. one hundred and forty-seven of range fifty-one, in the county of Traill, in the year 1889. (3) That said lien be foreclosed according to law, to pay and satisfy plaintiff's claim, principal, interest, and costs. That the defendants Anna G. and William E. Clayton be ordered to deliver to this plaintiff said crop of wheat, or so much thereof as will fully pay and satisfy the amount of $360.70 and all accrued interest and taxable costs; or, in default of said delivery, that plaintiff have judgment absolute against said Anna G. Clayton and William E. Clayton for the full amount of his claim, principal and interest thereon, from the 5th day of March, 1890, until fully paid, and costs of suit to be taxed. (5) That, if the court should be of the opinion that the notice of seed lien above set out is not in all respects a sufficient compliance with the requirements of the statutes to entitle plaintiff to the benefit of a seed lien, then and in that event plaintiff prays

the court to correct and reform said notice to make it conform to the intention of the parties thereto, and to order its execution and enforcement so reformed. (6) Plaintiff prays for costs, and for general an equitable relief in the premises."

To this complaint the defendants Anna G. and William E. Clayton interposed a demurrer upon the ground that the complaint does not state facts sufficient to constitute a cause of action. The district court overruled the demurrer, and from the order overruling the demurrer, the defendants, the Claytons, appeal to this court. The only question presented for our decision, is the question of the sufficiency of the complaint as against the appellants.

It appears by the complaint that seed grain was furnished by plaintiff to the defendant Bradley upon an oral understanding that it was to be sown upon the north half of section 32, township 147, range 51, in Traill county, and that Bradley did sow the grain on that tract, and that a crop was produced from the seed grain the same year. The fact further appears by the complaint that plaintiff in due time filed an account, in writing, conforming to the requirements of § 5492, Comp. Laws, except that the same did not embrace a description of the land upon which the seed so furnished had been or was to be sown; but did contain a description of a wholly different tract upon which no part of the seed was sown or expected to be sown. The contention of appellants' counsel is that the omission to describe the right land in the "account in writing" is fatal to the lien. In this counsel is entirely correct. No requirement of the statute under consideration is plainer, and certainly none is more important, than the provision of § 5492 requiring that the land on which the seed is sown or will be sown should be described in the instrument which is put on file. In construing the seed-lien statute, the fact must not be overlooked that the lien given is wholly statutory in its nature and origin. It was unknown at common law, and hence can neither be acquired nor enforced unless there has been a substantial compliance with the act of the legislature from which the lien arises. Kelly v. Seely, 27 Minn. 385, 7 N. W. Rep. 821. The lien may be obtained without the consent of the party to whom the seed

is furnished, and without resort to legal proceedings. The lien is entirely analogous to the liens of mechanics and material-men, and such liens are never extended by the courts beyond the fair and reasonable import of the language used in the statute. Mushlett v. Silverman, 50 N. Y. 360; Hooper v. Flood, 54 Cal. 218; Malter v. Mining Co., (Nev.) 2 Pac. Rep. 50; Gordon Hardware Co. v. San Francisco, etc., R. Co., (Cal.) 22 Pac. Rep. 406; Phil. Mech. Liens, § 428. But the respondent claims in the complaint that the court, if it deems the description in the instrument filed to be defective, should reform such instrument, and "make it conform to the intention of the parties thereto." The power to reform a contract in a case where, by reason of mistake or fraud, it does not embody the true agreement of the parties, certainly exists in courts of equity. But the power relates only to contracts voluntarily entered into; it has no application to cases like the case at bar, where the lien sought to be obtained does not originate in any contract, and may as well be had in cases where there is no contract for a lien as in cases where such contract is made. In this case the lien can only be acquired by complying with the statute, and the right to reform the instrument which is filed cannot be execrised. The case of Lindley v. Cross, 99 Amer. Dec. 610, is in point. In the opinion, page 613, the court say: "The lien of the mechanic or material-man is created by statute, and, before either can avail himself of such a lien, the statute must be complied with." And also see Goss v. Strelits, 54 Cal. 640.

Another point, one not suggested by counsel, is equally fatal to the sufficiency of the complaint. The first section of the statute (5490) gives a lien only when the seed is furnished "to be sown or planted upon any lands owned, used, occupied or rented by such person," *i. e.*, the person to whom the seed is furnished. There is no averment in the complaint that the seed was furnished to be sown or planted upon any such land. The statement made in the complaint (paragraph 3) that the seed was sold and delivered to Bradley for the purpose of seeding certain land which Bradley then "spoke of as the land which he had recently purchased from Clayton," comes far short of being an allegation that Bradley at that time owned such land,

or had actually purchased it prior thereto, or at any time. No attempt is made in the complaint to allege that the seed was furnished to be sown on any land either rented or occupied by Bradley. In paragraph 6 of the complaint it is averred "that the said Clayton E. Bradley sowed said seed wheat on the north half of section 32," etc. This naked statement, in the absence of averments showing a use or the right to use the tract for cropping purposes, falls short of meeting the requirement of statute. Nothing is stated inconsistent with the idea that Bradley sowed the seed on section 32 under a mere license to enter, obtained from the owner to enter upon and fulfill a contract to seed the land and furnish the seed, and do no more. If such were the fact, and it is not inconsistent with the complaint, no lien would attach to the crop, even if purchased by Bradley for the express purpose of seeding the land upon which it was sown by him. For this omission in the complaint, as well as that first noticed, the order overruling the demurrer to the complaint must be reversed, and the action must be dismissed as against the appellants. It will be so ordered. All concur.

ROBERT A. FOX, Plaintiff and Respondent, *v.* ALLISTAIR MACKENZIE, Defendant and Appellant.

1. Effect of Undertaking Given to Procure Discharge of Attachment.

The giving of an undertaking under §§ 5009, 5010, Comp. Laws, Dak., to procure a discharge of an attachment, does not merely release the levy but destroys the writ itself, and thereafter, a motion to dissolve the attachment as being irregularly or improvidently issued will not be entertained.

(Opinion Filed November 29, 1890.)

APPEAL from district court, Ramsey county; Hon. CHARLES F. TEMPLETON, Judge.

James F. O'Brien and *W. H. Standish*, (*O. F. Woodruff*, of counsel,) for appellant, *Messrs. Cochrane and Fleetham*, for respondent.

The case was elaborately briefed on both sides, but as the opinion cites most of the cases they are not noted here.

CORLISS, C. J. The defendant and appellant, having given the statutory undertaking to discharge the attachment under which his property had been seized, now insists that his right to have the attachment dissolved because improvidently issued is nevertheless unimpaired. The ground of the attachment was the non-residence of the defendant, and on the motion to dissolve it the defendant presented affidavits showing that the attachment affidavit was in that respect false. These affidavits, on the motion of the plaintiff, were stricken from the files, the court below ruling that the right of defendant to move to dissolve on the ground that the attachment had been improvidently issued was lost by his giving the undertaking to discharge the attachment under the statute. Was this error? The statute provides two distinct modes of securing the discharge of an attachment. One is on motion, because of irregularities in the proceedings, or on account of the falsity of the attachment affidavit; the other is by the giving to the plaintiff of an undertaking to pay the judgment. §§ 5009-5011, Comp. Laws.

It is clear that a successful motion to discharge an attachment, culminating in an order to that effect, is the utter annihilation of the proceeding. Everything from the seizure back to and including the false affidavit is swept aside. The language of the statute is that the defendant may move to "discharge the attachment." The same language is employed in the section providing for the giving of an undertaking by the defendant. Such an undertaking operates to "discharge the attachment." The same language is employed in the section providing for the giving of an undertaking by the defendant. Such an undertaking operates to discharge the attachment." These words must have the same construction when used to describe the effect of the giving of such undertaking as when employed in the section relating to motions to dissolve, unless we can see good reason for giving them different interpretations in the different sections. If the only effect of the giving of an undertaking by the defendant was designed to be the release of the particular property seized from the levy, if the writ nevertheless was to remain in its full vigor, why did not this section limit such effect in express terms to a discharge of the lien of

the attachment, and why did it declare that the consequence would be a discharge of the attachment itself, using the very language which, in the same statute, was employed to express the legal extinction of the writ? One of the principal reasons urged to support the doctrine that the affidavit may be traversed although the defendant has rebonded is that the other rule would result in great injustice to the defendant, who might suffer damages through delay, for which the law would afford him no redress, or which the penalty of the plaintiff's undertaking would not equal; that the law intended that he should have the speedy mode of securing possession of his property by bonding to prevent such irreparable injury; and that it would be unjust to hold that he could secure this right only at the expense of the other right to assail the truth of the attachment affidavit.

The whole force of this argument depends upon a false assumption. So far from securing his property more speedily by rebonding, the fact is that a motion to dissolve on the ground of the falsity of the affidavit may result in the defendant's securing a more speedy return of his property than he would by rebonding. The plaintiff has three days after the execution of such undertaking in which to decide whether he will except to the sufficiency of the sureties. § 5010 Comp. Laws. During this time the sheriff has the right to and usually will hold the property. The plaintiff may then except to the sureties, and the defendant can thereafter have them justify, upon not less than five days' notice. § 5010 Comp. Laws. It is, therefore, always in the power of the plaintiff to prevent the defendant from securing a return of the attached property in less than eight days from the execution of the undertaking. But the defendant may, in a proper case, in a case where he will suffer irreparable damage from the delay, in any case of great hardship, apply to the court to shorten the time in which to move to vacate the writ, and the court will, in the exercise of its discretion, shorten, by an order to show cause, the time in which to make such motion, forcing the plaintiff to sustain his attachment in much less than eight days; and, if it be said that it may require time for the defendant to prepare his papers for such a motion, it is no less true that it may and often will take time for him to secure sureties

to sign his discharge undertaking. It is thus apparent that the defendant gains nothing in the point of time by rebonding; nor is there anything in the contention that to bar his right to traverse the attachment affidavit because he has rebonded is unjust, even on the assumption that he can more quickly secure his property by giving a discharge bond than by motion. Counsel for appellant has taken it for granted that in this jurisdiction the defendant has only these two modes of saving or regaining his property from the grasp of the attachment. They have overlooked or misconstrued § 4997, Comp. Laws, which provides that the warrant of attachment shall require the sheriff to seize and safely keep defendant's property "unless the defendant give him security by the undertaking of at least two sufficient sureties in an amount sufficient to satisfy such demand, besides costs, or in an amount equal to the value of the property which has been, or is about to be, attached, in which case to take such undertaking." It was urged on the argument of this cause by counsel for the appellant, who made an oral argument, that the bond provided for in this section is the same as the bond specified in § 5010, and that if the execution of one will bar the motion to discharge the attachment so will the execution of the other. To this view we cannot assent. The bond referred to in § 4997, as we construe it, is a mere substitute for the levy made or about to be made. That bond we will designate as the "substitute bond," the other as the "discharge bond," in the course of this opinion. The latter runs to the plaintiff in the writ, while the former is given to the sheriff. The discharge bond is in double the amount of the claim, or of the appraised value of the property seized, while the penalty of the substitute bond is only commensurate with the amount of the claim, or of the appraised value of the property attached. The substitute bond can be given before seizure to prevent it, or immediately after a levy, without an appearance in the action. The discharge bond can only be executed after seizure, and after the defendant has appeared in the action. It is presented to the court or the clerk, and the sureties thereon must justify if the plaintiff so demands. The other bond is delivered to the sheriff, and no justification of sureties is required. The condition of the discharge bond is

that the amount of the judgment recovered by plaintiff shall be paid. The statute does not provide in express terms what the condition of the substitute bond shall be. It is expressly provided that the giving of the discharge bond shall "discharge the attachment." No such provision is found in connection with the substitute bond. If the plaintiff omit to except to the sureties in the discharge bond, he cannot after judgment look to the sheriff, as the law has given him the bond in lieu of the attachment and levy thereunder. Would it be claimed that the sheriff would be likewise exonerated in all cases on taking the substitute bond to which plaintiff has no power to object? These two bonds are essentially different. The one destroys the attachment, the other at most only the levy.

It is apparent from these considerations that the argument of hardship has no force in this jurisdiction, on the view of the question most favorable to the appellant. The defendant may always release his property, or prevent its being seized, without waiving his right to assail the truth of the attachment affidavit, or even without subjecting his person to the jurisdiction of the court, where he has not been personally served with process. The substitute bond merely represents the property seized or about to be seized, and in no manner affects the writ itself. Counsel for appellant seems to concede that, under such a state of the law, the court may well hold that the execution of the discharge bond destroys the right to assail the attachment. It is on this ground that he insists that Ferguson v. Glidewell, (Ark.) 2 S. W. Rep. 713, does not overrule the prior cases, but is founded on a change in the law, giving the defendant the right to execute a forthcoming bond to obtain a return of his property, no such bond being authorized when the former decisions were made. In the case of Bates v. Killian, 17 S. C. 553, stress was laid on the clause, to be found also in § 5011, Comp. Laws, providing that in all cases the defendant might move to discharge the attachment as in case of other provisional remedies. From this it is inferred that he was to enjoy this right, not only in all cases, but also at all times and under all circumstances. It is strictly true that the defendant had the right in this case to move to discharge the attachment, but the time to exercise this right has

gone. The argument proves too much. It leads to the doctrine that a motion to dissolve for mere irregularities is not lost by rebonding, for the defendant has the right by statute to make this motion at all times as he has to make the motion to discharge because the attachment was improvidently issued, and yet no case can be found ruling that, as to irregularities, the right is not lost by rebonding. On the contrary, the decisions are in the opposite direction, and some in cases of forthcoming bonds, merely. Wolf v. Cook, 40 Fed. Rep. 438; Bank v. Mixter, 124 U. S. 728, 8 Sup. Ct. Rep. 718; Lumber Co. v. Raymond, 76 Iowa, 225, 40 N. W. Rep. 821; Payne v. Snell, 3 Mo. 409; Barry v. Foyles, 1 Pet. 314.

The earlier Arkansas cases cited (Delano v. Kennedy, 5 Ark. 457; Childress v. Fowler, 9 Ark. 159) are not authorities in support of appellant's views. When these cases were decided, the attachment proceeding was not, as it is in our own state, merely ancillary to the action. It was a component part of the action itself. The writ was attacked, not by motion, but by plea in abatement. Under such a system, the hardship of delay was real and not fictitious. Unless he should rebond, the defendant could not secure possession of his property until the issue raised by his plea in abatement could be regularly tried, and determined in his favor. In the subsequent case of Ferguson v. Glidewell, 2 S. W. Rep. 711, the same court, referring to those prior adjudications, thus state the reasons which lay at their foundation, and also the change which had been subsequently wrought: "This court held that the proceeding authorized by these statutes was in its inception a compound proceeding, combining a proceeding *in rem* with a proceeding *in personam*, each having a distinct identity, but liable to be transformed at any time before judgment into a proceeding solely *in personam*, and, as a whole, was founded upon the declaration, bond, affidavit, and writ, in harmonious combination; and that, should this foundation be defective, as it would be in case the affidavit, the bond, or the writ should not be in conformity with the statute, or either should vary, the one from the other, in so much as to disturb the harmony of the whole as one suit, the entire proceedings, if appropriately assailed, would necessarily fail. It fur-

ther held that the object of these statutes was to obtain jurisdiction of the person of the defendant; that the bond which the defendant was authorized by these statutes to execute to secure the release of his property was essentially an instrument of bail, which accomplished substantially all the ends that were accomplished at common law by the taking of the bail-bond below, filing, entering, and perfection of bail to the action above; that, when a defendant in an action of attachment executed such a bond, he did nothing more than a defendant did in England, in an ordinary action, when he first executed a bail-bond below to the sheriff, and subsequently appeared, as he had covenanted to do, and entered into a recognizance of special bail to the action above, and perfected appearance there by the justification of his bail; that the bail-bond below to the sheriff, and the recognizance of special bail to the action above, did not have the effect, at common law, of cutting off any of the defenses to the defendant; and that, therefore, the execution of the bond by the defendant for the purpose of discharging the attachment, under the statutes referred to, did not impair any of the defendant's rights of defense, and that, after its execution, he might defend the action either by plea in abatement, interposed in apt time and in due form, or by a plea in bar, in the same manner in every respect as if he had not executed the bond, and has suffered the property attached to remain in the hands of the sheriff. Childress v. Fowler, *supra.*

But the Code has made radical changes in the pleading and practice in the courts of this state. The bond and affidavit made by the plaintiff to secure an attachment and the writ of attachment no longer form a part of the original proceedings by which an action at law may be commenced. Under the Code, attachment is a provisional remedy, and merely ancillary to the action in which it is sued out. Its object, as expressly defined by the Code, is to secure the satisfaction of such judgment as may be recovered by the plaintiff. The bond the defendant is authorized to give to dissolve the attachment no longer fills the place of a bail-bond at common law. It does not bind him to appear and answer to the plaintiff's demand at such time and place as by law he should, as it did under the former statutes.

The rules of construction heretofore used by this court in passing upon the effects of a bond by the defendant to dissolve an attachment upon his right to attack the attachment proceedings are not, therefore, applicable to a dissolution bond executed under the Code, the reason having ceased to exist." This case is directly in point, the court holding that the defendant and sureties were precluded from asserting that the attachment was improvidently issued; even though after the execution of the bond the writ had been vacated on motion. The discharge can have no effect at all if it does not affect the bond. The court held that there was in fact no attachment to discharge, saying: "Section 337 as we have seen, provides that the defendant may discharge the attachment by giving bond that he will perform the judgment of the court. How can the attachment be sustained or discharged after the defendant has discharged it by giving the bond?"

The decision in Lehman v. Berdin, 5 Dill. 340, was simply the adoption of the prior ruling by the state by the federal court, as was indeed its duty. These rulings were sound, as was the decision in Love v. Voorheis, 13 La. Ann. 549, where the statute provided that the giving of the bond should operate not to discharge the attachment, as in this state, but merely release the property from the levy. Right here lies the fallacy of appellant's reasoning. He repeatedly asserted that the statute gives him the right to move at any time before judgment. But this provision necessarily presupposes an existing attachment to be assailed and overthrown. The right to strike down the writ by litigation certainly cannot be exercised after the suitor has voluntarily supplanted the writ as well as the levy by giving the statutory discharge bond. The right to move to discharge the attachment any time before judgment will not warrant the court in reviving the writ which the defendant by rebonding has already discharged. The authorities fully sustain our position. The cases here cited are not all directly in point, but they are all in harmony with our views, and some are express authority for our position: Dierolf v. Winterfield, 24 Wis. 143; Wolf v. Cook, 40 Fed. Rep. 438; Austin v. Burgett, 10 Iowa, 302–304; Allerton v. Eldridge, 10 N. W. Rep. 252; Hill v. Harding, 93 Ill. 80; Bunneman v.

Wagner, 16 Or. 433, 18 Pac. Rep. 842; Myers v. Smith, 29 Ohio St. 123; Paddock v. Matthews, 3 Mich. 23; Endress v. Ent, 18 Kan. 236; Bank v. Mixter, 124, U. S. 728, 8 Sup. Ct. Rep. 718; McCombs v. Allen, 82 N. Y. 117; Carpenter v. Turrell, 100 Mass. 450; Barry v. Foyles, 1 Pet. 314; Inman v. Strattan, 4 Bush, 445; Hazelrigg v. Donaldson, 2 Metc. (Ky.) 445; McAllister v. Eichengreen, 34 Md. 54. The Arkansas cases we have seen are not in point, and are opposed to the latest decisions of that court under new statutes very similar to those of our state. In Louisiana, the statute, as we have seen, provided for only a releasing of the property, and not the discharge of the attachment on the giving of a bond, and the cases from that state, are, therefore, foreign to the question involved. Two decisions from New York are cited, (Garbutt v. Hanff, 15 Abb. Pr. 189; Claflin v. Baere, 57 How. Pr. 78,) which appear to sustain appellant's view, but the court of appeals in that state in quite a recent case has ruled that the discharge bond destroyed the attachment, (McCombs v. Allen, 82 N. Y. 114.)

It is true that the precise question presented by this appeal was not before that court, but both the decision and the language of the court sustain the holding of the court below in the case at bar. Defendant, having discharged an attachment by rebonding, went into bankruptcy within four months after the time when the attachment was issued. The bankruptcy act under such circumstances destroyed the attachment. In an action on the bond, it was contended that the bond was a mere substitute for the writ, and that, the bankruptcy proceedings having annihilated the attachment, the bond also was swept away. But the court held that there was no attachment existing after defendant had rebonded upon which the bankruptcy act could exert its force, saying: "There was no attachment lien nor any attachment in force upon which such proceedings could operate, and this fact is conclusive against the defendants." The same decision was made in Carpenter v. Turrell, 100 Mass. 450, and in Hill v. Harding, 93 Ill. 80. The case in 4 Hill, 598, (*in re* Faulkner,) was a case of void attachment, because the affidavit on which it was founded was insufficient on its face. Bruce v. Conyers, 54 Ga. 679, belongs to the same class, as is

apparent from the syllabus: "Attachment may be dismissed for defective affidavit after replevy bond has been given. The security in the replevy bond is not bound if the property was not bound. A void attachment will neither uphold the levy nor a bond given to support the levy." There is a manifest difference between a void attachment and one which may be set aside because improvidently issued. A void attachment will not support a discharge bond, because there is nothing for the bond to rest upon. A valid attachment which may be vacated because the affidavit is false will support such a bond. We will discuss this question and the appellant's contention that the attachment was void in a subsequent portion of this opinion.

The Ohio case (Egan v. Lumsden, 2 Disn. 168) cited by appellant does not express the rule in that state. Myers v. Smith, 29 Ohio St. 123. This later and higher decision supports the respondent's view. There is, in fact, no authority to support the appellant's position under the same statute, the strongest case (Bates v. Killian, 17 S. C. 553) being a decision of a jurisdiction having no forthcoming bond, and providing no other means by which defendant could secure possession of his property except by giving the bond, the effect of which, it was claimed, was to bar defendant's right to assail the attachment affidavit. It is on the ground of the absence of the right to give such a bond that the appellant is strenuously insisting upon the hardship of the construction for which respondent contends; and the supreme court of Arkansas in Ferguson v. Glidewell, 2 S. W. Rep. 711, lays considerable stress on the fact that since the last decision in that state the right to give such a bond to secure his property has been conferred upon the defendant by statute. As we regard the statute in our own state, the bond it provides for is still more favorable to the defendant, as it enables him not merely to become the custodian of the property subject to the lien of the attachment, but to release his property from such lien absolutely. This was the construction given the same statute in California. Curiac v. Packard, 29 Cal. 194. This construction does away with the criticism of Chief Justice Cockrill, in Ferguson v. Glidewell, 2 S. W. Rep. 711-718, that the right to give a forthcoming bond was not sufficient to pro-

tect the defendant, as the property would remain subject to the attachment in his hands, and he be thereby precluded from selling it in the usual course of business. Under our statute, the substitute bond takes the place of the lien of attachment, and defendant can, by giving it, secure or retain, without losing the right to attack the writ because improvidently issued, the same unfettered dominion over his property which he could exercise before the seizure was made or threatened. It was also argued that a bond given to discharge a void attachment is itself void, and that the attachment in this case being founded, as is admitted by the motion to strike out the affidavits, on a false affidavit, is void. This question will more properly arise in an action on the bond, but as the motion to discharge also embodies the further motion to annul the bond, we will consider the point. The general proposition that a void attachment will not sustain a bond given to discharge it or release the property is sustained by authority, and is sound on principle. Williams v. Skipwith, 34 Ark. 529; Bruce v. Conyers, 54 Ga. 679; Hamilton v. Merrill, 37 Ohio St. 685; Vose v. Cockroft, 44 N. Y. 415; Shevlin v. Whelen, 41 Wis. 93; Bank v. Mixter, 124 U. S. 728, 8 Sup. Ct. Rep. 718. But the attachment in this case was not void. There was jurisdiction to issue it. The power to grant the warrant rests not upon the fact of non-residence, but upon the fact that the affidavit states that the defendant is a non-resident. The statute provides that "the warrant may issue on affidavit stating," etc. § 4995 Comp. Laws. Said the court in Haggart v. Morgan, 5 N. Y. 422: "The fact itself is not jurisdictional, although competent proof of that fact is." And in Lovier v. Gilpin, 6 Dana, 321, the court observed: "The authority of the justice does not depend in any degree upon the truth of the statement made by the affiant, and on the ground of which the attachment issues, but upon the sufficiency of the statement itself when compared with the law. To prove the falsity of a statement which is sufficient in itself does not, therefore, disprove the authority or jurisdiction of the justice, nor prove nor make the process void for want of authority." See, also, Drake, Attchm. §§ 320, 397, note. The only case appearing to hold the contrary is Egan v. Lumsden, 2 Disn. 168. In the other cases

in which the courts have held the giving of the undertaking no destruction of the right to traverse the attachment affidavit, it has never been insisted nor intimated that the writ was void because the affidavit was false. The condition of the discharge bond as fixed by the statute indicates the legislative intent that the bond shall not be affected by the dissolution of the attachment, or by any other contingency than the failure of plaintiff to obtain judgment in the action. That condition is to pay the amount of the judgment that may be recovered against the defendant. The promise is absolute, because upon it the writ itself is discharged. The order of the district court is affirmed. All concur.

WILLIAM BUDGE, Appellant, *v.* THE CITY OF GRAND FORKS, Respondent.

1. Taxation — Action by Purchaser of Void Certificate to Recover Against City.

Plaintiff's assignor purchased certain real estate at tax-sale thereof for non-payment of an assessment for street improvement made by the authorities of the defendant city. The city had jurisdiction to make the assessment and sell the assessed property for non-payment, but, by reason of irregularities in the proceedings leading up to the sale, the tax-sale certificates issued by the city treasurer to the purchaser were subsequently decreed to be invalid. *Held*, that the tax-sale purchaser bought under the rule of *caveat emptor*, and, in the absence of a statute authorizing it, had no right of action against the city for the purchase money paid for such invalid tax-sale certificates, and the rule is none the less applicable because the sale was made for the exclusive benefit of the city defendant.

2. Same; Same; Effect of Recitals in Certificate.

Held, further, that the recital in such certificate that the purchaser would be entitled to a deed at a specified time was of no force as a covenant for a deed, and added nothing to the force of the statutory provision to same effect.

3. Same — Reassessment.

Held, also, that a subsequent statute, authorizing municipalities to reassess for street improvements where a former assessment was for any cause invalid, as to all property upon which such former assess-

ment had not been paid, was intended for the benefit of the taxing municipalities only, and that where such municipality had received the amount of the former assessment by the sale of the assessed property, the right of such municipality to assess such property for such improvement was extinguished, and could not be reasserted, and no power of reassessment as to such property was given by such statute.

(Opinion Filed, November 29, 1890.)

APPEAL from district court, Grand Forks county; Hon. CHARLES F. TEMPLETON, Judge.

Cyrus Wellington and J. H. Bosard, for appellant: Many cases hold that purchaser at tax sale has no remedy if his tax title fail, but those cases, with one exception, relate to tax sales for general taxes, not to sales based, like this, on local assessments. In those cases the county or town whose officer made the sale was but an agent of the state, was not acting in its own behalf, as the city was in the case at bar: Chapman v. City, 40 N. Y. 372; People v. Chapin, 5 N. E. 64; Saulters v. Victory, 35 Vt. 350; Norton v. Supervisors, 13 Wis. 611; Phillips v. City, 31 N. J. L. 143; Waples on attachment, 543; 1 Parsons on Contracts, 462; McGoren v. Avery, 37 Mich. 120; 2 Greenleaf on Evidence, § 121; Paul v. Kenosha, 22 Wis. 266; 2 Dillon on Mun. Cor., § 938; Chapman v. Co., 107 U. S. 348; Marsh v. Co., 10 Wall. 676; Louisiana v. Wood, 102 U. S. 204; Martin v. McCormick, 9 N. Y. 331; Barton v. Supervisors, 33 Wis. 445; Clark v. Co., 9 Neb. 516; Piemental v. San Francisco, 21 Cal. 351.

The doctrine of *caveat emptor* does not apply in such a case, where there is a total failure of consideration and the city receives the purchase money solely for its own use.

The city, under authority of statute, gave appellant's assignor certificates in which it was stated that he would be entitled to a deed unless the lots were redeemed prior to a certain date; the law implies from an agreement to give a deed a covenant, that the deed to be given shall pass good title; Turner v. Ogden, 1 Black, 450; Brevoort v. Brooklyn, 89 N. Y. 128: Phillips v. City, *supra*. Doctrine of *caveat emptor* is not applied to judicial sales, void, because the proceedings were a nullity, but only where the judgment debtor had no title to the property sold:

Boggs v. Hargrave, 16 Cal., 560; Freeman on Executions, § 301; Dawley v. Brown, 65 Barb. 107, Commissioners v. Smith, 10 Watts, 392. Where the judgment is void the purchaser can be relieved from his purchase: Verdin v. Slocum, 71 N. Y. 345, and other cases; Rorer on Judicial Sales, § 48. Innocent purchaser may recover back money paid on void sale, so long as person sued retains the money: Brandon v. Brown, 106 Ill. 519; (This is such a case.) Maxim "*Ignorantia legis non excusat*," does not apply; it is enough to hold that no one shall exempt himself from a duty, or escape a penalty by the plea of ignorance, or acquire an advantage by pretending ignorance: 2 Pothier on Ob. 297; Culbreath v. Culbreath, 50 Am. Dec. 375.

An agent who assumes to sell, warrants his power to do so; the city assumed to sell as agent of the owner.

The act of 1889 (providing for re-assessment) renders the city liable. Where a moral obligation exists (as here, to refund) the legislature may impose a legal obligation; Brewster v. Syracuse, 19 N. Y. 116; Jefferson etc., Co. v. Clark, 95 U. S. 644, and other cases.

After an assessment has been set aside, one who has voluntarily paid the assessment may recover from the city: Jersey City v. Ricker, 38 N. J. L. 225; Valentine v. City, 34 Minn. 446—and the Indiana cases hold that the purchaser of certificate stands in same position as voluntary payor.

Exemption of defendant from liability here, is contrary to public policy; Corbin v. County, 1 McCrary, 521.

Arthur J. O'Keefe, for respondent: Money voluntarily paid for taxes with knowledge of the facts, cannot be recovered: Mayor v. Lefferman, 45 Am. Dec. 145; Allentown v. Saeger, 20 Pa. St. 421; Stickney v. Bangor, 30 Me. 404; Sanford v. New York, 33 Barb. 147; Powell v. Supervisors, 46 Wis. 210; Comrs. v. Goddard, 22 Kan. 389, and other cases. *Caveat emptor* applies here: State v. Casteel, 11 N. E. Rep. 219. If a purchaser at tax sale fails to get title he is without remedy: Cooley on Tax. 572; Lynde v. Melrose, 10 Allen, 49; Packard v. New Limerick, 34 Me. 266; Worley v. Cicero, 11 N. E. 227. Such purchaser buys at his peril and is bound to inquire into

the regularity of the proceedings: Stead v. Course, 4 Cranch 403; Earley v. Doe, 16 How. 618; French v. Edwards, 13 Wall. 506; Blackwell on Tax Titles, p. 67; McCormack v. Edwards, 6 S. W. 32; Martin v. Barbour, 34 Fed. 711; Cooley on Tax. p. 572; Desty on Tax. p. 850; Sullivan v. Davis, 29 Kan. 28; Phelps v. Mayor, 112 N. Y. 216; Christy v. St. Louis, 61 Am. Dec. 598; Churchman v. Indianapolis, 11 N. E. Rep. 301; Rorer on Jud. Sales, §§ 150, 174, 476; Black on Tax Titles, § 269; Loomis v. Los Angeles, 59 Cal. 456; Bales v. York Co., 18 N. W. Rep. 81; Merriam v. Otoe Co., 19 N. W. Rep. 479; Younglove v. Hackman, 1 N. E. Rep. 233. Where tax is fair and assessment made against persons bound by law to pay it, but invalid by reason of irregularity, purchaser is held to know of irregularity and cannot recover: 2 Dillon, Mun. Cor. p. 938. Law of 1889 does not affect this case. Void assessment cannot be cured by legislature: People v. Seymour, 76 Am. Dec. 529; 99 id. 205; Mellinger v. Houston, 3 S. W. 249; Bartlett v. Wilson, 8 Atl. 321, and other cases.

BARTHOLOMEW, J. This action was orginally commenced by Jacob S. Eshelman. Pending the action Eshelman died, and his administrator assigned the claim on which the suit was brought to the plaintiff, William Budge, who was substituted as plaintiff by order of the court, and filed an amended complaint alleging, in substance, that the defendant is a municipal corporation. That in 1883 the defendant caused Kitson avenue, in said city to be filled in and graded. That the mayor and council of said city, by ordinance duly passed, attempted to levy a special tax to pay for said filling and grading upon the property abutting upon said avenue. That subsequently thereto, the said special tax not having been paid, and about March 13, 1884, the said mayor and council, under an ordinance duly passed, caused the real estate upon which said special tax was levied to be sold to pay the same, and that upon such sale all of said property was purchased by one Jacob S. Eshelman; and the defendant city, through its treasurer, and in pursuance of an ordinance duly passed, caused eighteen certificates of sale to be issued to said Eshelman, in each of which it was stated that the property therein described had been sold for a delinquent special tax,

as provided by law, specifying the purposes of the tax and the person to whom and the amount for which the sale was made, and stating that if not redeemed the purchaser would be entitled to a deed on and after a certain time, upon the surrender of the certificate. That Eshelman paid the city of Grand Forks and said city received for said certificates the sum of $1,810.85, and that by virtue of an ordinance duly passed the city appropriated said sum to its own use, and paid the same out for municipal purposes. That said special tax, and the sale thereunder, and the certificates issued to Eshelman, and all of said ordinances, except the last, were void for the following reasons: The mayor and council did not, before filling and grading said avenue, or at any time, or in any manner, declare such work or improvement necessary to be done, nor did they cause to be published a resolution that said work was necessary to be done for four successive weeks in an official newspaper in said city, nor in any other manner. That, in a proper action in the district court for Grand Forks county, brought by the property owners against the city of Grand Forks and Jacob S. Eshelman, and on December 3, 1886, it was by the said court duly adjudged and decreed that said special tax and said tax certificates were void, and said Eshelman was ordered to deliver up said tax certificates for cancellation, and the city was perpetually enjoined from issuing any deeds upon said certificates. Then follows the allegations that the claim was duly presented and disallowed, and subsequently assigned to plaintiff, with prayer for judgment for $1,810.85 and interest since March 12, 1884. To this complaint defendant filed a demurrer, on the ground that the facts stated did not constitute a cause of action. The demurrer was sustained, and judgment entered dismissing the complaint, and plaintiff appeals.

It is alleged in the complaint that the tax certificates issued by the city to appellant's assignor were absolutely void for certain specified reasons. The supreme court of Dakota territory held those reasons sufficient. See McLauren v. City of Grand Forks, 43 N. W. Rep. 710. The charter of the city of Grand Forks authorized the city to fill and grade its streets, and assess the expense thereof upon abutting property, and to sell such

property at tax sale to satisfy such assessment, unless the same was paid as the charter prescribed; but before the city could proceed to grade and fill any particular street, the city council was required, by resolution, to declare such improvement necessary, and to cause such resolution to be published in an official paper for four consecutive weeks. This duty the city council entirely neglected to perform, and for that cause the territorial supreme court declared that the purchaser took nothing by the tax sale. Whatever right to recover the purchase money he may have had is here sought to be enforced by his assignor. It is not claimed that there is any express statute authorizing a recovery. Appellant's position is that a purchaser at a tax-sale of a void tax-sale certificate may, on common-law principles, in an action for money had and received, recover the consideration paid from the municipality for whose use and benefit the tax was levied and which received the benefit of the consideration. Preliminary to any investigation of this position, we notice that the defects which rendered the tax-sale invalid were all defects in procedure. *Prima facie*, the property was subject to taxation for the improvement of the street upon which the property abutted, and the city authorities had jurisdiction to assess and collect such tax; but because they failed to follow their authority their action was invalid. But an investigation of the records pertaining to the attempted taxation would have revealed all the infirmities. It is true that municipal corporations can claim no exemption from the universal obligation resting upon all contracting parties to do justice, and no statute is required to compell them to refund money which they have received to their own use through any fraud or misrepresentation on their part, or through any mistake of fact, or which of right they ought not to retain. Louisiana v. Wood, 102 U. S. 294; Chapman v. County of Douglas, 107 U. S. 348, 2 Sup. Ct. Rep. 62; Clark v. Commissioners, 9 Neb. 516, 4 N. W. Rep. 246; Pimental v. City of San Francisco, 21 Cal. 351; Paul v. Kenosha, 22 Wis. 256.

Considerations of this character led the supreme court of Wisconsin, at an early date, to hold squarely that money paid at tax-sale for void tax certificates could be recovered back in an action for money had and received. Norton v. Supervisors,

13 Wis. 684. There was in Wisconsin at that time an express statute authorizing a recovery; but the court goes further, and pronounces the statute simply declaratory of the common law, and denies the application of the rule of *caveat emptor* to a case of that kind. This case was against a county. The certificate had been issued on a general tax-sale, and was void by reason of irregularities in the tax proceedings. The court makes a distinction, holding, in effect, that as to the title of the party against whom the tax was assessed the tax-title purchaser buys at his peril, but as to the sufficiency of the proceedings to pass that title he takes no chances. No authority is cited in support of the opinion, but it has been repeatedly recognized and followed in Wisconsin. See Van Cott v. Supervisors, 18 Wis. 247; Warner v. Supervisors, 19 Wis. 611; Hutchinson v. Supervisors, 26 Wis. 402; Barden v. Supervisors, 33 Wis. 445. In Chapman v. City of Brooklyn, 40 N. Y. 372, the common-law right of recovery in a case quite similar to the case at bar was also asserted. In that case the city had assessed certain property for street improvement. Under the law the property had to be assessed in the name of the owner, and upon non-payment such proceedings were to be had as should ultimately terminate in a judgment in a court of record against such party, and on such judgment an execution was to be issued against the personal property of the defendant. If such execution was returned, unsatisfied, then, and then only, could the property against which the assessment was made be sold. In this case the assessment was made and all the proceedings had and judgment rendered against a party who had no interest in the land whatever.

It will be noticed that, under the distinction in Norton v. Supervisors, *supra*, the case of Chapman v. City of Brooklyn presents the exact conditions for the application of the rule of *caveat emptor*. The court, however, did not apply the rule, but adverted to the broad equity principle already stated, and said that under those principles it had been repeatedly held that taxes illegally imposed and collected might be recovered back. Now, if judicial decisions can determine anything, it is well settled that illegal taxes voluntarily paid can never be recovered

back. See Desty, Tax'n, 788, 791, and cases cited; Cooley, Tax'n, 805, and cases cited; Bank v. Americus, 68 Ga. 119; Raisler v. Athens, 66 Ala. 194; Welton v. Merrick Co., (Neb.) 20 N. W. Rep. 111; Railroad Co. v. Dinwiddie, 8 Sawy. 312, 13 Fed. Rep. 789; Peebles v. Pittsburgh, 101 Pa. St. 304. None of the cases cited by the New York court hold differently. The doctrine had already been expressly recognized in New York, (Swift v. City of Poughkeepsie, 37 N. Y. 511,) and has since been reaffirmed, (Phelps v. Mayor, etc., 112 N. Y. 216, 19 N. E. Rep. 408.) Neither would it necessarily follow, because an illegal tax that had been paid could be recovered back, that the purchaser of an invalid tax certificate could recover his purchase money. There is a very pronounced distinction between the rights of the party upon whom the tax was assessed, and who has paid the same, and the claim of the tax-title purchaser. Lynde v. Melrose, 10 Allen, 49. In that case the right of a tax-sale purchaser, whose title had been declared void by the judgment of a court, to recover his purchase money, was denied in the broadest terms. The court says: "No precedent for maintaining such a suit is found, and plaintiff's counsel rests his argument solely upon the ground that the defendant has received the amount of the tax without consideration. * * * * * But there is a plain distinction between the right of a person to recover from the town the amount of the tax unlawfully assessed against him and the claim of a purchaser under a collector's deed, whose title proves defective. The town is not a party to the deed. The purchaser is a mere volunteer in the payment of the tax. He has the same means of knowing whether it is legally assessed that the town has. He buys a title without warranty, except such covenants as he takes from the collector, and he must rest solely upon them. Beyond these covenants his deed is a mere quitclaim, for which he has paid what he thought the chance worth. His speculation may prove profitable or wholly unprofitable, but no one has taken his property without his consent, or with any contract, express or implied, to reimburse him if his bargain prove a losing one." This case was decided before Chapman v. City of Brooklyn and while it would seem

exactly in point, yet it is not mentioned in the latter case. But in the subsequent case of Brevoort v. City of Brooklyn, 89 N. Y. 128, Lynde v. Melrose was cited with approval, (see page 135,) but the case was distinguished by reason of certain specific agreements of the collector to repay in case of failure of title. In this case it is said: "It is true, as claimed by defendant, that the invalidity of the assessments appears upon the face of the assessment rolls, and undoubtedly, if the plaintiff had paid his money, as a simple purchaser at tax-sale, without any agreement for repayment in case any irregularity should exist or be discovered, he could not have recovered back the money thus paid. In such a case he would buy without warranty, and take such a title as the tax sale would give him." That the New York court never intended to announce any general common-law right on the part of tax-sale purchasers to recover the purchase money paid for invalid certificates is apparent from the language in People v. Chapin, (N. Y.) 5 N. E. Rep. 64, where, in speaking of a statute conferring such right of recovery, the court says: "By it the state voluntarily assumes a liability to refund money received on a sale where the tax proceedings have not been in accordance with the statute, and are invalid; thus subjecting itself to a just rule of responsibility applied, without a statute, to inferior municipalities." Citing Chapman v. City of Brooklyn. The case of Phillips v. City of Hudson, 31 N. J. Law, 143, is pressed upon our attention as fully sustaining appellant's position. In that case the assessment was for street improvement, and was held void by reason of certain irregularities in the tax proceedings, and the purchaser at the tax-sale was allowed to recover the purchase price paid; two justices concurring, and the chief justice dissenting on the main point. But that case, as an authority for appellant's contention, is very much weakened by the subsequent case of Casselbury v. Piscataway Tp. 43 N. J. Law, 353, where it is said: "It is not denied that the township had the power to tax and to sell for taxes, that the taxes were actually levied and were unpaid, that a sale was actually made, and that there was no fraud or imposition, and no warranty. It is merely alleged that there was illegality in the method of procedure. The rule of law ap-

plicable to such a case is that the municipality is under no obligation to refund the purchase money because the tax-title fails. The purchaser is a volunteer and buys at his own risk." Citing Lynde v. Melrose, *supra*, and Cooley, Tax'n, 572. The court adds; "The case of Phillips v. City of Hudson, 31 N. J. Law, 143, is not to be regarded as opposed to this rule. * * * * * These judges reached the conclusion that the assessment was void, that the declaration of sale was a nullity, and that the case stood as if no conveyance had been executed. The matter was thus placed upon a footing of an unexecuted agreement to convey in pursuance of a sale made to enforce payment of a tax not legally due to the city. Viewed in this aspect, the case is, by essential differences, distinguished from the case in hand." The cases heretofore cited from Wisconsin, and the cases in 40 N. Y. and 31 N. J. Law, are the only cases to which our attention has been called (and we find no others) where it has been held that the purchaser of invalid tax sale certificates could recover his purchase money in an action for money had and received, and in the absence of a statute. Both New York and New Jersey have subsequently recognized and affirmed the general doctrine denying a recovery in such cases, as stated in Lynde v. Melrose, *supra*. In Otoe Co. v. Gray, 10 Neb. 565, 7. N. W. Rep. 325, the action was against the county, and a recovery was refused on the ground that it did not appear that the county received to its own use all the money paid. That point was deemed sufficient for the decision of the case, and the general right of recovery is neither denied nor affirmed. The case would not seem to be an authority either way.

On the other hand, the cases that have denied a recovery are very numerous. Cooley on Taxation, 475, thus states the law: "A tax-sale is the culmination of proceedings which are matters of record, and it is a reasonable presumption of law that, where one acquires rights which depend upon matters of record, he first makes search of the record in order to ascertain whether anything shown thereby would diminish the value of such rights, or tend in any contingency to defeat them. A tax purchaser, consequently, cannot be in any technical sense a *bona*

fide purchaser as that term is understood in the law, because a *bona fide* purchaser is one who buys an apparent good title without notice of anything calculated to impair or affect it; but the tax-payer is always deemed to have such notice when the record shows defects. He cannot shut his eyes to what has been recorded for the benfit of all concerned, and, relying implicitly on the action of the officers, assume that what they have done is legal because they have done it. * * * The law never assumes the existence of jurisdictional facts, and throughout the tax proceedings the general rule is that the taking of an important step is a judrisdictional prerequisite to the next, and it cannot therefore be assumed because one is shown to have been taken that the officer performed his duty in taking that which should have preceded it. The tax purchaser buys, therefore, under the rule of *caveat emptor*, and, under common-law rules, would get nothing unless he got the land itself." In Desty on Taxation, 850, the same principles are stated at length, and with equal emphasis, and the author says: "Except as limited and qualified by express statutory provisions, the rule (*caveat emptor*) applies to all purchasers at tax sales, and if the public has nothing to sell the purchaser gets nothing. Purchasers are bound to know at their peril that the supposed delinquent is in fact delinquent; that he has been lawfully assessed, and has failed to make payment. * * * The purchaser at a municipal sale for taxes, buys at his own risk, and at his peril investigates the proceedings. A county does not guaranty tax-titles, except as the statute may provide, and cannot refund money upon the failure of such titles."

The principles laid down by these text-writers are fully sustained by the following authorities: Lynde v. Melrose, *supra*; Casselbury v. Piscataway Tp., *supra*; Phillips v. Jefferson Co., 5 Kan. 412; Commissioners v. Walker, 8 Kan. 431; Sapp v. Commissioners, 20 Kan. 243; County of Lyon v. Goddard, 22 Kan. 389; Sullivan v. Davis, 29 Kan. 28; Rice v. Auditor General, 30 Mich. 12; Hamilton v. Valiant, 30 Md. 139; Jenks v. Wright, 61 Pa. St. 410; Packard v. New Limerick, 34 Me. 266; Wilmerton v. Phillips, 103 Ill. 78; Loomis v. County of Los Angeles, 59 Cal. 456; City of Logansport v. Humphrey, 84 Ind.

467; Board v. Armstrong, 91 Ind. 528; State v. Casteel, (Ind.) 11 N. E. Rep. 219; Worley v. Town of Cicero, id. 227; Railroad Co. v. Alexander, (Ark.) 4 S. W. Rep. 753; McCormick v. Edwards, (Tex.) 6 S. W. Rep. 32; Barber v. Evans, 27 Minn. 92, 6 N. W. Rep. 445; Flint v. County Commissioners, 27 Fed. Rep. 850. In Merriam v. Otoe Co., 15 Neb. 408, 19 N. W. Rep. 479, it is said: "Parties dealing with a county or other municipality are under obligations to act with fairness and in good faith, as such corporation can only act through its records and other instrumentalities given it by law. Such persons are bound to take notice of such records, not only of what they show, but also, if such be the case, of their failure to show matters material to the case in hand. It was then the duty of plaintiff, before buying the lands in question at private tax-sale, to examine the record and see for what taxes they were being sold. If he neglected this duty, or knowingly co-operated with the county treasurer in a sale and purchase of the land for a tax unauthorized by law, he cannot call upon the county to save him harmless from the effects of such imprudence. * * * * * If the purchaser, the most active and interested participant in the purchase and sale, choose to neglect these duties, the county, which is scarcely present at all, cannot be held to insure him from the loss which always does, and probably is generally intended to, follow an investment made with such apparent imprudence." It is true that some of the cases above cited were actions brought by the fee owner to recover illegal taxes which he had paid; but, as we have seen, it has been declared that the claims of such a party to recover were superior to those of the tax purchaser. Certainly we can see no reason, nor has any been suggested, why they should be less. But as there exists some conflict in the authorities, and as this is the first case of its kind that has arisen in this state, we are urged to adopt what learned counsel insists is the more just and equitable rule, and allow a recovery in every case where a tax-sale purchase proves to be illegal and void. But we are by no means convinced that such a rule has any superior claim to justice. In our opinion it has not. In reaching this conclusion, we extend no immunities to municipal corporations. We simply apply the same principles that would

obtain between individuals. Each step leading up to the sale of real estate for non-payment of taxes is prescribed by law. These steps the purchaser is bound at his peril to know. The law presumes that he knows them, and will not heed his declaration to the contrary. *Ignorantia legis non excusat* is one of the most familiar and most universal maxims of the law. Again, each step in the tax proceedings is jurisdictional in its nature, and unless legally performed, the succeeding officer is without authority to act. Jurisdiction is never presumed, but must appear from the records of the tax proceedings. These records the law requires to be kept for the very purpose of showing the regularity of the proceedings. They are open to the inspection of the purchaser. He is chargeable with full knowledge of their contents. Whatever may affect the legality or value of his prospective purchase is known to him before he makes his bid. The municipality does not ask him to purchase. He is a volunteer in its broadest sense. He buys without warranty or covenant of any kind, and bids what he considers the chance worth. Under these circumstances, and in a case like the present, where there was no fraud, no misrepresentation, and no mistake of facts, it is well settled as between individuals that the purchaser is without remedy in case of failure of title. Rawle, Cov. § 321, and cases cited. And he ought to be without remedy. In this case appellant's assignor knew when he made the purchase that in case of redemption he would receive an increase on his investment usually unknown to legitimate business. Upon failure to redeem, he hoped to obtain title to valuable property for a small fraction of its real worth. Appellant says that his assignor should be given all these chances for unusual gains, but at the same time should be fully indemnified against any risk of loss. In no other line of business, under no other circumstances, would such a claim be made. In the interests of the public revenue, and as an inducement to bid at tax sales, our law presents a tempting offer to the speculator. In the same interest many of the states have gone further, and have enacted laws providing for the recovery by the tax-title purchaser of his purchase money upon failure of the tax-title. But the very fact that such statutes have been so generally passed is in itself a

strong argument against the existence of the right of recovery in the absence of a statute authorizing it.

In this connection we must notice another point. The tax-sale certificates issued to appelant's assignor recite that the purchaser will be entitled to a deed on and after a specified date, in case no redemption is made. Counsel insist that such recital is equivalent to a covenant for a deed, which cannot now be given because the city has been perpetually enjoined from issuing deeds on such certificates. But we do not think the recital constitutes a covenant in any proper sense. It is simply a recital of a provision of the law, and its presence in the certificate adds nothing to the force of the law, or to the liability of the municipality. Even if held to be a covenant we could not give it effect. The tax collector's powers are such only as are given by statute. He cannot bind the municipality which he represents to any liability not authorized by law, and he is without authority to make such covenant. It is true that a collector's promise to refund in case the tax-sale proved illegal was enforced in Brevoort v. City of Brooklyn, *supra*, but in Hyde v. Supervisors, 43 Wis. 129, the court held a similar agreement made by the board of supervisors at the time of the tax-sale, and the further agreement, to secure to such purchaser a perfect title to the lands described in the tax-sale certificates to be in excess of any authority conferred upon the board and not binding upon the county. Certainly this is the better doctrine.

A distinction is sought to be made between cases where the defendant municipality receives the proceeds of the tax-sale solely to its own use and benefit, and where it receives such proceeds in part as the collecting agent for other municipalities, and it is said that while a recovery might not be just in the latter cases, it should certainly be enforced in the former, and we are cited to the New York cases as making such distinction. No such distinction is affirmatively announced in those decisions. We doubt if any such were in the mind of the New York court. But if such distinction is made, it arrises from the fact that the court refuse to apply the rule of *caveat emptor* in Chapman v. City of Brooklyn, and, as we hold that such rule applies in this case, we cannot adopt such distinction.

In Churchman v. City of Indianapolis, (Ind.) 11 N. E. Rep. 301, the action was brought to recover purchase price of property bought at tax-sale for non-payment of assessment for street improvement, which assessment and sale were illegal and void, and the court says: "It is now deffinitely settled that money voluntarily paid on a demand in the nature of a tax, as an assessment in the nature of a street improvement really is, cannot be recovered back, except in pursuance of some statutory provision authorizing such a recovery, and we know of no statute permitting, much less requiring, money voluntarily paid upon either an erroneous or irregular or even wrongful assessment for the improvement of a street to be refunded. [Citing authorities.] From this, it very naturally follows that the doctrine of *caveat emptor* applies as fully to sales upon assessments for street improvements as to any analogous class of cases." This case is direct authority for the application of the rule in an action which cannot be distinguished in principle from the case at bar. Let it be once granted—and it is not disputed in this case—that an assessment for street improvement is a tax, and the whole line of authorities at once applies to a case of that kind.

But one more point is made in the case. In 1889 the legislature of Dakota passed an act entitled "An act providing for the reassessment of abutting property for the improvement of public streets." See chapter 31, Laws 1889. The statute provides that when any city "has heretofore, upon a petition of a majority of the abutting property owners upon any street, made a special assessment for grading or paving the same and assessed the abutting property uniformly, and in the same amount per front foot, and proceeded to pave or grade the street in accordance with the petition, and it shall appear that the ordinance or other proceedings in making the assessment were for any reason invalid, the city council is hereby authorized and empowered to reassess all the real property abutting upon such improvement upon which the special assessment for the same has not been paid, upon the front-foot plan, in such sum as may be sufficient to pay its just proportion of the cost of such improvement;" and the following sections point out the method of reassessing and collecting such tax. It is claimed that this statute, in effect, au-

thorizes a recovery in this case; that, as the assessment has been declared invalid, the city has a right to reassess the property and collect this tax again; and that it would be grossly unjust to allow the city to collect a second tax, and at the same time hold the proceeds of the first; and that we cannot presume that the legislature intended to work such injustice. We will not stop to discuss whether or not a statute passed in 1889 could have any effect upon the rights or liabilities of the parties to a tax-sale made in 1884, or whether or not a party in any particular case can receive any benefit from any statute passed after the action was commenced. We are of opinion, and so hold, that the statute in question was passed exclusively for the benefit of municipalities, and to enable them to obtain their revenues, and not, directly or indirectly, for the benefit of tax-sale purchasers; and that when a municipality has once received the amount of a special assessment upon any particular piece of property, even though that special assessment was invalid, that such tax is paid, and no right of reassessment exists under the statute. If independently of this or any other statute a legal obligation rested upon the municipality to refund the amounts paid for illegal tax certificates, then it could not, perhaps, be said that the tax was paid and the right to reassess might exist; but just so long as the rule of *caveat emptor* applies to all purchasers at tax-sales, it must logically follow that where a municipality receives the money for a tax-sale certificate, the tax, for non-payment of which the sale was made, is paid. The claim of the municipality is satisfied, and can never again be reasserted. It is clear that appellant can claim nothing from that statute. The fact that the principles involved in this case are quite important, and are here raised for the first time in this state, together with the zeal and ability with which the points were pressed upon us by counsel, have caused us, perhaps unduly, to lengthen this opinion. The decision of the lower court was clearly in accord with the weight of authority, was strictly just, and must be affirmed. All concur.

CORLISS, C. J., having been of counsel, did not sit on the hearing of this case; Judge WINCHESTER, of the sixth judicial district, sitting by request.

MARY C. HALLEY, Respondent, *v.* J. B. FOLSOM, Appellant.

1. Contract—Executory—Warranty.

In an executory contract for the sale of personal property, the vendor may warrant the quality of the goods contracted to be sold, and such warranty will have the binding force of a warranty upon a sale *in præsenti*, and no greater.

2. Same; Patent and Latent Defects—Action on Warranty.

Such warranty will not cover defects that are patent or readily discovered on inspection, and it is the duty of the vendee to reject the property if it does not conform to the representations; but if the vendee accepts the property without knowing or having reason to believe that it does not fulfill the terms of the warranty, and the defect is one that might not be readily discovered, the vendee may, upon a subsequent discovery of the defect, bring an action for damages on the warranty without returning or offering to return the property.

3. Evidence; Jury Sole Judges of Weight of.

Where there is a substantial conflict in the testimony, the jury are the sole judges of the weight of evidence; and, where the trial court charged the jury that certain propositions must be established by a clear preponderance of evidence, this court cannot say that the jury disregarded the charge of the court, simply because we might think the preponderance of testimony was not in favor of such proposition.

4. Evidence Held Incompetent to Rebut Proof of Warranty.

The poor credit of the vendee cannot be shown to rebut evidence of a warranty where the sale was made on credit, but at a price above the cash market value of the article, and security taken for the purchase price.

5. Evidence; Competency of Question Not Apparent—Exclusion Not Error.

Where an objection is sustained to a question propounded to a witness, and the competency of the question is not apparent on its face, the party must offer to prove the facts sought to be elicited before he can assign error upon the ruling upon the objection.

(Opinion Filed February 4, 1891; Rehearing Denied February 25, 1891.)

APPEAL from district court, Ransom county; Hon. W. S. LAUDER, Judge.

J. E. Robinson, for appellant, cited: U. S. Digest, Sales, § 1099; Pickett v. Hayes, 13 Ind. 181; 5 Wait's Actions and Defenses, 554, 563; Osborne v. Gantz, 60 N. Y. 540; Maxwell v. Lee, 27 N.

W. 196; Benjamin on Sales, § 311; Poland v. Brownell, 131 Mass. 138.

Messrs. Goodwin, Van Pelt & Gammons, for respondent, cited upon the point stated in first paragraph of the foregoing syllabus: Dailey v. Green, 15 Penn. St. 118; Byers v. Chapin, 28 Ohio St. 300; Field v. Kinnear, 4 Kan. 409; Taylor v. Cole, 111 Mass. 363; Polhemus v. Heman, 45 Cal. 573; Brigg v. Hilton, 99 N. Y. 517. On the third point they cited: Brewing Co. v. Mielenz, 5 Dak, 136; Pielke v. R. R. Co. id. ib. 444. On the fourth point they cited: Green v. Disbrow, 56 N. Y. 336; Greenleaf on Evidence, vol. 1, § 52. On the fifth point: Mordhorst v. Neb. Tel. Co. 44 N. W. 469; Kern v. Bridwell, 21 N. E. 664; Smedhurst v. Proprietors, etc., 19 id. 387.

BARTHOLOMEW, J. This was an action to recover damages for a breach of warranty in the sale of certain seed wheat. At the close of plaintiff's testimony, and again when the testimony was all in, appellant moved the court to take the case from the jury, and direct a verdict for defendant, for the reason "that the sale mentioned in the complaint was not a sale with a warranty; that it was only an executory contract for subsequent sale and delivery of wheat; and that the subsequent acceptance of the wheat, with opportunity for examination, bars any action for recovery by reason of the wheat not being as contracted for." The adverse ruling on this motion raises the first question in the case. The contract was made at a distance of several miles from the wheat. Plaintiff was represented by her husband, who acted as her agent. The amount, price, terms of payment, and security to be given were agreed upon, and, as plaintiff claims, the warranty was given. Plaintiff not being present to execute the note and mortgage, the papers were prepared, and taken to plaintiff, who signed them, and returned them the following day by her husband, who delivered them to an agent of the defendant, and received an order for the wheat. At that time the wheat was in the possession of another agent of defendant, and was an unseparated portion of a much larger quantity of wheat of substantially the same quality. Plaintiff sent her son, a young man nineteen years of age, after the wheat, and it was

hauled away during two succeeding days. For the purposes of this case we will assume, without deciding, that there was no completed sale until the wheat was delivered, and we will also assume that the son had all the authority to reject the wheat that the plaintiff would have had if present; still we think there was no error in overruling appellant's motion. It is true that there can be no effective warranty—no warranty that will serve as the basis of an action—without a completed sale. If the purchaser reject the property because not of the specified quality, he may have an action on the contract for failure to deliver, but he can have no action upon the warranty. There can be no breach of the warranty if the title never vests in the purchaser.

The case of Osborn v. Gantz, 60 N. Y. 540, cited by appellant, was a case where the purchaser refused to accept the goods. In executory contracts for the sale of personal property, the acceptance of the property by the vendee, with full opportunities for inspection, and where he is not induced to refrain from inspection through any fraud or artifice of the vendor, is generally regarded as an admission that the property corresponds with the terms of the contract of sale. Reed v. Randall, 29 N. Y. 358; Dutches Co. v. Harding, 49 N. Y. 321. But this rule does not cover latent defects, or defects not readily discernible on inspection. It is entirely competent, however, for the vendor, in an executory contract of sale, to make an absolute warranty of the quality of the goods. It is purely a question of intent. If he intend to extend the warranty beyond the delivery, and make himself responsible for any damages that may result in case the goods are not as represented, and if the other party so understand it, he is bound. In this respect the law is the same whether the contract of sale be executory or *in præsenti*. Patent defects are not within the warranty in either case. And in either case, where defects are discovered after delivery, the vendee is not bound to return or offer to return the goods, but may retain and use the same, and bring his action upon the warranty. In Day v. Pool, 52 N. Y, 416, Peckham, J., delivering the opinion of the court, says: "In addition to the mere contract of sale in an executory as well as on a sale *in*

præsenti, a vendor may warrant that an article shall have certain qualities. This agreement to warrant in an executory contract of sale is just as obligatory as a warranty on a present sale and delivery of goods." And again: "I see no reason why the same rights and remedies should not attach to a warranty in an executory as in a present sale, and no greater. The purchaser in an executory sale could not rely upon a warranty as to open, plainly apparent defects, any more than he could in a sale *in præsenti*." And again: "In my opinion, where there is an express warranty, the purchaser, whether in an executed or an executory sale, is not bound to return the property upon discovering the breach, even if he have a right to do so." In Maxwell v. Lee, (Minn.) 27 N. W. Rep. 196, it is said: "It is undoubtedly the settled law in this state, and generally elsewhere, that on an executory contract of sale, as in a sale *in præsenti*, of personal property, the vendor may warrant the quality; and that the vendee, upon the receipt of it, and upon subsequent discovery of the breach of warranty, is not bound to return, (even if he had the privilege of doing so,) but may retain and use the property, and have his remedy upon the warranty." See, also, Scott v. Raymond, 31 Minn. 437, 18 N. W. Rep. 274; Mandel v. Buttles, 21 Minn. 391; Polhenus v. Heiman, 45 Cal. 579; Gurney v. Railroad Co., 58 N. Y. 358; Hull v. Belknap, 37 Mich. 179; Axe Co. v. Gardner, 10 Cush. 88; Brigg v. Hilton, 99 N. Y. 517, 3 N. E. Rep. 51; Doane v. Dunham, 65 Ill. 516; Dailey v. Green, 15 Pa. St. 125; Brantly v. Thomas, 22 Tex. 270. As appellant's motions were based upon the theory that there could be no warranty in an executory contract of sale of personal property, they were properly overruled.

The fourth assignment of error is closely allied to the foregoing. Appellant asked an instruction, which was refused, covering the thought that if plaintiff accepted the wheat, and retained and used it without objection, the presumption was conclusive that the property conformed to the contract, and that such acceptance barred all claims for compensation on account of any defect shown by subsequent inspection. The authorities already cited show that such is not the law. The defect claimed in this case was that the wheat had been heated

or "bin burned" to an extent that destroyed the germ, so that it would not sprout. A witness, who examined the wheat some weeks after it was sown, testified that not more than one-half of the seed grew; that the kernels were soft, and gave no indications of growing; and James Halley, plaintiff's husband, testified that the poor quality of the seed was not known until after it was sown. Young Halley, the son who hauled the wheat, testified that he held the sacks into which the wheat was placed, but that he noticed nothing wrong about it. Another witness, an experienced farmer, who was present getting some of the same wheat for himself, testified that he told young Halley that he did not think the wheat was No. 1, but thought it would make good seed. There was also a difference of opinion among the witnesses as to whether or not bin-burned wheat would grow. This evidence tended to show that the defect was one not readily discovered on casual examination, and that it might require special knowledge to detect it. Whether or not there was a warranty or whether or not plaintiff by herself or agent accepted and received the wheat knowing or having reason to believe that it did not comply with the warranty, were matters fully and very fairly submitted to the jury by the learned trial judge. The law covering the point raised by the instruction refused was correctly given to the jury in the charge of the court.

It is assigned as error that the verdict is against the charge of the court, because the court charged the jury that in order to find a verdict for respondent they must find certain propositions sustained by a clear preponderance of evidence, and it is claimed that the preponderance of the evidence is against each of these propositions. But it must be evident that we can never disturb the judgment on this assignment until we are willing to substitute the views of this court as to the weight of testimony for those of the jury. It needs no citation of authorities to show that we cannot do that where there is any substantial conflict in the testimony, as there certainly is in this case. Appellant had testified that he did not care to sell wheat to respondent, and was asked by his counsel to explain why. Under objections, the appellant was not permitted to explain. The

avowed object was to show that respondent was in impecunious circumstances, and without good credit. Respondent's husband had testified to an express warranty of the wheat. This, appellant had denied. It was sought to show respondent's financial standing, and base thereon an argument that appellant would not be so anxious to sell wheat on time to a person without credit as to warrant its quality, for the purpose of inducing a sale when wheat was a cash article. But it stood uncontradicted that appellant had sold the wheat to respondent at a price much higher than the cash value of the wheat in market, and had taken security for the purchase price. Under these circumstances we think the evidence sought to be introduced entirely incompetent.

Another witness for appellant, who had been engaged in farming for many years, was asked this question: "Did you ever hear of any farmer asking another to guaranty to him the quality of wheat?" An objection to the question was sustained, and we think rightfully so. The competency of the question is not apparent, and the record does not show that appellant stated for what purpose he asked it, or what he proposed to prove. In the absence of such showing, we cannot presume error. Mordhorst v. Telephone Co., (Neb.) 44 N. W. Rep. 469. The remaining assignments of error are entirely within the foregoing rule. We find nothing in the record that requires a reversal of the judgment below, and it is accordingly affirmed. All concur.

ADAM C. KIDD, Appellant, *v.* SAMUEL K. McGINNIS, Respondent.

1. **Contract; Public Park, Refusal of City to Accept.**
K. and M, were the owners in severalty of certain lands within the corporate limits of the city of J. They entered into a contract with trustees, by which they agreed to furnish a fund which the trustees agreed to expend in improving certain land of M. for a city park and to have the improvements completed by January 1, 1885; K. and M. agreeing that upon the completion of the improvements, or at any time prior to January 1, 1886, when the city of J. would accept the same, they would dedicate certain land, including the land on which the improvements were made, to the city for a public park forever, on certain conditions. The city, by resolution, agreed to accept the land when improved as stated in the contract. The funds were raised, improvements made, and deeds of dedication placed in the hands of the trustees. The city refused to accept. After January 1, 1886, M. withdrew his deed, and conveyed to a third party. *Held*, that he violated no contractual relations with K. in so doing.

2. **Specific Performance — Continuing Covenants.**
Courts of equity will not decree specific performance of contracts containing continuous covenants, the enforcement of which might require the constant supervision of a court; nor will they enforce specific performance of contracts, every alleged violation of which would require the consideration and determination of questions of fact.

(Opinion Filed January 13, 1891.)

APPEAL from district court, Stutsman county; Hon. RODERICK ROSE, Judge.

Fredrus Baldwin and Paul & Merwin, for appellant, argued that the contract between the trustees and the parties to this action, together with the first resolution of the city council, constituted a dedication of land for public purposes: Dillon Mun. Cor. 764; Abbott v. Mills, 3 Vt. 526; Princeville v. Auten, 77 Ill. 325; Wheeler v. Bedford, 54 Conn. 244; Price v. Plainfield, 40 N. J. L. 608; Maywood Co. v. Maywood, 118 Ill. 61; Weeping Water v. Reed, 21 Neb. 261; Dillon 632, 642, Abbott v. Cottage City, 143 Mass. 521.

Edgar W. Camp, for respondent.

BARTHOLOMEW, J. In 1883 appellant and respondent were, respectively, owners of certain lands within the corporate, but

not the platted, limits of the city of Jamestown. On the 15th day of August, 1883, they entered into a contract in which two named trustees were designated as parties of the first part, and appellant and respondent were the parties of the second part. The contract provided that a certain sum should be raised and placed in the hands of the trustees to be by them expened in improving certain land, belonging to the respondent, for a public park, all of said money to be so expended on or prior to January 1, 1885; and that at any time after said money was so expended, and prior to January 1, 1886, when the city of Jamestown would accept the same, the second parties agreed to dedicate certain lands, including the land on which the improvements were made, to the city of Jamestown as a public park forever: "provided, that the city of Jamestown shall accept said lands, and shall at the time of said acceptance of such land agree to maintain the same as a public park forever, exempt from taxation, and in good repair, and with such buildings and improvements only as shall be suitable to the purposes of a public park, and free from all nuisance of any nature whatsoever." On the same day the common council of the city of Jamestown passed a resolution as follows: "Be it resolved by the city council of the city of Jamestown, D. T., that said city of Jamestown agree with S. K. McGinniss and Adam C. Kidd that at such time before the 1st day of January, A. D. 1885, as the entire sum of four thousand dollars ($4,000.00) at least shall be expended upon that portion of land agreed by said S. K. McGinniss and Adam C. Kidd to be dedicated to the city of Jamestown as a public park forever, by an instrument of agreement of date August 15, 1883, between said parties and John S. Watson and Lyman N. Cary as trustees, together with such further sums as may be paid into the hands of said trustees for the improvement thereof, and in accordance with the terms of said agreement, to which reference is hereby made, and free from all debts for such improvements or otherwise, and with all improvements that shall have been commenced thereon up to the time of such acceptance and dedication, fully completed and finished, said city council will accept the said land as dedicated, as per the terms of said agreement, as a public park forever,

and will maintain the same exempt from taxation in as good repair as when accepted, and will thereafter put upon such park such improvements only as by them deemed suitable and necessary for the purpose of a public park, and will maintain it free from any nuisance whatsoever." This resolution was not presented to or signed by the mayor.

In pursuance of the foregoing agreement, the trustees proceeded to improve the land for park purposes, the appellant furnishing $3,580 of the money so used, and prior to January 1, 1885, the improvements were completed as contemplated, and the deeds from appellant and respondent for the lands agreed to be dedicated were placed in the hands of the trustees, to be delivered to the city. The court found that these deeds were tendered to the city by the trustees on January 5, 1885. The correctness of this finding is challenged, appellant claiming that the tender was prior to January 1, 1885. In our view the point is immaterial. The deeds were not accepted when tendered, and respondent's deed remained in the trustees' hands ready for delivery until after January 1, 1886. The city took no further action in the matter until December 17, 1885, when the council passed a resolution refusing to accept said lands, or having anything further to do with the matter. It also appears from the pleadings that about January 21, 1886, respondent withdrew his deed from the trustees without the consent of appellant, and deeded the land to the Jamestown College. Appellant's theory of this action seems to be that, by such conveyance of the land to a third party, respondent rendered it impossible to carry out the park project, and impossible for appellant to insist upon specific performance upon the part of the city; that after the parties had incurred large expense in improving the land for park purposes, respondent had no legal right to abandon the project, and devote the lands to other purposes, without the consent of appellant; that the establishment of said park would greatly enhance the value of appellant's adjacent land, and that by the failure to establish the park appellant has been damaged to the extent of his money invested in the improvements, as well as by the loss of such increased value

in his land, and he seeks to recover such damages from respondent.

The trial court found for respondent, apparently on the ground that appellant had failed to establish any damages. We shall not discuss the evidence as to that point, or any of the many questions that are raised that might bear upon the liability of the city. The city is not a party to this action. As we view the pleadings and the facts found, there are other and insuperable obstacles to any recover against this respondent. It is not claimed that there ever was an acceptance on the part of the city of the proposed dedication, or that the park ever had an existence as a city park; on the contrary, it is claimed that the city did not accept, and that respondent has placed it out of the power of appellant to enforce an acceptance. This case does not present any contract for the purchase and sale of realty. There is no element of forfeiture in it, nor is it a case where interest on purchase money can compensate for delay. The contract between the trustees and the parties to this action simply provided that the land should be ready for dedication by January 1, 1885, and then gave the city an option until January 1, 1886, within which to accept such dedication. The resolution passed by the city council on August 15, 1883—and we must not be understood as expressing any opinion as to whether or not such resolution was regularly adopted, or within the powers of the council—purported to bind the city to accept whenever the land was improved as provided in the contract with the trustees. The findings show it was so improved before January 1, 1885. The city did not accept. The delay was not inadvertent and excusable; on the contrary it was willful and intentional, as is indisputably shown by the resolution of December 7, 1885. Hence an acceptance by the city at any time after January 1, 1886, would have given it no right whatever to insist upon performance upon the part of the proposed grantors. See Pom. Eq. Jur. § 1408, and note. At the time the respondent withdrew his deed from the trustees, and conveyed the land to the college, the city certainly had no legal right to object thereto; and the case furnishes us with no evidence of any contractual relations between the parties to this action that would have

enabled either of them, as against the other, to insist upon a dedication at any time after January 1, 1886. We may view it from another standpoint.

It is insisted that the alienation of his land by respondent renders it impossible to insist upon specific performance on the part of the city because the other parties are not in a position to perform on their part. But such alienation was not made until after the contract, if any existed, was broken on the part of the city. Now, if an enforceable contract existed against the city, certainly damages for its breach, if any were sustained, can be recovered. That action is left to appellant, which ought, perhaps, to be a sufficient reason why he ought not to recover against this respondent. But it is clear to us that appellant never had any right of action for specific performance against the city. While the power of a court of equity to thus coerce the legislative branch of a municipal government is very doubtful, (see Wells, Juris. 33 *et seq.*,) yet we do not base our decision on that ground. Both the contract and the resolution provide that the city, when it accepts such dedication, shall agree to maintain the same as a public park forever, in good repair, or in as good repair as when accepted, free from all nuisances whatsoever, and place only such buildings and improvements thereon as shall be suitable to the purposes of a public park. Now, it is evident that these covenants are continuing covenants, and their enforcement would or might require the constant supervision of a court. Courts of equity will never compel specific performance of such contracts. Blanchard v. Railroad Co., 31 Mich. 43, and the extended citations in the reporter's note to that case. Again, every alleged violation of said contract would involve the consideration and determination of questions of fact. Such contracts are never specifically enforced. Caswell v. Gibbs, 33 Mich. 331. The transfer of his land by respondent deprived appellant of no legal right. The judgment of the district court dismissing the complaint is affirmed. All concur.

WILLIAM ELL, Respondent, *v.* NORTHERN PACIFIC RAILROAD COMPANY, Appellant.

1. **Negligence — Fellow-Servant.**
   The negligence of the foreman of a gang in failing to block a pile which was shoved against plaintiff, injuring him, because it was not blocked, is the negligence of a fellow-servant, although the foreman had authority to employ and discharge plaintiff, and the plaintiff was under his superintendence and control in doing the work in the performance of which he was injured.

2. **Who Are Fellow-Servants.**
   Whether a negligent servant is the fellow-servant of an employe who is injured by the carelessness of the former depends, not upon the relative ranks of the two servants, but upon the character of the work, the negligence with respect to which resulted in the injury.

3. **When Negligence of Servant is the Negligence of the Employer.**
   The negligent performance or omission to perform a duty which the master owes to his employes is at common law the negligence of the master, whatever the grade of the servant who is in that respect careless. The negligence of a servant engaged in the same general business with the injured servant is the negligence of a fellow-servant, whatever position the former occupies with respect to the latter, as to all acts which pertain to the duties of a mere servant, as contradistinguished from the duties of the master to his employes.

4. **Negligence; Measure of Damages.**
   In actions for damages for negligence, interest may be awarded or withheld in the discretion of the jury.

(Opinion Filed January 15, 1891.)

APPEAL from district court, Stutsman county; RODERICK ROSE, Judge.

John C. Bullitt, Jr. and John S. Watson, for appellant: The judgment can be sustained only by the adoption of the superior servant limitation of the fellow-servant rule. The idea that the master is responsible to inferior servants for acts of superiors has produced confusion in the decisions. In general it is favored by the southern and western courts, and by the U. S. supreme court; but is repudiated by courts whose number and authority (saving the U. S. supreme court) outweighs that of those favor-

ing the doctrine: McKinley on Fellow Servants, §§ 111 to 167; Dillon in 24 Am. Law Rev. p. 118; Crispin v. Babbitt, 81 N. Y. 516; Hanathy v. R. R. Co., 46 Md. 280; Zeigler v. Day, 123 Mass. 152; Hogan v. R. R. Co., 49 Cal. 128; Am. and Eng. R. R. Cases, vol. 17, p. 516: Fanvell v. R. R. Co., 4 Metc. 49; Herbert v. R. R. Co., 3 Dak. 38; Elliot v. R. R. Co., 41 N. W. 757, etc. The company's duty to the plaintiff was fulfilled when it had furnished suitable appliances for the work; the negligent use of the appliances by a fellow servant of whatever grade was one of the plaintiff's employment.

S. L. Glaspell for respondent: In adopting unqualifiedly the superior servant limitation of the fellow-servant rule this court would follow the Supreme Court of the United States and every state supreme court which has passed upon the question as an original proposition since 1884, when C. M. & St. P. R. Co. vs. Ross, 112 U. S. 377, was decided and the superior servant limitation given a full and unqualified adoption by the highest court in this country. The rule as laid down by Mr. Justice Field in that decision is as follows: "There is, in our judgment, a clear distinction to be made in their relation to their common principal, between servants of a corporation, exercising no supervision over others engaged with them in the same employment, and agents of the corporation, clothed with the control and management of a distinct department, in which their duty is that of direction and superintendance."

The rule is recognized in Elliott vs. Railroad Co., 5 Dak. 223, s. c. 41 N. W. 758; and see Railroad Co. v. Fort, 17 Wall. 553, s. c. 21 L. Coop. Ed. 739.

By the clear weight of authority it is now held, that the general rule, that the master is exempt from liability to one servant for an injury caused by the negligence of a fellow servant, does not apply where the injured servant is inferior in rank to the one by whose negligence he is injured, and is under the direction and control of such other and is bound to obey his orders: Beach on Contrib. Neg. § 110; Deering on Neg. § 204; Thompson on Neg. vol. 2, p. 1028; Sherman & Redfield on Neg. (4th Ed.) § 226; Wharton on Neg. § 229; Gravelle v. M. & St. L.

Ry. Co., 10 Fed. 711; Miller v. U. P. R. Co., 12 Fed. 600; Thompson v. C. M. & St. P. R. Co., 14 Fed. 564; Mason v. Edison, 28 Fed. 228; Borgman v. St. L. & O. R., 41 Fed. 667; Slater v. Chapman, (Mich.) 35 N. W. 106; Berea Stone Co. v. Kraft, 31 Ohio St. 287; Brown v. Sennett, (Cal.) 9 Pac. 74; Railroad Co. v. Driscoll, (Col.) 21 Pac. 708; Kelley v. Cable Co. (Mont.) 14 Pac. 633; N. P. R. Co. v. O'Brien, (Wash.) 21 Pac. 32; Railroad Co. v. Hawk, (Ill.) 12 N. E. 253; Railroad Co. v. Fox, (Kan.) 3 Pac. 320; Harrison v. Railroad Co., (Mich.) 44 N. W. 1034; Railroad Co., v. Smith (Neb.) 36 N. W. 285; Criswell v. Railroad Co., 30 W. Va. 798, s. c. 33 Amer. & Eng. R. Cases 232; Stephens v. Railroad Co., 86 Mo. 221, s. c. 28 A. & E. R. Cases 538; Railroad Co. v. Collins, 2 Duv. (Ky.) 113, s. c. 87 Amer Dec. 486; Railroad Co. v. Jones, 9 Heisk, (Tenn.) 27; Patton v. Railroad Co., (N. Car.) 31 A. & E. R. Cases 298; Mann v. Orient Print Works, 11 R. I. 152; Couch v. Railroad Co., 22 S. C. 557, s. c. 28 A. & E. R. Cases 331; Ayres v. Ry. Co., (Va.) 33 A. & E. R. Cases 269; Darrigan v. Railroad Co., 52 Conn. 285; Van Amburg v. Railroad Co., 37 La. 650; Railroad Co. v. Williams, (Va.) 9 S. E. 990; Baldwin v. Railroad Co., 63 Iowa, 210, s. c. 39 N. W. 507; Atlanta Cotton Factory Co. v. Speer 69 Ga. 137, s. c. 47 Amer. Rep. 750; Reddon v. U. P. R. Co., (Utah) 15 Pac. 262; Hobson v. Railroad Co., (New Mex.) 28 A. & E. R. R. Cases 360

These authorities adopt the limitation without reserve and without qualification as to the specific act of negligence, viz., whether the negligence grows out of a duty which the master owes to the servant or not; and hold that the negligence of a superior servant whatever it be is the negligence of the master.

In some states where the superior servant limitation is denied it is conceded that where a foreman has the power of employing, directing and discharging men under him, that he is a vice principal.

Mr. McKinney in his work on Fellow Servants, § 64, claims Texas as one of the states which "discountenances the limitation;" and while that may be true, it is held in Missouri Pac. R. Co. v. Williams, (Texas) 12 S. W. 835: "A servant who has the authority to employ other servants, under his immediate super-

vision, exercises an important function of his master, and has as full control over them as the master would have were he present acting in person. The subordinate, in such case, is as much the servant of the agent who employs and controls him as he would be of the master, were the latter discharging the functions of the agent. It seems, therefore, that there is as much reason for holding that a servant assumes the risk of the master's negligence as for holding that he assumes the risk of the negligence of such a superior employe of his master. He may be presumed to exercise an influence over a co-employe who did not employ and has no power to discharge him, calculated to promote care and vigilance on the part of the latter, which he cannot or dare not exercise towards one who has the right to terminate his employment." And to the same effect see Patton v. Railroad, 31 Amer. & Eng. R. Cases 303.

The learned editor of the American and English Railroad Cases says, in his note to Chicago, Milwaukee & St. P. R. Co. v. Ross, 17 Amer. & Eng. R. Cases 514: "It is, we believe, true that in every case where the power to employ and discharge exists, the relation established has been held to be not that of a fellow servant, but of vice principal." See list of cases cited in same note, and notes in Vol. 17, Amer. & Eng. R. Cases p. 560 and 563; Railroad Co. v. Sullivan, 41 A. & E. R. Cases 463.

This superior servant limitation must be correct in some cases, or a corporation would escape liability altogether. Many courts have therefore qualified the doctrine to the extent of holding that the master is only liable when the superior servant violates some duty which the master owes to the inferior servant. It is the duty of the master to furnish a reasonably safe place to work, and safe and proper tools. It is the duty of the master to maintain such, and his duty of caring for the safety of his men is continuing, and never ceases while they are in his employ.

Counsel for appellant first seeks to escape the rule of the master's liability for the negligence of a superior servant, resulting in injury to an inferior acting in obedience to the order of the superior, and next he contends that a specific act of negligence charged, viz., the omission of Withnell to block the out-

side pile, was not a duty which the railroad company owed to Ell. Possibly not, if every other act of negligence be eliminated from the case. But the case does not rest on that act alone. It was clearly the duty of Withnell, having charge of a crew of men performing a dangerous work in a dangerous place, to provide for their safety. This was an obligation of the company which it had delegated to him. He knew the log was not blocked. His attention was called to the fact before Ell was hurt. It is conceded that the log should have been blocked by some one. Ell testified, "it was the business of the foreman to block it."

In Moore v. Railroad Co. 21 A. & E. R. R. Cases 512, the supreme court of Missouri say: "It was the duty, a contractual obligation of the company, to provide for the safety of the men at work in repairing the car. The company devolved that duty upon the person who represented it in conducting, ordering and managing the work, and the men engaged in it." The foreman of a crew of car repairers sent one of them to repair a car and neglected to set out signal flags. He failed to provide for the safety of his subordinate and although he was supplied with signal flags his negligence in failing to use them is held to be the negligence of the company. See Railroad Co. v. Lavalley, 5 A. & E. R. Cases 549; Abel v. Railroad Co. 28 A. & E. R. Cases 497 (N. Y.) In Bergmann v. Railroad Co. 41 Fed. 671, Judge Shiras says: "Where a given operation connected with a railway requires care and oversight for the proper performance thereof, and for that purpose there is placed in charge thereof one clothed with the duty of supervising and managing the given work, having the power of control and direction over those employed in the details of the same, who in turn are expected to obey the orders and instructions of the former, such person, in carrying out the duty of control, supervision and management, represents the company, and for his negligence in the performance thereof the company is responsible."

Withnell's work was one of superintendence; from his position he directed the movements of his men. If he knew, or by the use of diligence might have known of the existence of danger to those engaged in the work, it was his bounden duty to

convey such information to them. Kelly v. Cable Co. (Mont.) 14 Pac. 633. The foreman of a yard who has charge of receiving and piling lumber, in the performance of his duty of maintaining an inspection of the piles in reference to their security against falling upon those employed near them, is not a "mere foreman" or co-laborer, but in the performance of such duty is a superior or vice principal. Baldwin v. Railroad Co. (Iowa) 25 N. W. 918.

This case appears again in 39 N. W. 507, where the court say: "We think the evidence tends to show negligence on the part of the person having charge of the piling of the timber and its care which caused the injury. This person had full control of the timber yard, employed and discharged men, and is to be regarded as a vice principal. He was sometimes absent from the yard, and the care and management of the business and matters were committed to or devolved on another, who took his place and exercised the authority with which he was charged. This other person is therefore to be regarded as a temporary vice principal in the place of his superior." A foreman directed one of his men to dig gravel under a high bank, who was injured by the bank falling during such employment. Prior to that time it was the custom to station a watchman to give a warning, which was omitted on this occasion. Held they were not fellow servants, and for such negligence the master is liable. Railroad v. Crockett, (Neb.) 26 N. W. 921. Ell was working in a dangerous place by reason of the orders and direction of his foreman. It was not a mere careless act done by the foreman in performing his work as a co-laborer or fellow-servant, but it was a negligent and unskillful exercise of authority over the men in his charge, which caused the injury complained of. Chicago & Alton R. R. Co. v. May (Ill.) 15 Amer. & Eng. R. R. cases 320; Heckman v. Mackey, 35 Fed. 353; Brown v. Sennett (Cal.) 9 Pac. 74.

The Minnesota case of Lindvall v. Woods, 42 N. W. 1020, is cited by appellant's counsel as sustaining his position; but upon examination it appears that the negligent act was not one of supervision, but a part of the work being performed by the men themselves, "The bents of the trestle were not properly braced."

It does not appear that the boss was present or that he had notice of the danger. The pieces for the trestle were furnished on the ground. All that remained was to put them together in place. The inference is, from the meagre statement of the case, that the boss was at another place on the work and knew nothing of the matter at the time. If he had personally stood by, overseeing the operation and having seen the danger carelessly omitted to warn his men then another and different question would have arisen.

In the Wisconsin case of Johnson v. Ashland Water Co. 45 N. W. 807, it is found that the foreman was personally engaged in the work himself, his crew consisting of himself in this instance, until he called Johnson to his assistance, who it was claimed was not a servant of the company. It does not appear that the foreman hired him or had authority to discharge him or even to direct him. It does not appear that Johnson was working in an elevated place on a narrow plank, nor that the foreman knew of his danger and having opportunity neglected to warn him.

CORLISS, C. J. This litigation has its origin in an injury sustained by plaintiff while in the employ of the defendant. He, with several others, was engaged in removing long piles from a platform car to bents on the north side of the defendant's track. These bents were heavy timbers resting on piles driven in the ground, and running at right angles with the track, and the ends nearest to the track were about five feet therefrom. They were the same height as the platform of the car. At the time the accident occurred they were covered over with piles to within two feet from the ends nearest to the track. The piles were rolled from the car to the bents over two round skids about eight inches in diameter, one end of each of which rested upon a pile on the car, and the other upon the pile on the bents which was nearest to the track. Both ends of the skids were on the same level. Reaching from the platform of the car to the ends of the bents were boards a foot wide, over which the men passed from the car to the bents in rolling the piles along over the skids to the bents. In transferring the

piles from the car, some of the men rolled them with their hands, and others used cant-hooks in the work. One of the piles which was being removed from the car rolled from the ends of the skids into the space between the pile on the bents nearest to the track and the next pile, and pushed the former pile towards the plaintiff, and upon his leg, breaking the same near the ankle. One of the grounds upon which plaintiff based and seeks to sustain his recovery was the alleged negligence of the foreman of the gang at work in failing to block this pile so as to prevent its being shoved towards the plaintiff. That the pile was not blocked at the end where plaintiff was working appears to be undisputed. There was evidence to show that the foreman was notified of this fact before the accident. While he denies this, yet there was sufficient evidence to warrant a jury in finding the fact against his testimony. We are clear that the jury were authorized, under the evidence, to find that plaintiff was injured by reason of the negligence of the foreman, Withnell, in failing to block the pile. Will the law hold the defendant responsible for this negligence? Against such liability, defendant invokes the fellow-servant rule, and our statute embodying it. To escape the force of this rule, plaintiff contends that the case is brought within the scope of the fellow-servant rule, and that such limitation has the voice of weightier authority, of better reason, and of more numerous precedents in its behalf. This issue of law we are to determine, and our investigation must run along the line of general principles; for the adjudications upon this subject—so multitudinous as almost to warrant the simile, "thick as autumnal leaves that strew the brooks in Vallambrosa"—these adjudications are so discordant, enumerating so many rules, stating so many limitations, applying the law to facts so diverse, that one is reminded of Gibbon's remark upon the infinite variety of laws and opinions when Justinian entered upon the reform of codification—that they were beyond the power of any capacity to digest. We are compelled to decide whether this superior-servant limitation shall be adopted in this state. The trial court declared it to be the law in his charge to the jury, and refused to charge against the adoption of the doc-

trine, although requested to so charge by defendant's counsel. Whatever other ground of liability there may have been, the verdict cannot stand if the trial judge erred in this respect, for the verdict may rest entirely upon the ground work of such instruction.

The foreman, Withnell, through whose negligence it is insisted that plaintiff was injured, had control of the gang employed on the work, and was vested with authority to employ and discharge the men, who were subject to his direction and supervision. Hence it is urged that he was in his position, and therefore, in the prosecution of the work of unloading these piles, a vice-principal, and not a fellow-servant. In this connection the authorities are cited which sustain the doctrine that the station of the employe, and not the character of the act, determines the question whether the master is responsible. In many of the cases where the superior-servant limitation was applied, such servant was in fact the fellow-servant of the employe injured. But, because of some superior position occupied by him with respect to the servant injured, the master was, by a legal fiction, regarded as personally present in the person of the superior-servant, and made responsible to one servant for the manner in which another servant performed the duties and labors pertaining to a servant's employment. Here lies the difference between the two rules. Those cases which preserve the fellow-servant rule in its full integrity bring the facts of each case to the test, not of the rank of the negligent servant, but of the character of the negligence from which damage results. Did the master owe to his servant a duty as master? Answer the inquiry in the affirmative, and he cannot escape a careless discharge of that duty by shifting the burden to the shoulders of a servant, however inferior his position may be. The negligence of a fellow-servant has not wrought injury in such a case. It is the negligence of the master himself, because that was carelessly done which he was bound to have carefully performed. The master must use due care in supplying his servants with safe appliances, and in providing them a safe place in which to work. These are duties of the master. They are none the less his duties because from the necessities of bus-

iness, or for other reasons, he confides their discharge to an employe. His personal negligence in this respect would create liability. He cannot gain exemption from negligence of another in this regard by delegating these personal duties to another. This doctrine is sound, and it in no manner is a limitation of the fellow-servant rule. On the other hand, the other doctrine is a limitation—a very important limitation—of that rule. It finds no warrant in the cases which first enunciated that rule. It rests on no subsequent legislation; and we are firm in the conviction that the mere superiority in the rank of the negligent servant—his right to control the servant injured, and to employ and to discharge him—calls for no modification of the fellow-servant rule. The bed-rock of that doctrine is that every employe assumes the risk of his co-employe's negligence as one of the ordinary risks of his work. Is a superintendent or foreman so much more careless in the performance of work pertaining to a servant's duties than a subordinate employe that the risk of the former's negligence is an extraordinary one? If work belonging to the duties of a servant be done carelessly, what conceivable difference is there whether the negligence proceed from a commander or a subaltern, so long as the master himself is not personally at fault. The superior-servant is in fact a fellow-servant. The two are engaged in the same general work for the master; one using his muscle chiefly, and the other perhaps working mainly with his brain. The only ground on which the superior's relation as fellow-servant is ignored is the constructive presence in his person of the master, because the master in the distribution of labor has appointed him to work in the line of superintendence and control. But this control, this superior rank, cannot lift him above the grade of a fellow-servant into the position of a vice-principal so long as he is engaged in the work of a servant only. If a servant of inferior rank should perform the same work, he would not be regarded as the master; and we are at a loss to understand how the higher rank of the servant can change the nature of the act, or increase the risk of the inferior servant, so as to render inapplicable the fellow-servant rule. The superior-servant is no more the representative of the mas-

ter than the inferior servant, except in the enlarged field of his action, and the wider scope of the trusts confided to him. They are both laboring for a common master in the same general business; both ultimately accountable to him; and employed, controlled, and discharged by him, either personally, or by some one selected by him for that purpose. The ultimate power to employ, control, and discharge is in his hands.

The reason for the fellow-servant rule applies with full force to the work of a servant, whatever the rank of the servant who performs it. It would be an anomalous condition of the law if the negligence of one servant was within the ordinary risks of the employment, while the negligence of another, no more prone to carelessness, should be without the domain of such risks merely because he had been set in a higher place of service by reason of superior skill or ability. Judge Cooley says: "In some quarters a strong disposition has been manifested to hold the rule not applicable to the case of a servant who at the time of the injury was under the general direction and control of another, who was intrusted with the duties of a higher grade, and from whose negligence the injury resulted. But it cannot be disputed that the negligence of a servant of one grade is as much one of the risks of the business as the negligence of a servant of any other; and it seems impossible, therefore, to hold that the servant contracts to run the risks of negligent acts and omissions on the part of one class of servants, and not those of another class. Nor, on grounds of public policy, could this distinction be admitted, whether we consider the consequences to the parties to the relation exclusively, or those which affect the public, who, in their dealings with the employer, may be subjected to risks. Sound policy seems to require that the law should make it for the interest of the servant that he should take care not only that he be not negligent himself, but also that any negligence of others in the same employment be properly guarded against by him so far as he may find it reasonably practicable, and be reported to his employer, if needful. And in this regard it can make little difference what is the grade of the servant who is found to be negligent, except as superior authority may render the negligence

more dangerous, and consequently increase at least the moral responsibility of any other servant who, being aware of the negligence, should fail to report it." Cooley, Torts, 543. Judge Dillon is equally emphatic against the limitation. He says: "The master owes certain defined, personal, unalienable, non-assignable duties towards servants. These duties may be devolved on others by the master, but not without recourse on him. * * * In the general American law, as I understand it, the doctrine of vice-principal exists to this extent, and no further, viz.: That it is precisely commensurate with the master's personal duties towards his servants. As to these, the servant who represents the master is what we may call for convenience a 'vice-principal,' for whose acts and neglects the master is liable. Beyond this the master is liable only for his own personal negligence. This is a plain, sound, safe, and practicable line of distinction. We know where to find it, and how to define it. It begins and ends with the personal duties of the master. Any attempt to refine, based upon the notion of 'grades' in the service, or, what is much the same thing, distinct 'departments' in the service, (which 'departments' frequently exist only in the imagiantion of the judges, and not in fact,) will breed the confusion of the Ohio and Kentucky experiments, whose courts have constructed a labyrinth in which the judges that made it seem to be able to 'find no end; in wandering mazes lost.' * * * The real inquiry is, was the injury caused by another servant one of the ordinary risks of the particular employment? If so, the grade, whether higher, lower, co-ordinate, or the department of the faulty servant, is of no consequence. It is a condition of the contract of service that the servant takes upon himself the risk of accidents in the common course of the business, all open and palpable risks, including the negligence of all fellow-servants of whatever grade in the same employment." 24 Amer. Law Rev. 175. The superior-servant doctrine unfairly discriminates against masters whose business is of such nature that grades of service are indispensible. This case will furnish an illustration of the truth of this statement. The work with respect to which Withnell, the foreman, was careless—the blocking of the pile—was the work of a

servant. Had the same accident occurred in the employ of a master whose servants were all of the same rank, no claim of liability would be thought of. The proprietor of a factory, of a machine-shop, of a mill, of any business in which gradations of service are not absolutely essential, is present in the persons of his servants only so far as his personal duties to his employes are concerned. But the railroad master, though Argus-eyed to discern, and Briarean to prevent, the negligence of its horde of vice-principals—conductors, as in the Ross case, 112 U. S. Rep. 377, 5 Sup. Ct. Rep. 184, superintendents, section bosses, foremen of various gangs, and many others—would find itself impotent to save itself from enormous responsibility not incurred by many other masters, notwithstanding its utmost caution in the selection of its employes. According to this doctrine the master that has fully discharged all its or his personal duties may be guilty at the same time in as many different places of a score of negligent acts by construction of law, although they are acts pertaining to the duties of a mere servant, performed by one who is in fact a servant, and whose carelessness in this regard can as fairly be said to be within the risks incurred by the injured servant as the carelessness of an employe of lower rank. If there is anything in the reason for the fellow-servant rule, it applies with even stronger force to a class of servants whose higher position is a guaranty of better skill and intelligence, and consequently of the exercise of greater care. Their enlarged responsibility to the master will tend to make them more cautious. Their compensation is frequently so large as to make the retention of their positions very desirable to them. This will augment their caution; for negligent performance of duty would be almost certain to result in their dismissal. There is nothing in the controlling power of the superior servant that warrants any difference in the law; for it cannot be said, as is frequently asserted in cases, that any employe is justified in submitting to the carelessness of a superior from fear of being discharged; and the fact is that it is seldom in the power of the injured servant to anticipate or guard against the careless act of the fellow-servant causing injury to him. If he could and did, the accident would not happen. If he could and did not, he

would be himself negligent, and his recovery would be defeated. In either case there would be no occasion for the fellow-servant rule. The basis of the fellow-servant doctrine is not that the servant can, as a rule, be on his guard against his co-servants' carelessness, but that he takes the risk of such negligence when he makes his contract of employment. It is said that a servant can exert an influence for care upon a fellow-servant of the same grade that he could not exert upon a superior-servant by whom he had been employed and could be discharged, and therefore in the latter case the master is responsible. If this affects the question, then the master should have been held liable, in many cases, where the injured servant could not possibly have exerted any such influence upon the negligent servant.

The books are full of such cases, in none of which was the master adjudged responsible. The courts have held that the rule is "not confined to the case of two servants working in company, or having opportunity to control or influence the conduct of each other, but extends to every case in which the two, deriving their authority and their compensation from the same source, are engaged in the same business, though in different departments of duty." Holden v. Railroad Co. 129 Mass. 268. Many of the cases holding the master exempt from liability under the fellow-servant rule were, as we have said, cases in which the injured servant could not possibly have exerted influence over the negligent servant. Their separate departments of service, or their usual stations of employment, kept them as a rule, entirely aloof from each other. In the following cases the relation of fellow-servant was held to exist between persons who could exert little, if any, influence over each other. Steamship Co. v. Merchant, 133 U. S. 375, 10 Sup. Ct. Rep. 397—the carpenter, the porter, and stewardess of a steamship; Railway Co. v. Welch, 72 Tex. 298, 10 S. W. Rep. 529—foreman of a bridge gang, and servants operating train; Elliott v. Railroad Co., 5 Dak. 523, 41 N. W. Rep. 758—a section foreman and a conductor; Fagundes v. Railroad Co., 79 Cal. 97, 21 Pac. Rep. 437—a laborer employed to remove snow from track and a conductor; Baughman v. Superior Court, 72 Cal. 573, 14 Pac. Rep. 207—a conductor and brakeman; Randall v. Railroad Co., 109 U. S. 478,

3 Sup. Ct. Rep. 322—a brakeman and conductor of different trains; Van Wickle v. Railway Co., 32 Fed. Rep. 278—a track repairer and an engineer; McMasters v. Railroad Co., (Miss.) 4 South. Rep. 59—brakeman of one train and employe on another; Naylor v. Railroad Co., 33 Fed. Rep. 801—engineer and switchman; Van Avery v. Railroad Co., 35 Fed. Rep. 40—engineers of different trains; Connelley v. Railroad Co., (Minn.) 35 N. W. Rep. 582—a sectionman and an engineer or brakeman; Howard v. Railroad Co., 26 Fed. Rep. 837—an engineer and fireman of different trains; Railroad Co. v. Rider, 62 Tex. 267; Gormley v. Railroad Co., 72 Ind. 31; Collins v. Railroad Co., 30 Minn. 31, 14 N. W. Rep. 60; Clifford v. Railroad Co., 141 Mass. 564, 6 N. E. Rep. 751; Keyes v. Railroad Co., (Pa) 3 Atl. Rep. 15; Whaalan v. Railroad Co., 8 Ohio St. 249—in each case an engineer and a sectionman. Without stating the relation of the injured to the negligent servant in each of the following cases, they are referred to as being in the same line: Holden v. Railroad Co., 129 Mass. 268; Valtez v. Railroad Co., 85 Ill. 500; Besel v. Railroad Co., 70 N. Y. 171; Brown v. Railroad Co., (Cal.) 7 Pac. Rep. 447; Roberts v. Railroad Co., 33 Minn. 218, 22 N. W. Rep. 389; Brown v. Railroad Co., 31 Minn. 553, 18 N. W. Rep. 834; Cooper v. Railroad Co., 23 Wis. 668; Heine v. Railroad Co., 58 Wis. 525, 17 N. W. Rep. 420; Capper v. Railroad Co., 103 Ind. 305, 2 N. E. Rep. 749; Henry v. Railroad Co., 81 N. Y. 373; Blake v. Railroad Co., 70 Me. 60; Harvey v. Railroad Co., 88 N. Y. 481. The list might be greatly enlarged.

Going back to the fountain, we find this idea of exertion of influence by the injured servant as the basis of the servant rule distinctly repudiated. In the Farwell case, 4 Metc. (Mass.) 60, Chief Justice Shaw says: "It was strongly pressed in the argument that although this might be so where two or more servants are employed in the same department of duty, where each can exert some influence on the conduct of the other, and thus to some extent provide for his security, yet that it could not apply where two or more are employed in different departments of duty at a distance from each other, and where one can in no degree influence or control the conduct of the other. But we think this is founded upon a supposed distinction on which

it would be extremely difficult to establish a practical rule. * * * When the object to be accomplished is one and the same, when the employers are the same, and the several persons employed derive their authority and their compensation from the same source, it would be extremely difficult to distinguish what constitutes one department, and what a distinct department, of duty. It would vary with the circumstances of every case. If it were made to depend upon the nearness or distance of the persons from each other, the question would immediately arise, how near or how distant must they be to be the same or different departments? Besides, it appears to us that the argument rests up an assumed principle of responsibility which does not exist. The master in the case supposed is not exempt from liability because the servant has better means of providing for his safety when he is employed in immediate connection with those from whose negligence he might suffer, but because the implied contract of the master does not extend to indemnify the servant against the negligence of any one but himself; * * * and he is not liable in tort as for the negligence of his servant because the person suffering does not stand towards him in the relation of a stranger, but is one whose rights are regulated by contract, express or implied. The exemption of the master, therefore, from liability for the negligence of a fellow-servant does not depend exclusively upon the consideration that the servant has better means to provide for his own safety, but upon other grounds. Hence the separation of the employment into different departments cannot create that liability where it does not arise from express or implied contract, or from a responsibility created by law to third persons and strangers for the negligence of a servant." It is thus apparent that there is nothing in the fact that an inferior servant may not be able to exert any influence for safety over his superior to justify the refusal to apply the fellow-servant rule. On principle, we are opposed to the doctrine of the Ross case, 112 U. S. 377, 5 Sup. Ct. Rep. 184. We believe that the true rule was stated and applied in Crispin v. Babbitt, 81 N. Y. 516: "The liability of the master does not depend upon the grade or rank of the employe whose negligence causes the

injury. A superintendent of a factory, although having power to employ men or represent the master in other respects, is in the management of the machinery a fellow-servant of the other operatives. * * * The liability is thus made to depend upon the character of the act in the performance of which the injury arises, without regard to the rank of the employe performing it. If it is one pertaining to the duty that the master owes to his servants he is responsible to them for the manner of its performance. The converse of the proposition necessarily follows: If the act is one which pertains to the duty of an operative, the employe performing it is a mere servant; and the master, although liable to strangers, is not liable to a fellow-servant for its improper performance." To same effect are Lindvall v. Woods, (Minn.) 42 N. W. Rep. 1020; Davis v. Railroad Co., 55 Vt. 84; State v. Malstar, 57 Md. 287; Car Co. v. Parker, 100 Ind. 191; Hussey v. Coger, 112 N. Y. 614, 20 N. E. Rep. 556; Copper v. Railroad Co., (Ind.) 2 N. E. Rep. 749; Yates v. Iron Co., (Md.) 16 Atl. Rep. 280; Elevator Co. v. Neal, 65 Md. 438. 5 Atl. Rep. 338; McGovern v. Manufacturing Co., (Ga.) 5 S. E. Rep. 492; Lewis v. Seifert, (Pa.) 11 Atl. Rep. 514; Olson v. Railroad Co., (Minn.) 35 N. W. Rep. 866; Anderson v. Winston, 31 Fed. Rep. 528; Webb v. Railroad Co., (N. C.) 2 S. E. Rep. 440.

This list might be added to, but we are concerned not so much about the number of cases to be cited in support of our views as about the soundness of our position upon principle. We believe that the fellow-servant rule should hedge about all masters without discrimination; that its wise and just barrier against liability should not be broken down by a fiction; that those whose business, from its very nature, necessitates gradations of service should not be deprived of its protection on account of a distiction which in no manner affects the considerations which gave it birth, and have led to its almost universal adoption. We see nothing to justify the limitation doctrine, except the increased safety of employes in a dangerous business; and this applies, if at all, equally to cases where the two servants are of the same grade. But, so far from augmenting their safety, the liability of the master will have the contrary effect, if it produces any effect at all. That servant will grow more careless, who in-

stead of being exclusively liable for his own negligence, finds that beyond him is another liability, so much more desirable to the injured servant that the careless servant is invariably lost sight of—the liability of the corporation, against which the verdict is more easily secured, and, when obtained, is certain of payment.

We have assumed that our statutes on this question (§ 3753 Comp. Laws) are only declaratory of the common law. But we do not decide whether they limit the liability of a master. They certainly impose upon him no greater responsibility than the common law, and, as the question of their restrictive force has not been discussed, we do not decide it. See Herbert v. Railroad Co., 3 Dak. 38, 13 N. W. Rep. 349, on appeal 116 U. S. 642 6 Sup. Ct. Rep. 590, and dissenting opinion. We are clear that the trial court erred in refusing to charge the jury that the negligence of Withnell in failing to block the pile was the negligence of a fellow-servant, and in instructing them that it was not; and for this error the judgment of the district court is reversed. There are other questions in the case, on which we refrain from expressing any opinion, as the evidence on a new trial may be materially different. This does not apply to the question of interest, and we therefore hold that the trial court erred in charging the jury to give the plaintiff interest on his recovery, without submitting it to their discretion. "In an action for the breach of an obligation not rising from contract, * * * interest may be given in the discretion of the jury." § 4578, Comp. Laws. Judgment reversed, and new trial ordered. All concur.

OVE JOHNSON, Respondent, *v.* NORTHERN PACIFIC RAILROAD COMPANY, Appellant.

1. **Bills of Exceptions — Order Extending Time to Settle.**
Where the district court by *ex parte* orders, which were duly served on respondent's counsel, enlarged the time for settling a bill of exceptions, no reason being brought upon the record for granting such orders, and counsel for respondent appearing, and objecting to the settlement, *held*, such orders were such as the court had authority to make *ex parte*, and were therefore *prima facie* valid. Nothing to the contrary being shown, this court will assume that such orders were based upon a proper showing of cause.

2. **Same; Settlement After Statutory Time Had Elapsed.**
Where, after time granted for settling a bill had expired, the district court, without making an order extending time, and, against objection, settled and allowed the bill, *held* not error. Such order of settlement operated to extend the time until the date of the actual settlement. It is within the power of the district court, under the Code, either to enlarge time, or to allow an act to be done after the time limited by the Code. Comp. Laws, §§ 4939, 5093. Under existing statutes, settling bills of exception and statements, and giving notice of intention to move for a new trial, are matters not of a jurisdictional nature. Until the time for appeal has expired, all of the various steps leading up to and including a motion for a new trial may, with respect to time, after statutory time has elapsed, be taken at any time allowed by the sound judicial discretion of the trial court. This court will presume that such discretion is properly exercised in all cases until the contrary appears.

3. **Railroad Companies — Presumption of Negligence.**
In an action for damages caused by a prairie fire alleged to have been started by defendant's negligence, and where the complaint charges negligence both as to the machinery and appliances in use upon the train which threw out the fire, and as to the management of such machinery and appliances, *held*, the primary fact that defendant's train threw out the fire in question being shown, such fact of itself will operate to make out a *prima facie* case of negligence. Such fact creates a disputable presumption of defendant's negligence.

4. **Same; Same; How Rebutted.**
Held, further, that the *prima facie* case of negligence cannot be rebutted by the defendant by showing merely that the machinery and appliances were of a proper character, and were at the time in good condition, without showing the further fact that the same were handled with due care at the time the fire was thrown out.

5. Same; Degree of Care Required.

The trial court charged the jury as follows: "The care must be proportionate to the danger. A higher degree of care is required when the wind is high than when it is calm, and where combustible matter is very dry than when it is wet." *Held*, that under the evidence said instruction was erroneous.

6. Erroneous Instruction in This Case Held Not Prejudicial.

Held, further, that such error does not constitute reversible error, for the reason that the plaintiff conclusively established his right to recover on grounds wholly different from and independent of the subject-matter of the erroneous instruction. Such instruction did not materially affect the substantial rights of the defendant, and hence it is not prejudicial error.

7. Negligence—Measure of Damages.

In an action for damages to property caused by negligence, the measure of damages is controlled by § 4578, Comp. Laws, which reads as follows: "In an action for the breach of an obligation not arising from contract, and in every case of oppression, fraud and malice, interest may be granted in the discretion of the jury." Under this section, the following charge *held* to be prejudicial error: "If you find from the evidence that the plaintiff's property was destroyed by or through negligence of the defendant, then you must assess the damages of the plaintiff in such a sum as he has proven to you he has sustained, with interest at seven per cent. per annum from the date of loss to plaintiff." The instruction directly violates the statute, in this: The discretion vested by the statute in the jury to either grant or withhold interest is taken away from the jury, and exercised by the trial court. For this error a new trial will be granted, unless plaintiff consents to a modification of the judgment by deducting interest upon the value of the property destroyed; such value not being contradicted by testimony.

(Opinion Filed November 29, 1890; Rehearing Denied January 13, 1891.)

APPEAL from district court, Stutsman county; Hon. RODERICK ROSE, Judge.

John S. Watson for appellant: The degree of care which a railroad is bound to exercise is not dependent on the weather: Mich. Cen. R. R. Co. v. Anderson; and the instruction quoted above in paragraph 5 of the syllabus is erroneous. If there is error in the charge in respect to any particular point, judgment cannot be affirmed on other grounds, since it cannot be said that the verdict was not the result of the erroneous instruction:

Amaker v. New, 11 S. E. 386. The complaint alleged and the answer denied negligence in handling defendant's engine; the burden was on plaintiff to prove negligence; no attempt to prove it was made; therefore the court's instruction that an engine may cause fires through negligence in its management, was error, because not applicable to the facts proved and because it tended to mislead the jury by directing their attention to an assumed act of negligence: Babcock v. R. R. Co., 33 N. W. 628; Fisk v. R. R. Co., 38 id. 132; Jones v. Mathieson, 2 Dak. 531.

S. L. Glaspell, for respondent: There is no jurisdiction to settle bill of exceptions after the time limited by law or extended by the court has expired: Comp. Laws, § 5083; Hayne on New Trial, p. 773; Higgins v. Mahoney, 50 Cal. 444; Gimbel v. Turner, 14 Pac. 255; Hake v. Struble, 12 N. E. 676; Finley v. Whitley, 22 N. E. 640; Muller v. Ehlers, 91 U. S. 249; Sisson v. State, 45 N. W. 1129; City v. Shipley, 13 Atl. 375.

WALLIN, J. This is an action to recover damages for injuries to property caused by a prairie fire which plaintiff alleges resulted from the defendant's negligence. A verdict and judgment were rendered for plaintiff on December 13, 1889, and by three separate orders the time for preparing and signing a bill of exceptions, and serving a notice of intention to move for a new trial was extended to February 13, March 1, and March 15, 1890, respectively. These orders were duly served on plaintiff's counsel, but were made *ex parte*, and no cause is spread upon the record for making the same. The notice of intention and the proposed bill were served within the last extension of time, *i. e.*, upon March 14, 1890; but the bill was not settled by the trial court until the period last granted for that purpose had elapsed and not until April 15, 1890. Plaintiff's counsel appeared, and objected to the settlement of the bill, and his objections were entered upon the record as follows: "The plaintiff objects to the allowance or settlement of this bill of exceptions for the reason that the same was not presented to the court for settlement within the time limited by law, and for the further reason that the orders herein made extending the time for settlement of the bill of exceptions were made *ex parte*, without notice to plain-

tiff or his attorney, and without his consent; which objection is allowed, and made part of the record in this case. Roderick Rose, Judge. Dated April 15, 1890." A preliminary motion was made in this court to purge the record by striking out the bill of exceptions for the reasons above stated. In support of the motion, respondent's counsel claims in his brief that "the paper which purports to be a bill of exceptions was settled and signed * * * at a time when the court had no jurisdiction to settle or sign a bill of exceptions; otherwise, the statute limiting such time is of no effect, and the orders of the court extending such time were unnecessary, and there is no limit of time for an exercise of such discretion." In support of his contention that the act of allowing and signing a bill is essentially a jurisdictional act, in the sense that the court is withont power to do the act after the time limited by statute or extended for that purpose has expired, counsel cites numerous authorities; among others, the following: Hayne, New Trial, p. 773; Higgins v. Mahoney, 50 Cal. 444; Bunnell v. Stockton, (Cal.) 23 Pac. Rep. 302; Buckley v. Althoff, (Cal.) 24 Pac. Rep. 635; Gimbel v. Turner, (Kan.) 14 Pac. Rep. 255; Short v. Railroad Co., (Iowa,) 44 N. W. Rep. 539; also Muller v. Ehlers, 91 U. S. 249; and other authorities.

The case last cited follows the rule of the common law which still obtains in the federal courts, and which requires all proceedings in an action of a strictly judicial character, and not *ex parte* in nature, to be done in term-time. In the case cited the bill was not settled below at the term when the case was disposed of by the trial court, nor was an order entered at such term continuing the matter, and allowing the bill to be settled at a subsequent term. Under the procedure referred to, the court below was without power to allow and sign the bill after adjournment of the term *sine die*, and hence the supreme court refused to consider it. But this practice has long since been abrogated by statute in Dakota. Section 4828, Comp. Laws, provides, in effect, that the district courts are always open for the purpose of hearing and determining all actions, special proceedings, motions, and applications whatsoever, "except issues of fact in civil and criminal actions." Under the innovations made by

the statute, the district courts of the late territory and of the now state of North Dakota, excluding the cases enumerated in the statute, have authority to discharge all their functions, not only at a general or special term, but equally, and to the same extent, when there is, strictly speaking, no term. We think the case, 91 U. S. *supra*, not in point. The district court had ample jurisdiction to allow and sign the bill when that act was done.

But the bill in this case was not settled within the time granted by the court; and respondent's counsel contends that the act of signing and allowing it was, for that reason, without authority, and void. The cases cited in support of this proposition from California, Kansas, Iowa, and Nebraska fully sustain the contention so far as those states are concerned; but we find, upon examination, that the statutes of the states above mentioned which regulate the allowance and settlement of bills of exception differ radically from our own laws upon that subject. It will be found that, in all the states referred to, the language of the statute, either in express terms or obvious implication, inhibits the settlement of bills and statements after the time limited by law or granted for that purpose has expired. On the other hand, our statute, as amended in 1887, (§ 5093, Comp. Laws,) expressly permits any of the acts connected with the settlement of bills and statements, and giving notice of intention to move for a new trial, to be done after the time has elapsed, and within the time granted after the original period has expired. This amendment inaugurated a departure from the California practice, which had largely prevailed in the territory prior to the adoption of the amendment. We think it was the purpose of the act of 1887 to place the whole matter of settling bills and statements for a new trial, and giving the notice of intention, within the sound judicial discretion of the trial court as to the time within which the several steps in the process may be taken after the statutory limit has been passed. In this view of the statute, the entire process leading up to and including a motion for a new trial, after the statutory limit has expired, and before the time of appeal has elapsed, is a matter of sound discretion with the district courts, and hence cannot be properly

classed with questions which go to the jurisdiction of that court. In this case the bill was allowed and settled after the time granted for that purpose had run, and the trial court did not do what it would have been better practice to have done, viz., enter an order of record stating that, for good cause shown, time was extended to the date of settlement. The power to enter such an order on good cause being shown is expressly granted by § 5093, Comp. Laws. We hold that the actual settlement operates *ipso facto* to extend the time to the date of such settlement. This view is sustained by authority. Volmer v. Stagerman, 25 Minn. 244. This ruling was made under statutes much less liberal than the rules established by the act of 1887, *supra*. The supreme court of Minnesota placed its decision upon a section of its statute which corresponds to § 4939 of the Compiled Laws.

But the action of the trial court is further criticised by counsel because the several orders of the court extending time were made *ex parte*, and no reason for making them appears of record. From what has been said, it appears that, if the orders extending time had never been made, the settlement of the bill would be upheld as valid, upon the ground that the fact of settlement operated to extend the time to the date of the actual settlement. However such orders may properly be made *ex parte*. See 4 Wait, Pr. 595. We certainly think it would be much better practice, in this class of cases, to require cause to be shown in the usual way by affidavit, and the affidavit should be served upon counsel with the order. The moving party should excuse his default, and bring his excuse upon the record. Such practice would promote the due and regular administration of the law, even in cases where the grounds or cause of the order are within the knowledge of the judge who makes the order. But the question for us to decide is whether the bill in this case was legally allowed and settled finally. For the reasons and upon the authority above shown, we hold that it was. Section 5093 Comp. Laws, is a departure, and goes further in the direction of liberality in facilitating the settlement of bills and statements, and moving for new trials, than any other legislation which has come to our attention. If experience shall demonstrate that the policy of the state is too liberal, the remedy is with the legis-

lature. Until the contrary is alleged and proven, this court will hold in a case where a bill or statement is allowed and signed, or a notice of intention after the time for doing so has expired, that the district court acted upon good cause shown. Abuse of discretion will not be inferred from the mere fact that the record is irregular in not showing the grounds upon which the court proceeded. The motion to strike the bill from the record must therefore be denied.

Proceeding to the merits, we remark, first, that we shall not have occasion to discuss a number of the questions which are presented by the record, for the reason that the same questions were considered and determined by this court in the case of Gram v. Railroad Co., reported in 46 N. W. Rep. 973, (*ante* p. 252.) The two cases were represented by the same attorneys, representing the same parties; the issues made by the pleadings in the two actions are identical; and the damage was done in both cases by one and the same fire, originating at the same time and place, and in the same manner. The evidence upon several vital features of the two cases come from the same witnesses and tended to prove the same state of facts in both cases. We shall therefore, so far as the two cases rest upon the same facts, apply the principles to this case which were applied in the former, and not discuss them here. The acts of negligence charged which are material were as follows: *First*, faulty construction of the engine and its negligent and unskillful management, whereby fire which did the injury was negligently allowed to escape; *second*, the existence, by sufferance of the defendant, of large quantities of grass and weeds and other dry and combustible material upon the right of way at and near the point where the fire started. The first instruction of the court to the jury excepted to by the defendant was as follows: "An engine may be properly constructed and supplied with the necessary appliances, and yet cause fires through negligence in its management, in which case the defendant would be liable as for the running of defective engines." In support of this assignment of error, counsel, in his brief, uses the following language: "This instruction was clearly erroneous. It is true that the plaintiff alleged in his complaint that the engine in question

was so negligently and unskillfully handled that fire escaped from it; but, as we have already observed, there was no attempt to substantiate the allegation by proof in its support. The answer of defendant denied negligence in this regard, and the issue was with plaintiff to establish its existence. This he failed to do. There was no evidence whatever introduced as to the manner in which the engine was managed and operated, and therefore nothing upon which the court could properly base a charge as to negligence in its operation. The instruction itself considered as an abstract proposition of law, was doubtless correct; but it was not applicable to the facts upon the trial." We think this position is untenable. Counsel is mistaken in assuming that there was no evidence in the case tending to show negligence or unskillfullness in the management of the engine at the time the fire was emitted; the evidence tending directly to show that the fire which caused the damage was thrown out from one of defendant's passing trains. We hold that this evidence, though purely circumstantial, is, under the better authority, sufficient, *prima facie*, to establish defendant's negligence both as to the character of the machinery and appliances used, and as to the manner of its use and management at the time the fire was thrown out from the train.

The considerations upon which this rule rests are familiar to the profession, and need not be repeated here. The reasons upon which the rule is founded apply as strongly to the management of the machinery as to its character. There is much conflict of authority upon the point, but this court will adhere to the rule as above stated, as most conducive to the ends of justice. See Kelsey v. Railway Co., (S. D.) 45 N. W. Rep. 207, and authorities there cited; White v. Railway Co., (S. D.) 47 N. W. Rep. 146. The *prima facie* case of negligence in operating the machinery and appliances used by the defendant upon the train in question, made by the circumstantial evidence, as before stated, was not overcome or attempted to be refuted by any evidence offered in defendant's behalf. Hoffman v. Railway Co., (Minn.) 45 N. W. Rep. 608. It follows that the trial court correctly and appropriately called attention to this feature of the case. The law as laid down was not only abstractly

correct, but was pertinent alike to the evidence and the issues made by the pleadings. See Nelson v. Railway Co., (Minn.) 28 N. W. Rep. 215; Karsen v. Railway Co., 29 Minn. 12, 11 N. W. Rep. 122. Whether the rule of law is founded upon a statute, as in Minnesota, and some other states, or is established by judicial exposition, as is the case in some jurisdictions, can make no difference. When once adopted, the scope and effect of the rule is the same. It is quite true that plaintiff could have made out his case without showing negligence, either as to the character of defendant's machinery or the mode of its operation, by showing, as he did, that the fire in question was the proximate result of fire thrown out from defendant's train upon its right of way, and which ignited in combustible matter negligently permitted to accumulate and remain upon the right of way; but plaintiff had the right also to allege and prove, as he did, that there was negligence with respect to the machinery used, and the manner of its operation. We find no error in the instruction of the court upon this feature of the case.

The defendant duly excepted to the following instruction to the jury: "The care must be proportionate to the danger. A higher degree of care is required in running engines when the wind is high than when it is calm, and when combustible matter is very dry than when it is wet." We think this instruction was unwarranted by the evidence as given. It is doubtless true, in general, that the law exacts care from all persons in proportion to the danger to be avoided; and this principle is applicable to cases of this character. 8 Amer. & Eng. Enc. Law, p. 3, and note. But the instruction must be considered with reference to the evidence. The evidence showed conclusively that at the time and place where the fire originated vegetation was very dry on the right of way and adjacent thereto, and that when the train in question passed the place where the fire started a strong wind was blowing from the northwest. The evidence established the existence of a state of facts under which, according to the directions of the trial court to the jury, it was incumbent upon the defendent to put forth "a higher degree of care" in running its engines than would be exacted in calm weather, and when vegetation was wet. The trial court signally failed to

inform the jury in what particulars, or how, the higher degree of care which he stated was necessary, under the circumstances of the case, could be exerted; nor did the court by illustration or otherwise, enlighten the jury as to the special nature of that higher degree of care which he said was required in a high wind, and when vegetation was dry. The court did not explain to the jury, and the evidence failed to do so, that in calm weather certain appliances were used, and certain efforts were required to be put forth, by those in charge of the engine to prevent the escape of fire; and that such preventatives were inadequate, and other means must be employed, when a strong wind prevailed. In our opinion, the instruction was clearly misleading. Certainly nothing in the evidence would justify the inference that the defendant could put forth a higher degree of care with respect to preventing the escape of fire at one time than at another. In the absence of such evidence, there certainly is no presumption of law that railroad companies may be less careful with respect to fire on calm days than when the wind is high. On the contrary, due care, in this regard, means the greatest possible care at all times, and under all conditions of wind and weather. See Railroad Co. v. Anderson, 20 Mich. 244. Not having shown unusual care at the time and place in question, the jury would be warranted under the charge of the court, in finding the defendant guilty of want of due care. A *prima facie* case having been made out by the plaintiff by the circumstantial evidence, the jury would infer that the company had not rebutted the plaintiff's case, inasmuch as the higher degree of care required was not attempted to be shown. The jury were certainly misinformed as to the law, and were misled so far as the matter of requiring a higher degree of care is concerned. Ordinarily, the charge would be prejudicial, and warrant a new trial; but in this case, after a very careful consideration of all the evidence and the whole charge of the court, we are convinced that the verdict was not at all influenced by the erroneous charge. The undisputed evidence shows defendant to have been negligent in two particulars, viz.: In the manner of keeping its right of way in which the fire originated; and, *secondly*, in allowing the damaging fire to escape from the engine. The defendant did not

rebut either branch of plaintiff's case. The company did not offer testimony tending to show ordinary care, either with respect to the manner of operating its train, or as to the condition of its right of way at the point where the fire caught in the same. In this state of the evidence, ordinary care not having been shown by the defendant, the jury could not have done otherwise than find for the plaintiff on the question of defendant's liability. In order to recover, it was not essential for the plaintiff to show negligence in the appliances used, or in the management of the train. The evidence fully warrants the verdict upon another independent branch of the case, viz., that relating to the condition of the right of way. What the jury were told as to due care, or a "higher degree of care," in operating the train, could have no legitimate influence upon their minds in reaching a conclusion as to whether, at the point where the fire started, the right of way was in a negligent condition, or whether the fire caught within the right of way. Upon this branch the evidence was conclusive, and not controverted. We are clear that the instruction was erroneous, but equally clear that it did not prejudice the defendant nor materially affect the substantial rights of the defendant. The assignment of error upon this point must be overruled. Brobst v. Brock, 10 Wall. 519; also opinion in Ross' Case, 112 U. S. 395, 5 Sup. Ct. Rep. 184.

We have carefully examined the defendant's other assignments of error, and find nothing in them which would warrant the court in disturbing the verdict, except the following instruction: "If you find from the evidence that the plaintiff's property was destroyed by or through the negligence of the defendant, then you must assess the damages of plaintiff in such a sum as he has proven to you he has sustained, with interest at seven per cent. per annum from the date of loss to plaintiff." This instruction is error. The action is for the breach of an obligation not arising from contract. In this class of cases, § 4578, Comp. Laws, controls. The section is as follows: "In an action for the breach of an obligation not arising from contract, and in every case of oppression, fraud, or malice, interest may be given in the discretion of the jury." The trial judge improperly took

from the jury the discretion vested in them by the statute, and assumed to exercise it himself. Counsel for respondent cites § 4577, Comp. Laws, as authority supporting the instruction. That section has no application to a case like this, where the relation of debtor and creditor does not exist. Nor is this a case where the damages are certain, or capable of being made certain by mere calculation. Counsel also cites numerous adjudications in other states in support of the rule of damages laid down by the trial court. Such authorities cannot prevail against a plain provision of the Code. Section 4578, was doubtless enacted for the express purpose of settling a rule of damages about which there was much fluctuation occasioned by conflicting adjudications. The instruction was in the teeth of the Code, and was a substantial error, which will render it necessary to vacate the verdict, and grant a new trial, unless the plaintiff shall elect to strike from the judgment of the court below the amount which represents the interest upon the value of the property destroyed, computed at 7 per cent. per annum from the date of the loss (September 21, 1885,) to the date of the verdict, (December 13, 1889.) Deducting such interest, the remainder, representing the value of the property at the date of the loss, would be $865.33. The plaintiff, at his option, may apply to the district court, and have the judgment modified by entering judgment for the sum above named, with costs and disbursements, and interest thereon from the date of the verdict; otherwise a new trial will be granted. An order will be entered accordingly. All concur.

REPORTER: As to the rule concerning interest in such cases, see also Ell v. N. P. R. R. Co., *ante* p. 336.

JOHN H. SARLES, LEE B. DURSTINE and FRANK B. SARLES and SARLES & DURSTINE, Respondents, *v.* JOHN MCGEE, JAMES DUNN, CATHERINE DUNN, MARY A. ASHMORE, WILLIAM E. GREENE and WILLIAM C. WHITE, Trustee, Defendants; MARY A. ASHMORE, Appellant.

1. **Mortgages; Notice; Senior and Junior Incumbrancers.**
A senior incumbrancer is not bound to respect the equitable rights of a junior incumbrancer in the property unless he has notice, either

actual or constructive, of such rights. The recording of the junior mortgage is not constructive notice to the prior mortgagee of the existence of such mortgage, or of the mortgagee's equitable right thereunder, to insist that the prior mortagee shall not release from the lien of his mortgage any property upon which the subordinate incumbrancer has no lien, to his prejudice.

(Opinion Filed January 13, 1891; Rehearing Denied Feburary 3, 1891.

APPEAL from district court, Stutsman county; Hon. WM. H. FRANCIS, Judge.

In April, 1883, defendent McGee, owner of part of section 4-149-67, mortgaged said land to appellant to secure payment of his note to her in sum of $1,900. At the same time he had a building on said premises insured against fire for $2,500, with loss payable to appellant. In June, 1883, McGee mortgaged the same and other premises to plaintiffs to secure payment of $2,600. Both mortgages were recorded as soon as made.

In October, 1883, the insured building was destroyed by fire. Neither plaintiffs' nor appellant's debt was then due. Later, and before either debt was due, the insurer made its drafts for sum of $2,466.67, payable to McGee and appallant. By agreement between McGee and appellent the latter applied $700 of the insurance moneys on her debt and the balance was disposed of by McGee.

Afterwards appellant foreclosed her mortgage, bid in the property and a sheriff's deed was made to her.

Then plaintiffs brought this suit to foreclose their mortgage and prayed for a decree adjudging the appellant's mortgage discharged and that her foreclosure proceedings and sheriff's deed be adjudged null and void.

The judgment of the district court was in accordance with the prayer of the complaint.

Edgar W. Camp, for appellant; *John S. Watson*, for respondent.

CORLISS, C. J. Viewed in the light of the record, the plaintiffs sought and obtained against the defendant unwarranted re-

lief by invoking that equitable principle whose peculiar office it is to create a duty enforceable in a court of equity which a court of law does not recognize as of binding force. They prayed that they might be relieved from the injurious consequences of defendant's alleged disregard of an equitable duty which they claimed she owed to them. Did she owe such duty? The facts, so far as disclosed by the record, compel a negative reply to this inquiry. Defendant held a first mortgage upon certain premises. Plaintiff owned a second mortgage thereon. There were buildings on the land. Upon them was insurance effected by the mortgagor in his own name; the policy stating that the loss, if any, should be paid to the first mortgagee, the defendant, as her interest might appear. These buildings were destroyed by fire, and the loss adjusted and paid. The amount exceeded the amount of defendant's mortgage. We will assume that it was all paid to her personally, and paid after the mortgage debt had all become due, although the record by no means necessitates such a view of the facts. A large portion of the money she paid over to the mortgagor, retaining an amount for which she gave credit on the mortgage. We will also assume, without deciding, that it was the defendant's duty, as first mortgagee, to respect the rights of subsequent incumbrances of which she had knowledge, and not suffer any of her security to pass from her control, to the prejudice of the subordinate lien; and that, it appearing that the value of the security held by the second mortgagees, the plaintiffs, was seriously impaired by the destruction of those buildings, it was the duty of defendant, if cognizant of plaintiffs' lien, to apply the insurance money in her hands to the extinguishment of her lien, and not suffer the greater portion of it to escape such lien by passing into the mortagagor's control. Still, not even in the forum of conscience would the relief sought for be granted upon the facts as shown by the record on this appeal. Defendant foreclosed her mortgage after this insurance money came into her hands, assuming that it did come within her control, and, having purchased on the forclosure sale, in course of time secured a deed vesting in her the title of the property under this foreclosure.

Plaintiffs in this action to foreclose their second mortgage ask

that defendant's foreclosure proceedings, culminating in this deed, be annulled by the court on the theory that it was the defendant's duty to apply the insurance money in extinguishment of her lien, because of her equitable duty not to impair the subordinate lien by her conduct with respect to the security. Plaintiffs insist that she had two distinct securities out of which she could collect her debt—the land and the insurance money; that they held a lien on only one of these securities—the land; that defendant owed to them the duty of obtaining their pay from the insurance money, which was sufficient to extinguish her lien; and that equity will regard such duty as performed, and the lien wiped out, on the principle that one who disregards duty shall not assert his own dereliction to the detriment of another to whom that duty was owing. In all this record we find nothing to render these considerations pertinent. There was no equitable duty, because defendant had no knowledge of the rights of the plaintiffs as junior incumbrancers. Equity compels no one to respect an unknown right. Defendant did not know of plaintiffs' mortgage when she suffered this insurance money to pass from her control to the mortgagor. There is no averment of notice in the complaint. This demurrable defect was not cured by the reception without objection of evidence of notice on the trial. Under such a state of the record, the complaint might be amended to conform to the proof. But there is no such evidence in the record. There is no such fact found. There is no pretense of actual notice. Without notice of the lien to be protected, there arose no duty to protect it. Deuster v. McCamus, 14 Wis. 333; Straight v. Harris, id, 509; Insurance Co. v. Halsey, 8 N. Y. 271; Vanorden v. Johnson, 14 N. J. Eq. 376; Ward's Ex'rs v. Hague, 25 N. J. Eq. 397; Wade, Notice, § 203, and cases cited. This principle is elementary. It is true that constructive notice is held to be sufficient to create the duty. But defendant did not have even constructive notice of plaintiffs' inferior lien. The record of their mortgage constituted no such notice. It is only as to subsequent incumbrancers or purchasers that the recording of a mortgage or deed is notice. So the statute is written. §§ 3293, 4369, Comp. Laws. Similar statutes have been so constructed in many jurisdictions. Deus-

ter v. McCamus, 14 Wis. 333,; Straight v. Harris, id. 509; Insurance Co. v. Halsey, 8 N. Y. 271; Vanorden v. Johnson, 14 N. J. Eq. 376; Cheeseborough v. Millard, 1 Johns. Ch. 409; Jones, Mortg. §§ 982, 723, 562. The judgment of the court below annulled the foreclosure proceedings, treating the mortgage lien as extinguished as to plaintiffs. This judgment was unwarranted by the complaint, the findings, or the evidence, and must therefore be reversed, and the complaint dismissed. All concur.

RICHARD S. TYLER, Respondent *v.* CASS COUNTY, Appellant.

1. Taxation — Lands in Northern Pacific Grant Prima Facie Taxable, Though in Fact Not Taxable.

The defendant county, through its treasurer, sold certain lands for delinquent taxes at the annual tax-sale in October, 1885. The lands so sold were a part of the original grant by the general government to the Northern Pacific Railroad Company. The lands were surveyed at the expense of the United States, and earned by said company after the passage of the act of congress of July 15, 1870, pertaining to survey fees; and no part of said survey fees had been repaid to the United States at the time of such sale. Prior to the assessment and levy of said taxes, for which said lands were sold, the railroad company had disposed of the lands, and conveyed them to third parties by deeds and contracts, and such third parties were in possession. Said lands were regularly assessed, and all the proceedings leading up to the tax-sale were regular. Plaintiff bought the land at such tax-sale, and brings the action to recovery the purchase money so paid. *Held*, that such lands were not taxable at the time of such assessment, because the United States held the fee title to said lands, and had a lien thereon for survey fees, (Railroad Co. v. Rockne, 115 U. S. 600, 6 Sup. Ct. Rep. 201;) but that, since land was a subject of taxation in Dakota Territory, *prima facie* these lands were taxable. Taxation was the rule; freedom from taxation the exception.

2. Same—Jurisdiction of Assessor.

Held, further, that the assessor being a judical officer, where property is exempt from taxation by class, and not by specific description, he has full jurisdiction, and it is his duty to decide in each instance whether or not a particular piece of property falls within any of the exempted classes, and in this respect the source of the law that establishes the exemption is immaterial.

3. Same; Same—Erroneous Decision of Assessor.

Held, further, that an erroneous decision of an assessor in the matter of exemptions does not deprive the tax proceedings of jurisdiction; but, until such erroneous decision is modified or set aside by the proper tribunal, all officers with subsequent functions may safely act thereon.

4. Same—Caveat Emptor—Budge v. Grand Forks Followed.

Upon a right of recovery at common law, there is nothing in this case to relieve the plaintiff from the rule of *caveat emptor*, as announced by this court in the case of Budge v. City of Grand Forks, 47 N. W. Rep. 390, (*ante* p. 309.)

5. Same—Treasurer is a Ministerial Officer, Protected by His Warrant.

Under the laws in force when such sale was made, the treasurer, in the matter of the collection of the taxes, was purely a ministerial officer; and when he received the duplicate tax-list, with the warrant of the county commissioners attached, if such process was fair on its face, and contained nothing that would apprise the treasurer of any defects or infirmaties, and in a case where it does not appear that the treasurer had any knowledge of any defects or infirmities, such treasurer was fully protected from personal liability in collecting the taxes upon all property contained in said list, so long as he acted strictly within the statute. The law furnished his authority for selling property for delinquent taxes; the warrant, with the tax-list attached, furnished him the subjects upon with to exercise such authority.

6. Same—Treasurer Must Sell all Lands on the List on Which Taxes Remain Unpaid.

The statute, (Comp. Laws, § 1621,) which required the treasurer to "sell all lands liable for taxes of any description for the preceding year or years," meant all lands liable for taxes, as shown by the process in his hands. He could not refuse to sell lands on his list, nor could he sell lands not on his list.

7. Same; Sale Held Not to Have Been by Mistake or Wrongful Act of Treasurer.

Section 1629, Comp. Laws, then in force, read as follows: "When by mistake or wrongful act of the treasurer, land has been sold on which no tax was due at the time, the county is to save the purchaser harmles by paying him the amount of the principal, and interest at the rate of 12 per cent. per annum from the date of sale, and the treasurer and his sureties shall be liable for the amount to the county on his bond, or the purchaser may recover the same directly from the treasurer." *Held*, that the sale of the lands in this case was neither the mistake nor the wrongful act of the treasurer, within the meaning of said section, and that plaintiff has no right of action under such section.

8. Section 84, Chapter 132, Laws 1890, Not Retroactive. Section 84, c. 132, of the laws of North Dakota for 1890 has no application to a sale of lands made before the enactment of said chapter.

(Opinion Filed November 29, 1890; Rehearing Denied.)

APPEAL from district court, Cass county; Hon. WM. B. MCCONNELL, Judge.

S. B. Barlett, A. C. Davis and J. A. McEldowney, for appellant: In absence of a statute the maxim *caveat emptor* applies to the fullest extent to purchaser of tax-title. Cooley on Taxation, (2d Ed.) 546; Devlin on Deeds, vol. 2, §§ 1349–51; Black on Tax Titles, §§ 263, 269; Blackwell on Tax Titles, §§ 53, 66, 67, 442; Desty on Taxation, vol. 2, p. 1011.

To bring the case within the statute, the sale must have occurred by the mistake or wrongful act of the treasurer; but he makes no mistakes and commits no wrong in pursuing the command of his tax warrant. Cooley, 797; Desty, vol. 2, p. 689; Sprague v. Birchard, 1 Wis., 457; Bird v. Perkins, 33 Mich. 28. The statute makes the tax-list, with the warrant attached, full authority to the treasurer to collect all the taxes therein contained.

Charles A. Pollock, also for the appellant: The treasurer is a ministerial officer, the warrant is his authority and must be strictly pursued: Desty, vol. 2, p. 685. The mistake, in this instance, was made by the assessor. To construe the statute so as to allow a recovery in such a case, would also render the treasurer and his bondsmen liable, and result in making it impossible for a treasurer-elect to secure bondsmen.

Jesse A. Frye, on behalf of Stutsman county, filed a brief on reargument of the case, for appellant: There are no findings showing what part of money received at tax-sale belonged to the county, nor how much of it had been paid over to the school districts. The words "by the mistake or wrongful act of the treasurer," must be allowed some force; they were placed in the statute to limit the cases in which recovery could be had. They are placed first in the section, and are the emphatic words of the section.

An examination of the revenue law establishes the fact that it is left to the assessor to determine what property is liable to taxa-

tion. The assessment roll and the tax-list, based thereon, with the warrant of the county board, is the rule of action for the treasurer, the command of his superiors and his shield when attacked for obeying it. He has no more right to question the decision of the assessor than has a sheriff, with execution, to question whether or not the court erred in rendering judgment. And the direction of the treasurer, in the statute, to sell all lands "liable to taxation" is to be construed with those other provisions of the statute, which require him to execute the warrant, and were intended to mean "apparently liable," liable as they appeared on the list. A ministerial officer is protected by process "fair upon its face." Cooley on Torts, 460, 464; Cooley on Taxation, (2d Ed.) 800; Savacoal v. Boughton, 5 Wend. 170; Chegarry v. Jenkins, 5 N. Y. 376; Sprague v. Birchard, 1 Wis. 457; Wall v. Trumble, 16 Mich. 228; Loomis v. Spencer, 1 Ohio St. 153; Little v. Merrill, 10 Pick. 547; Erskine v. Hohnback, 14 Wall. 613; Freeman on Executions, § 101. There can be no recovery here apart from the statute, as for money had and received.

Section 84, chap. 132, laws of 1890, does not affect this case. That act will not be construed to operate retrospectively: Cooley Const. Lim. p. 461; Giles v. Giles, 23 Minn. 348. Said § 84, by its teams applies only to sales made under the act of 1890. Even if that section applied, the legislature cannot create an obligation where none existed before. Cooley Const. Lim. 460; Hasbronck v. Milwaukee, 13 Wis. 37.

Messrs. Stone & Newman for the respondent: The money paid by a purchaser of land at tax-sale may, without a statutory provision to that effect, be recovered back, when the county had no jurisdiction to assess or tax the land. Chapman v. City of Brooklyn, 40 N. Y. 372; Bank of Commonwealth v. Mayor of New York, 43 N. Y. 184; Newman v. Supervisors of Livingston county, 45 N. Y. 676; Schwinger v. Hickok, 53 N. Y. 280; Norton v. Supervisors, 13 Wis. 684 (star p. 612); Cortlin v. Davenport, 9 Iowa, 239. And under the principles of these cases it has been repeatedly held that taxes illegally imposed and collected may be recovered back from the municipality into whose treasury they have been paid. Dorr v. Boston, 6 Gray, 131;

Slack v. Norrish, 33 Vt., 818; Gillette y. Hartford, 31 Conn., 356; Saulters v. Victory, 35 Vt., 357.

The rule that a purchaser cannot recover the money paid by him at a void tax-sale, as the cases show is based upon the principle that the purchaser at tax-sale is a volunteer in the payment of taxes legally levied on land subject to taxation, and has been applied only in cases where jurisdiction existed to levy the taxes, but the title of the purchaser failed by reason of non-compliance with the statute in the assessment, levy or sale; in short, the cases, in which the rule of *caveat emptor* applies. Sullivan v. Davis, 29 Kan. 21 (star p. 28); Lyon Co. v. Goddard, 22 Kan. 276 (star p. 389); Lynde v. Inhab. of Melrose, 10 Allen (Mass.) 49; Rice v. Auditor Gen., 30 Mich. 12; Hart v. Henderson, 17 Mich. 218; Hamilton v. Valiant, 30 Md. 139; City v. Humphrey, 84 Ind. 469; McWhinney v. City, 98 Ind. 182; Hilgenberg v. Commissioners, (Ind.) 8 N. E. Rep. 294; State v. Casteel, (Ind.) 11 N. E. Rep. 219.

The statutes in force at the time of the purchase in question upon the completion of the act of purchase by the plaintiff, constituted a contract between the state and the purchaser, upon which the purchaser was entitled to reply, and which the state or the county, acting as a *quasi* municipal sub-division of the state, is bound to respect and execute, and in the event of the failure of the title under such purchase, arising from want of jurisdiction to tax the land, the purchaser may recover his purchase money with the interest allowed by the statute, from the defendant. Corbin v. Commissioners, 1 McCrary, (C. C. Rep. U. S.) 621; Wheeler v. County auditor, Washington Co., (Minn.) 15 N. W. Rep. 375; Dickeman v. Dickeman, 11 Paige, 484; Fleming v. Roverud, (Minn.) 15 N. W. Rep. 119; Halibert v. Porter, (Minn.) 11 N. W. Rep. 84; Cooley on taxation, 370; Chapman v. Brooklyn, *supra*.

Chapter 28 of the Political Code of 1877, was adopted in the Territory of Dakota in 1868, from the Revised Laws of Nebraska of 1866, and was adopted substantially, without change.

The provisions of the Iowa Code of 1851, were adopted by the Territory of Nebraska in 1858, and contained many of the provisions of our present statutes; subsequent legislation by the

State of Nebraska having developed the precise provisions adopted by the legislature of the Territory of Dakota from the Nebraska statute.

Section 62, chap. 28, Political Code (1620 Comp. Laws), providing for the sale of land for taxes as originally adopted by the territorial legislature, directed the treasurer to sell "all lands on which taxes levied for the preceding year still remain unpaid."

Prior to the adoption of the Revised Codes of 1877 this statute was amended so as to make it read as follows: "All lands, town lots or other real property which shall be liable for taxes of any deecription for the preceding year or years, and which shall remain due and unpaid."

The form of deed provided by § 1639 of the Comp. Laws is the identical form prescribed by § 72 of the Revised Laws of Nebraska, 1886, and both recite that the lands conveyed are legally liable to taxation.

Section 78, chap. 28, Political Code, (§ 1629, Comp. Laws), in the Iowa Code of 1851, in the exact form in which it is found in the Comp. Laws, (except as to amount to be paid by the county) and in which form it was adopted in 1858 by the Nebraska Legislature, and in 1868, by the legislature of the Territory of Dakota. Since its adoption by the legislature of the Territory of Dakota, and in 1871 it was amended by the Nebraska legislature by adding the words, "or other officer" to the word treasurer, making it apply to the mistake or wrongful act, not only of the treasurer but of any other officer of the county.

These changes could not affect the purchaser, and must be construed as having been made for his benefit, and indicating an intention more fully to protect the title of the purchaser at tax-sale, and to furnish such purchaser assurances upon which he could rely—that only lands liable for taxes at the time of the sale, should be offered for sale.

Whatever respondent's right, in the absence of a statute, § 78, chap. 28, Political Code, (§ 1629 Comp. Laws) is clearly applicable to the case at bar, and justifies a recovery in this action. This statute is cumulative and not exclusive. Norton v. Supervisors of Rock County, 13 Wis. 684 (star p. 612.)

The act of the treasurer in selling the land was wrongful; it

was also the result of a mistake, and the mistake is a mistake of fact. The lands were not taxable, for the reason that the consideration therefor had not been paid to the United States. The payment of that consideration, which was the fee for surveying, was the fact which would render the lands liable to sale. The treasurer evidently supposed this fee had been paid, and for that reason offered the lands for sale. In this he was mistaken as to the existence or non-existence of the fact of the payment of the survey fee, and the mistake is therefore a mistake of fact. Roberts v. Adams Co., (Neb.) 25 N. W. Rep. 726; Same v. Same, 30 (Neb.) N. W. 406; Com's of Saline County v. Young 18 Kan. 440.

A mistake of fact consists in "belief in the present existence of a thing material which does not exist, or of the past existence of a thing which has not existed." § 888, Civil Code, (3512 Compiled Laws).

The mistake on the part of the treasurer, consisted in the belief that the Northern Pacific Railroad company had complied with all the conditions of its grant by the payment of the survey fees; which fact did not exist. The error arose from ignorance of a material fact, rather than from an erroneous conclusion, with a full knowledge of all the facts. Had the treasurer been fully cognizant of all the facts, yet drawn an erroneous conclusion therefrom as to their legal effect he would still not have been protected, as "ignorance of law will not furnish an excuse for any person, either for a breach, or for an omission of a duty." Story, Equity Jurisprudence, § 110; Kerr on Fraud and Mistake, p. 396. And it is therefore immaterial whether the mistake of the treasurer was a mistake of fact or a mistake of law. Northrop v. Graves, 50 Am. Dec. 264; Black v. Ward, 15 Am. Rep. 162, and notes, pp. 183 and 184.

The sale in question was also the wrongful act of the treasurer. He derived all his authority to make it from the statute alone. Parker v. Sexton, 29 Iowa, 421; Hurley v. Powell, 31 Iowa, 64; Rhodes v. Sexton, 33 Iowa, 540; Madson v. Sexton, 37 Iowa, 562; C. R. & M. R. R. Co. v. Carroll County, 41 Iowa 153; Blackwell on Tax Titles, p. 276, (star p. 252;) Black on Tax Titles, § 46; McInery v. Reed, 23 Iowa, 410; Sharp v. Speir, 4 Hill, 76. He is directed to sell "all lands, town lots and other real prop-

erty which shall be liable for taxes of any description for the preceding year or years, and which shall remain due and unpaid."

The power to sell lands for taxes is limited by the sovereign power of the territory, and no authority is conferred upon the treasurer, to sell any other than those directed by the legislature. His sale of other lands is an invasion of property rights which may be prevented by injunction and is therefore wrongful. N. P. R'y Co. v. Traill County, 115 U. S. 600.

The amendment of the statute by the insertion of the direction to sell only lands "which shall be liable for taxes of any description for the preceding year or years" was intended to limit the power of the treasurer. The language is clear. It cannot be construed to mean lands which shall appear from the tax-list to be liable. This would be adding words not necessary to the complete understanding of the meaning of the statute.

The only answer made by appellant to this position, is the one of hardship upon the treasurer. The statute provides that the county shall "save the purchaser harmless, by paying him the amount of principal, and interest at 12 per cent." It further provides that "the treasurer and his sureties shall be liable for the amount to the county, on his bond," and herein consists the hardship complained of by respondent.

It is evident, however, that there is no such hardship. If the treasurer has already paid to the county the money received, such payment would constitute a good defense in an action against him under the statute. Morrill v. Taylor, 6 Neb. 243; Blackwell on Tax Titles, p. 57 (star p. 56). The error in which appellant falls in the construction of this statute is in assuming that the treasurer sells by virtue of his warrant.

In those states in which the treasurer sells land by virtue of his tax warrant, the statute so expressly provides, and no such provision exists in the statute of Dakota. Our statute is unlike that of any other state or territory in that it directs the treasurer to sell only lands "liable for taxes."

The revenue statutes of the territory indicate an intention by the legislature to protect the purchaser at tax-sales from loss in all cases, and § 78, chapter 28 (1629), would seem to be only supplementary to § 79, chapter 28 (1643), and the fact that these

sections in the Political Code appear in the same connection would strengthen the view that each was designed to supplement the other and to provide a protection in all cases, to the tax-sale purchaser. Section 79 (1643) protects him, where there was a legal tax due upon the land.

Section 78 (1629) seems intended to cover all other cases. Section 79 (1643) providing for all cases where there is a tax due upon the property; § 78 (1629) for all cases where there are no taxes due upon the property. In the one case, the person owing the tax must pay it; in the other, as the county had no claim for any taxes it must refund it, and this is the construction put upon section 78 (1629) by the decisions of all the courts which have passed upon it. Coulter v. Mahaska County, 17 Iowa, 92. Scott v. Chickasaw County, 46 Iowa, 253; Morris v. County of Sioux, 42 Iowa, 416; McCann v. County Commissioners Otoe County,(Neb.) 2 N.W. Rep. 707; Roberts v. Adams County, (Neb) 25 N. W. 726; Roberts v. Adams County, (Neb.) 30 N. W. 404.

The state furnishes a public record of "lands liable for taxes" for the guidance of the treasurer in the performance of his duties under the statute. Section 10, chap. 8, Political Code, (77 Comp. Laws.); § 85, chap. 28, Political Code, (1646 Comp. Laws.)

The rule of *caveat emptor* does not apply as against a positive covenant or a statutory provision. The statute becomes a part of the contract of purchase, upon which respondent may rely.

There is in this no requirement that the purchaser shall make any inquiry with reference to the title or the assessment. City v. Humphrey, 84 Ind. 469; McWhinney v. City, 98 Ind. 183; Packard v. New Limerick, 34 Main. 269.

All cases cited by appellant, in support of its position are cases in which the title of the purchaser failed through some irregularity in the assessment, levy or sale.

The record of the assessment, levy and sale constitutes the muniments of title of the purchaser of tax sale, and the rule, extends no further than to require the purchaser to examine this record, and to know at his peril that each step provided by the statute and essential to a valid assessment, levy and sale has been strictly complied with. He is not bound to go beyond the

record, relating to assessment for, levy of, and sale under, the particular tax for which the land is sold. Hamilton v. Valiant, 30 Md. 140; Blackwell on Tax Titles, pp. 66, 67.

Respondent's right of action accrued upon the payment of the money to the treasurer. The wronful act which gave this right of action was the sale of the land by the treasurer to respondent and the receipt by the treasurer of the purchase money, and the treasurer deriving his authority to sell, solely from the statute, the wrongs or mistakes of the other officers of the county, can in no manner affect his liability, or the liability of the county, under this statute.

The treasurer does not derive his authority to sell, from the warrant, but solely from the statute, and the warrant is in no manner material to the sale; it is immaterial whether the treasurer has any warrant whatever, so far as the sale of real estate is concerned.

If the treasurer derives no authority to sell real estate from his warrant, it affords him no protection in such sale.

Even in the case of personal property, the warrant is no protection in cases where there is no jurisdiction. Waters v. Danies 4 Vt. 601; Henry v. Sargent, 13 N. H. 321; State v. Shacklett, 37 Mo. 280; St. Louis Mutual Life Insurance Co. v. Charles, 47 Mo. 462; St. Louis Building & Saving Association v. Leighton, 47 Mo. 393; Rice v. Wadsworth, 27 N. H. 104; Kelley v. Noyes, 43 N. H. 209; Cunningham v. Mitchell, 67 Pa. St. 82; Walden v. Dudley, 49 Mo. 420.

The respondent is further entitled to recover under § 84, of an act approved March 11, 1890. The section cited, so far as applicable, is identical with § 97, chapter 11, General Statutes of Minnesota, and in adopting it, the State of North Dakota adopted the construction put upon it by the courts of Minnesota. McDonald v. Hovey, 110 U. S. 619; Metropolitan R R. Co. v. Moore, 121 U. S. 558.

The provisions of this section apply as well to void sales made before the passage of the act as to those made after its passage. State v. Cronkite, 28 Minn. 197.

And in answer to Mr. Frye's brief they said, among other things: The argument of counsel proceeds upon the false pre-

sumption that all land is *prima facie*, taxable, and the erroneous conclusion drawn therefrom that in the case at bar, the assessor had jurisdiction on the subject matter.

All land in Dakota is *prima facie*, not taxable. It originally belonged to the government of the United States.

The government of the Territory of Dakota was subordinate to the government of the United States, and not a sovereign power. The exercise of the power of taxation is the exercise of a power of the highest sovereignty. N. P. R. R. Co. v. Rockne, 115 U. S. 600. It cannot be exercised by the subject over the property of the sovereign.

The presumption being that the title to land in the Territory of Dakota, is in the government of the United States, it follows that such land is not *prima facie* taxable, but is taxable only upon proof that the title has passed from the United States. The laws of the territory recognize this principle and provide the means of obtaining such proof. §§ 77 and 1646, Compiled Laws. The land of the United States is not therefore the subject matter of taxation by the Territory of Dakota, and only becomes such subject matter of taxation upon proof that the title has passed from the United States.

It is conceded by the stipulation of facts, that the land in question is a "part of the public domain of the United States." The assessor, therefore, had not jurisdiction of the subject matter at the time of the assessment of the land in question.

The sheriff must determine whether the property upon which he levies is the property of the defendant. This he must do at his peril.

He must also determine whether the property upon which he levies, and which is claimed as exempt from execution, is in fact exempt. In this he acts at his peril. These are questions of fact and law which he is required to determine.

The requirement that the treasurer shall only sell lands over which the territory has power of taxation: or in other words, which are subject matter of taxation is no more difficult of performance, and puts no greater burden upon him than the law has always put upon the sheriff, in determining whether the property he levies upon is the property of the defendant, and in

determining whether such property is or is not exempt from execution; neither does such determination any more render him a judicial officer, than the determination required of the sheriff confers judicial functions upon him.

It is a simple requirement, with which he is furnished ample means for complying, and which the compensation received by him, under the law, would make eminently proper should be placed upon him rather than any other officer, and which complied with furnishes an additional check upon the wrongful sales of government lands for taxes, and which compliance, as we shall see, furnishes his only defense to any action which can be maintained for the prevention or redress of the injury done by such wrongful sale.

BARTHOLOMEW, J. This action was commenced by the presentation by plaintiff of a claim to the board of county commissioners of the defendant county, by which plaintiff sought to recover certain money paid by him as the purchase price of tax-sale certificates on certain real estate sold by defendant's treasurer for delinquent taxes at the annual tax-sale on October 6, 1885. The board of county commissioners refused to allow the claim, and plaintiff appealed under the statute to the district court. In that court the case was tried upon an agreed statement of facts without a jury. From this statement it appears that the real estate in question was a part of the original grant by the United States to the Northern Pacific Railroad Company; that said company had, prior to the levy and sale hereinafter mentioned, disposed of said lands to private parties by deeds and contracts, and such parties were in possession; that no patents had issued for said land; that the railroad company earned said lands after the passage of the act of congress of date July 15, 1870, pertaining to survey fees; that said lands were originally surveyed at the expense of the United States government, and after the passage of said act of congress, and no part of the cost and expenses of said survey had, at the time of said tax-sale, been repaid by said railroad company to the United States, as provided by the last-mentioned act of congress; that in 1884, and prior thereto, the taxing officers of the defendant county proceeded to assess said lands and levy taxes thereon, all of

which remained unpaid on October 6, 1885, and on said date the treasurer of said county proceeded to sell said lands for said delinquent taxes, and the plaintiff purchased the same, and it was to recover the purchase money so paid that this action was brought.

No question is made as to the regularity of the sale, or the tax proceedings leading thereto. The statement of facts, as was intended, brings the lands clearly within the conditions existing in Railroad Co. v. Rockne, 115 U. S. 600, 6 Sup. Ct. Rep. 201. Under the law as settled by that case, the lands in question were not taxable at the time the taxes were assessed and levied, by reason of the non-payment by the railroad company of the survey fees, for which the general government had a lien upon the lands The lands not being taxable, of course nothing passed by the sale. Plaintiff claims to recover his purchase money, with 12 per cent. per annum interest, under a statute to be hereinafter considered; or the purchase price, with legal interest, as for money had and received. The liability of a taxing municipality to refund money paid for void tax-sale certificates, in the absence of a regulating statute, has very recently received full consideration by this court, and such liability was denied. See Budge v. City of Grand Forks, 47 N. W. Rep. 390, (*ante* p. 309). As the briefs of counsel in this case were in the hands of the court, and received careful consideration before the decision was reached in the case against the city of Grand Forks, it will not be necessary for us to say anything upon this point in addition to what we then said, except to note one distinction which is strenuously insisted upon by counsel. In the former case the invalidity of the tax-sale certificates arose from certain irregularities in the proceedings of the taxing officials; in this case the invalidity arose from the entire absence of power in the sovereignty under whose authority this tax-sale was made to impose any tax whatever upon the lands which plaintiff purchased at said sale. In Railroad Co. v. Rockne, *supra*, it was held that when, after the passage of the act of congress of July 15, 1870, lands within the original grant to said railroad company were surveyed by the general government, the government had a lien upon the lands for the expenses of

such survey, and that the fee title could be divested only by payment of such lien. Since the fee title, coupled with an actual interest in the land, remained in the general government, the territory of Dakota was powerless to tax such land. It is true that by territorial statute the property of the United States was expressly exempted from taxation; but said statute was unnecessary, as the organic act of the territory forbade the taxation by the territory of the property of the Unted States, and the power cannot exist in a state to tax the property of the United States, even in the absence of all special provisions. McCulloch v. Maryland, 4 Wheat. 316; Van Brocklin v. Anderson, 117 U. S. 151, 6 Sup. Ct. Rep. 670; Tucker v. Ferguson, 22 Wall. 527; People v. U. S., 93 Ill. 30.

Respondent claims that as to all matters of procedure, the rule of *caveat emptor* applies to tax-sale purchasers, but that it goes no further; that such purchaser is under no duty to inquire into the facts giving original jurisdiction to impose the tax; and that a taxing municipality should refund, in a case like this, when it has received money to which it had not only no legal right, but to which the territory was powerless to give it a legal right. On the argument this distinction impressed us, but upon full investigation we fail to find any direct support for it, either in authority or reason. The taxing powers of a state are plenary, and extend to all property within its jurisdiction not specially exempt. *Prima facie*, all property within any given county is taxable. The statute says, (§ 1541, Comp. Laws:) "All property, * * * except such property as is hereinafter expressly exempted, shall be subject to taxation." The organic act of the territory of Dakota (§ 12) says: "The legislative power shall extend to all rightful subjects of legislation not inconsistent with the constitution and laws of the United States; but * * * no tax shall be imposed upon the property of the United States." Clearly, this is a limitation—an exception to the general power. Taxation is a rule; freedom from taxation is the exception. Whoever would claim immunity must bring himself within the exception. He cannot make a *prima facie* case for recovery by simply alleging that he has been taxed. Butler v. Supervisors, 26 Mich. 22; Robertson v. Com-

missioners, 44 Mich. 274, 6 N. W. Rep. 659; Davenport v. Railroad Co., 38 Iowa, 633; Tucker v. Ferguson, *supra*. If any particular property be not taxable, it is because it belongs to a class which by some law has been relieved of the burdens of taxation; and from the very necessities of the situation the power must be lodged somewhere to say whether or not any specified piece of property belongs to any particular class, otherwise no assessment could ever be made. And a particular tract of property that belongs to a class that has been relieved of the burdens of taxation by express legislative enactment is just as free from such burden as the tract that belongs to the class that was never subject to the burden, and the county would have just the same legal right to the money received from a tax-sale of the one tract as of the other, and, as we view it, the duty would devolve upon the assessor in each case, and in the one just as much as in the other, to decide, primarily, whether or not the respective tracts should be assessed. In Foster v. Van Wyck, 41 How. Pr. 493, the court says: "It can make no difference, in regard to the assessor's jurisdiction, whether this immunity from taxation arises from state or national law. In either case the question of liability to taxation is to be determined by the assessors; and they have, of course, jurisdiction to decide it. It is equally a judicial decision in either case, having equal protection from liability for having decided erroneously." Nor must we confound an erroneous decision of the assessor on a matter within his jurisdiction with a want of jurisdiction. The assessor is the first officer to act in the process of the collection of the public revenue. His jurisdiction depends upon the antecedent act of no official. The law fixes his jurisdiction, and for taxation purposes it is co-extensive with its geographical limits, and covers the whole subject-matter of assessments. Every tract of land within those limits must either be placed upon or omitted from the assessment roll, and the matter must in each instance be determined by the assessor.

The cases sometimes speak of the assessor as having no jurisdiction to assess exempt property; but this must always be received in connection with the further proposition that the assessor has the right, and it is his duty, to decide what does and

what does not belong to the exempt classes. It is true that if the law expressly exempts certain described property, then there is no question of exemption left for the assessor to decide, and he is without jurisdiction to assess the property so described. State v. Shacklett, 37 Mo. 280, was a case of that kind. For the full facts in that case it is necessary to consult Railroad Co. v. Shacklett, 30 Mo. 550. The capital stock of the railroad company was exempt, but had been assessed by the assessor, and the collection of the tax enforced by Shacklett, and an action was brought against the collector and his bondsmen to recover the amount, and the court says: "The officer is bound to know the law; and if he executes process which is void, emanating from a court or officer having no jurisdiction, he acts at his peril, and will not be protected where the assessment was illegal. Its illegality was apparent on the very face of the tax-books placed in the collector's hands, as much so as if it had purported to have been made on the court-house or other property which the law expressly exempts from taxation." The language of the learned court, as applied to the case before it, has our full approval. It is no doubt true that, if an assessor should return a tract of land as belonging to and assessed against the United States, such assessment would be a nullity; and the assessor, and all acting after him in the collection or enforcement of such tax, would be trespassers. The same would be true should an assessor assess a schoolhouse and grounds against a school township; and the reason would be, in each case, that on the face of the proceedings the officer would be attempting to do what the law positively declared should not be done. But should the same officer in good faith, and relying upon the record as it appears to him, assess property against private parties in possession, but which in fact belonged to the United States or to a school township, such act would not be without jurisdiction, nor would the officer be a trespasser, because upon the face of the record he would be doing only what he had full authority to do. Of course, a tax-sale following such assessment would pass no title; but that event always follows an illegal sale, and does not prove that the assessor was without jurisdiction.

The agreed statement in this case shows that the lands in question formed a portion of the original grant of lands by the general government to the Northern Pacific Railroad Company. This and similar grants have been held to pass to the grantee an estate in *præsenti*, subject to be defeated by conditions subsequent, and that no patent or conveyance other than the grant was necessary to pass the title. Buttz v. Railroad Co., 7 Sup. Ct. Rep. 100; Railroad Co. v. Peronto, (Dak.) 14 N. W. Rep 103; Railroad Co. v. Smith, 9 Wall. 95; Railroad Co. v. U. S., 92 U. S. 741. The agreed statement repels the supposition of any failure on the part of the grantee to perform the conditions subsequent, and alleges that, prior to the assessment and levy of the taxes for which the land was sold, the Northern Pacific Railroad company had sold said lands to private parties and conveyed the same by deeds and contracts, and such parties were in possession. Now, we are bound to presume, in support of the action of the treasurer, that these transfers appeared of record. At the time of the assessment, § 5 of chapter 99 of the laws of Dakota Territory for 1883 was on the statute books. That section declared that these lands should be taxable as soon as sold, or contracted to be sold, by the railroad company. It is very evident from the agreed statement that the assessor of the defendant county, in perfect good faith, proceeded to assess the lands in controversy to the parties who appeared by the records of said county to hold the title to said lands, and were in possession of the same. This was clearly within his authority and clearly within his duty. The title of the purchaser at the tax-sale based upon this assessment fails, not because the proceedings were not regular and sufficient to pass whatever title the parties had in whose name the land was assessed, but because the title was not in such parties, and was in the United States. The respondent invokes for his protection the rule of *caveat emptor* as applied to sales on execution in so far as that rule relieves the purchaser of any duty to inquire into the jurisdiction of the court that rendered the judgment. But respondent misconceives the condition. There was no lack of jurisdiction in this case. Upon the ground of a common-law right of recovery, we

find no reason to distinguish this case from Budge v. City of Grand Forks, *supra*.

But the plaintiff bases his right to recover more especially upon § 1629 of the Compiled Laws, which is as follows: "When, by mistake or wrongful act of the treasurer, land has been sold on which no tax was due at the time the county is to save the purchaser harmless by paying him the amount of principal, and interest at the rate of twelve per cent. per annum from the date of the sale, and the treasurer and his sureties shall be liable for the amount to the county on his bond, or the purchaser may recover the amount directly from the treasurer." The trial court placed the liability of the county upon this statute, and under the agreed facts reached two conclusions of law: *First*, That the lands were not taxable when the assessment and levy were made. This is conceded. And, *second*. That the lands were sold by the mistake and wrongful act of the county treasurer. This conclusion is challenged, and the case turns upon its correctness. The case is of general interest to the state, as nearly all of the counties that include any portion of the grant to the Northern Pacific Railroad Company are directly interested in the result, and the aggregate of money involved is great. This statute appears as § 78 of chapter 28 of the Political Code of 1877. Under that section the purchaser was entitled to recover the amount to which he would have been entitled had the land been rightfully sold; and by another provision of statute the purchaser was then, and still is, entitled to his principal, and interest at the rate of 30 per cent. per annum, in case of redemption from rightful sales. But the original § 78 was amended by § 1, c. 130, Laws 1885, by which the rate of interest was limited to 12 per cent., and as thus amended it forms § 1629 of the Compiled Laws. The states of Iowa and Nebraska have similar statutes. So far as we can trace it, the statute originated in the Iowa Code of 1851, where it appears in language almost identical with our § 78 of chapter 28 of the Code of 1877. We do not find the Iowa statute construed by the courts of that state until after the Revision of 1860, when the statute appears in a changed form, and reads: "When, by the mistakes or wrongful act of the treasurer, land has been sold on which no taxes were due, or were errone-

ously assessed," etc.; and closes by making the treasurer liable only for his own acts and those of his deputy. This statute was before the supreme court of Iowa in Coulter v. County of Mahaska, 17 Iowa, 92; but in that case the liability of the county for the principal and interest was conceded, and the sole point in dispute was whether or not the county was liable for 30 per cent. penalty allowed by the Iowa statutes, and the court held that it was not. In Morris v. County of Sioux, 42 Iowa, 416, cited by respondent, there was no question under the statute before the court; and Scott v. Chickasaw Co., 46 Iowa, 253, was a clear case of wrongful assessment, and within the strict words of the Iowa statute.

In Nebraska the law was originally taken from Iowa, but was changed in 1871 to read: "When, by the mistake or wrongful act of the treasurer or other officer, land has been sold contrary to the provisions of this act," etc.; and making such treasurer or other officer liable over to the county on their official bonds. And by a later enactment (see § 131, Revision, 1881, Neb.) the statute is again changed to read as follows: "When, by the mistake or wrongful act of the treasurer or other officer, land has been sold on which no tax was due at the time, or whenever land is sold in consequence of error in describing such land in the tax receipt, the county is to hold the purchaser harmless," etc.; and closing by declaring that such treasurer or other officer shall be liable only for their own and deputies' acts. The cases of McCann v. Otoe Co., 9 Neb. 324, 2 N. W. Rep. 707; Roberts v. Adams Co., 18 Neb. 473, 25 N. W. Rep. 726, and *eo nomine*, 20 Neb. 411, 30 N. W. Rep. 405, are cited in support of the judgment in this case; but all those cases were decided after the change in the statute, and the two latter after the second change. What constitutes the legality is not disclosed in the case in 9 Neb. and 2 N. W. Rep. The court simply remarked that the plaintiff had brought himself within the provisions of their revenue law, and was entitled to recover, and added: "The question of the liability of the treasurer or other officer making the mistake or error is not, under the issues, involved in the case." The other cases were precisely alike in principle. The title to the lands was in the United States, and it was al-

leged "that said lands were wrongfully placed upon said tax-list by said defendant's commissioners and said defendant'a assessor." It is evident is these cases that the sale occurred through the mistake of the assessor, unless, indeed, it is the duty of the treasurer to ascertain for himself, in each instance, whether or not the land is subject to taxation—a point to be considered further on. The statutes of Iowa and Nebraska differ so radically with each other and with ours that it is evident that the decisions under one statute establish no precedent to be followed in the construction of the others. There is another class of statutes making counties liable generally to refund to tax-sale purchasers when the tax-sale is invalid, irrespective of any liability over on the part of any officer through whose mistake or wrongful act the sale was made. Such statutes are found in Kansas, Minnesota, Iowa, Wisconsin, Pennsylvania, New York, and in North Dakota since the passage of chapter 132, Laws 1890, and perhaps other states. The common object of these statutes is doubtless to encourage bidding at tax sales by removing all risk of loss to the purchaser. But it is evident, upon statement, the the decisions under these statutes cannot control this case. We must resort to the statute itself and the ordinary rules of construction. The appellant claims that the county treasurer is a ministerial officer, and that in performing his functions he is protected by his warrant, so long as that warrant bears no inherent evidence of infirmity; that he is bound, under the law, to follow that warrant, and that in the performance of that legal duty he can commit no "wrongful act," within the meaning of the statute; that the county is not liable, under the statute, in any case, unless the county treasurer is primarily liable, and that no liability attaches to the treasurer under the agreed statement.

The respondent contends that the tax-warrant is neither authority nor protection to the treasurer; that his authority to collect taxes must be found directly in the law, and that outside of the law he has no protection; that the law directs him to sell lands that are "liable for taxes," and that this liability must be determined by himself at his peril, without regard to his warrant; and that, if he sells lands not liable for taxes, he thereby

commits a legal wrong—a wrongful act, which a court of equity will redress—and brings himself within the terms of the statute. A consideration of the statutes governing the whole subject of taxation will be necessary to enable us to pass upon these contradictory points. Section 638 of the Compiled Laws, in describing the duties of the treasurer, provides that "he shall be the collector of taxes, shall keep his office at the county seat, and shall attend his office three days in each week. He shall be charged with the amount of all tax-lists in his hands for collection, and credited with the amounts collected thereon and the delinquent list, and shall keep a fair and accurate current account of the moneys by him received," etc. Section 639, following, reads: "The books, accounts, and vouchers of the county treasurer, and all moneys, warrants, or orders remaining in the treasury, shall at all times be subject to the inspection and examination of the board of county commissioners; and at the regular meeting of the board, in January and July of each year, and at such other times as they may direct, he shall settle with them his accounts as treasurer, and for that purpose shall exhibit to them all his books, accounts, and moneys, and all vouchers relating to the same, to be audited and allowed, which vouchers shall be retained by them for evidence of his settlement, and, if found correct, the account shall be so certified; if not, he shall be liable on his bond." Chapter 15, Compiled Laws, being chapter 28 of the Political Code of 1877, was in itself a complete revenue law. It has been superseded by chapter 132 of the Laws of North Dakota for 1890; but this case arose, and must be decided, under the old law. The first section of said chapter 15, being § 1541, provides that all property shall be taxable, unless expressly exempt. Section 1542 enumerates the exemptions, and includes the property of the United States. Section 1544 contains the following: "On or before the twentieth day of January of each year, the board of county commissioners of each county shall provide for the use of the assessor suitable notices and blank forms for the listing and assessment of all property, and such instructions as shall be needful to secure full and uniform assessment and returns, and a list of all the entered lands in his county or district, subject to taxation,"

etc. Section 1547 reads: "All taxable property, real and personal, shall be listed and assessed each year in the name of the owner thereof as soon as practicable on or after the first Monday in May, including all property owned on the first day of April of that year," etc.; and the remainder of that section, and the following sections to 1551, give the assessor full power to assess and list and value all taxable property. Following this are detailed instructions as to making the assessment roll, and the equalization by the board of county commissioners, and the levy of the taxes, and the preparation by the county clerk of duplicate tax-lists—one to be retained by the clerk, and the other forwarded, with the warrant of the county commissioners attached, to the county treasurer; and § 1596 provides as follows: "An entry is required to be made upon the tax-list and its duplicate showing what it is, and for what county and year it is; and the county commissioners shall attach to the lists their warrants under their hands and official seal, in general terms requiring the treasurer to collect the taxes therein levied according to law; and no informality in the foregoing requirements shall render any proceedings for the collection of taxes illegal. The county clerk shall take the receipt of the county treasurer on delivering to him the duplicate tax-list with the warrant of the county commissioners attached; and such list shall be full and sufficient authority for the collection by the treasurer of all taxes therein contained." The following sections to and including 1607 provide for the collection of taxes and form of duplicate receipts—one for the tax-payer, and one for the county clerk—and make the treasurer liable on his bond in case the receipt sent to the clerk does not correspond with his list, and provides for the treasurer's cash book and a duplicate to be kept by the clerk. Section 1608 is as follows: "If on the assessment roll or tax-list there be any error in the name of the person assessed or taxed, the name may be changed and the tax collected from the person intended if he be taxable, and can be identified by the assessor or treasurer; and when the treasurer, after the tax-list is committed to him shall ascertain that any land or other property is omitted he shall report the fact to the county clerk, who, upon being satisfied thereof, shall

enter the same upon his assessment roll, and assess the value, and the treasurer shall enter it upon the tax-list and collect the tax as in other cases." Sections 1610 to 1618, inclusive, provide for the delinquent penalties and liens, and for collection by distress and sale. Section 1612 reads as follows: "Taxes upon real property are hereby made a perpetual lien thereupon against all persons and bodies corporate, except the United States and the territory, and taxes due from any person upon personal property shall be a lien upon any real property owned by such person, or to which he may acquire a title." Commencing with § 1619, the statute provides for deliquent tax-sale of real estate; and § 1621 is as follows: "On the first Monday of October in each year between the hours of nine o'clock a. m. and four o'clock p. m., the treasurer is directed to offer at public sale at the court-house or at a place of holding courts in his county or at the treasurer's office, where by law the taxes are made payable, all lands, town lots, or other real property which shall be liable for taxes of any description for the preceding year or years, and which shall remain due and unpaid; and he may adjourn the sale from day to day until all the lands, lots, or other real property have been offered; and no taxable property shall be exempt from levy and sale for taxes." The following sections to and including § 1634 provide for the manner of sale, form of certificate to be issued to purchaser and for resale in case purchaser does not pay, and for private sale where land is not sold for want of bidders, for time and manner of redemption, and for execution and form of tax-deed. Section 1629, being the section under which this claim is made, has already been quoted in full. The remaining sections of the chapter are miscellaneous in their character. Section 1646 provides that the territorial auditor shall procure from the proper land offices a list of lands becoming taxable for the first time in each county, and forward the same to the respective county clerks on or before May 30th of each year, and § 1656 reads as follows: "If any county treasurer shall fail to make return, fail to make settlement, or fail to pay over all money with which he may stand charged, at the time and in the manner prescribed by law, it shall be the duty of the county clerk, on receiving instructions for that purpose

from the territorial auditor, or from the county commissioners of his county, to cause suit to be instituted against such treasurer and his sureties, or any of them, in the district court of his county."

It will be seen that, as a revenue law, this statute is specific, certain, and complete. The various steps are pointed out, and the various duties assigned, with exactness. What property shall be, and what property shall not be, taxed are specifically stated. The assessor is charged with the absolute duty, and armed with full authority, to assess all taxable property in the county. The board of county commissioners must furnish him with a "list of all entered lands in his county or district subject to taxation;" and "all taxable property, real and personal, shall be listed and assessed each year in the name of the owner thereof," etc.; and the assessment roll shall contain "a list of all taxable lands in such county." An assessor is a judicial, and not a ministerial, officer. Farrington v. Investment Co. (N. D.) 45 N. W. Rep. 191, and authorities cited. His actions are subject to review by the board of equalization or by *certiorari*, but until thus set aside or modified his decisions furnish the legal basis on which officers with subsequent duties must act. And the law having, at the outset, thrown upon the assessor the duty and the power of assessing all taxable property, proceeds upon the presumption that such duty has been done, except that for the greater protection to the revenue it provides that property that has been omitted from the roll may be entered thereon by the county clerk, and valued, and on the tax list, and the taxes collected as in other cases. But the statute will be searched in vain for any authority on the part of the treasurer to strike from his list any property that the clerk has entered thereon. Upon the assessment roll as returned or as modified by the board of equalization the taxes are levied; and the tax-list and duplicate, which must contain "a list of all the taxable lands in the county," are prepared by the county clerk. One list is retained by the clerk. To the other is attached the warrant of the county commissioners; and the same, with the warrant, is delivered to the treasurer. This warrant directs the treasurer "to collect the taxes therein levied

according to law," and such list "shall be full and sufficient authority for the collection by the treasurer of all taxes therein contained." When this list is delived to the treasurer, he is charged with the full amount thereof, and in his settlement with the commissioners he can be credited only "with the amounts collected thereon and the delinquent list;" and the delinquent list, as thus used, refers to such taxes as cannot, by the use of any means provided by the law, be collected; and, if the treasurer fails to thus account for the full amount with which he is charged, he and his bondsmen are liable on his official bond. From this view of the statute it would seem that the office of treasurer was purely ministerial. His duties are assigned, their performance demanded, and punishment prescribed for failure. There is no room for discretion, He is as powerless to question the decision of the assessor as is a sheriff with a special execution to question the correctness of a judgment of a court with acknowledged jurisdiction.

But respondent claims that judicial powers are given to the treasurer under § 1621, already quoted, where he is directed to sell all lands "which shall be liable for taxes of any description." The contention is that the order to sell lands that are liable for taxes is equivalent to an order to sell no lands that are not so liable, and that by said section the duty is thrown upon the treasurer to decide in each instance whether or not the property is so liable. This construction, if correct, largely supersedes the office of assessor. If the treasurer is to disregard his warrant, and sell no property not liable for taxes, even though the same appears on his list, it is at least equally true that he must sell all lands that are liable for taxes, although the same do not appear on his list. To perform that duty, the treasurer must at once recanvass the county, and decide for himself what property is, and what property is not, subject to taxation. We do not believe such was the legislative purpose. The language is no broader in § 1621 than in § 1593, where the clerk is directed to prepare a list which shall contain "a list of all taxable lands in the county." The mandate to the clerk is as positive as the mandate to the treasurer, but the clerk is to make "a list of all taxable lands in the county, * * * with the names

of the persons or parties in whose names each subdivision was listed," etc.; clearly showing that his list is to contain only what the assessor has listed. We think § 1621 must have a similar construction. The treasurer can strike nothing from his list, and is under no obligations to go outside of his list. But respondent insists, further, that what is now § 1621, when originally passed by the territorial legislature, directed the treasurer to sell "all lands on which the taxes levied for the preceding year still remain unpaid," and that the amendment introduced into the Code of 1877 directing the treasurer to sell "all lands liable for taxes of any description for the preceding year or years" was intended to throw this additional and judicial function upon the treasurer, and that if such was not its purpose it is meaningless and inexplicable. We think the amendment susceptible of a very simple explanation. Section 1612, Comp. Laws, as it appeared in the Code of 1877, provided, as it does now, that "taxes due from any person upon personal property shall be a lien upon any real property owned by such person, or to which he may acquire a title." If real estate could only be sold to satisfy the taxes levied thereon, clearly the provision relative to the lien on realty of taxes on personlty would be a nullity; and in order to give effect to that provision, it was necessary to direct all lands to be sold that were "liable for taxes of any description," and that undoubtedly was the purpose of the amendment. Viewing the whole statute and all its parts, we are still forced to regard the treasurer as a purely ministerial officer.

Ministerial officers are protected by the process under which they act when that process is fair upon its face, and while their acts are strictly within its terms, even though such process was issued improperly, and without jurisdiction. There may have been a doubt as to this proposition at one time, but we deem the law too well settled now to make a discussion of the cases profitable. See Cooley, Tax'n, (2d Ed.) §§ 797, 798; Freem. Ex'ns, § 101; Savacool v. Boughton, 5 Wend. 170; Chegary v. Jenkins, 5 N. Y. 376; Wall v. Trumble, 16 Mich. 228; Sprague v. Birchard, 1 Wis. 457; Loomis v. Spencer, 1 Ohio St. 153; Little v. Merrill, 10 Pick. 547; Erskine v. Hohnback, 14 Wall. 613. The

cases of Association v. Lightner, 47 Mo. 393 and Insurance Co. v. Charles, id. 462, and Walden v. Dudley, 49 Mo. 419—cited by respondent to show that the collector is not protected where property is exempt—do not go to the extent claimed.

In case of 47 Mo. 393, it is said: "But the collector is an executive officer, and has always been protected by his precept, unless it appears upon its face to have been issued against property wholly exempt from taxation." And in the case on page 462, same volume, it is said: "If the tax-list shows jurisdiction, he (the collector) is protected." And in the case in 49 Mo. this language is used: "Were the property expressly and unconditionally exempt, and by plain description, the collector would be bound to know it." An examination of these authorities shows beyond question that they held the collector protected in all cases unless his warrant showed upon its face that property had been assessed which was absolutely exempt by law, and in such a case the process is not "fair on its face." If, therefore, it should be admitted that the assessor in this case was without jurisdiction, still the treasurer would be protected; for there is no pretense that there was anything on the face of the warrant, either in its recitals or omissions, that apprised the treasurer of any defects in jurisdiction, or that the treasurer had any such knowledge outside of his warrant.

But it is insisted that the warrant is not the treasurer's authority; that it is not the process under which he acts; that he acts under the law. With our construction of the law, perhaps, the point is not very material in this case. It is no doubt correct, as the supreme court of Ohio held, under a statute similar to ours, (see Loomis v. Spencer, *supra*,) that the treasurer's authority comes both from the law and his warrant. He could not sell in a summary manner if the statute did not so provide. The law furnishes him the instrumentalities; the warrant furnishes him the subjects upon which the law's instrumentalities are to be exercised. The supreme court of Iowa, in Parker v. Sexton, 29 Iowa, 421, held that the warrant was not the treasurer's authority to sell. The question before the court was whether or not a sale made by a treasurer under a defective warrant was a valid sale, (the warrant was without seal;) and that

court, undoubtedly correct, held that it was. This case was followed by Hurley v. Powell, 31 Iowa, 64; Rhodes v. Sexton, 33 Iowa, 540; Madson v. Sexton, 37 Iowa, 562; and Railroad Co. v. Carroll Co., 41 Iowa, 153—all involving the same point, and decided in the same way. But the learned supreme court of Iowa, in Parker v. Sexton, *supra*, after quoting the section that is substantially the same as our § 1621, says: "Now, it will be observed that by the provisions of this section the tax-warrant requires the treasurer to collect, and is authority for the collection of the taxes in the tax-list contained. But it does not authorize him to collect taxes therein named by distress and sale of personal property, nor to sell real estate; nor does it exempt him from liability for illegal or erroneous taxes collected by him. In short, the tax-list and warrant, as provided by this section, becomes simply the authority to collect or receive the taxes: nothing more." This language does not meet our approval as applied to our statute. When the warrant requires the treasurer to "collect the taxes therein levied according to law," we think it does not simply mean to receive the taxes therein levied according to law, but that it requires the treasurer, if necessary, to use all the instrumentalities of the law to enforce the collection of the taxes. But as the treasurer, in selling the lands in question, acted strictly in accordance with law, and within the terms of his warrant, regular and fair on its face, with no inherent indications of infirmity, he is fully protected, unless the peculiar, and not altogether perspicuous, language of the statute imposes a liability contrary to the general rules governing such cases.

The statute, already quoted in full, says: "Where, by mistake or wrongful act of the treasurer, land has been sold on which no tax was due at the time," etc. Respondent contends that every sale of land on which no tax is due is a legal wrong —a wrong for which there is a remedy in a court of equity— and that, as the sale is the act of the treasurer, it is in every instance his wrongful act; that in an action brought to enjoin such sale, or to cancel such certificates of sale, the treasurer is a necessary party, and that judgment will in such action be rendered against him for costs, as a consequence of his wrongful act; that it would be a strange anomaly if a court of equity

should interfere by injunction to prevent a rightful act. But it often happens that, upon the record made, a certain act may be entirely rightful, and it may be the duty of the appropriate officer to perform such act, yet, by reason of matters *dehors* the record, its performance may be enjoined. A sheriff may have an execution in his hands which he is in duty bound to serve, but, by reason of matters *dehors* the record, the collection of the judgment on which the execution issued may be enjoined. Says Mr. Cooley: "The general rule is that such an officer (ministerial) is legally protected against any illegalities except those committed by himself, and it is not illegal for him to execute process that comes to him as a ministerial officer from other officers whose action he has no authority to revise or review. Indeed, if we are to judge by the weight of authority, it is more than doubtful if he has any right to do otherwise than to proceed with its execution, even though he may be satisfied that lying back of it are illegalities that would defeat the tax, and entitle one who should pay it to reimbursement." Cooley, Tax'n, (2d Ed.) 798; Wall v. Trumbull, *supra*. Nor does the incident of costs furnish any criterion by which to gauge the character of the act. If the action were brought after the treasurer who made the sale had gone out of office, his successor would be a proper and necessary party defendant and judgment for costs might be rendered against such successor, but no wrongful act could be charged to him. But will the language of the statute bear the construction that respondent seeks to place upon it? A careful reading of the statute makes it clear to our minds that the legislature never intended to place any ultimate liability upon the counties. In every instance where the county is required to pay under the statute, "the treasurer and his sureties shall be liable to the county for the amount on his official bond;" or, in every case where liability arises under the statute, the party "may recover the same directly from the treasurer." The treasurer and his bond are the ultimate sources of responsible liability; and, upon respondent's theory, whenever lands are sold upon which no taxes are due, that liability arises. It matters not whether the sale occurred through the carelessness or mistake or willful act of the property owner in with-

holding from the assessor facts which would show his property exempt from taxation; or the mistake of the assessor in adjudging that to be taxable which was not, or the wrongful act of the assessor in purposely listing property that he knew to be exempt; or whether it be the mistake of the clerk in copying the assessor's roll, or the wrongful act of the clerk in purposely falsifying that roll; or whether it be the mistake of the treasurer in failing to give credit for taxes paid, or in applying the credit to the wrong description; or the wrongful act of the treasurer in purposely selling lands on which he knew the taxes to have been paid—alike, in each case, the treasurer's bond is the guaranty against the financial loss.

We do not think the statute is so elastic. The first and most important thing in the section is a limitation. Before the rule is reached, the limitation is announced. The use of the limitation discloses the legislative understanding that it was necessary, in order to exclude cases that would otherwise come within the statute. If the legislature intended to throw upon the treasurer that universal responsibility for which respondent contends, then this limitation is worse than surplusage; it is misleading, confusing, and contradictory. We cannot charge that reproach upon the legislature. If the statute read, "When land has been sold on which no tax was due," etc., then it would be entirely perspicuous, and respondent's position would be unassailable; but with the limitation introduced, the position is entirely untenable. It is true that, whenever land is sold for taxes on which no tax was due, there exists a legal wrong. But whose wrong? We have seen that the treasurer has no discretion; he must follow his warrant. It cannot be that, where the law commands a thing to be done under pain of punishment, to do that particular thing is a wrongful act, which in turn must be followed by punishment. The wrong is the wrong of the assessor who assessed property that was not subject to assessment, and not of the mere minister who could not question his instruction.

There was a statement on argument that the treasurer made a mistake of fact in supposing that the survey fees had been paid when they had not, and that the sale was the result of such

mistake. Without holding that the treasurer could make a mistake upon that point, or that it would affect this case if he did, it is a sufficient answer that there is no suggestion of any thing of the kind in the agreed statement of facts. We conclude that the sale in this case was not made by the mistake or wrongful act of the treasurer. We reach that conclusion without considering the effect that the opposite conclusion would have upon county treasurers. When we consider that result, our conclusion becomes irresistible. In all cases of liability under the statute as it was passed, the treasurer was required to refund to the purchaser the purchase price, with 30 per cent. per annum, interest from the date of sale, and since the amendment of 1885, with 12 per cent. per annum interest. The statute will be searched in vain for any source of reimbursement to the treasurer. He may have exercised the utmost good faith, and been without personal fault, and have scrupulously accounted to the county for all money received from such sales; yet, if the statute covers the case, his liability is absolute, and must be met. It may be that where he has turned over to the county the money received from such sale, and is subsequently compelled to repay the money, with the enormous interest, to the purchaser, he can recover from the county the money received by it, with legal interest from the time of demand made; but that would be very inadequate financial consolation to the man who had been compelled to pay interest on that sum at 12 or 30 per cent. for a term of years.

The case at bar illustrates most forcibly the injustice that would follow such a construction of the statute. The question of the taxability of the lands within the original grant to the Northern Pacific Railroad Company had been in litigation for years. The district court of Dakota Territory had held that they were taxable, and on appeal to the supreme court of the territory the judgment was affirmed by a divided court. A rehearing was granted, and upon a second argument the judgment was again affirmed by a divided court and from that judgment of affirmance an appeal was taken to the supreme court of the United States. Pending that appeal, the lands here involved were assessed, and sold for taxes to plaintiff. Prior to such

assessment and sale, the supreme court of Minnesota had held other portions of the same grant, under identical conditions, to be taxable. Cass Co. v. Morrison, 28 Minn. 257, 9 N. W. Rep. 761. After the sale of the lands to plaintiff, the supreme court of the United States, in deciding the appeal from the supreme court of the Territory of Dakota, held the lands not taxable. Railroad Co. v. Rockne, *supra*. But to hold that the county treasurers are liable under this statute for all tax-sales of lands within said grant prior to the decision in the Rockne case requires us to say that because the county treasurers, in a matter wherein they acted in a purely official capacity, followed not only their warrants, but also the decision of the supreme court of the territory and of the supreme court of the state of Minnesota—the only courts that had passed upon the question at that time—therefore they incurred liabilities which must inevitably bankrupt them and their bondsmen. In our judgment, any statute that would permit, much less compel such a result would be a stigma upon legislation.

Another point is made in the case. As has been stated, chapter 132 of the Laws of North Dakota for 1890, approved March 11, 1890, provides generally for a recovery by the purchaser of the purchase money paid for invalid tax-sale certificates. Section 84 reads as follows: "When a sale of land, as provided in this act, is declared void by judgment of court, the judgment declaring it void shall state for what reason such sale is declared void. In all cases where such sale has been, or hereinafter shall be, so declared void, or any certificate or deed issued under such sale shall be set aside or cancelled for any reason, or in case of mistake or wrongful act of the treasurer or auditor, land has been sold upon which no tax was due at the time, the money paid by the purchaser at the sale, or by the assignee of the state upon taking the assignment, and all subsequent taxes penalties and costs paid by such purchaser or assignee, shall, with interest at the rate of 10 per cent. per annum from the date of such payment, be returned to the purchaser or assignee, or the party holding his right, out of the county treasury, on the order of the county auditor; and so much of said money as has been paid into the state treasury shall be charged to the state by the

county auditor, and deducted from the next money due the state on account of taxes. The county treasurer or auditor shall be liable on their bond for any loss occasioned by any such wrongful act." This section is nearly identical with § 97, c. 11, Gen. St. Minn., and it is claimed that in adopting the section this state adopts it with the construction put upon it by the courts of Minnesota. Such is undoubtedly the general rule. McDonald v. Hovey, 110 U. S. 619, 4 Sup. Ct. Rep. 142; Railroad Co. v. Moore, 121 U. S. 558, 7 Sup. Ct. Rep. 1334. The supreme court of Minnesota in State v. Cronkhite, 28 Minn. 197, 9 N. W. Rep. 681, held that the Minnesota statute applied to sales made before, as well as after, the act. There was a special reason for that decision that is not applicable here, but a scrutiny of the two statutes will disclose that they are not identical, and the decision rests squarely upon the variation. Our statute says: "When a sale of land, as provided in this act, is declared void," etc., and "in all cases where any such sale (*i. e.*, a sale as provided in this act) has been, or hereinafter shall be, so declared void," etc. The Minnesota statute reads: "When a sale of lands, as provided in this act, is declared void by judgment of court, the judgment declaring it void shall state for what reason such sale is declared void. In all cases where any sale has been, or hereafter shall be, so declared void," etc. The learned supreme court of Minnesota say: "The whole argument of appellant in support of his position hinges upon the assumption that the words "so declared void" refer exclusively to sales made subsequent to and under the act, and thereafter declared void, as prescribed in the first clause of the section. We think any such construction of the act is untenable. No possible reason can be suggested why the legislature should leave a class of cases like the present unprovided for.

Similar statutes for the protection of purchasers at tax-sales have been in force for years, broad enough to cover all such cases; and it can hardly be supposed that by re-enacting, in substance, an existing law, the legislature designed to omit from its benefits any such class of cases without any conceivable reason for doing it. * * * But we think the language will not reasonably admit of the construction claimed. The first clause of the

section simply provides what shall be the form of any judgment thereafter to be rendered, declaring void a sale of lands for taxes. The second clause is a general provision for the reimbursement of all purchasers at tax-sales declared void by judgment of court. Its language is broad and comprehensive, and covers every tax-sale declared void by judgment of court, without regard to whether the sale was made before or after the act." In our statute the recovery is limited to sales made as provided in the act. Minnesota had substantially the same law on her statute books for years before. The new enactment repealed the old, but if a recovery could not be had under the new law for void sales made under the old, then a limited number of cases would come neither under the new or the old law, and the court very properly said that the legislature never could have intended such a result. But this state had no such law until the enactment of chapter 132 of the laws of 1890, and there is no authority in that statute for applying its benefits to a tax-sale made in 1885.

We find no ground upon which respondent has any right of recovery in this case. The district court is directed to reverse its judgment, and dismiss the case; appellant to recover costs in both courts. Reversed. All concur.

REPORTER: See Wallace v. County, 6 Dak. 1.

C. AULTMAN & COMPANY, a Corporation, Appellant, *v.* J. C. GINN, Respondent.

1. Measure of Damages on Breach of Warranty.

The measure of damages on breach of warranty on sale of personal property being the difference between what it would have been worth had it been as warranted and its actual value, *held* reversible error to allow defendant's counsel to ask a witness to testify as to the value of the machine, a self-binding harvester, on the assumption that it was useless, the evidence clearly showing that it could be, and was in fact,

used, although it failed to bind all the sheaves; the answer to such question being prejudicial.

(Opinion Filed January 13, 1891.)

APPEAL from district court, Pembina county; HON. WILLIAM B. MCCONNELL, Judge.

Action on promissory notes. Answer admits execution and delivery of notes; alleges that they were given for a self-binding harvester, which was sold to defendant with a warranty that it was made of proper materials and was suitable for purpose of cutting and binding grain; that defendant relied on the warranty in buying the machine; that in fact it was useless for said purpose, that in trying to use said machine and through its failure to work defendant suffered damage to amount of $200.00; that he had paid on the purchase price of the machine $92.00; and demanded judgment for $292.00 and costs. Reply denied the allegations of the answer setting up a counter claim, and set out the terms of the warranty. Verdict for plaintiff in sum of $20.00. Plaintiff appealed. Thirteen assignments of error were made and argued by appellant's counsel, only one of which is considered by the court.

W. J. Kneeshaw and Cy. Willington for appellant cited on the point discussed in the opinion: Osborne v. Marks, 33 Minn. 56.

T. W. Gaffney, for respondent, filed no brief.

CORLISS, C. J. Under the pleadings the defendant in effect became plaintiff. He admitted plaintiff's cause of action, and sought to recoup damages for breach of warranty on sale of a self-binding harvester for which the notes sued upon were given. So far as the machine was concerned, the measure of defendant's damages on breach of warranty was the difference between the value of the machine had it been as warranted and its actual value at the time of delivery. Comp. Laws, § 4593. There being no evidence to the contrary, the presumption is that the property would have been worth the contract price had it been as warranted. In receiving evidence as to its actual value, the court erred in allowing this question to be answered: "I will ask

you what a self-binder is worth that fails to be useful as a machine of that character, if it is no use as a binder or harvester?" The question was properly objected to, and over this objection the witness was allowed to answer: "It ain't worth anything." The answer was very damaging. There was nothing in the case to warrant such an inquiry. There was no trouble except with the binder, and a careful examination of the plaintiff's own testimony on cross-examination discloses the fact that the defect in the binder was not a very serious one. He said that there was no trouble in cutting or elevating the grain; that the only difficulty was in binding, and the breaking of sway-bars; that it would not bind over half of the grain. The hypothetical question that we have quoted assumed a state of facts not only unwarranted, but in direct opposition to the evidence as it fell from the plaintiff's own lips. For this error the judgment must be reversed, and a new trial ordered. No other question will be considered, because the respondent has failed to file any brief in support of his judgment. All concur.

EDWIN R. CLARKE, Plaintiff and Respondent, *v.* ROBERT E. WALLACE, *et al.*, Defendants, ROBERT M. WINSLOW, CHAS. F. BICKFORD and FRANK E. BICKFORD, Administrators, etc., and RACHEL T. SHEETS, Administratrix, etc., Defendants and Appellants.

1. Partnership—Guaranty of Commercial Paper by Partner.

A member of a partnership engaged in the banking business has no authority by virtue of his partnership relation, to guaranty in the firm name commercial paper for the benefit or accommodation of third parties; and the firm would not be bound by such guaranty, in the absence of the showing of specific authority, or an authority to be implied from previous course of business between the parties, or subsequent ratification of the act by the other partners.

2. Same; Same—Extent of Partner's Power to Bind Firm by Guaranty.

One member of a firm has no authority to bind his firm by a guaranty of commercial paper of a third party, even when such firm is interested

in the transaction, unless such guaranty is necessary for carrying on the business of the firm in the ordinary way.

3. Same; Same—On the Facts of This Case Firm Held Not to be Bound.

Where one member of a firm, without the knowledge or consent of his copartners, in consideration of receiving security on a firm debt, guaranteed the note of the debtor to a third party, in an amount several times greater than the debt to be secured, *held*, that the other members of the firm were not bound by such guaranty.

(Opinion Filed February 2, 1891.)

APPEAL from district court, Stutsman county; Hon. RODERICK ROSE, Judge.

Nickeus & Baldwin, for appellants, cited: State v. Caskell, 18 Wend. 478; Zuel v. Bowen, 78 Ill. 234; Blodgett v. Weed, 119 Mass. 215; Deets v. Lonsdale, 49 Ind. 525. Plaintiff cannot hold the partners without showing their authority for or assent to the guaranty. Bank v. Bank, 60 N. Y. 285; Williams v. Wellbridge, 3 Wend. 415; Henderson v. Birkevootz, 37 Cal. 113; Frend v. Durgee, 35 Am. Rep. 92. Appellants did not become liable by receiving the benefit of the transaction. Craighead v. Petterson, 72 N. Y. 280; Lindley on Part. 504; Collyer on Part. 645, § 412.

Edgar W. Camp, for the respondent, cited: Andrews v. Congar, 102 U. S., p. 90 of Lawyers' Co Op. Ed.; Steuben Bank v. Albinger, 4 N. E. 341; Donegan v. Moran, 5 N. Y. Supplt. 575. The effect of the transaction was the same as if one partner had discounted Wallace's note with funds of the partnership and then sold and guaranteed the note. And this he might have done. Bank v. Bank, 101 U. S. 181. In order to save a debt a bank may do many things which under other circumstances would be *ultra vires*: Morse on Banking, §§ 54, 57, 60, 78; McCraith v. Bank, 10 N. E. 862; Bank v. Bank *supra*. Appellants are estopped by retaining benefits of the transaction. Morse, § 752. The managing partner made the promise on which plaintiff recovered; thus asserting his authority to make it as part of the firm business. Johnson v. Trask, 22 N. E. 377;

Fuller v. Scott, 8 Kan. 25; Story, Part. § 108; Credit Co. v. Howe Machine Co., 54 Conn. 387.

BARTHOLOMEW, J. The findings of the court show that in 1883 the defendants Winslow and Allen, together with John A. J. Sheets and Samuel M. Bickford—the two latter now deceased, and their administrators being defendants herein—were copartners engaged in the banking, real estate and loan business at Jamestown, Dak. T., under the firm name of "North Dakota Bank." Allen was the managing member of the firm. The firm had about $1,300 on deposit in the First National Bank of Jamestown. The defendant Robert E. Wallace was president of the latter bank. This bank was in failing circumstances. Wallace needed $5,000 to help him out of the embarrassments connected with the failure of the bank, and he proposed to Allen that, if the North Dakota Bank would aid him in obtaining a loan of that amount, he would secure the deposit of that firm in the said First National Bank. Allen, in his individual name, opened a correspondence with the plaintiff, Clarke, who was a non-resident, which resulted in obtaining a loan from Clarke to Wallace for the required amount, the note to be guaranteed by the North Dakota Bank. Accordingly Wallace executed the note, and Allen guaranteed it in the name of the North Dakota Bank, and the money was paid over to Wallace. Plaintiff Clarke, loaned the money largely on the credit of the North Dakota Bank. Wallace secured the deposit of the North Dakota Bank in the First National Bank by delivering collaterals to Allen, and the amount of the deposit was subsequently realized out of the collaterals. Allen had no express authority from the other members of the firm to guaranty the note of Wallace, nor did the other members of the firm have any knowledge of such guaranty, or ever in any manner ratify the same, nor did they, prior to the bringing of this action, have any knowledge that the deposit in the First National Bank was paid from the proceeds of collaterals delivered by Wallace to Allen.

This action, so far as these appellants are concerned, is brought on the guaranty heretofore mentioned, the defense being lack of authority on the part of Allen to thus bind the firm. The contract of guaranty was entered into contemporaneously

with the execution of the note, and plaintiff parted with his money largely upon the strength of the guaranty, and the consideration therefor was ample. Baylies, Sur. 54, 55; 9 Amer & Eng. Enc. Law, 69, and cases cited. The benefit received by the firm in obtaining security on its deposit in the First National Bank becomes material only so far as it bears upon the question of the authority of Allen to bind the firm. It is not usual for persons in business to make themselves answerable for the conduct of other people; and it is settled law that the party who takes a promissory note bearing the endorsement of a firm, either as guarantors or sureties, takes it burdened with the presumption that the firm name was not signed in the usual course of partnership business, and no recovery can be had by simply showing the endorsement. The holder is required to show special authority to make the endorsement on the part of the partner by whom the firm name was signed, or an authority to be implied from the common course of business of the firm, or previous course of dealing between parties, or that the endorsement was subsequently adopted and acted upon by the firm. Sweetser v. French. 2 Cush. 309: Schermerhorn v. Schermerhorn, 1 Wend. 119; Bank v. Bowen, 7 Wend. 158; Foot v. Sabin, 19 Johns. 154; Bank v. McDonald, 127 Mass. 82; Moynahan v. Hanaford, 42 Mich. 329, 3 N.W. Rep. 944. In this case there was no previous course of dealings between the parties from which authority on the part of Allen to guaranty in the firm name could be implied; there was no express authority, and no subsequent ratification on the part of the firm, or any member thereof. But it is claimed that the indorsement was made for the purpose of preserving the firm assets or collecting a firm debt, and that the implied powers of a partner cover such a case. We think, however, that plaintiff seeks to push the rule further than any decided case warrants. The case of Andrews v. Congar, 102 U. S. (Co Op. Ed.) bottom page 90, is cited to support the contention. It does not go so far. In that case one member of a firm, without the consent of his copartners, indorsed in the firm name certain notes issued by a corporation. It appeared, however, that the firm owned a majority of the stock of the corporation, and the larger part of the benefits arising from the notes accrued at once to the firm.

The business of the corporation might almost be regarded as a branch of the business of the firm.

But the correctness of the decision in that case seems to be questioned in Bates on Partnership, (vol. 1, § 321,) and it no doubt goes as far as any court has gone in that direction. In Lindley on Partnership, 341, (bottom paging,) it is said: "The latter cases, however, decide that, unless it can be shown that the giving of guaranties is necessary for carrying on the business of the firm in the ordinary way, one of the members will be held to have no implied authority to bind the firm by them." Nor do we think that one partner has any implied power to bind his firm in the use of unusual and extraordinary means for collecting a debt. In this case the guaranty was not necessary to carry on the firm business in the ordinary way. It does not appear but that the deposit of the firm would have been paid in full without the guaranty; but further than that we are not willing to hold that one member of a firm, in order to secure a debt, has implied authority to bind a firm for a distinct and separate liability to a third person; and particularly must that be true where, as in this case, the liability incurred is several times greater than the debt sought to be secured. It can be readily seen that any different rule would be extremely hazardous. As fully sustaining our views, see Moore v. Stevens, 60 Miss. 809; Macklin v. Kerr, 28 U. C. C. P. 90. Plaintiff failed to establish any liability upon the guaranty in suit as against these appellants, and the judgment of the lower court as to them must be reversed, and a new trial ordered. All concur.

Gull River Lumber Co. v. School District No. 39 of Barnes County.

1. Transfer of Causes Under Omnibus Bill.

Respondent, after the admission of North Dakota into the federal Union, argued the appeal in this case in the supreme court of the state, applied for a rehearing after defeat, and after securing a rehearing applied for and obtained a continuance. *Held*, he could not thereafter obtain a transfer of

the case to the federal court on the ground of diverse citizenship, under the provisions of the enabling act.

(Opinion Filed February 2, 1891.)

APPLICATION to remove cause to United States circuit court.

White & Hewit for applicant.

CORLISS, C. J. The plaintiff and respondent has filed a written request for the transfer of this cause to the proper federal court under the provisions of the enabling act. We find ourselves powerless to bring plaintiff back to the point of divergence, that it may again choose its future route in the course of this litigation. With the admission of this state into the federal Union, there were laid out before plaintiff by the omnibus bill two paths, running so diversely that the selection and pursuit of one must forever preclude the choice of the other. Had plaintiff chosen the federal path in proper time, the facts disclosed by its written request on this application would have entitled plaintiff to select that route. Diverse citizenship, both at the commencement of the action and at the time of the application, is shown. Both parties were corporations, but corporations are citizens, within the meaning of the statutes conferring jurisdiction on the federal courts on the ground of diverse citizenship. Wisconsin v. Insurance Co., 127 U. S. 265, 8 Sup. Ct. Rep. 1370. It is true that one of the parties, the defendant, was not a citizen of the state of North Dakota at the time the action was instituted, but it was at that time a citizen of the territory of Dakota, and that portion thereof out of which the state was afterwards erected; and the spirit of the enabling act is to regard the state as admitted, and the federal court as in existence at the time of the commencement of the action for the purpose of determining the right of either party to transfer the cause to the proper federal court. The plaintiff, however, has proceeded upon the highway of state jurisdiction. Subsequently to admission, plaintiff argued the defendant's appeal in this court, and, having been defeated, plaintiff applied for and obtained a rehearing, and moved for and secured a continuance of the reargument to a later day in the term.

It is clear that under the terms and spirit of the enabling act an election to remain in the state forum destroys the right to request a transfer of the case. The language of the act is that "in the absence of such request such cases shall be proceeded with within the proper state courts." § 23. The case is not to be proceeded with until such request is made, but in the absence thereof the state court is to retain jurisdiction; obviously, not during the pleasure of the parties, but thereafter throughout the entire course of the litigation. If there is "absence" of any request when any step is taken by the applicant for transfer in the state court after admission, the state court shall thereafter proceed with the case. But it is urged that to defeat a party's right to a transfer he must proceed in the state court voluntarily, and that all the steps taken by respondent since statehood have been coerced by its opponent; that, having been successful in the court below, respondent may act on the defensive without being open to the charge of having voluntarily elected to remain in the state court. It would seem to be clear that the acts of respondent since statehood have been voluntary, so far as the tribunal in which they were to proceed is concerned. Plaintiff may have been forced to argue the defendant's appeal in order to support the judgment rendered in favor of defendant in the district court, but it was not obliged to argue such an appeal in the state court. The question is not whether a party is obliged to take the steps which he has taken; but could he be compelled to take them in the state court? May a defendant who, after statehood, answers; who is successful on trial; who is defeated on appeal; and who finally meets with reverses in the trial court on a second trial—may he claim to have been acting under coercion through all these various stages, and that therefore he has never elected to remain in the state court? It would seem strange that a party who had the power to direct his course, and choose which line of jurisdiction he would follow, when pushed along by his antagonist should be heard to plead that his choice of tribunals was the result of coercion. If defendant's contention is sound, then, in the case we have above supposed, federal jurisdiction might be invoked after the lapse of years, and after a long course of procedure, in

every stage of which, up to the application for transfer, the defendant had been acting only on the defensive. There is nothing in the opinion in Wing v. Railroad Co., (S. D.) 47 N. W. Rep. 530, or Ames v. Railroad Co., 4 Dill. 251, to justify such a contention; on the contrary, we cite them in support of our conclusion. Should we be in error in our decision, the federal supreme court can correct it. The application is denied. All concur.

RHODE ISLAND HOSPITAL TRUST COMPANY, as Executor and Trustee of the estate of GEORGE H. BROWN, deceased, Plaintiff and Respondent, *v.* ANDREW J. KEENEY, Defendant and Appellant.

1. Attachment—Summons Must be Served Within Thirty Days.

Unless the summons in an action is served in the manner prescribed by law within 30 days after the issue of a warrant of attachment, the writ becomes void, and will be set aside on motion.

2. Personal Service of Summons Without the State.

The summons and complaint mailed to the defendant were taken from the postoffice by defendant's husband, and delivered to her in a sealed envelope. *Held*, not personal service, within the meaning of the statute permitting personal service without the state as a substitute for publication and deposit in the postoffice.

(Opinion Filed February 2, 1891.)

APPEAL from district court, Cass county; HON. WILLIAM B. MCCONNELL, Judge.

S. G. Roberts, (Benton & Amidon, of counsel,) for appellant: The statute providing for service on defendant not in the state must be strictly followed. Forbes v. Hyde, 31 Cal. 351; Beach v. Beach, 43 N. W. 702; Barber v. Morris, 33 id. 560. Wortman v. Wortman, 7 Abb. Pr. 72.

Messrs. Ball and Smith for respondent: The statute must be strictly followed but should be liberally construed. See 2129 Civil Code. The statute is silent as to the manner in which personal service out of the state shall be made, and in this case

the receipt of the summons is admitted. Under such circumstances there is no reason for holding the service void because made by a co-defendant. Cheeney v. Harding, 32 N. W. 64; Hanna v. Barrett, 18 Pac. 497; Johnson v. McCoy, 9 S. E. 87.

CORLISS, C. J. Under § 5011 of the Compiled Laws, appellant, by motion, assailed the attachment issued against the defendant's property herein, having purchased the same subsequently to the levy of the warrant, founding his motion upon the alleged legal death of the writ. He urged that the summons had not been served within thirty days after the warrant was issued, and that under the express provisions of the statute the attachment fell. Having failed in his motion, he has taken this appeal. The mere issue of a summons confers upon the court jurisdiction to issue a writ of attachment, provided proper affidavit and undertaking are filed. For the special purpose of obtaining and levying such a writ, the action is deemed pending from the time the summons is issued. The court's jurisdiction, however, is conditional. Personal service of the summons must be made, or publication thereof must be commenced within thirty days after the issue of the writ, to preserve its life. Section 4993, Comp. Laws. Such service is a condition precedent to the preservation of such jurisdiction. Taylor v. Troncoso, 76 N. Y. 599; Mojarrieta v. Saenz, 80 N. Y. 658; Blossom v. Estes, 84 N. Y. 615; Millar v. Babcock, 29 Mich. 526. For the purpose of the issue and levy of an attachment, the action is deemed pending from the time the summons is issued, provided the summons is served personally or constructively within thirty days. Within thirty days of what particular period is not stated, but we are clear that such period is the date of the issue of the writ. This view is sustained by the decisions of New York, where the same provision is found. Taylor v. Troncoso, 76 N. Y. 599; Mojarrieta v. Saenz, 80 N. Y. 658; Blossom v. Estes, 84 N. Y. 615; Gribbon v. Freel, 93 N. Y. 93. No personal service was made within the state, nor was the summons published; but the summons and complaint were mailed to the defendant, directed to her at her place of residence without the state, and the sealed envelope containing them was handed to her by her husband, who took the mail from the postoffice.

This was not personal service of the summons without the state, within the meaning of the statute, which permits such service as a substitute for publication and deposit in the postoffice. It was not personal service in any sense. It was but the completion of the transportation of the envelope and its contents by mail. Her husband did not pretend to, nor did he in fact, serve upon her any paper. He merely brought her her mail. The sealed envelope might with no different effect upon her rights have been handed to her by a letter carrier, or by some one at the postoffice. It was not contended that the papers were personally served upon defendant, in the strict sense of the term. But it was urged that the statute providing for such service did not contemplate the same kind of service as is requisite where a personal judgment is sought to be obtained against a defendant by service of a summons within the state; that the main, and only important, purpose of the statute was to give the defendant notice of a suit in which jurisdiction of his property had already been secured by the issuance and levy of an attachment; and that the receipt of the summons and complaint by mail gave her such notice. In short, it is contended that jurisdiction is not obtained by the service without the state, but by the levy of the attachment antedating service.

This view is based on an erroneous conception of proceedings by attachment. They are not, strictly speaking, proceedings *in rem*. Such proceedings are simply against specific property, or interests therein. No person is named in the proceeding as a party. The whole world is bound. The seizure is notice. It confers jurisdiction. No other prerequisite to jurisdiction is prescribed. Under our system the seizure of the property does not confer absolute jurisdiction. That jurisdiction is conditional. It will be defeated by failure to comply with a jurisdictional condition subsequent. Had the statute required publication of the summons, or its equivalent — personal service without the state—as a condition precedent to jurisdiction over property seized, where there had been seizure of property under attachment, it would not be seriously urged that that condition must not be strictly complied with. It cannot alter the rule that such service is essential to preservation of a qualified juris-

diction which has already attached. It is not the case of a mere irregularity in procedure, not jurisdictional in its character. It is the omission to comply with a condition subsequent, jurisdictional in its nature, by the very terms of the statute. Whatever is essential to the perpetuation of temporary and conditional jurisdiction must be regarded with as strict an eye by the courts as though it were a condition precedent to the vesting of any jurisdition at all. See Steere v. Vanderberg, 35 N. W. Rep. (Mich.) 110; Barber v. Morris, 33 N. W. Rep. (Minn.) 560. The view of respondent's counsel would lead to serious trouble. The statute provides that personal service of the summons without the state is equivalent to publication and deposit. This phrase, "personal service," must have the same meaning in all cases where such service is made. There cannot be one rule of construction where property has been attached, and another rule where the suit is instituted to settle a non-resident's claim to real property within this state, or for the purpose of foreclosing his equity of redemption in real estate situated therein.

According to this view of respondent's counsel, all that is needed is notice to the defendant in such cases. If only notice is requisite where property is attached, no more is necessary in other cases where the courts are authorized to hear and determine the rights of non-residents upon constructive service of process. In such cases jurisdiction is acquired if the defendant has reasonable notice of the proceedings. This is the effect of respondent's claim. If the manner of giving that notice may be dispensed with under a loose and so-called equitable construction of the statute, why not substitute the view of the court for the explicit language of the provision requiring the summons to be served or published within thirty days? Why not adjudge that all that is required is that plaintiff should proceed with reasonable diligence, and that forty days would be in time? The truth is that we have no right to speculate about the wisdom of or reason for jurisdictional prerequisites. There must be some precedure to confer jurisdiction. The character of it is a legislative question, subject, of course, to the requirements and prohibitions of the constitution; and no court may upon any supposed reason, or to give effect to any suppose spirit of the

statute, ignore its explicit and peremptory provisions. It is a safe rule that in taking jurisdictional steps the commands of the law must be strictly obeyed. The phrase "personal service" has a clear meaning, and when employed to designate the manner of service without the state, it should have the same significance as when used to prescribe the mode of service within the state. The summons was not served in any manner within thirty days after the issue of the attachment, and the writ fell for want of legal support. Nor did defendant's subsequent appearance revive it. Blossom v. Estes, 84 N. Y. 615. The order sustaining the attachment is reversed, and the district court is directed to set aside the attachment and all proceedings thereunder. All concur.

WALLIN J., being disqualified, did not sit; Judge TEMPLETON, of the first judicial district, sitting in his place.

ANDREW J. BOWNE, Plaintiff and Respondent, *v.* C. C. WOLCOTT, Defendant and Appellant.

1. Public Lands; Title After Location With Scrip and Before Patent.

Where a party locates government scrip upon government land at the proper local land office, and where, at the time, the land so entered was subject to entry with such scrip, and the entry was accepted by the officers of the local land office, and the patent certificate issued to the entryman, such entryman holds the full equitable and beneficial title to such land, but until the patent actually issues the naked legal title remains in the United States.

2. Same; Grant by Entrymen With Covenant of Seisin.

Where, in such case, the grantee of the entryman, prior to the issuance of the patent, again conveys the land by warranty deed, with covenant that he is "well seized in fee" of said land, such covenant of seisin is broken, because the grantor is not seized of the legal title.

3. Same; Same; Damages For Breach of Covenant.

But such deed does convey to the grantee the full equitable and beneficial title to said land; and until some paramount or hostile title is in some manner asserted, or the grantee is in some manner disturbed

in his possession, such breach is a mere technical breach, for which the grantee can recover nominal damages only.

(Opinion Filed February 4, 1891.)

APPEAL from district court, Grand Forks county; Hon. WILLIAM B. MCCONNELL, Judge.

J. F. McGee, for appellant, maintained: That the title was complete in the grantor before patent, and that there was, therefore, no breach of the covenant of seizure; but if otherwise then (the grantee having obtained the full equitable and beneficial title, being in possession and not offering to re-convey,) only nominal damages were recoverable.

W. H. Standish and J. H. Bosard, for respondent, filed no brief.

BARTHOLOMEW, J. This was a trial to the court on an action brought on a covenant of seisin in a deed. The unquestioned findings of fact show that prior to January 10, 1882, the land in controversy was the property of the general government; on that date one Bailey located what is known as "Sioux Half-Breed Scrip" upon said land at the local land office of the United States at Grand Forks; that the land was at that time subject to entry with such scrip; that the entry remained intact upon the records of the land department, but no patent has ever been issued by the general government for the land; that said entry was duly accepted by the local land officers at the Grand Forks land office; that subsequent to the acceptance of said location Bailey transferred the land to Goodhue, who entered into possession of and platted the same into town lots and blocks, and by warranty deed conveyed the property described in the complaint, and delivered possession of the same to the defendant, Wolcott; and that in March, 1883, in consideration of the sum of $600, Wolcott conveyed the land by warranty deed to the plaintiff, which deed contained the covenant set forth in the complaint, which is as follows: "And the said C. C Wolcott, party of the first part, for himself, his heirs, executors and administrators, does covenant with the party of the second part, his heirs and assigns, that he is well seized in fee of the land

and premises aforesaid, has good right to sell and convey the same, in manner and form aforesaid;" that under such deed plaintiff at once entered into possession of said property, and has never been in any manner interfered with or disturbed in such possession, and no paramount or hostile title to said premises has ever been asserted against plaintiff's title or possession. On these facts a judgment was rendered against defendant, and in favor of plaintlff, for the consideration money, with interest from the date of conveyance, with costs and disbursements. From this judgment defendant appeals to this court.

We first inquire whether these facts show a breach of the covenant of seisin. There is no allegation or intimation in the complaint that any irregularity or informality in any way exists in the location of the scrip, and it is expressly found that the land was subject to entry with such scrip. In speaking of the condition of the title to lands that have been properly entered, but to which no patent has been issued by the general government, the supreme court of the United States, in Carroll v. Safford, 3 How. 441, uses this language: "It is said that the fee is not in the purchaser, but in the United States, until the patent shall be issued. This is so technically at law, but not in equity. The land in the hand of the purchaser is realty, and descends to his heirs, and does not go to his executors or administrators. In every legal and equitable aspect, it is considered as belonging to the realty. Now, lands which have been sold by the United States can in no sense be called the property of the United States. They are no more the property of the United States than lands patented. So far as the rights of the purchaser are concerned, they are protected under the patent certificate as fully as under the patent. Suppose the officers of the United States had sold a tract of land, received the purchase money, and issued the patent certificate, could it be contended that they could sell it again, and convey a good title? They could no more do this than they could sell land a second time which had been previously patented. When sold, the government, until the patent shall issue, holds the mere naked legal title of the land in trust for the purchaser, and any second purchaser would take the land charged with the trust." This rule has been repeatedly affirmed,

and we are not aware that it has ever been departed from by the federal supreme court. As the facts in this case come fully within the language used by the court in the above quotation, it follows that the defendant, at the time he executed the conveyance in this case, was the owner of the full equitable and beneficial title to the land, but that the naked legal title was held by the United States. We hold that the covenants in the deed can be satisfied with nothing less than the conveyance of the absolute title, both legal and equitable. Lord Ellenborough, in Howell v. Richards, 11 East, 633, said: "The covenant of title is an assurance to the purchaser that the grantor has the very estate in quantity and quality which he purports to convey." The legal title being in the government, defendant did not convey to the plaintiff complete equitable, legal, and alienable title to the land, and hence the covenant of seisin was broken.

The more difficult question in this case, however, pertains to the correct rule of damages for such breach. It has been repeatedly announced, both in the text-books and in the decided cases, that the measure of damages for the breach of the covenants of seisin was the consideration paid, with interest. In numberless cases this statement stands unqualified. But an examination of the cases will show that in each instance a paramount title had been asserted, or that the grantee took nothing by the conveyance for the reason that the grantor had no interest to convey. Very many of the cases where this language has been used were cases where the grantee, who had been evicted by paramount title, was seeking to recover the actual value of the premises at the time of the eviction. The courts of this country, however, and generally, though not uniformly, of England, have limited the recovery to the consideration paid, and interest, irrespective of the extent to which the value of the premises has been augmented, either through an expenditure of money, or by reason of the favorable situation of the premises. The rule that is generally adopted in the United States is very clearly stated by Kent, C. J., in Statts v. Ten Eycks' Ex'rs, 3 Caines, 111, and the English rule is well stated in Mayne, Dam. (2d Ed.) 147. The general rule as thus stated was applied by the court in this case. Appellant contends that this case

comes without the general rule, and requires the application of different principles. In this we think he is correct. The hardship of the rule that would allow a grantee to recover the full purchase price with interest and still retain the land, has been very frequently discussed and regretted by courts. In this case respondent seeks to avoid the hardship of the rule by claiming that, if plaintiff recovered the full amount of the purchase money and interest, thereby the conveyance from the defendant to the plaintiff becomes a nullity; that defendant receives back his land, plaintiff recovers his consideration, and thereupon the parties are left in *statu quo*. This doctrine has been sometimes announced by the courts, but it is strictly limited to one class of cases, and those are cases wherein there has been a total breach of the covenant—wherein nothing, in fact, passed to the grantee; and while it would be true that the grantor could not aver against his own deed, yet the grantee could do so, and if the grantee avers that there has been a complete breach of the covenant, and that nothing in fact passed to him by the conveyance, and if such averments are verified by the decision of the court and thereby become matters of record, the grantor can thereafter take advantage of the record, and can re-enter, and the grantee will not be heard to set up the conveyance by way of estoppel. See Porter v. Hill, 9 Mass. 34; Foss v. Stickney, 5 Greenl. 390. In this case, however, there is no allegation that no interest passed by the deed On the other hand the complaint is pregnant with the thought that some estate did pass to the grantee, and the findings show that the full equitable title —everything but the mere legal title—passed to the grantee, that possession passed, and that such possession has remained undisturbed, and no hostile title has ever been in any way asserted. The record thus made would negative the idea that the grantee took nothing. It is perfectly clear that he took a very valuable interest. No reconveyance is tendered. The judgment on such a record would be no authority for the grantor to re-enter; so that in this case it is entirely clear that whatever estate was conveyed to the grantee still remains in him, and will remain in him after final judgment in this case. Hence he will have the full beneficial interest in the land, and also whatever

damages he may recover in this case. The inequity of allowing him to recover the full purchase money, and at the same time retain the land, is apparent on statement.

It has been held, when a grantee tenders a reconveyance when there has been a technical breach of the covenant of seisin, that the proper rule of damages is the entire purchase price, with interest. See Frazer v. Supervisors, 74 Ill. 282; Kincaid v. Brittain, 5 Sneed, 119; Recohs v. Younglove, 8 Baxt. 385. But in the absence of such tender the authorities are clear that for a mere technical breach the grantee is not entitled to recover the full amount of the purchase price. In Ore Co. v. Miller, 41 Conn, 112, the court say: "The general rule is, in actions upon contracts, that the plaintiff shall recover the actual damages sustained. An action for the breach of the covenant of siesin is not an exception to the rule. It is generally true that in such cases the actual damage sustained is in fact the consideration paid, and interest, because the party takes nothing by his deed. It is in its inception, and continues to be, a nullity. But if the party takes anything by his deed, directly or indirectly, by its own force, or by its cooperation with other instruments or other circumstances, whether it be the entire thing purchased or a part of it, the value must be considered in considering damages." To same effect, see Kimball v. Bryant, 25 Minn. 496; Cochrell v. Procter, 65 Mo. 41; 2 Suth. Dam. 265; Mayne, Dam. 143; Smith v. Hughes, 50 Wis. 620, 7 N. W. Rep. 653; Hencke v. Johnson, 62 Iowa, 555, 17 N. W. Rep, 766.

From these views it is apparent that the learned trial court adopted an improper rule of damages, as that court evidently deemed the consideration price and interest, irrespective of actual damage, to govern in cases of the breach of these covenants. It is claimed, however, that this rule receives some support from our statute. Section 4584, Comp. Laws, is as follows: "The detriment caused by a breach of the covenant of seisin, of right to convey, of warranty, or of quiet enjoyment, in a grant of an estate in real property, is to be deemed (1) the price paid to the grantor, or, if the breach is partial only, such proportion of the price as the value of the property affected by the breach bore, at the time of the grant, to the value of the whole prop-

erty." It is said that the breach in this case, such as it is, extends to the whole property, and that under the statute the damages would be the entire consideration. We do not, however, consider the statute as laying down an ironclad rule of damages that cannot be changed or varied. When the statute says that the detriment for the breach of the covenants is "deemed to be," we understand it to mean that primarily, and in the absence of proof of especial circumstances, that would be the general rule, but that the rule as thus announced is subject to the same variations as the common-law rule that existed prior to the enactment of the statute.

It appears in this case that appellant first conveyed to respondent by quit claim deed, under which respondent went into possession. Subsequently, but without any new or further consideration, on respondent's request, appellant executed and delivered the warranty deed containing the covenant on which this action was brought. Appellant contends that the warranty deed was without consideration, and hence the covenant was of no binding force. The findings give us no definite information as to why the second deed was executed. It may be that the original contract of sale contemplated a warranty deed. There is nothing in the findings to negative that idea, and it is hardly to be presumed that a party would have assumed the liabilities arising upon these covenants unless under some obligation to do so. In the present state of the record, we cannot hold that there was any error on this point. By reason of the error in the assessment of the damages, this case is remanded to the district court of Grand Forks county, with instructions to reduce the amount of the judgment to six cents damages. Appellant will recover costs of this court. Modified and affirmed. All concur.

CORLISS, C. J., having been of counsel, did not sit in the hearing of the above case; Judge TEMPLETON, of the first judicial district, sitting by request.

HELEN DE LENDRECIE, Plaintiff and Appellant, *v.* JARVIS PECK, Defendant and Respondent.

1. Appeal; Error Not Excepted to.

The action of the trial court in directing a verdict, and in refusing to allow plaintiff to dismiss her action, cannot be reviewed on appeal without an exception. Sections 5080, 5237, Comp. Laws, *held* not to permit such review without an exception.

(Opinion Filed February 25, 1891; Rehearing Denied.)

APPEAL from district court, Ransom county; Hon. W. S. LAUDER, Judge.

W. E. Dodge, for appellant; *S. H. Moer*, for respondent.

CORLISS, C. J. We regret that imperative rules of practice prevent our examining the merits of the questions raised on this appeal. They are not properly before us. Appellant's counsel has failed to challenge by exception the correctness of the ruling of which her new counsel now complains. The action is in the nature of replevin. Plaintiff's theory of the action, as disclosed by the complaint, was absolute ownership. On the trial she asked the privilege to amend her complaint by averring a special interest in the property. This request was denied. While this ruling was excepted to, error is not here assigned on account of it, and the question is not argued in this court. Failing to secure an amendment, plaintiff then requested leave to dismiss her action. This motion was not ruled upon. At the same time defendant asked for an instruction from the court directing a verdict in his favor. The motion of defendant was granted, and from the judgment based upon the verdict so directed this appeal is taken. Appellant's counsel failed to except to the action of the court directing a verdict; nor did he except to the failure of the court to allow plaintiff the privilege of dismissing the action on her motion. The necessity of exceptions to present these questions is not seriously controverted, except upon the theory that the general rule requiring an exception in such cases is rendered inapplicable by the provisions of § 5080 and § 5237 Compiled Laws. Section 5080 cannot possi-

bly have any application. The ruling of the court in directing a verdict cannot be construed as either an order or a decision, within the meaning of that section. Such ruling, if erroneous, constitutes an error of law occuring on the trial. The California statute is practically the same as § 5080, so far as this question is concerned. Mr. Hayne says, speaking of the California practice in this respect: "As has been shown, an erroneous ruling on a motion for a non-suit is an error of law. Under the language of the subdivision, therefore, it must be excepted to, and, as it is not one of those matters which are deemed to be excepted to, the exception must be taken by the party. The exception is to be taken in the same manner as exceptions to the admission or rejection of evidence." Hayne, New Trial & App. § 119. Only the verdict of a jury, certian orders, and certain decisions are deemed excepted to. The direction of a verdict is neither the verdict, nor is it an order or a decision. An order is defined as "every direction of a court or judge made or entered in writing, and not included in a judgment." § 5323, Compiled Laws. A decision is the written statement of the court's findings of fact and conclusions of law. §§ 5066, 5067, id. Nor will § 5237 aid the appellant. It provides that, "upon an appeal from a judgment as well as upon a writ of error, the supreme court may review any intermediate order or determination of the court below which involves the merits, and necessarily affects the judgment, appearing upon the record transmitted or returned from the district court, whether the same was excepted to or not. Nor shall it be necessary in any case to take any exception or settle any bill of exceptions to enable the supreme court to review any alleged error which would, without a bill of exceptions, appear upon the face of the record."

To bring the ruling of the trial court in this case within this section, it must be either an order or a determination. That it is not an order is apparent from the statutory definition of an "order" already referred to. There can be found no decision in which such a ruling, or indeed any ruling, upon the trial of a case, has been construed to be an order. Nor can it be held to be a determination. Such a construction would lead to the doc-

trine that every erroneous and prejudicial ruling upon a trial could be reviewed without an exception, as it would involve the merits, and necessarily affect the judgment. A defendant who admitted the making of an oral contract, void under the statute of frauds, and who relied solely upon its invalidity, could review, without exception, an erroneous ruling upon the trial admitting parol evidence of such an agreement, for this would involve the merits, and necessarily affect the judgment. The result of this doctrine would be that we would have a bill of exceptions without the necessity of any exceptions in it, and the phrase, "errors of law occurring at the trial," would cease to have any distinctive significance. Section 5237 was taken from Wisconsin in 1887. In 1883 it was construed by the supreme court of that state in the same manner in which we interpret it. In Kirch v. Davis, 55 Wis. 287, 11 N. W. Rep. 689, the court said, at page 298, 11 N. W. Rep. 693. "Counsel for the defendant argued that the direction to return a verdict for the plaintiff is an order or determination which may be reviewed on appeal from the judgment, under Rev. St. p. 799, § 3070." The court then quotes the section, which is precisely the same as § 5237, and then continues: "These provisions have no application to rulings and determinations of the court which do not become part of the record proper. If they are of such a character that it is necessary to settle a bill of exceptions in order to make them of record, they are not reached by the statute. Unless excepted to, they cannot be properly inserted in the bill. Otherwise we might have a bill of exceptions without exceptions, which is an absurdity. The direction to the jury to return a specific verdict for the plaintiff is no part of the record proper. It can only be presented in a bill of exceptions. Hence the statute does not authorize a review of such direction on appeal, no exception thereto having been taken."

Counsel for appellant insists that the sufficiency of the evidence to sustain the verdict was raised by his motion for a new trial, and that that question is before us. We cannot assent to this view. There is no question of fact or of the sufficiency of the evidence to sustain the verdict upon this record. The jury did not consider the sufficiency of the evidence, nor did they

find any fact in the case. Their verdict resulted from a mandatory ruling of the court upon the trial, which ruling was not excepted to. If this was error, it was an "error of law occurring on the trial." The judgment must be affirmed. All concur.

BARTHOLOMEW, J., having been of counsel, did not sit in the above case, nor participate in the decision.

THE STATE OF NORTH DAKOTA, *ex rel* S. B. BARTLETT, States Attorney for Cass County, Plaintiff and Appellant, *v.* SIMON FRASER and GEORGE BENZ, Defendants and Respondents.

1. **Intoxicating Liquors—Place Where Liquor is Sold a Nuisance.**

   Where it appears that one of the defendants, who resides at St. Paul, Minn., is, through the agency of the other defendant, engaged in carrying on the business of keeping for sale and selling intoxicating liquor at a place of business located at Fargo, in the state of North Dakota, in violation of the prohibitory liquor law, *held*, that such place of business is a common nuisance, whether such liquor was or was not drank by purchasers at such place of business, with the knowledge and consent of the agent in charge of such place of business. Construing § 13, c. 110, Laws N. D. See State v. Chapman, (S. D.) 47 N. W. Rep. 411.

2. **Same—Original Packages—Wilson Bill.**

   Held, further, since the passage by congress of the law commonly known as the "Wilson Bill." that sales of intoxicating liquor in violation of the prohibitory legislation of North Dakota, which are made in this state by a non-resident, through an agent living in this state, are unlawful sales, whether the liquor sold is or is not imported liquor, or whether it is or is not contained in the original cask or package in which it was shipped out of another state or county. *In re* Van Vliet, 43, Fed. Rep. 761; *in re* Spicklar, id. 653.

(Opinion Filed February 4, 1891.)

APPEAL from district court, Cass county; Hon. WILLIAM B. MCCONNELL, Judge.

George F. Goodwin, attorney general, *Chas. A. Pollock*, assistant attorney general, and *S. B. Bartlett*, for appellant; Messrs. *Ball & Smith* and *Tilly & Stewart*, for respondents.

WALLIN, J. This is an action in equity, brought on behalf of the state by the district attorney for Cass county under § 13 of chapter 110 of the laws of North Dakota of 1890. The plaintiff demands in its complaint, in substance, that the defendants be enjoined from the further prosecution of their business as liquor dealers, and that their place of business, located in the city of Fargo, be abated as a common nuisance. The complaint charges, in substance, that the defendants are carrying on the business of selling intoxicating liquor in Fargo at the number and street stated in the complaint. The defendant, Simon Fraser, answers separately as follows: "(1) That defendant denies each and every allegation in said complaint contained, except as hereinafter specifically admitted, denied or modified. (2) That defendant admits that S. B. Bartlett is district attorney, as alleged in paragraph one of said complaint. (3) And this defendant, for a further defense and answer to said complaint, says that at all times since the 20th day of July, A. D. 1890, in said complaint mentioned, this defendant was the duly authorized agent of George Benz, George G. Benz, and Henry L. Benz, copartners as George Benz & Sons, of the city of St. Paul, in the state of Minnesota, and as such agent to receive, offer for sale, and sell all kinds of spirituous and malt liquors at the city of Fargo, Cass county, state of North Dakota; also except expenses and commissions, to remit the same to George Benz & Sons, his principals; and, so acting, this defendant, since the 20th day of July, A. D. 1890, at all times in said complaint mentioned, has continued to receive, store, offer for sale, and sell spirituous and malt liquors, shipped to him as such agent, at said city of Fargo, by his said principals, from the city of St. Paul, in the state of Minnesota; and that he has received, stored, offered for sale, and sold the same as such agent, at the city of Fargo, while contained in the original packages in which they were inclosed and shipped at said city of St. Paul, by his said principals, and in which the same were received by this defendant, as such agent, in said city of Fargo, and not otherwise. That this defendant has occupied the premises in said complaint described since the 20th day of July, A. D. 1890, as a store-room in which to receive, store, expose for sale,

and to sell such goods, in manner and form aforesaid, and not otherwise. That said goods so received, stored, offered for sale, and sold as aforesaid were at all times since the said 20th day of July, A. D. 1890, in said complaint mentioned, the sole property of said George Benz & Sons, of the city of St. Paul, in the state of Minnesota, and were shipped to this defendant as their agent, in said city of Fargo, for the purposes aforesaid, from the city of St. Paul, state of Minnesota. Wherefore, this defendant prays: *First*, that the injunction granted by the court in this action be dissolved; *second*, that said action be dismissed as to this defendant, and that he go hence with his costs." Defendant George Benz answers the camplaint as follows: "(1) That this defendant denies each and every allegation in said complaint contained, except as hereinafter specifically admitted, denied or modified. (2) That this defendant admits that S. B. Bartlett is district attorney, as alleged in paragraph one of said complaint. (3) That this defendant, for a further defense and answer to said complaint, says that at all times since the 20th day of July, A. D. 1890, in said complaint mentioned, this defendant has been the owner of the premises described in said complaint. That he has leased the same to Simon Fraser, co-defendant in said action, to be used and occupied by said Simon Fraser as a store-room in which to receive, store, offer for sale, and sell spiritous and malt liquors, such business to be conducted in a lawful manner. That this defendant is informed and believes that said Simon Fraser, at all times since the 20th day of July, A. D. 1890, in said complaint mentioned, has occupied said building and premises as a store-room to receive, store, offer for sale, and sell as agent for said George Benz, George G. Benz, and Henry L. Benz, copartners as George Benz & Sons, spirituous and malt liquors, shipped to him as such agent at the city of Fargo, by his said principals, from St. Paul, state of Minnesota, selling and disposing of the same in the original packages, in which said liquors were shipped from said city of St. Paul, and received by him at said city of Fargo. Wherefore this defendant prays—*First*, the injunction in this action be dissolved; *second*, that said action be dismissed, and that this defendant go hence with his costs."

A trial was had in the district court upon an agreed state of facts, which embody, in substance, the facts and allegations contained in the answer of the defendants. We will only quote the fourth and fifth stipulations of fact, which are as follows: "That the following testimony of one J. C. Murray is agreed upon as being the only testimony offered in the case, and is here incorporated as a part of this statement of facts, the same being in words and figures following, to-wit: 'State of North Dakota, county of Cass—ss.: I, John Murray, of lawful age, being duly sworn, say I know the defendant, Simon Fraser. That I have seen him at his place of business. His business is a liquor dealer in the city of Fargo, county of Cass, state of North Dakota. His place of business is 516½ on Front street, in the city of Fargo, Cass county, state of North Dakota. I was at his place of business within the past two or three days. I bought a small bottle of whisky in his said place of business, and drank it. Saw others drinking. I have been in his place of business five or six times within the past week. His is a place where intoxicating liquors are kept for sale, and sold and drank upon the premises. At the times I have been there I have seen divers persons drinking intoxicating liquors there, and have seen them buy the same there. It is a place where persons resort for the purpose of drinking intoxicating liquors as a beverage. J. C. MURRAY. Subscribed and sworn to before me this 21st day of August, A. D. 1890. S. B. BARTLETT, District Attorney in and for Cass county, North Dakota.' It is further stipulated that all the liquor hereinbefore referred to was sold in original packages by the said defendant Simon Fraser, as the agent of George Benz & Sons, of St. Paul, Minnesota."

The trial court made and filed its findings of law and fact as follows: "This cause coming on to be heard at a regular term of this court, held at the courthouse in the city of Fargo, in said county and state, on the 10th day of September, A. D. 1890, the plaintiff being represented by S. B. Bartlett, Esq., district attorney, and Charles A. Pollock, Esq., and the defense by Messrs Ball & Smith and Messrs. Tilly & Stewart, on the plaintiff's complaint and the separate answers of said defendants, together with the evidence introduced by the respective parties,

and was argued by counsel on behalf of the plaintiff and defendants; wherefore the court makes and finds the following findings of fact herein, to-wit: (1) That the defendant Simon Fraser is the agent of George Benz & Sons, of St. Paul, Minnesota, and authorized as such agent to receive, store, and sell spirituous and malt liquors in the city of Fargo, in said Cass county, in the original package in which the same is consigned to him by his said principals at St. Paul, and received by him at said city of Fargo. (2) That during all times in said complaint mentioned said defendant Simon Fraser received, stored, and sold spirituous and malt liquors in the original packages, as consigned to him by his principals from St. Paul, Minnesota, and as received by him at said city of Fargo. (3) That the defendant George Benz is the owner of the building on the west half of lot eight, in block numbered five, of the original townsite of the town, now city, of Fargo, known as number five hundred sixteen and a half (516½) Front street, in said complaint described; and that he leases the same to said Simon Fraser as the agent of George Benz & Sons, to receive, store and sell spirituous and malt liquors as such agent and importer of the same in the original packages in which the same are consigned to him from St. Paul, Minnesota, and received by him at the city of Fargo, and not otherwise. (4) That the evidence fails to show that said liquor was sold by said defendant Simon Fraser to be drank on the said premises in said complaint described, or that the same was drank on said premises by and with the knowledge and consent of said defendant, Simon Fraser." From which findings of fact, the court finds the following conclusions of law, to-wit: "(1) That the defendant, Simon Fraser, as the law now is in the state of North Dakota, has the right, as an agent of a non-resident importer of spirituous and malt liquors, to sell the same in the original packages in which said liquors are consigned to him by his principals from a foreign state, and received by him in this state. (2) That under the law the said George Benz had the right to lease the premises described in the complaint to Simon Fraser, as agent for George Benz & Sons, to be occupied by him as such agent, for the purpose of receiving, storing and selling spirituous and malt liquors shipped to him by his

said principals from a foreign state, and received, stored, and sold by him in the original packages in which the same were consigned to him from a foreign state, and received by him in this state. (3) That under the laws of the state of North Dakota said premises in said complaint described cannot be adjudged a public nuisance by reason of said premises being occupied and used by said defendant Simon Fraser, as agent for George Benz & Sons, importers of spirituous and malt liquors, for the purpose of receiving, storing and selling the same, shipped to him by his said principals, so long as he receives, stores, and sells the same in the original packages in which said liquors are consigned to him by his principals from a foreign state, and in which he receives the same in this state. (4) That to justify the court in adjudging the premises a public nuisance it must be shown by clear and positive evidence that said premises were used by said defendant Fraser as a resort for drinking intoxicating liquors, and that such liquors were so drank on said premises, by and with his knowledge and consent. Let judgment be entered accordingly. By the court WILLIAM B. MCCONNELL, Judge." Upon these findings a judgment of dismissal was entered.

By a *consensus* of judicial opinion, both state and federal, the question of whether a state, in the exercise of its power to conserve the public health and morals, may wholly prohibit the manufacture and sale of intoxicating liquors within its boundaries, is no longer debatable in the courts. It is equally well settled where a statute of a state prohibits the manufacture and sale of liquor, and declares that all places in the state where it is made or sold are common nuisances, and also authorizes a court of equity to abate such places as nuisances, and to enjoin the prosecution of such business by the ordinary procedure employed by courts of equity, that such legislation does not deprive any one of any rights guaranteed by the constitution of the United States. See Mugler v. Kansas and Kansas v. Ziebold, 123 U. S. 623, 8 Sup. Ct. Rep. 273; Kidd v. Pearson, 128 U. S. 1, 9 Sup. Ct. Rep. 6. No reason is given by the trial court for its judgment dismissing the action, other than a general statement to the effect that under existing law it is not unlawful

for a non-resident importer to keep a place of business in this state where intoxicating liquors are stored and kept for sale and sold, provided that the liquor thus stored and sold is in the original and unbroken package in which it was contained when shipped out of the state from which it came. This conclusion of the district court could only have been reached upon the assumption that the prohibitory liquor law of North Dakota is unconstitutional, and consequently void in so far as it prohibits the sale of imported liquor in the original cask or package in which the same is imported. In this, we think, the trial court was mistaken. Counsel for respondents, arguing in support of the judgment of the court below, cite the case of Leisy v. Hardin, reported in 135 U. S. 100, 10 Sup. Ct. Rep. 681, and contend that the case is decisive of the point in question. It is true that decision, when it was promulgated by the supreme court of the United States, was, with respect to the federal question involved in the case, decisive authority, and the doctrine enunciated by the decision, as the law then stood, would have protected a non-resident importer in the business of importing foreign or interstate intoxicants and selling them in the unbroken package in this state regardless of any state law or police regulation forbidding such sale. The decision rests upon and interprets the provision of the United States constitution, declaring that congress shall have power "to regulate commerce with foreign nations and among the several states;" the decision, in effect, holding that intoxicating liquor, when it came into the state as an article of foreign or interstate commerce, was within the limits of federal protection, and until a quantity of interstate or foreign liquor should be sold by the importer, and thus mingled with the mass of state property, it was not subject to seizure under the police regulations of any state. The court say: "Commerce between the states has been confided exclusively to congress by the constitution, and is not within the jurisdiction of the police power of the state, unless placed there by congressional action." Prior to this decision there had been no congressional action placing interstate intoxicants within reach of the police regulations of any state prior to their sale by the importer, and with respect to this the court say: "The absence of a law by congress

as to any article of commerce is equivalent to its declaration that the importation of that article into the states shall be unrestricted."

But subsequent to the decision of Leisy v. Hardin, and prior to the sales of liquor made by the defendants, congress took action in the premises, by passing an act commonly known as the "Wilson Law." This statute provides "that all fermented, distilled, or other intoxicating liquors transported into any state or territory, or remaining therein for use, consumption, sale, or storage therein, shall, upon arrival in such state or territory, be subject to the operation and effect of the laws of such state or territory enacted in the exercise of its police powers, to the same extent, and in the same manner, as though such liquor or liquids had been produced in such state or territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise." Under this statute imported liquor, however introduced into the state, is placed under local control, to the same extent as liquors of domestic production. On crossing the boundry line of a state, the supreme authority has declared by this enactment that interstate liquor ceases to be an object of federal protection and control, and becomes mingled with the mass of property within the state, and, in common with all such property, is subject to local police regulations. It has been contended, but not in this case, that the Wilson bill is invalid, because it in terms delegates to the states the power to regulate interstate commerce in liquor, and thereby violates the provision of the federal constitution, which confers such power upon congress alone. Counsel in this case insist that the act, if valid, is only permissive to the states, and until a state has acted under it and passed new laws, or re-enacted existing statutes, that the provisions of the Wilson bill are inoperative, and that the pre-existing prohibitory legislation of the state is void as to imported liquor sold in the original package. This position is supported by a decision of the circuit court of the United States for the district of Kansas, in a decision rendered by Judges Philips and Foster. *In re* Rahrer, 43 Fed. Rep. 556. But precisely the opposite view is taken, and the validity of the Wilson law, and, also, of the pre-existing pro-

hibitory legislation of the state of Iowa, is fully sustained by able opinions promulgated by the circuit court of the United States for the southern district of Iowa, and also for the eastern district of Arkansas. The opinions are respectively by Judge Shiras and Judge Caldwell. They are reported in 43 Fed. Rep. 655, 761. We deem it unnecessary to quote the lauguage or reproduce the reasoning of these cases. They are already familiar to the profession. It will suffice to state that we concur in the conclusions reached in the cases cited, and hold that the Wilson law is a valid enactment, and is not a delegation, but an exertion, of legislative power of congress. Such legislation only indicates the time and the event which determines when intoxicating liquor ceases to be an article of interstate commerce and becomes mingled with the mass of property in the state, and thereby subject to local control. We hold that the prohibitory law of the state as originally passed could not have been enforced against any imported liquor while the same remained within the protection of federal authority, and that in this respect the law continues unchanged. It cannot now be enforced as against any imported liquor which has not passed beyond federal protection. A majority of this court is of the opinion that both the Wilson law and the prohibitory law of this state are valid enactments, and that the final arbitrator of the question—the supreme court of the United States—will so rule at a day not distant; and we are unanimous in viewing this case as one in which a subordinate court should give the benefit of the doubt, if any, in favor of the constitutionality of the laws in question. To do so is only to observe a firmly-settled rule of statutory construction. Cooley, Const. Lim. 220.

We shall consider only one further question. It arises out of the fourth conclusion of law as found by the district court, which is as follows: "That to justify the court in adjudging the premises a public nuisance it must be shown by clear and positive evidence that said premises were used by said defendant Fraser as a resort for drinking intoxicating liquors, and that such liquors were so drank on said premises by and with his knowledge and consent." This is error. Section 13 of the act declares that "all places where intoxicating liquors are sold,

bartered, or given away, in violation of any of the provisions of this act, or where persons are 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." It is quite plain from the language of the statute above quoted that Fraser's knowledge and consent as to the drinking on his premises was not an essential element. The place where the liquor was sold in violation of the statute was under the terms of the statute a common nuisance, whether such drinking was or was not permitted by Fraser. The state of South Dakota substantially copied the thirteenth section of the prohibition law of North Dakota, and the supreme court of that state has recently construed the same language, and reached the same conclusion. State v. Chapman, 47 N. W. Rep. 411. In the opinion, p. 415, the following language is used: "It is the illegal sale, or the illegal keeping of intoxicating liquors in a place, that makes it a common nuisance, and when either one or both are proven the offense is made out. The statute also provides that a place where persons are permitted to resort for the purpose of drinking intoxicating liquors as a beverage is also a common nuisance." It follows from the views above expressed that the judgment of the court below dismissing the action must be reversed and a new trial granted. It will be so ordered. All concur.

REPORTER: See Wilkerson v. Rahrer, 11 S. Ct. 865; Tredway v. Riley, 49 N. W. 268; Commonwealth v. Calhane, 27 N. E. 881; Tinker v. State, 8 So. 814.

IN THE MATTER OF THE ELECTION OF DIRECTORS OF THE ARGUS PRINTING COMPANY.

1. **Corporation; Right of Pledgee to Vote Stock.**
   The pledgee of stock in whose name it stands on the corporate records has a right to vote the stock at a meeting to elect directors.

2. **Same; Pledgor Can Compel Pledgee to Give Proxy.**
   The pledgor has no right to vote such stock, but a court of equity will, in a proper case, compel the pledgee to give the pledgor a proxy.

3. Same—Stockholder on Company's Books May be Director Though He Have Assigned His Stock.

One not appearing to be a stockholder upon the corporate records is not eligible to the office of director, under the statute providing that only stockholders are eligible to that office; one who still so appears is eligible, and may vote notwithstanding he has assigned the stock.

4. Same—Majority of Stock Must be Voted at Election of Directors.

A vote of stockholders representing a majority of the subscribed capital stock is necessary to the choice of a director. There being no such vote, the election is declared illegal, and a new election ordered.

5. Same—Stockholders' Meeting.

A stockholder holding a majority of the subscribed capital stock having acquiesced in the organization of a stockholders' meeting, and having participated in the business of the meeting as so organized, among other things having nominated persons for the office of director, cannot afterwards withdraw from the meeting, and organize another meeting, at the same time and in the same place, and by voting at that meeting elect the persons voted for by him the directors of the corporation. It is his duty to remain in the meeting first organized and vote his stock there, and no one can prevent his voting his stock at that meeting, although his ballot may be rejected. Notwithstanding such rejection, had he voted his stock at the original meeting the persons voted for by him would have been elected directors, and under the statute declared by the court elected.

6. Same; Same—Transfer of Stock Made to Render Transferee Eligible for Director.

A transferee of stock upon the corporate records is qualified to vote the stock, and to become a director, although the transfer was made for the express and sole purpose of so qualifying him, provided that it was not made in furtherance of a fraudulent scheme.

(Opinion Filed February 25, 1891; Rehearing Denied March 18, 1891.)

APPEAL from district court, Cass county; Hon. WILLIAM B. MCCONNELL, Judge.

A. C. Davis, B. F. Spaulding and *Benton & Amidon*, for Appellant; *Edwin O. Faulkner, S. G. Roberts* and *A. W. Edwards* for Respondents A. W. Edwards, H. C. Plumley and M. R. Flint.

CORLISS, C. J. On this appeal we are asked to review the judgment of the district court in summary proceedings instituted under § 2932 of the Compiled Laws to determine

the rights of certain persons to the offices of directors of the Argus Printing Company, a corporation. This statute provides that upon the application of any person or body corporate aggrieved by any election held by any corporate body, or any proceedings thereof, the district judge of the district in which the election is held must proceed forthwith summarily to hear the allegations and proofs of the parties, or otherwise inquire into the matters of complaint, and thereupon confirm the election, order a new one, or direct such other relief in the premises as accords with right and justice. This appeal must be decided as we determine which of two persons had the right to vote 546 shares of stock. The total amount of stock which had been issued at the time of the meeting to elect directors was 570 shares. At this meeting A. W. Edwards voted these 546 shares of stock for the following directors: A. W. Edwards, H. C. Plumley, M. R. Flint, Alexander Griggs, and William A. Stevens. At the same time and place one E. O. Faulkner voted these same shares for Alexander Griggs, W. A. Stevens, B. F. Spaulding, H. C. Plumley, and E. O. Faulkner as directors. In whom was the right to vote this stock? The stock at one time was the property of A. W. Edwards. For the purpose of securing a debt which he owed to J. J. Hill, this stock, with 10 other shares, was transferred upon the corporate books to E. O. Faulkner, confidential clerk of Mr. Hill. Certificates representing the total number of shares, 556, were issued directly to Mr. Faulkner, the same being signed by Mr. Edwards as president of the company, the old certificates held by Edwards being canceled. The stock, therefore stood on the books of the corporation in the name of E. O. Faulkner.

Where there has been no transfer of the stock on the books of the corporation a pledgee of such stock may not vote it. The beneficial ownership is still in the pledgor, and the records of the corporation still show him to be a stockholder. In none of the cases cited in which the right to vote was adjudged to be in the pledgor, instead of the pledgee, had there been a record of the transfer made. See McDaniels v. Manufacturing Co., 22 Vt. 274; *in re* Baker, 6 Wend. 509; *ex parte* Willcocks, 7 Cow. 410; Strong v. Smith, 15 Hun. 222. We have discovered an Oregon

case in which the stock stood upon the books in the name of the pledgee, but the court ruled that he could not vote it because he had no authority from the pledgor to make the transfer. This case we will refer to hereafter. In the case at bar the stock stood in the name of the representative of the pledgee upon the corporate records. Was he a *bona fide* stockholder within the meaning of our statute which restricts the right to vote stock to those who are *bona fide* holders thereof? § 2931, Comp. Laws. It may be stated in this connection that Edwards could not vote the stock, as the stock had not stood in his name on the books of the corporation for ten days prior to the election. Id. If, then, the representative of the pledgee could not vote the shares, no election of directors could be held, for no one else had a right to vote it, and without its being represented at the election no election of directors could be had, for the reason that these shares constituted more than half of the capital stock. At all elections or votes had for any purpose, there must be a majority of the subscribed capital stock represented, etc. Id. No person can be chosen director without a majority vote. § 2925, id. At the time the legislature em-employed the word "stockholders" in the section prescribing the qualification of a voter at corporate meetings, that word had acquired a definite and fixed meaning, so far as a pledgee of stock was concerned. It had been repeatedly adjudged that a pledgee of stock whose transfer was upon the corporate records was a "stockholder," within the meaning of the statute providing for the liability of stockholders for the debts of corporations. The general reasoning upon which these decisions were based was that the pledgee with a recorded transfer was a stockholder for the purpose of receiving dividends and voting at stockholders' meetings; and that he could not enjoy all of the benefits enjoyed by a stockholder without being subject to a stockholder's liability. Said the court in Bank v. Case, 99 U. S. 628: "It is thoroughly established that one to whom stock has been transferred in pledge, or as collateral security for money loaned, and who appears on the books of the corporation as the owner of the stock, is liable as a stockholder for the benefit of creditors. We so held in Pullman v. Upton, 96 U. S. 328, and

like decisions abound in the English courts, and in numerous American cases, to some of which we refer. Adderly v. Storm, 6 Hill, 624; Rosevelt v. Brown, 11 N. Y. 148; Bank v. Burnham, 11 Cush. 183; Magruder v. Colston, 44 Md. 349; Crease v. Babcock, 10 Metc. (Mass.) 535; Wheelock v. Kost, 77 Ill. 296; *in re* Bank, 18 N. Y. 199; Hale v. Walker, 31 Iowa, 344. For this several reasons are given. One is that he is estopped from denying his liability by voluntarily holding himself out to the public as the owner of the stock, and his denial of ownership is inconsistent with the representation he has made; another is that by taking the legal title he has released the former owner; and a third is that, after having taken the apparent ownership. and thus become entitled to receive dividends, vote at elections, and enjoy all the privileges of ownership, it would be inequitable to allow him to refuse the responsibilities of a stockholder." In Pullman v. Upton, 96 U. S. 328, the court said: "So in Bank v. Burnham, 11 Cush. 183, it was decided that a transfer of stock on the books of the bank, intended merely to be held as collaterial security, makes the holder liable for the bank debts. It was said that the creditor was to be considered the absolute owner, and that his arrangement with his debtor cannot change the character of the ownership." In Magruder v. Colston, 44 Md. 349, where it was held that the pledgee whose transfer was recorded was liable as a stockholder, the court said: "Stockholders are those who appear on the books of the bank as owners of shares, and who are entitled to manage its affairs, and they can only throw off the liabilities incident to that relation by transferring the stock."

That the word "stockholder," as used by the legislature, was, in the absence of any qualification of its meaning, understood by the legislature to be sufficient to embrace a pledgee with a legal title to the stock because of a transfer on the books, is clear from the provisions of § 2933, Compiled Laws, expressly declaring that the holding of stock by a pledgee shall not render the holder a stockholder, within the meaning of that section, rendering stockholders liable for debts of the corporation. It is significant that in § 2931, prescribing the qualification of a voter, and declaring that he must be a *bona fide* stockholder, no

such limitation of the meaning of the word "stockholder" is to be found. There are numerous cases in which it is said that a pledgee is a stockholder, and entitled to vote when he appears to be a stockholder on the books of the corporation. In Franklin Bank v. Commercial Bank, 36 Ohio St. 350, plaintiff loaned to one Foote, the president of defendant, a sum of money, and received as security a pledge of the capital stock of defendant owned by such president. Defendant having refused to transfer the shares on its books, plaintiff sued for the conversion of the stock. The court held that he could not recover, on the principle that one corporation will not be allowed to own stock in another corporation in the absence of statutory authority. Said the court: "Were this not so, one corporation, by buying up the majority of the shares of the stock of another, could take the entire management of its business, however foreign such business might be to that which the corporation so purchasing such shares was created to carry on. * * * Nor would this result follow any the less certainly, if the shares of stock were received in pledge only to secure the payment of a debt, provided the shares were transferred on the books of the company to the name of the pledgee. A person in whose name the stock of the corporation stands on the books of the corporation is as to the corporation a stockholder, and has the right to vote upon the stock. * * * Hence if the plaintiff appeared upon the books of the defendant as the transferee or owner of the two hundred shares of stock represented by the certificate to Foote, it would have the right to vote upon the stock at all meetings of the stockholders of the defendant; and it would be only necessary for it to procure in pledge, as security for money loaned, a majority of the shares of the capital stock of the Commercial Bank, (defendant in the case,) in order to obtain full control of its affairs and take charge of its banking operations. * * * It therefore follows that the refusal of the defendant to permit the transfer upon its books to the plaintiff of the two hundred shares of its stock violated no right of the plaintiff, and consequently created no liability on the part of the defendant. Such refusal did not amount to a conversion of the stock. Its action in refusing to transfer was but the denial

of any right by the plaintiff to be placed in a position to interfere and participate in the control and management of its internal affairs." In Poole v. Association, 30 Fed. Rep. 513, Judge Brewer says: "The stock was assigned as collateral for moneys advanced by B. D. Brown. It was duly transferred on the books of the company, so that they unquestionably have all the rights of stockholders." In State v. Ferris, 42 Conn. 560, a bankrupt in whose name stock stood on the books of the company was adjudged entitled to the right to vote the stock after the title to the stock had passed to the assignee in bankruptcy under the provisions of the bankrupt act. The court observed: "It has been repeatedly held by this court that the books and records of a corporation determine who are its stockholders for the time being, and who have the right to vote on the stock, although the same may have been sold or pledged as collateral security. In such cases the party who appears to be the owner by the books of the corporation has the right to be treated as a stockholder, and to vote whatever stock stands in his name." See, also, People v. Robinson, 64 Cal. 373; 1 Pac. Rep. 156; State v. Pettineli, 10 Nev. 141. Mr. Colebrooke, in his work on Collateral Securities, says: "In the absence of restrictive statutes, the pledgee of certificates of stock indorsed and transferred on the books of the company has a right to vote at its meetings. His name appearing as stockholder on the records, he becomes for all purposes a stockholder. The right to vote is an incident of the pledge, and according to the presumed intention of the parties." § 283. In Vail v. Hamilton, 85 N. Y. 453, the action was brought to set aside a mortgage on corporate property, on the ground that it was void because two-thirds of the stockholders had not assented to it. Certain of the stock stood in the name of the pledgee on the books of the corporation. The assent of such stock was essential to the validity of the mortgage. The pledgee did not give such assent, and the court adjudged the mortgage void on the ground, among others, that the pledgee was, as to that particular stock, a stockholder, and his assent was necessary because without it there was not the assent of the requisite two-thirds. The court said: "It is true that the shares were transferred to Conklin as collateral security,

but the certificate was absolute in its terms, and he was described therein as owner. He so appeared upon the proper books of the corporation. Under such a title, he had power to render the security available by sale to satisfy the debt on default of payment, and until the debt was satisfied he was the one interested in protecting the property represented by the shares from diversion by liens or preferences improperly created. The company had a right of redemption, and so had an equitable interest in the stock; but upon defendant's theory they could, without redemption, overreach the legal title by creating a mortgage which, when enforced, would extinguish it, and until that event deprives it of value. Conklin had a clear interest in that matter. Except as limited by statute, no stockholder by any title could have more or greater rights, or be subjected to other liabilities. He is relieved by statute from personal liability." This, as we have already seen, is the case in this state. "He would be otherwise bound for the debts of the corporation, for a creditor need in general look only for the legal title. For the same reason he had a right to vote; his character upon the books of the bank would be conclusive upon the inspectors; and whether § 17 of the act of 1848, *supra*, could under any circumstances, be so construed as to deprive one with such a tittle from voting, it is not necessary to inquire, for the question does not arise; but it is clear that, except for the permission given in that section, even a pledgor could not vote. It has no application to an assent required to be given in writing to a specific act of the corporation, and which, without qualification, the statute requires to be given by a stockholder. Such we have no doubt was the character of Conklin as to the five hundred shares in question at the time of the execution of the mortgage. Including these shares as part of the stock to be represented, the assent required by statute was not given, and the mortgage is of no validity." In Hoppin v. Buffum, 9 R. I. 513, the court said: "The object of the stock-book, and of requiring transfers of stock to be recorded by the corporation, is for the protection of the corporation, to enable it to know who are its members, who are entitled to dividends, and for no purpose is it more important than to enable it to know who are entitled to

vote in case of an election." The language of the court *in re* Steamboat Co., 44 N. J. Law, 529, is equally emphatic on the proposition that the record determines the question who are stockholders in their dealings with the corporation, which embrace the payment and receipt of dividends, and the voting at stockholders' meeting for directors and for other purposes; although on application to a court of equity the stockholder might be compelled no give a proxy to another or to vote as such other should direct. Said the court: "The general rule is that the books of the corporation are the evidence of the persons who are entitled to the rights and privileges of stockholders in the management of the affairs of the corporation. With the single exception that stock really belonging to the corporation cannot, at any election for its directors, be voted upon, directly or indirectly (citing cases), the books of the corporation are the only evidence of who are the stockholders, and, as such are entitled to vote at elections. Downing v. Potts, 23 N. J. Law, 66. Neither the inspectors nor stockholders can dispute the right to vote of any one who appears by the company's books to be the holder of stock legally issued.

In Pender v. Lushington, 6 Ch. Div. 70, the articles of association provided that every member should be entitled to one vote for every ten shares, but should not be entitled to more than one hundred votes in all, and that no member should vote at any general meeting unless he had been possessed of his shares for three months previously thereto. It was held that the register of stockholders was the only evidence by which the right to vote could be ascertained, and that no vote of shareholders appearing on the register, and properly qualified, should be rejected on the ground that their shares had been transferred to them by other shareholders, for the purpose of increasing their own voting power, or with an object alleged to be adverse to the interests of the company, or on the ground that the holders were not beneficial owners of the stock. So, also, it is held that a person has a right to vote on stock standing in his own name as trustee for another, or on stock which he has pledged or hypothecated, if it be in his own name on the company's books; and that inspectors of the election, in determining the

qualifications of voters, have no authority to inquire whether the stockholder who appears by the books to be a stockholder is or not the real owner of the stock standing in his name. They must take the company's books as conclusive evidence of the qualifications to vote." To same effect are Coleb. Coll. Sec. § 282; 1 Mor. Priv. Corp. §§ 170, 483; Burgess v. Seligman, 107 U. S. 20–29, 2 Sup. Ct. Rep. 10. In State v. Smith, (Or.) 14 Pac. Rep. 814, (on rehearing, 15 Pac. Rep. 386,) it was held that the pledgee, who had secured a transfer to himself of the stock on the books of the corporation under the authority of the express language of the assignment of the stock, empowering the pledgee to transfer the stock to his own name on the books, was, nevertheless, not entitled to vote the stock. But the reason for the decision has no application in this jurisdiction. The court held that the power to make the transfer on the books, although unlimited, although without condition as to the time when it might be exercised, could not lawfully be exerted until the pledgee had destroyed the equity of the pledgor by foreclosure. This decision is clearly opposed to that of the court in Nicollet Nat. Bank v. City Bank, (Minn.) 35 N. W. Rep. 577, where the court affirmed a judgment against the defendant for conversion of stock, because it had refused to transfer the same upon its corporate books to the name of a pledgee thereof before foreclosure of the pledge, and while still a mere pledgee. This case recognizes the absolute right of the pledgee to such a transfer. Said the court: "Although the assignment to the plaintiff was for the purpose of collateral security, the plaintiff was entitled to have the same entered on the books of the bank." To same effect, Dayton Nat. Bank v. Merchants' Nat. Bank, 37 Ohio St. 215. The right of the pledgee to insist upon a transfer upon the books at once is recognized by numerous cases. Rich v. Boyce, 39 Md. 314; Hubbell v. Drexel, 11 Fed. Rep. 115–118; Coleb. Coll. Sec. § 272; and dissenting opinion of Lord, C. J., in State v. Smith, (Or.) Pac. Rep. 137, which accords with our views.

But our statute settles the question. It in express terms declares that a transfer of stock shall not be valid except between the parties, unless the transfer is entered upon the corporate

books. § 2915, Compiled Laws. Under such a statute, the condition of a pledgee with an unrecorded transfer would be similar to that of a mortgagee whose real or chattel mortgage should not be recorded or filed. Nay, his situation would be worse. A mortgagee's lien in such a case cannot be defeated by the levy of an attachment without notice. But a creditor of a pledgor of stock, who attaches the same in ignorance of a transfer thereof, no transfer on the books having been made, secures a lien which is superior to the interest of the pledgee, and his paramount lien cannot be be defeated by subsequent notice of the transfer. *In re* Murphy, 51 Wis. 519, 8 N. W. Rep. 419; Fiske v. Carr, 20 Me. 301; Skowhegan v. Cutler, 49 Me. 315; Naglee v. Wharf Co., 20 Cal. 529; Weston v. Mining Co., 5 Cal. 186; Strout v. Mining Co., 9 Cal. 78; Fisher v. Bank, 5 Gray, 373; Sabin v. Bank, 21 Vt. 353; Cheever v. Meyer, 52 Vt. 66; Bank v. Gridley, 91 Ill. 457; Northrop v. Turnpike Co., 3 Conn. 549; Pinkerton v. Railroad Co., 42 N. H. 462; Ft. Madison Lumber Co. v. Batavian Bank, (Iowa) 32 N. W. Rep. 336; Colt v. Ives, 31 Conn. 25; Sibley v. Bank, 133 Mass. 515; Bank v. Williston, 138 Mass. 244; People v. Robinson, (Cal.) 1 Pac. Rep. 156. To say, in the light of this statute and its construction, that a power vested in the pledgee to record the transfer was intended by the pledgor not for the purpose of conferring on the pledgee power to protect himself while a pledgee by making such a record, is downright nonsense. Said the court in Rich v. Boyce, 39 Md. 314: "So far from the transfer of stock to the appellee's own name being a wrongful conversion, it was the exercise of an undoubted right, conferred upon him by the appellant. Without such right the pledge would have been doubtful security, as the stock would have been liable to execution or attachment by any creditor of the appellant." To same effect, Coleb. Coll. Sec. § 288. But where the pledgor not only authorizes a record of the transfer to be made by the pledgee, such record being essential to the latter's protection, but makes the transfer on the books himself, as in the case at bar, by surrendering his old certificates and issuing directly to the pledgee new certificates, signed by the pledgor himself as president of the corporation, no room is left for the inquiry whether the pledgee

had authority to make the transfer upon the corporate books, as in the Oregon case. In Day v. Holmes, 103 Mass. 310, the court held that a pledgee was justified in procuring new certificates to be issued to himself in place of stock assigned to him in blank, and that this act did not constitute a conversion of the stock. See, also, Coleb. Coll. Sec. §§ 288, 323.

The provision of the statute that a stockholder, to be entitled to vote, must be a *bona fide* stockholder, and have stock in his own name on the books, at least 10 days prior to the election, must be read and interpreted in the light, not only of the decisions holding that a pledgee is a stockholder, but also in connection with the legislation which, under the decisions and by its terms, makes it necessary for a pledgee to secure a transfer on the books to protect himself against the creditors of his pledgor. Knowing that stock is frequently pledged, and that the pledgee would secure a transfer on the books to protect himself, it must be assumed that the legislature intended he should be regarded as a stockholder with power to vote, for it has disqualified his pledgor to vote the stock after transfer; and it would be unjustifiable to impute to the law-making power a deliberate design frequently to leave a majority of the stock of a corporation without power to act, and thus render it impossible to hold a stockholders' meeting for any purpose. Unlike the doctrine of the common law, which allows any minority of the stockholders, however small, to constitute a quorum, (1 Mor. Priv. Corp. § 476,) our statute requires a vote of stockholders representing a majority of the subscribed capital stock (§ 2925, Comp. Laws) to elect directors. Moreover, the provision that the pledgor, and not the pledgee, should be liable for the debts of the corporation, to the extent of a stockholder's liability, clearly indicates that it was intended that the latter should have the right to make a transfer on the books, for without such transfer he is never liable. Anderson v. Warehouse Co., 111 U. S. 479, 4 Sup. Ct. Rep. 525. There is a class of cases in which the books are not conclusive of the right of the person to vote who appears upon the books to be a stockholder. The law will not allow the transfer upon corporate books to cover up the incapacity of the real owner to vote upon the stock. No corpora-

tion, in the absence of statutory permission, has any right to vote its own stock. Such stock having no vote, the colorable transfer of it upon the books will not give the person in whose name it stands authority to vote it. See *ex parte* Holmes, 5 Cow. 426; Frog Co. v. Havan, 101 Mass. 398. But there is a marked difference between such a case and the case of a pledgee who in good faith holds the legal title to the stock. The rights of the pledgor are in equity. He may, in a proper case, compel the pledgee to give him a proxy by a bill in equity. Scholfield v. Bank, 2 Cranch, 115; Vowell v. Thompson, 3 Cranch, 428; McHenry v. Jewett, 90 N. Y. 58; Hoppin v. Buffum, 9 R. I. 513. The fact that such suits have been instituted indicates the necesity for them. A pledgor who has a legal right to vote stock, notwithstanding it has been transferred on the corporate books, need not resort to equity for a proxy. Said the court in the last case cited: "If the real owner wishes to have his name, or the true state of facts, appear on the books, he has his remedy in equity to compel a proper transfer, or to compel the pledgee to give a proxy, as was done in the case of Vowell v. Thompson, 3 Cranch, C. C. 428." The pledgee sustains a relation to the corporation. This is determined by the record. In dealings with the corporation, his status as a stockholder is fixed by the books. "As between a corporator and the corporation the records of the corporation or its stock-book, as it is called, is the evidence of their relation. Meetings of the stockholders, elections, and dividends, etc., are regulated by this record." Bank of Commerce's Appeal, 73 Pa. St. 59. If the equities and contract relations between different persons, claiming the right to vote the same stock, are to be considered in determining the question of the right to vote, few elections would be certain, and the courts would often be called upon to investigate a multitude of collateral issues in determining who had been elected directors, or whether any other business transacted at a stockholders' meeting had the support of the requisite amount of stock. Said the court in Hoppin v. Buffum, 9 R. I. 513: "Upon any other rule, it could never be known who were entitled to vote until the courts had decided the dispute. The corporation or its of-

ficers would have to decide it for the time, and it would leave the election in uncertainty."

The record fixes the status of a person as a stockholder; and another having an equitable right to wield the power of a stockholder, as between himself and the one who has the legal right, must enforce that equitable right by the decree of a court, before he can be recognized as a stockholder in his relations with the corporations. The legal title to the stock determines the right to vote, and the courts, on *quo warranto* or on summary proceedings under the statute, cannot regard and enforce a merely equitable right. It is true that under the statute the court is authorized to award broader relief than on *quo warranto*. It may declare a different set of directors elected, but the proceeding in its essential nature is a proceeding at law to determine who had the legal right to vote as stockholders at a stockholders' meeting for directors or for other purposes. That the legal title to stock hypothecated and transferred to the creditor on the books is in the creditor so far as dealings with the corporation are concerned is elementary. National Bank v. Watsontown Bank, 105 U. S. 217; Wilson v. Little, 2 N. Y. 448; Ang. & A. Corp. § 580; Pullman v. Upton, 96 U. S. 328; Bank v. Case, 99 U. S. 628; Coleb. Coll. Sec. § 282. It is not strictly accurate to speak of the creditor holding hypothecated stock transferred on the corporate books as a mere pledgee. His relation to the debtor and to the corporation may be more accurately described. He is a holder of the legal title to stock as collateral security. The debtor has a general right to the return of his property and its title, on payment of his obligation. By his own voluntary act, the debtor has conferred upon the creditor all the rights of a stockholder by authorizing him to transfer the stock on the corporate books. In this case the debtor himself made the transfer by canceling his certificates, and issuing in their place others directly to the creditor's agent, signed by himself as president of the corporation. We are clearly of the opinion that Faulkner, and not Edwards, was entitled to vote the 546 shares of stock in question. The agreement between Hill and Edwards that the stock should be placed in the name of such person as Hill should designate, for the

purpose of giving Hill control of the corporation, adds nothing to his legal rights, but it would be an important element in the case were Edwards here invoking equity to compel Hill to give him a proxy. The latter could use it as a defense to an application for such relief. If, however, as is contended by Mr. Edwards, Hill agreed to leave him in control of the corporation, a resort to equity to compel the giving of a proxy would be his proper remedy. Such issues cannot be tried at every election, nor is it the policy of the law that they should be. It would, indeed be a startling doctrine that the legality of business transacted at stockholders' meetings should be subject to the ultimate decision of complicated questions arising between different claimants of the same stock. If Faulkner voted this stock at the meeting, it is our duty, under the statute, to declare the other set of directors elected. *Ex parte* Desdoity, 1 Wend. 98; *in re* Barker, 6 Wend. 509; *in re* Election of Directors of Steamboat Co., 44 N. J. Law, 529; *in re* Cape May & D. B. N. Co., (N. J.) 16 Atl. Rep. 191. Before discussing this, however, we should dispose of a further question relating to the qualification of Faulkner to vote this stock.

The statute declares that a stockholder must be a *bona fide* stockholder to entitle him to vote. This phrase "*bona fide*," in this connection, is used in contradistinction to "bad faith." In re-election of directors of St. Lawrence Steamboat Co., 44 N. J. Law 529, the statute required a person to be a *bona fide* stockholder to be eligible to the office of director. The court said, in construing this statute: "A stockholder may have purchased stock with a view of becoming a director, or have obtained it by gift, or he may hold it upon a trust, and be qualified to be a director. If the stock was legally issued, and was not the property of the corporation, and the legal title is in him, he is *prima facie* capable of being a director, and his right to be a director, in virtue of his legal title to such stock, can be impeached only by showing that title was put in him colorably, with a view to qualify him to be a director for some dishonest purpose, in furtherance of some fraudulent scheme touching the organization or control of the company, or to carry into effect some fraudulent arrangement with the company." But we do not think that

Faulkner voted this stock for the persons who claim to be elected as directors. It is undisputed that he did not vote the stock at the meeting over which Mr. Edwards presided. At the hour named for the meeting, Edwards assumed to act as chairman, and directed a Mr. Flint to act as secretary. This was without objection. The call was then read. Next Edwards stated that the object of the meeting was to elect directors for the ensuing year. Ballot boxes were then prepared, and nominations for directors were made by Edwards and by Mr. Faulkner. After that some other routine business was transacted, and then an adjournment was taken, on motion of Mr. Faulkner, until afternoon. When the meeting was reopened, after adjournment, Faulkner moved to reconsider all that had been done, on the ground that the president of the corporation had no right to act as chairman of the stockholders' meeting without election, and that he had not been elected or chosen chairman. In a word, Faulkner claimed that the meeting had not been properly organized. We think his claim came too late. He had acquiesced in the organization and had participated in the business of the meeting. He had even recognized, by making nominations for directors, that at that meeting, as so organized, the candidates for directors should be voted for. Failing in his efforts to reorganize the meeting, he withdrew from it without voting, or offering to vote, his stock for directors. It is true that Edwards had notified him that he would not be permitted to vote his stock for directors. But this would not dispense with affirmative action on his part. His secret intention to vote for certain persons for directors, without expressing that intention in a legal way, would not elect any one to office. It is true that Edwards might, and probably would, have refused to receive the ballot which he might have offered. But it was not in the power of Edwards, or of any one else, to prevent his voting at that meeting. There was therefore no reason for his withdrawing. It was his duty to remain at the stockholders' meeting as organized, and vote his stock at that meeting This he did not do and we are of opinion that voting the stock at another meeting, which he held with others in the same room, at the same time, was of no effect. A minority must have a right to insist that,

after a meeting is organized, the majority shall not withdraw from it, and organize another meeting, at which the minority must appear or lose their rights. Once concede the right, and there is no limit to the number of wrecked meetings which may, at the caprice of a majority, precede the transaction of any business.

Suppose the vote of two-thirds of the stock voted is required to carry a measure under the law or the by-laws of the corporation. Stockholders having more than one-third of the stock present can vote it down. Can a majority, constituting less than two-thirds, withdraw from an organized meeting, and thus compel the minority to follow them, or lose their right to defeat the measure? We believe it would be unwise, and unjust as well, to sanction such a rule. It is not essential to the protection of the majority who have the right to vote at the meeting as organized. On the other hand, the contrary rule is necessary for the protection of the minority. It is true that mere irregularities in conducting a meeting will not vitiate an election, but when a meeting is once organized it is not a mere irregularity to withdraw from it and start a new one. The persons voted for at the second meeting cannot be adjudged to have been elected directors, without deciding both that the second meeting was valid and that the first was illegal. "The acts of a majority are not binding upon the company, unless the proceedings are conducted regularly, and in accordance with general usage, or in the manner prescribed by the charter and by-laws of the company." 1 Mor. Priv. Corp. § 487, and cases. See *in re* Long Island R. Co. 19 Wend. 37. To elect directors, they must receive the vote of a majority of the subscribed capital stock. § 2925 Comp. Laws. This is fatal to the election of the persons voted for at the legal meeting. Only twelve shares were lawfully voted at that meeting. It was therefore error to dismiss the petition. It was the duty of the court, under the statute, to set aside the old, and order a new, election. *In re* Long Island R. Co., 19 Wend. 37; § 2932, Comp. Laws.

There remains to be considered the qualification of one of the directors voted for at the pretended meeting by Faulkner. To be a director one must be a holder of stock. § 2926, id. Short-

ly before the election Faulkner transferred to B. F. Spaulding ten of the 556 shares held by him, and on the day of election Spaulding demanded a transfer on the books. This request was refused. We do not think that he was eligible to the office of director. He did not appear to be a stockholder upon the books of the corporation. If he was entitled to have his transfer recorded, the corporation would be liable for its refusal, and he could recover the full value of his stock. 1 Mor. Priv. Corp. § 217 and cases cited. Or he might compel a transfer by an application to a court of equity. Id § 220, and cases cited. But until such transfer is made he is not, under our statute, a stockholder in his relations with the corporation. Our statute in express terms declares, as we have already seen, that a transfer of stock, not entered upon the corporate books, shall not be valid for any purpose, except as between the parties. § 2915, Comp. Laws. If it is effectual to qualify the transferee for the office of director, it is valid for a very important purpose. We may not disregard the imperative provision of this law, nor can we shut our eyes to its very obvious policy. It would be as unfortuuate, and as fruitful of confusion and litigation, to have the eligibilty of a person for the office of director left in doubt at a stockholders' meeting to elect directors, as to have left in uncertainty the qualification of a person to vote as a stockholder for a director at that meeting. Under a statute couched in the same language, it has been held that the assignor of stock not transferred on the coporate books, and not the assignee thereof, has the right to vote the stock at a meeting to elect directors. People v. Robinson, 64 Cal. 373, 1 Pac. Rep. 156; State v. Pettineli, 10 Nev. 141. See also, 1 Mor. Priv. Corp. § 483; State v. Ferris, 42 Conn. 560. The decisions in New Jersey and Oregon (44 N. J. Law, 529, 14 Pac. Rep. 814) are not of controlling force here, because our statute, by both its terms and its manifest spirit, compels the adoption of a different doctrine. A person who desires to be recognized as a stockholder, for the purpose of voting, of being a director, of suing for dividends, must secure such a standing by recording his transfer on the corporate books. Nor will the assignee be without remedy. The law affords him the two remedies referred to against the corporation for an unwar-

ranted refusal to make the transfer, and he may, by a resort to a court of equity, compel his transferrer to give him a proxy after he has been unjustifiably deprived of his right to have his name entered upon the books of the corporation as a stockholder. Moreover, he can always insist on a transfer as a condition precedent to his purchase or loan on the security of the stock. Business prudence would prompt this caution.

In cases where the corporation has a lien on the shares of its stockholders, the purchaser, without a transfer on the books, takes subject to the lien, and the corporation may refuse to record the transfer until the lien is discharged. 1 Mor. Priv. Corp. § 203. By insisting upon a transfer upon the books before he pays his money, the purchaser will secure his stock free from such lien, as the act of the corporation in making such transfer would be a waiver of the lien. Id. § 208; National Bank v. Watsontown Bank, 105 U. S. 217. In Helm v. Swiggett, 12 Ind. 194, it was held that a corporation, whose charter gave it a lien upon the stock of a stockholder for a debt owing to the corporation, had no lien for a debt of the assignee of stock on stock assigned, but not transferred on the books, the court saying: "Ownership simply of a certificate of stock in the bank did not constitute the owner of it a stockholder. It required a transfer of the stock to him upon the books of the bank." Referring to the provision requiring a transfer upon the books, Mr. Morawetz says: "It follows, therefore, that a transfer upon the books is essential to a novation of the contract of membership, where there is a provision of this description. An assignment of shares, although valid as between assignor and assignee, would not effect their legal relationship to the company until after a transfer was entered upon the books," etc. Volume 1, § 170. Under our statute no person can claim to be a stockholder, in his dealings with the corporation, until his name appears in some way as stockholder on the corporate books; and as the statute requires a person to be a stockholder, not stock-owner, to entitle him to be a director, we are clear that Spaulding was not eligible to that office. "The directors of a corporation are generally required to be shareholders by express provisions of the

company's charter or articles of association. A person is a shareholder, within the meaning of a provision of this description, if he holds shares on the books of the company, but not if he is merely the holder of the certificate. It has been held that the transferee on the books is eligible, although he is not the real owner of the shares, and the transfer was executed for the sole purpose of making him a director. A different rule might apply where the statute expressly requires the directors to be the owners of shares." Id. § 506. Had Spaulding appeared as a stockholder on the corporate books, he would have been qualified to hold the office of director, although the transfer had been made to him for the sole purpose of so qualifying him. As he did not so appear, he was not eligible to that office.

It was urged that as Faulkner subsequently to the issue of the stock had indorsed it in blank, and left it in the possession of Hill, that he (Faulkner) had ceased to be a stockholder, and therefore had no right to vote the stock or be a director. Under our statute providing that an unrecorded transfer of stock shall not be valid for any purpose except between the parties, we are clearly of the opinion, as we have already stated in another connection, that until a transfer should be made on the books Faulkner would continue to be a stockholder, for the purpose of voting the stock or of being eligible to the office of director. People v. Robinson, 64 Cal. 373; 1 Pac. Rep. 156; State v. Pettineli, 10 Nev. 141; 1 Mor. Priv. Corp. § 483; State v. Ferris, 42 Conn. 560. There are certain findings of fact which we are unable to discover any evidence in the record to sustain. The view the trial court took of the law may, however, explain why they are embodied in the case. The court finds that Hill, in electing directors, was not to put in men unsatisfactory to Edwards. Mr. Faulkner, on cross-examination by Mr. Edwards himself, stated that Edwards said to Hill that Hill was to have a majority of the directors. Mr. Edwards then remarked: "Satisfactory to me, of course?" To this the answer was: "He was to pick his own men." This is all the evidence on the point. Mr. Edwards did not testify in the case. It is true that the record seems to show that Hill was not to put in men who were enemies of Edwards, but this will not justify a finding that the majority of the di-

rectors were to be satisfactory to Edwards. Many persons who were not his enemies might nevertheless be unsatisfactory to him. The most that it can be claimed that the evidence discloses is that the question as to what men the majority of the board should be composed of was to depend upon a fact not to be determined by Hill or Edwards finally, but by the courts; whereas, the finding would make Edwards the sole and final arbiter of the question. This would be repugnant to the spirit of the arrangement which was to prevent Edwards from dealing with the corporation and its assets to the prejudice of Hill. Prior to this time Hill had held, as collateral for this same debt, stock in another corporation controlled by Edwards. Hill discovered that the organization of this corporation had been suffered to lapse; that his stock had therefore become worthless; and that Edwards had formed a new corporation. This stock had not been transferred on the books of the corporation, and Edwards, therefore, had full control of it, and by means of it had had complete control over the corporation. When Edwards proposed to give Hill stock in the new company as security, Hill said: "What good would that be if you form a third company?" To this Edwards replied that, to prevent this, Hill could have the stock put in his own name, and have absolute control, and then he would be safe, and a third company could not be started. Certainly, Mr. Hill would have no control whatever if Mr. Edwards were allowed arbitrarily to pronounce unsatisfactory every director for whom Mr. Hill or his representative should vote this stock. The effect would be that Mr. Hill would have control only on condition that he suffered Mr. Edwards to control him in exercising that control. Other findings it is not important to refer to, as a new election must be had.

The third conclusion of law is unwarranted. It states that Faulkner held this stock subject to the joint order of Hill and Edwards. Having made a transfer of the stock upon the records by issuing new shares directly to Faulkner, Edwards, as pledgor had no control over the stock without paying his debt. He could not control Faulkner in voting it without appealing to a court of equity under peculiar circumstances creating an equity in his behalf. Such circumstances are not shown by this record

to exist in this case. This he did not do, and it was error to hold that he could, at a stockholders' meeting, exercise any control over the stock or over Faulkner, who held it. The judgment of the district court is reversed, and that court is directed to render judgment, setting aside as illegal, the election of A. W. Edwards, H. C. Plumley, M. R. Flint, Alexander Griggs, and William A. Stevens, as directors, and ordering a new election to be had as required by the statute. The old directors will hold their office until their successors are elected and qualified. § 2924, Compiled Laws. It will be so ordered. All concur.

WILLIAM BRAITHWAITE, Plaintiff and Respondent, *v.* HENRY C. AIKIN and HARVEY HARRIS as Administrator, etc., Defendants. THOMAS C. POWER and JOHN W. POWER, Defendants and Appellants, and WILLIAM REA and GEORGE F. ROBINSON, copartners, etc., J. C. KAY and WOODRUFF MCKNIGHT, copartners, etc., A. W. CADMAN and JOSEPH MCC. BIGGERT, Intervenors and Respondents.

1. **Contract of Affreightment.**
The master of a vessel agreed for a stipulated price to transport goods from Bismarck, Dak., to Ft. Buford, Mont. The closing of navigation interrupted his voyage. A few days afterwards consignee forcibly took the goods from him. *Held*, that the master, being able and willing to complete the transportation to earn his freight, could recover full freight.

2. **Same; Time of Delivery.**
No time of delivery being specified in the contract of affreightment, *held, further*, that the master could rightfully have held the goods until the opening of navigation, that he might earn his freight by completing the transportation.

3. **Same; Suit by Trustee of Express Trust.**
Held, that plaintiff might sue upon the contract of affreightment set forth in the opinion as the trustee of an express trust, under § 4872, Compiled Laws.

4. **Partnership; Partners as to Third Parties.**
The owners of three steamers operated them jointly for their own benefit, under the name "Benton Line." *Held*, that they were all liable as partners or joint traders on a contract of affreightment made by

their authorized agent in such name of "Benton Line" to carry goods in place of one of such boats. It seems that by operating such boats jointly in such a 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.

5. **Same; Death of Partner; Substitution of Administrator.**
One of three defendants having died *pendente lite*, and his administrator having been substituted, and having voluntarily appeared and defended the action, and no objection having been raised by any of the defendants to such a course until after trial and verdict, *held*, this court would not on appeal of surviving defendants reverse judgment against all the defendants when the portion thereof relating to the administrator provides that the judgment against him shall be paid only in due course of administration.

6. **Courts of State Successors of Territorial Courts.**
The district court of the state of North Dakota is the successor of the territorial district court, and has jurisdiction to render judgment 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.

7. **Appeal—Appellant Cannot Question Ruling Not Affecting His Rights.**
Defendants cannot raise the point that a judgment against them should have been in favor of the plaintiff alone, and not in favor of the plaintiff and intervenors. This is a matter exclusively between the plaintiff and the intervenors.

(Opinion Filed January 15, 1891.)

APPEAL from district court, Burleigh county; Hon. W. H. WINCHESTER, Judge.

This action was tried in the territorial district court before Hon. Roderick Rose and a jury. After verdict, but before judgment, North Dakota was admited into the Union.

Francis & Barnes for appellants: The steamer Eclipse having been lost before the beginning of this action plaintiff's agency for her owners had terminated, and he could not maintain this action. Ins. Co. v. Ruggles, 12 Wheaton, 498. The Eclipse was a general ship—carried other goods than those here involved. In an action for freight of goods carried in a general ship all the owners must join. Abbott on Shipping, 7th Am. Ed., p. 115; Abbott's Law of Merchant Ships,

12th Ed., p. 69; Parsons on Maritime Law, vol. 2, pp. 671-2; Parsons on Shipping, vol. 1, pp. 116-17. The verdict is void because it is a joint verdict against surviving defendants and the administrator of a deceased defendant. Wait's Practice, vol. 1, pp. 153-4; Estee's Pleadings, vol. 1, p. 85; Pomeroy's Remedies, 2d Ed., pp. 357-60 and pp. 454-5.

Geo. W. Newton for plaintiff and Louis Hanitch for intervenors: Defendants by not raising point of non-joinder by demurrer or answer have waived it. Coulson v. Wing, 22 Pac. 570; Samainego v. Stiles, 20 id. 607; 1 Wait's Pr. 119-20; Dunnell v. Walsh, 33 N. Y. 43. Master of boat may sue in his own name. Lewis v. Hancock, 11 Mass. 72; Bliss Code Pl. § 59. The administrator of the deceased defendant was properly substituted as a party defendant. Pomeroy's Remedies, § 407; Lecher v. Trilling, 24 Wis. 610; Bank v. Howland, 42 Cal. 129; Gardner v. Walker, 22 How. P. 405.

CORLISS, C. J. In November, 1880, the steamer Eclipse sailed from Bismarck, in the territory of Dakota, on an eventful voyage up the Missouri river, bound for Ft. Buford, Mont., laden with army supplies consigned to the quarter-master at that point. She never reached her destination, but was frozen in about 60 miles from the fort by water and 35 miles from it by land. There has been much litigation connected with this vessel. Some of it has been finally disposed of, (Rea v. Eclipse, 30 N. W. Rep. 159; on appeal, 135 U. S, 599, 10 Sup. Ct. Rep. 873;) and some of it awaits final settlement by this court on this appeal. The purpose of this action was to recover full freight for transporting these military stores under an agreement to carry them from Bismarck to Ft. Buford. Deferring for the present the consideration of the question whether the defendants against whom the judgment appealed from was rendered are liable, and whether the plaintiff has shown a right to maintain this action for such freight in his own name, we will first determine whether any freight can be recovered at all, and, if so, whether full freight, or only a portion thereof, was earned. The judgment was for the full amount agreed to be paid. The goods were not delivered at the point to which they were con-

signed. Were there no other facts in the history of this case, the judgment of this court must condemn the recovery of any amount. A contract of affreightment is subject to the general rule of law that the person who claims compensation must perform every condition precedent of an entire contract before his claim for any amount will be heeded. Part performance will not entitle him to *pro rata* pay, unless such incomplete performance is voluntarily accepted by the one entitled to insist on perfect compliance with all the terms of the contract, under such circumstances that the law will imply a promise to pay for that which has been done. It is upon this principle that the adjudications stand allowing freight *pro rata itineris*. Pars. Merc. Law, 350; Transportation Co. v. Hoyt, 69 N. Y. 230; McGaw v. Insurance Co., 23 Pick. 405-411; Coffin v. Storer, 5 Mass. 252; The Nathaniel Hooper, 3 Sum. 542. This doctrine, with its limitation, is embodied in our Code. § 3868, Comp. Laws. But it is here insisted that full freight was properly allowed, and the statement of additional facts is necessary that we may weigh the full force and merit of this contention. When the master of the steamer discovered that to proceed further on the voyage was impossible, he immediately began to prepare a safe place for the cargo on the shore, with the intention of afterwards taking steps to complete the transportation, and make delivery at Ft. Buford, as required by his contract. Two days were occupied in unloading, and on the following day the consignee appeared in the person of the officer of the day of the fort, and demanded the carog. It is evident that in so short a time the master of the steamer had had no opportunity to make arrangements for completing the transportation. He was not then in default, unless he had refused to proceed further with the goods, which is not pretended, or perhaps unless the voyage had been interrupted because of his own careless act. We are not apprised that any negligence of his in this respect is claimed, nor do we find in the record anything to warrant such a contention. The voyage was suspended for a time by an act beyond the power of man to control. But the ability to complete the transportation was not necessarily gone; nor does the disposition to perform his contract seem to have

been wanting on the part of the master. It is true that, had the delivery been thus prevented not merely temporarily, but for all time, the fact that this result had been brought about by the operation of the elements beyond man's control would have furnished no excuse for a failure to comply with an unconditional engagement to make delivery at the place specified; and, had there been an absolute promise to lay down these stores at Ft. Buford by a certain date, the carrier must have been without redress, though the unexpected freezing of the river had rendered delivery by that date impossible without the slightest fault on his part. But no time of delivery was prescribed by the contract of the parties. The law allows a reasonable time under all the circumstances. Comp. Laws, § 3572. The freezing of the river did not exonerate the master from the contract duty of making delivery at Ft. Buford, but, being without fault, it did release him from the obligation to deliver the goods by the same time which would have witnessed their unlading at Ft. Buford had the navigation of the river remained unobstructed. See Parsons v. Hardy, 14 Wend, 216. It cannot be possible that a consignor who places no restrictions as to time upon the transportation of his property has the right under the law to insist that a voyage commenced on the verge of winter shall be completed before navigation closes when this is impossible, no negligence of the carrier concurring to cause delay. The reasonable time in which the delivery may be made must be gauged by the exigencies of the case. To lie for months by a wharf, with clear channel from vessel's prow to point of unlading, would be indefensible. But, when caught in the ice without fault, to lie for as many months in the inexorable embrace of nature, brings no blame to man, for human laws recognize man's impotence before the might of natural laws and forces. It is true that the master was at liberty to forward the freight by other means. 1 Pars. Shipp. & Adm. 233, and cases cited. This he was given no opportunity to do. It is also true that he might without legal fault have waited until the opening of navigation in the spring to resume his voyage and transport the freight to its destination in the bottom in which it was originally shipped. It was, of course, his duty in the meantime to protect the prop-

erty, and this it is undisputed he was doing when it was taken from him by force by a squad of men from the fort, acting under the instructions of the consignee. He protested against this, insisting upon his right to earn his freight by completing the transportation; but all his protests were unavailing, and he finally yielded only to superior force, without resistence, it is true, but this was commendable, as bloodshed would have probably resulted had forcible opposition been interposed.

The master has a lien on the property to enable him to earn his freight. The moment the transportation begins the lien attaches, and is not divested so long as the master is proceeding not in default. The consignor is not bound to pay until the transportation is completed in accordance with the contract, but he may not prevent the master's earning his freight. If he takes possession of the goods short of their destination, when the master, not in default, is willing and able to complete the transportation, he must pay full freight. He has prevented or waived the performance of the condition precedent. The law therefore regards it as performed. It is true that in this case the performance was prevented by the consignee, and not by the shipper; but in this respect the consignor is represented by the consignee, and the former is responsible for the acts of the latter. The consignor has done his full duty to the consignee when he has paid or agreed to pay freight to a certain point. If the consignee sees fit to take the goods at some other place when the transportation is only partially completed, and when the master is able and willing to perform his contract, he, the consignee, can make no claim against the consignor, and the latter should therefore pay the freight which the master was able, willing, and had a legal right to earn. "There can be no action unless delivery is either made or prevented from being made by the act or fault of the shipper or consignee." 1 Pars. Shipp. & Adm. 220. The consignee, under our statute, controls the delivery of the freight, even in cases where there is a conflict between him and the consignor. § 3846, Comp. Laws. He certainly has no greater right to prevent the carrier's earning freight than has the shipper. The shipper cannot, although he owns the property, stop the trans-

portation at any point without paying full freight. 1 Pars. Shipp. & Adm. 231. The carrier, as before stated, has a lien for his freight and to earn his freight, so long as he is not in default; and neither the consignor nor the consignee can take from him the power, under such circumstances, to earn his freight, without being held to have waived the performance of the condition precedent to make delivery at the place specified. The authorities are very satisfactory on this point. Moreover, the doctrine stands on principle, and our Code has embodied this rule in statutory form. § 3868, Comp. Laws; Pars. Merc. Law, 349; The Nathaniel Hooper, 3 Sum. 542–555. Bradstreet v. Baldwin, 11 Mass. 229; Luke v. Lyde, 2 Burrows, 882–887; Palmer v. Lorillard, 16 Johns. 348; Clarke v. Insurance Co., 2 Pick. 104; McGaw v. Insurance Co., 23 Pick. 405–410; Hunter v. Prinsep, 10 East, 394; and cases hereafter cited. We are clear that at the time the master was prevented from completing his transportation of the property he was able, willing, and had the legal right to go on with his contract, and make delivery at Fort Buford. The voyage was merely interrupted. The delay occasioned by this unavoidable accident had not been, nor was it likely to be, so great as to justify the consignee in assuming that the delivery would not be made at Fort Buford within a reasonable time, under all the circumstances. Even though the master had distinctly informed the consignee that he would not proceed with his contract until he could continue the transportation by river, in the spring, we believe that under the authorities the consignee could not have demanded the goods without entitling the plaintiff to full freight.

In this we are sustained by eminent authority; and on principle the consignor, who had failed to provide against such a contingency in his contract of affreightment, should not be allowed to insist under such circumstances that the carrier, at perhaps an expense so great as more than to destroy the profit of the voyage, should forward the goods by another route, and by other means. A shipment by water on the verge of winter must be understood by both parties to be subject to the risks of delay from the closing of navigation, nothing to the contrary appearing in their contract. The agreement was to transport

all the way by water. A reasonable time to carry by water is a reasonable time during the period that navigation is possible. In Luke v. Lyde, *supra*, Lord Mansfield says, (page 887): "If a freighted ship becomes accidentally disabled on its voyage (without the fault of the master) the master has his option of two things—either to refit (if it can be done within convenient time,) or to hire another ship to carry the goods to the port of delivery. If the merchant disagrees to this, and will not let him do so, the master will be entitled to the whole freight of the full voyage. And so it was determined in the house of lords in that case of Lutwidge v. Grey, [H. L. 1773.]" In Clark v. Insurance Co., 2 Pick. 104, the question for decision was whether the ship-owner could recover insurance on freight, or freightage, as our statute terms it, he having delivered the cargo to the shipper, who demanded that it be immediately sent forward or delivered to him. At this time the vessel was in the port of Kennebunk, Me., into which she had put on her voyage to make repairs in consequence of damages suffered during a severe gale. It was found that it would take two months to put the vessel in proper trim to continue her voyage. The ship-owner could not recover insurance if it was still in his power to earn his freight at the time he delivered the cargo to the shipper notwithstanding the demand; and the court ruled that the underwriters were not liable, because the ship-owner, to earn his freight, might have resumed and continued the voyage after the repairs had been made; that he was not bound to deliver at the intermediate port in spite of the delay except on receiving full freight. The court said: "One test of this reasoning would be to consider whether the merchant had a right to his goods at Kennebunk, against the will of the shipper, without paying freight. It has been already said that the contract of affreightment is not to be terminated at the will of one of the parties only. Delays not occasioned by the fault of the owner or master of the ship may take place, which may operate most unpropitiously upon the merchant. Such are the delays by contrary winds, as that the best planned voyages are often frustrated. Such may be the case of an embargo. Such was the case in Palmer v. Lorillard, 16 Johns. 348, cited by the counsel in the

case at bar. Palmer and others had undertaken to carry some tobacco from Richmond to New York for Lorillard and the ship sailed upon the voyage in February, but, finding the Chesapeake blockaded, she returned to Richmond. Lorillard there demanded his goods in September, but the master refused to deliver them without being paid half his freight, and in a few days the vessel and cargo were totally lost in a storm at the wharf, and the court held in that case that the contract was only suspended by the blockade, and that the owner of the ship might detain the goods until they could prosecute the voyage in safety, unless the merchant would pay full freight. There the delay was three times as great as would have been sustained by the plaintiff in the case at bar if he had repaired his ship." And in conclusion the court said: "But we are satisfied that the master lost the freight by his own act in giving up the voyage. He had an interest in carrying the cargo which he was not obliged to abandon on account of the accident that happened to the ship. He might lawfully have insisted upon detaining the goods while the repairs could have been made, which it seems to us could have been made in a reasonable time." The case of Allen v. Insurance Co., 44 N. Y. 437, is peculiarly in point. The vessel in that case was stranded, and afterwards prevented from completing her trip by the ice. The case is, if anything, stronger than the one at bar, for the court said that but for the detention by stranding she would have been able to finish her voyage before cold weather could have prevented its completion. But it is by no means certain that, had the Eclipse not been temporarily detained while repairs made necessary by running upon a snag were being made, she would have succeeded in reaching Ft. Buford before the ice could have stopped her progress. She was detained only from 5 o'clock in the afternoon until 8 the next morning, and it was undisputed that she always lay by at night. Therefore, little, if any, time was lost because of this accident. In the case cited the court held that the master had a right to complete the transportation on the opening of navigation to earn his freight, and to hold the cargo for that purpose unless paid full freight by the shipper. The court said, (page 443:) "Detention by the close of naviga-

tion, which is the act of God or *vis major*, not accompanied by any accident or injury to the vessel, does not have the effect to terminate or dissolve a contract of affreightment. The owner or master of the vessel is not absolved from his liability to the shipper, nor can the latter demand his goods free of freight on account of the detention." To same effect, Murray v. Insurance Co., 4 Biss. 417, where the court said: "When a vessel takes a cargo, as in this case, in the fall of the year, to transport to a distant point, it is one of the incidents of the navigation that owing to variable weather or freezing up she may not be able to reach her port of destination." Declaring the same principles are Hadley v. Clarke, 8 Term. R. 259; McGaw v. Insurance Co., 23 Pick. 405; Allen v. Insurance Co., 44 N. Y. 437-443; Hubbell v. Insurance Co., 74 N. Y. 246; Hughes v. Insurance Co., 100 N. Y. 58, 2 N. E. Rep. 901, and 3 N. E. Rep. 71; Griswold v. Insurance Co., 1 Johns. 205, 3 Johns. 321; Pars. Shipp. & Adm. 231-233; Jordan v. Insurance Co., 1 Story, 342; The Nathaniel Hooper, 3 Sum. 542-559; Bradhurst v. Insurance Co., 9 Johns. 17; Insurance Co. v. Butler, 20 Md. 41. The master is sometimes bound to forward the goods by other means in case of an interruption of the voyage, instead of delaying to repair. Saltus v. Insurance Co., 12 Johns. 107; Treadwell v. Insurance Co., 6 Cow. 270; Bryant v. Insurance Co., 6 Pick. 131; Adams v. Haught, 14 Tex. 243; Schieffelin v. Insurance Co., 9 Johns. 21. But these were all cases in which the voyage was unexpectedly delayed. In this case both parties must have anticipated that the closing of navigation might intervene, and suspend the voyage. No time for delivery having been specified, no provision for forwarding by other means in such a contingency having been inserted in the agreement, and the contract being to ship all the way by water, it is not a case for the application of the doctrine that delay must be prevented by forwarding the goods by other conveyance. The law, in the light of these circumstances, writes into the compact an assent to such a delay. See Saltus v. Insurance Co., 12 Johns 107; Allen v. Insurance Co., 44 N. Y. 437. It cannot be said that the master by removing the cargo from the steamer to the river's bank, had abandoned the transportation of the goods. This was

done for the safety of both the vessel and the cargo, and was essential to their safety, as it is undisputed that the risk to both from the breaking up of the ice in the spring would have been greater with the steamer loaded than with the cargo on shore. It was the undoubted duty of the master to do precisely what he did do to protect the interests not only of the owner of the cargo, but the owner of the boat also. "Suppose a ship meets with a calamity in the course of a voyage, and is compelled to put into a port to repair, and there the cargo is required to be unloaded in order to make the repairs or to insure its safety or ascertain and repair the damage done to it, would such an unloading dissolve the contract for the voyage? Certainly not." Per Story, J., in The Nathaniel Hooper, 3 Sum. 542-559. See, also, Murray v. Insurance Co., 4 Biss. 417. We hold that full freight was earned.

But the plaintiff's right to maintain this action is challenged. It is insisted that he is not the proper person to sue for such freight. The action stands on a written contract of affreightment. We must look at it to discuss this point intelligently. It is in the following form: "Bismarck, D. T., Nov. 3, 1880. Capt. W. Braithwaite, Steamer Eclipse—Dear Sir: On your accepting this proposition we agree to give you $1.75 per one hundred pounds from Bismarck to Ft. Buford on freight up to the amount of one hundred tons, and all over and above one hundred tons $1.50 for one hundred pounds; receipt to be equal to one hundred tons to Buford; freight to be paid on receipt of bills of lading by draft at ten days' sight on Jos. Leighton, St. Paul. Yours, etc., J. C. Barr, Agt. for H. C. Aikin, Jos. Leighton and Benton Line." Across the face of this the acceptance of the proposition was endorsed in the following words: "Str. Eclipse, W. Braithwaite, Master." Can the plaintiff maintain this action upon this contract? Our statute, taken from New York, provides that an action may be brought in the name of the trustee of an express trust alone, and that every person in whose name a contract is made for the benefit of another is such trustee. § 4872, Compiled Laws. In view of the construction placed upon this legislation it is unimportant whether we consider this as a contract in which the words of agency are merely descriptive of the person contracting or whether we regard the

writings as disclosing the fact that plaintiff was contracting for other parties. In either case he was in fact contracting in his own name for the benefit of others. The proposition was that "on your accepting this proposition we agree to give you," etc. It was addressed to plaintiff, and by him accepted. That paintiff under the statute could sue upon such contract in his own name is placed by the authorities beyond the realm of debate. In Iron, etc., Co. v. Lundberg, 121 U. S. 451, 7 Sup. Ct. Rep. 958, the agreement on which the action was founded provided, so far as is material to this point, as follows: "I, Gustave Lundberg, agent for M. N. Hogland's Sons & Co. of Stockholm, agree to sell," etc. The court ruled that Lundberg could sue upon it in his own name. The court, after quoting the New York statute, couched in the same language as that of this state, and after stating that that statute controlled, as the case arose in the southern district of New York, said: "The case then stands thus: If the agreement to sell is an agreement made by Lundberg personally, and not in his capacity of agent of the Swedish firm, the price is likewise payable to him personally, and the action on the contract must be brought in his name even at common law. If, on the other hand, the agreement must be considered as made by Lundberg not in his individual capacity, but only as agent and in behalf of the Swedish firm, and for their benefit, then the price is payable to him as their agent and for their benefit, in the same sense in which an express promise to pay money to him as the agent of that firm would be a promise to pay him for their benefit; and therefore, by the law of New York, which governs this case, an action may be brought in his name. In either view, this action is rightfully brought." To same effect are McLaughlin v. Bank, (Dak.) 43 N. W. Rep. 715; Considerant v. Brisbane, 22 N. Y. 389; Ludwig v. Gillespie, 105 N. Y. 653, 11 N. E. Rep. 835.

The appellants Thomas C. Power and John W. Power next urge that the court erred in directing a verdict against them, claiming that the question of their liability on the contract was, under the evidence, a question of fact. We cannot give our assent to this proposition. These appellants were held, if at all, by the signature of the words "Benton Line" to the contract by

J. C. Barr. Whom were these words intended and understood to bind? Had Barr authority to bind such persons by such an agreement? Is there any conflict on these points? T. C. Power, one of the defendants, was examined or the trial, and testified that three steamers named "Helena," "Butte," and "Benton" together constituted and were known as the "Benton Line" on the Missouri river during the season of 1880; that he and John W. Power were part owners of all of these steamers, and that they were run during that season "for the benefit of the owners in every point and place." John C. Barr testified that he was in 1880 general agent for the "Benton Line," and that T. C. Power and John W. Power, with others, authorized him to bind them by signing the words "Benton Line" to contracts of this character; that he intended to sign for the three steamers named constituting the Benton Line when he signed the words "Benton Line" to the contract in question. Barr was defendants' own witness. T. C. Power testified that Barr was general agent of the Benton Line in 1880. I. P. Baker, one of defendants' own witnesses, on direct examination was asked this question by defendants' counsel: "When I speak of who constituted the Benton Line I refer to the Benton Line, whose name, or the name of which, is subscribed to the contract here. Now, who constituted that line?" To which inquiry he made the following reply: "The steamer Butte and her owners, the steamer Helena and her owners, and the steamer Benton and her owners. They constituted the Benton Line. The boats operated jointly constituted the Benton Line." This brief review of some of the evidence discloses that there was no controversy as to certain facts, and these facts were that the owners of these three steamers were operating them jointly under the name "Benton Line" during the season of 1880 on the Missouri river; that John C. Barr was their general agent, authorized to bind them by such a contract as the one made with plaintiff, and that he signed this contract for the purpose of binding this association of boats and owners. It is undisputed that this freight was transported by the Eclipse for and in the place of one of these steamers—the Butte. The unavailing efforts of the defendants to show that there was another enterprise at that time conducted under

the name of "Benton Line," or popularly so called, presents no error. It was entirely immaterial how many other business concerns by that name were operated at that time, there being no offer to show that it was on behalf of such other Benton line that Barr made the contract. His evidence that he executed it on behalf of the one in which defendants were interested is undisputed, and must therefore be taken as conclusive. He distinctly testified that the defendants Power and others authorized him to bind them by signing "Benton Line" to contracts. This disposes of a great many of the numerous assignments of error in the case. Did the operating of those three steamers jointly for the benefit of all the owners render them all liable on the contract in this case? If they were all liable, then defendants T. C. and J. W. Power cannot complain at this stage of the case that they only were sued, for the time to insist that all the other owners should be joined was when the answer was served by plea in abatement. Such a defense is purely dilatory, and is waived both at common law and under our statute, if not specially pleaded. Comp. Laws, §§ 4909, 4912, 4913; Barry v. Foyles, 1 Pet. 316; Moore v. Bank, 13 Pet. 311; Manufacturing Co. v. Kimberly, (Minn.) 33 N. W. Rep. 782; Davis v. Choteau, (Minn.) 21 N. W. Rep. 748.

We hold that the owners running these boats jointly for their mutual benefit were copartners in that business, and were all liable as such on the contract made in the prosecution of that business by their agent on their behalf. §§ 4028, 4072 Comp. Laws. There is still another ground of liability under the undisputed evidence. The owners of these boats, by running them under the name of "Benton Line," held out to the world that they were engaged in a joint venture for joint profit. Each vessel was not operated separately. To the outside world there appeared to be an association of boats, bound together by a common interest, operated under a common control, and in a common name. The owners of these boats, in whose interest they were managed, knew that an appearance of partnership was created by their conduct. On this rests an estoppel. Ordinarily another element is necessary to create a partnership liability by estoppel. It is generally essential to be shown that the per-

son dealing with the parties took the appearance for the fact. He must have been misled. But in a very similar case it was ruled, and we think correctly so ruled, that where the holding out is as conspicuous and long-continued as it was in this case, the law presumes that the business world deals with the parties as partners in fact, or as joint traders. It appears that all these boats had been operated for two seasons—1879 and 1880—before making this contract under this name and in this manner; the contract having been made near the close of the season of 1880; that two of them were so operated during the year 1878, and that one of them had been run in this name since 1875. No contract on behalf of these boats was made, so far as the record discloses, in the name of any of the boats or of the persons operating her. On the contrary, it appears that several of such contracts with the plaintiff were made under that name. The decision in Sun Mut. In. Co. v. Kountz Line, 122 U. S. 583, 7 Sup Ct. Rep. 1278, is in point. Four transportation companies having permitted their boats to be placed before the public as being engaged in the same business and as constituting the Kountz line, each company was held liable for the negligence of those placed in charge of one of the boats. The court said: "As there is no evidence of any direct representation by these transportation companies, or any of them, to the shippers of the cargo in question as to their relation in business with each other, or as to their relations, respectively, with the Kountz line corporation, the inquiry in this case must be whether they so conducted themselves with reference to the general public as to induce a shipper acting with reasonable caution to believe that they had formed a combination in the nature of a partnership or were engaged as joint traders under the name of the Kountz line. In our judgment it must be answered in the affirmative. It could not, we think, be answered otherwise consistently with the inferences which the facts reasonably justify." See, also, Bostwick v. Champion, 11 Wend. 571; Champion v. Bostwick, 18 Wend, 175.

Objections were made to the reading of the deposition of John C. Barr, taken on behalf of the plaintiff. Whether the court erred in receiving the deposition it is unnecessary to decide, for

the same witness was subsequently called by the defendants, and his testimony on this examination was as we have already stated it. Eliminating the deposition from the record does not at all affect the case. There was, therefore, no reversible error. The plaintiff was asked if he did not in another action against the steamer Eclipse, in which he was claimant, claim that the total earnings of the steamer for the season of 1880 was $8,000, which included the amount for which plaintiff was prosecuting this action. Objection to this inquiry was sustained. We find no error in this. The witness was not asked whether he claimed this money in that action. He was merely asked whether he did not claim that the steamer's earnings were a certain sum. But a mere claim of this money in another action would constitute no defense in favor of those who owed it. Nor would payment of the money by a stranger, nor a recovery of it from a stranger, necessarily inure to the benefit of those who were in fact liable. Moreover, no such defense was pleaded, and the evidence was properly rejected as not being within the issues.

It is next insisted that the court erred in rendering a joint judgment against the surviving defendants and the administrator of the deceased defendant, Leighton. It was undoubtedly the common-law rule that the representatives of a deceased debtor could not be joined with the surviving debtors in the same action whether the defendants were jointly or jointly and severally liable. Pecker v. Cannon, 11 Iowa, 20; Bank v. Mott, 27 N. Y. 633; Bank v. Howland, 42 Cal. 129; New Haven, etc., Co. v. Hayden, 119 Mass. 361. Whether the Code has changed this rule it is not necessary to decide. Assuming that, on proper objection being made, the action, upon the death of Leighton, should have been divided, and plaintiff, upon reviving the action against the administrator of the estate of the deceased defendant, under § 4881, Compiled Laws, should have proceeded against such administrator in a separate action, it is now too late for the surviving defendants to raise this point. No objection was made to continuing the action against all parties jointly in the original suit until after trial and verdict. The defendants, under such circumstances, must be deemed to have waived the objection.

Conceding that two separate judgments should have been rendered on the verdict—one against the surviving defendants, and another against the administrator—payable out of the estate in due course of administration, still the error in rendering only a single judgment is one of form, and not of substance, and is therefore not reversible error. The rights of the parties under the law are settled by the judgment rendered in the same manner in which they would have been settled had two separate judgments been entered. On the judgment against the survivors executions could have been issued forthwith, while the judgment against the administrator merely fixes the fact and the amount of the liability as the statute provides, the claim to be paid only in due course of administration. Compiled Laws, § 5802. Our statute provides that "the court shall in every stage of an action disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the adverse party, and no judgment shall be reversed or affected by reason of such error or defect." Id. § 4941. Acting under a statute precisely the same, the court in Decker v. Trilling, 24 Wis. 610, held in accordance with our views on the same question, saying: "It is a beneficent statute, designed to reach to just such a case as this. It is a matter of no consequence to a party separately liable to a judgment that some other person is included with him in the same judgment. It does not injure him in the least, but must be regarded as beneficial, rather than otherwise." See, also, Eaton v. Alger, 47 N. Y. 345. In California, in the case of Bank v. Howland, 42 Cal. 129, the single joint judgment against all was merely modified by inserting a clause directing that the judgment, so far as it affected the administrator, should be payable out of the estate in due course of administration. As to the surviving debtors it was affirmed. This case appears to be an authority warranting the entry of only a single judgment against all the defendants, provided it is restricted in its operation so far as the representative is concerned, so that it can be enforced only through the administration of the estate, and not by execution. This was held proper in Lawrence v. Doolan, 68 Cal. 309, 5 Pac. Rep. 484, 9 Pac. Rep. 159. See, also, Eaton v. Alger, 47 N. Y. 345; Grocer Co.

v. Johnson, 50 Ark. 62, 6 S. W. Rep. 231; Braxton v. State, 25 Ind. 82; Myers v. State, 47 Ind. 293. Should we hold that the obligation of co-partners is several as well as joint under our statute, it is possible that we would reach the conclusion that under the provisions of our Code there was no error even in form in the judgment. The objection to proceeding against the survivor and the representative of the deceased was that a joint judgment could not be rendered against them, and there was no power in the court to render several judgments in the same action. But under the reform system such practice it seems is permitted. §§ 4901 subd. 3, and 5096. Comp. Laws; Burgoyne v. Trust Co., 5 Ohio St. 586; Parker v. Jackson, 16 Barb. 33; Arthur v. Griswold, 60 N. Y. 143–145. Nor is the plaintiff any longer bound to treat all the defendants either as jointly or as severally liable, and proceed against each separately or all jointly. He may sue all or any number in the same action, when they are severally liable. § 4880 Comp. Laws. The action under such a system is treated as embodying a separate claim against each defendant, all bound together in the same proceeding. Burgoyne v. Trust Co., 5 Ohio St. 580. Whether the debt of a partnership is joint only or joint and several we do not determine. See §§ 3425, 3574, 4051, 4901, subd. 4 Comp. Laws.

Even without statutory change a partnership obligation, though only joint at law, is in equity, for the purpose of preventing a discharge of the estate of a deceased partner from liability, regarded as joint and several. All the cases agree that the representative of the deceased partner may be proceeded against in equity, and only in equity; but some of them rule that the action will lie against him only after it appears that the survivors are insolvent, or after the remedy against them has been exhausted, while others hold that the action may be brought immediately, and without proving such insolvency, See Doggett v. Dill, 108 Ill. 560. The obligation of a partnership being joint and several only in equity, and the representative being liable only in that forum, it might with some force be urged that for that reason the representative and the survivor could not both be proceeded against in an action at law. But

no question of this kind was raised in this case until after trial and verdict, and the representative of Leighton voluntarily assumed the defense. Said the court in Sherman v. Kreul, 42 Wis. 33-39, in which this precise question was involved: "Here the administrators saw fit to waive the equitable forum, and asked and obtained leave to litigate the liability of the estate in a court of law. Should they now be permitted, after having thus asked leave to defend, to turn around and say that the action can only be prosecuted against the surviving partners? It seems to us that they must abide by the forum which they have chosen, and that it is too late to make the objection that the remedy against the estate was in equity." We refrain from deciding these questions, because they were not fully argued. It would certainly seem more consonant with our system of procedure that the survivors and the representatives should be proceeded against in the same action. There has been a change of front. Form no longer dominates as in the past. It is made subservient to the speedy, direct, and simple attainment of the right in litigation. In this light should statutes regulating procedure be interpreted, not forgetting, however, that violence must not be done to the language employed, and ever mindful that reasonable regulation of procedure is essential to the due administration of justice.

The jurisdiction of the district court of the sixth judicial district of this state to render the judgment appealed from is next challenged. The action had been tried and the verdict rendered in the district court of the territory of Dakota prior to division and admission; but before judgment was obtained the territorial district court had ceased to exist. Benner v. Porter, 9 How. 235. North Dakota had become a state, with a complete judicial system of her own. The court which rendered the judgment is the court of original jurisdiction under the state constitution, and was made the successor of the territorial district court by the enabling act, § 23. The command of that act was that cases such as was the one at bar should, when pending in the district court of the territory at the time of admission, be proceeded with in the state forum of original jurisdiction in due course of law. The territorial courts having been

courts of the United States, it was competent for congress to legislate touching the transfer of their records, and of the proceedings pending therein at the time of admission. Said Chief Justice Taney, in Hunt v. Palao, 4 How. 589: "The territorial court of appeals was a court of the United States, and the control over its records therefore belongs to the general government and not to the state authorities; and it rests with congress to declare to what tribunal these records and proceedings shall be transferred," etc. If, as seems to be asserted in Benner v. Porter, 9 How. 235, the assent of North Dakota to the transfer of such jurisdiction was necessary, that assent was clearly manifested by accepting statehood under the enabling act, which provided for such transfer. See, also, § 1 of schedule to constitution. We hold that the state court had jurisdiction of the case and power to render the judgment. Defendants further assail the judgment so far as the intervenors are given rights therein. The intervention was without objection, so far as the defendants are concerned. They never answered the complaint in intervention, and we cannot see what possible prejudice has resulted or can result to them from the clause in the judgment directing that a portion of the recovery be paid to the intervenors. It in no manner increases the liability of the defendants. It merely diverts a portion of the recovery from plaintiff to the intervenors. This is a matter between him and them exclusively. See Speyer v. Ihmels, 21 Cal. 281-284, where the court say: "The objection that the judgment should not have directed the money in the sheriff's hands to be paid to the intervenors *pro rata* cannot avail the appellant, because it is a matter in which he is not interested; and those who are interested in it have not appealed." We have with great labor studied the record of about 500 pages, and the numerous errors assigned, without finding reversible error, and the judgment of the district court is therefore affirmed. All concur.

WILLIAM BRATHWAITE, Plaintiff and Appellant, *v.* HENRY C. AIKIN, HARVEY HARRIS, as Administrator, etc., THOMAS C. POWER and JOHN W. POWER, under the name and style of BENTON LINE, Defendants, WILLIAM REA and GEORGE F. ROBINSON, copartners, etc., J. C. KAY and WOODRUFF MCKNIGHT, copartners, etc., A. W. CADMAN and JOSEPH MCC. BIGGERT, Intervenors and Respondents.

1. Intervention to Obtain Judgment Against Defendant—Equities Between Plaintiff and Intervenor.

Where an intervention complaint was framed on the theory only of co-operation by the intervenors with plaintiff in the effort to secure judgment against defendants, and the prayer for relief merely requested a 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 plaintiff and the intervenors, as between themselves, were to be adjusted in the action, but the verdict being a joint verdict, in favor of the plaintiff and intervenors, for the amount of the recovery, *held* error to award to intervenors any specific portion of the recovery against defendants, there having been no adjustment of the equities between plaintiff and intervenors. Such portion of the judgment reversed, with directions that rights of plaintiff and intervenor be settled as between themselves.

(Opinion Filed January 15, 1891.)

APPEAL from district court, Burleigh county; Hon. WM. H. WINCHESTER, Judge.

George W. Newton, for appellant; *Louis Hanitch*, for intervenors.

CORLISS, C. J. By a complaint in intervention the plaintiff in the original action is sought to be made defendant as to the intervenors. The action has for its object the recovery of freight for the transportation of certain army stores by water from Bismarck, Dak., to Ft. Buford, Mont. The judgment, so far as it fixed the liability of defendants, has been affirmed. See Braithwaite v. Power, *ante*, 455, (decided at this term.) The plaintiff now assails that portion of it which awards to the intervenors the greater share of the recovery. The most that ap-

pellant asks on this appeal is that the judgment in this respect be modified by directing the payment of the amount thereof into court subject to the further order of the court. We think appellant's prayer should be heeded. A glance at the facts will make this apparent. The vessel in which were the goods, to recover freight for the transportation of which this action was instituted, was the steamer Eclipse, and she was engaged in that kind of business under an arrangement embodied in a written contract between the plaintiff and the intervenors. This agreement recited the facts that this steamboat was at the time it was made hopelessly involved in debt, and was about to be sold at marshal's sale, and that certain of the parties to the agreement were creditors of the vessel. The agreement then continues:

"And the parties hereto, fearing a sacrifice, to protect their several interests, and to prevent such a sacrifice, and form a fund for building up said boat, and afterwards, if knocked down to them, to provide a working capital to manage and run said steamboat, covenant and agree as follows:

"*First.* That each of said parties shall contribute into a general fund the respective amounts set oppositie their names: Capt. W. Braithwaite, $2,500; John D. Biggert, $2,500; Robinson, Rea & Co., $2,500; Cadman & Co., $100; Kay, McKnight & Co., $450. —which several amounts are to be paid in cash, by the respective parties, to said parties of the first part, in case said steamboat is purchased by them as herein provided, or so much thereof as may be necessary to be used for paying so much of the bid as may be necessary to be paid in cash, and the remainder to be used as working capital.

"*Second.* That, in addition to said cash fund, the several parties are to contribute as capital the amount of their respective claims against said steamboat, and, in case said steamboat is bought in by the parties hereto, their claims are not to be paid at once, but be receipted for by them, and afterwards paid, as hereinafter provided for.

"*Third.* When the said steamboat is put up at marshal's sale, the same is to be bidden for by the several parties of the first part to such an amount as a majority in interest in said amount of $10,000 may determine, and to be put in the name of W.

Braithwaite and John D. Biggert as trustees, to be held by them thereafter as such trustees for the following uses and purposes: First, that the same be managed and run in the interest of all of the parties hereto, said W. Braithwaite to act as captain, and John D. Biggert as financial agent; the said Braithwaite to receive a salary of one hundred and fifty dollars per month, and said John D. Biggert to receive a salary of one hundred dollars per month during the time she is run in the interest of the parties hereto.

"*Fourth.* Out of the earnings of the said steamboat the respective claims of said parties of the second part are first to be paid, and, second, the full amount of their respective portions of said $10,000 advancement is to be paid; and when said parties of the second part are fully paid, then this trust shall cease and determine, and the said steamboat shall remain wholly to the use and benefit of the said W. Braithwaite and John D. Biggert, their executors, administrators, and assigns. Signed and sealed and delivered this 4th day of February, A. D. 1880, with our hands and seals."

The name of Joseph McC. Biggert was afterwards substituted for that of John D. Biggert in the agreement.

It appers that under this arrangement the money subscribed was paid, and the vessel bought therewith at the marshal's sale, the title being taken in the names of plaintiff and Biggert. The vessel was being operated under the contract, when this freight was earned. The intervenors, until paid under the contract, are clearly entitled to the net earnings of this vessel, after deducting the expenses of operating her, and the necessary expenses of collecting the funds which are embraced within the trust created by the agreement. Plaintiff does not appear to question this, but insists that the intervention was not upon the theory of a litigation of the rights of the parties as between themselves, but merely for the purpose of joining plaintiff in the prosecution of the action. The allegations of the intervention complaint, its prayer for relief, the procedure upon the trial, the joint verdict rendered without objection—all justify the plaintiff in assuming that such was the sole object of the intervention. There is no suggestion that plaintiff has been guilty of any

dereliction of duty as trustee, or that he is not abundantly able to respond to the beneficiaries for all moneys to which they may be entitled under this trust. There was a good reason for intervenors stepping into the case, aside from the purpose of litigating their exact rights to the fund as between themselves and plaintiff. Here was an important controversy, in which they were largely interested financially, and it was entirely natural that they should wish to have some voice in and control over the prosecution of the case. The averments of the complaint and the prayer for relief fully warranted the belief that such was the sole motive of the intervention. Had it been the design of the parties to settle by their intervention all their conflicting rights, the complaint in intervention would naturally have averred how much was due upon their respective debts, to secure which this trust was created. These were first to be paid out of the earnings of the boat. It is averred that they have not been paid, for it is stated that the intervenors have never received any portion of the earnings of the vessel. But it is nowhere alleged how much these claims amount to. Had the object of the intervention been to have a full settlement of the trust with respect to this fund, the amount of the claims first payable out of such fund under the trust would have been set forth in the complaint in intervention.

The prayer for relief does not necessarily control the scope of the relief that will be granted, but it certainly does throw light upon the purpose of the pleader, especially when in accord with the spirit of the pleading. There is no prayer for an accounting; there is no request for judgment in favor of the intervenors against either the defendants or the plaintiff. On the contrary, the intervenors expressly negative such a theory of their intervention by demanding that the money be paid to Biggert, or to some proper person to be designated by the court, to be applied as provided for in said contract. Such person and not the court, was to distribute the fund. After the intervention had been proceeded with on this theory down to the application for judgment, it was not competent for intervenors to make a sudden change of front to the surprise and disadvantage of plaintiff. It is evident that a full accouting between the parties

has not been had. Justice demands that plaintiff should be given an opportunity to make such claims against the trust funds as are proper to be allowed. As plaintiff appears to raise no objection that the accounting be had upon this intervention, the judgment is modified, in so far as it directs certain portions of the money to be paid to plaintiff and intervenors, respectively, and the court below is directed to enter judgment expunging such provisions from the original judgment, and ordering that the money be paid into court as a trust fund subject to the further order of the court, the rights of the respective parties thereto to be subsequently determined in this action, and giving the intervenors twenty days within which to amend their complaint in intervention to secure an accounting of this trust fund, and the plaintiff forty days in which to serve amended answer; costs to be awarded appellant.

CAPITAL BANK OF ST. PAUL, Plaintiff and Appellant, *v.* SCHOOL DISTRICT NO. 53, Barnes County, D. T., Defendant and Respondent.

1. **School Districts—Contract Ultra Vires—Ratification.**

A contract, authorized by the inhabitants of a school district at a district meeting, to build a school house for an amount in excess of funds on hand or subject to collection for that purpose, and the amount that could be realized from the maximum tax which could be levied by the inhabitants for the current year and used for that purpose, is void. Therefore, *held*, that such a contract, void because the district board had no authority to make it, could not be made binding upon the district by subsequent ratification by the inhabitants. Whether there was sufficient evidence of such ratification not decided.

2. **Same—Receipt of Fruits of Contract Creates No Liability.**

Such contract being impliedly prohibited by statute, the receipt by the district of the fruits thereof creates no liability either under the contract or for the value received.

3. **Same—Warrant Creates No New Liability.**

A warrant creates no greater liability than the debt it represents,

whether in the hands of the original party or of a purchaser before maturity and for value.

(Opinion Filed November 29, 1890.)

APPEAL from district court, Stutsman county; Hon. RODERICK ROSE, Judge.

White & Hewit and *Bartlett Tripp*, for appellant.

Mr. Tripp argued as follows: The court below directed the verdict as appears from the abstract upon the ground that "the district exceeded its authority in issuing orders for a greater amount than could be raised by the levy of a tax in one year," and was governed no doubt by the language of the supreme court of Dakota Territory in Farmers & Merchants Nat. Bank v. School District No. 53, 42 N. W. 767. One of the essential distinctions between that case and the case at bar, which seems to have been overlooked by the lower court, or which was deemed by it not to apply, was "that the inhabitants of the district did not direct the making of or make the contract, and had never in any way ratified the acts of the school board in issuing such warrants." In this case we say there was evidence of ratification on the part of the inhabitants of the district of the acts of the board. The court below seems to have been of the opinion that such evidence was immaterial, the inference being from the act of directing the verdict, that the learned judge was of the opinion that the district could not ratify such unauthorized acts of the board; that the district could not do indirectly what it had not power to do directly. We think the court below has misconstrued and extended the meaning of the language used by the court in Farmers & Merchants Nat. Bank v. School District No. 53 *supra*. It is true that a hasty reading of this decision alone would seem to give the impression that the court intended to hold in all cases, where the warrants or orders exceeded the amount of the tax levy of that year, they were absolutely void. This the court did not and could not intend to hold. The language of the court must be applied to the facts of that case. What was in fact determined in that case, and how far it is authority in the case at bar can best be determined by an examination of the companion case submitted with it at

the same time and the opinion in which is written by the same judge, to-wit: The Capital Bank of St. Paul v. School District No. 85, 42 N. W. R. 774. In this last case the supreme court says: "they expended more than could legally have been collected by tax on the property of the district in one year;" yet affirms a judgment against the district for the full amount of the warrants and interest, while in the case against district 53, where the board had done the same thing, the court holds the warrants void, and affirms a judgment in favor of the district. The only difference between the two cases so far as this question is involved was, that in the former case the action of the board was ratified, in the latter it was not. The courts in such case, because of the action of the inhabitants in ratifying such contract, will construe it as one to be paid out of the revenues from year to year to be obtained under the statutes providing for and limiting taxation. The territorial supreme court reached the conclusion that the district may make a contract — at least by ratification — incurring a liability greater than can be provided for by the taxation of the year in which it is made. Applying the results of that decision to the facts of this case it is decisive of it. We say there was abundant evidence tending to show that the district had ratified the acts of the district board in building this house and issuing these orders. See, also, Sullivan v. School District 39, 18 Pac. R. (Kans.) 287; Everts v. District Township Rose Grove, 41 N. W. 478; Andrews *et al* v. School District No. 4, 33 N. W. 217; Sherman *et al* v. Fitch, 98 Mass. 59; City of Conyers v. Kirk *et al*, 3 S. E. Rep. (Ga.) 442; Fisher *et al* v. Inhab. School District No. 17, 58 Mass. 496; Keyser v. School District, 35 N. H. 477; Kimball v. School District, 28 Vt. 8; Jordan v. School District, 33 Me. 170; Coney v. Somerset, 44 N. Y. S. 445; Banks v. Albany, 92 N. Y. 363; Read v. Plattsmouth, 107 U. S. 568; Corwin v. Wallace, 17 Iowa 374; Humphrey v. Association, 50 Iowa, 607; Pinches v. Church, 55 Ct. 183; Brown v. Atchison, 17 Pac. R. 465.

Again, the school district having accepted the fruits of the contract, and thereby having made the contract its own, will not be heard to say that it had no power to make such contract and is not bound thereby. Corporations neither private nor muni-

cipal are longer permitted to use the doctrine of *ultra vires* as a sword, but only as a shield in defense of their corporate rights. I think it may be safely said from a review of the modern decisions of the courts that the line of distinction is now well drawn between contracts made without or in excess of authority, and those declared to be illegal or expressly prohibited by statute. The doctrine of *ultra vires* was at first permitted to be set up by or against corporations upon the theory that public policy demanded that these artificial persons should be kept strictly within the limits of the powers granted them; it was soon found however that this rule worked a great hardship to parties dealing with such persons in ignorance of their chartered powers, and that the interests of the people would be best subserved by estopping them from denying their power or the authority of their agents to make such contracts, the same as in case of individuals, leaving the government to withdraw or annul their charter in case of its violation, and no good reason would seem to exist why a corporation should be permitted to say that its agent, who made the contract had no authority so to do, while it knowingly and willingly accepts its results and retains its proceeds, while an individual, who under such circumstances has ratified the unauthorized act of his agent is held liable as principal to the same extent as if it had been made by himself. I think the courts have so far receded from the position originally taken on this question that it may be safely said they are quite unanimous now in not permitting a corporation, which has received and retained the benefit of an unauthorized contract, unless it be a contract *malum in se*, to retain the benefits of such contract and successfully interpose the plea of *ultra vires*; and I may further say with equal safety that the great weight of authority now denies to the corporation, in case of an executed contract which is neither *malum in se* nor *malum prohibitum*, the right to retain its proceeds and interpose this plea when sued upon the contract, and that the few remaining courts which still deny the right to sue upon the contract permit a recovery as for money had and received or some similar action. Bank of Augusta v. Earle 13, Pet. 519; Zabriskie v. Ry. Co. 23 How. 391; Ry. Co. v. McCarthy, 96 U. S. 258; Hitchcock v. Galveston, 96 U.

S. 341; Gold Mining Co. v. Nat. Bk., 96 U. S. 640; Nat. Bk. v. Matthews, 98 U. S. 621. The great majority of the state courts are now in line with the decisions of the Supreme Court of the U. S., at least so far as contracts made without authority merely, are concerned. Perkins v. Ry. Co., 47 Me. 575; Ossipee Mfg. Co. v. County, 54 N. H. 295; Ry. Co. v. Proctor, 29 Vt. 93; Dill v. Wareham, 7 Metc. 438; Monumental Nat. Bank v. Globe Works, 101 Mass. 57; Attleborough Nat. Bank v. Rogers, 125 Mass. 339; Phil. Loan Co. v. Towner, 13 Ct. 249; Hood v. Ry. Co., 22 Ct. 1; Converse v. Railway Co., 33 Ct. 166; Silver Lake Bank v. North, 4 John. Ch. 370; Third Av. Savings Bank v, Dimock, 24 N. J. Eq. 26; Allegheny City v. McClurken, 14 Pa. St. 81; Penn. Del. etc. Co. v. Dandridge, 8 Gill & J., 248; Boyce v. Trustees M. E. Church, 46 Md. 359; Bank v. Hammond, 1 Rich, Law, 281; City Fire Ins. Co. v. Carrugi, 41 Ga. 660; Screven Hose Co. v. Philpot 53 Ga. 625; Hazlehurst v. Savannah R. R. Co., 43 Ga. 13; So. Life Ins. Co. v. Lanier, 5 Fla, 110.

Upon the right to recover in this action for money lent and advanced, see Bicknell Adm'r v. Widner, 73 Ind. 501; Tracy v. Talmage, 14 N. Y. 162; Custer v. Leavitt, 15, N. Y. 9.

F. H. Remington, John S. Watson and *C. M. Hertig* for respondent.

Mr. Remington argued: If the district had not the power to make, or to direct the making of the contract, it is obvious that it had not power to ratify. Hodges v. City of Buffalo, 2 Denio 110; 1 Dillon, Mun. Cor. § 463, 3d Ed. This will undoubtedly be conceded.

The supreme court of the territory expressly held in the case of F. & M. Nat. Bank v. School District 53, *supra*, that neither the school board nor the school district had power to incur the indebtedness, because it exceeded the maximum of taxes that could be levied and collected in any one year. The decision in the companion case, Capital Bank v. School District 85, 42 N. W. Rep. 774, is in entire harmony with that view. The latter case simply holds that inasmuch as the taxes which could have been levied between the date of the warrants and the date of ratification would have been sufficient to pay the warrants, the district

at the date of ratification had the power to ratify. No such facts appear in the case at bar. Not only are the Dakota cases against the power of the voters of the district to make or authorize the contract that was made, but the cases of Kane v. School District No. 3, 52 Wis. 502, and School District v. Stough, 4 Neb. 357, also hold the same doctrine.

The statement of appellant's counsel as to the progressive limitation of the doctrine of *ultra vires* is true as to private but not as to public corporations. Zottman v. San Francisco, 20 Cal. 96; Clark v. City, 19 Iowa 199; Mayor v. Ray, 19 Wall. 468; Dillon on Mun. Cor. (3d Ed.) § 504; School Dist. v. Stone, 106 U. S. 183; Dartsmouth Savings Bank v. School Dist., 43 N. W. 822; Bank v. School Tp., *ante* p. 26.

A rehearing having been granted the case was argued by Messrs. Jones and McLaren, for appellant, and by Mr. Remington for respondent. The opinion handed down after the rehearing was filed March 16, 1891.

CORLISS, C. J. The plaintiff, seeking judgment in the court below, based its claim upon four alleged warrants, signed by defendant's clerk and director, and drawn in the usual form upon defendant's treasurer. When these papers were received in evidence they created a presumption of liability against the defendant and in favor of plaintiff, assuming that plaintiff had established its title to them. This apparent liability defendant claims to have overthrown by undisputed evidence, and the trial court so held directing a verdict in favor of defendant. Defendant's successful defense was the illegality of the pretended warrants for want of power to contract the indebtedness which they represented. If the uncontroverted facts justify the conclusion against the defendant's power to incur the debt, then the warrants are void. Their issue adds nothing to the force of the original claim. They create no new debt. No estoppel can rest upon them. Their negotiation for value before maturity will not confer any greater rights upon the purchaser. All who deal with them, either originally or by subsequent purchase, are affected by every defense to the pretended debt they represent. Bank v. Willow Lake Tp., *ante* p. 26, 44 N. W. Rep.

1002, and cases cited. The view we take of the law renders the statement of only a few facts important. The assessed valuation of the district at the time the warrants were issued and the contract on which they rest was made was $18,305. These *pseudo* warrants were given to Sargent & Germain on a contract between them and the defendant's school board to erect a school house for the district for $6,000, which contract was fully performed by them. It does not appear that the district board was ever empowered to build any particular school house, or, indeed, any school house at all. The authority must come from the inhabitants at a district meeting. The minutes of such meeting disclose merely that a motion was made and carried to ballot to build a school house. The school board was appointed a building committee, and a tax of ten mills was levied for that purpose; but it nowhere appears that the inhabitants actually balloted to erect such a building or any school house, or in any manner authorized its construction. Nor does it appear that any site was ever selected, either by the inhabitants or by the district board. It was undisputed that the district never had any title to the land on which the house was erected; nor were any proceedings ever taken by the district for the purpose of acquiring title to the land, or to secure the right to build the school house thereon. That the action of the district board in making the contract to construct the building was wholly unauthorized and void cannot well be disputed. See Farmers, etc., Bank v. School District, No. 53, (Dak.) 42 N. W. Rep. 767. The power to designate a site and to authorize the building of a school house is vested exclusively in the inhabitants. But it is urged that although not originally binding upon the district, the contract has been ratified by the conduct of the inhabitants since the erection of the school house, and the issuing of the warrants representing the alleged contract price therefor. While we do not wish to be considered as assenting to this view of the evidence, we will assume for the purpose of this opinion that there was sufficient evidence of ratification to submit to the jury. Still we think the court would have been justified in rendering judgment for defendant. Nay, we hold it would have been the duty of the court to give such

judgment. Ratification is equivalent only to original authority, and we are of opinion that the inhabitants under the statute had no authority to direct the building of a schoolhouse whose cost would exceed the funds provided for that purpose. We hold that this contract was void, not only for want of power in the district to make it, but because prohibited by the spirit and necessary implication of the statute.

The sections of the act essential to the solution of this question are as follows: "§ 29. The inhabitants qualified to vote at a school district meeting lawfully assembled shall have power * * * (4) to designate by vote a site for a school house; (5) to vote a tax annually not exceeding one per cent. on the taxable property of the district as the meeting shall deem sufficient to purchase or lease a site, and to build, hire, or purchase a school house, and to keep the same in repair." "§ 56. The district board shall purchase or lease such site for a school house as shall have been designated by the voters at a district meeting, in the corporate name thereof, and shall build, hire, or purchase such school house as the voters of the district in a district meeting shall have agreed upon out of the funds provided for that purpose." Laws 1879, c. 14. The manifest purpose of this legislation is to prevent the district, unless bonds are issued under chapter 24 of the laws of 1881, from either mortgaging the future resources, or increasing beyond one per cent. of the assessed valuation the present burden of the inhabitants of the district. The inhabitants, in meeting lawfully assembled, select a site, direct the building of the school house, and levy 1 per cent. tax to pay for the same. It is out of the funds provided for that purpose that the board is to build and pay for the house. The funds provided for that purpose are those on hand, or subject to collection for that purpose, and, in addition, the amount which can be raised by a levy of a tax of not exceeding 1 per cent. on the assessed valuation of the district; and the tax must be levied before it can be said that the funds are provided. The inhabitants cannot in any one year levy this maximum tax for any number of years in advance. No funds can be deemed as provided for that purpose which the district has not then on hand for that purpose, or subject to collection, or

which it has not levied a tax to raise. As to future levies, the fund cannot be said to be a fund provided, but is a fund to be provided in the future. The contract price for the school house in question was $6,000, or over 30 per cent of the assessed valuation of the district. If this contract were valid, those inhabitants who were not willing that such an expense should be made would be forced to pay over 30 times the maximum tax that can be levied for that purpose in any one year, or the future taxing power of the district for that purpose would be anticipated and destroyed for years to come. The evils of an indebtedness in the form of warrants to be paid in the remote future is illustrated in this case. These warrants were sold at seventy cents on the dollar; and every contracter with a district who expects pay in warrants all of which cannot possibly be paid until after the lapse of years, and who is faced with the necessity of raising money upon them by a sale at a discount, must, to save himself, charge the district, in excess of what he would otherwise charge it, enough to make good his loss and in this way the loss becomes the loss of the district. Moreover, such warrants bear a higher rate of interest than bonds which can be sold usually at par, bearing a moderate rate of interest.

That this evil was intended to be prevented by this statute, and that our interpretation of the statute is in harmony with the will of the legislature, is evinced by chapter 24 of the laws of 1881, which authorizes school districts to bond for the building of a school house. This act was doubtless passed to enable a school district to raise immediately for that purpose a sum which in many districts could be brought together only after years of maximum taxation. And this act contains a positive restriction against every district not in a town or city containing more than 1,000 inhabitants, limiting its authority to bond to the amount of $1,500. No other district can bond for more than 5 per cent. of its assessed valuation. Why this limitation, if every district could build a school house costing many times the sum limited, and create a valid indebtedness for such amount by the issue of warrants? These warrants in this case, if valid, created when issued a present liability, which could have been put in judgment to hang over the district as an incubus, forever in the absence of

legislative relief; for the annual interest upon this debt—$600—(10 per cent. on $6,000) would exceed yearly by over $400 the maximum tax which could be levied to apply thereon. The increase in the assessed valuation might ultimately enable the district to discharge the annual interest, but the payment of the principal must await a change in the law. An evidence of indebtedness, whose interest cannot for years be paid, whose principal can be discharged only in the event of legislative interference, must have but little value in the market, and will inevitably bring to the treasury of the district much less than its face value. The inhabitants of the district in any one year were not to be permitted thus to waste the property of future inhabitants, and create burdens, in excess of the benefits received, to be thereafter imposed upon property and values which should subsequently come under the taxing powers of the district. Our views find support in the decision of the territorial supreme court in Farmers', etc., Bank v. School-Dist. No. 53, (Dak.) 42 N. W. Rep. 767. We find nothing in Capital Bank v. School Dist. No. 85, id. 774, decided by the same court at the same term, at war with the other decision. It is true that in the first case the court, while favoring the construction we adopt, limited the scope of its decision to the denial of the right to create a present indebtedness by the issue of warrants payable immediately in excess of the amount of tax that could be levied during the year the debt was contracted. This is the doctrine of Minnesota under a similar statute, but we cannot give it our assent. If the contract to build the school house is valid, we see nothing in the statute to prevent the issuing of warrants to pay the contract price therefor, payable immediately, and such warrants the creditor is entitled to. If, as we hold, the policy of the law condemns the extravagant debt, it is of no importance whether the debt is payable at once or in the future. It is, in fact, payable in the future, although the warrant is due immediately, for a judgment recovered upon such warrant can be satisfied only from an insufficient tax to be levied for years before full payment can be made. We do not believe that the legislature intended that these municipal corporations, intrusted with so few duties, possessing such

meager powers, so dwarfed in their stature that they bear but faint resemblance to the more perfect forms of municipalities, should possess authority to mortgage their taxing power so heavily that the interest of the debt could not be fully discharged; that the principal itself must remain forever unpaid.

Especially strong are we in this view when we consider that the same corporations have been given authority to borrow on district bonds a limited sum of money for the very purpose of building school houses. This act provides fully for the payment of the interest on the bonds and the extinction of their principal by the creation of a sinking fund to be derived from a tax of two mills. No means of paying the warrant indebtedness or the interest thereon are designated, and this points strongly against the power to create such an indebtedness. It is true that a tax of five mills may be levied for the purpose, among other things, of discharging any debts of the district lawfully incurred, but only little, if any, of this could ever be available to apply on the interest and principal of such warrants, as this is all the tax there can be levied to furnish the furniture and necessary apparatus for the school house of the district. The language of the supreme court of Wisconsin in Kane v. School-Dist. No. 3, 52 Wis. 502, 9 N. W. Rep. 459, meets our full approval: "We entertain very grave doubts whether the board and the voters of the district combined can make a contract payable out of funds not intended to be voted or raised by taxation during the current year, except by taking such proceedings in the particular cases authorized, as are necessary, under the statute, to make a loan in behalf of the district. If they can, then it would be wholly unnecessary to make any loans on behalf of a district, and the district might during any current year incur such an amount of indebtedness, to be charged upon the funds of succeeding years, as to absorb all the taxes which could be lawfully collected in such years, and leave the district wholly without resources, except by a repetition of the same system of mortgaging the future for the necessities of the present. Either this result would follow, or, if such liabilities were held to be debts lawfully incurred by the district, then the tax-payers of the district could be compelled to raise the neces-

sary amount to pay the same at the time agreed upon for their payment, notwithstanding such sum might exceed the limit fixed by the statutes for raising money by taxation for the purposes for which the debt was incurred. It seems to be the policy of the laws of this state to restrict the expenditures of the towns, cities, counties, and school districts within certain specified limits; and in the case of school districts it has put a very effectual restraint upon such expenditures by fixing a limit to the amount which can be lawfully collected from the tax-payers of the district for school purposes in any one year. To give proper force to these legislative restrictions it would seem necessary to restrain the district, as well as its officers, from contracting debts drawing interest, which can become a lawful charge upon the future resources thereof."

The district could not estop itself from setting up this plea of *ultra vires* by any act on its part, nor could it ratify what it had no power originally to do, nor can it be made liable for the value received. The contract out of which the warrants grew was not merely beyond the power of the corporation; it was prohibited by the spirit and policy of the law. An express prohibition would not, as we construe the statute, add any strength to this view of the case. The law will not imply a promise to pay against its own prohibitions, nor will the courts suffer a policy once declared to be defeated by the receipt of the benefits of a contract which that policy condemns. The spirit of the legislation we have been considering is that these small and feeble corporations shall keep within very narrow bounds in their expenditures; and an implied liability for an amount in excess of that limit—perhaps enormously in excess—because of value received, would bring the wisdom and strength of a salutary policy to naught. The sovereign power, by limiting the capacity of the inhabitants of this as well as of other districts to contract indebtedness, determined to save them from the evil effects of temporary extravagance. This court is now asked by its judgment nevertheless to visit the consequences of such extravagances upon their heads. The doctrine that there is no implied liability against the law's prohibition or policy is sound on principle, is supported by numerous prece-

dents, and the question is not open to debate in this jurisdiction. Bank v. Willow Lake School Tp., (N. D.) 44 N. W. Rep. 1002. This controversy illustrates the wisdom of the rule we enunciate. This contract, if valid, would mortgage the entire property of the district for one-third of its assessed value, and the equivalent for this enormous incumbrance would be only a school house. Place no limit upon the power of the inhabitants and it would be easy for corrupt men to secure and wield the controlling power in sparsely settled districts, and create obligations binding upon the district so appalling in amount as to drive out its inhabitants, and prevent others from settling within its borders. It is gratifying that in this case law and justice go hand in hand. The question of legal fraud is not before us, but he indeed must be obtuse who cannot find corruption in the conception and consummation of this school house project. No community, without being the victim of fraud, would ever burden itself to build a school house with a debt equal to one-third of its entire wealth. The loss may fall upon one guiltless of any participation in or actual knowledge of that fraud; but, had the plaintiff made those inquiries touching the purpose for which these warrants were issued, and respecting the assessed valuation of the district, which the law's behests and common business prudence required, suspicion of fraud must have been aroused. The judgment of the district court is affirmed. All concur.

ON REHEARING.

We see no reason to alter our views in this case. On the contrary, we are strengthened in our opinion. We will discuss the new arguments advanced by appellant's counsel. It is said that the statute designates three distinct school district funds—one for the erection of school houses, etc., for the purchase of school-sites, and the payment of debts contracted for that purpose and called the "school house fund;" a second for rent, repairs, fuel, etc., known as the "contingent fund;" and a third for the payment of teachers' wages, named the "teachers' fund." § 52. And it is then insisted that when the statute limits the power of the district board to build a school house out of the funds pro-

vided for that purpose the only object of the statute is to point out the particular fund among these three funds out of which the school house shall be built. In the first place no necessity for such a provision existed, if that was designed to be its scope and meaning. The legislature had already in explicit terms provided how each of these three funds should be applied, and the use of any portion of these funds for a purpose not authorized would have been illegal without additional legislation. Neither the teachers' fund nor the contigent fund, except by virtue of some special provision authorizing such a course, could be used to build a school house. "The district treasurer shall separate the moneys received from the county treasurer by district tax into the different funds in proportion to the rates of taxes levied by the district, and shall keep a separate account with each fund in a suitable and permanent book of record to be provided by the district board. He shall pay no order which does not specify the fund on which it is drawn, and the use to which the money is applied." Id. Moreover, the language of § 56 is fatal to this construction. The section does not provide that the district board shall build the school house out of the "fund" provided for that purpose, but out of the "funds" provided for that purpose. If the object of the legislature was to designate the particular fund as contradistinguished from the two other funds, the singular, and not the plural, of the word would have been employed. All through § 52 the singular is employed in designating each fund; and in § 44 the same care in the use of the word is manifested. So long as it is used to distinguish these three funds the singular is employed. But when we reach the provision authorizing the treasurer to make an indorsement upon a warrant because not paid for want of money the statute speaks of "funds." "Each order shall specify whether the money is to be paid from the teachers' fund, the contigent fund, or the school house fund; and in case the treasurer has no money in the fund drawn upon to pay such school warrant, he shall indorse it, 'Not paid for want of funds.'"

It is apparent that whenever the legislature intended in this act to refer to a particular fund to the exclusion of the other funds they used the word "fund" for that purpose; and on the

other hand, when they employed the word "funds" their purpose was to refer to moneys generally, and not to refer to any special fund, as distinguished from all others. Nor can it be inferred from this provision imposing the duty on the treasurer to make the endorsement "Not paid for want of funds" that it was the purpose of the legislature that debts might be contracted to any extent, and therefore in excess of the ability of the district to meet them out of the taxes of the current year. This provision has reference solely to those frequent, but temporary, deficits in the treasury, arising from the fact that debts, although contracted subsequently to the levy of a tax to pay them, may fall due before the taxes are collected. Even when the last day of payment has arrived there is no certainty that it will witness the full discharge of this important duty to the government. The experience of mankind justifies the conclusion that some portion of the tax will be withheld until payment is coerced. Inability to pay, a determination to test the legality of the tax, the injunction of a court restraining its collection, are among the many causes which almost invariably keep a portion of the levy from the public treasury beyond the day when it should have been paid in. It may be stated as a rule practically without exception that some portion of the debts of a school district will become payable before the funds provided for that purpose are on hand to be applied in extinguishment of such debts. It is in the light of these facts that we are to construe the requirements that the treasurer shall make the endorsement, "Not paid for want of funds." Nor is there anything in that provision authorizing the levy of a tax of five mills to pay, among other things, "debts or liabilities of the district lawfully incurred" to warrant the contention of appellant. The insignificance of this tax, especially when it is considered that it is the only tax that can be levied for the purpose of furnishing the school house with school furniture, apparatus, etc., is conclusive that the object was not to provide means of discharging debts unlimited in amount; but to meet these liabilities which, through the failure to collect in full the amount of a levy for any other purpose, or by reason of any other peculiar cause, might find no funds for their payment. Suppose the debt for

building a school house is precisely the amount of the levy for that purpose, but because it falls due before the funds are on hand, and because the warrant issued to represent it is indorsed "Not paid for want of funds," the debt bears interest at the rate of 10 per cent. The collection of the full amount of tax would leave the interest unprovided for; and, being a valid claim, it was entirely proper that some provision should be made for its payment. We have that provision in the section which declares that the tax of five mills may be used for the purpose, among others, of discharging any debts or liabilities of the district lawfully incurred.

We do not see how it is possible to subject the school district to liability for the value received in this case without overthrowing what we regard as the settled policy of the legislature touching such districts. We believe that they were not to contract debts in building school houses beyond their present power to provide funds. An express declaration that such was the legislative purpose would not strengthen our convictions in this respect. The people were to be protected against their own temporary extravagance. A large body of non-voting tax-payers, women, minors, foreigners who had not declared their intention to become citizens, and non-residents, were to be saved from the extravagance of voters. Frauds might be easily perpetrated in sparsely settled districts. These were some of the considerations which led the legislature to confer only such power to create indebtedness as was commensurate with the ability of the district to discharge it by funds on hand or under the control of the district by reason of the levy of a tax for that purpose. There exists an intimate connection between the power of municipalities to create indebtedness and the ability to discharge it by taxation. In no other manner can municipal or *quasi* municipal corporations meet their obligations. Property used for public purposes cannot be touched; money must be brought into the treasury by taxation to pay debts. Having specially authorized the building of a school house out of funds provided for that purpose, the statute clearly prohibits the erection of school houses in any other manner or under any other circumstances. An express prohibition would have manifested the same purpose

in only a different form. Said the court in Clark v. School-Dist. No 1, 78 Ill. 474: "The authority given to school directors by statute to 'appropriate to the purchase of libraries and apparatus any surplus fund after all necessary school expenses are paid,' is a limitation of their power to make such purchases to the circumstances named, and is an implied restriction of any power to purchase generally on credit. A purchase of such articles by the school directors on a credit when it does not appear that there were any surplus funds after all necessary school expenses were paid applicable to such purchase, is void, and there is no contract implied by law to pay for articles thus purchased arising from their receipt and use. The only remedy of the seller under such circumstances is to reclaim the property itself." See also, Dickinson v. City of Poughkeepsie, 75 N. Y. 65, cited with approval in People v. Gleason, 121 N. Y, 631-634, 25 N. E. Rep. 4; Addis v. City of Pittsburgh, 85 Pa. St. 379. In Farmers' etc., Bank v. School-Dist. No. 53, (Dak.) 42 N. W. Rep. 767, the court, referring to this statute said: "School-districts are corporations created for special purposes, and have only such powers as are specially granted by the legislative enactment, and those that are necessarily implied to accomplish the objects for which they are created. The specification of these powers by the statute under which they are organized restrains them from the exercise of other powers than those granted, and such as must be implied to enable them to effect the object of the grant, and operates to restrain them from the exercise of other powers; and in the discharge of their duties and the exercise of the powers granted they are governed and restrained by the provisions of the law under which they are created. Where the law specifically defines their powers the legal presumption is that they are prohibited from the exercise of any others than those absolutely essential to enable them to accomplish the purposes of the grant." Said the court in Gelpcke v. City of Dubuque, 1 Wall. 220: "What is implied in a statute is as much a part of it as what is expressed." In City of Evansville v. State, 118 Ind. 426, 21 N. E. Rep. 267, the court states it as well settled that "a law may be within the inhibition of the constitution as well by implication as by expression."

It will be noticed that nowhere are the inhabitants generally authorized to build school houses. They have power to vote a limited tax for that purpose, and the district board shall build such school house as the inhabitants designate at a district meeting, not on the credit of the district, not by anticipating its revenues for years to come, but only out of funds then actually provided for that purpose. This is all the authority the inhabitants possess, and every tax-payer has a right to insist that it is all they shall exercise, and that his property shall not be burdened because of the receipt of value against this wise restrictive policy of the law. It is not strictly accurate to assert that a municipal corporation is invariably benefited to the extent of value received when that value has assumed the form of immovable property. It would be far from the truth to state that a school district poor in treasury and in the taxable property of its inhabitants, and requiring but a small school house to accommodate its pupils, would be benefited to the extent of its value by the erection of such a school building as would be a credit to some great metropolis. Private business corporations, when transcending their powers in the purchase of property, should be held responsible for the actual value of the property received, because, being organized for purposes of trade, they have power to dispose of such property in the same manner as individuals. School houses are not erected for sale or for speculation, and the benefit to the district is not to be determined by any market price, but by their value for use for the specific purpose for which they were erected. For such purpose a school house costing many thousands of dollars might be no more valuable than one costing only as many hundred. There is, therefore, a good reason for making a distinction between private and municipal corporations in determining whether an act in excess of power is prohibited in the sense that it cannot form the basis of a claim even for value received. We do not, however, wish to be understood that in every case, and under all circumstances, no recovery can be had on *quantum meruit* where a contract of a muncipality is in excess of its powers. We decide merely this case. While satisfied that the defense which we sustain will work justice in this case, we are not unmindful of the fact that

there may be instances in which to insist upon it will savor somewhat of repudiation—where a school house only commensurate with the needs of the district has been erected fairly and with the assent of all the people. We feel confident that in such cases a sense of honor will prompt the people to brush aside this particular defense of want of power, and move them to pay that which the law, indeed, but not conscience, would justify them in withholding. The judgment is affirmed. All concur.

ANDREW J. BOWNE, Plaintiff and Respondent v. C. C. WOLCOTT, Defendant and Appellant. (Two cases.)

1. **Grant—Covenant of Seisin.**
   Where, in a covenant of seisin in a warranty deed, the grantor covenants "for his heirs, executors, and administrators," no action will lie against the grantor for a breach of such covenant.

2. **Same; Damages for Breach.**
   Where A. contracts to sell realty to B., and subsequently B. contracts to sell the land to C., and at B.'s request A. conveys direct to C. by deed with general covenant of seisin, the amount of recovery against A. for breach of such covenant would in any event be limited to the consideration received by him with interest thereon. § 4584 Comp. Laws.

3. **Covenant of Seisin Does Not Run With the Land.**
   Under §§ 3444, 3445, 3446, Comp. Laws, the covenant of seisin does not run with the land in this state.

(January Term, 1891.)

APPEAL from district court, Grand Forks county; Hon. WILLIAM B. MCCONNELL, Judge.

J. F. McGee, for appellant; *J. H. Bosard*, for respondent.

BARTHOLOMEW, J. These are actions for damages for breach of covenant of seisin in deeds to realty. The facts connected with the title to the lands here involved, and the breach of the covenant, are identical with the facts of Bowne against the same defendant, *ante*, 419, (decided at this term,) and it would be unnecessary to add anything to what we then said, except

for certain points of difference in the records which have been properly raised and pressed upon us, and which it is our duty to decide. The covenants of seisin in the various deeds on which these actions are based are in the following words: "And the said C. C. Wolcott, party of the first part, for his heirs, executors, and administrators, does covenant with the said party of the second part, his heirs and assigns, that he is well seized in fee of the lands and premises aforesaid, and has good right to sell and convey the same in manner and form aforesaid." The covenantor covenants "for his heirs, executors, and administrators." Appellant contends that under that covenant no action will lie against the grantor, and we think the position is well taken. Courts cannot make contracts for parties, but must take them as they find them. If these covenants differ from usual covenants under the same circumstances, we are bound to presume that parties intend they should so differ. We are bound to presume that the grantee accepted this covenant because he could get no better. It may well be that the grantor was willing to bind his heirs and representatives to the extent of the estate that they might receive from him, but was unwilling to bind himself. The condition of the title in these cases makes that view all the more probable. The naked legal title was in the United States, and would be divested only by patent; and it is matter of general knowledge that, in the transactions of the general land office, years sometimes elapse between the time of the delivery of the patent certificate by the local office and the issue of the patent from the general office; and it may well be that the grantor in these cases desired to postpone all liability on the covenant of seisin until such time as in the ordinary course of events the patents would certainly be issued, and so refused to create any liability during his own life time. This point was directly decided in Rufner v. McConnel, 14 Ill. 168, and Traynor v. Palmer, 86 Ill. 477; and we find no contrary ruling. If it was the intention to bind the grantor, and the wording of the covenant was a mistake, then plaintiff brought this action in the wrong forum. Courts of law can neither ignore nor correct mistakes.

This ruling settles one point common to both cases; but

there are two other points in the McFadden case that require our attention. Three deeds are declared upon in that case. In the first, Wolcott, in consideration of $300, sold and agreed to convey the land to one Collins. Subsequently, Collins, for a consideration of $600, sold to plaintiff, and at Collins' request Wolcott, the defendant, deeded directly to plaintiff, and the consideration recited in the deed was the amount paid by plaintiff to Collins, to-wit, $600, but the only consideration received by defendant was the sum of $300. The trial court allowed plaintiff to recover the full $600 and interest. In that there was error. Section 4584, Comp. Laws, reads as follows: "The detriment caused by the breach of a covenant of seisin * * * is deemed to be—*First*, the price paid to the grantor; * * * *second*, interest thereon for the time during which the grantee derived no benefit from the property, not exceeding six years; and, *third*, any expenses," etc. Had the breach been total, followed by eviction, the recovery should have been limited to the "price paid to the grantor," with interest and expenses as provided. See, also, Cook v. Curtis, (Mich.) 36 N. W. Rep. 692. In the third cause of action the defendant deeded to one Nugent for a consideration of $100, the deed containing the covenant sued upon. Subsequently, Nugent conveyed to plaintiff for a consideration of $500. In the lower court plaintiff had judgment on the covenant in the deed from defendant to Nugent for the full consideration that plaintiff paid Nugent. This was clearly wrong, for the reason just stated, and for the further reason that plaintiff would have no cause of action whatever on said covenant as against this defendant, even if defendant were included in the wording of the covenant. The covenant of seisin does not run with the land in this state. Section 3444, Comp. Laws, reads as follows: "The only covenants which run with the land are those specified in this title, and those which are incidental thereto." The following section reads: "Every covenant contained in a grant to an estate in real property which is made for the direct benefit of the property, or some part of it then in existence, runs with the land." The next section reads: "The last section includes covenants of warranty, for quiet enjoyment, and for further assurance on the part of

the grantor, and covenants for the payment of rent or of taxes or assessments upon the land, on the part of the grantee." No other covenants are named, and the foregoing exclude the covenant of seisin. Neither can we hold that a conveyance of land by one who has a right of action upon a breached covenant of seisin works an assignment of the cause of action. The only effect of such a holding is to make the covenant run with the land, which is contrary to the expressed will of our law makers. For the reason heretofore given the judgment in these cases must be reversed, and the actions dismissed. It is so ordered. All concur.

CORLISS, C. J., having been of counsel, did not sit on the hearing of the above cases; Judge TEMPLETON, of the first judicial district, sitting by request.

GULL RIVER LUMBER COMPANY, Plaintiff and Respondent, *v.* SCHOOL DISTRICT No. 39, Barnes County, D. T., Defendant and Appellant.

1. **Practice—Findings of Fact.**

Where the trial court determines the issues of fact without a jury, the requirement of the statute as to findings is mandatory, and not directory. In such cases it is the duty of the trial court without request to make express findings of the ultimate facts which are material and arise upon the pleadings. Accordingly where the district court, in such case, made no express findings of the ultimate facts which were in issue, but instead of doing so adopted certain documentary evidence, and a certain stipulation of facts, as its findings of fact, and from such findings drew certain legal conclusions, upon which judgment was entered, *held* reversible error.

2. **Capital Bank v. School District Followed.**

Upon the merits this case will be governed by the principles of law laid down in another case like it, decided at the present term of this court, *i. e.*, Capital Bank of St. Paul v. School District No. 53, ante, 479.

(Opinion Filed November 29, 1890.)

APPEAL from district court, Barnes county; Hon. WILLIAM H. FRANCIS, Judge.

Herman Winterer and *F. H. Remington*, for appellant; *White & Hewit*, for respondent.

A rehearing was granted and the decision of the court on the rehearing was handed down March 16, 1891

WALLIN, J. This is an appeal from a judgment in favor of the plaintiff for $3,210.68. The complaint is as follows: "The plaintiff alleges *First.* That plaintiff is, and at the times hereinafter mentioned was, a corporation duly created, organized and existing under and by virtue of the laws of the state of Minnesota, and doing business as such at Gull River, Minnesota; that defendant is, and at the times hereinafter mentioned was, a corporation duly created, organized and existing under and by virtue of the laws of the territory of Dakota, and doing business as such in the county of Barnes, territory of Dakota. *Second.* That on or about the 2d day of August and 11th day of September, 1882, respectively, defendant, for value, made, executed, and delivered to one J. C. Drake its two certain orders or warrants upon its treasurer as follows: 'No. 1. Territory of Dakota. Aug. 2, 1882. Treasurer of school district No. 39 of Barnes county: Pay to J. C. Drake, or bearer, one thousand dollars out of any moneys in the district treasury belonging to the building fund not otherwise appropriated, for building school house. F. H. Abbott, District Clerk. A. T. Anderson, Director. $1,000.00.' 'No. 3. Territory of Dakota. Sept. 11, 1882. Treasurer of school district No. 39 of Barnes county: Pay to J. C. Drake, or bearer, eleven hundred and forty-six dollars and seventy-four cents out of any moneys in the district treasury belonging to the school house fund, not otherwise appropriated, for building school house. F. H. Abbott, District Clerk. A. T. Anderson, Director. $1,146.74.' *Third.* That on the said 2d day of August and 11th day of September, 1882, respectively, said J. C. Drake duly presented said orders for payment to Clemens Schmidt, treasurer of defendant; that payment of the same was on said date refused, and the following endorsement made upon the backs of the same on said dates: 'Presented for payment, and not paid for want of funds; payable at the First National Bank of Valley City, with interest at 10 per cent. per annum. Clemens Schmidt, Treas., School District No. 39, Barnes Co., D. T.' *Fourth.* That thereafter, during the year 1882, (the precise date plaintiff cannot now state)

said J. C. Drake, for a valuable consideration, sold, assigned, indorsed, and transferred said orders to plaintiff, and the indebtedness for which the same were given. *Fifth.* That on August 2, 1882, and September 11, 1882, as aforesaid, and at various times subsequently thereto, said orders were presented to the treasurer of defendant for payment, and payment thereof refused, and that no part thereof has ever been paid. *Sixth.* That plaintiff is now the legal owner and holder of said orders and claims, and that the same are now due and payable, and that there is due from defendant to plaintiff thereon the sum of twenty-one hundred and forty-six and seveny-four one-hundredths dollars, with interest thereon, as aforesaid."

To which complaint defendant answered as follows: "The above-named defendant, answering the complaint in this action, denies any knowledge or information sufficient to form a belief as to whether the plaintiff is, or at the times mentioned in the complaint was, a corporation, created, organized, or existing under or by virtue of the laws of the state of Minnesota, or doing business as such at Gull River, Minnesota. Defendant denies that on or about the 2d day of August or the 11th day of September, A. D. 1882, or at any other time, defendants made, executed, or delivered to one J. C. Drake, its two warrants or orders mentioned in said complaint, or either of said warrants or orders. Defendant denies any knowledge or information sufficient to form a belief as to whether on said 2d day of August or 11th day of September, A. D. 1882, or at any other time, said J. C. Drake presented said orders for payment to Clemens Schmidt, treasurer of defendant, or as to whether payment of the same was on said date refused, or as to whether the indorsement mentioned in the complaint was made upon the back of the same. Defendant denies any knowledge or information sufficient to form a belief as to whether J. C. Drake sold, assigned, indorsed, or transferred said orders, or either of them, to the plaintiff, or the indebtedness for which the same were given. Defendant denies any knowledge or information sufficient to form a belief as to whether on August 2, 1882, and September 11, 1882, or at any other time, said orders were presented to the treasurer of defendant for payment, or payment thereof refused. Defend-

ant denies that no part of said warrants or orders has heen paid. Defendant denies any knowledge or information sufficient to form a belief as to whether the plaintiff is now the legal owner or holder of said warrants or orders; and the defendant denies that the same are now due or payable, or that there is due from defendant to plaintiff thereon the sum of twenty-one hundred and forty-six and 74-100 dollars, with interest thereon, or any other sum. For a second and further answer and defense to the complaint in this action, the defendant alleges that the two warrants mentioned in the complaint were issued by the director and clerk of defendant for building a school house, and furnishing materials for the same; that the assessed valuation of all property, both real and personal, in school district No. 39, Barnes county, territory of Dakota, in the year A. D. 1882, and at the time said warrants were issued, was eighteen thousand seven hundred and ten dollars; that each of said warrants exceeded one per cent. on the taxable property in said district; that each of said warrants exceeded one and one-half per cent. on the taxable property in said district; that the school board of said district was never directed or authorized by any district meeting in said district to incur an indebtedness for which said warrants were issued, and the incurring of said indebtedness was never ratified or sanctioned in any way by any district meeting in said district, but, on the contrary, at a district meeting in said district, held on the third day of May, A. D. 1882, a motion was made, seconded, and carried to raise eight hundred dollars for building a school house, and no direction was ever given to the school board to expend any greater amount for such purpose; that the defendant has no title to the land upon which the school house for which said warrants were issued is situated, and no proceedings were ever instituted for the purpose of acquiring title to the same, or to acquire the right to build said school house thereon."

A bill of exceptions was allowed and signed, which, among other things, shows that the case came on for trial before the district court at the June term in 1888, and a jury was waived. Also the following: "The attorneys for the plaintiff and defendant agreed by written stipulation as to the evidence in the case,

which evidence and stipulation are as follows:" Here follows certain documentary evidence, to-wit, the original school orders, copies of which are set out in the complaint, with the endorsements thereon, which were put in evidence as Exhibts A and B, respectively; then exhibit C was put in evidence, which was a certain book, called upon its title page "School District No. 39, County of Barnes. District Clerk's Record Book." Exhibit C embraces 11 pages of the abstract filed in this court, and consists of records kept by the clerk of the district of the proceedings had at all the corporate meetings of the district from and including May 2, 1882, to and including July 26, 1887; also the record of the proceedings had at two meetings held by the school board of said district. After the exhibits came the said stipulation of facts, which reads as follows: "The plaintiff and defendant are each corporations, as alleged in the complaint, and were at the times therein set forth. The signatures to the warrants hereto attached, which are admitted in evidence, and marked exhib. 'A' and 'B,' are the genuine signatures of the then acting district clerk and district director; and the signature to the endorsements certifying to the same is the genuine signature of the then acting treasurer. These signatures were made on the respective dates of the instruments and indorsements aforesaid. These were the legal officers of the defendant at that time. The exhibits aforesaid are the warrants in suit in this matter. The plaintiff is, and at the time this suit was brought was, the owner and holder of said warrants by the indorsement and transfer of the same set forth in the complaint. There have been no payments made on the same excepting the payments endorsed on the back of exhibit B, which correctly shows the payments made, and their manner and dates. They were made by the county treasurer. The said orders were issued as follows: Exhibit A during the progress of the building of the school house, and Exhibit B at the time of its completion; and were given in pursuance of contract made between the school board of defendant and J. C. Drake, and for the amount agreed upon by said contract. The assessed valuation of all property in said district at the time said warrants were issued was $18,710.00, including both real and personal. Said district

is not in any city or town, and did not at that time contain 1,000 inhabitants. The title to the land on which the school building is located is not, and never has been, in the defendant, nor sought to be obtained in any way. The book called upon its title page 'School District No. 39, County of Barnes. District Clerk's Record Book,' constitutes the school district records of the defendant. They are what they purport to be, and the minutes therein are what they purport to be—minutes of meetings of the school district—excepting the minutes dated May 12, 1882, and the one immediately following, without date. The latter two are the minutes of meetings of the school board of defendant. The building is 26x36 feet, with 12 foot posts, and is brick-veneered. The building has been used since its completion and up to the present time continuously for all school purposes. School has been held there from the first, and teachers hired by authority of the district, with the knowledge that they would teach in the building in question; and all apparatus provided as appears by the minutes has been placed in that building, and all school district meetings have been held therein. Before the time of the annual meeting held in 1883 by defendant, and shortly after the building was completed, it became generally known to the people of the district that the orders in suit had been issued for the purchase of the building; and many of the people thought that an $800.00 building should have been built instead, as authorized by the first district meeting. The orders in question have never been audited by defendant. A special meeting of defendant was duly called and held some time before the annual meeting in 1886, to consider the question of appointing an auditing committee, and bonding for these orders in suit under the special bonding law of 1885. The orders in suit and their amount were stated at that meeting and discussed, and it was decided not to bond for the amount or any other amount, or to appoint an auditing committee. The annual meeting of 1886 was held later than that, on June 29, 1886. The clerk's record, above referred to, is offered and received in evidence, and marked 'Exhibit C,' it being agreed by counsel that copies of all its records be made and certified to by the clerk of the court at Valley City, and attached hereto, and the book be

returned to the defendant; and also it is agreed that certified copies of the warrants Ex. A. and B be attached hereto in place of the originals, they being retained. The foregoing is agreed to be all the facts in this issue, and is hereby submitted as such. Dated June 29, 1888. WHITE & HEWIT, Attorneys for Plaintiff. F. H. REMINGTON, HERMAN WINTERER, Attorneys for Defendant."

Said stipulation, together with the documentary evidence, (Exhibits A, B, and C,) was filed with the clerk of the district court, before the case was submitted for determination, and on June 29, 1888; and said documentary evidence and stipulation of agreed facts embraced all the evidence and facts upon which the district court proceeded to determine the case. The cause having been submitted to the district court for its determination, that court determined the issues, and filed its decision in writing, which decision is as follows: "This cause coming on to be heard on the pleadings and papers herein, and the facts in the case having been stipulated in writing by the attorneys for the respective parties hereto, and filed with the clerk of this court on June 29, 1888, the court now here adopts said facts so stipulated as its own findings of fact in this case—that there is due plaintiff on the warrant in suit $3,180.18; and as conclusion of law thereon finds that plaintiff is entitled to judgment against defendant for the sum of three thousand one hundred and eighty dollars and eighteen cents ($3,180.18) and the costs and disbursements of this action, to be taxed according to law, and judgment is ordered and granted accordingly. Dated and signed this August 2, 1888. By the court, WILLIAM H. FRANCIS, Judge."

Upon this decision judgment was entered in favor of the plaintiff. In due time defendant filed its exceptions to the decision and findings, which exceptions were allowed, and are as follows: "The defendant in this action hereby makes the following objections and exceptions to the findings of fact and conclusions of law contained in the decision of the court, dated the 2d day of August, 1888, and filed in the office of the clerk of this court in and for Barnes county, on the 4th day of August, 1888: *First.* The defendant objects and excepts to the said

findings of fact that there is due plaintiff upon the warrants in suit $3,180.18, upon the ground that there is nothing due. *Second.* The defendant objects and excepts to the said findings of fact upon the ground that they do not determine all or any of the issues of fact raised by the pleadings. The facts agreed upon were not facts put in issue by the pleadings, but facts in the nature of evidence, bearing upon the facts put in issue by the pleadings, and from which the facts in issue could be determined either for the plaintiff or the defendant. This the court has not done, and hence the findings of fact are insufficient. *Third.* The defendant objects and excepts to the conclusion of law contained in said decision, that plaintiff is entitled to judgment against the defendant for the sum of three thousand one hundred and eighty dollars and eighteen cents and the costs and disbursements of this action, to be taxed according to law, upon the ground that it is against the law. *Fourth.* The defendant objects and excepts to said conclusion of law upon the ground that the officers of the defendant exceeded their power in issuing the warrants in suit. *Fifth.* The defendant objects and excepts to the said conclusion of law upon the ground that each of the warrants in suit exceeded one per cent. and exceeded one and one-half per cent. upon the taxable property in said district, and exceeded the amount which the district was allowed by law to raise by tax for the purpose of building a school house. *Sixth.* The defendant objects and excepts to the said conclusion of law upon the ground that the warrants in suit exceeded $1,500.00 and exceeded the amount for which the district was allowed by law to bond for the purpose of building a school house. *Seventh.* The defendant objects and excepts to the said conclusion of law upon the ground that the warrants in suit exceeded $800, and exceeded the amount which the people of the district, assembled in district meeting, authorized to be expended for the purpose of building a school house. *Eighth.* The defendant objects and excepts to said conclusion of law upon the ground that the issuing of the warrants or the making of the contract upon which they were issued was never authorized to be expended for the purpose of building a school house. *Ninth.* The defend-

ant objects and excepts to said conclusion of law upon the ground that the issuing of the warrants or the making of the contract upon which they were issued was never authorized by any district meeting of defendant. *Tenth.* The defendant objects and excepts to said conclusion of law upon the ground that the issuing of the warrants in suit or the making of the contract upon which they were issued has never been ratified or sanctioned by any district meeting of the defendant. *Eleventh.* The defendant objects and excepts to the said conclusion of law upon the ground that the defendant has never had title to the land upon which the school building for which the warrants in suit were issued is located.

In this court appellant assigns numerous errors, which assignments need not be set out at length, as they are all based upon the foregoing exceptions to the findings of the trial court. The assignment of errors squarely presents, among others, a preliminary question of precedure of controlling importance in disposing of this case, and one, too, which is of much interest to the profession in its bearings upon the matter of procedure in all cases where the issues of fact are tried to the court without a jury. The point is this: Did the court in this case prepare and sign findings such as are contemplated by the statute regulating such findings? Comp. Laws, §§ 5066–5069. We have concluded that a negative answer must be given to this question. Findings were not waived, nor did the district court exercise its right to require counsel to frame and present proposed findings to the court. Prudent practitioners often volunteer and present proposed findings to the court, but this was not done in this case; nor does the statute or rules of practice require it to be done in any case. Findings not having been required by the court nor voluntarily presented by counsel, the duty of preparing and signing findings of fact and of law is one which the statute expressly devolves upon the court itself. The statutory requirement is explicit and positive in its terms; and the courts of other states, where substantially the same provisions are found, have uniformly construed the language as being mandatory, and not directory merely. Such construction accords with our own views. To hold that the statute is direct-

ory only would, in our opinion, impair its efficiency. Hayne, New Trial & App. § 238. Express findings are required upon every material issue raised by any pleading, and, if any are left unfound it is ground for reversal. Id. § 239; People v. Forbes, 51 Cal. 628; Billings v. Everett, 52 Cal. 661; Speegle v. Leese, 51 Cal. 415; Johnson v. Squires, 53 Cal. 37; Bank of Woodland v. Treadwell, 55 Cal. 380; Harlan v. Ely, id. 344. In the case we are considering the district court did not draw up express findings on the ultimate questions of fact raised by the complaint and answer; but in lieu of such express findings the court reverts to the stipulation of counsel as to the facts and evidence submitted at the trial, and set out herein at length. The court says: "The court now here adopts said facts so stipulated as its findings of fact in this case, and that there is due plaintiff on the warrants in suit $3,180.18." What, then, is it that the learned trial court thus undertakes to substitute for express findings of the ultimate facts? This question is best answered by an examination of the stipulation of counsel to which the court refers. Such examination will disclose that the stipulation embraces an agreement of what shall be put in evidence at the trial; also that certain facts not proven are agreed to; and, finally, that certain other facts which are deducible from the evidence are agreed to as facts. But such facts as are agreed to are — like the testimony in the case — merely evidential of the ultimate facts which the court is required to find in response to the issues arising upon the pleadings. Among the facts expressly mentioned in the stipulation is the following: "The book called on its title page 'School District No. 39, County of Barnes. District Clerk's Record Book'—constitutes the school district records of the defendant. They are what they purport to be, and the minutes therein are what they purport to be—minutes of meetings of the school district—except the minutes dated May 12, 1882, and the one immediately following without date. The latter two are minutes of the meetings of the school board of defendant." This part of the stipulation refers directly to Exhibit C. It follows that, by adopting the stipulation of counsel made at the trial, with respect to the evidence and certain facts, as the findings of the court, the court

necessarily finds as ultimate facts all matters of fact relevant or otherwise which are contained in Exhibit C, which, as before stated, is a voluminous record of the administrative acts and doings of the defendant during a period of some five years, and the bulk of which cannot, of course, have any direct connection with any of the questions in litigation here, but some of which, as counsel claim, do bear upon the issues of this case.

Counsel are at loggerheads in their briefs as to what ultimate facts appear and what do not appear in Exhibit C. Respondent's counsel contends that certain facts—some of which are pertinent, and others claimed not to be so—are duly found by the court, because the court adopts Exhibit C as a part of its findings of fact; and, on the other hand, the appellant's counsel contends that certain specific facts material to a determination of the case are proven either positively or negatively by Exhibit C, but that such facts are not enunciated and embodied in the findings of the court, nor in the stipulated facts, and hence are practically useless in disposing of the case. It is obvious that this confusion comes about solely because the letter and spirit of the statute were violated when the trial court assumed to substitute for express findings upon material and ultimate facts in issue certain evidence and evidential facts submitted at the trial and agreed to by counsel. In Wagner v. Nagel, (Minn.) 23 N. W. Rep. 308, the court say: "A conclusive reason why this judgment must be reversed is that there are no findings to support it. The so-called findings are mere statements of evidence." As to indefinite findings, see Templen v. Plattner, (Iowa) id. 664; Demming v. Weston, 15 Wis. 236-238. The supreme court of Missouri say: "A finding of facts which does not cover all the matters put in issue by the pleadings is insufficient, and ground of reversal." Downing v. Bourlier, 21 Mo. 149. Judgments were reversed in the following cases for insufficient findings of fact: Bates v. Wilbur, 10 Wis. 415; Reich v. Mining Co., 3 Utah, 254, 2 Pac. Rep. 703; Bowman v. Ayers, (Idaho) 13 Pac. Rep. 346; Conlan v. Grace, (Minn.) 30 N. W. Rep. 880. We do not hold that it would be impossible to so stipulate the facts at the trial that they would be at once so explicit and so responsive to the issues that they could be adopted

in *hæc verba* by the court as the findings of fact; but we do hold that this record does not present such a case. In this case the ultimate facts which are material to a determination of the issues have not been found, and for such omission the judgment will be reversed. But the same disposition of the case will follow upon a consideration of the record upon the facts and merits. A perusal of this record shows that the case is parallel in its facts, and falls completely within the principles of law laid down in a case decided by this court at the present term, *i. e.*, Capital Bank of St. Paul v. School Dist. No. 53, reported *ante*, 479. We deem further discussion of this case unnecessary. Following the ruling in the case cited, we shall make an order directing a reversal of the judgment, and dismissing the action. All concur.

ON REHEARING, MARCH 16, 1891.

PER CURIAM. After due consideration of the arguments presented at the rehearing of this case the court will adhere to its views as set forth in the foregoing opinion. Its reasons for so doing are set forth in the opinion filed in the case of Capital Bank of St. Paul v. School Dist. No. 53, *ante*, 479, where the principal questions involved in this case are fully considered.

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APPEAL.

APPEALABLE ORDER.

1. An order of the district court refusing an application for judgment upon the findings of a jury is not an appealable order, within the meaning of subdivision 1, § 5236, Comp. Laws 1887, which subdivision is as follows: "An order affecting a substantial right, made in any action, when such order in effect determines the action, and prevents a judgment from which an appeal might be taken." Such an order neither determines an action nor any issue in an action, nor is it the legal effect of such an order to prevent the entry of a judgment from which an appeal might be taken. *Persons v. Simons, 243.*

2. *Held, further*, that the order is not rendered appealable by the fact that the district court had previously denied defendant's application for judgment on the findings of the jury. *Id.*

3. An order vacating an attachment is an appealable order. *Red River Valley Bk. v. Freeman, 196.*

BOND ON APPEAL.

Municipal and public corporations need not give bond on appeal to obtain stay of proceedings. *Territory v. Woodbury, 85.*

REVERSIBLE ERROR.

1. After a trial by jury, and at the close of plaintiff's testimony, the defendant moved the trial court to direct a verdict in defendant's favor, which motion was granted, and plaintiff duly excepted to the order. Evidence examined. *Held*, that the order directing a verdict was substantial error to plaintiff's prejudice, and that a new trial must be granted for the reason that the evidence reasonably tended to sustain the allegations of the complaint, and hence such evidence should have been submitted to the jury. *Slattery v. Donnelly, 264.*

2. Where defendant sheriff justified seizure under writ of attachment and alleged that the debt, on which was brought the action in which the writ issued, was incurred under false pretenses, (plaintiff claiming property as exempt) the refusal of the court to allow proof of the false pretenses is reversible error. *Taylor v. Rice, 72.*

3. Error does not constitute reversible error where the plaintiff conclusively established his right to recover on grounds wholly different from and independent of the subject-matter of the erroneous instruction. Such instruction did not materially affect the substantial rights of the defendant, and hence it is not prejudicial error. *Johnson v. N. P. R. R. Co., 354.*

WHAT ERRORS REVIEWED.

1. To sustain objection to a question, the competency of which is not apparent on its face, is not error unless offer is made to prove the facts sought to be elicited by the question. *Halley v. Folsom, 325.*

2. Sufficiency of the evidence to support the verdict cannot be assailed in the supreme court when in neither the notice of intention to move for a new trial nor the bill of exceptions are the particulars specified wherein the evidence is alleged to be insufficient. *Pickert v. Rugg, 230.*

3. The action of the trial court in directing a verdict, and in refusing to allow plaintiff to dismiss her action, cannot be reviewed on appeal without an exception. Sections 5080, 5237, Comp. Laws, *held* not to permit such review without an exception. *DeLendrecie v. Peck, 422.*

4. Irregularities in procedure not objected to nor called to attention

ASSIGNMENT.

(Of mortgage. See *Mortgage.*)

ASSIGNMENTS FOR BENEFIT OF CREDITORS.

RESERVATION OF EXEMPTIONS.

Under the statute regulating assignments for the benefit of creditors, defendant in due form made a voluntary assignment of all of his property for the benefit of his creditors, "except such property only as is exempt by law from attachment and execution, as provided by §§ 323, 324 and 325 of the Code of Civil Procedure." In proper time defendant filed a duly verified inventory, showing a schedule of his property claimed by him as absolutely exempt under § 323, id.; also a schedule of his personal property, valued at $1,499.77, claimed as additional exemptions under § 324, id.; and a final schedule of all of his property not claimed as exempt property. *Held*, that such assignment was not *prima facie* fraudulent in law, under § 2023 of the Civil Code; nor void on its face, as against non-assenting creditors, under subdivision 3, § 2030, id. *Red River Valley Bk. v. Freeman. 196.*

DEBTOR ENTITLED TO ADDITIONAL EXEMPTIONS.

Held, further, that a debtor making such assignment, who claims additional exemption of personal property to an amount not exceeding $1,500 in value, is entitled to such exemptions; and, when the debtor's duly verified inventory embraces a schedule of such additional exemptions, that such inventory and schedule, in the absence of fraud, is sufficient, *prima facie*, as a claim by the debtor of such additional exemptions. *Id.*

DUTY OF ASSIGNEE.

Held, further, that, under the statute regulating such assignments all property not exempt from execution passes to the assignee, and that it becomes his duty, as assignee, to follow and take into his possession all of the debtor's non-exempt property, not voluntarily turned over to him by the assignor. Such voluntary assignment creates a trust, and district courts, sitting as courts of equity, have, under the statute, and by virtue of their inherent powers, jurisdiction over the subject matter of the trust; and such courts will, on proper application, put forth their equity powers to aid the administration of the trust. *Id.*

RESERVATION OF EXEMPTIONS NOT GROUND FOR ATTACHMENT.

Held, further, that, in the absence of actual fraud, attachment will not lie against an assignor, for the sole reason that in making an assignment for the benefit of creditors he reserves all his property "exempt from execution." *Id.*

ATTACHMENT.

ATTACHMENT PAPERS NOT PART OF PLEADINGS.

Attachment proceedings are incidental to the main case, and form no part of the pleadings proper; and it is error to render judgment on the pleadings while a material issue raised by the complaint and answer remains untried. *Jordan v. Frank, 206.*

SUMMONS MUST BE SERVED WITHIN THIRTY DAYS.

Unless the summons in an action is served in the manner prescribed

by law within thirty days after the issue of a warrant of attachment, the writ becomes void, and will be set aside on motion. *Rhode Island Hospital Trust Co. v. Keeney, 411.*

EFFECT OF UNDERTAKING GIVEN TO PROCURE DISCHARGE OF ATTACHMENT.

The giving of an undertaking under §§ 5009, 5010, Comp. Laws, Dak., to procure a discharge of an attachment, does not merely release the levy but destroys the writ itself, and thereafter, a motion to dissolve the attachment as being irregularly or improvidently issued will not be entertained. *Fox v. McKenzie, 298.*

CLAIM OF EXEMPTIONS.

Property seized under writ of attachment cannot be claimed as exempt where debt was incurred under false pretenses. *Taylor v. Rice, 72.*

(Order vacating is appealable. See *Appeal.*)

BANKING.

(Guarantee by one partner of firm engaged in banking. See *Partnership.*)

BANKS.

(See *Constitutional Law.*)

BILL OF EXCEPTIONS.

ORDER EXTENDING TIME TO SETTLE.

Where the district court by *ex parte* orders, which were duly served on respondent's counsel, enlarged the time for settling a bill of exceptions, no reason being brought upon the record for granting such orders, and counsel for respondent appearing, and objecting to the settlement, *held*, such orders were such as the court had authority to make *ex parte*, and were therefore *prima facie* valid. Nothing to the contrary being shown, this court will assume that such orders were based upon a proper showing of cause. *Johnson v. N. P. R. R. Co., 354.*

SETTLEMENT AFTER STATUTORY TIME HAD ELAPSED.

Where, after time granted for settling a bill had expired, the district court, without making an order extending time, and, against objection, settled and allowed the bill, *held* not error. Such order of settlement operated to extend the time until the date of the actual settlement. It is within the power of the district court, under the Code, either to enlarge time, or to allow an act to be done after the time limited by the Code. Comp. Laws, §§ 4939, 5093. Under existing statutes, settling bills of exception and statements, and giving notice of intention to move for a new trial, are matters not of a jurisdictional nature. Until the time for appeal has expired, all of the various steps leading up to and including a motion for a new trial may, with respect to time, after statutory time has elapsed, be taken at any time allowed by the sound judicial discretion of the trial court. This court will presume that such discretion is properly exercised in all cases until the contrary appears. *Id.*

(See *Appeal.*)

BILL OF SALE.

(See *Fraudulent Conveyances.*)

CLAIM AND DELIVERY.

ACTION AGAINST SHERIFF—JUSTIFICATION.

In action of, against sheriff, who justifies under writ of attachment, he may show that debt, in action to recover which said writ issued, was incurred by false pretenses. *Taylor v. Rice*, 72.

CLERK OF DISTRICT COURT.

(Powers of in entry of judgment. See *Judgment*.)

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(See *Equity*.)

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COMPENSATION.

(Of officers. See *Municipal Corporation* and *County Commissioners.*)

CONFLICT OF LAWS.

CONTRACT MADE IN ANOTHER STATE.

Contract of insurance made and to be performed in another state is governed by laws of that state. *Travelers Ins. Co. v. Cal. Ins. Co., 153.*

(See *Trust and Trustee.*)

CONSTITUTIONAL LAW.

CONSTITUTION, WHEN NOT SELF-EXECUTING.

1. Article 20 of the state constitution is not self-executing; it cannot be enforced by the penalties in the former license law; the provision in that article 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," clearly indicates the intent of the constitutional convention that supplemental legislation should be the means of enforcing said article. *State v. Swan*, 5.

2. Until such supplemental legislation is had, article 20, while prohibitory in form, is in fact only a declaration of principles, and without force to repeal the prior license law; and hence relator's restraint is not unlawful. *Id.*

SEED GRAIN BONDING LAW VALID.

An act approved February 14, 1890, entitled, "An act authorizing counties to issue bonds to procure seed-grain for needy farmers resident therein," examined and held to be valid, and not an abuse of legislative powers, in that it authorizes the issue of bonds and taxation for a public purpose. *Held, further*, that the act is not an infringement of § 185 of the state constitution, in this: that it is a measure intended for the "necessary support of the poor." *State v. Nelson Co.*, 88.

ORIGINAL JURISDICTION OF SUPREME COURT.

In the exercise of its original jurisdiction, under § 87 of the state constitution, the supreme court, exercising its discretion, will issue the writs of *habeas corpus*, *mandamus*, *quo warranto*, *certiorari* and injunction only when applied for as prerogative writs; and where the question presented is *publici juris*, and one affecting the sovereignty of the state, its franchises or prerogatives, or the liberties of the people. To invoke the original jurisdiction of this court, the interest of the state must be primary and proximate, and not secondary and remote. This court will judge for itself whether the wrong complained of is one which requires the interposition of this court to protect the prerogatives and franchises of the state in its sovereign character. In all cases where the original jurisdiction of this court is invoked, except in *habeas corpus* cases, the attorney general shall proceed only on leave, based upon a *prima facie* showing that the case is one of which it is proper for this court to take cognizance. In ordinary cases, this court will not exercise its original jurisdiction to restrain local taxation for any reason. The proper jurisdiction for that purpose is lodged in the district courts. *Held*, this being an application made by the attorney general in behalf of the state to enjoin the issue of bonds upon the alleged ground that the statute authorizing the bonds is unconstitutional, that the question is one of local concern, and affects only the county of Nelson and its tax-payers, and hence the case does not fall within the limited class of cases in which this court will exercise original jurisdiction. *Held*, that the writ of injunction is denied upon the ground that the statute in question is valid law, and also upon the ground that the question presented is one of merely local concern, and hence is not a proper case to call for the issuing of a writ out of this court. *Id.*

OFFICE NOT ESTABLISHED BY CONSTITUTION MAY BE ABOLISHED AT ANY TIME.

Section 10 of the schedule to the constitution, providing that "the county and precinct officers shall hold their offices for the term

CONTRACT.

incorporate under the same name, for the same purposes, and all the partnership effects should be assigned to the corporation, and that the capital stock should be not less than $50,000, and should be held and divided among said parties in the same proportion as the capital of said copartnership. *Held*, (1) that the articles contemplated that the capital to be furnished as specified should be actual capital, and that parol evidence to show that said capital was to be nominal only was properly disregarded; that plaintiff H., having joined with G. and E. and two other parties in executing and filing articles of incorporation, whereby they became a body corporate under the name and for the purposes provided in the copartnership articles, as between said parties and under the copartnership articles, the existence of the corporation worked *eo instanti* the dissolution of the partnership, and that, although the articles of incorporation provided for five incorporators, instead of three, and fixed the capital stock at $100,000, yet, as H. was one of the incorporators, he is conclusively held to have assented thereto, and cannot be heard to say that the corporation so formed is not the corporation provided for by the copartnership articles, particularly when such changes could in no manner affect his interest in or control over such corporation; (3) that, while H. was a necessary party to a transfer of the firm property to the corporation, yet a transfer thereof by G. and E. cannot, in equity, be avoided by H. because he wrongfully refused to join therein; (4) that, as all the capital stock of the corporation would belong to the same parties who furnished the firm capital, and in the same proportion, it was competent for said corporation to assess its capital stock for an amount sufficient to pay the debts incurred by the firm in procuring the property that was transferred to the corporation, so long as such assessment was less than the amount that each party was originally required to furnish under the copartnership articles, none of said parties having actually paid in their firm capital, and said parties would not be entitled to said stock without paying such assessment; and plaintiff H. would not be entitled to paid-up non-assessable stock unless he had paid in the full amount as required by the copartnership articles. *Hennessy v. Griggs*, 52.

RIGHT OF PLEDGEE TO VOTE STOCK.

The pledgee of stock in whose name it stands on the corporate records has a right to vote the stock at a meeting to elect directors. *In re Argus Company*, 434.

PLEDGOR CAN COMPEL PLEDGEE TO GIVE PROXY.

The pledgor has no right to vote such stock, but a court of equity will, in a proper case, compel the pledgee to give the pledgor a proxy. *Id.*

STOCKHOLDER ON COMPANY'S BOOKS MAY BE DIRECTOR THOUGH HE HAVE ASSIGNED HIS STOCK.

One not appearing to be a stockholder upon the corporate records is not eligible to the office of director, under the statute providing that only stockholders are eligible to that office; one who still so appears is eligible and may vote notwithstanding he has assigned the stock. *Id.*

MAJORITY OF STOCK MUST BE VOTED AT ELECTION OF DIRECTORS.

A vote of stockholders representing a majority of the subscribed capital stock is necessary to the choice of a director. There being no such vote, the election is declared illegal, and a new election ordered. *Id.*

missioners is plain and not ambiguous. There is no chance for different persons to place different constructions upon the statute. The only fees they are allowed to charge is three dollars per day for the time engaged in their official duties, and also five cents per mile for travel, and, if he has made any other charges, those are illegal. *State v. Bauer, 273.*

CLAIM FOR TEAM HIRE.

Whether or not he can demand pay from county for use of his team. *Quære. Id.*

(Taking excessive fees. See *Criminal Law.*)
Vacancy in office to be filled by. See *District Assessor.*)

COUNTY TREASURER.

AUTHORITY TO SELL LANDS.

Authority of county treasurer to sell lands for taxes is derived from the statute and can only be controlled by court of competeut jurisdiction. *Bode v. N. E. Inv. Co., 121.*

PROPER PARTY IN ACTION TO ENJOIN TAX SALE.

Is necessary party defendant in action to restrain sale of lands for taxes. *Id.*

(See *Taxation.*)

COURTS.

OF STATE, SUCCESSORS OF TERRITORIAL COURTS.

The district court of the state of North Dakota is the successor of the territorial district court, and has jurisdiction to render judgment 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, 455.*

TERRITORIAL COURTS.

Territorial courts are bound by federal precedents. *Territory v. O'Hare, 30.*

(See *District Court, Jurisdiction, Supreme Court, Removal of Causes.*)

COVENANTS.

(Covenants of seisin in conveyance of land. See *Public Lands, Deed.*)
(Continuous. See *Specific Performance.*)

CRIMINAL LAW.

COUNTY COMMISSIONER; EXCESSIVE FEES; CHARGE FOR USE OF TEAM.

B., a county commissioner, was indicted and convicted for "taking excessive fees." The indictment was framed under § 6303, Comp. Laws, which is as follows: "Every executive officer who asks or receives any emolument, gratuity, or reward, or any promise of any emolument, gratuity, or reward, excepting such as may be authorized by law, for doing an official act, is guilty of a misdemeanor." At the trial the following facts were established by undisputed evidence: At the

date alleged, B. was a county commissioner, and, on that date, presented a bill to the county board of his county for a gross sum. The bill was allowed by the board, and ordered paid, and, on the same day, a warrant issued to B. for the amount of his bill, and was paid to B. out of the county treasury. The record book describes the bill as being rendered "for Com. services and work." The bill as allowed and paid embraced the following items, viz.: (1) "April 29th, county committee work to Hankinson and Lidgerwood, three days with team, $18." (2) "May 11th, committee work to Dwight, one day with team, $6." (3) "May 13th, committee work to Moreton, one day with team, $6." No evidence was offered explanatory of the above-mentioned items in the bill, the prosecution claiming that where it appeared that such claims were in fact presented by and paid to an executive officer, that the offense defined in the statute was made out. At the close of the case for the state, defendant moved the trial court to advise the jury that the evidence was "insufficient to warrant a conviction." The motion was denied. *Held*, to be error. *State v. Bauer*, 273.

Lumping Items in Bill.

Applying the law governing the compensation allowed commissioners to the several items of the bill above set out, it appears, upon the face of each item, that a portion thereof is for official services, viz.: "committee work," and another portion of each item is a claim (whether legal or not) against the county for strictly private and non-official services, to-wit, a claim for the use of a team for a specified number of days. Deducting the legal *per diem* for official services due B., the balance of the claim is, on its face, and in fact, for the use of a team a specified number of days. *Held*, that the claim for the use of the team as asked for and received by B., does not constitute an offense, under § 6303, *supra*. Such a claim is not a demand by an executive officer for "any emolument, gratuity, or reward" for "doing any official act." The act of furnishing a team is not an act enjoined by law, and hence is not an official act; nor does lumping a private claim for the use of a team with a claim for fees change the essential character of the claim. Such a claim is, and must remain, a mere demand of payment for a strictly private and non-official service. *Id.*

Section 6303 Compiled Laws.

It is conceded that these claims against the county were not asked for by B. as an incentive or inducement to the performance of any official act. *Held*, that this fact is also fatal to the case of the prosecution. We hold that § 6303 was intended to provide for cases not covered by § 6300, viz.: for cases where the bribe is not asked for or received to influence official discretion, but is asked for and received as an incentive or inducement to do an official act which is lawful in itself, and does not involve the exercise of official discretion in the sense intended in § 6300. Section 6303 was not, in our opinion, intended to include the offense of demanding and receiving extortionate fees where the officer asks for such fees as legal fees. *Id.*

Charge for Team Not a Charge for Official Services.

The following instructions were also given to the jury, and excepted to by defendant: "Now the particular charge upon which the prosecution in this case relies for a conviction is that this defendant, while acting as county commissioner and in the performance of his official duties, charged for the use of his team, or for the use of a team, Now, gentlemen, if you find, under the evidence in this case, beyond a reasonable doubt, that this defendant made a charge, and received compensation accordingly from the county, for the use of his team while he was engaged in the performance of his official duty, it is your duty to return a verdict of guilty." *Held*, error. *Id.*

CRIMINAL PROCEDURE.

CALLING JURY.

In a criminal case, where the jury was called and sworn singly, and without calling twelve jurors into the box, and where the parties were required to exhaust all challenges to individual jurors as each juror appeared, and before proceeding further with the call, *held* not error. *Territory v. O'Hare, 30.*

CALLING FROM LIST—ERROR; HOW WAIVED.

Where the clerk of the district court, in calling names for a trial jury, did not obtain the names from any jury box, and did not use either a jury box or ballots in calling the jury, but called off the names of those who served as jurors from a list of names before him, *held*, it was error, *Held, further*, that had the attention of the trial court been called to such irregularity before the trial began, it would have been its imperative duty to have promptly dismissed from the trial panel all jurors who were so drawn. But where, in a criminal case, such irregularities of the clerk were discovered by the defendants's counsel while they were going on, and before the trial began, but he made no objection based on such irregularities, but, on the contrary, kept silent, as to the same until after a verdict was returned into court, *held*, that the irregularity was waived. *Held, further*, that such irregularity was of a character which might be waived without impairing defendant's right of trial by jury. *Held, further*, that it was too late to take advantage of such irregularity upon a motion for a new trial, where defendant's attorney had such previous knowledge of the irregularity, but reserved his knowledge thereof, and brings it before the court for the first time, and by affidavit, upon a motion for a new trial. *Id.*

OVERRULING CHALLENGE FOR CAUSE WHEN PEREMPTORY CHALLENGES UNEXHAUSTED NOT REVERSIBLE ERROR.

Where it is conceded that defendant's challenge of a juror for cause in a criminal case was improperly overruled, but it did not appear affirmatively from the record that, at the time the jury was completed and accepted, defendant had exhausted his peremptory challenges, *held*, that defendant was not in a position to take advantage of such erroneous ruling. In such case the court will assume that the juror, if objectionable to defendant, could have been gotton rid of by a peremptory challenge. *Id.*

CHALLENGE.

Challenge for cause should designate the cause relied upon. *Id.*

CROSS-EXAMINATION OF DEFENDANT.

Where, in a criminal case, defendant, at his own request, had taken the stand as a witness in his own behalf, and, on cross-examination, was required to testify as to his antecedents, and, in so doing, stated that he had passed under names other than his own, and had been in jail at different times and places, such testimony being objected to as irrelevant, and not proper cross-examination—no question of privilege having been presented, *held*, not error. A defendant, under such circumstances, occupies no better position than any other witness; hence, within the bounds of a sound judicial discretion, may be cross-examined as to specific collateral facts for the sole purpose of affecting his credibility. This is the rule as established by a decided preponderance of authority; but a different rule prevails in certain states, as in Oregon, California and Missouri, where statutes have restricted the right of cross-examination to matters drawn out in chief. *Id.*

CHARGING JURY AS TO EVIDENCE.

Where the trial court, in a criminal case, in delivering its charge to the jury, makes an argumentative comparison upon the relative credibility of the principal witness for the defense, and the principal witness for the prosecution, where their testimony is vital, and diametrically in conflict, and in so doing disparages the credibility of such witness for the defense, and also conveys to the jury in plain, though indirect, terms, that the court entertains strong suspicions of the credibility of such witness for the defense, *held*, error which must reverse the judgment. *Held, further*, that such error is not cured by repeated statements in the charge that the jury are the exclusive judges of the weight of evidence, and the credibility of witnesses. Subdivision 6, § 343, Code Crim. Proc., which declares that, in charging the jury in criminal trials, the judge "may state the testimony, * * * but must not charge the jury in respect to matters of fact," has as to criminal trials, abrogated the common-law rule, under which judges were permitted to give juries their own views and opinions upon the weight of the evidence and the credibility of the witnesses. *Id.*

DAMAGES.

(Measure of. See *Negligence*; *Warranty*; *Public Lands*; *Trover and Conversion*; *Deed.*)

DEATH.

(Of party. Substitution of administrator. See *Partnership.*)

DEED.

COVENANT OF SEISIN.

Where, in a covenant of seisin in a warranty deed, the grantor covenants "for his heirs, executors, and administrators," no action will lie against the grantor for a breach of such covenant. *Bowne v. Wolcott*, 497.

DAMAGES FOR BREACH.

Where A. contracts to sell realty to B., and subsequently B. contracts to sell the land to C., and at B.'s request A. conveys direct to C. by deed with general covenant of seisin, the amount of recovery against A. for breach of such covenant would in any event be limited to the consideration received by him with interest thereon. § 4584, Comp. Laws. *Id.*

COVENANT OF SEISIN DOES NOT RUN WITH THE LAND.

Under §§ 3444, 3445, 3446, Comp. Laws, the covenant of seisin does not run with the land in this state. *Id.*

AGREEMENT TO RECONVEY.

A separate agreement was executed between grantor and grantee in a deed, by which latter agreed to reconvey to former on payment of a specified sum. *Held*, that such separate agreement did not show conclusively that such deed was executed to secure a debt, but that the question whether the transaction was a sale with an optional right of repurchase, or a mortgage, was one of fact resting upon the intention of the parties, to be determined from all the evidence in the case. *Devore v. Woodruff*, 143.

GIVEN AS SECURITY.

When deed absolute in form is intended as security, grantee becomes trustee for grantor. *Jasper v. Hazen*, 75.

DEFENDANT.

(See *Parties.*)
(Cross-examination of defendant. See *Criminal Procedure.*)

DELIVERY.

(See *Contract.*)

DEMURRER.

(Effect of order overruling with leave to amend. See *Judgment.*)

DEPUTY.

APPOINTMENT.

Power of assessor to appoint deputy is statutory. *Farrington v. N. E. Inv. Co., 102.*

DILIGENCE.

(In bringing action. See *Trover and Conversion.*)

DIRECTOR.

(See *Corporations.*)

DISTRICT ASSESSOR.

LEGISLATIVE OFFICE.

Office of county assessor is legislative office and may be abolished at any time. *State ex rel v. Harris, 190.*

COMMISSIONERS MAY FILL VACANCY EXISTING PRIOR TO ELECTION.

The vacancy in said office which the county commissioners are authorized to fill by § 30 is the vacancy existing before the election of any officer to fill the office as well as a vacancy created after the office has once been filled. *Id.*

OFFICE OF COUNTY ASSESSOR ABOLISHED—OFFICE OF DISTRICT ASSESSOR CREATED.

Section 30 of the revenue law, approved March 11, 1890, abolished the office of county assessor, and created the new office of district assessor the instant the statute took effect. *Id.*

DISTRICT COURT.

JURISDICTION.

Issues writs of *habeas corpus, mandamus, quo warranto, certiorari,* and injunction. *State v. Nelson County, 88.*

(Powers of in cases of assignment. See *Assignment for Benefit of Creditors.*)

ELECTION.

(See *Corporation.*)

ENABLING ACT.

(See *Courts, Removal of Causes.*)

EQUITABLE ESTOPPEL.

(See *Estoppel.*)

EQUITY.

ACTION TO REMOVE CLOUD ON TITLE.

1. An action in equity to set aside foreclosure proceedings as constituting a cloud on plaintiff's title cannot be maintained where such foreclosure proceedings were void on the face of the record. *Morris v. McKnight, 266.*

2. One in possession of real estate, but having no legal or equitable title thereto, cannot maintain an action to remove a cloud upon the title thereto. *Jackson v. LaMoure Co., 238.*

(Actions between partners. See *Partnership.*)

(Jurisdiction in cases of trust. See *Trust and Trustee.*)

(Power to compel giving of proxy. See *Corporation.*)

(Powers of court of, in assignments. See *Assignment for Benefit of Creditors.*)

(Reformation of instrument. See *Seed Lien.*)

ERROR.

(See *Appeal.*)

ESTOPPEL.

BY SILENCE.

1. One who participates in and assents to the carrying out of an agreement in a certain manner is estopped to say that it was not properly done. *Hennessy v. Griggs, 52.*

2. Against insured, is created by silence after notice of errors made by agent of insurer in writing application. *Johnson v. Ins. Co., 167*

BY ACCEPTING OF LESS THAN LEGAL FEES.

Rendering bills and accepting salary at a less rate than that fixed by law does not preclude an officer from claiming full pay for salary subsequently coming due. *O'Hare v. Park River, 279.*

OF CORPORATION BY ITS OFFICERS.

The officers of a school township cannot estop the township by a representation, express or implied, that the facts to authorize the issue of a lawful warrant exist. *Bank v. School Township, 26.*

(Against one seeking to reinstate mortgage. See *Mortgage.*)

EVIDENCE.

PAROL TO VARY WRITTEN CONTRACT.

Defendant having written plaintiff asking if it could furnish defendant coal at same prices and terms as previous season, if he used about one-half to two-thirds of amount used the previous season, and plaintiff having, by letter, in answer to his inquiry, offered to sell at the price of $3.50 per ton, and defendant having thereafter, by letter, accepted the offer, *held*, that parol evidence to show that, intermediate plaintiff's offer and defendant's acceptance, the parties fixed the amount of coal to be delivered at the full amount used by defendant the season before,

FEES.

(See *County Commissioners.*)
(Taking excessive. See *Criminal Law.*)

FELLOW-SERVANT.

(See *Negligence.*)

FINAL JUDGMENT.

(See *Judgment.*)

FINDINGS OF FACT.

(See *Practice.*)

FIRE INSURANCE.

(See *Insurance.*)

FORECLOSURE.

(See *Mortgages.*)
(Action to set aside. See *Equity.*)

FORFEITURE.

Who Can Raise Question of.

Question of forfeiture of right of entryman to public lands by agreement to convey can only be raised by the United States. *Larison v. Wilbur. 284.*

(Of rights under policy of insurance. See *Insurance.*)
(Waiver of. See *Insurance; Public Lands.*)

FORMER ACTION.

(When a bar to subsequent action. See *Judgment.*)

FRAUD.

Knowledge of Agent's Fraud.

By silence after notice of insurance agent's fraud the insured becomes a participant in the fraud. *Johnson v. Ins. Co., 167.*

(Of lienee in describing land. See *Seed Lien.*)
(Of insurance agent in writing application, how proved. See *Evidence* and *Insurance.*)
(Of agent, chargeable to principal. See *Insurance.*)

FRAUDULENT CONVEYANCES.

Conveyance by Insolvent; Secret Trust Reserved.

L., a merchant, was embarrassed financially, and was being pressed by his creditors with demands which he was unable to pay. The plaintiffs, among others, were creditors of L., and were urging him to satisfy their claim. Under these circumstances L. executed and delivered to plaintiffs a bill of sale, absolute on its face, and which purported to sell and convey to plaintiffs all the merchandise then in L.'s store, and

INSOLVENCY.

(See *Assignment for Benefit of Creditors.*)

INSTRUCTIONS.

(See *Charging Jury; Trial.*)

INSURANCE.

LIMITATION OF TIME TO BRING ACTION ON POLICY OF INSURANCE.

1. Where a policy of fire insurance provides that action thereon must be brought within a specified time after the loss occurs, the limitation runs from the date of the fire, although, under other provisions of the policy, the cause of action does not accrue until some time after the fire. *Travelers Ins. Co. v. Cal. Ins. Co., 151.*

2. A stipulation in an insurance policy issued in Dakota territory, upon property therein, which limits the time within which an action may be brought upon the policy to the period of six months from the date of loss is void. Such stipulation would be upheld at common law, but is void under the statute. § 3581, Comp. Laws. *Johnson v. Ins. Co., 167.*

APPLICATION FOR INSURANCE.

1. Where a written application signed by the insured declared that "the statements made by me, and answers to questions above given, are true and a warranty on my part, and are the basis upon which I ask hail insurance by the Dakota Fire & Marine Insurance Company on the crops herein described," and where the policy refers to such language as follows: "Assured's application, of even number and date herewith, on file in the office of the company in Chamberlain, Dakota, is hereby referred to as part hereof, and is a warranty on the part of the assured, and the basis on which this insurance is written"—and where the policy further declares that any misrepresentation or false statement or concealment of facts in the application, or if the property is or becomes incumbered, shall operate to render the policy void"—*held*, that such statements, if not intrinsically material have been made so by the express agreement of the parties, and such agreement must prevail, under Comp. Laws, § 4163, which provides: "A policy may declare that a violation of specified provisions thereof shall avoid it; otherwise the breach of an immaterial provision does not avoid the policy." *Id.*

2. Where the agent who solicits insurance, either by his direction or act, makes out an application for insurance incorrectly, notwithstanding all the facts are stated to him truthfully by the applicant, the error or fraud will not defeat the policy, and is chargeable to the insurer, and not to the insured. *Held, further*, that parol evidence is admissible to show that the application was filled by the agent, and that the answers of the applicant were falsified by the agent without the applicant's knowledge. *Id.*

3. Where a policy of insurance, with a copy of the application indorsed thereon, was sent by the company to the insured, and was in the possession of the latter for several months before the loss occurred,

held, that the insured was chargeable in law with knowledge of the contents of both the policy and the application, and the circumstance that the assured did not actually read or know the contents of the application, or know that a copy of the application was indorsed on the policy, would make no difference. The paper being his own contract and in his actual custody, he will be presumed to know all of its contents, even where the copy on the back was not referred to in the body as being indorsed on the back. *Id.*

4. Under such circumstances, where a fraud is practiced by the agent upon both the insured and insurer, and where such fraud would be readily detected by the insured upon reading the copy of the application indorsed on the policy, the insured will be estopped from denying knowledge of the fraud. It was the duty of the insured, upon receiving the policy, to proceed at once to have the same corrected or rescinded. He did not do so. *Held*, that by such silence, when he should have spoken, the insured constructively became a participant in the original fraud of the agent, and thereby forfeited his rights under the policy. Such policy was defeated in its very inception, and it never attached to the risk which it covered. See Comp. Laws, § 4164. *Id.*

PROOFS OF LOSS.

1. Where the plaintiff was bound by the terms of his policy, in the event of a loss, to furnish the insurer certain proofs of loss, but wholly failed to furnish the prescribed proofs or any proofs of loss, either within the time limited by the policy, or within a reasonable time thereafter, or at all, *held*, that, by reason of such default and omission, the plaintiff forfeited his right to recover under the policy. *Id.*

2. Evidence to establish a waiver of such forfeiture examined, and *held* sufficient to constitute a waiver. *Id.*

FORFEITURE WAIVED BY DEMANDING JUDGMENT FOR PREMIUM NOTE.

At the time of the service of defendant's answer to the plaintiff's complaint in this action, the defendant had full knowledge of all the facts constituting the grounds of forfeiture of said policy by the plaintiff; and with such knowledge, and by way of counter-claim in its answer defendant seeks to recover from the plaintiff the amount of the premium note given by said plaintiff as a consideration for the issuance of said policy. *Held*, that pleading such counter-claim operated as a waiver of the forfeiture of the policy. The policy was not void, but was voidable at the option of the insurer. After knowledge of the forfeiture, defendant saw fit to demand judgment for its premium. This was equivalent to an independent action for the premium, and waived the forfeiture. If the answer had not, among other defenses, pleaded a forfeiture which went to the inception of the policy, and which would, if established, defeat the premium note, the case would have been otherwise. *Id.*

MORTGAGEE TO WHOM LOSS PAYABLE MAY SUE ALONE ON POLICY.

A mortgagee, to whom policy to mortgagor is made payable, may sue alone where his claim exceeds the amount of the insurance. *Travelers Ins. Co. v. Cal. Ins. Co.*, *151.*

REINSURANCE; WHEN INSURED MAY SUE REINSURER.

A mere contract of reinsurance creates no privity between the original insured and the reinsurer; but where the loss or risk is expressly

assumed by another company, the original insured may sue upon such contract as having been made for his benefit. *Id.*

INTERVENTION.

Equities Between Plaintiff and Intervenor.

Where an intervention complaint was framed on the theory only of co-operation by the intervenors with plaintiff in the effort to secure judgment against defendants, and the prayer for relief merely requested a 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 plaintiff and the intervenors, as between themselves, were to be adjusted in the action, but the verdict being a joint verdict, in favor of the plaintiff and intervenors, for the amount of the recovery, *held* error to award to intervenors any specific portion of the recovery against defendants, there having been no adjustment of the equities between plaintiff and intervenors. Such portion of the judgment reversed, with directions that rights of plaintiff and intervenor be settled as between themselves. *Braithwaite v. Aikin*, 475.

INTOXICATING LIQUORS.

Place Where Liquor is Sold a Nuisance.

Where it appears that one of the defendants, who resides at St. Paul, Minn., is, through the agency of the other defendant, engaged in carrying on the business of keeping for sale and selling intoxicating liquor at a place of business located at Fargo, in the state of North Dakota, in violation of the prohibitory liquor law, *held*, that such place of business is a common nuisance, whether such liquor was or was not drank by purchasers at such place of business, with the knowledge and consent of the agent in charge of such place of business. Construing § 13, c. 110, Laws N. D. *State ex rel v. Fraser*, 425.

Original Packages—Wilson Bill.

Since the passage by congress of the law commonly known as the "Wilson Bill," sales of intoxicating liquor in violation of the prohibitory legistation of North Dakota, which are made in this state by a non-resident, through an agent living in this state, are unlawful sales, whether the liquor sold is or is not imported liquor, or whether it is or is not contained in the original cask or package in which it was shipped out of another state or county. *Id.*

(See *Prohibition; Constitutional Law.*)

JOINT TRADERS.

(See *Partnership.*)

JUDGMENT.

Order Overruling Demurrer With Leave to Amend is not Final Judgment.

In a former action a demurrer was interposed to the answer, and upon argument thereon the district court made the following order: "It is ordered that said demurrer be, and the same is hereby, overruled. It is further ordered that said demurrer be, and the same is hereby sustained to the plaintiff's complaint, and that said action be, and the same is hereby, dismissed, with costs to be taxed, unless the plaintiff amends his complaint within twenty days from the date here-

JURISDICTION.

JURY.

MISREPRESENTATIONS.

(See *Representations.*)

MORTGAGES.

DEED WITH AGREEMENT TO RECONVEY.

1. Deed intended as security, with agreement to recovery on payment, creates trust in favor of grantor. *Jasper v. Hazen, 75.*

2. Deed with agreement to reconvey not always a mortgage. Effect of agreement depends on intention of parties. *Devore v. Woodruff, 143.*

NOTICE—SENIOR AND JUNIOR INCUMBRANCERS.

A senior incumbrancer is not bound to respect the equitable rights of a junior incumbrancer in the property unless he has notice, either actual or constructive, of such rights. The recording of the junior mortgage is not constructive notice to the prior mortgagee of the existence of such mortgage, or of the mortgagee's equitable right thereunder to insist that the prior mortgagee shall not release from the lien of his mortgage any property upon which the subordinate incumbrancer has no lien, to his prejudice. *Sarles v. McGee, 365.*

MORTGAGEE MAY SUE ON INSURANCE POLICY.

Mortgagee to whom loss is payable and whose interest exceeds amount of policy may sue on it alone. *Travelers Ins. Co. v. Cal. Ins. Co., 151.*

FORECLOSURE.

1. Where a debt is secured by mortgage on several parcels of land and the court finds that the mortgagee is entitled to a sale thereof, it has no authority to except any part thereof from the decree of sale, though the value of the remainder is greater than the amount of the debt. *Baker v. Marsh, 20.*

2. To enable a party, claiming as assignee of mortgagee, to foreclose a mortgage upon real estate in this state by advertisement, the record must satisfactorily show the legal title to the mortgage to be in the assignee. *Morris v. McKnight, 266.*

3. Where a mortgage upon real estate was executed to "Beecher & Dean," and subsequently one Charles R. Dean, assigned his interest in such mortgage to one Salmon I. Beecher, which assignment was duly recorded, and thereafter Salmon I. Beecher assigned said mortgage to George S. Barnes, which assignment was also duly recorded, and said Barnes assigned to Elizabeth McKnight, and which last assignment was also recorded, and said Elizabeth McKnight proceeded to foreclose by advertisement, *held*, that the record did not show that the legal title to said mortgage had ever passed from "Beecher & Dean," and such foreclosure was void on the face of the record. *Id.*

SATISFACTION—REINSTATEMENT—PRIORITY.

1. Mortgagee in a lost, and for that reason unrecorded, mortgage, having executed and recorded an instrument certifying that such mortgage had been paid and satisfied, cannot reinstate the prior lien of his mortgage as against an innocent assignee for value of a second mortgage, who buys relying upon the satisfaction as an extinguishment of the prior mortgage, although the mortgagees in the second mortgage knew of the unrecorded mortgage, and took their lien expressly subject to it. *Morris v. Beecher, 130.*

2. The fact that, about the time of the execution and recording of the satisfaction another mortgage for about the same amount as the unrecorded mortgage, given to the same mortgagee, by one who had assumed the unrecorded mortgage, but given subsequently to the second mortgage, was executed and recorded, is not sufficient to put the purchaser of the second mortgage upon inquiry as to whether the unrecorded mortgage had in fact been paid and satisfied, as against the recorded satisfaction given by the first mortgagee, although such substituted mortgage recites that the property is free from all incumbrances. *Id.*

MOTION FOR NEW TRIAL.

(See *New Trial.*)

MUNICIPAL CORPORATION.

Prohibited Contract.

Where a contract is expressly prohibited or declared void by statute, retention of the fruits of such contract will not subject a municipality to liability under the contract or on a *quantum meruit*. *Bank v. School Tp., 26.*

Publication of Ordinance.

Under the provisions in the general town incorporation law, (§ 1043, Comp. Laws,) which provides that "every by-law, ordinance, or regulation, unless in case of emergency, shall be published in a newspaper in said town, if one be printed therein, or posted in five public places, at least ten days before the same shall take effect," a by-law passed by the town trustees, but never published or posted, in a case where no emergency is alleged or shown, is of no force or effect, even as to such persons as have notice of its passage by the trustees. Either publication or posting is a prerequisite to a binding enactment. *O'Hara v. Park River, 279.*

Salary of Officer.

When the compensation of a town marshal is fixed at a certain amount per month, the fact that such marshal renders his bills for services and receives his pay for two months, at a rate less than the rate fixed by law, will not preclude such officer from claiming the full pay allowed by law for the subsequent months. *Id.*

Payment of Less Than Legal Salary Accepted.

But the fact that such officer rendered his bills for two months, even though for an amount less than that prescribed by law, and that such bills were allowed and paid as rendered, and such payment received without objection or protest, amounts to an adjudication of the claim for services for the time covered by the bills rendered, which, in the absence of accident, surprise, or mistake of fact, cannot be reopened. *Id.*

City Assessor.

Assessor of city organized under c. 24, Political Code, has no power to appoint a deputy. *Farrington v. Inv. Co., 102.*

(Taxation by. See *Taxation.*)

(Estoppel by acts of officers. See *Estoppel.*)

NEGLIGENCE.

Presumption of Negligence.

In an action for damages caused by a prairie fire alleged to have been

started by defendant's negligence, and where the complaint charges negligence both as to the machinery and appliances in use upon the train which threw out the fire, and as to the management of such machinery and appliances, *held*, the primary fact that defendant's train threw out the fire in question being shown, such fact of itself will operate to make out a *prima facie*, case of negligence. Such fact creates a disputable presumption of defendant's negligence. *Johnson v. N. P. R. R. Co., 354.*

How Rebutted.

Held, further, that the *prima facie* case of negligence cannot be rebutted by the defendant by showing merely that the machinery and appliances were of a proper character, and were at the time in good condition, without showing the further fact that the same were handled with due care at the time the fire was thrown out. *Id.*

Degree of Care Required.

The trial court charged the jury as follows: "The care must be proportionate to the danger. A higher degree of care is required when the wind is high than when it is calm; and where combustible matter is very dry than when it is wet." *Held*, that under the evidence said instruction was erroneous. *Id.*

Contributory Negligence.

Where plaintiff is damaged by prairie fire set by defendant, the fact that plaintiff had no fire-break to protect his property is not negligence *per se;* but in such case the question whether or not such omission would constitute negligence, would be a question of fact for the jury, under proper instructions. Such a question would usually be one of pure fact. *Gram v. N. P. R. R. Co., 252.*

Fellow-Servant.

1. The negligence of a foreman of a gang in failing to block a pile which was shoved against plaintiff, injuring him, because it was not blocked, is the negligence of a fellow-servant, although the foreman had authority to employ and discharge plaintiff, and the plaintiff was under his superintendence and control in doing the work in the performance of which he was injured. *Ell v. N. P. R. R. Co., 336.*

2. Whether a negligent servant is the fellow-servant of an employe who is injured by the carelessness of the former depends, not upon the relative ranks of the two servants, but upon the character of the work, the negligence with respect to which resulted in the injury. *Id.*

3. The negligent performance or omission to perform a duty which the master owes to his employes is at common law the negligence of the master, whatever the grade of the servant who is in that respect careless. The negligence of a servant engaged in the same general business with the injured servant is the negligence of a fellow-servant, whatever position the former occupies with respect to the latter, as to all acts which pertain to the duties of a mere servant, as contradistinguished from the duties of the master to his employes. *Id.*

Measure of Damages.

1. In actions for damages for negligence, interest may be awarded or withheld in the discretion of the jury. *Id.*

2. In an action for damages to property caused by negligence, the measure of damages is controlled by § 4578, Comp. Laws, which reads as follows: "In an action for the breach of an obligation not arising from contract, and in every case of oppression, fraud and malice, inter-

ORIGINAL PACKAGE.

(See *Intoxicating Liquors.*)

PARTIES.

ENJOINING TAX PROCEEDINGS.

Proper parties defendant in action to enjoin sale of lands for taxes. *Bode v. N. E. Inv. Co., 121.*

(Plaintiff in action on insurance policy, See *Insurance.*)

(Substitution of. See *Partnership.*)

PARTNERSHIP.

PARTNERS AS TO THIRD PARTIES.

The owners of three steamers operated them jointly for their own benefit, under the name "Benton Line." *Held*, that they were all liable as partners or joint traders on a contract of affreightment made by their authorized agent in such name of "Benton Line" to carry goods in place of one of such boats. It seems that by operating such boats jointly in such a 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. Power, 455.*

GUARANTY OF COMMERCIAL PAPER BY PARTNER.

A member of a partnership engaged in the banking business has no authority by virtue of his partnership relation, to guaranty in the firm name commercial paper for the benefit or accomodation of third parties; and the firm would not be bound by such guaranty, in the absence of the showing of specific authority, or an authority to be implied from previous course of business between the parties, or subsequent ratification of the act by other partners. *Clarke v. Wallace, 404.*

EXTENT OF PARTNER'S POWER TO BIND FIRM BY GUARANTY.

One member of a firm has no authority to bind his firm by a guaranty of commercial paper of a third party, even when such firm is interested in the transaction, unless such guaranty is necessary for carrying on the business of the firm in the ordinary way, *Id.*

ON THE FACTS OF THIS CASE FIRM HELD NOT TO BE BOUND.

Where one member of a firm, without the knowledge or consent of his copartners, in consideration of receiving security on a firm debt, guaranteed the note of the debtor to a third party, in an amount several times greater than the debt to be secured, *held*, that the other members of the firm were not bound by such guaranty. *Id.*

DEATH OF PARTNER; SUBSTITUTION OF ADMINISTRATOR.

One of three defendants having died *pendente lite*, and his administrator having been substituted, and having voluntarily appeared and defended the action, and no objection having been raised by any of the defendants to such a course until after trial and verdict, *held*, this court would not on appeal of surviving defendants reverse judgment against all the defendants when the portion thereof relating to the administrator provides that the judgment against him shall be paid only in due course of administration. *Braithwaite v. Power, 455.*

POWER OF SALE.

(See *Trust and Trustee.*)

PRACTICE.

FINDINGS OF FACT.

Where the trial court determines the issues of fact without a jury, the requirement of the statute as to findings is mandatory, and not directory. In such cases it is the duty of the trial court without request to make express findings of the ultimate facts which are material and arise upon the pleadings. Accordingly where the district court, in such case, made no express findings of the ultimate facts which are in issue, but instead of doing so adopted certain documentary evidence, and a certain stipulation of facts, as its findings of fact, and from such findings drew certain legal conclusions, upon which judgment was entered, *held* reversible error. *Gull River Lumber Co. v. School Dist.*, *500.*

(In criminal actions. See *Criminal Procedure.*)

(In trial of civil actions. See *Trial.*)

(Summons, defective. See *Summons.*)

(Settling bill of exceptions. See *Bill of Exceptions.*)

PRAIRIE FIRE.

(See *Railroad Companies.*)

PRESUMPTIONS.

(Proceedings of trial court presumed regular. See *Bill of Exceptions.*)

(Of knowledge of contents of instrument from possession of copy. See *Insurance.*)

(Of negligence. See *Negligence.*)

(Of law in favor of tax proceedings. See *Taxation.*)

PRETENSES.

(See *False Pretenses.*)

PRINCIPAL AND AGENT.

WHAT CONSTITUTES AGENT.

Solicitor of insurance is agent of insurer. *Johnson v. Ins. Co.*, *167.*

AGENT'S ADMISSIONS; WHEN NOT BINDING ON PRINCIPAL.

Plaintiff had grounds for suspicion that one M. had stolen a quantity of plaintiff's grain from his granary, and had subsequently delivered such grain to the defendant at its elevator, at LaMoure, and within twenty-four hours after M. had actually delivered certain grain at said elevator, and received tickets therefor, plaintiff visited the elevator at LaMoure, and there saw L. engaged in buying grain for defendant, and issuing tickets for the same, and in receiving such grain into the defendant's elevator. Under these circumstances, and in response to inquiries made of L. by plaintiff, L. stated to plaintiff, in substance, that, several hours prior to the time of such conversation, L. had purchased of M. and given him defendant's elevator tickets therefor, a quantity of grain corresponding in kind and amount to that supposed to have been stolen from the plaintiff. *Held*, in an action against the defendant for the value of the grain, that said statements and admis-

sions made by L. as to receiving the grain, and issuing tickets therefor, were inadmissible because not a part of the *res gestæ*, and their admission in evidence was error. The statements of L. were made concerning a transaction which was within the scope of L.'s authority as agent, but such transaction was closed, and entirely completed some hours prior to the time at which L. narrated the fact to the plaintiff. The declarations and admissions of L. were not made while the wheat was being received into the elevator; nor were the declarations made spontaneously, and so connected with the principal transaction as to spring from and form a part thereof. Such declarations by the agent were not a necessary part of the duty intrusted to him, and cannot therefore, bind the principal, in the absence of authority from the principal to make such declarations. Evidence examined and found not to show that L. had authority from defendant to make the declarations and admissions which were admitted in evidence. *Short v. N. P. Elevator Co., 159.*

AGENT'S TORT.

Defendant having been sued for damages caused by fire alleged to have been set out by his servants or agents, *held* proper to prove defendant's orders to his hired men not to set any fires. *Moe v. Job. 140.*

PRIORITY.

(Between mortgagees. See *Mortgage.*)

PRIVITY.

(Between insured and reinsurer. See *Insurance.*)

(Of parties defendant. See *Judgment.*)

PROCESS.

(See *Summons.*)

PROHIBITION.

EFFECT OF ARTICLE 20 OF STATE CONSTITUTION.

When a party was held by a magistrate for a violation of the laws against selling intoxicating liquor as a beverage without license, in force on that subject when the constitution was adopted, and committed, in default of bail, and brought before this court on *habeas corpus* proceedings, claiming that he was unlawfully restrained of his liberty, because all pre-existing laws against selling intoxicating liquor without license were repealed by article 20 of the constitution, (being the prohibition article,) as being repugnant thereto, *held* that, if article 20 of the constitution be self-executing and operative, it repeals the pre-existing license law, including penalties. *State v. Swan, 5.*

(See *Intoxicating Liquors; Constitutional Law.*)

PROOF.

(See *Evidence.*)

PROXIMATE CAUSE.

(See *Railroad Companies.*)

PROXY.

(Right to proxy. See *Corporation.*)

PUBLICATION.

(Of ordinances. See *Municipal Corporation.*)

PUBLIC LANDS.

Title to Northern Pacific Indemnity Lands.

Title to the indemnity lands in the grant to the Northern Pacific Railroad Company does not pass from the United States until the selection of such lands by the company with the approval of the secretary of the interior. Until such approval such lands are not subject to taxation. *Jackson v. LaMoure Co.*, 238.

Pre-emption; Question of Forfeiture Can Only be Raised by United States.

As against all the world, except the United States, plaintiff had perfect title to said land, with good authority to sell and convey the same, and the question of forfeiture, by reason of the existence of said prior parol contract, under § 2262, Rev. St. U. S., can be raised only by the United States. Such forfeiture may be waived. This court cannot anticipate the action of the federal officers in that respect. *Larison v, Wilbur*, 284.

Title After Location With Scrip and Before Patent.

Where a party locates government scrip upon government land at the proper local land office, and where, at the time, the land so entered was subject to entry with such scrip, and the entry was accepted by the officers of the local land office, and the patent certificate issued to the entryman, such entryman holds the full equitable and beneficial title to such land, but until the patent actually issues the naked legal title remains in the United States. *Bowne v. Wolcott*, 415.

Grant by Entrymen with Covenant of Seisin.

Where, in such case, the grantee of the entryman, prior to the issuance of the patent, again conveys the land by warranty deed, with covenant that he is "well seized in fee" of said land, such covenant of seisin is broken, because the grantor is not seized of the legal title. *Id.*

Damages For Breach of Covenant.

But such deed dose not convey to the grantee the full equitable and beneficial title to said land; and until some paramount or hostile title is in some manner asserted, or the grantee is in some manner disturbed in his possession, such breach is a mere technical breach, for which the grantee can recover nominal damages only. *Id.*

(Taxation of lands in grant to the N. P. R. R. Co. See *Taxation.*)

PUBLIC POLICY.

(See *Fraudulent Conveyances.*)

QUANTUM MERUIT.

Liability of Municipality.

Municipality retaining fruits of illegal contract not liable on. *Bank v. School Tp.*, 26.

(Liability. See *School District.*)

QUESTIONS OF LAW AND FACT.

QUO WARRANTO.

RAILROAD COMPANIES.

transfer of the case, the complete successor of the territorial court in which such action was pending at the time of the admission of this state into the Union; provided, the record, which closes with the filing of the request, discloses a proper case for transfer. All proceedings in the state court thereafter are *coram non judice*. *Miller v. Sunde 1.*

3. The filing of the request in open court, the attention of the court being called thereto, works an immediate destruction of the jurisdiction of the state court, and at the same moment vests such jurisdiction in the proper federal court. The only power that remains in the state court is to perform the merely ministerial act of making the formal transfer. *Id.*

4. The proper state court, however, is until such request the successor of the territorial court in which the case was pending. *Id.*

CITIZENSHIP.

The personal citizenship of an administrator, executor, trustee, or receiver determines the question of diverse citizenship, on which federal jurisdiction depends. Neither the fact that the representative was appointed such in the state of which the opposite party is a citizen, nor the fact that the beneficiary whom the representative acts for may be a citizen of the same state, affects the question. *Id.*

REPLEVIN.

(See *Claims and Delivery.*)

REPRESENTATIONS.

MADE MATERIAL BY AGREEMENT.

Immaterial representations may be made material by agreement. *Johnson v. Ins. Co. 167.*

RES GESTÆ.

(See *Principal and Agent.*)

REVENUE.

(See *Taxation.*)

RIGHT OF WAY.

(See *Railroad Companies.*)

SALARY.

(Of officer. See *Municipal Corporation.*)

SATISFACTION.

(Of mortgage. See *Mortgage.*)

SCHOOL DISTRICTS.

CONTRACT ULTRA VIRES—RATIFICATION.

A contract, authorized by the inhabitants of a school district at a district meeting, to build a school house for an amount in excess of funds on hand or subject to collection for that purpose, and the amount that could be realized from the maximum tax which could be levied by the inhabitants for the current year and used for that purpose, is void. Therefore, *held*, that such a contract, void because the

TRANSFER OF CAUSES.

(See *Removal of Causes.*)

TREASURER.

(County. See *County Treasurer; Taxation.*)

TRIAL.

OBJECTIONS—WAIVER.

Oral demurrer to sufficiency of evidence is waived by failure to object to evidence which cures the defect. *Bowman v. Eppinger, 21.*

PLAINTIFF'S CASE.

Evidence to negative contributory negligence is not necessary to make *prima facie* case for plaintiff. *Gram v. N. P. R. R. Co., 252.*

CHARGE OF THE COURT.

Instructions of trial judge to jury *held* correct under the evidence. *Pickert v. Rugg, 230.*

WHEN COURT SHOULD DIRECT VERDICT.

The existence of any legal evidence in the record, upon which a verdict for the party holding the burden of proof can be based, is a question of law for the court; and it is error to refuse an instruction asked by defendant, after the testimony is closed, directing a verdict in his favor, when upon the evidence in the record, a verdict for plaintiff must properly be set aside on application. *Bowman v. Eppinger, 21.*

(In criminal cases. See *Criminal Procedure.*)

TROVER AND CONVERSION.

MEASURE OF DAMAGES.

To entitle a person to recover the highest market value between the time of the conversion of property and of the rendering of the verdict, he must affirmatively show such facts as establish clearly that he has commenced and prosecuted his action with reasonable diligence. No presumption will be indulged in his favor, and the statute will be strictly construed against him. *Pickert v. Rugg, 230.*

REASONABLE DILIGENCE IN BRINGING ACTION.

Delay of eleven months in bringing his action, *held* fatal to plaintiff's claim that he had prosecuted his action with reasonable diligence, within the meaning of § 4603, subd. 2, Comp. Laws, giving him the highest market value between the conversion and the verdict, when the action has been prosecuted with reasonable diligence. *Id.*

TRUST AND TRUSTEE.

HOW TRUST RELATION IS CREATED.

1. Assignment for benefit of creditors creates a trust. *Red River Valley Bank v. Freeman, 197.*

2. When one receives a deed absolute in form, but intended as security only, and with a promise to reconvey upon payment, he becomes trustee for the grantor to the extent of grantor's interest therein. Likewise, when one receives personal property as security only, and under a promise to return the same on certain contingencies, he becomes

VACANCY.

(In office. See *District Assessor.*

VENDOR AND VENDEE.

(Of personal property. See *Warranty.*)

VERDICT.

SETTING ASIDE.

Verdict cannot be set aside as against evidence where there is a substantial conflict in the testimony. *Halley u. Folsom, 325.*

(Directing. See *Appeal; Trial.*)

(Error in order denying motion for, how waived. See *Appeal.*)

WAIVER.

(Of forfeiture. See *Insurance; Forfeiture; Public Lands.*)

(Of defect in summons. See *Summons.*)

(Of right to object to illegality of election. See *Corporation.*)

WARRANT.

(School warrant. See *Schools and School Districts.*)

WARRANTY.

IN EXECUTORY CONTRACT.

1. In an executory contract for the sale of personal property, the vendor may warrant the quality of the goods contracted to be sold, and such warranty will have the binding force of a warranty upon a sale *in præsenti*, and no greater. *Halley v. Folsom, 325.*

2. Such warranty will not cover defects that are patent or readily discovered on inspection, and it is the duty of the vendee to reject the property if it does not conform to the representations; but if the vendee accepts the property without knowing or having reason to believe that it does not fulfill the terms of the warranty, and the defect is one that might not be readily discovered, the vendee may upon a subsequent discovery of the defect, bring an action for damages on the warranty without returning or offering to return the property. *Id.*

EVIDENCE TO REBUT PROOF OF WARRANTY.

The poor credit of the vendee cannot be shown to rebut evidence of a warranty where the sale was made on credit, but at a price above the cash market value of the article, and security taken for the purchase price. *Id.*

MEASURE OF DAMAGES ON BREACH OF WARRANTY.

The measure of damages on breach of warranty on sale of personal property being the difference between what it would have been worth had it been as warranted and its actual value, *held* reversible error to allow defendant's counsel to ask a witness to testify as to the value of the machine, a self-binding harvester, on the assumption that it was useless, the evidence clearly showing that it could be, and was in fact, used, although it failed to bind all the sheaves; the answer to such question being prejudicial. *Aultman & Co. v. Ginn, 402.*

(By statements in application for insurance. See *Insurance.*)