REPORTS OF CASES

DECIDED IN THE

SUPREME COURT

OF THE STATE OF

NORTH DAKOTA,

FROM JANUARY 15, 1891, TO MAY 31, 1892.

EDITED BY

R. D. HOSKINS, Reporter.

VOLUME II.

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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.

CONSTITUTION OF NORTH DAKOTA.

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

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

Cases Reported in This Volume.

Cases Cited in Opinions in This Volume.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF NORTH DAKOTA

PATRICK J. LYONS and THOMAS J. WOODMANSEE, as the firm of LYONS & WOODMANSEE, Plaintiffs and Appellants, *v.* DANIEL B. MILLER, Defendant and Respondent.

Want of Jurisdiction—Waiver by Appeal.

After an appeal upon questions of law and fact by a defendant from a judgment of a justice of the peace to the district court, where a demand for a new trial is embodied in the notice of appeal, the defendant cannot deny the jurisdiction of the district court over his person, although the justice of the peace rendering the judgment appealed from never acquired jurisdiction over his person. Whether such justice acquired such jurisdiction by litigating the cause on the merits after motion to dismiss for want of jurisdiction had been overruled, not decided.

(Opinion Filed January 15, 1891.)

APPEAL from district court, Kidder county; Hon. W. H. WINCHESTER, Judge.

W. F. Cochrane and *Geo. W. Newton*, for appellants; no appearance for respondent.

Action for goods sold and delivered; tried in justice court, where plaintiff recovered judgment. On appeal by defendant to district court action dismissed on ground of no jurisdiction over person of defendant. Reversed and district court ordered to try cause.

Cochrane and Newton, for the appellants, urged that the objection to the return endorsed on the summons as being

insufficient or that there was no legal service thereof, came too late and if the same was, as a matter of fact, insufficient the question had been waived and that a general appearance had been entered by answering, demanding a jury trial and other general appearances for the defendant, citing Compiled Laws, § 4904; Railway Co. v. DeBusk, 12 Colo. 294, 20 Pac. Rep. 752; Walker v. Turner, 42 N. W. Rep. 910; Burnham v. Doolittle, 15 N. W. Rep. 606; Williams v. Railway Co., 6 N. W. Rep. 445; Allen v. Coates, 11 N. W. Rep. 132.

The opinion of the court was delivered by

CORLISS, C. J. The justice of the peace before whom this action was instituted failed in the first instance to acquire jurisdiction of the person of the defendant because the summons was not properly served. The defendant appeared specially for the purpose of objecting to the court's jurisdiction, and moved the court to set aside the service of the process on the ground that the court had not acquired jurisdiction of his person. This motion being overruled, the defendant, after requesting and securing a change of venue, answered the complaint, and the case was tried. Defeat ensuing, defendant appealed from the judgment on questions of law and fact, demanding in his notice of appeal a new trial of the case in the district court. That court adjudged that the action should be dismissed for want of jurisdiction of the person of the defendant. This ruling is challenged by this appeal, and we think the appellant must succeed. Whether the defendant, by pleading and litigating the cause on the merits, waived his objection to the court's jurisdiction over his person, made before he had appeared specially, it is not necessary for us to decide. The defendant himself invoked the jurisdiction of a new tribunal, not for the purpose of correcting an erroneous ruling on the question of jurisdiction, but to have the issues litigated upon the merits. He demanded a new trial in his notice of appeal, and under the statute such demand is an appeal to the district court to hear and determine the cause on the merits. Compiled Laws, § 6131. It is not entirely logical for him to repudiate a jurisdiction he has invoked, not for the special purpose of reversing an erron-

eous ruling on the question of jurisdiction, but for the purpose of a trial of the action on the merits in a new tribunal. The district court had jurisdiction of the person of the defendant when he himself invoked the jurisdiction generally, and the cause, therefore, should have been tried upon the merits. Seurer v. Horst, 31 Minn. 479, 18 N. W. Rep. 283, is an express authority in favor of our views. For the error in refusing to entertain jurisdiction of the case the judgment of the district court is reversed, and that court is directed to proceed with the trial of the action as in other cases of similar appeals. All concur.

ANDREW SANDAGER and HANS HAUGAN, Plaintiffs and Respondents, *v.* NORTHERN PACIFIC ELEVATOR COMPANY, Defendant and Appellant.

Chattel Mortgages—Rights of Mortgagee.

Plaintiffs were the owners of a chattel mortgage, properly filed. Among other provisions contained in the mortgage were the following: "And it is hereby agreed that if default be made in the payment of the said debt, or any part thereof, or if any attempt be made to remove or dispose of said property, or if at any time said mortgagees shall deem the said debt unsafe or insecure, or whenever they shall choose to so do, they are hereby authorized, either by themselves or agent, to enter upon the premises where the said property may be, and remove and sell the same," etc. While the mortgage was in full force and unsatisfied defendant unlawfully took possession of the property covered by the mortgage, and converted the same to its own use. *Held*, that under the power to "remove and sell" the property the owner of the mortgage was authorized to take possession upon condition broken and that, having the right to take possession, they were also in a position to maintain an action against the defendant for the value of the mortgaged property, which defendant had unlawfully taken and converted.

(Opinion Filed February 25, 1891. Re-hearing Denied April 1, 1891.)

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

A. C. Davis, for appellant. *Rourke & Allen* and *Goodwin & Van Pelt* for respondents.

Action to recover price of wheat, alleged to have been converted by defendant. Judgment for plaintiff. Defendant appeals. Affirmed.

Mr. Davis, for the appellant, cited no authorities.

Rourke & Allen and Goodwin & Van Pelt, for respondents:

On the point that plaintiff did not allege facts to show that at the time of the commencement of the action plaintiff was entitled to the possession of the mortgaged property: Everett v. Buchanan, 2 Dak. 249, 268; Brewing Company v. Elevator Co., 5 Dak. 62; Nichols v. Barnes, 3 Dak. 148; Bank v. Elevator Co. 43 N. W. Rep. 806; Machine Co. v. Campbell, 13 Pac. Rep. 324; Campbell v. Quackenbush, 33 Mich. 287; Lainy v. Perrott, 12 N. W. Rep. 192. A stipulation in a chattel mortgage that the mortgagor shall remain in possession until breach of condition, is personal to the mortgagor and cannot be assigned or transferred. The mortgagee is therefore not precluded from bringing trover for the property, before or after breach of condition, against a purchaser from the mortgagor. Ballune v. Wallace, 2 Rich. (S. C.) 80; McCandless v. Moore, 50 Mo. 511.

The opinion of the court was delivered by

WALLIN, J. This action is to recover the value of certain wheat, which the plaintiffs allege that the defendant has unlawfully converted. Plaintiffs base their right of recovery upon a certain chattel mortgage covering the wheat, a copy of which is annexed to the complaint, and made a part thereof. The complaint contains all necessary averments to show the plaintiffs' right of recovery, and is in no respect criticised, except as to that part thereof which has reference to the rights of the mortgagees upon a default. The conditions of the mortgage are as follows: "And it is hereby agreed that if default be made in the payment of said debt, or any part thereof, or if any attempt be made to remove or dispose of said property, or if at any time said mortgagees shall deem the said debt unsafe, or whenever they shall choose so to do, they are hereby authorized, either by themselves or agent, to enter upon the premises where

the said property may be, and remove or sell the same, at public or private sale, without notice to the mortgagor, and without demand of performance, and out of the proceeds retain the amount then owing on said debt, with expenses attending the same, including ——— dollars attorney's fees, rendering to the undersigned the surplus after the whole of said debt shall have been paid, with charges aforesaid." There was a jury trial resulting in a verdict and judgment for the plaintiffs. None of the evidence comes up with the judgment record, and we must therefore assume, in support of the judgment, that the material facts which are set out in the complaint were supported by the evidence, including the following allegations of fact: "That while said mortgage remained in force and unsatisfied, and on or about the 30th day of August, 1889, the defendant wrongfully and unlawfully took possession of the whole of said five hundred and ninety bushels of wheat, and wrongfully and unlawfully converted the same to its own use, all to the damage of these plaintiffs in the sum of two hundred and fifty-two and fifty-one hundredths dollars." When the case was called for trial, defendant objected to the introduction of any evidence under the complaint, on the ground that it did not state facts sufficient to constitute a cause of action. The objection was overruled, and the defendant saved an exception to the ruling, and subsequently embodied the exception in a bill of exceptions, which was incorporated with the judgment roll, and comes up on appeal from the judgment. This ruling is the only error assigned by the appellant in this court. Counsel for the appellant states the point of the exception as follows: "The plaintiffs claim the right to the immediate possession of the property in dispute by virtue of a chattel mortgage, a copy of which they annex to their complaint. There is no express stipulation in the mortgage entitling the mortgagees to the possession of the mortgaged property, either before or after condition broken, or in any other contingency." Counsel further says that, "in the absence of an express stipulation in the mortgage, the mortgagor shall be entitled to the possession of the property." Also that "it is well established that to maintain an action for the conversion of personal property the plaintiffs must have the same

title and right to the possession which would be essential if the suit were in replevin." We confess to a total inability to discover any force or merit in the appellant's objection. A breach of the conditions of the mortgage is alleged and shown, and by the express terms of the instrument the mortgagees are "hereby authorized, either by themselves or agent, to enter upon the premises where the said property may be, and remove and sell the same." This provision gave the mortgagees the right upon a breach to "remove and sell." The words employed plainly import that the mortgagees may take possession, and we think they are incompatible with any other fair construction. Having the right to the possession upon a breach of the conditions of the mortgage, and a breach having occurred, the plaintiffs were in a position to maintain an action for the value of the property as against the defendant, who had unlawfully taken and converted it to their own use. The judgment will be affirmed. All concur.

SCOTT N. SANFORD, Plaintiff and Respondent, *v.* DULUTH & DAKOTA ELEVATOR COMPANY, Defendant and Appellant.

Chattel Mortgages—Conversion of Property by Third Party—Demand—Sale by Mortgagor—Review on Appeal.

1. The plaintiff held a chattel mortgage given by K. upon wheat, and the mortgage was filed in the proper office. After the filing, and while the debt secured by the mortgage was due and unpaid, K. sold and delivered the wheat to the defendant, the elevator company, and the company received the wheat into one of the warehouses located in the county where the wheat was sold and where the mortgage was filed. A warehouse receipt for the wheat was made out in the name of K., and by his direction it was delivered to Bell, the defendant, who claimed the wheat. Defendant cashed the warehouse receipt, and took it from Bell. There was no evidence that the elevator company mixed the wheat with other grain, or sold it, or any part of it. Plaintiff sues for the value of the wheat, and alleges that the defendant had refused to deliver the wheat upon his demand therefor, and had unlawfully converted the wheat. At the trial no demand was shown, and the only evidence of conversion was the sale, delivery, and payment, as above stated. At the close of the testimony the elevator company requested the trial court to direct a verdict in its favor, upon the ground

of failure of proof of demand and refusal before suit, and failure of proof of conversion by the elevator company. The motion was denied, and an exception was saved. *Held* error.

2. The case was given to the jury, but, on the request of the elevator company so to do, the trial court refused to charge the jury respecting the law governing the conversion of property. The court stated as a reason for its refusal that the undisputed testimony showed a conversion of the wheat. Defendant excepted. *Held*, that the refusal was error.

3. Under the provisions of the Civil Code of North Dakota, (Comp. Laws, §§ 4330, 4338, 4346, 4348, 4356, and 4358,) the title to chattels does not pass from a mortgagor upon the execution and delivery of the mortgage, or upon a breach of its conditions; nor does the title pass until a foreclosure has been completed. After default, as well as before, the mortgagor of chattels is the legal and equitable owner thereof, and as such has a vendible interest in the chattels. A purchaser of such chattels, who merely buys, pays for, and takes possession, and does no act which is inimical to the rights of the mortgage holder, is not necessarily a wrong-doer. Such purchaser does not convert the property.

4. An action for the value cannot be maintained in such a case by the mortgagee against the purchaser without a demand and refusal to deliver before suit; no affirmative title being alleged by the purchaser.

5. Section 6933, Comp. Laws, construed, *held*, that a purchaser who has no notice or knowledge that the mortgage is unpaid, or that the mortgagee has not consented to the sale, may assume that, in selling, the mortgagor is not committing a felony. Under such circumstances the title will pass to the purchaser, even if the act was a crime as to the seller.

6. No motion for a new trial was made in the court below, but the rulings complained of were preserved by a bill of exceptions incorporated with the judgment record. On appeal from a judgment this court will review alleged "errors of law occurring at the trial," and properly appearing upon the record, without a motion for a new trial in the court below.

7. Where a trial court improperly refuses to direct a verdict at the close of the testimony, or to give a request in the charge to the jury, such improper refusals constitute "errors of law occurring at the trial." The remedy for such errors by motion for a new trial is not exclusive, but is concurrent with that of appeal from the judgment.

(Opinion Filed March 17, 1891.)

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

A. C. Davis, for appellant. *Rourke & Allen* and *Goodwin & Van Pelt*, for respondent.

Action for value of wheat, alleged to have been converted by defendant. Judgment for plaintiff. Reversed and new trial ordered.

The opinion of the court was delivered by

WALLIN, J. This is an action to recover the value of certain wheat covered by plaintiff's chattel mortgage. The complaint charges in effect that plaintiff is the mortgagee and owner of a chattel mortgage executed by one Carl Kruger and wife, and covering the grain in question; that the mortgage was duly filed in the office of the register of deeds of Ransom county, in which the wheat was raised, and in which all the transactions in question occurred; and also "that, while said mortgage remained in force and unsatisfied, and on or about the 3d day of October, 1889, the defendants wrongfully and unlawfully took possession of the whole of said one hundred and ninety-four bushels of wheat, and wrongfully and unlawfully converted the same to their own use." The complaint further charges, in substance, that the defendants unlawfully detain the wheat in Ransom county, and "that said plaintiff has caused to be demanded of said defendants, of each and both of them, the delivery and possession thereof, before the commencement of this action; but said defendants refused, and still refuse and neglect, to deliver the same, or any part thereof, to the plaintiff." Judgment is demanded for the value of the wheat and interest, but not for a return of the property. After admitting that the defendant is a corporation, the defendant the elevator company answers as follows: "And, further answering, the defendant denies any knowledge or information of the allegations of the complaint (except as above admitted) sufficient to form a belief." At the trial the execution, delivery, and filing of the chattel mortgage were shown, and that the debt secured by it was due and unpaid. The evidence relied upon to show conversion is epitomized as follows: "That on the 3d day of October, 1889, the mortgagors delivered to the defendant the Duluth & Dakota Elevator Co., one hundred and ninety-four

bushels of the wheat described in the mortgage; that said defendant received and took the same into its elevator at Sheldon, N. D., and by its duly authorized agent issued tickets or warehouse receipts therefor in the name of the mortgagor, Carl Kruger; that said defendant, by the direction of said Kruger, delivered said tickets to the defendant Bell, who claimed the wheat represented thereby; that said Bell presented said tickets for payment to E. B. Bruce, the paying agent of said elevator company, and received from him in payment therefor, on October 3 or 4, 1889, the sum of one hundred and thirty-four dollars and twenty cents." There was no competent evidence of actual notice to defendant of the existence of the mortgage, and the agent who received the wheat, and the agent who cashed the wheat tickets, both testified that they knew nothing of the mortgage when the wheat was received and paid for. No demand or refusal to deliver the wheat was shown at the trial, and it is conceded that no demand was ever made upon the elevator company. At the close of the testimony the defendant the elevator company moved the court to direct a verdict in its favor upon the ground that there was no evidence to justify a verdict against such defendant, and specifying the following points: "*First*, there is no evidence to show any conversion by said defendant of the property in question; *second*, there is no evidence of any demand made upon said defendant for the property in question before the commencement of the action." The motion was denied, and said defendent excepted to the ruling. The said defendant then asked the court to submit to the jury the question of the conversion of the property in controversy, and to instruct the jury as to the law upon the subject. The court refused to so instruct the jury, and assigned as a reason for such a refusal that the undisputed testimony showed that the wheat in question was converted by said defendant. Defendant excepted to such ruling. The case was given to the jury, and the verdict and judgment were for the plaintiff. There was a bill of exceptions settled and filed, which was annexed to the judgment roll. The defendant the elevator company without moving for a new trial in the court below, appeals from the judgment. The

only errors assigned in this court which are insisted upon are the following: *First*, the court erred in refusing the motion of the defendant the Duluth & Dakota Elevator Company to direct a verdict in favor of said defendant; *second*, the court erred in refusing to submit to the jury the question of the conversion of the property in question, and in refusing to instruct the jury as to the law upon that subject.

In this court respondent's counsel raise the preliminary question that the court cannot consider either of the errors assigned, for the reason that no motion for a new trial was made in the court below. Counsel say: "The question whether there is sufficient evidence to go to the jury involves a review of that evidence. If the appellant desires a review of the facts, a motion for a new trial in the district court was necessary." This contention is untenable. The errors assigned are clearly such as the statutes classify as "errors of law occurring at the trial," and no question of fact is sought to be reviewed. It is true that such errors may be urged as grounds for a new trial, but that remedy is not exclusive, but, on the contrary, it is well settled that the remedy by motion for a new trial for such errors is concurrent with that of appeal from the judgment. Of course the errors must appear upon the judgment roll, and such errors cannot be made to appear without incorporating a bill with the judgment roll, which was done in this case. Our statutes regulating exceptions and new trials are in the main copied from those of the state of California, and the decisions from that state are decisive upon the point in discussion. Craven v. Dewey, 13 Cal. 42; Walls v. Preston, 25 Cal. 61, 67; Donahue v. Gallavan, 43 Cal. 576; Caldwell v. Parks, 47 Cal. 642; Levy v. Getleson, 27 Cal. 685; Hayne, New Trials and App. p, 311, § 112. In California the practice of directing nonsuits prevails; but such practice, so far as the question we are considering is concerned, is substantially the same as directing a verdict. In both cases the court passes upon the legal sufficiency of the evidence to warrant a judgment. Marshall v. Manufacturing Co., (S. D.) 47 N. W. Rep. 290; Hayne, New Trial & App. p. 284, § 100. Errors of law were reviewed in the late territorial court without a motion for a new trial.

Nichols v. Bruns, (Dak.) 37 N. W. Rep. 753. Section 5094, Comp. Laws, also indicates that a bill of exceptions not used on a motion for a new trial may be used on appeal from a final judgment. Respondent cites Reed v. Bernal, 40 Cal. 628. The case is not in point. It simply holds that the supreme court of California will not examine the evidence to see whether the findings of fact are supported by the evidence without a motion for a new trial. In the case at bar the errors assigned are errors of law. See authorities, supra. When the rulings were made which are assigned as error in this court no findings of fact had been made in the trial court. Darst v. Rush, 14 Cal. 83; Sullivan v. Cary, 17 Cal. 85.

The more serious question arises from the non-demand of the wheat before the action was brought. Respondent's counsel contend that no demand was necessary, first, because, as he claims, the answer, by its general denial, shows that a demand would be unavailing. We cannot so construe the answer. It alleges neither title nor right of adverse possession in the defendant. It simply puts the plaintiff upon his proofs. Plaintiff alleges that the property is covered by his chattel mortgage, and that the defendant has unlawfully converted it, and has refused to deliver it after demand. The issue joined by the answer only puts the plaintiff upon his proof as to the allegations of the complaint. The answer pleads no right in the defendant adverse to the rights of a mortgagee under a chattel mortgage. Nor does the evidence show that the defendant the elevator company has at any time assumed absolute dominion over the property as against plaintiff, or has done any act inimical to the rights of the plaintiff as a mortgagee, unless the purchase is inimical. But counsel argue that no demand was necessary, because, as they claim, the conceded facts show a conversion by the elevator company before suit commenced. It is true that no demand before suit would be necessary if the elevator company had, before suit brought, done any act with respect to the grain inconsistent with plaintiff's rights as a mortgagee. Counsel cite Phillip Best Brewing Co. v. Pillsbury & H. El. Co., 5 Dak. 62, 37 N. W. Rep. 763, and Nichols v. Barnes, 3 Dak. 148, 14 N. W. Rep. 110. But these cases are not in point, because

in the cases cited the evidence showed affirmatively that the defendants had converted the grain—in one case by selling it, and in both cases by mixing it with their own grain, or with that of other persons, in a common mass. In the case at bar there is no such showing. On the contrary, the evidence tends to show that the grain is in the defendant's elevator, and there is not a *scintilla* of testimony that defendant had mixed it with other grain, sold it, or done any other act adverse to plaintiff's rights as mortgagee. Defendant received the grain into its elevator, issued wheat tickets therefor in the name of the mortgagor, who delivered the wheat, and, on direction of the mortgagor so to do, delivered the tickets to defendant Bell, who claimed the wheat. Defendant also cashed the tickets so issued and delivered. No fraud is alleged or shown. The transaction is a sale of personalty, accompanied by delivery, made by a mortgagor of mortgaged property, before the debt is paid. The mortgage contained the usual covenants, as follows: "If default shall be made in the payment of said sum of money, or the interest thereon at the time said note shall become due, or if any attempt shall be made to dispose of or injure said property, or to remove said property from said county of Ransom, or any part thereof, by the mortgagors, or any other person, or if said mortgagors do not take proper care of said property, or if said mortgagee shall at any time deem himself insecure, then, thereupon and thereafter it shall be lawful, and the said mortgagors hereby authorize said mortgagee, his executors, administrators, or assigns, or attorney, or authorized agent, to take said property wherever the same may be found, and hold or sell and dispose of the same," etc. The mortgage further stipulates that "that the said mortgagors hereby waive demand and personal notice of the time and place of sale; and, as long as the conditions of this mortgage are fulfilled, the said mortgagors to remain in the peaceable possession of said property." It is conceded that the debt was due and unpaid when the grain was put in the elevator; also that such fact, as well as the act of disposing of the grain, would operate to authorize the mortgagee to proceed to take possession and foreclose the mortgage in accordance with the law. Appellant contends that the mortgagee

has not proceeded to foreclose in accordance with the law. No opportunity was given to the elevator company to deliver up the wheat to the plaintiff. There was no refusal to deliver the wheat, and no demand before suit commenced.

Counsel claims in his brief that "appellant was entitled, before being subject to the costs of an action, to a reasonable time in which to investigate the right of the mortgagee to the possession of the property. This right was not accorded to it." To decide the question presented it becomes necessary to determine whether a purchaser who buys chattels without actual notice, but with constructive notice of the existence of a chattel mortgage upon them, is, in making such purchase and taking possession of the property, an intentional wrong-doer. Authorities are much divided upon the question of whether a vendee who takes possession from a bailee who had no authority to sell may plead a non-demand in a suit for conversion. The states of New York, Pennsylvania, Connecticut, Indiana, and some others, hold that, where the purchase is *bona fide*, a demand before suit is essential. See authorities collated in Bigelow, Lead. Cas. Torts, pp. 446, 447. It has been held in Massachusetts that a mere purchase and taking possession *bona fide* from one without authority to sell, where there is no further act of dominion, does not itself constitute a conversion. This, we think, is the more equitable rule. Gilmore v. Newton, 9 Allen, 171. See Kellogg v. Olson, 34 Minn. 103, 24 N. W. Rep. 364. In this case the purchaser is chargeable with constructive notice of the existence of the mortgage, and we think that no demand would be necessary if the purchase was illegal as to the purchaser; but the question is whether the elevator company, in buying and taking possession of this wheat, and doing no more, was a wrong-doer. The answer to this inquiry turns upon whether a mortgagor of chattels, after default, the mortgage having been filed, has a vendible interest in the mortgaged property. If the mortgagor has such interest, it follows that a purchaser from him is not a wrong-doer, and that the mere fact of purchase and taking possession would not work a conversion. At common law the mortgage "vests the title to the chattel in the mortgagee; not an absolute title, indeed, but

a present title, defensible upon a condition subsequent." Jones, Chat. Mortg. § 426. Having the title the mortgagee may "take the goods into his own custody, or maintain trespass or trover for them against any one who takes or converts them to his own use. See, also, section 699, Id. The common-law rule that title passes obtains in Minnesota and New York and in many of the states. Gates v. Smith, 2 Gil. 21; Mann v. Flower, 25 Minn. 500. A mere refusal by a mortgagor or his vendee to allow the mortgagee to take possession would be a conversion. Fletcher v. Neudeck, 30 Minn. 125, 14 N. W. Rep. 513; Galen v. Brown, 22 N. Y. 37. But the Civil Code of North Dakota has made radical changes in the nature of chattel mortgages, and in consequence of such changes the rights of both parties to a chattel mortgage, as well as the rights of the public with respect to property covered by such mortgages, have been greatly modified. See §§ 4330, 4338, 4346, 4348, 4356, and 4358, Comp. Laws. Under these provisions of the statute it is apparent that the title, both legal and equitable, as well as the right of possession, remains in the mortgagor. Nor is his title divested by a default, or by any breach of the conditions of the mortgage. The title does not pass from the mortgagor under the Code until the foreclosure is completed. Id. § 4338. But it usually happens, as in this case, that the parties insert a stipulation in the mortgage authorizing the mortgagee, upon default, or upon condition broken, to take the property into his possession. Appellant concedes that the mortgagee in the case at bar had the right, before suit commenced, to take the property into his possession, and to foreclose, but insists that the elevator company bought the vendible interest of the mortgagee in good faith, and without actual notice of the existence of the mortgage, and that it had assumed no dominion over the property hostile to the rights of the mortgagee, and consequently was entitled to a demand before being mulcted by costs of suit.

We are of the opinion that appellant's contention is sound upon principle, and therefore hold that a demand was essential before suit. After condition broken, as well as before, the mortgagor was the absolute legal and equitable owner of the

wheat in question, and as such owner had a vendible interest which he could sell and deliver to a vende, subject, of course, to the lien of the mortgage. We do not place the decision, however, upon the ground that the elevator company had no actual notice of the existence of the mortgage. We are unable to see why the purchase would have been wrongful, even with actual notice of the existence of the mortgage. There was constructive notice, resulting from filing the mortgage, of the fact of the existence of the mortgage, and of the stipulations contained in it. The purchase, after filing in the proper office, was made subject to the lien, whether there was or was not actual notice. We place the ruling upon the general principle that the owner of personal property has a right to sell and deliver it, and that the purchaser takes a good title, subject to any lien thereon. Jones, Chat. Mortg. § 455. The sale and delivery alone not constituting a conversion of the property, it becomes necessary, in order to show conversion, that a demand and refusal to deliver should be shown. Cadwell v. Pray, 41 Mich. 307, 2 N. W. Rep. 52; Kohl v. Lynn, 34 Mich. 360. In Michigan, as in this state, a mortgage of chattels does not transfer title. Jones. Chat. Mortg. § 427; Randall v. Higbee, 37 Mich. 40; People v. Bristol, 35 Mich. 28; Campbell v. Quackenbush, 33 Mich. 287. See, also, Adams v. Wood, 51 Mich. 411, 16 N. W. Rep. 788. We do not overlook the fact that under the Penal Code (§ 6933, Comp. Laws,) it is felony in the mortgagor, "while the mortgage remains in force and unsatisfied," to "sell" the mortgaged property "without the written consent of the then holder of such mortgage." This statute, however, does not make it penal in the purchaser who buys mortgaged property; much less does it declare that the buyer obtains no title by such purchase. On the contrary, the very phraseology of the act carries the implication that such property might be sold and bought whenever the mortgage ceases "to be in force," or with the consent of the holder of the mortgage. In this case there is no evidence that defendant knew when it received the wheat that the mortgage was unpaid, and "remained in force," or knew that the holder of the mortgage had not given his consent to the sale. Nor do the terms of the mortgage convey any such information to the public. In

the absence of notice or knowledge of the criminal nature of the act of selling, any purchaser would be justified in proceeding upon the assumption that the mortgagor, in offering to sell and selling the property, was not in the act of committing a felony. Should a case arise where it appears that a purchaser buying mortgaged chattels knew and had actual knowledge at the time of his purchase that the mortgagor had no legal right to sell, and that the sale was, as to the mortgagor, a criminal act, a different question might be presented. In the supposed case it might become necessary to determine what effect such actual knowledge of the mortgagor's crime would have upon the question of demand as prerequisite to a suit by the mortgagee for the possession or the value of the chattels; but, as we have seen, no such question arises upon this record.

The question has frequently arisen in the courts whether a statute which makes a specific act criminal in the party who performs the forbidden act operates as a total prohibition of the act. It is now settled as a general rule that the act so impliedly prohibited will be treated as *prima facie* unlawful, and void as against the party who is subjected to the penalty. A statute in Minnesota made it penal to sell lots in a town plat before the plat was recorded. A lot was sold, and notes taken for the purchase money before the plat describing the lot was recorded. An action was brought upon the notes, and the maker sought to defend upon the ground that the act of selling was penal in the seller. After stating the general rule governing such cases substantially as above stated, the court says: "The imposing of a penalty does not necessarily give rise to an implication of an intention that, where an act is done which subjects a party to a penalty, the act itself should be void, and of no legal effect; and if it seems more probable from the subject and terms of the enactment, and from the consequences which will be anticipated, as likely to result from giving such an effect to the penal law that it was not the intention of the legislature to make the transaction void, but only to punish the offending party in the manner specified, the law should be so construed. Harris v. Runnels. 12 How. 79: Pangborn v. Westlake, 36 Iowa 546; Middleton v. Arnolds, 13 Grat. 489; Niemeyer v. Wright,

75 Va. 239. The only provision in this statute from which it can be inferred that the contracts for the sale or leasing of platted lands were intended to be prohibited, and avoided if made, is that which subjects the vendor or lessor, who has not first complied with the requirements of the law, to a pecuniary penalty. If the purpose of the section was also to prevent such sales and contracts by making them illegal, a purchaser having such knowledge of the facts, as any reasonable prudent purchaser would acquire, violates the law, and is as much in the wrong as the vendor. The fact that no penalty, forfeiture or disability is declared with respect to the purchaser under any circumstances, is worthy of being considered in this connection. The act is wholly consistent with a theory that, as a means of securing the observation of the prescribed requirements of platting and recording, only the specified penalty should be imposed as a consequence of the disregard of the law. It is in the power of the proprietor platting his lands to comply with the requirements of the law. Another person, a purchaser of a portion of the land, cannot do this. A specific penalty is declared for the omission of the former. The statute is silent as to the consequences of the latter." De Mers v. Daniels, 39 Minn. 158, 39 N. W. Rep. 98. The court, in Pangborn v. Westlake, 36 Iowa, 546, holds to the same views, and cites many authorities. See, also opinion of supreme court of the late territory in Territory v. Shearer, 2 Dak. 332; 8 N. W. Rep., bottom page 135. Applying the rules of construction laid down in the cases cited, we find no difficulty in reaching the conclusion, and so hold, that the penal law of this state, which, under certain circumstances, makes it criminal in the mortgagor to sell mortgaged chattels, but does not punish the buyer, was not intended to annul such sales, nor prevent the title from passing to the purchaser when such sales are made. If the title passes to the purchaser, (and we hold that it does,) the purchaser cannot be a wrong-doer in a case where there is no evidence that the purchaser knew that the sale was a crime in the seller. We do not decide what the rule would be in a case where the purchaser consciously and intentionally aided the mortgagor in committing the forbidden act. No such case is before us. The evi-

dence negatives such knowledge. In the case at bar nothing appears that can stand in the way of holding that the purchaser in buying this wheat lawfully acquired the title to the same, subject to the lien of the mortgage thereon. An action will not lie against such a purchaser without a demand and refusal before suit, except where there has been a conversion of the property, or where a claim of title adverse to the mortgagee's right of possession has been pleaded by the defendant. We hold that the trial court erred in refusing to direct a verdict for defendant, and in refusing to charge the jury upon the law governing the conversion of chattels. For these errors the judgment will be reversed, and a new trial granted. All concur.

JOHN G. KEITH, Plaintiff and Respondent, *v.* JOHN E. HAGGART, Defendant and Appellant.

Chattel Mortgage — Record — Priorities — Execution — Evidence.

1. Where the undisputed evidence shows that a creditor requested security from his debtor, and the debtor promised, by letter, to give security, but mentioned no property upon which such security would be given, and subsequently a chattel mortgage from the debtor to the creditor was filed in the proper office, and the creditor at once notified by the debtor of such filing, and the creditor accepted such security, and procured a certified copy of the mortgage, *held*, as between the mortgagee and an execution creditor of the mortgagor whose lien on the property did not attach until months after the mortgage was filed, that there was no question as to delivery and acceptance of the mortgage to be submitted to the jury.

2. In an action between the mortgagee and the representative of a creditor of the mortgagor whose debt existed prior to the execution of the mortgage, where it was claimed that the mortgage was void under the statute as against the creditor, because not properly witnessed, and therefore not entitled to record, where the only evidence that the mortgage was witnessed by the parties whose names appeared thereon as witnesses came from a witness against whom the other party introduced impeaching testimony, and where the evidence also tended to show that one of the parties whose names appeared as wit-

nesses left the territory of Dakota two days before the mortgage was executed, and did not afterwards return, *held*, that the court erred in refusing to submit to the jury the question of the proper execution of the mortgage.

3. The testimony of a witness whose only knowledge of the value of a certain article on a certain date is derived from inspection of an entry written in pencil in the day-book of a party in no manner connected with the action, where it is not shown by whom such entry was made or when it was made, or that the party making it had any knowledge of the market value of such articles, is not competent to establish the value of such article.

(Opinion Filed March 12, 1891.)

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

Pollock & Young, for appellant. *Ball & Smith*, for respondent.

Action by plaintiff, as mortgagee, against defendant, as sheriff of Cass county, to recover value of wheat seized and sold by defendant under execution. Judgment for plaintiff. Reversed and a new trial ordered.

Pollock & Young for appellant:

The mere signing of a mortgage, coupled with the fact that the same found its way into the office of the register of deeds, does not constitute a delivery. Jones on Chat. Mortg., § 106; Day v. Griffith, 15 Iowa 104. The question of delivery is always a question of fact for the jury. Jones on Chat. Mortg., § 112. There being no delivery of a mortgage, it is absolutely void as to third parties. Compiled Laws North Dakota, § 3229. The mere knowledge of the mortgagee that mortgages in his favor have been filed is not sufficient to constitute an acceptance by him. Jones on Chat. Mortg., § 108; Cobb v. Chase, 54 Iowa 253, 6 N. W. Rep. 300; Parmelee v. Simpson, 5 Wall. 81. The validity and identity of the note, whether or not payments were made thereon, which saved the cause of action on the note from being barred under the statute of limitations, and the making, delivery, filing and acceptance of the chattel mortgage, were questions of fact for the jury and not of law

for the court. Compiled Laws North Dakota, § 5032; Koehler v. Adler, 78 N. Y. 287; Hibbard v. Smith, 4 Pac. Rep. 473, 8 Pac. Rep. 46; Railroad Co. v. Stout, 17 Wall. 647; Bank v. Dana, 79 N. Y. 108.

Ball & Smith for respondent:

The question of delivery is a question of fact for the jury, but under the evidence in this case, if the question had been submitted to the jury, and the jury had found that no delivery of the mortgage had ever been made, it would have been the duty of the court to set aside the verdict as unsupported by the evidence, and in hostility to all evidence given. Town of Grand Chute v. Winegar, 15 Wall. 355. The question whether a mortgage is properly executed and acknowledged is one of law to be passed upon by the court. Jones on Chat. Mortg., § 112. The testimony of a witness as to market value is not incompetent if it is derived from inquiry in the trade or from invoices and accounts. Greely v. Stilson, 27 Mich. 153; Alfonso v. United States, 2 Story 421; Lush v. Druse, 4 Wend. 313.

The opinion of the court was delivered by

BARTHOLOMEW, J. Sections 4388 and 4389 of the Compiled Laws provide that, before mortgaged chattels can be taken on execution against the mortgagor, the officers holding the writ must pay or tender to the mortgagee the amount of the mortgage debt, or deposit such amount with the county treasurer, payable to the order of the mortgagee. The respondent, as mortgagee, brought an action against the appellant, as sheriff of Cass county, to recover the value of certain property seized and sold by appellant under execution against one Donald E. Keith, and upon which the respondent claimed to hold a valid mortgage given by said Donald E. Keith to him, and which sale was made without compliance with the statute above mentioned. The issues were upon the validity of the mortgage and the value of the property. It was undisputed that the execution plaintiffs were creditors of the mortgagor at and prior to the time of the execution of the mortgage under which respondent claimed. No questions arise upon any other notice than

the constructive notice given by the record. Section 4379, Comp. Laws, is as follows: "A mortgage of personal property is void as against creditors of the mortgagor, and subsequent purchasers and incumbrancers in good faith for value, unless the original, or an authenticated copy thereof, be filed by depositing the same in the office of the register of deeds of the county where the property mortgaged, or any part thereof, is at such time situated." Respondent's mortgage was on file in the proper office, but appellant contended that it was not legally entitled to filing, because not witnessed as required by § 4384, Id., which reads as follows: "A mortgage of personal property must be signed by the mortgagor in the presence of two persons, who must sign the same as witnesses thereto, and no further proof or acknowledgment is required to admit it to be filed." Appellant also claimed that the evidence failed to show any delivery of the mortgage to or acceptance thereof by the mortgagee prior to the levy under the execution.

The appellant requested the court to give the following instructions to the jury: "The law of this territory provides that a mortgage of personal property must be signed by the mortgagor in the presence of two persons, who must sign the same as witnesses thereto; and I charge you that if you should find from the evidence that the mortgages introduced in evidence, and under which plaintiff claims to recover in this action, were not signed by D. E. Keith in the presence of the two witnesses who purport to have signed their names as witnesses to said mortgages, and each of them, or if you find that the man E. J. Emmons, whose name appears as a witness to each of said mortgages, did not sign his name thereto, the mortgages are, and each of them is, void as against creditors, notwithstanding the plaintiff, J. G. Keith, may have been an innocent party, and had no knowledge of the fact surrounding the execution of the mortgages; and the fact that they were filed in the office of the register of deeds in this county would not in any way affect them, for the reason that, if not properly executed as required by law, they were not entitled to be filed." This the court refused, and gave the following: "The defense is as to two matters: First. There is a denial of the execution of this chattel

mortgage, and then a contention as to what the value of the property was; but I do not deem the evidence of the defendant sufficient to impeach the mortgage, and therefore I instruct you that the evidence is sufficient in this case to show that this was a valid and existing mortgage, and that it covered this property, and therefore it narrows the inquiry down in your minds to one of the identity of this property, which is not disputed, and as to its value." The ruling of the court in refusing the instruction asked, and in giving the instruction quoted, makes it necessary for us to discuss a portion of the evidence. This discussion will be better understood after a preliminary statement. The respondent, John G. Keith, was a resident of Chicago. Donald E. Keith, the mortgagor, was his brother, and resided in Cass county, in the territory of Dakota. Donald was a witness for the respondent before the jury. An effort was made to impeach his testimony. Four witnesses, after showing themselves to be properly qualified, testified to his bad reputation for truth and veracity. No effort seems to have been made to contradict or modify the impeaching testimony. On this subject the court instructed the jury as follows: "If you believe from the evidence that the witness, D. E. Keith has been successfuly impeached on this trial, or that he has willfully sworn falsely as to any matter or thing material to the issue in this case, then the jury are at liberty to disregard his entire testimony, except in so far as it has been corroborated by other creditable evidence, or by the facts and circumstances proved on the trial."

Turning now to the points raised by the assignment, it appears by undisputed and unquestioned evidence that Donald E. Keith was indebted to respondent in 1874, and at that time gave respondent his promissory note for the amount due January 1, 1880. Nothing was paid on this note, although there was usually an open account between the brothers. In 1883 the note was indorsed by the payment of interest to that date, being the amount found due to Donald upon a settlement of the account. During the year 1883 respondent requested Donald to give him some security for the debt, and Donald promised, by letter, to do so.

No property was mentioned upon which security was to be given, but respondent knew that Donald could give only chattel security. On December 21, 1883, the register of deeds of Cass county placed on file in his office a chattel mortgage from Donald to respondent. How the mortgage reached the register is not shown. Under the authorities it is clear that the delivery to the register under these circumstances did not constitute delivery to the mortgagee, as against third parties whose rights accrued before the mortgage was in fact accepted. Cobb v. Chase, 54 Iowa 253, 6 N. W. Rep. 300; Wadsworth v. Barlow, 68 Iowa 599, 27 N. W. Rep. 775; Dole v. Bodman, 3 Metc. (Mass.) 139; Thayer v. Stark, 6 Cush. 11; Maynard v. Maynard, 10 Mass. 456. Appellant seeks to bring this case under the above line of authorities, but the undisputed testimony of plaintiff when on the stand shows that he was advised by the maker of the mortgage of the fact that it was made and filed, about the time it was filed, and that he accepted the same, and received a certified copy of the mortgage. The executions were not levied until August 21, 1884. Under these facts we think the court was correct in holding that there was no question of delivery and acceptance to go to the jury.

But in refusing to give the instruction asked, and in holding that the mortgage was in all respects a valid, subsisting mortgage as against existing creditors, the court erred. The appellant had the right, under the evidence, to have the jury say whether or not the mortgage was in fact witnessed by the parties whose names appeared thereon as witnesses. There was no evidence in the case except that of Donald E. Keith, and no fact or circumstance tending to show that the mortgage was executed in the presence of and witnessed by E. J. Emmons. The mortgage was dated December 19, 1883. Donald testified that he thought it was executed on the day of its date; that he filled out the mortgage on his farm, and signed it in the presence of Mr. Street and Mr. Emmons, who signed as witnesses, and his wife; that Mr. Emmons was his wife's brother, and resided in another state, but was visiting at his place; and that when Emmons returned home his (Keith's) wife went with him. The other witness to the mortgage (Mr. Street) was living at the time in

the family of Donald E. Keith, and their residence was about five miles from Casselton, their market-town. Mr. Street was called as a witness by appellant. He was asked nothing touching the execution of the mortgage, but testified that when Mr. Emmons went away Mr. Keith and wife and witness went with him to Casselton, and witness left Mrs. Keith and Mr. Emmons at the residence of one Kilbourne, and took the team back to the farm; that Mr. Emmons and Mrs. Keith did not return, but that Mr. Keith returned a day or two afterwards. This witness testified that he thought Mr. Emmons left on the 17th day of December, 1883. Mr. Kilbourne, who resided in Casselton, was also called as a witness. He testified that on the 17th of December, 1883, Mrs. Keith and Mr. Emmons were at his house in Casselton; that they were going away, and Mrs. Keith came for the purpose of bidding witness' wife good-bye; that Mrs. Keith came late in the afternoon, and remained an hour or two, and left in company with Mr. Emmons and Mr. Keith shortly before train-time. This evidence strongly tended to prove that Mr. Emmons left Dakota territory on December 17, 1883, and hence could not have witnessed a mortgage that was executed on December 19, 1883. It, at least, raised a conflict in the evidence on that point that should have been submitted to the jury.

Numerous assignments of error are made upon the ruling of the court in admitting and rejecting testimony. We have examined these assignments carefully, they possess no general interest, and we deem the rulings of the trial court strictly correct, except in one instance, which we proceed to notice. Among the property sold by appellant was a quantity of wheat. The value of this wheat was in controversy. Respondent introduced one Fisher as a witness on this point. The witness testified that in the fall of 1884 he was buing wheat for a mill at Casselton, and stated that on August 21, 1884, that being the date when the wheat was seized, the mill paid 66 cents per bushel for wheat of the grade that this wheat was shown to be. On cross-examination it appeared that the witness did not commence work at the mill until after September 1, 1884, and that he had no knowledge whatever of the value of wheat on August

21, 1884, except what he obtained by examining "the day-book that was kept in pencil by the man in the mill." Immediately upon the development of the source from which this witness obtained his information the appellant requested that his testimony on this point be stricken out. This request was refused. We think it should have been granted. Respondent introduced no other evidence of the value of the wheat, and the testimony of Mr. Fisher was widely variant from that of appellant's witnesses; hence it cannot be said that Fisher's evidence was not prejudicial to appellant. Courts have gone to great lengths in admitting testimony of this character. Information gained from inspection of invoices showing actual sales has been admitted as evidence of value. Lush v. Druse, 4 Wend. 313. In Finerstein's Champagne, 3 Wall. 145, the supreme court of the United States—three judges dissenting—admitted letters of third parties to show the value of certain imported wines. The letters, however, were written by large importing houses dealing in the same class of goods, and with a view to making sales. It has also been held that men engaged in the business and having large experience may testify as to value, although their information comes chiefly from price current lists and returns of sales furnished daily. Whitney v. Thatcher, 117 Mass. 527. In Sisson v. Railroad Co., 14 Mich. 489, and Railroad Co. v. Perkins, 17 Mich. 300, the market reports contained in commercial papers were admitted in evidence to establish values. We certainly are not warranted in going further in this direction than some of the foregoing cases have gone. To do so would be to disturb those ordinary conditions of safety and certainty which the law has always deemed essential in judicial investigations, and none of these cases would sustain the ruling of the trial court in this case. The witness obtained his information entirely from a pencil entry found in a book called the day-book at the mill. It is not shown when this entry was made, or by whom it was made, or that it was made by any party having any knowledge of the market. Under these circumstances, and the entry being strictly *res inter alios acta*, it would hardly be contended that the entry itself could be introduced in evidence against appellant, and yet the entry would certainly be more

competent than the oral statement of its contents. The testimony of Mr. Fisher should have been stricken out. For the foregoing errors of the district court the judgment must be reversed, and a new trial granted. It is so ordered. All concur.

WALLIN, J., having been of counsel, did not sit on the hearing of the above case; LAUDER, J., of the fourth judicial district, sitting by request.

AUGUSTA MATILDA WOOD, Executrix of the last will and testament of CHRISTIENA NISSEN, deceased, Plaintiff and Respondent, *v.* CHRISTIAN NISSEN, Defendant and Appellant.

Record on Appeal—Bill of Exceptions—Notice of Settlement—Striking From Record.

1. After an appeal from a judgment in favor of the plaintiff a transcript of the proceedings had at the trial, embracing the evidence as extended by the stenographer, was, by order of the district court, annexed to the judgment roll, and the same was sent up to this court as a part of the record. No proposed bill of exceptions or statement of a case was ever served, and no notice was given to plaintiff's counsel, stating the time and place when and where a bill or statement would be presented to the trial court for settlement and allowance; nor did the trial court make an order purporting to be an order settling or allowing a bill or statement. No attempt was made in the transcript to specify errors of law, or to indicate wherein the evidence is insufficient to justify the findings of fact. *Held*, that such transcript of the proceedings, embracing the evidence, is neither a bill of exceptions nor a statement of a case, and constitutes no part of the judgment roll; nor is the same an order "involving the merits," within the meaning of Comp. Laws 1887, §§ 5103, 5237. See De Lendrecie v. Peck, 1 N. D. 422, 48 N. W. Rep. 342.

2. A preliminary motion to purge the record by eliminating therefrom the "transcript" aforesaid was granted.

3. No error appearing upon the face of the record proper, the judgment of the court below is affirmed.

(Opinion Filed June 6, 1891.)

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

W. L. Eaton, *J. B. Cleland*, and *Tilly & Stewart*, for appellant. *H. F. Miller* and *Stone, Newman & Resser*, for respondent.

Action to recover real property held in trust. Judgment for plaintiff. On appeal motion entered to strike from transcript the evidence. Motion granted. Judgment affirmed.

Messrs. H. F. Miller and Stone, Newman & Resser for the motion:

The orders entered after the appeal was perfected were without jurisdiction and void. Comp. Laws North Dakota, § 5233. The appeal being from the judgment must be heard on the judgment roll alone. Comp. Laws North Dakota, § 5217. The court cannot add to or take from the judgment roll. Hahn v. Kelly, 34 Cal. 391; Sharp v. Daugney, 33 Cal. 505. Neither the "transcript of the evidence," "deposition" or "exhibits" constitute a part of the judgment roll. Harper v. Miner, 27 Cal. 107; Huton v. Reed, 25 Cal. 479; Spinetti v. Brignardello, 53 Cal. 283; Ritter v. Mason, 11 Cal. 214. Such matters can only be made a part of the judgment roll by a bill of exceptions or statement of the case settled and allowed. Comp. Laws North Dakota, § 5103; Kavanagh v. Maus, 28 Cal. 262; Wetherbee v. Carroll, 33 Cal. 549. A bill of exceptions which is only a rescript of the evidence will not be considered. Caldwell v. Parks, 50 Cal. 502. If the papers mentioned in the orders should be deemed to come within the requirements of the statute defining a statement of the case, they cannot be considered on the appeal as they contain no specifications of error. Butterfield v. Railroad Co., 37 Cal. 381; Spanagle v. Dellinger, 38 Cal. 278; Thorn v. Hammond, 46 Cal. 531; Watson v. Railroad Co., 50 Cal. 523.

Messrs. W. L. Eaton, J. B. Cleland and Tilly & Stewart in opposition to the motion:

On an appeal from a judgment the supreme court will review alleged errors of law occurring at the trial and properly appearing in the record, without a motion for a new trial in the court below. Sanford v. Elevator Co., 2 Dak., ante, 48 N. W.

Rep. 434. A court cannot lose jurisdiction over its record, and it at all times has the right and power to make a complete record of any cause tried therein, or to order such amendments made thereto as will conform to the facts and show a true and complete statement of all the proceedings of that court in the trial, even after an appeal has been taken, without leave of the appellate court. Comp. Laws North Dakota, § 5235; Peterson v. Swan, 119 N. Y. 662, 23 N. E. Rep. 1004; Hollister v. Judges District Court, 8 Ohio St. 202; Rew v. Barber, 14 Am. Dec. 515 and note; Judson v. Gray, 17 How. Pr. 289.

The opinion of the court was delivered by

WALLIN, J. In this action, after a trial by the court, a judgment was entered in favor of the plaintiff and against the defendant. The judgment was entered December 16, 1887. An appeal was perfected December 12, 1889. After the appeal was perfected, and on December 18 and 19, 1889, the district court made the following orders:

"On the 18th day of December, 1889, Wm. B. McConnell, judge of the district court, third judicial district, in and for the county of Cass and state of North Dakota, being the judge before whom was tried the above entitled action, orders that there be added to and made a part of the judgment roll and of the record upon the appeal of the above entitled action to the supreme court, in addition to the summons, complaint, answer, findings of fact, and conclusions of law, and decree therein, the following papers, which necessarily involve the merits and affect the judgment in said action, to-wit: The transcript of the evidence taken upon the trial of said action, as the same has been extended by the official stenographer, and filed in this court; also the depositions of Henry Lubens, P. K. Eversen, Karen Nissen, and W. E. Owen, produced and read upon the trial of said action; also all the exhibits introduced or offered and excluded on the hearing of said action, which said transcript, depositions, and exhibits constitute all the evidence given upon the trial of said action upon which said findings of fact and conclusions of law and decree were based, together with all the

exceptions taken to the rulings and decisions of the court of said trial. WM. B. MCCONNELL, Judge."

"I Wm. B. McConnell, judge of the district court of the third judicial district in and for the county of Cass and state of North Dakota, being the judge before whom was tried the above entitled action, do hereby certify that the judgment roll and record in said action should contain and does contain the following papers, to-wit: The summons and complaint, answer, findings of fact, and conclusions of law, and decree; the transcript of the evidence taken upon the trial of said action, as the same has been extended by the official stenographer, and filed in this court; the depositions of Henry Lubens, P. K. Eversen, Karen Nissen, and W. E. Owen, produced and read upon the trial of said action; also all exhibits introduced or offered and excluded on the hearing of said action, which said transcript, depositions, and exhibits constitute and comprise all the evidence given upon the trial of said action upon which the findings of fact and conclusions of law and decree herein were based, together with all the exceptions and decisions of the court at said trial. Dated at Fargo, Cass county, North Dakota, this 18th day of December, A. D. 1889. WM. B. MCCONNELL, Judge of the District Court."

The papers sent up to this court embrace, in addition to the statutory judgment roll, (Comp. Laws, § 5103,) what purports to be "the transcript of the evidence taken upon the trial of the action, as the same has been extended by the official stenographer, and filed in the district court; also certain depositions read at the trial, and certain evidence which was offered and excluded at the trial." A preliminary motion was made in this court by respondent to eliminate said transcript of the evidence, depositions, etc., from the record. The motion must be granted. It is not claimed that any proposed statement of a case or bill of exceptions was ever served or attempted to be served upon the plaintiff or his counsel. Nor did the trial court ever settle or allow a bill or statement embracing the evidence, or any bill or statement. The so-called "transcript," extended by the district court stenographer, embracing the proceedings and evidence at the trial, falls far short of being

either a bill of exceptions or a statement of the case. The so-called "transcript" lacks several vital elements essential to a bill or statement: *First*, no proposed statement or bill was ever served upon plaintiff's counsel in this case; *second*, no notice of the settlement and allowance of any bill or statement was ever served on plaintiff's counsel; *third*, the district court never made any order settling a case or bill of exceptions in the case; and, *finally*, there are no specifications of errors of law and no specifications showing wherein the findings of fact are not justified by the evidence. Under the existing statutes and rules of court such errors and specifications are essential features of every bill and statement. Comp. Laws, 1887, §§ 5079, 5084, 5090, 5093, 5094. It is well settled that a true and correct transcript of the stenographer's minutes of the proceedings had at the trial do not, under our practice, constitute either a bill of exceptions or a statement of the case within the meaning of the law. Harper v. Minor, 27 Cal. 107; Hutton v. Reed, 25 Cal. 479. The transcript of the proceedings had at the trial being eliminated by the motion, the case was submitted upon the merits without argument. The court finds no error upon the face of the record when thus purged of the transcript, and therefore will direct that the judgment of the court below be in all things affirmed. So ordered. All concur.

JULIA H. MILLS, Executrix of the will of TRUMAN MORSE, deceased, Plaintiff and Respondent *v.* RICHMOND W. HOWLAND, CHARLES H. HOWLAND, and HERMAN WARNER, Defendants; CHARLES H. HOWLAND, Defendant and Appellant.

Service of Process—Amendment of Return.

1. After judgment entered in a case where there was no appearance by defendants, the trial court may, in furtherance of justice, and in affirmance of such judgment, permit the sheriff, on his application, and upon notice to the defendants, to amend his return of service of summons in accordance with the truth, and thus bring upon the record jurisdictional facts.

2. Such amended return, when filed, relates back to the original re-

turn, and has the same effect as if the amended return had been originally made.

(Opinion Filed June 7, 1891.)

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

S. G. Roberts, for appellant. *Francis & Southard*, for respondent.

Action to foreclose a mortgage. Judgment for plaintiff. Defendant Charles H. Howland appeals from an order denying a motion to set aside the judgment. Order affirmed.

S. G. Roberts for appellant:

The power to hear and determine a cause is jurisdictional. It is indispensible to the validity of a judgment in an action that the court by which it is rendered should have jurisdiction of the person of the defendant as well as the subject matter of the action. Kendal v. Washburn, 14 How. Pr. 380. The requirement of the statute that "the summons shall be subscribed by the plaintiff or his attorney" is mandatory and must be substantially complied with to give the court jurisdiction of the defendant. Dix v. Palmer, 5 How. Pr. 234; Lyman v. Milton, 44 Cal. 634; People v. Green, 52 Cal. 577; Ward v. Ward, 59 Cal. 139; Osborn v. McCloskey, 55 How. Pr. 345; Reynolds v. Page, 35 Cal. 296. The filing of the sheriff's amended return does not change the record as to the issuing of a summons. If the summons is so defective as to be in effect no summons, then there is an entire want of jurisdiction and the judgment based upon it is absolutely void. Freeman on Judgments, § 125; Clark v. Thompson, 47 Ill. 25; Hahn v. Kelley, 94 Am. Dec. 742; Coit v. Hoven, 79 Am. Dec. 244; Williams v. Van Valkenburg, 16 How. Pr. 144. The judgment was void for want of jurisdiction over the person of the defendant. A void judgment is in legal effect no judgment. Freeman on Judgments, § 117.

Francis & Southard for respondent:

Good authority will uphold the defective summons as sufficient. Shinn v. Cummings, 65 Cal. 97; Meschen v. More, 54

Wis. 214. If the summons attached to the return is in law and fact an original summons it can be amended by the district court by the addition of the attorney's signature. Farmer's Loan Co. v. Dickson, 17 How. Pr. 478; Crafts v. Sikes, 4 Gray 195; Langmaid v. Kahn, 44 Ark. 404; McCoy v. Boyle, 10 Mo. 391; Polack v. Hunt, 2 Cal. 195; Parker v. Barker, 80 Am. Dec. (N. H.) 131; Whitewell v. Barber, 7 Cal. 64.

The opinion of the court was delivered by

BARTHOLOMEW, J. This is an appeal from an order denying a motion to set aside a judgment. It appears from the abstract that in June, 1888, the plaintiff attempted to bring an action against the defendants for the foreclosure of a mortgage. No appearance was made in the action by either Richmond W. or Charles H. Howland. An appearance was entered for Warner, who was a non-resident, but no answer filed. Judgment and decree were entered in the case in September, 1888, and the judgment recites that due and personal service had been made upon the defendants. The facts were, however, that the summons attached to the sheriff's return of service, and which he certified he personally served upon the Howlands by copy, was not subscribed by the plaintiff or her attorneys, as expressly required by section 4893, Comp. Laws, and this summons was marked "original." On discovering that the summons returned by him was not subscribed by the attorneys, the sheriff, on affidavits and the papers in the case, moved the court for an order allowing him to amend his return. This motion was dated February 24, 1890. On February 26, 1890, an order was entered granting the motion, and directing an amended return to be filed *nunc pro tunc*. This order recites that the respective parties were represented by counsel in the argument on the motion. The affidavits upon which the motion was based are uncontradicted, and show that the copies of summons served upon the Howlands were subscribed in ink, with the names of plaintiff's attorneys; and the affidavit of one of said attorneys, and which was used upon the motion, shows that R. W. Howland was repeatedly in the office of plaintiff's attorneys after said service and before judgment, asking for an extension of time in

the case, and that, on his request, plaintiff's attorneys delayed taking judgment for some time. In compliance with the leave given by the court, the sheriff filed an amended return attached to a complete summons. No exception to or appeal from this order was ever taken. On the 2d day of January, 1891, the defendant C. H. Howland served notice on plaintiff's attorneys of a motion to vacate the judgment and all subsequent proceedings therein on the ground "that said judgment was entered without authority of law, and is void, in that no summons was ever issued therein, and the court never having acquired jurisdiction of the defendants, or either of them." Subsequently this motion was heard and denied. The motion was made on the papers filed and the record in the case. From the order denying this motion C. H. Howland appeals. Section 4892, Comp. Laws, provides that actions shall be commenced "by the service of a summons." Section 4893 reads as follows: "The summons shall be subscribed by the plaintiff or his attorney, and directed to the defendant, and shall require him to answer the complaint, and to serve a copy of his answer on the person whose name is subscribed to the summons, at a place within the territory, to be therein specified, in which there is a post-office, within thirty days after the service of the summons, exclusive of the day of service." The summons is served by delivering a copy thereof to the defendant, or leaving a copy at his dwelling-house in certain cases. No exhibition of the original is necessary. When the motion to set aside the judgment was made the record disclosed full and complete legal service. The amended return, when filed, related back to the original return, and had the same effect as if the amended return had been originally made. Murfree, Sheriffs, § 880, and cases cited; also In re Lake, 15 R. I. 628, 10 Atl. Rep. 653. The ruling of the trial court upon the question of permitting the amendment is not before us. This appellant, by counsel, opposed that motion, but saw proper to take no appeal from the decision; hence the recitals in the amended return are conclusive upon him if the amendment was one that could have been made upon any showing. We do not understand appellant to controvert that proposition. His position is that such amend-

ment was utterly futile in any event, because the record disclosed the fact that no summons was ever issued in the case, hence none could have been served, and no action was commenced or jurisdiction of the person of the appellant obtained; that the pretended judgment was a nullity, and no subsequent amendment could originate an action to support it. But we think the record upon which he based his motion is against appellant. The affidavit of the officer who made the service shows that the copy served upon appellant was complete, "including the subscription of the names of Francis & Southard, plaintiff's attorneys," and in the amended return he certifies that "the summons so served was subscribed in ink with the signature of Francis & Southard, plaintiff's attorneys." "Signature" means a person's name as set down by himself. See And. Law Dict. It seems certain, then, that there was a summons issued, signed by plaintiff's attorneys, and that the copy delivered to appellant was so signed. The fact that the attorney or the attorney's clerk may have indorsed the word "original" on a copy not signed, and failed to indorse it on the copy that was signed, would not destroy its effect as a valid summons. Theoretically the officer prepares the copies for defendants. It was his duty to return a summons signed by plaintiff's attorneys, and to see to it that the copies served corresponded therewith. This he inadvertantly failed to do; but service upon appellant of a copy signed by the attorneys could not prejudice him in any manner, and was none the less good service. The facts were that a valid summons was issued and was properly served upon appellant, but when judgment was entered the record showed that no summons had been served. After judgment the court permitted the facts showing jurisdiction to be brought upon the record by amendment to the return. This action of the court was in furtherance of justice and fair dealing, and is abundantly sustained by the authorities. In the case of Railway Co. v. Yocum, 34 Ark. 493, judgment had been rendered by default on a return that failed to show legal service of process. The defendant appealed, and subsequently the trial court allowed the sheriff to amend his return, showing good service. The learned supreme

court of Arkansas said: "When a summons has been in fact duly served, it is the duty of the defendant to take notice of it, unless all defenses be waived. He cannot shelter himself under a defective return from the consequences of his default, if the true facts be at any time brought properly upon the record. He could not in the action question the truth of the return in either case, and his remedy for a false return would be as effective in the case of the amended as of the orignal return." Mill Co. v. Bank, 97 Ill. 294, contains a very instructive discussion of this whole question, and the conclusion is reached that an officer's return may always be amended to correspond with the facts, in affirmance of a judgment, but never to defeat a judgment. To same effect, see Moyer v. Cook, 12 Wis. 335; Gasper v. Adams, 24 Barb. 287; Magrew v. Foster, 54 Mo. 258; Montgomery v. Merrill, 36 Mich. 97; Dunham v. Wilfong, 69 Mo. 355; Wilcox v. Sweet, 24 Mich. 355; Murfree, Sheriffs, §§ 875, 875*a*, and cases cited. Of course reasonable diligence in applying for leave to amend must always be shown, and the rights of innocent third persons protected. In this case the application was made as soon as the mistake was discovered, and within a year and a half from date of judgment, and no third parties are shown to be interested. The appellant had ample notice of the pendency of the action. His default was deliberate and intentional, and, what is a little remarkable, he makes no pretense of having any defense whatever to this action. His appeal to this court is based on no merits in his case, and he is entitled to such consideration as a rigid application of the rules of law gives him, and nothing more. Judgment affirmed. All concur.

THE STATE OF NORTH DAKOTA *ex rel.* THE DAKOTA HAIL ASSOCIATION, of Plankinton, Plaintiff and Respondent, *v.* A. L. CAREY, Commissioner of Insurance of North Dakota, Defendant and Appellant.

Mandamus — Parties — Procedure — Insurance Companies — Right to Transact Business.

1. Under the territorial statutes now in force in this state, the remedy by *mandamus* is in some respects assimilated to a civil action, but is not in strictness a civil action, and is a special proceeding. Comp Laws 1887, §§ 5505, 5536.

2. The party prosecuting the writ may be known as the plaintiff, and the adverse party as the defendant; but where the writ is sought to enforce a duty due the state as such, or sought with respect to a right of common concern to a large number of persons, but not a right where the state as such is concerned, or sought to enforce a right peculiar to the relator, the proceeding should be had in the name of the State *ex rel.* the ———.

3. Where the remedy concerns the state as such, the writ should be applied for by the attorney general, or, at least by his assent.

4. Where the subject-matter does not concern the state as such, but is of common concern to a large number of persons—for example, to all citizens of a county, town, city, or district—any citizen of the locality is beneficially interested, and may apply for the writ, within the meaning of § 5518, Comp. Laws 1887.

5. Where the writ is sought for the benefit of the relator alone, the fact of his special and peculiar right to the writ must be made to appear by the affidavit.

6. The insurance commissioner of this state, in granting or revoking a certificate authorizing insurance companies to transact business within the state acts within the limits of a discretion express y conferred upon him by statute. Such official discretion, when once it has been exercised, cannot be controlled or reviewed by *mandamus*.

(Opinion Filed June 16, 1891.)

APPEAL from district court, Burleigh county; Hon. W. H. WINCHESTER, Judge.

C. A. M. Spencer, Att'y Gen., for appellant. *S. L. Glaspell*, for respondent.

Mandamus proceedings. Peremptory writ, as prayed for by relator, issued. Defendant appeals. Reversed.

The opinion of the court was delivered by

WALLIN, J. The affidavit upon which the alternative writ issued was made by the secretary of relator, and states, in substance, that the relator is a mutual hail insurance company, organized under the laws of the territory of Dakota, and has been engaged in business in the states of North and South Dakota, with its principal office at Plankinton, South Dakota; that the relator has at all times fully complied with the laws of North Dakota, and is therefore authorized to do business in said state; that the defendant, as insurance commissioner, issued to the relator a certificate of authority to do business in North Dakota in 1890, and at the close of that year, and on January 27, 1891, relator filed with the defendant its annual statement, as required by law, which defendant accepted without objection, and has at no time given relator notice of any defect therein; that relator has literally complied with all the requirements to authorize it to do business in this state during the year 1891, and on January 27, 1891, defendant issued to it a certificate of authority for said year. On the same day relator tendered to defendant the fees for filing such statement, and for furnishing copies for publication, and for issuing said certificate. Defendant requested affiant to hold said money until some time later, which relator did. That on February 6, 1891, relator sent said money to defendant, who on March 3, 1891, returned the same. On March 10, 1891, relator again tendered said fees, together with the legal fees for issuing certificates to five agents, all of which the defendant refused to accept; and relator deposited said fees in the name and for the use of said defendant in the James River National Bank, and notified defendant accordingly. That defendant has failed to publish such annual statement, or designate the newspapers in which the same may be published. That on February 19, 1891, the defendant, by letter, attempted to recall relator's certificate of authority, and again, on February 25th, defendant, by letter asked relator to surrender such certificate, and stated that said fees would be returned later. On

March 10, 1891, relator presented to defendant a properly certified list of agents, and demanded that certificates of authority be issued to such agents, and at the same time tendered the legal fees therefor. On March 16, 1891, defendant, by letter to relator, refused to issue such certificates to agents, and declared relator's certificate of authority "null and void," and ordered relator to discontinue business in this state, and returned the fees to relator; and on the same day defendant issued and sent to relator a proclamation assuming to revoke the authority of relator to do business in this state. All the letters mentioned in said affidavit are attached as exhibits, and also the certified list of agents, with demand as stated, and the proclamation issued by defendant. The alternative writ commanded the commissioner to publish such annual statement for the year 1890, to designate the papers in which the same should be published, and issue certificates of authority to local agents, or to show cause, etc. On the return-day the defendant, by the attorney general, appeared before the district court, and moved to quash the alternative writ upon two grounds: *First*, that the said action is not brought in the name of and by the proper party, the real party in interest; *second*, that the affidavits and exhibits show upon their face that the plaintiff is not entitled to the relief demanded. The motion to quash was denied, and defendant excepted to the ruling. Defendant elected to stand upon the motion to quash, and refused to answer or plead further. Wherenpon the trial court entered judgment, adjudging as follows: "That a peremptory writ of *mandamus* do now issue out of this court directed to the said defendant, A. L. Carey, commanding him that he do forthwith publish, or cause to be published, the annual statement for the year 1890 of the relator the Dakota Hail Association, and to select or designate the newspapers in which the same may be published; and that he issue certificate of authority to the agents of said Dakota Hail Association as requested; and that plaintiff do have and recover of defendant the costs of the proceeding." The errors assigned in this court are that the court erred in denying the motion to quash, and in entering the judgment. It is a stipulated fact that the state, as such, has no interest in the controversy. We

shall therefore, without conceding that such a stipulation is binding upon the court, and without passing upon the question of whether the state, as such, has a direct interest in the questions at issue, proceed to consider the matter as a purely private controversy.

The attorney general contends that this proceeding is not a special proceeding, but is a civil action, and, consequently, that it should be brought in the name of the real party in interest, *i. e.*, in the name of the Dakota Hail Association of Plankinton, S. D., and should not be brought in the name of the State of North Dakota ex rel., etc.; citing Comp. Laws 1887, §§ 4830, 4870, 5005, 5518; 14 Amer. & Eng. Enc. Law, p. 217, and cases cited. Section 4830 in terms refers only to "actions at law and suits in equity," as such actions and suits existed prior to the innovations made by the reformed procedure. No reference is made to a special proceeding. See Comp. Laws 1887, §§ 4810, 4812. Section 4870 declares that "every action must be prosecuted in the name of the real party in interest," etc. This obviously has reference exclusively to those remedies formerly had by an action at law or by suit in equity, and we think it would be a violation of the plain intent of the statutes to extend its meaning so as to include special proceedings which are not mentioned in § 4870, but on the contrary, are regulated by distinct and special proceedings of the statute. Comp. Laws 1887, §§ 5505, 5536. The attorney general also cites the following authorities: State v. Marston, 6 Kan. 524; Bobbett v. State, 10 Kan. 15; State v. Board, 11 Kan. 67; People v. Pacheco, 29 Cal. 213; Territory v. Cole, 3 Dak. 301, 19 N. W. Rep. 418. Doubtless these cases, especially that cited from California, with others from that state not cited, tend to support the position taken by the attorney general. With respect to the territorial case, it will be noticed that the case seems to turn upon the non-residence and non-official capacity of the relator, rather than upon the question how the procedure should be entitled. The use of the name of the territory is not criticised in the opinion. In the state of Kansas the statutes regulating the remedy by *mandamus* differ materially from those of this state. The Kansas enactments pointedly recognize the

remedy as a civil action by repeatedly referring to the parties as "plaintiff" and "defendant." Gen. St. Kan. 1889, pars. 4809, 4811. The statutes of Iowa, in express terms, make the remedy an action, and authorize the action to be brought in the name of either the state or a private party, according to the nature of the case. McClain, Ann. St. §§ 3373, 3385. Authorities based on these statutes are not in point in this state, as we have no such statutes. It must be conceded, however, that there is authority of great weight sustaining the position of the attorney general, but we think the better authority and better reason is the other way. We have found no precedent in the reported cases decided by the late territorial supreme court for omitting the name of the sovereign in any *mandamus* case. We can see no good likely to result from changing the established practice in this respect, and, on the other hand, a change not based on a new and well-considered statute would, in our opinion, tend to much confusion in the practice, and thereby greatly impair the usefulness of the writ.

We think the statutes regulating special proceedings give countenance to the existing practice. Comp. Laws 1887, §§ 5518, 5527. We therefore hold that the name of the state was properly inserted in the title of this proceeding. High, Extr. Rem. § 430. We still add, as a guide for future cases, that the name of the state should be inserted in the writ in connection with the name of the relator in all cases whether the matter is one in which the state as such is strictly a party in interest or not, or whether the question is one of public concern or a purely private dispute. The statutes of the state have assimilated the *mandamus* proceeding to a civil action, but have not made it a civil action, as is done in the case of *quo warranto*. Comp. Laws 1887, §§ 5345, 5361. We think it will be proper to add, with a view to settling a very embarrassing and much controverted question of practice, that in cases where the state, as such, is directly interested as a party, the attorney general should apply for the writ, or in some manner signify his assent to the proceeding; but on the other hand, where the controversy does not concern the state, as such, but does concern a large class of citizens in common, as, for example, the citizens

and tax-payers of a particular county, town, city or district, the required affidavit may properly be made by any citizen of the locality affected. In the class of cases last referred to, any citizen of the locality affected is, in our opinion, "beneficially interested" within the meaning of section 5518, Comp. Laws 1887. It follows that, in this class of cases, the writ may be invoked by any citizen without the concurrence of any officer. People v. Collins, 19 Wend. 56; Railroad Co. v. Hall, 91 U. S. 355; Pumphrey v. Mayor, 47 Md. 145; Attorney General v. Boston, 123 Mass. 479, opinion; People v. Board, 56 N. Y. 249; People v. Common Council, 77 N. Y. 503; note to Dane v. Derby, 89 Amer. Dec. 741; State v. Weld, 39 Minn. 426, 40 N. W. Rep. 561; High, Extr. Rem. § 431, Hyatt v. Allen, 54 Cal. 353; State v. Board, 35 Ohio St. 368.

Where the right sought to be secured by the writ is private only, the relator must, of course, show that his individual interest is affected in some way peculiar to himself. See authorities supra. It may be added that under § 4, c. 21, Laws 1890, defining the duties of the attorney general of the state, it would not be the duty of that officer to represent the state officially in court or in any case where an inspection of the papers would disclose the fact that the name of the state is inserted in the writ as a formal or nominal party only, and that the state, as such, is not interested as a party in the subject-matter. It follows from what has been said that the district court did not err in holding that this proceeding is properly instituted and entitled in the name of the state. The record discloses that many of the material averments in the affidavit of the relator are not embodied in the alternative writ, but are simply referred to and adopted as a part of the writ, without being annexed thereto. The point is not made on the motion to quash the writ, and we shall dispose of the case wholly on another ground. But we are clear that the omission to incorporate in the alternative writ any material fact contained in the affidavit would be fatal on demurrer or motion to quash the writ. The writ only is served on the defendant, and the defendant answers only to the alternative writ in cases where such writ issues. The writ should be treated as a declaration at

common law or a complaint under the Code, and nothing which is omitted from it need be answered. Comp. Laws 1887, §§ 5519, 5521, 5522, 5528; High, Extr. Rem. §§ 449, 451.

Proceeding to the merits of the motion to quash the writ, we are called upon to determine whether the facts stated in the writ, including for the purposes of this case all the facts set out in the affidavit, are sufficient in law to entitle the relator to the peremptory writ. The attorney general contends that the affidavit shows affirmatively and clearly that the relator is not entitled to invoke the aid of the writ for the purpose of compelling the commissioner of insurance to do the various acts and things required to be done by the writ, viz., to designate the newspapers in which the relator's annual statement should be published, and to issue the certificates of authority to enable the local agents of the relator to transact business, etc. § 3053, Comp. Laws 1887. The ground work of the contention is that the insurance company complaining is not entitled to the writ, because it is not, and was not when the writ issued, legally entitled to have its annual statement for 1890 published, nor legally entitled to have certificates issued to its local agents enabling them to do business for the current year, because, as counsel contends, the company itself was and is without authority to do business in this state; the certificate issued to the company by the defendant for the year 1891 having been "canceled" and declared "null and void," and the company notified thereof by a formal letter from the commissioner, dated March 15, 1891. The motion to quash admits the facts set out, and it is conceded that the various letters constituting the exhibits were written by the insurance commissioner and received by the relator prior to instituting this proceeding; but the relator denies the authority of the commissioner to revoke the relator's certificate on any grounds set out in any of the letters. In his brief counsel for relator says: "It is admitted that the commissioner of insurance has authority, in some cases, to revoke and cancel certificates issued by him, but it is vigorously denied that this is one of such cases. There must be cause for such action on the part of the commissioner. Having once authorized an insurance company to commence business in this state,

its continuance does not depend on his whim or caprice. There must be a reason found in the statute for depriving the company of what is usually a valuable franchise or right. The causes upon which such action may be taken are found in Laws 1885, c. 69, §§ 28, 33, and Laws 1890, c. 75."

The issues presented require a consideration of the nature and extent of the authority vested in the insurance commissioner with respect to granting and revoking certificates of authority to do business in the state. Section 16, c. 69, Laws 1885, provides that insurance companies doing business in the state shall annually, on the 31st day of December, make and file with the insurance commissioner a statement, as prescribed in the act, showing in detail its business affairs and financial resources, etc., which statement, together with the certificate of authority for the company to do business, are required to be published in certain newspapers, as indicated by said § 16. Section 25 of said chapter is as follows: "It shall not be lawful for any agent or agents to act for any company or companies referred to in this act, directly or indirectly, in taking risks or transacting the business of fire, cyclone, tornado, hail and inland navigation insurance in this territory, without procuring from the territorial auditor a certificate of authority, stating that such company has complied with all the requisites of this act which applies to such company. The statements and evidences of investment required by this act shall be renewed from year to year, in such manner and form as required by this act; and the auditor, on being satisfied with the capital, securities and investments remaining secured as hereinbefore provided, shall furnish a renewal of the certificate as aforesaid." Section 28 is as follows: "If the auditor has, or shall have, at any time after examination, reason to believe that any annual statement or other report required or authorized by this act, made or to be made out by any officer or officers, agent or agents of any corporation, association or partnership incorporated by or organized under the laws of any state or territory of the United States or any foreign government, is false, it shall be the duty of said auditor to immediately revoke the certificate of authority granted on behalf of said corporation or association, and mail a

copy of said revocation to such company, and the agent or agents of such corporation, association or partnership, after such notice, shall discontinue the issuing of any new policies, or of the renewal of any policy previously issued; and such revocation shall not be set aside, nor any new certificate of authority be given, until satisfactory evidence shall have been furnished to said auditor that such corporation or association is, in substance or in fact, in the condition set forth in such statement or report, and that all requirements of said act have been fully complied with." Section 29, Id., expressly authorizes the commissioner, either in person or by representative, "whenever he shall deem it expedient to do so," to "examine into the affairs" of any company doing business in this state. Section 33 reads as follows: "And whenever it shall appear to said auditor from the report of the person or persons appointed by him that the affairs of any company not incorporated by the laws of this territory are in unsound condition he shall revoke the certificates granted in behalf of said company, and shall cause a notification thereof to be published in any newspaper of general circulation published at the capital, and mail a copy thereof to each agent of the company. The agent or agents of such company shall, after such notice, be required to discontinue the issuing of new policies, and the renewal of any policies previously issued." From these provisions of the statute it conclusively appears that the state, through its legislature, has seen fit to invest the commissioner of insurance with an absolute power and discretion with respect to granting insurance companies permits to do business within the state, and also with respect to revoking such permit after it has been once granted. With respect to granting the permit to do business, it does not suffice that a company is in fact solvent and has strictly complied with all legal prerequisites to the transaction of business. It can secure the permit only when the commissioner "is satisfied with the capital, securities and investments," etc. § 25, Id. Again, where a company has made the prescribed annual statement of its affairs and resources in good faith, and with entire truthfulness in fact, the commissioner may revoke any certificate of authority to do business given to

such company if, after an examination conducted as he sees fit, or without such examination, the commissioner "has reason to believe that such annual statement * * * is false." Section 28, Id. The same absolute right to revoke a certificate of authority is given the commissioner when the examination has been made by a representative of the commissioner, if from the report made it shall appear to the commissioner "that the affairs of any company not incorporated by the laws of this territory are in unsound condition." § 33, Id. Whether such unrestricted power and discretion to either grant or withhold a permit to do business within the state, and to revoke or not revoke such permit when granted, is or is not wisely vested in the insurance commissioner, are questions which address themselves to the legislature. The courts can not consider the expediency of any law which the legislature has power to enact. The power to prescribe terms on which a foreign insurance company can do business in a state is plenary. State v. Doyle, 40 Wis., 176, 220. It is elementary that the writ of *mandamus* will not issue to control the exercise of judgment and discretion which the law invests in an officer. To do so would simply result in a usurpation by the courts of the very power and discretion which the law confers upon others. High, Extr. Rem. §§ 44, 46. The court has not been aided by counsel in this branch of the case by the citation of authority, but we have found a recent case from Kansas which is a *mandamus* case, and practically on all fours with the case under discussion, and in our view is exactly in point. Insurance Co. v. Wilder, 20 Pac. Rep. 265. The whole case is instructive, but we need quote only the syllabus: "The determination of the superintendent of insurance granting, refusing or revoking licenses authorizing insurance companies to transact business within the state involves the exercise of official judgment and discretion on its part which can not be controlled or directed by *mandamus*." It follows that the trial court erred in denying the defendant's motion to quash the alternative writ upon the merits, and in entering judgment in favor of the relator. The judgment should be reversed and it will be so ordered. All concur.

WILLIAM H. DUNSTAN, Plaintiff and Appellant, *v.* NORTHERN PACIFIC RAILROAD COMPANY, Defendant and Respondent.

Damages in Ejectment — Reservation in Deed — Railroad Right of Way.

1. In an action of ejectment, and to recover damages for withholding the property, where it appears that plaintiff has conveyed the land pending the litigation, he is still, under § 5454 of the Compiled Laws, entitled to judgment for whatever damages the evidence may establish.

2. Where the Northern Pacific Railroad Company conveyed a portion of the land granted to it by congress to a private person, "reserving and excepting therefrom, however, a strip extending through the same * * * of the width of 400 feet — that is, 200 feet on each side of the center line of the Northern Pacific Railroad, or any of its branches—to be used for right of way, * * * in case the line of said railroad or any of its branches, has been or shall be located on or over * * * said described premises," *held*, that such reservation covered one such strip only, and that the railroad company could not claim a right of way, both for its main line and a branch line, over the tract so conveyed under such reservation.

3. *Held, further*, that where a separate corporation entered upon and located and constructed a line of railroad across said tract, and subsequently leased the same to the Northern Pacific Railroad Company, which latter company operated the same as a branch of its main line, that, whatever interest in or right to the right of way of such road the latter company had, it obtained and held under its lease, and not under the reservation.

(Opinion Filed June 17, 1891. Re-hearing Denied Aug. 21, 1891.)

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

S. L. Glaspell, for appellant. *John S. Watson* and *W. F. Ball*, for respondent.

Action in ejectment and for damages for witholding the property. Judgment for plaintiff. Defendant appeals. Reversed and new trial ordered.

S. L. Glaspell for appellant:

The defendant is not permitted by its charter to construct branch lines, and unless power to build them is

conferred upon a company by its charter, either in express terms or by necessary implication, they cannot be constructed. Railroad Co. v. Railroad Co., 31 N. J. Law 205; note to M'Abey v. Railroad Co., 20 Am. & Eng. R. R. Cases 319; note to Lamer v. Railroad Co., 10 Id. 21. Conceding that defendant cannot construct a branch line, there is still a line of decisions holding that one who has contracted with a corporation cannot deny the existence of the corporation or deny its power to do what the parties have mutually agreed to do. Thus a person who has borrowed money from a bank and failed to pay cannot make the defense when sued for it that the bank had no right to loan the money. Mining Co. v. Bank, 96 U. S. 640. The reservation is void for uncertainty. The strip is excepted for right-of-way or other railroad purposes so that there is taken out of the grant a part of the thing granted; not merely an easement, but the fee. Munn v. Worrall, 53 N. Y. 44; Washburn on Real Property, Vol. 3, p. 368; Mayor, etc. v. Law, 26 N. E. Rep. 471. An exception in a deed is to be taken most favorable to the grantee and if not described with certainty the grantee shall have the benefit of the defect. Jackson v. Hudson, 3 Johns. 375; Thompson v. Gregory, 4 Johns. 81; Jackson v. Gardner, 8 Johns. 394. After third parties have acquired rights the original parties cannot correct an erroneous description to their prejudice without their consent. Sneed v. Woodward, 30 Cal. 430; 2nd Wait's Actions and Defenses 504; Hall v. Pickering, 40 Maine 548; Rorer on Railroads, 318; Van Wyck v. Wright, 18 Wend. 157. Defendant is a mere lessee, liable to be ejected for non-payment of rent or breach of other conditions. Railroad Co. v. Day, 30 Am. & Eng. R. R. Cases, 333. Trespass or ejectment will lie. Note to Railroad Co. v. Karnes, 10 Am. and Eng. R. R. Cases, 43; note to Jones v. Railroad Co., 14 Id. 224; Rorer on Railroads, 305, 318.

John S. Watson and W. F. Ball for respondent:

Violations of a charter cannot be assailed collaterally in a suit by private parties. Cowell v. Colo. Springs Co., 100 U. S. 55; Natoma, etc., v. Clarkin, 14 Cal. 552; Finch v. Baldwin, 17 Johns.

161. Where a corporation is incompetent by its charter to take title to real estate, a conveyance to it is not void, but only voidable; and the sovereign only can object. Bank v. Matthews, 98 U. S. 621; Christian Union, etc., v. Yount, 11 Otto 352; American Bible Society v. Marshall, 15 Ohio St. 537. It is a well established principle that reservations and exceptions, which are not definitely fixed by the grant containing them, may be designated by the grantor, and if for any reason he fails to so designate them, the grantee may do so. Holmes v. Seeley, 19 Wend. 506. If a way is expressly granted and its locality is not defined, it may be fixed by the acts of the parties and when once fixed it cannot be changed. Bannon v. Angiers, 2 Allen 128; Wynkoop v. Berger, 12 John. 222. The owner of the way may locate it, providing he does so without unnecessary injury to the other party. Hart v. Conner, 25 Conn. 331; Garland v. Furber, 47 N. H. 301; Russell v. Jackson, 2 Pick. 574; Jennison v. Walker, 11 Gray 426. The uncertainty in a reservation may be cured by the acts of the parties. Benn v. Hatcher, 81 Va. 25; Gill v. Grand Tower, etc., 92 Ill. 249; Dygert v. Mathews, 11 Wend. 35; Crocker v. Crocker, 5 Hun 587.

The opinion of the court was delivered by

BARTHOLOMEW, J. This was an action under our statute in the nature of ejectment for a quarter section of land, coupled with a claim for damages for withholding the same. Under the answer the issues were upon the amount of damages, and the ownership of a strip of land 400 feet in width across said tract, the title to which defendant claimed to hold under the reservation or exception hereafter noticed. The land in dispute was a part of the original grant of lands by congress to the defendant railroad company. Plaintiff traced his title through a certain deed from defendant to one Davis, dated September 15, 1876, and conveying the S. ½ of said quarter section, and a deed from defendant to one Hamilton, dated November 10, 1878, conveying the N. ½ of said tract. Davis and Hamilton conveyed to plaintiff in December, 1878, without reservation or exception. Plaintiff also showed possession of said strip of land in defendant since the fall of 1885, and introduced evidence on the ques-

tion of damages. The conveyances by defendant through which plaintiff claimed title contained, immediately after the granting clause, the following language: "Reserving and excepting therefrom, however, a strip of land extending through the same (or so much of said strip of land as may be within said described premises), of the width of four hundred feet—that is, two hundred feet on each side of the center line of the Northern Pacific railroad, or any of its branches—to be used for right of way or other railroad purposes, in case the line of said railroad, or any of its branches, has been or shall be located on or over or within less than two hundred feet of said described premises." The strip claimed was shown to extend diagonally across said quarter section, and was used by defendant, as appears from its testimony, as a right of way for what is known as the "James River Valley Branch" of the Northern Pacific Railroad. Defendant's evidence showed that this road was originally constructed by a distinct and separate corporation—the James River Valley Railroad Company—and after its completion it was leased by said last-named company to defendant for a term of 999 years, for the annual rental of one dollar, and the payment of the annual interest on the outstanding bonds of the James River Valley Railroad, and since December, 1885, defendant has been in possession of and was operating said road as a branch of the Northern Pacific Railroad. It also appeared that after the commencement of this action plaintiff conveyed the quarter section to his wife, and the wife reconveyed to plaintiff, and delivered the deed during the progress of the trial. There is no claim that the James River Valley Railroad Company ever took any steps to secure title to a right of way across said tract. When the testimony was closed, defendant moved the court to direct a verdict for defendant on the following grounds: *First*, because the evidence showed that defendant did not construct the line of road in question over plaintiff's land; *second*, because prior to the trial plaintiff had conveyed his interest in the land to a third party; *third*, because it appeared that plaintiff had no title to the particular land of which he sought to gain possession; and, *fourth*, because the evidence was insufficient to justify any verdict against

defendant. This motion was granted, and a verdict returned accordingly. If this ruling can be sustained on any ground assigned, the judgment must be affirmed.

The first ground is not seriously urged in this court, and indeed could not be. The point might be material on the question of damages, but it furnished no ground for refusing plaintiff possession. Ejectment always lies against the party in possession. Nor did the fact that plaintiff, pending the action, transferred the land to a third party, entitle defendant to a verdict on all the issues. We do not pass upon plaintiff's right to a judgment for possession, under the facts disclosed by the evidence upon this point; but § 5454 of the Compiled Laws provides that where the plaintiff shows a right to recover at the time the action was commenced, but such right has terminated during the pendency of the action, the verdict and judgment must be according to the fact, and plaintiff may recover damages for withholding the property. In this court, however, respondent's chief contention is that the ruling must be sustained on the third ground presented in the motion; on the theory that defendant's title to this right of way did not pass from it by the deeds executed to plaintiff's grantors, but was reserved and excepted by the language already quoted. In passing upon this point we shall not stop to consider respondent's power under its charter to build or operate branch lines, nor plaintiff's right to question that power. Neither need we define the exact estate excepted or reserved by the language used, nor decide whether or not such exception or reservation would in any event be void for uncertainty. These questions were ably discussed by the eminent counsel representing the respective parties, but, in our view, the solution is not involved in the decision of this case. It appears from the evidence that prior to the construction of the James River Valley Railroad, the main line of defendant's road had been located, and was being operated, over and across this same quarter section of land; and, while it perhaps does not appear in evidence, yet it is conceded by counsel that it was so located and operated prior to and at the time of the execution of the conveyances from defendant to plaintiff's grantors. We concede,

for the purposes of this opinion, that the plaintiff is bound by the language contained in those conveyances to the same extent that his grantors were bound. It does not certainly appear in what manner the main line crosses this quarter section, or whether or not it intersects both the north and south half thereof, but it does appear that this branch line crosses the tract diagonally near the center; hence it is certain that both lines must to some extent run upon the same subdivision as originally conveyed by defendant. The reservation is of "a strip of land * * * of the width of four hundred feet, that is, two hundred feet on each side of the center line of the Northern Pacific Railroad, or any of its branches, to be reserved for right of way, * * * in case the line of said railroad, or any of its branches, has been or shall be located on or over * * * said described premises." This language covers but one strip. If the line of the defendant's road had already been located across the land when the conveyance was made, then the language simply reserved the right of way for such line. If the line was subsequently located, its location at once fixed the limits of the reservation, and exhausted its extent. In neither case was there anything left on which to base a claim for right of way for a branch road. The language will not bear extension beyond its plain import. Should we hold that it could be construed to mean two strips, each of four hundred feet in width, simply because the defendant operates two lines across this tract, then we would be forced to hold that it could be construed to mean as many such strips as could be surveyed within the limits of the tract, should the defendant at any future time desire to operate that number of lines across said tract. No one would contend for such a construction.

But, to our minds, there is another and broader reason why defendant can in this action assert no claim under the reservation in the conveyances to plaintiff's grantors. Such reservations neither created or preserved any rights of the James River Valley Railroad Company. When that company entered upon and located its line of road across plaintiff's land it was, and still is, a stranger to such reservation. Nor could such location define or fix the limits to any rights or estate of this

defendant. As long as the James River Valley Railroad Company remained in possession of this road defendant had no interest whatever in this right of way. It has never located any branch of its line thereon. If it now has any interest in such right of way it is by reason of the receipt by it of a lease from the James River Valley Railroad Company, and not by reason of the existence of the one condition prescribed in the reservation. There is a clear and well defined distinction between a line of road that is in fact a branch of a main line and a road that is simply operated as a branch; all the difference that exists between absolute ownership and a right to use for a limited time, under certain restrictions. Again, suppose that defendant should default in the payment of the interest on the bonds of the James River Valley Railroad, in accordance with the terms of the lease, and the lease should be for that reason cancelled, and the road returned to the control and possession of the James River Valley Railroad Company. Would this defendant still hold the title to this right of way? Certainly not. Yet where is the conveyance or decree that divested it? If the cancellation of the lease terminates all of defendant's interest in this right of way, is it not absolutely certain that whatever interest it has is dependent upon the lease, and not upon this reservation?

This case turns largely upon a question of construction, and it is clear to us that the learned trial court entertained an erroneous view of the scope and effect of that reservation. What we have said fully disposes of the fourth ground of the motion for verdict. It must be noticed that plaintiff's right to maintain ejectment, under the facts in this case, is not challenged, and hence not passed upon. The judgment of the district court is reversed, and case remanded for trial *de novo*. All concur.

JAMES K. JOSLYN, Plaintiff and Respondent, *v.* THOMAS J. SMITH, *et al.*, Defendants; EDWARD J. MCMAHON and PETER S. MCKAY, Defendants and Appellants.

Foreclosure of Seed Lien—Waiver of Right—Findings.

1. In an action to foreclose the seed lien given by our statute it is not necessary to allege in the complaint that the seed was sold to be sown on any particular tract of land. It is enough on this point if the complaint shows that the seed was sown on land "owned, used, occupied or rented" by the purchaser.

2. A judgment will not be reversed by reason of the failure of the trial court to make a finding upon a particular point in a case where the result could not have been different if the court had found the fact exactly as alleged by such party.

3. A party does not waive his right to a statutory lien by taking other security for the debt, unless the security taken or credit extended is such as to evidence an intent to waive the lien and rely exclusively on the security given.

(Opinion filed June 30, 1891.)

APPEAL from District Court, Steele County. Hon. WILLIAM B. MCCONNELL, Judge.

E. J. & J. P. McMahon and *J. E. Robinson* for appellants. *C. J. Paul*, (*Stone, Newman & Resser*, of counsel,) for respondent.

Action in equity to foreclose a seed lien. Parties defendant were prior mortgagees. Judgment for plaintiff. Defendants appeal. Affirmed.

E. J. & J. P. McMahon and J. E. Robinson, for appellants, cited no authorities in their brief.

C. J. Paul, (Stone, Newman & Resser, of counsel,) for respondent:

The only question that arises is, does the complaint state facts constituting a cause of action; does it justify the findings of fact and do the findings sustain the judgment? The attempted exceptions to the findings do not warrant a review of the facts. They are not sufficiently specific for consideration.

Gilman v. Thiess, 18 Wis. 554; Taft v. Kessel, 16 Wis. 274; Smith v. Coolbaugh, 21 Wis. 428; Paggeot v. Sixton, 23 Wis. 195; Thomas v. Mitchell, 27 Wis. 414; Newell v. Doty, 33 N. Y. 83; Stone v. Trans. Co., 38 N. Y. 242; Wheeler v. Billings, 38 N. Y. 263; Goodrich v. Thompson, 44 N. Y. 335; Ward v. Craig, 87 N. Y. 557; McCormick v. Phillips, 34 N. W. Rep. 62; Galloway v. McLean, 2 Dak. 372; Hicks v. Coleman, 25 Cal. 122; Sill v. Reese, 47 Cal. 348. The alleged error that "the findings do not cover and pass on all the material issues in the case" is untenable. No requests were made by appellant for findings in the court below, and of course no exceptions taken to a refusal to find, and the objection, if it exists, can not now be raised. Hurlbut v. Jones, 25 Cal. 226; Calderwood v. Brook, 28 Cal. 151; Hidden v. Jordan, 28 Cal. 302; Lucas v. San Francisco, 28 Cal. 591; Pralus v. Jefferson Co., 34 Cal. 558; Hathaway v. Ryan, 35 Cal. 188; Merrill v. Chapman, 34 Cal. 251.

The opinion of the court was delivered by

BARTHOLOMEW, J. This was an action in equity to foreclose what is known under our statute as a "seed lien." The parties defending were prior mortgagees. The findings and conclusions of the trial court were in plaintiff's favor, and judgment accordingly, and defendants appeal. Of the errors assigned three only are noticed in appellant's brief. It is claimed that the complaint fails to state a cause of action, because it does not state that the seed grain was sold by plaintiff to be sown upon any particular land. As was said by this court in Lavin v. Bradley, 1 N. D. 291; 47 N. W. Rep. 384, this seed lien is entirely a creature of the statute, and can be acquired only by strict compliance therewith. But nothing further is required. When the conditions of the statute are met, the lien is perfect; and the statute does not require that the seed grain should be purchased to be sown on any particular tract of land. In this respect it differs from the lien of the mechanic or material man, and the reason for such difference is clear. The material man is given a lien upon the realty on the theory that he parts with his material with the understanding that it will be used in making improvements upon, and thus augmenting the value of, certain

specified realty. But the seed grain man is given a lien only upon the crop raised from the seed sold. It is entirely immaterial upon what land it may be grown. It is true that it must be upon land "owned, used, occupied, or rented" by the purchaser of the seed; in other words, the purchaser must be interested in having a crop raised from the seed. Without this limitation, the law might be made the instrument of injustice. If A. should enter into a contract with B., by the terms of which B. agreed for a stated compensation to furnish the seed and seed a certain tract of land belonging to A., and B. should purchase the seed, on credit, from C., and seed the land, and receive his compensation, it would be most unjust to permit C. to file a lien on A.'s crop to secure the debt due from B. to C. It is next urged that the court did not pass upon the lien asserted by appellants under a prior mortgage. It is true the court made no findings as to the execution of such mortgage, or as to its non-payment. No such findings were asked, nor can their absence in any manner prejudice appellants. The seed lien statute declares the lien therein provided for to be superior to the lien of any chattel mortgage on the crop, executed after the passage of the act. The answer shows appellant's mortgage to have been executed after the passage of that act. Had the court specifically found that appellant's mortgage was executed as alleged in the answer, and that it was entirely unpaid, yet under the findings respecting the seed lien, the conclusion of the court that plaintiff's seed lien was superior to the lien of appellants' mortgage would have been inevitable. There is no error there of which appellants can complain. It is alleged in the answer, and plaintiff's testimony shows, that at the time he sold the seed grain he took a note from the purchaser for the amount, secured by a chattel mortgage on all the crops grown upon the land where this crop was grown during that year and the succeeding year. The mortgage contained the following: "It is hereby agreed that James K. Joslyn, by taking this mortgage and note, waives no right to a seed lien for the amount thereof." The court made no finding as to such mortgage, apparently on the theory that it was entirely immaterial, or not in issue. Appellants insist, however, that it is material, and that a party

who takes mortgage security for a debt thereby waives the benefit of any statutory lien to which he might otherwise be entitled. It has sometimes been so held, but only when the security taken, or length of time given for payment, was entirely inconsistent with the idea of relying upon or enforcing a lien, and manifested an intent to waive it. The question of waiver is a question of intent; and, where the law raises a presumption of waiver from the act of the party in taking security, such presumption may be overcome by evidence *aliunde*. Pratt v. Eaton, 65 Mo. 165; Clark v. Moore, 64 Ill. 274; Gilcrest v. Gottschalk, 39 Iowa 311; Monteith v. Printing Co., 16 Mo. App. 450; Peck v. Bridwell, 10 Mo. App. 524. But in this case all presumptions of intent to waive the lien are refuted by the express agreement of the parties that the plaintiff waived no right to a lien by taking the note and mortgage. Nor is there any allegation in the answer, or claim in the evidence, that the mortgage was taken in lieu of the lien, or that there was any intent to waive the lien. Without an allegation of this kind there was no issue in the point for the court to pass upon. See East v. Ferguson, 59 Ind. 169. The findings are attacked in the assignment of errors as not being sustained by the evidence. The point is not urged in this court, but we have examined the evidence, which is brief and uncontradicted, and it fairly supports all the findings. The judgment of the district court must be affirmed. All concur.

WILLIAM BRAITHWAITE, Plaintiff and Appellant, *v.* HENRY C. AIKEN, HARVEY HARRIS, as Administrator of the Estate of JOSEPH LEIGHTON, Deceased, and THOMAS C. POWER and JOHN W. POWER, under the name and style of BENTON LINE, Defendants and Respondents; WILLIAM REA and GEORGE F. ROBINSON, Co-partners as ROBINSON, REA & Co., J. C. KAY and WOODRUFF MCKNIGHT, Co-partners as KAY, MCKNIGHT & Co., and A. W. CADMAN, as A. W. CADMAN & Co., and JOSEPH MCC. BIGGERT, Intervenors and Appellants.

New Trial—Newly Discovered Evidence—Sufficiency of Affidavit.

1. Affidavit held insufficient to justify the granting of a new trial on the ground of newly discovered evidence.

2. To warrant the granting of a new trial on such grounds affidavits must show such new facts as will probably lead to a different result on a new trial.

3. The facts must be established by the affidavits of persons who are personally familiar with them. It is not sufficient to set forth that another will testify to these facts or some of them. The affidavit of such person showing what he personally knows about them must be produced, unless some strong reason is shown why this requirement should be dispensed with.

4. Applications for new trial on this ground are looked upon with disfavor and distrust.

5. Although the trial court has large discretion in awarding or refusing new trials, which will not be interfered with except in case of abuse, yet when a new trial is granted upon a particular ground, there must be some legal evidence that such cause for a new trial exists, and the ground must be a legal ground for granting a new trial.

(Opinion filed June 22, 1891. Re-hearing denied Aug. 4, 1891.)

APPEAL from district court, Burleigh county; HON. W. H. WINCHESTER, Judge.

George W. Newton, for appellant William Braithwaite. *Louis Hanitch*, for intervenors and appellants. *Jamison & Boucher* and *Francis & Barnes*, for respondents.

Appeal from an order granting a new trial. Reversed.

The main authorities relied upon by the appellants are set forth in the opinion.

Jamison & Boucher, (W. H. Francis, of counsel), for respondents:

An order granting a new trial having been made upon good cause shown and in furtherance of justice, and being a matter appealing to the discretion of the court is not subject to review by an appellate court. Barrett v. Railroad Co., 45 N. Y. 628; Hoyt v. Thompson, 19 N. Y. 218; Smith v. Lovejoy, 62 Ga. 372; Detroit Tug Co. v. Carnter, 42 N. W. Rep. 968. It is well settled that an order granting a new trial will not be reversed unless a manifest abuse of discretion appears. Haas v. Whittier, 21 Pac. Rep. 547; Minturn v. Bliss, 19 Pac. Rep. 185; Nalley v. McDonald, 77 Cal. 284, 19 Pac. Rep. 418; People v. Holt, 73 Cal. 241, 14 Pac. Rep. 856; Peebles v. Peebles, 41 N. W. Rep. 387; Jones v. Parker, 97 N. C. 33, 2 S. E. Rep. 370; Insurance Co. v. Jones, 7 S. E. Rep. 83; Irwin v. McKnight, 76 Ga. 669; Ruffner v. Hill, 7 S. E. Rep. 13; Bussey v. Bussey, 39 N. W. Rep. 847; Langley v. Daley, 46 N. W. Rep. 247; Heilner v. Brown. 12 Pac. Rep. 903. The party alleging error in granting or refusing a new trial must make the error affirmatively appear; must show abuse of discretion (and this the appellants have not done.) Hall v. Bark "Emily Banning," 33 Cal. 522; Weddle v. Stark, 10 Cal. 301; Bensley v. Atwill, 12 Cal. 240; McCarrity v. Byington, 12 Cal. 432; Watson v. McGuire, 17 Cal. 92; Quinn v. Kenyon, 22 Cal. 82; Petery v. Bugby, 24 Cal. 422; Hawkins v. Reichert, 28 Cal. 535. Applications for a new trial on the ground of newly discovered evidence are addressed to the discretion of the court and its action will not be disturbed, except for an abuse of discretion, the presumption being that the discretion was properly exercised. People v. Sutton, 15 Pac. Rep. 86; Longley v. Daly, 46 N. W. Rep. 247; Spootiswood v. Weir, 22 Pac. Rep. 289; State v. Nance, 25 S. C. 168; Grace v. McArthur, 45 N. W. Rep. 518; Gaines v. White, 47 N. W. Rep. 524. When it appears by the record that a motion for a new trial based upon several grounds was granted by an order which does not disclose any ground for its basis, the ruling will not be disturbed if it can be sustained

upon any of the specified grounds of the motion. People v. Lum Lit, 83 Cal. 130, 23 Pac. Rep. 228; Barney v. Dudley, 19 Pac. Rep. 550; Taylor v. Railroad Co., 79 Ga. 330, 5 S. E. Rep. 114; Curtis v. Starr, 24 Pac. Rep. 806. To render newly discovered evidence cumulative and thus an insufficient basis for a new motion for a new trial, it must be of the same quality or description as that given upon the trial of the action. Wilcox Silver Plate Co. v. Barclay, 48 Hun 54; National Bank v. Heaton, 6 N. Y. Supl. 37; Parshall v. Klinck, 43 Barb. 212.

The opinion of the court was delivered by

CORLISS, C. J. The judgment in this litigation in favor of the plaintiff has already been affirmed by this court as to two of the defendants. Braithwaite v. Power, 1 N. D. 455, 48 N. W. Rep. 354. While the appeal of these two defendants was pending in this court, the remaining defendant, Harvey Harris, as administrator of the estate of Joseph Leighton, deceased, made a motion for a new trial on various grounds, which was granted not only as prayed for, but to the extent of destroying the entire judgment, not only as against Harris as administrator, but also as against the two defendants who previously had been unsuccessful in their efforts to secure a new trial, and who were at that moment challenging in this court the decision of the trial court refusing them this relief. The recitals in the order granting them a new trial, and the sweeping language of the order, force us to the conclusion that the trial court has assumed to grant a new trial as to defendants, over which it had no jurisdiction for that purpose, because they theretofore had removed the judgment and record to this court by appeal. We will not discuss the power of the trial court to render the judgment of this court nugatory before it is promulgated. We think the court erred in awarding the new trial, even assuming that the order affected the verdict and judgment only so far as the interests of the defendant, Harris, were concerned. While the motion was made upon several grounds, and while the order does not disclose the precise foundation on which it stands, yet we are relieved from the necessity of demonstrating that it can rest upon none of the grounds set forth in the notice of inten-

tion, with the single exception of the ground of newly discovered evidence, by the concession of respondent's counsel that all other grounds are abandoned. The only defense which it can be claimed that the newly discovered evidence would tend to establish is that of payment. The first paper which the record discloses is a petition made in form by Harris, the administrator, but, as it is verified by one of the attorneys for the administrator upon information and belief, it is difficult to see what weight is to be given it. Moreover, it contains nothing of importance, except the admission of Joseph Leighton in his lifetime that he had paid the plaintiff's claim. We fail to see that this was an admission against his own interest. It would, indeed, be a novel rule that a new trial could be granted upon evidence which must be rejected when offered on trial as the worst form of hearsay. In the affidavit of W. B. Jordan there is a repetition of these solemn admissions of Leighton that he had settled the plaintiff's claim. The only pretense of any legal evidence of payment is a receipt claimed to have been found among the papers of Joseph Leighton after his death. It reads as follows: "St. Paul, Minn., October 19, 1883. $150.00. Received of Joseph Leighton one hundred and fifty dollars and 00-100, the same being in full for interest and profits in Str. Eclipse and F. Y. Batchelor to date. Jos. McC. Biggert." What possible connection there is between the receipt and the claim of plaintiff, which is for freight for transporting army stores in 1880, it is impossible to conceive. No explanation is offered. The receipt refers expressly to interest and profits in steamers Eclipse and F. Y. Batchelor, and not to compensation for carrying freight for Leighton and others upon the steamers three years before. By his own terms it precludes the idea that it records a settlement of the claim in controversy in this action. It is clearly explained by the affidavit of Joseph McC. Biggert, who signed the receipt. His explanation is not controverted. He says that some time after the sale of the steamer Eclipse, in the spring of 1881, to Joseph Leighton, he was employed by Mr. Leighton as agent of that steamer, and of the steamer F. Y. Batchelor, at Bismarck, and that he was to be paid $150 per month and one-eighth of the earnings of each of the boats for

his services; that he remained in the employ of Mr. Leighton under this contract during the season of 1881, and that in 1883, at the request of Mr. Leighton, he went to Fort Buford to close the books of these steamers for 1881; and that he finally accepted $150 in full for the balance of the salary due him, and gave the receipt in question. The force of this affidavit is sought to be destroyed by the assertion that Joseph McC. Biggert, who made the affidavit, would not be competent to testify to these facts, because they constituted transactions with and statements by the deceased Joseph Leighton, and that the statute seals Biggert's lips as against the representatives of Leighton, he being interested, it is claimed, in the recovery. To support this view, respondent refers to § 5260, subd. 2, Comp. Laws. We do not think that the case falls within the statute. At common law, neither a party to a suit nor one not a party, but merely interested in the litigation, could be sworn as a witness. Our Code has abrogated this rule in sweeping terms, declaring in express language, not only that a party may be a witness, but that any one interested in the action may be allowed to testify. Both classes are expressly named in that portion of § 5260 which changes the old rule. But both classes are not expressly named in subdivision 2 of the same section, which qualifies the scope of this sweeping change. It is only a party who will not be permitted to testify as against the representatives of a decedent. Persons merely interested are not there mentioned. They stand, so far as this section is concerned, under the new rule enunciated in the first part of the section. They may testify in all cases without any such restriction. Parties and persons interested, it is declared, may testify in all cases; but parties only are declared incompetent to testify as against the representatives of a decedent. Interested persons are left under the new rule. Under statutes practically the same, the same conclusion has been reached. We cite the following cases in support of our decision that Joseph McC. Biggert, not being a party to the action, would be competent, under § 5230, subd. 2, Comp. Laws, to testify to the facts stated in his affidavits, however much he might be interested in the recovery: Berry v. Sawyer, 19 Fed. Rep. 289; Potter v. Bank, 102 U. S.

163. The action was not prosecuted for the immediate benefit of Biggert. However, it is only necessary to look upon the receipt alleged to have been newly discovered to see that no court would be justified in submitting it to a jury as any evidence of payment, without evidence connecting it with plaintiff's claim in this case. Nor is it probable that the jury would have rendered a different verdict had the receipt been received in evidence and considered on the trial. No attempt is made to connect it with the plaintiff's claim, which forms the basis of this action, by any evidence that would be competent on a new trial. "The evidence must be such as to render a different result probable on a re-trial. This is a consequence of the provision that the cause for which a new trial may be granted must be one materially affecting the substantial rights of the party. If there be no probability that the new evidence would change the result, its absence cannot be said to have materially affected the substantial rights of the party." Hayne, New Trials & App. § 91, and cases cited. To same effect, Spottiswood v. Weir, 80 Cal. 448, 22 Pac. Rep. 289; Grace v. McArthur, 76 Wis. 641, 45 N. W. Rep. 518. The evidence connecting the receipt and plaintiff's demand for freight must be competent. Hayne, New Trials & App. § 91; People v. Voll, 43 Cal. 168. It is true that the appellate court will uphold the ruling of the trial court granting a new trial when it would have refused to disturb the decision of that court had a new trial been denied. But the discretion of the trial court must be legally exercised. It has bounds, and the appellate court will see that these limits are respected. The party recovering a judgment has valuable rights which cannot be dissipated by the judicial breath. There must be some ground for the new trial. Clifford v. Railroad Co., 12 Colo. 125, 20 Pac. Rep. 333; Lorenzana v. Camarillo, 41 Cal. 467. Said the court in the Clifford Case: "The general rule so often announced, that a stronger presumption obtains in favor of an order granting than one denying a new trial, is urged in the present case as a strong reason why the ruling should not be disturbed. This rule should also be limited to cases wherein the ground on which the new trial was granted constitutes a legal ground for such order, and the alleged causes have

an actual existence." But this rule should have but little weight in this case, for the reason that the judge by whom the new trial was granted was not the judge before whom the case was tried, and therefore was no better qualified by reason of having been present at the trial properly to exercise discretion in the matter than this court. "The discretion vested in the trial court to grant or refuse a new trial is neither an arbitrary nor a general discretion. It is based on the theory that the judge who tries a case, having the parties, their witnesses and counsel before him, with opportunity to observe their demeanor and conduct during the trial, and to note all incidents occuring during its progress likely to affect the result thereof, is better qualified to judge whether a fair trial has been had and substantial justice done than the appellate tribunal." To the judge who granted this new trial the record was as cold and lifeless as it is to us. No recollection of the appearance, demeanor, conduct of witnesses and parties; no impressions derived from the view of the trial and its manifold incidents—went to make up the judgment that deemed a new trial just. That judgment was the result merely of the comparison of one lifeless record with another—the affidavits with the record of the proceedings on the trial. The reason for the rule that the order granting a new trial is to be sustained, although the trial court would have been justified in reaching a different conclusion, and although the appeliate court might deem a different conclusion the better one, therefore does not exist in this case; and the rule itself should not, under such circumstances, be rigidly followed, if followed at all. Comp. Laws, § 4697. But the order granting the new trial being defended only on the ground of newly discovered evidence, we are clear that, under the most liberal rule in favor of the decision of the trial court, the order cannot be sustained. So far as the receipt is concerned, it is entirely foreign to this case.

Two other facts are set forth: It is claimed that there was a talk of settlement between Leighton and John D. Biggert, who, it is insisted, was acting for the parties interested in the freight, to recover which the action was brought. The averment that he represented all the parties is on information and

belief, and no reason is assigned why some one familiar with the fact does not make an affidavit as to his authority. It is stated in substance, that in this conversation Leighton informed Biggert that the claim in question had been paid. There was no legal evidence of the authority of John D. Biggert to bind the parties interested; and without such authority the statements of Leighton made to him are only declarations in Leighton's own interest. "In asking for a new trial on the ground of newly discovered evidence, it is not sufficient for the moving party to state in his affidavit what, as he has learned, certain persons know about the matter, and how, as he believes, they will testify. He must produce the affidavits of the newly discovered witnesses as to what they know, and as to what they will testify." Arnold v. Skaggs, 35 Cal. 686; Hayne, New Trial & App. § 93. It is singular that Leighton should have claimed to John D. Biggert, at this conversation on July 10, 1888, that the claim had long since been paid and settled, when it is undisputed that he (Leighton) wrote Biggert on June 27, 1888, inquiring whether, in case he should settle with other parties, they would see him clear of Braithwaite, the plaintiff; and on July 21, 1888, 11 days after this alleged talk, he again wrote Biggert that whatever was due had been ready for the past seven years, and would be paid whenever he could safely pay either Braithwaite or Biggert. We find nothing in the affidavits used upon the motion which rises to the dignity of evidence of payment of the claim in question. Had such evidence been disclosed, then, no matter how strongly rebutted, the exercise of the discretion of the court in awarding the motion for new trial would not, except in a clear case, be disturbed. This is the true limit of the rule that the decision of the trial court will not ordinarily be interfered with. But there must be facts for the court to exercise its discretion upon, and these facts must be sufficient to enable the appellate court to see that the trial judge had some legal evidence showing a legal ground for a new trial because of newly discovered evidence. In such a case, the rule applies which makes the exercise of the discretion of the trial court binding upon the appellate court in the absence of a palpable abuse, al-

though the latter court would have reached a different conclusion had it been called upon to exercise its own discretion in the first instance. In the language of the court in Clifford v. Railroad Co., 12 Colo. 125, 20 Pac. Rep. 333: "This rule should also be limited to cases wherein the ground on which the new trial was granted constitutes a legal ground for such order, and the alleged causes have an actual existence." An order granting a new trial is an appealable order. § 5236, subd. 3, Comp. Laws; Laws 1891, regulating appeals, § 24, subd. 3. This clearly indicates that the trial judge who grants a new trial must act, not arbitrarily, but upon facts showing a legal ground for a new trial. A principle important to be borne in mind on such an application is that the claim of newly discovered evidence is looked upon with suspicion; that the papers upon which the motion is based should be scanned in a spirit of distrust; and that the "strictest showing of diligence, and all other facts necessary to give effect to the claim," should be required by the court. Hayne, New Trials & App. § 87, and cases; People v. Sutton, 73 Cal. 243, 15 Pac. Rep. 86; Longley v. Daly (S. D.), 46 N. W. Rep. 247; Spottiswood v. Weir, 80 Cal. 448, 22 Pac. Rep. 289; Gaines v. White (S. D.), 47 N. W. Rep. 524. This salutary rule must have been ignored by the trial judge in awarding the new trial in this case.

The statement which Mr. Jordan in his affidavit swears that John D. Biggert made out and signed in his presence was not newly discovered evidence at all. The statement was offered in evidence on the trial, and on motion of counsel was stricken out after having been received in evidence in the deposition of John D. Biggert. It would appear, nothing to the contrary being known, from the affidavit of Mr. Jordan, that John D. Biggert himself made out the statement without any direction or aid from Joseph Leighton; and it is intended to carry the conclusion that, representing the parties, he had thus made an admission against their interests. But the inference which it is sought to have drawn, that the physical act performed by Biggert in making out this statement was the expression of his own knowledge of the matter, and hence an admission, is destroyed by what defendants themselves offered to prove by the testimony

of John D. Biggert, who was sworn on behalf of defendants on the trial. They offered to prove by him that he made out the statement from memoranda furnished him by Leighton, and he testified that he had no personal knowledge of the business of the boat. He could not bind the plaintiff by any statement, or thereby create evidence against him, as there is nothing to show that he had any authority to act for plaintiff, and there is no legal evidence that he was empowered to represent any one interested in the claim sued upon. The order granting a new trial is reversed, with costs. All concur.

NATIONAL GERMAN AMERICAN BANK, Plaintiff and Appellant, *v.* GREGOR LANG, Defendant and Respondent.

Action on Note — Principal and Agent — Foreign Laws — Pleading — Evidence.

1. Where a litigant desires to take advantage of the laws of another state it is incumbent upon him to show by proper averments what such laws are, and wherein they differ from those of this state. If he fails to do so it is error to admit testimony at the trial as to what the foreign law is. In the absence of allegation and proof to the contrary the courts will presume that the foreign law is the same as that of the forum.

2. The defendant for value made and delivered to plaintiff an obligation in the following form: "$1,200. 11th March, 1889. Ninety days after date I promise to pay to the National German-American Bank, St. Paul, at the bank, St. Paul, the sum of twelve hundred dollars, value received. On acct of the ranch. GREGOR LANG." At the trial plaintiff put this paper in evidence, together with evidence showing the amount of interest which had accrued after the paper matured, figured at 7 per cent., and rested the case. Upon defendant's motion the district court nonsuited the plaintiff, and directed a verdict for the defendant. *Held* error. The instrument contains all the essentials of a promissory note; and, while the phrase, viz., "on account of the ranch," is superfluous, it does not relieve the defendant of his personal liability to pay the note, nor purport to do so.

3. Defendant's answer stated in substance that, while the defendant personally made and delivered the note and received the money therefor from plaintiff, the money so received was to be used for the

benefit of one P., whose agent the defendant was; that the plaintiff was informed when the note was made that the money was to be used in defraying the expense of operating a ranch belonging to P., and that P. himself assented to the giving of the note. *Held*, that the answer failed to state any defense. The answer does not state that P. at any time orally agreed to pay the note, but, if such agreement had been made, it would be inadmissible in evidence to vary and contradict the express terms of the written agreement.

4. *Held, further*, where an agent contracts in behalf of his principal he must do so in the name of the principal. If the agent contracts in his own name, he alone is bound.

(Opinion Filed July 13, 1891.)

APPEAL from district court, Stark county; Hon. W. H. WINCHESTER, Judge.

James G. Campbell and *John B. & W. H. Sanborn* for appellant. *Leslie Simpson* for respondent.

Action on promissory note. Judgment for defendant. Reversed and judgment ordered for plaintiff as asked for in its complaint.

The opinion of the court was delivered by

WALLIN, J. This action is upon a promissory note, of which the following is a copy: "Neimmela Ranch, Mingusville, Montana, 11th March, 1889. $1,200.00. Ninety days after date I promise to pay to the National German-American Bank, St. Paul, at the bank, St. Paul, the sum of twelve hundred dollars, value received, on act. of the ranch. GREGOR LANG." The complaint charges that the defendant executed this note and delivered it to the plaintiff, and that it is unpaid. The answer admits the execution and delivery of the note and its nonpayment. As a defense the answer alleged that the defendant was, when he made the note, acting as the general agent of one Sir John Pender, and the defendant executed and delivered the note in his capacity of agent of said Pender, and not in his individual capacity; that the money which was raised by the defendant from the bank for the note was used solely for the use and benefit of Pender, to meet the expenses of running his (Pender's) ranch, of which defendant was the manager; that

plaintiff accepted the note and advanced the money with full knowledge of all the facts above stated. The answer further avers that the note was given with the consent and approval of Pender, and that the plaintiff accepted the paper and advanced the money, knowing that Pender consented and approved of making the note as it was made. The action was tried by a jury. The plaintiff put in evidence the note described in the complaint. A witness in plaintiff's behalf testified that he had computed the interest on the note at 7 per cent. per annum from its maturity until the date of the trial, and that such interest amounted to the sum of $68.59. The witness further testified in substance that he had computed the interest at 7 per cent. after the note fell due, because the legal rate in North Dakota is 7 per cent. upon overdue claims. On cross-examination, and against the plaintiff's objection, the witness was required to testify concerning the laws of the state of Minnesota regulating interest, where the note was made payable. Plaintiff objected to all cross-examination and testimony concerning the rate of interest in the state of Minnesota, upon the ground that the law governing the case was the law of the place of trial; that the presumption of law is that the law of another state is the same as that of the forum. Counsel for defendant then conceded that the legal rate of interest in Minnesota is 7 per cent. The plaintiff rested the case upon said testimony, whereupon the defendant moved the trial court that the plaintiff be non-suited on the following grounds: *First*, that there is no competent evidence showing the amount claimed by the plaintiff to be due on the alleged note; *second*, as appears from the note itself, or certain words in the note, there is an ambiguity in its terms which has not been explained; *third*, there is no evidence in this case that the obligation claimed to have been signed by the defendant imports an obligation on his part to pay the amount specified at all events. The court sustained the motion of defendant and directed the jury to return a verdict for the defendant, to which rulings plaintiff, by its counsel, duly excepted. A statement of the case was settled, which embodied the above rulings, and upon which plaintiff moved for a new trial. The motion being denied, and judgment being entered

for defendant, the plaintiff appeals from the same and from the order denying its application for a new trial. The rulings upon the motion for a nonsuit and to direct a verdict are assigned as error in this court.

Counsel for defendant has not argued the case orally, or filed a brief in this court, and the only ground or reasons upon which the trial court proceeded to direct a verdict in defendant's favor are those suggested by the language used by counsel in stating his motion to direct a verdict as above stated. We are entirely clear that the direction to the jury was error, and that the grounds upon which defendant asked for such direction are fundamentally unsound. We remark first that it was error to allow the defendant's counsel, against objection, to cross-examine plaintiff's witness concerning the laws of Minnesota regulating the rate of interest there. The witness simply testified in chief to the fact that he had computed interest on the note since its maturity, and that the amount at 7 per cent. was a certain sum, and had said nothing concerning the laws of the state of Minnesota. There were no issues in the pleadings which could render such evidence material. Where a suitor desires to take advantage of the laws of another jurisdiction it is incumbent upon him to allege and show what the laws are in such other jurisdiction, and set forth wherein they differ from the law of the forum. There were no such averments in defendant's answer, and hence all evidence touching the subject-matter was irrelevant and immaterial. In the absence of such allegations, the courts will presume that the law of the place where the contract was made or was to be performed is identical with the law of the forum. 2 Pars. Bills & N. p. 371; Cooper v. Reaney, 4 Minn. 528 (Gil. 413); Leavenworth v. Brockway, 2 Hill, 201; Forsyth v. Baxter, 2 Scam. 9; Brimhall v. Van Campen, 8 Minn. 13 (Gil. 1.) Courts of one state do not take judicial notice of the laws of another state. Pars. Bills & N. p. 334; Whidden v. Seelye, 40 Me. 247; Hoyt v. McNeil, 13 Minn. 390 (Gil. 362); Legg v. Legg, 8 Mass. 99; Holmes v. Broughton, 10 Wend. 75. But in this case the interest after the maturity of the note was computed by the witness, and the amount stated figured at the rate of 7 per cent. per annum. This was

proper under the laws of this state, and to clinch the matter counsel for defendant admitted in open court that the legal rate of interest in the state of Minnesota was 7 per cent. The two rates were shown to be identical, and we might add that no testimony was necessary to show the proper rate on an overdue claim. In the absence of contract the law fixes the rate at 7 per cent. on such claims. But, aside from all questions connected with the interest it is obvious that the principal sum named in the note was past due, and hence the plaintiff could not be properly nonsuited on account of failure to show—if he had failed—how much was due him on account of the interest. This view of the record leads us to conclude that the learned trial court directed a verdict for the defendant wholly upon the theory that the note described in the complaint is void upon its face, or, at least, that it does not on its face import a legal obligation resting upon the defendant. The plaintiff put the note in evidence, and showed by a witness who had made the computation of interest that a certain sum was due as interest. If the note evidenced a legal debt due from defendant to plaintiff, this evidence made out a *prima facie* case for plaintiff. Even this was unnecessary, for the reason that the answer admits that the defendant received the money, and executed and delivered the note to plaintiff, and that the same was unpaid. The answer is fully responsive to all the material allegations of the complaint, and amounts to a plea of confession. Upon the answer the defendant was legally entitled to have judgment entered in his favor on the pleadings, unless, in addition to the plea of confession, the answer sets out facts showing an avoidance of the cause of action stated in the complaint, and this it fails to do, as will hereafter appear.

An examination of the instrument sued upon discloses that it contains all the essentials of a promissory note. It is a clear, plain, unambiguous agreement in writing to pay a specified sum in money at a time stated unconditionally. It is true, the note embraces the phrase, "On account of the ranch." While these words are superfluous, they do not import or indicate that the defendant is not personally bound by the obligation. They do not embody a condition of any sort; nor are they ambiguous at

all. They simply suggest the idea that the debt is created and the money received on account of a ranch, but nothing on the face of the paper implies that the ranch does not belong to the defendant, who signed the note and received the money. The implication, if any, would be that the ranch did belong to the man who promised to pay the note. It follows that when plaintiff rested its case a *prima facie* case was established both on the admissions in the answer and the proof. It was manifest error, therefore, to nonsuit the plaintiff and direct the jury to return a verdict for defendant. If the defense set out by the answer had been valid, it was error to direct a verdict in favor of the defendant, as was done, before any evidence was offered in support of the defense pleaded. For this error the judgment of the court below must be reversed. But, in view of the circumstances as disclosed by the record we conceive it to be our duty to make a final disposition of the case without directing a new trial. It would be worse than idle, it would be grossly unjust, to permit a re-trial upon the merits, if the defendant, upon his own showing, has no legal defense to the cause of action stated in the complaint. We are entirely clear that the answer states no defense as against the defendant's personal liability to pay the note. The answer nowhere avers that defendant's principal ever agreed, expressly or by implication, to pay the obligation upon which plaintiff loaned its funds. How, then, can the court declare that the defendant's principal shall pay an obligation which he never promised to discharge? But if there had been an express agreement entered into by parol at the time the note was made and delivered, whereby it was agreed between all the parties that the defendant should not be bound, and that the principal, Sir John Pender, should be bound, such an agreement, if pleaded, would constitute no ground of defense to the action. The bank advanced its funds to the defendant, and took his personal and written obligation therefor. The transaction was evidenced by a writing, and to permit such supposed agreement to be proven by parol would be to vary, contradict and annul the written agreement by a parol contemporary arrangement. This the law will not tolerate. Comp. Laws, § 3545; Thompson v. McKee, 5 Dak. 176, 37 N. W. Rep.

367; Cowel v. Anderson, 33 Minn. 374; 23 N. W. Rep. 542; Harrison v. Morrison, 39 Minn. 319, 40 N. W. Rep. 66; Eighmie v. Taylor, 98 N. Y. 288; Dickson v. Harris, 60 Iowa 727, 13 N. W. Rep. 335; Allen v. Furbish, 4 Gray 504. Where an agent contracts in behalf of his principal the contract must be in the name of the principal, and not in his own name. If the agent contracts in his own name he alone is liable. Comp. Laws, §3984; Mechem, Ag. §§432-438; Sencerbox v. McGrade, 6 Minn. 484 (Gil. 334); Heffner v. Brownell, 70 Iowa 591, 31 N. W. Rep. 947; also 75 Iowa 341, 39 N. W. Rep. 640; Deering v. Thom, 29 Minn. 120, 12 N. W. Rep. 350; Mayhew v. Prince, 11 Mass. 54; Spencer v. Field, 10 Wend. 87. In view of the well established principles of law underlying this case and laid down in the authorities cited, it is entirely clear that the answer does not set out any defense to plaintiff's cause of action. The judgment must be reversed, and the district court directed to enter judgment as demanded in the complaint. It will be so ordered. All concur.

CORLISS, C. J., in concurring, expresses no opinion on the point that the laws of the jurisdiction where a contract is made or to be performed are, in the absence of proof to the contrary, presumed to be the same as the laws of the forum so far as statute law is concerned.

HARMAN YERKES, Plaintiff and Respondent, *v.* TAYLOR CRUM, Defendant and Appellant.

Attorney and Client—Acquiring Title Adverse to Client—Amendment of Answer.

1. While the relation of attorney and client continues the attorney can, as against his client, acquire no beneficial interest in or title to the subject-matter of the litigation antagonistic to the title or interest of his client. Whether or not such title so acquired can be assailed by a third party is a question upon which the members of this court are not agreed.

2. Where an answer shadows forth a good defense, but states it imperfectly, the defect should be met by a motion calling for an amend-

ment curing such defect, and not by motion for judgment on the answer as frivolous.

(Opinion filed July 13, 1891.)

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

J. E. Robinson and *Taylor Crum*, for appellant. *Stone, Newman & Resser* for respondent.

Action for cancellation of tax deed, to quiet title to certain realty in plaintiff and for possession of the same. Judgment for plaintiff. Defendant appeals. Reversed.

Mr. Crum presented the case for the appellant in an exhaustive oral argument, but cited no authorities in his brief.

Stone, Newman & Resser for respondent:

Appellant could not, pending the litigation between respondent and the Hadleys, in which he acted as attorney for them, acquire any interest in the premises in question antagonistic to the Hadleys by the purchase of an outstanding tax title. Such purchase is wholly void and the question may be raised by respondent. Lynn v. Morse, 39 N. W. Rep. 203; Greenhood on Public Policy, p. 437; Rogers v. Marshall, 13 Fed. Rep. 59; Henry v. Raiman, 25 Pa. St. 354; Lindsey v. Sinclair, 24 Mich. 380. If not wholly void appellant would take in trust, and such purchase would inure to the benefit of the Hadleys, and any interest thereby acquired would pass *co instanti* and vest in respondent by operation of law, and this could not be prevented or such interest divested by any act or consent of the Hadleys. Stockton v. Ford, 11 How. 232; Moore v. Bracken, 27 Ill. 22; McDowell v. Milroy, 69 Ill. 498; Reichhoff v. Brecht, 2 N. W. Rep. 522. Equity would treat appellant as trustee for respondent in the purchase in question. His act was the act of the Hadleys. Black on Tax Titles, § 138; Cooley on Taxation, p. 345-6; Blackwell on Tax Titles, *399; Frye v. Bank, 11 Ill. 367; Douglas v. Dangerfield, 10 Ohio, 152. Such a transaction is always presumptively fraudulent and void and the burden of proof is on appellant, and it is sufficient for respondent to allege

the transaction alone. Whipple v. Barton, 3 Atl. Rep. 922; Briggs v. Hodgdon, 7 Atl. Rep. 387; Rogers v. Mining Co., 9 Fed. Rep. 721; Jennings v. McConnell, 17 Ill. 148; Kisling v. Shaw, 33 Cal. 425; Merryman v. Euler, 46 Am. Rep. 564.

The opinion of the court was delivered by

BARTHOLOMEW, J. A brief statement of the pleadings is necessary for a proper understanding of the points raised by this appeal. The complaint states that plaintiff is the owner of a certain lot in the city of Fargo, and as his source of title avers that in December, 1881, Lafayette Hadley and Kate Irene Hadley, his wife, executed to plaintiff a mortgage on said lot to secure a certain sum of money, the mortgagors undertaking to pay all taxes that had been or might be assessed against the premises; that default was made in the payment of the amount secured by the mortgage, and the same was foreclosed and bought in by plaintiff for the amount due upon said mortgage, with costs and disbursements, and, no redemption thereof being made, plaintiff received a sheriff's deed for said lot; and in October, 1885, he commenced an action against the Hadleys to quiet title, and for possession; and that under the decision of the supreme court of Dakota territory rendered on or about March 2, 1889 (see Yerkes v. Hadley, 40 N. W. Rep. 340), the title to said lot was quieted in plaintiff, and he was in fact in possession; that during the whole of the time said action was pending the defendant, Crum, who was a duly admitted attorney in the courts of said territory, acted as the attorney for the said Hadleys, and conducted said litigation in their behalf, and as their sole attorney; that the Hadleys neglected to pay the taxes assessed upon said lot for the year 1884, and in October, 1885, said lot was sold by the treasurer of Cass county for said delinquent taxes, and tax-sale certificate therefor issued to one Clifford; that about April 20, 1887, and while the defendant, Crum, was acting as the attorney of said Hadleys in said litigation, Clifford assigned said certificate to said defendant, and on October 6, 1887, defendant surrendered the same, and received a tax-deed for the lot, and subsequently took possession thereof, claiming title under the tax-deed. Plaintiff also alleged tender

of the amount due under the tax certificate. The prayer was for the cancellation of said deed and the restoration of possession to plaintiff. A demurrer to the complaint as not stating a cause of action was overruled, and exception taken. Subsequently defendant filed his answer, the material portions of which are as follows: "Defendant specifically denies that he was the attorney for Lafayette and Kate Irene Hadley, or either of them, during all the time from or about the 3d day of November, 1881, until on or about the 11th day of March, 1889, either as alleged in said complaint or otherwise; but in this behalf defendant alleges that he was the attorney for Kate Irene and Lafayette Hadley from on or about the 9th day of October, 1885, until the 8th day of April, 1887, on which said 8th day of April, 1887, the relation of attorney and client between the defendant herein and said Kate Irene and Lafayette Hadley ceased and terminated by mutual consent; that after said 8th day of April, 1887, defendant acted in said action in his own interest and in his own behalf, using the name and title of the original action, under and by virtue of § 85 of the Code of Civil Procedure." Then follows a specific denial that defendant was acting as attorney for the Hadleys on April 20, 1887, when the tax certificate was assigned to defendant, or on October 6, 1887, when the tax-deed was executed. On the coming in of the answer plaintiff moved for judgment on the pleadings, and the motion was granted, and judgment rendered accordingly.

Appellant urges the insufficiency of the complaint in this court. It is admitted that it would be a good complaint, as against the Hadleys, were they attempting to hold under this tax-deed; and it is no doubt equally true that the complaint would be insufficient against a tax-title holder in no manner connected with the Hadleys. The due and orderly administration of the law requires that causes should be presented to the courts by men specially fitted to aid the courts in the discharge of their duties—men who spend their lives studying the great principles of justice, and their application to the infinite variety and countless ramifications of the business affairs of life. The proper discharge of the functions of an attorney requires that the client should place his affairs in the hands of his

attorney without hesitation or reservation—like an open book, to be read and understood in every detail, and the more ignorant and inexperienced the client the greater the necessity. From these conditions it inevitably follows that the attorney will often have opportunities to take unconscionable advantage of the ignorance or necessities of his client. The law has always been keenly solicitous to forestall any such result, and this alike for the protection of the financial interests of clients and the high standard of the legal profession. It does not wait for fraud or deceit to be alleged and proven. It simply looks at the transaction, and, if the circumstances be such that the confidence of the client may be abused, or a temptation held out to the attorney to be unfaithful to his trust, it places the stamp of prohibition upon that transaction. "Such transactions are not held to be void upon the ground of intentional fraud or proven bad faith, but because the relations of the parties are such that the one may make use of his position of power and influence over the other, or of his superior knowledge derived while in the employment of the other, to take an unfair advantage of him. The law, upon grounds of high public policy, seeks to destroy the temptation to abuse such opportunities, and therefore does not inquire whether the transaction was fraudulent or not." Rogers v. Marshall, 13 Fed. Rep. 61. "Where fidelity is required, the law prohibits everything which presents a temptation to betray the trust. The orison which deprecates temptation is the offspring of infinite wisdom, and the rule of law in accordance with it rests upon most substantial foundations." Henry v. Raiman, 25 Pa. St. 359. Among the transactions thus prohibited are those by which an attorney, while acting as such, obtains any title to or interest in the subject-matter of the litigation which is antagonistic to the title or interest of his client. In the judgment of the writer of this opinion, such transactions are nugatory, and wholly void, so far as they purport to transfer any beneficial title or interest to the attorney. If he takes anything, he takes it in trust for his client, and it at once inures to the benefit of his client. See, on this point, Cunningham v. Jones, 37 Kan. 477, 15 Pac. Rep. 572; Elliott v. Tyler, (Pa.) 6 Atl. Rep. 917; Zeigler v. Hughes,

55 Ill. 288; Wright v. Walker, 30 Ark. 44; Cleavinger v. Reimer, 3 Watts & S. 486; Lynn v. Morse, 76 Iowa 665, 39 N. W. Rep. 203; Harper v. Perry, 28 Iowa 57; Baker v. Humphrey, 101 U. S. 494; Briggs v. Hodgdon, 78 Me. 514, 7 Atl. Rep. 387. Many more cases on this point are found in the books, some of them, like the case in 101 U. S., only going to the extent of declaring that the attorney cannot, without the client's consent, purchase an antagonistic interest. This qualification is usually found in controversies between the attorney and client. The precise point was raised and fully discussed in Cunningham v. Jones, *supra*, and the conclusion reached that the failure of the client to object did not in any manner validate the transaction. See, also, West v. Raymond, 21 Ind. 305. I think this conclusion is sound. If the purchase by an attorney of a title to the subject-matter of the litigation antagonistic to the title of his client can be assailed only by the client, then the strongest temptation is held out to the attorney to abuse the confidence of the client to exercise his power and influence over the client to prevent any objection on his part, and it need not be stated that the attorney's efforts in that direction would be successful in a large percentage of cases. To so hold, it seems to me, would be to invite the very results that the law abhors. I think the courts should forever remove this temptation by declaring all such purchases void, by whomsoever attacked. These are not the views of the court, however. Another class of transactions which have met with the displeasure of the courts is that by which the attorney purchases from the client the client's interest in the subject matter of the litigation. Some most respectable courts have held that such a purchase could not be made while the relation of attorney and client continued. West v. Raymond, *supra*; Hall v. Hallet, 1 Cox 134; Rogers v. Marshall, *supra*. And we nowhere find that this rule has been relaxed further than to hold that such transaction is presumptively fraudulent, and the burden rests upon the attorney to establish the perfect fairness, adequacy, and equity of the transaction. Bingham v. Salene, 15 Or. 208, 14 Pac. Rep. 523; Dunn v. Dunn, 42 N. J. Eq. 431, 7 Atl. Rep. 842. Cowee v. Cornell, 75 N. Y. 91, 100; Nesbit v. Lockman, 34 N. Y. 167. Viewed in

the light of these well settled and salutary principles, it is clear to me that the demurrer to the complaint was properly overruled. The allegation was that this defendant, while acting as the attorney for the Hadleys in certain litigation between them and this plaintiff, wherein the title to this same lot was the sole issue, each claiming ownership, took an assignment of a tax certificate on said lot, and received a tax deed thereon. This deed, under the authorities cited, could convey no beneficial interest to defendant. The tax-title was of necessity antagonistic to any title the Hadleys had or claimed to have in said lot, and whatever interest might be conveyed to the attorney would inure at once to the benefit of the Hadleys, and under the decision in Yerkes v. Hadley, *supra*, it would inure to the benefit of this plaintiff. It was not necessary, as urged, to allege that the Hadleys had title when they executed the mortgage. That fact was not material. They covenanted to pay the taxes, and this tax deed was the necessary consequence of the breach of their covenant to plaintiff. The chief justice concurs in this conclusion, but for other reasons. But the ruling of the learned trial court upon the motion for judgment ought not, we think, to be sustained. Section 5026, Comp. Laws, provides that, if an answer be frivolous, the party prejudiced thereby may move the court for judgment thereon, and judgment may be given accordingly. In Bank v. Sawyer, 7 Wis. 383, a frivolous pleading is thus defined: "It is a pleading interposed for delay, and its frivolous character indicates bad faith in the pleading. Hence the severity of the judgment in striking it off. The party who thus trifles with the administration of justice, and the necessary forms by which it is administered, forfeits all claims to the favor of the court. He is not entitled to amend or plead over, as in case of error in pleading." This case was, however, submitted to us apparently on the theory that, if the answer was vulnerable to a demurrer, the ruling of the trial court should be affirmed, although we might not think the pleading frivolous; and we will decide it upon that basis, but will not decide what is the proper practice, under our statute, upon this point, until the question is presented in argument. The answer in this case admits that the defendant herein appeared on the record as

attorney for the defendants in the case of Yerkes v. Hadley, from its inception, in 1885, until its final termination, in March, 1889; but it is clearly alleged that on the 8th day of April, 1887, the relation of attorney and client theretofore existing between this defendant and the Hadleys ceased and terminated by mutual consent, and that after said date this defendant appeared in and defended said case in his own interest and behalf, using the name and title of the original action, under § 85 of the Code of Civil Procedure. It is clear that, if defendant ceased on the 8th of April, 1887, to in any manner represent the Hadleys as their attorney, then he had a right to take an assignment of the tax certificate on April 20, 1887, and to take a deed thereon when the certificate matured, and the title so received could be pleaded in defense to this action. Respondent does not question that proposition, but insists that the answer does not state sufficient facts to show this to be true, because, to enable defendant to continue to use the names of the Hadleys in his own behalf under the statute alleged, he must have purchased the interest of the Hadleys in the subject-matter of the litigation, and that no such purchase is alleged; and, further, that if any such purchase was made, it was made when the relation of attorney and client existed, and there are no allegations to overcome the presumption of law that such purchase was fraudulent and void. It may be conceded that, in order to establish the allegation in the answer, the defendant would be obliged to prove a purchase by himself of the interest of the Hadleys in the subject-matter of the litigation, and that, if such purchase was made while the relation of attorney and client existed, the further burden would be thrown upon him to establish the perfect fairness, adequacy, and equity of the transaction. But this evidence would be necessary simply to establish the ultimate fact alleged, to-wit, that after April 8, 1887, the case of Yerkes v. Hadley was defended solely in the interest of this defendant, and that the relation of attorney and client had ceased to exist. Whether or not such proof could be introduced under the answer as it stands is not before us. But it is clear that the defect in this answer, if any, is not that it does not state a defense, but that it states a defense im-

perfectly; that it is not sufficiently full, specific, definite, and certain. These objections should be met by a motion requiring an amendment. In Kelly v. Barnett, 16 How. Pr. 135, which was an application for judgment on an alleged frivolous pleading, the court said: "Vagueness of pleading, it is well settled, is not frivolousness. It is to be corrected by an amendment, and not by judgment. It is enough on this application that a good defense is shadowed forth." See, also, Dagal v. Simmons, 23 N. Y. 491. For the error pointed out, the trial court will reverse its judgment, and proceed with the case in accordance with this opinion. Reversed.

WALLIN, J., (*concurring.*) I agree with my associates in holding that the judgment must be reversed. The answer is meager and vague, but it embodies a material issue of fact, and hence it cannot be ignored as wholly worthless. The district court erred in granting the motion for judgment on the pleadings. Upon such a motion every reasonable intendment must be indulged in support of the pleading which is assailed by the motion. I express no opinion concerning the other features of the case contained in the views of my Brother BARTHOLOMEW.

CORLISS, C. J. I concur in the result, but feel constrained to withhold my assent to the doctrine enunciated in Cunningham v. Jones, 37 Kan. 477, 15 Pac. Rep. 572. I do not at present believe that the adjudications warrant the broad doctrine of that case. Nor can I see any foundation for it in principle, keeping in view the reason for the rule which condemns the purchase by an attorney of an interest adverse to his client pending the litigation. It is sufficient for the protection of the client that he should have the right to treat the act of his counsel as void, or to claim the benefit of all that the counsel has secured. That an utter stranger to the client and the interests of the client in the litigation should have the power, officiously, to interfere and vindicate the right of the client to his attorney's zealous aid, unaffected, whether consciously or unconsciously, by any hostile interest, would seem anomalous. If the purchase of an adverse interest by the attorney is utterly void, as held in the Cuningham Case, then, no matter how willing the

client may be to recognize and affirm it, the act cannot be ratified, and the stranger may avail himself of a defense of which he could not have taken advantage had the purchase orignally been made by the client, and the attorney honestly succeeded to his interest. Of course, this argument assumes that the client owes no duty to the stranger in respect to the subsequently acquired interest. In the case at bar he did owe such duty, and it is on that ground that I agree with the opinion of the court that plaintiff could insist upon the invalidity of the purchase by the attorney of the Hadleys, assuming that he was then acting as attorney for them. But in the Cunningham Case no such obligation existed. The theory on which the plaintiff here can insist upon the invalidity of the attorney's title is not that the deed was void, but was, in legal contemplation, a purchase by the Hadleys themselves. Having the right to claim that the purchase should inure to their benefit, they were bound to avail themselves of such right under the covenant in their mortgage, and under their duty to plaintiff as mortgagors, irrespective of such a covenant, to pay the taxes upon the land. They could not waive this right, for they held it only as trustees for the plaintiff, who was the sole beneficiary. If, where the client owes no duty to the one who seeks to destroy the attorney's title, the attorney, with the free assent of the client, cannot buy an interest adverse to both parties, then the stranger would enjoy an advantage where the attorney should purchase which he would not enjoy in case the client, his antagonist, should buy. Assume that there is no duty resting upon either party to a litigation touching the title to real estate to pay taxes thereon, so far as the other parties is concerned. In such a case the defendant might purchase the land on tax-sale, and his inchoate right might, by lapse of time and the execution of a deed, ripen into a perfect title. Should he be unsuccessful in his defense, he nevertheless might stand impregnably upon his new title, under the tax-deed, in any future proceeding. It would not be void. Securing such title would involve no breach of duty to his antagonist. But should his attorney purchase on such tax-sale, then, if the purchase is void, no prior assent to, no subsequent ratification by, the

client of such purchase, however solemnly made, could preclude his adversary from taking advantage of this wholly fictitious fraud upon the client, which the client himself had voluntarily disclaimed. This would be allowing a stranger to vindicate the right of the client to his attorney's undivided allegience when the client himself insists that he has no cause for complaint. The true reason for the rule inhibiting dealings by the attorney adversely to the interests of his client is the protection of the client. As fraud in such cases might be difficult of proof, and as men may be influenced unconsciously by their personal interests pulling them in the opposite direction, while striving to be loyal to their trusts and while honest in the belief that they are loyal, the law has placed in the hands of the client the power arbitrarily in all cases to thurst aside the ordinary legal effect of the attorney's acts so far as they clash with the client's interests, however fair the transaction may have been. There is no justification for pushing the rule further, thus enabling a stranger to reap profit from an act of the attorney where the same act performed by the client would have barred the stranger's right. Under such a stringent rule, the purchase being a nullity, the client could not, by succeeding to the attorney's interest, secure that paramount right which he could have obtained had he originally made the purchase himself; and thus a rule ordained for the protection of the client is turned against him for the benefit of a stranger.

VERMONT LOAN & TRUST COMPANY, Plaintiff and Respondent, v. H. L. WHITHED, Defendant and Appellant.

Usurious Contract—Compensation for Procuring Loan—General Act—Constitutional Law—Uniform Operation—Building and Loan Associations.

1. Section 4, c. 184, Laws 1890, provides that in all loan transactions the written contract shall correctly state the amount received by the borrower, and the rate of interest to be paid, and a failure so to do renders the contract usurious and void, except as otherwise in the chapter provided. Section 7 provides that a loan broker or other

person may receive a compensation for procuring a loan when such compensation, and the interest stated in the contract, together do not exceed 12 per cent. per annum in the aggregate. In a transaction where no middleman was employed, a note was given for $575, due in five years, with 7 per cent. interest. The borrower received $500, and no more, $75 being by agreement retained for making the loan; and the amount so retained, added to the 7 per cent., stated in the note, did not exceed 12 per cent. on $500 for five years. *Held*, that if the transaction was usurious, under § 4, it was not saved by the provisions of § 7.

2. A public law of universal interest to the people of the state, and embracing all the citizens of the state, or all of a certain class or certain classes of citizens, and not limited to any particular locality, is a general, and not a special, law, as the term is used in the constitutional inhibition against special legislation.

3. A statute that grants no privileges or immunities, except such as would apply to all citizens under the circumstances and conditions expressed in the statute, does not violate the constitutional provision against granting special privileges and immunities.

4. The constitutional requirement that all laws of a general nature shall have a uniform operation is satisfied if the benefits and burdens of such law fall equally upon all members of the class or classes upon which it does operate.

5. The legislature has the right to classify persons or subjects for the purposes of legislation. Such classification must not be arbitrary, but must be based upon such differences in situation, condition, and purposes between the persons and things included in the class and those excluded therefrom as fairly and naturally suggest the propriety of, and necessity for, different or exclusive legislation in the line of the statute in which the classification appears.

6. The dealings of building and loan associations with their own stockholders differ from ordinary loan transactions to such an extent as to warrant the legislature in excepting such associations, as to such dealings, from the operation of the provisions of the general usury law.

7. In construing a particular section of a statute, it is the duty of the court to ascertain the intent of the legislature, and for that purpose it should consider the entire statute, and its general subject-matter, as well as all other statutes *in pari materia;* and, where the court is satisfied that adherence to the strict letter of the law would defeat the object and intent of the legislature, it is the duty of the court to regard the intent, even where to do so it is compelled to restrain the application of the letter.

(Opinion Filed July 14, 1891.)

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

H. L. Whithed (*Bangs & Fisk*, of counsel), for appellant. *Burke Corbett* (*Cy Wellington* and *Cochrane & Feetham*, of counsel), for respondent.

Action on promissory note for the purpose of testing the constitutionality of chapter 184, Laws of 1890, known as the "usury law." Judgment for plaintiff, holding the statute void under the state constitution. Defendant appeals. Reversed and district court directed to dismiss the action.

H. L. Whithed for appellant:

The contract in this case failed to express the exact amount of money to be received by the borrower. Having failed to do this, the section is indivisable, and it is made by the statute and so declared to be usury, which would make the contract nugatory and void, and respondent would be entitled to recover nothing. McGee v. Trotter, 1 Heisk 453. The authorities are numerous to the effect that usury, under whatever guise it will be cloaked, will be detected and ferreted out by the courts. It is also equally well recognized that a principal, as in this case, cannot, by way of a fee or compensation, take to exceed the rate of interest allowed by law. If § 11 of the act is unconstitutional it leaves the balance of the act operative and valid. Mathias v. Cromer, 40 N. W. Rep. 926. An unconstitutional provision or section in a statute will not affect the other provisions of the law, unless they are essentially and inseparably connected in substance. Cooley's Const. Lim. 177; Com. v. Hitchings, 5 Gray 485; People v. Briggs, 50 N. Y. 553. If the general provisions of the law are unobjectionable, the whole act will not be declared nugatory in consequence of some objectionable provisions. Smith v. Village of Adrian, 1 Mich. 495; Ames v. Booming Co., 6 Mich. 266; People v. Haug, 37 N. W. Rep. 21; Woolen v. State, 5 So. Rep. 39. The taking of premiums by building and loan associations is generally considered unobjectionable. Association v. Robinson, 69 Ala. 413; Winsted, etc., v. Ford, 27 Conn. 282; Id v. Rice, 27 Conn. 293; McLaughlin v.

Association, 62 Ind. 264; Hawkeye, etc., v. Blackburn, 48 Iowa 385; Merrill v. McIntyre, 13 Gray 157; Shannon v. Dunn, 43 N. H. 194; Hoboken v. Martin, 13 N. J. Eq. 427. Where the constitution provides that the legislature "shall pass no special law for any cause for which provision can be made by a general law" the Legislature is the sole judge as to whether provision by a general law is possible. State v. County Court, 50 Mo. 317, 11 Am. Rep. 415; State v. Hitchcock, 81 Am. Dec. 503.

Bangs & Fisk of counsel, for appellant:

Section 2 of article 1 of the state constitution requiring all laws of a general nature to have a uniform operation must be construed to mean that all laws of a general nature must operate equally upon all persons who are brought within the relations and circumstances provided for, though it may not affect every citizen of the state. 3 Am. & Eng. Ency. of Law, 697; McAunich v. Railroad Co., 20 Iowa 338; Railroad Co. v. Iowa, 94 U.S. 163; Cordova v. State, 6 Tex. App. 207; Sutherland on Stat. Con., § 125 and cases cited; Bumsted v. Govem, 47 N. J. Law 368; Id, 48 N. J. Law 612; State vs. Mining Co., 16 Nev. 432; Corwin v. Ward, 35 Cal. 198; Jackson v. Shawl, 29 Cal. 267; Merritt v. Boom Co., 25 N. W. Rep. 403; Ex Parte Smith, 38 Cal. 702; State v. Barker, 30 N. W. Rep. 267; People v. Henshaw, 18 Pac. Rep. 413. The word "operation" as used in said section refers to the practical working and effect of the law. Geebrick v. State, 5 Iowa 491. If a law acts equally and uniformly upon all parties upon whom it acts at all, it is not repugnant to the above constitutional provision. Corwin v. Ward, 35 Cal. 198. A law is general and uniform in its operation which operates equally upon all the subjects within the class of subjects for which it is adopted. Nichols v. Walter, 33 N. W. Rep. 800; Sutherland on Stat. Con., § 124. A general law is one which refers to persons and things as a class. Kilgore v. Magee, 85 Pa. St. 411; Wheeler v. Philadelphia, 77 Pa. St. 349; Walker v. Potter, 10 Ohio St. 85; McAunich v. Railroad Co., 20 Iowa 343; Barbier v. Connolly, 5 Sup. Ct. Rep. 357; Minn. Loan Co. v. Beebe, 41 N. W. Rep. 232. The law in question is not a special law. Holmes v. Smythe; 100 Ill. 413; Freeman v. Association, 114 Ill. 182;

Ex Parte Lichenstein, 7 Pac. Rep. 728; Winget v. Association, 21 N. E. Rep. 12; Chicago, etc., v. Iowa, 94 U. S. 155; State v. Berker, 30 N. W. Rep. 373; People v. Meyer, 3 West. 538. Special laws are those made for individual cases, or for less than a class requiring laws appropriate to its peculiar condition and circumstances. State v. Wilcox, 45 Mo. 458. The true practical limitation of the legislative power to classify is that the classification shall be upon some reason suggested by necessity, by such a difference in the situation and circumstances of the subjects placed in different classes as suggest the necessity or propriety of different legislation with respect to them. Cobb v. Bard, 42 N. W. Rep. 396; State v. Spaud, 34 N. W. Rep. 164; Sutherland on Stat. Con., § 127 and cases cited; Cooley Const. Lim. 481 *et seq.* A classification may be sustained where the differences are not extreme, but exist. The test would not then be judicial, depending on whether the law was special, but legislative, whether wise or not. Wheeler v. Philadelphia, 77 Pa. St. 338; Kilgore v. Magee, 85 Id 401; Rutgus v. New Brunswick, 42 N. J. Law 51, 407. Every intendment is to be made in favor of the constitutionality of the law. Kerrigan v. Force, 68 N. Y. 381; State v. Nelson County, 1 N. D. 88; Allen v. Pioneer Press Co., 41 N. W. Rep. 936.

Burke Corbett for respondent:

The principle of permitting the lender of money to exact a bonus or commission from the borrower is amply sustained by the courts. Van Tassell v. Wood, 12 Hun 388; Dayton v. Moore, 30 N. J. Eq. 543; Morton v. Thurber, 85 N. Y. 550; Atlanta, etc., Mining Co. v. Gwyer, 48 Ga. 11; Eaton v. Alger, 2 Ab. Pr. 5; Eldridge v. Reed, 2 Sweeney, 155; Cockle v. Flack, 93 U. S. 344; Trother v. Curtis, 19 Johns. 160; Thurston v. Corne, 38 N. Y. 281; Hall v. Daggett, 6 Cow. 513; Harger v. McCullough, 2 Denio 119. By § 11 of said act "none of the provisions of this act shall apply to any building and loan association incorporated under the provisions of any law of this State." Section 11 of article 1 of the State constitution provides that "all laws of a general nature shall have a uniform operation." A law is not general within the meaning of the

constitution simply because it bears equally upon all persons to whom it is applicable. A general law must be as broad as its object. Ex parte Westerfield, 55 Calf. 550. A statute which selects particular individuals from a general class and subjects them to particular rules, from which others in the same class are exempt, is a special law. State v. Hermann, 75 Mo. 340. Special legislation being prohibited by the constitution, courts will not sustain statutes of which the form alone is general but whose operation and effect are special. State v. Judges, 21 Ohio St. 11. By the exemption of building and loan associations from this act it gives them the right to make their contracts in any manner they choose, and seeks to take the like privilege from all other persons and classes. It is equivalent to a special statute, and hence unconstitutional. Gordon v. Winchester, 12 Bush. 110, 23 Am. Rep. 713. Subd. 13 of article 2 of § 69 declares that the legislature shall not pass special laws regulating the rate of interest on money, yet under this act building and loan associations, and they alone of all persons and corporations, are exempt from the provisions of the statute. They would be privileged to take any rate of interest they could procure and by any device they should resort to. This they cannot do, and the law will detect and prevent the taking of usury under whatever guise it may be cloaked. Philadelphia, etc., v. McKnight, 35 Pa. St. 470; Parker v. Fulton, 42 Ga. 251; Await v. Eutaw, 34 Md. 435; Bank v. Newman, 50 Md. 62; Patterson v. Albany, etc., 63 Ga. 373. By declaring § 11 of the act in question alone unconstitutional, and holding the balance of the act good, the court would assume the functions of a legislative body by enacting a law applying to all persons, building and loan associations alike with all other persons, but such was not the intent of the legislature. The vicious part of an act must be distinct and separable, and when stricken out enough must remain to be a complete act and sufficient to accomplish the object of the law as passed, in accord with the intent of the legislature. Meshmeier v. State, 11 Ind. 485; Burkholtz v. State, 16 Lea. 71; Bittle v. Stuart, 34 Ark. 224; Allen v. Louisiana, 103 U. S. 80; People v. Porter, 90 N. Y. 68. It may be laid down generally as a sound proposition

that one part of a statute cannot be declared void and leave any other part in force, unless the statute is so composite, consisting of such separable parts that when the void part is eliminated another part remains, capable by its own terms of being carried into effect, consistent with the intent of the legislature. People v. Cooper, 83 Ill. 585; Ex Parte Towles, 48 Tex. 413; State v. Clinton, 28 La. Ann. 201; Ex Parte Wells, 21 Fla. 280; Hinze v. People, 92 Ill. 406; Lombard v. Antioch College, 60 Wis. 459; Sparrow v. Commissioner, 56 Mich. 567; People v. Luby, 56 Mich. 551. When the different provisions of an act look to one object and its incidents, and are so connected with each other that if its essential provisions are repugnant to the constitution, the entire act must be deemed unconstitutional and void. Commonwealth v. Hitchings 5 Gray 482; Jones v. Robbins, 8 Gray 329, 339; State v. Commissioner, 5 Ohio St. 497; State v. Sinks, 42 Ohio St. 345; Railroad Co. v. Railroad Co., 28 Kan. 453; Rood v. McCargar, 49 Cal. 117; State v. Stark, 18 Fla. 255; Sparhawk v. Sparhawk, 116 Mass. 315, 320; People v. Cooper, 83 Ill. 585; Hinze v. People, 92 Ill. 406. If the parts of a statute are so connected as to warrant the conclusion that the legislature intended them as a whole, and would not have enacted the part held valid alone, when a part is unconstitutional, they are not separable; if one part is void the whole is void. Eckhart v. State, 5 W. Va. 515; Warren v. Mayor, 2 Gray, 84; State v. Sinks, 42 Ohio St. 345; People v. Cooper, 83 Ill. 595; State v. Pugh, 43 Ohio St. 98; Rader v. Township of Union, 39 N. J. Law 509; Flanagan v. Plainfield, 44 Id 118; State v. Commissioners, 38 Id 320; Telegraph Co. v. State, 62 Tex. 630; Childa v. Shower, 18 Iowa 261; Lathrop v. Mills, 19 Cal. 513; Moore v. New Orleans, 32 La. Ann. 726; Robinson v. Bidwell, 22 Cal. 379.

Cochrane & Feetham of counsel, for respondents:

The sole question presented by this appeal is the constitutionality of chapter 184 of the Laws of 1890, defining usury and prescribing punishments therefor. In the construction of statutes it is a rule of universal application that effect must be given to the words of the legislature, if there is no uncertainty

or ambiguity in their meaning. Comp. Laws, N. D., § 4731; Farrel Foundry v. Dart, 22 Conn. 376; Pearce v. Atwood, 13 Mass. 324; Doan v. Phillips, 12 Pick. 223; Fitzpatrick v. Gebhart, 7 Kan. 36. Statutes must be construed *in pari materia.* Converse v. U. S., 21 How. 463; State v. Garthwaite, 23 N. J. Law 143; Maniel v. Maniel, 13 Ohio St. 458; Bruce v. Schuyler, 94 Ill. 221; Isham v. Bennington Iron Co., 19 Vt. 230; People v. Jackson, 30 Cal. 427; Henry v. Tilson, 17 Vt. 479. The specification of particulars in an instrument or statute is an exclusion of generals. Potter's Dwarris on Stat. 674; Story on Constitution 448; Watkins v. Wassail, 20 Ark. 410; Sweckard v. Bailey, 3 Kan. 507. If § 11 of this act is in conflict with the constitution, then the entire act will fall. The general test rule is that where a part of a statute is unconstitutional, the remainder will not be adjudged void unless all the provisions are connected in subject-matter, dependent upon each other, operating together for the same purpose, or otherwise so connected together in meaning that it cannot be presumed the legislature would have passed the one without the other. Slossen v. Racine, 13 Wis. 398; State v. Donsman, 28 Wis. 531; Slinger v. Hinneman, 38 Wis. 504; Dells v. Kennedy, 49 Wis. 555; State v. Tuttle, 53 Wis. 45; In Re Devancine, 31 How. Pr. 343; People v. Briggs, 50 N. Y. 553. But to reject § 11 of this act would be a subjection of building and loan associations to the operation of a law which the legislature desired expressly to except from the usury penalties; would thwart the express legislative intent. Cooley's Const. Lim. 214; Rygate v. Wadsboro, 30 Vt. 746; Carnpan v. Detroit, 14 Mich. 266; Myers v. Berlandi, 39 Minn. 447; Emlie v. Caroline, 9 Wheat. 381; People v. Dana, 22 Cal. 11; Simmons v. Powers, 28 Vt. 354; Tyman v. Walker, 33 Cal. 634; Brown v. Wright, 15 N. J. Law 240; State v. Sauk County, 22 N. W. Rep. 573. The entire act is void. The exception of building and loan associations from the terms of this statute is as obnoxious to the restraint put upon special legislation by the constitution as would have been a special act of the legislature authorizing the taking by them of any rate of interest. Clark v. State, 14 At. Rep. 582: Utse v. Hyat, 9 S. E. Rep. 338; State v. Melica, 17 At. Rep. 941; Board v. Buck, 7 At.

Rep. 860; Henderson v. Johnson, 10 S. W. Rep. 788. A statute which relates to persons or things as a class is a general law, while a statute which relates to particular persons or things of a class is special and comes within the constitutional inhibition. State v. Miller, 13 S. W. Rep. 679; Wheeler v. Philadelphia, 77 Pa. St. 338; In Re Elevated Railroad, 70 N. Y. 328, In Re Church, 92 N. Y. 4. A determination whether or not a given law is general will proceed from a consideration both of the purpose of the act and the objects on which it is intended to operate. State v. Sloan, 8 At. Rep. 104; State v. Miller, 13 S. W. Rep. 679; State v. Sloan, 49 N. J. Law 356; Board v. Buck, 16 At. Rep. 701.

The opinion of the court was delivered by

BARTHOLOMEW, J. This is an agreed case submitted to the district court of the First district under the provisions of § 5540 of the Compiled Laws. The action is brought to recover judgment on a promissory note, and the statement shows that on July 1, 1890, appellant executed and delivered to respondent his promissory note of $575, due in five years, with interest at the rate of 7 per cent. per annum. The first interest payment became due September 1, 1890, and subsequent interest to be paid semi-annually. At the time of executing the note the appellant received from the respondent the sum of $500 and no more. The remaining $75 was by agreement retained by respondent as a compensation or fee for making such loan. Default was made in the first interest payment. The case turns largely upon the constitutionality of chapter 184 of the Laws of 1890. This chapter is entitled "An act defining usury and the penalty for taking the same," and it fixes the rate of interest, in the absence of a different contract, at 7 per cent. per annum, and fixes 12 per cent. as the limit that may be lawfully contracted for, and declares all contracts whereby a greater rate is, either directly or indirectly, received or contracted to be paid, to be usurious and void from the beginning, with an exception saving negotiable paper in the hands of a *bona fide* purchaser for value before maturity. The fourth section reads as follaws: "In all written contracts for the loan of money, the exact amount

agreed upon to be received for the use, by the borrower, shall be stated in the contract, and, separately therefrom, the rate per cent. thereon of interest contracted to be charged; and if in any contract, either verbal or written, for the loan of money, the borrower receives a less sum than the principal sum so agreed upon and contracted to be loaned to and received by the borrower, the said contract shall be deemed to be usurious, except as otherwise herein provided." The seventh section provides that any broker, loan agent, or other person may receive a compensation for obtaining a loan, or forbearance of money, where such compensation, added to the interest expressed in the contract, does not exceed in the aggregate 12 per cent. per annum interest. If the compensation and interest named exceed 12 per cent., then the entire contract is declared usurious and void. It is apparently conceded, as no question is made on the point, that the note in suit in this case violates the provisions of § 4, above quoted, unless the words, "except as otherwise herein provided," bring the transaction within the provisions of § 7. As the $75 retained added to the 7 per cent. stated in the note, would not exceed in the aggregate 12 per cent. per annum on $500 for five years, it is claimed that the transaction is valid, under § 7. We cannot admit such construction. In this case there is no middleman. The law can recognize no consideration passing from respondent to appellant except the loan of the money, and the amonnt retained by respondent was simply interest taken in advance. We do not think the transaction can be brought within the terms of § 7. Section 4 was enacted for a specific, well understood purpose. Few contracts are made that are usurious on their face. It is the almost universal custom to cover up the usury, either by misstating the amount of the loan or the correct rate of interest paid or contracted to be paid. The legislature intended by § 4 to effectually destroy any such cover, and to that end it, in positive terms, required parties to embody in the written contract the true contract, both as to amount loaned and interest paid or contracted to be paid. It matters not what the rate may be. It must be truly stated, or the contract is declared usurious and void. If the contracts mentioned in § 4 are

usurious only when the interest exceeds 12 per cent., or when the interest and compensation together exceed 12 per cent., then § 4 is a useless and purposeless enactment; as such contracts would in every case be usurious and void under the other sections of the chapter. We cannot adopt a construction of § 4 which renders it mere surplusage. The fact that the law is unusually stringent or even harsh in some of its provisions, or that by it our legislature has declared contracts usurious for reasons not heretotore known to the law, are matters with which we are not concerned, if the statute is a constitutional enactment. But, granting that the note in question violates the provisions of § 4, it is contended that said section, and the entire chapter 184 is unconstitutional by reason of the exception contained in § 11, which reads as follows: "None of the provisions of this act shall apply to any building and loan association incorporated under the provisions of any law of this state." It is claimed that this section is a violation of § 11 of the state constitution, which requires all laws of a general nature to have a uniform operation; and also of § 20, which forbids the granting of privileges or immunities to any citizen, or class of citizens, which, upon the same terms, shall not be granted to all citizens; and also of subdivision 13 of § 69, which prohibits the legislature from passing any special law "regulating the rate of interest on money." The questions thus presented are by no means free from embarrassment. We are asked to annul an important legislative enactment—one that reached the statute book only after receiving the sanction of the deliberate judgment of the legislature and the executive. The subject, too, is one peculiarly within the legislative branch of the government, and a proper control of the matter of usury has long been regarded as one of the most beneficial and salutatory objects of legislation. This is a case which demands implicit adherence to that well established rule which requires courts to respect and enforce the will of the legislature, unless there has been a clear and unequivocal violation of the fundamental law of the state. "A statute relating to persons or things as a class is a general law; one relating to particular persons or things of a class is

special." Suth. St. Const. § 121. "Special laws are those made for individual cases, or for less than a class requiring laws appropriate to its peculiar condition and circumstances." Id § 127. An inspection of the statute under consideration at once discloses that it does not come within the above definition of a special law. Nor does it grant any privileges or immunities to any citizen that would not equally extend to any other citizen coming within the class to which the exception applies. It is a statute general in form and general in its nature. If its operation be in any manner special, or if it grant privileges or immunities to any citizen or class of citizens that are not granted to all, it is because the statute is not literally uniform in its operation; and it becomes important to determine whether this lack of uniformity is of such a character as to violate the constitutional provision requiring all laws of a general nature to have a uniform operation. This provision is found in the constitution of a number of the states, and it has been before the courts in a large number of cases, and it has also been held that this provision was intended to prevent the granting to any citizen or class of citizens of privileges or immunities which, upon the same terms, shall not belong to all citizens. McGill v. State, 34 Ohio St. 237; Suth. St. Const. § 121; French v. Teschemacher, 24 Cal. 544. A "general law," as the term is used in this constitutional provision, is a public law of universal interest to the people of the state, and embracing within its provisions all the citizens of the state, or all of a certain class or classes of citizens. It must relate to persons and things as a class, and not to particular persons or things of a class. It must embrace the whole subject, or a whole class, and must not be restricted to any particular locality within the state. Case v. Dillon, 2 Ohio St. 607; Kelley v. State, 6 Ohio St. 269; Wheeler v. Philadelphia, 77 Pa. St. 338; State v. Wilcox, 45 Mo. 458; Van Riper v. Parson, 40 N. J. Law 123; *In re* Boyle, 9 Wis. 240; McGill v. State, 34 Ohio St. 237. The uniform operation required by this provision does not mean universal operation. A general law may be constitutional, and yet operate in fact only upon a very limited number of persons or things, or within a limited territory. But, so far

as it is operative, its burdens and benefits must bear alike upon all persons and things upon which it does operate, and the statute must contain no provision that would exclude or impede this uniform operation upon all citizens, or all subjects and places, within the state, provided they were brought within the relations and circumstances specified in the act. McGill v. State, 34 Ohio St. 246; Smith v. Judge, 17 Cal. 554; Darling v. Rodgers, 7 Kan. 592; Leavenworth Co. v. Miller, Id 479; Groesch v. State, 42 Ind. 547; Heanley v. State, 74 Ind. 99; State v. Wilcox, 45 Mo. 458; People v. Wright, 70 Ill. 398; McAunich v. Railroad Co., 20 Iowa, 338; Humes v. Railway Co., 82 Mo. 221; Railway Co. v. Iowa, 94 U. S. 155.

From the foregoing proposition it follows of necessity that the legislature has power to classify persons and subjects for the purpose of legislation, and to enact laws applying specially to such classes, and, while the laws thus enacted operate uniformly upon all members of the class, they are not vulnerable to the constitutional inhibition under consideration. But this power of the legislature is circumscribed. It is not an arbitrary power waiting the whim of the legislature. Its exercise must always be within the limits of reason, and of a necessity more or less pronounced. Classification must be based upon such differences in situation, constitution or purposes, between the persons or things included in the class and those excluded therefrom, as fairly and naturally suggest the propriety of and necessity for different or exclusive legislation in the line of the statute in which the classification appears. State v. Hammer, 42 N. J. Law 439; Nichols v. Walter, 37 Minn. 264, 33 N. W. Rep. 800; Board v. Buck, 51 N. J. Law 155, 16 Atl. Rep. 698; Railway Co. v. Markley, 45 N. J. Eq. 139, 16 At. Rep. 436; Miller v. Kister, 68 Cal. 142, 8 Pac. Rep. 813; City of Reading v. Savage, 124 Pa. St. 328, 16 Atl. Rep. 788; Hanlon v. Board, 53 Ind. 123; State v. Reitz, 62 Ind. 159.

The application of these principles to the case before us will advance us toward a correct conclusion. By § 11 above quoted, our legislature placed building and loan associations, incorporated under the laws of this state, in a separate class, and excepted them from the operation of the usury law. Is this

such a classification as the legislature had authority to make? The business of money loaning has its representatives in every community. The almost universal object of the lender is to increase his capital by such sums as the business indiscretion of his neighbors may permit, or their necessities compel them to pay for the use of the money loaned to them. To check the rapacity of capital, and to prevent unconscionable advantage being taken of mismanagement, misfortune, or inexperience, governments, in the exercise of their police power, have seen proper to place a limit upon the amount that may be charged for the use of money, and thus compel the capitalist to deal with his less fortunate fellow-men in a spirit of fairness and liberality. But the theory and purpose of building and loan associations are entirely different. These associations are, presumably at least, composed of men who are not capitalists, but who desire to form a fund from their mutual earnings that shall be mutually beneficial. To this end the persons subscribing for the stock of these associations agree to pay therefor in small amounts, at stated intervals, and to continue such payments until the amounts so paid, added to the profits that may be realized on the stock, equal its par value, and provisions are made for fines and forfeitures in case of non-payment. The stock is issued in one series, or in successive series, and all the stock of any one series which has not been forfeited will reach par at the same time, and the purposes of the association as to such stock will then be at an end, and the assets will be distributed, and the association dissolved. The fund so accumulated is, primarily, for the use of the stockholders. In the absence of express statutory authority, a building and loan association cannot loan its money outside of its own members. Endl. Bldg. Assn's. 312; Wolbach v. Association, 84 Pa. St. 211; State v. Association, 35 Ohio St. 258. Neither can a loan be made to a stockholder in excess of the par value of his stock. When a certain amount (not less than the par value of one share of stock) is accumulated, the money is put up for sale, usually termed "auction," and that member who is willing to pay the highest premium, or who is willing to have the largest amount deducted when the premium is deducted from the loan,

receives a loan equal to the par value of the stock held by such party, and assigns his stock to the corporation as collateral security. But his duty to continue his payments upon his stock is not changed, and should he fail in that duty, his stock would become forfeited; hence he is also required to execute his note for the loan, with mortgage security, and generally to pay interest on the amount until the note is paid. No definite date for payment is fixed. In theory, and generally in practice, the time of payment arrives when the stock reaches par, and the corporation as to such stock ceases to exist, and the member receives as his share of the assets his own note and mortgage. Under our statute the member has the right to pay his note at any time, and thus stop the interest, and in that case would, of course, be entitled, on the dissolution of the corporation, to receive the value of his stock in cash. But the effect of the transaction, generally speaking, is simply this: The association uses the fund to purchase the stock of that member who is willing to sell his stock in advance for the least money, and continue the payments upon stock subscription until the value of his stock reaches par. It will be noticed that all the stock receives the benefit of the premiums paid, that of the party receiving the so-called loan equally with that of the other stockholders, and the larger the aggregate premium paid the sooner the value of the stock will reach par, and the sooner the stated payments on account of stock subscriptions will cease. Endlich on Building Associations, at page 161, says: "If we consider the reasons which may be assumed to have guided legislatures in conferring upon building associations the extraordinary privileges and immunities which they enjoy, it will be readily understood (and there can be no other apology for it) that at the bottom of it all is a motive of public policy. The primary design of building associations is to encourage the acquisition of real estate, the building of dwellings, the ownership of homesteads, to increase the proportion of property holders among that class of the population whose slow and laborious earnings are, by reason of their pettiness, most fugitive, and generally spent before they reach a sum of sufficient magnitude to back a desire for those guaranties of good citizenship which the policy of our

law has always found in landed property. That is the class for whose benefit building associations were originally devised, from among whose numbers their membership was, and for the most part still is, drawn, and all the incidents of membership were designed to accommodate their necessities and intended to serve their purposes." The legislature of Dakota territory (§ 3, c. 41, Laws 1889) used the following language: "As building and loan corporations are aggregations of laborers, mechanics, workmen and working women, which start without any paid-up capital, and as these members only pay each month an assessment in proportion to shares, for the purpose of furnishing a home to each of its members in turn, which assessment stops the moment that every member has been thus furnished with such a home, these associations are hereby declared to be benevolent institutions, within the meaning of § 2, c. 28, of the Political Code of 1877." Rev. Laws. It is at once apparent that the transactions of these associations are separated by essential differences from the ordinary loaning business. The reasons and causes on which usury laws are based are largely absent. It was early said in England: "The defendant was interested in the fund when it was advanced and when it was paid. The rules of the society are, in effect, a mere agreement by partners that their joint contributions shall be advanced for the use of the one or the other, as occasion requires, and the transaction was not a borrowing by the maker of the note from the payee" (Silver v. Barnes, 6 Bing. N. C. 180); and this ruling has been uniformly followed in that country. In the case of Association v. Lake, 69 Ala. 456, in speaking of the workings of these associations, it is said: "The lettings of the moneys are frequently called 'loans,' but they are not strictly loans. The principal is never to be repaid. It is an advance payment by the corporation of the agreed value the shares owned by the bidder are to represent and have at the final completion of the enterprise and the dissolution of the corporation." The courts in a number of the states have adopted what is usually termed the "English rule," while in perhaps an equal number of states the courts have with more or less strictness treated these associations as ordinary money-loaning institutions. The de-

cisions will be found quite fully collected in 2 Amer. & Eng. Enc. Law, p. 608 *et seq.* The fact that learned courts, in the absence of statutes, have been so impressed with the inherent differences existing between the legitimate transactions of building and loan associations and the ordinary transactions of the money loaner, that they have refused to apply to the former the rules of law governing the latter, ought in itself to be conclusive of the fact that these differences are such as to naturally suggest the propriety and necessity for distinct legislation for the two classes; and it will be noticed, too, that these differences are directly in the line of what would be proper payment for the use of the money in the one case and what in the other. Another fact is significant. The incorporation of building and loan associations in the territory of Dakota was first authorized by chapter 34, Laws of 1885; and § 6 of that chapter provides (and this provision is very common in the laws authorizing such corporations) that no premiums, fines, or interest on premiums that may accrue to the corporations shall be deemed usurious. In all ordinary loan transactions, when no consideration passed to the borrower except the loan of the money, any so-called premium that might be paid for such loan would at once be branded by the courts as a cover for usury, and the transaction would be declared usurious, with whatever results might follow. The law that brings these associations into existence declares them to be so far *sui generis* that the performance of their functions requires the suspension in their favor of certain rules of law that are applied to all other parties. It seems very clear to us that the operations of building and loan associations, when confined to their own numbers, differ so radically from ordinary loan transactions that the legislature was clearly warranted in placing such associations in a separate class for the purposes of such legislation as pertains to interest and usury; and, the classification being once established, the extent to which the classes shall be separated is purely a matter of legislative discretion. The legislature has the right to leave such associations untrammelled in the matter of premiums paid for loans, and it has an equal right to leave them untrammeled in the matter of interest proper.

But we have been somewhat embarrassed by reason of our previous legislation on this subject. By chapter 34, Laws 1885, heretofore mentioned, these associations were confined in their operations to their own members and were not allowed to charge interest, as such, to exceed 12 per cent. per annum. That chapter was amended by chapter 34 of the Laws of 1887, but was not changed in the particulars above mentioned; but in 1889 another act pertaining to these associations was passed (chapter 40, Laws 1889), § 7 of which reads as follows: "That any funds of such corporation not loaned for a period of more than thirty days, and for which there is no sufficient demand under the provisions of the articles of incorporation and by-laws of the corporation, may be loaned by the corporation at any rate of interest allowed by law, upon any security approved and accepted by the board of directors of said corporation." This section, as we construe it, authorizes these associations, upon the conditions in the section specified, to loan their funds to outside parties at legal rates of interest. It must be conceded that, as to such transactions, building and loan associations differ in no material respect from other money-loaning institutions, and that as to them all the reasons upon which legislative classifications are sustained are wanting. Hence, if the exception contained in § 11 of chapter 184 of the Laws of 1890 must be held to include such transaction, then such chapter is not uniform in its operation and violates the constitutional provision. But, if consistent with legal principles, it is our duty to harmonize this statute with the constitution, and our efforts should first be directed towards ascertaining, if we can, the true intent and purpose of the legislature in the enactment of said § 11. The statute—the whole statute in which said section is found—is the first source to which we should turn for information, and it is also our right and duty to consider all other statutes *in pari materia*. Suth. St. Const. 316, and cases cited. "The general intent must be kept in view in determining the scope and meaning of any part." Id 317, and cases cited. The one prominent thought pervading the statute in question is the suppression of the mischief of usury. The sweeping terms used, the harsh and unusual penalties pre-

scribed, the evident care that no avenue of escape remain unguarded, leave no room to doubt the purpose and intent of that statute. What did the legislature intend to accomplish in excepting building and loan associations from its provisions? The thought should be emphasized that these associations are organized, primarily, for the purpose of dealing with their own stockholders, as hereinbefore described, and that as to such dealings they may constitutionally be exempted from the operation of all usury laws; that their only authority for dealing with outside parties comes from § 7, chapter 40, Laws 1889; and that the conditions therein prescribed are exceptional, and in properly organized and conducted associations will rarely or never occur, particularly as § 9 of the same chapter gives the directors authority to force the withdrawal of all unpledged stock. Mr. Endlich, in speaking of loans to outside parties, says (page 160): "Yet such loans must be regarded as shifts, allowable from the necessities of the case, for the purpose of obviating the contingency of its funds remaining idle on its hands for lack of members to take them up." These associations are not organized to transact any such business. It is a mere incident that may or may not be forced upon them. The legislature of 1889, in defining these associations as "benevolent institutions," did not contemplate or include these dealings with outside parties. Did not the legislature of 1890 use the term in the same sense? Prior to the passage of the law of 1890 these associations could not charge their own stockholders interest, as such, in excess of 12 per cent.; and, if the legislature desired to remove that restriction, § 11 had an office to perform. But should we hold that the section goes further and includes these now exceptional transactions with outside parties, then the gates would be thrown down and the promoters of any monied institution could organize strictly in accordance with the statute as a building and loan association, pay in their stated stipends, and, as there would be no demand whatever for the money among the stockholders, all the funds could be loaned to outside parties, with no restrictions whatever as to form of contract or rate of interest, and the result would be the exact reverse of what the legislature intended in passing the

law. Such a construction should only be adopted when forced upon the court. But it must be admitted that to adopt the narrower construction compels this court to place a limitation upon the language of the legislature. Have we that power? In the case of State v. Emerson, 39 Mo. 87, the court said: "In construing an instrument the true intention of the framers must be arrived at, if possible, and, when necessary, the strict letter of the act, instrument or law, must yield to the manifest intent." In Whitney v. Whitney, 14 Mass. 92, this language is used: "Therefore many cases not expressly named may be comprehended within the equity of a statute, the letter of which may be enlarged or restrained according to the true intent of the maker of the law." The supreme court of Vermont has said: "Effects and consequences of a construction are to be considered, and when, from a literal interpretation, an effect would follow contrary to the whole intent and spirit of the statute, the intent and not the literal meaning must be regarded." Ryegate v. Wardsboro, 30 Vt. 746. In People v. Insurance Co., 15 Johns. 358, it is said: "Whenever such intention can be discovered it ought to be followed with reason and discretion in the construction of the statute, although such construction seems contrary to the letter of the statute. * * A thing which is within the intention of the maker of the statute is as much within the statute as if it were within the letter, and a thing which is within the letter of the statute is not within the statute unless it be within the intention of the makers, and such construction ought to be put upon it as does not suffer it to be eluded." But the federal supreme court has perhaps gone as far as any court in giving effect to the intent of the law makers: "The spirit as well as the letter of a statute must be respected, and when the whole context of the law demonstrates a particular intent in the legislature to effect a certain object some degree of implication may be called in to aid the intent." Durousseau v. U. S., 6 Cranch. 307. "It is undoubtedly the duty of the court to ascertain the meaning of the legislature from the words used in the statute and the subject-matter to which it relates, and to restrain its operation within narrower limits than its words would import, if the court

are satisfied that the literal meaning of its language would extend to cases which the legislature never designed to embrace in it." Brewer v. Blougher, 14 Pet. 178. "If it be true that it is the duty of the court to ascertain the meaning of the legislature from the words used in the statute, and the subject-matter to which it relates, there is an equal duty to restrict the meaning of general words when it is found necessary to do so in order to carry out the legislative intention." Reiche v. Smythe, 13 Wall. 162. "A thing may be within the letter of a statute, and not within its meaning, or within the meaning, though not within the letter." Atkins v. Disintegrating Co., 18 Wall. 302. From these eminent authorities it follows that we have the undoubted right, and it is our solemn duty, to so construe chapter 184 of the Laws of 1890 as to effect the clear intent and purpose of the legislature in its enactment, although such construction may require us to place a limitation upon the language used. We hold, therefore, that the provisions of § 11 of said act, excepting building and loan associations incorporated under the laws of this state from the operation of the act, was not intended to include, and does not include, the transactions of any such association with any parties other than its own stockholders; and that, as thus limited, the legislature had the power to make the exception; and that, as said chapter is uniform in its operation upon all classes upon which it does operate, it is not vulnerable to any of the constitutional objections urged. The district court is directed to reverse its judgment and dismiss the case. Reversed. All concur.

CORLISS, C. J. (*concurring.*) I do not understand that the court decides in this case whether the transaction which is attacked as usurious comes within § 4 of the usury law. The question was not argued at the bar of this court, and it is too difficult of solution, and the consequences of a mistake are too far-reaching, to justify an interpretation of § 4 without full argument touching its proper meaning. It having been assumed by all parties that the case fell within § 4, and the entire argument having been directed to the question whether the

statute is constitutional, I refrain from expressing any opinion as to the true meaning and scope of § 4. I fully agree with my Brother BARTHOLOMEW in his opinion that the statute is constitutional.

JAMES C. CLARK, Plaintiff and Respondent, *v.* C. F. KING and JAMES O. SULLIVAN, Defendants; JAMES O. SULLIVAN, Defendant and Appellant.

Principal and Surety—Offset by Surety.

A surety jointly bound with his principal may, independently of statute, offset against such joint indebtedness his individual claim against the creditor in such joint indebtedness, where both the creditor and the principal are insolvent.

(Opinion Filed July 16, 1891.)

APPEAL from district court, Morton county; Hon. W. H. WINCHESTER, Judge.

Louis Hanitch and *B. W. Shaw*, for appellant. *H. G. Voss*, for respondent.

Action by the plaintiff against the defendants upon an undertaking wherein the defendants herein were sureties upon an appeal bond. Defendant Sullivan interposed an equitable set-off. A demurrer to the answer containing the same was sustained by the district court. Defendant appeals. Reversed.

Louis Hanitch and B. W. Shaw for appellant:

The facts alleged in the answer are sufficient to justify the allowance of the set-off upon equitable grounds. Howard v. Shores, 20 Cal. 282; Pomeroy's Rem. § 761; Lindsay v. Jackson, 2 Paige 581; Simpson v. Hart, 14 John. 63; Gillespie v. Torrence, 25 N. Y. 306; Smith v. Felton, 43 N. Y. 419; Seligmann v. Heller Co., 34 N. W. Rep. 232; Becker v. Northway, 46 N. W. Rep. 210.

H. G. Voss for respondent:

The general doctrine in equity as to set-off is the same as at law, and separate debts cannot be set off in equity any more

than at law against joint debts. Jackson v. Robinson, 3 Mason 138; Murray v. Toland, 3 John. C. R. 569; Dale v. Cooke, 4 John. C. R. 11; Elde v. Losswell, 2 Bladf. 349; Howe v. Shepard, 2 Sumn. 409; Robins v. Holley, 1 Monr. 191; Robbins v. McKnight, 5 N. J. Eq. 648; Davis v. Insurance Co., 4 Edw. 307; Birdsell v. Fisher, 17 Minn. 103, 76; Story, Eq. Jur., § 1436.

The opinion of the court was delivered by

CORLISS, C. J. The demurrer of plaintiff to counter-claim of defendant Sullivan having been sustained, he challenges by this appeal the ruling of the trial court in this respect. It is not pretended that the answer does not state a good cause of action in favor of defendant Sullivan and against the plaintiff; but it is insisted by plaintiff that, as the plaintiff's cause of action is a joint debt of defendant Sullivan with his co-defendant King, and as the claim sought to be offset against it is the debt of the plaintiff to the defendant Sullivan alone, it is not the proper subject of counter-claim; that Sullivan must sue upon it in an independent action. The complaint states a cause of action arising out of the execution of an undertaking on appeal by Mead as principal and the two defendants herein, King and Sullivan, as sureties, followed by the affirmance of the judgment appealed from. The claim set forth in the answer is a judgment recovered against the plaintiff, Clark, by Fairbanks, Morse & Co., which was assigned to defendant Sullivan before the commencement of this action. The liability of the two sureties on the undertaking is joint. No words expressing a several liability appearing on the face of the instrument, it was the joint, and not the joint and several, obligation of the parties executing it. Wood v. Fisk, 63 N. Y. 245; 1 Pars. Cont. 11; 1 Story, Cont. § 53; 1 Pom. Eq. Jur. § 409; Pickersgill v. Lahens, 15 Wall. 140. Statutory enactment in this state has left this rule unaltered, where at least one of the parties liable upon the obligation is a mere surety. Comp. Laws, §§ 3425, 3574. The counter-claim, therefore, cannot be sustained under the statute. The statutory counter-claim "must be one existing in favor of a defendant and against a plaintiff between whom a several

judgment might be had in the action." Comp. Laws, § 4915. See Roberts v. Donovan, 70 Cal. 108, 9 Pac. Rep. 180; Wood v. Brush, 72 Cal. 224, 13 Pac. Rep. 627. No several judgment against the defendant Sullivan could be rendered. Had plaintiff failed to make his co-defendant, King, a party, this defect of parties would have abated the action as thus commenced, the defect being legally brought to the attention of the court by demurrer or by answer, according as the defect might or might not appear upon the face of the complaint. Although only one of two joint debtors is served, the judgment must be against both jointly, to be enforced against their joint property and the separate property of the defendant served. Comp. Laws, § 4901, subd. 1. The plaintiff having no right to a several judgment against defendant Sullivan, the latter could not, therefore, under the statute offset his separate claim against the plaintiff. But we may look elsewhere for the proper rule to govern this question. The right to offset a claim is recognized by equity independent of any statute. We are very clear that the facts alleged in the answer bring this case within this principle of equity jurisprudence. The defendant avers the insolvency of the plaintiff. This creates an equity, for it is unconscionable that the plaintiff should insist that the defendant pay him, and then leave the defendant powerless because of plaintiff's insolvency to enforce his (defendant's) claim against the plaintiff. But a further equity appears. Defendant alleges the insolvency of his principal in the undertaking. Therefore not only will he be without the ability to collect his judgment from the plaintiff, but he will be without ability to reimburse himself out of his principal, who should save him from all loss. It would not be creditable to an enlightened administration of justice to deny the operation of this equitable rule under these facts, which appeal so strongly to the conscience. It is well established that the surety, when sued upon the joint obligation of himself and his principal, may offset the separate claim of the latter against the plaintiff in case of insolvency. Coffin v. McLean, 80 N. Y. 560; Becker v. Northway, 44 Minn. 61, 46 N. W. Rep. 210. Certainly this court would be open to the criticism of sacrificing substance to form if it refused to allow the

surety to set off his own separate demand against the plaintiff when the latter is insolvent. May he reach out, and, seizing without assignment, interpose his principal's claim as an offset, and yet is he powerless, under the same circumstances, to plead his own demand as a counter claim? Had defendant Sullivan been principal, his claim, upon the favorable consideration of a court of equity, would have been trifling when compared with that high claim to the favor of equity which all the adjudications agree is the peculiar property of a surety. One of the very elements of the law is that he is a favorite of a court of equity; and yet, as a principal debtor, Sullivan could have offset this separate claim against the plaintiff under the statute without showing any equity, because he would have been severally as well as jointly liable to plaintiff on the undertaking under our statute, and therefore a several judgment between him and plaintiff could have been rendered. But as surety, the favorite of the court, with strong equities pleading in his behalf, he may not, it has been decided, in this case, even under an equitable rule, have the same measure of relief and justice. The doctrine on which that decision must rest can have no place in the more advanced system of jurisprudence, which, unlike the old system—before equity achieved its memorable triumph, ere reform in procedure had supplanted technical rules—subordinates in large measure every other consideration to the accomplishment of justice. It is true that it sometimes has been thought that insolvency was not sufficient to create such an equity as would warrant a departure from the statutory rule. See 2 Smith, Lead. Cas. pt. 1, p. 355 and cases. But the doctrine of Lindsay v. Jackson, 2 Paige 581, commends itself with greater force to the reason and conscience of man. Said Chancellor WALWORTH in this leading case: "There is a natural equity that cross demands should be offset against each other, and that the balance only should be recovered. This was the rule of the civil law, and it is now adopted and preserved as the law of those countries where the principles of the civil law prevail. * * * By the common law of England, however, this natural equity was not allowed or enforced in the courts of law, but each party was left to recover his demand in a separate action. As a gen-

eral rule, the court of chancery followed the rule of law; and, after the statute had permitted set-offs to a certain extent in suits at law, this court also adopted and acted on that principle. But the courts of chancery, even before the statute, recognized the principle of natural equity, and acted upon it, in cases where the law could not give a remedy in a separate suit in consequence of the insolvency of one of the parties." To same effect are Smith v. Felton, 43 N. Y. 419; Seligmann v. Clothing Co., 69 Wis. 410, 34 N. W. Rep. 232; Becker v. Northway, 44 Minn. 61, 46 N. W. Rep. 210; Coffin v. McLean, 80 N. Y. 560; Davidson v. Alfaro, Id 660; Hiner v. Newton, 30 Wis. 640-644; Hobbs v. Duff, 23 Cal. 597-629.

We are not called upon to decide on this appeal whether it was proper for the defendant to urge his equity by answer, or whether he should not have filed his complaint in equity to enforce his equitable set-off. Nor are we asked to determine whether he should have waited until the recovery of judgment against him in this action, and then by motion or by action had one judgment set off against the other. Only the question of right has been discussed on this appeal. What is the proper procedure has not been touched. It might be well in passing, however, to refer to the fact that in New York, where the provisions of the Code relating to this question are the same as in this state, the practice, as apparently sanctioned by the courts, has been to insist upon this equity by answer. Coffin v. McLean, 80 N. Y. 560; Smith v. Felton, 43 N. Y. 419. This is true of Minnesota also, but the statute there was somewhat different. Becker v. Northway, 44 Minn. 61, 46 N. W. Rep. 210. See, also, Dempsey v. Rhodes, 93 N. C. 120. But see Duff v. Hobbs, 19 Cal. 646.

It was contended on the oral argument that equity would not decree the offsetting of defendant's judgment against plaintiff's claim because the plaintiff's claim was exempt; that, in effect, this would be the seizure of his exempt property to pay a judgment against him. The point is not without force, but it is not involved on this appeal, as there is nothing to show that plaintiff has not a large amount of property in excess of his exemptions. An insolvent may own a large estate. No cases

were cited on this point. An investigation of it has brought to light the following decisions, which we cite for the benefit of counsel without further comment. Puett v. Beard, 86 Ind. 172; Temple v. Scott, 3 Minn. 419 (Gil. 306); Curlee v. Thomas, 74 N. C. 51; Duff v. Wells, 7 Heisk. 17; Wilson v. McElroy, 32 Pa. St. 82.

It was also said that no equity could arise in favor of defendant, because he purchased the judgment he now seeks to offset with knowledge of plaintiff's insolvency, and for the express purpose of using the judgment as an offset, and that plaintiff paid practically nothing for it. These facts do not appear on the face of the answer to which plaintiff has demurred. A reply embracing them would, if sustained by proof, or demurred to, raise this question. We do not decide it now. The order appealed from is reversed, plaintiff to have 10 days after the *remittitur* is filed in which to reply to defendant's offset. All concur.

MARY ANN BAUER, Plaintiff and Respondent, *v.* CHARLES BAUER, Defendant and Appellant.

Compelling Support of Wife—Jurisdiction—Service of Summons.

The district court can obtain jurisdiction of the proceedings authorized by chapter 167 of the Laws of 1890 to compel a husband to support his wife only by service of a summons, as in other cases in equity.

(Opinion Filed July 27, 1891.)

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

W. J. Kneeshaw, for appellant. *E. W. Conmy*, for respondent.

Action to compel the defendant to support the plaintiff and her children, instituted by issuing an order to show cause why temporary alimony should not be awarded. On the return day defendant objected to the jurisdiction of the court on the ground that no summons had been served on the defendant. Objection overruled. Defendant appeals. Reversed.

The opinion of the court was delivered by

CORLISS, C. J. The jurisdiction of the district court to make the order appealed from is questioned by this appeal. The proceeding of which this order was the culmination was evidently instituted under chapter 167 of the Laws of 1890 by the plaintiff to compel her husband to support her and their children living with her. No summons was ever served or issued. A petition was presented to the district court, and upon that an order to show cause was made and served upon the husband. On the return day of the order to show cause, the husband appeared specially by counsel, and objected to the jurisdiction of the court over his person, for the reason that no proper steps had been taken to subject his person to such jurisdiction. The objection was overruled, and, no cause being shown, the order appealed from was made requiring the husband to pay his wife $25 per month for her support and maintenance, and $35 as an attorney's fee. It appears to have been the view of the trial court that this statute was intended to provide a summary method—one that would bring to the wife speedy relief where the husband had failed in his duty of support; and that, therefore, it was not intended that the dilatory proceeding by action should in such cases be resorted to. But in actions for divorce the wife need not wait until the final decree for relief. It is seldom that she does so wait. Temporary alimony is allowed *pendente lite*. An order to show cause may be secured and served with the summons, and as speedy a hearing had as could be and was had under this statute in this case, giving it the construction placed upon it by the trial court. It is true that permanent support cannot be decreed until after trial. But we must assume that the court will allow what is just *pendente lite*, and this is all the wife should receive. There was therefore no need of a more speedy remedy. But it was important to settle the question in this jurisdiction whether an independent proceeding could be instituted to compel the performance by the husband of his duty to provide for his wife and children. Many authorities—unquestionably the greater number—hold that no such action can be maintained; that the power of the court to compel by its decree a husband to care

for his wife and children exists only in actions for divorce, absolute or limited, as an incident thereto, and to prevent a failure of justice. On the other hand, some tribunals, with commendable adherence to principle, putting aside precedents whose spirit is narrow and technical, asserted boldly the inherent power of a court of equity to coerce the faithful discharge of this, the highest duty of man in social life, the law affording the wife no adequate redress. 1 Amer. & Eng. Enc. Law, 469, 470, and cases cited in notes. It would be almost a brutal jest to speak of the law's justice to a wife because she might carry her husband's credit into every place where necessities were to be had. He who trusts under such circumstances knows in advance that he must sue to collect. How many are willing to extend credit that they may have the pleasure of subsequent litigation? How many are willing to have their right to compensation for their merchandise depend upon uncertain questions whether the husband has supplied the wife with necessaries or with money to buy them, and upon the still more uncertain and very complicated question as to what in each particular case constitute those necessaries for which the law will hold the husband responsible? To carry with her his credit is therefore no adequate redress for the wrong he has done her. Moreover, the law frowns down unnecessary litigation. Equity abhors a multiplicity of actions. To prevent such multiplicity, equity, supplanting the law, lays hold of a controversy, and settles every phase of it. What greater encouragement to frequent and petty and bitter litigation than to bestow upon the neglected wife her husband's credit instead of a portion of his property or money? It was because of this divergence in the authorities we believe that this act was passed. Its purpose was to settle the question whether in this state, with its progressive jurisprudence, the wife should have an adequate remedy for her wrongs in this respect. We do not think its design was to innovate upon settled rules of procedure. Section 3 expressly provides that "the practice in such cases shall conform as nearly as may be to the practice in divorce cases, and the court shall have power to enforce its orders as in other equity cases." The implication from this phrase "other equity cases,"

seems to be irresistable that a proceeding under this statute is a case in equity. This is precisely what such a proceeding is in those jurisdictions in which the right to compel support independently of a divorce action is upheld. It is strictly a case in equity. A case in equity is instituted by the service of a summons. The provision that the practice shall conform as nearly as may be to the practice in divorce cases is significant. This gives the right to apply for temporary support before a final hearing can be had. That is the practice in divorce cases. This right confers upon the wife the same speedy remedy which she would enjoy should she sue for a divorce, and we do not see how the wife could ask for or how the legislature could grant her a more speedy remedy consistent with a full and fair hearing. She can secure temporary alimony in the divorce case, and temporary support when she proceeds under the statute, within a few days after commencing her action. The strongest circumstance in support of our view is the omission of the statute explicitly to provide any process for bringing the defendant into court different from that ordinarily employed. The statute merely declares that the wife may apply to the district court by petition. What is to be done by the court when this petition is presented to it is not indicated. There is absolute silence as to the practice from the time of the presentation of the petition down to the hearing, unless we give meaning to that general provision which declares that "the practice in such cases shall conform as nearly as may be to the practice in divorce cases." No specific procedure is prescribed. To hold that the issuance and service of a summons is necessary to jurisdiction is consistent with this general provision—it preserves the harmony of judicial procedure—while to hold the contrary is to assert that the legislature intended that the court should devise process of its own for bringing in the defendant. And why, it is asked, was not that process designated? This could have been done easily. Is not the silence of the statute in this regard conclusive that the legislature considered that such process had been prescribed by the general provisions that the practice in divorce cases should apply as nearly as possible? While we are not so clear in our views as we would wish to be,

yet we believe that our construction has more reasons in favor of it than the contrary interpretation. It is certainly safer; it conforms to settled rules of practice, the wisdom of which has been thoroughly tested, and it keeps the practitioner within known highways, instead of asking him to explore at his peril an unknown territory. We think the issuance and service of a summons was jurisdictional, and therefore the order of the district court is reversed, and the proceedings dismissed. All concur.

GEORGE A. BENNETT, Plaintiff and Respondent, *v.* NORTHERN PACIFIC RAILROAD COMPANY, Defendant and Appellant.

Injury to Employe—Contributory Negligence—Evidence.

1. Plaintiff was injured while coupling an engine to a car because there was not sufficient space for his body between them. The draw-bars of the engine and of the car were unusually short, leaving a space of only about 10 inches between the end of the car and of the engine when the draw-bars came together, whereas the usual space is from 24 to 30 inches. *Held* sufficient to justify a verdict that defendant's negligence was one of the proximate causes of the injury. It appearing that plaintiff was injured in consequence of his failure to obey the rule of defendant that he must examine so as to know the kind and condition of the coupling apparatus, the rule giving him sufficient time to make such examination in all cases, *held*, that he could not recover.

2. Exclamations and expressions of present pain may be proved by any one who hears them, although made subsequently to the injury.

(Opinion Filed July 27, 1891.)

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

W. F. Ball and *John S. Watson*, for appellant. *S. L. Glaspell*, for respondent.

Action to recover damages for a personal injury sustained by plaintiff while in defendant's employ. Judgment for plaintiff. Defendant appeals. Reversed and new trial ordered.

W. F. Ball and John S. Watson, for appellant:

The principle is well settled that no negligence can be inferred from the fact that a railroad track is constructed on a curve at the place of an accident to a servant. And this is true, although it appears that the accident would not have occurred had the track been straight. Tuttle v. Railroad Co., 122 U. S. 189. The wife of the plaintiff was asked the following question: "Have you ever noticed any exclamations or expressions of pain at any time," referring to the physical condition of the plaintiff. Evidence of this character is admissible only when it relates to expressions and exclamations made at or about the time of the injury. Reed v. Railroad Co., 45 N. Y. 574; Railroad Co. v. Kuntley, 38 Mich. 537; Wharton on Evidence, § 268 and cases cited; Laughlin v. Railroad Co., 44 N. W. Rep. 1049. An employe cannot judge of the reasonableness of the company's rules. Walsey v. Railroad Co., 33 Ohio St. 227; Hulet v. Railroad Co., 67 Mo. 239. It was undoubtedly contributory negligence on the part of the plaintiff to place himself in such a position as to incur the danger and suffer the injury complained of. Tuttle v. Railroad Co., 122 U. S. 189; Railroad Co. v. Lunde, 11 Am. & Eng. R. R. Cases, 188. The plaintiff entered upon the service of defendant under a written contract and he cannot escape strict compliance with the terms to which he there consented. Railroad Co. v. Whitcomb, 31 Am. & Eng. R. R. Cases, 149; Darractus v. Railroad Co., 2 S. E. Rep. 511; Walsey v. Railroad Co., 33 Ohio St. 227; Railroad Co. v. Black, 88 Ill. 112. It was not negligence to receive the Union Tank Line car because it had a shorter dead wood and draft iron than those in use upon defendant's cars. Whitcomb v. Railroad Co., 12 Am. & Eng. R. R. Cases 214; Kelley v. Railroad Co., 21 Id 633; Railroad Co. v. Black, 88 Ill. 112; Smith v. Potter, 46 Mich. 258, 2 Am. & Eng. R. R. Cases 140. When an instruction is based upon a state of facts not warranted by the evidence, the manifest tendency of which is, from the special features of the case, to lead the jury to infer the existence of such facts and thereby take an erroneous view of the case, it is ground for reversal. Willis v. Railroad Co., 17 Am. & Eng. R.

R. Cases 542; Bank v. Eldred, 9 Wall. 554; St. Louis v. Risley, 10 Wall. 91; U. S. v. Breitling, 20 How. 254; Jones v. Randolph, 14 Otto 108; Boardman v. Reed, 6 Pet. 328; Insurance Co. v. Baring, 20 Wall. 158; Miller v. Railroad Co., 41 N. W. Rep. 28. An instruction to the jury which does not arise out of facts of the case, is inapplicable to it and is erroneoes if calculated to mislead and confuse them. Railroad Co. v. Robbins, 2 Black 417; Bank v. Eland, 9 Wall. 554; Thompson, Charge to Juries, §§ 62, 63.

S. L. Glaspell for respondent:

Whether the plaintiff should have known and appreciated the danger was a question of fact properly submitted to the jury. Hugerford v. Railroad Co., 41 Am. & Eng. R. R. Cases 269; Lawless v. Railroad Co., 18 Id 96; Greenleaf v. Railroad Co., 29 Iowa 14; Goodrich v. Railroad Co., 22 N. E. Rep. 397; Kane v. Railroad Co., 32 U. S. 339 (Co-Op. Ed.); Thompson on Negligence, p. 1015-1239; Williams v. Railroad Co., 3 Dak. 168; Dorsey v. Phillips, 42 Wis. 583; Mares v. Railroad Co., 3 Dak. 336, on appeal 31 U. S. 296, (Co-Op. Ed.); Herbert v. Railroad Co., 3 Dak. 38, on appeal 29 U. S. 755 (Co-Op. Ed.) Defendant objects to plaintiff's wife testifying that plaintiff "woke up more than once in the night groaning," because it was hearsay evidence. The weight of authority is in favor of admitting such testimony. Matteson v. Railroad Co., 35 N. Y. 487; Perkin v. Railroad Co., 44 N. H. 223; Houston, etc., v. Shafer, 6 Am. & Eng. R. R. Cases 421; Railroad Co. v. Newell, 104 Ind. 264; Yeatman v. Hart, 6 Humph. (Tenn.) 374; Eckles v. Bates, 26 Ala. 655; Kent v. Lincoln, 32 Vt. 592; State v. Gedicke, 43 N. J. Law 86; Note to 28 Am. & Eng. R. R. Cases 563. The duty of inspection applies to foreign cars as well as to those owned by the railroad company, and the use of such cars with defective coupling apparatus is negligence. Sherman & Redfield on Negligence, § 196; Gottlieb v. Railroad Co., 100 N. Y. 462; O'Neil v. Railroad Co., 9 Fed. Rep. 337; Fay v. Railroad Co., 11 Am. & Eng. R. R. Cases 193; Goodrich v. Railroad Co., 41 Id 259; Bomar v. Railroad Co., 88 So. Rep. 478; Railroad Co. v. Barber, 44 Am. & Eng. R. R. Cases 523. Plaintiff was only bound to

raise by his proof a reasonable presumption of negligence. If the facts proved made it probable that the defendant neglected its duty, it is for the jury to decide. Greenleaf v. Railroad Co., 29 Iowa 14-46; Benzing v. Stenway, 101 N. Y. 553; Morton v. Railroad Co., 46 N. W. Rep. 111.

The opinion of the court was delivered by

CORLISS, C. J. The circumstances under which plaintiff was injured we think warranted the jury in finding that the defendant's negligence was one of the proximate causes of the damage which the plaintiff suffered. He was an employe of the defendant, acting as switchman. The first important fact in the history of the accident was the stepping of the plaintiff upon the foot-board of a switch engine to ride down upon it to a flat-car standing upon a curved switch, for the purpose of aiding in coupling the engine to the car in order to transfer it to another track. The car did not belong to defendant, but was owned by the Union Tank Line Company. This fact is of no moment, however, as the defendant was bound to inspect this foreign car the same as one of its own cars. Goodrich v. Railroad Co., 116 N. Y. 398, 41 Am. & Eng. R. R. Cases, 259, 22 N. E. Rep. 397; Gottlieb v. Railroad Co., 100 N. Y. 462, 24 Am. & Eng. R. R. Cases 421, 3 N. E. Rep. 344; Railroad Co. v. Kernan, 78 Tex. 294, 14 S. W. Rep. 668; Bomar v. Railroad Co., 42 La. Ann. 983, 8 S. Rep. 478; Fay v. Railroad Co., 30 Minn. 231, 11 Am. & Eng. R. R. Cases 193, 15 N. W. Rep. 241; O'Neil v. Railroad Co., 9 Fed. Rep. 337; Railroad Co. v. Barber, 44 Kan. 612, 44 Am. & Eng. R. R. Cases 523; Gutridge v. Railroad Co., 94 Mo. 468, 7 S. W. Rep. 476. It was defendant's duty to make this inspection before incorporating the car into one of its trains. More than sufficient time had elapsed since receiving the car to enable it to perform this duty, as the accident occurred in Jamestown, in this state, a considerable distance beyond the point where the car must have first come into its possession. It had been long enough in its custody to be carried to its destination and unloaded, as it was standing empty upon the switch at the time plaintiff was injured. There is no proof that the car was ever inspected. The defect was of such a nature

that the exercise of reasonable care in making an inspection must have disclosed the defect. Therefore, whether the car was or was not inspected, there was sufficient to justify a verdict that the defendant had been careless in the discharge of its duty to use reasonable care to furnish its employes with safe appliances of every kind, and keep them in safe condition. Railroad Co. v. Herbert, 3 Dak, 38, 8 Am. & Eng. R. R. Cases 85, 116 U. S. 642, 24 Am. & Eng. R. R. Cases 407, 6 Sup. Ct. Rep. 590. This is one of the master's duties, and the servant upon whom the master devolves its performance represents the master in that respect, and is not in the discharge thereof a fellow servant of the employe injured. Railroad Co. v. Herbert, 116 U. S. 642, 6 Sup. Ct. Rep. 590; Railroad Co. v. Kernan, 78 Tex. 294, 14 S. W. Rep. 668; Fay v. Railroad Co., 39 Minn. 231, 11 Am. & Eng. R. R. Cases 193, 15 N. W. Rep. 241; Condon v. Railroad Co., 78 Mo. 567; Bushby v. Railroad Co., 107 N. Y. 374, 14 N. E. Rep. 407; Ell v. Railroad Co., 1 N. D. 336, 48 N. W. Rep. 222. When plaintiff stepped upon the foot-board of the engine it appears to have been a short distance from the car, and was backing down towards it slowly. Plaintiff stood upon that portion of the foot-board which was on the short side of the curve of the switch. On the other side, standing also on the foot-board, was the foreman of the switching crew. He guided the link into the opening, while plaintiff reached over to the flat-car to pick up a pin lying there, for the purpose of using this pin to complete the coupling. While in this position he was squeezed between the locomotive and the car, and injured, because, as the evidence demonstrated, there was too little space between them, owing to the undue shortness of the draw-bars both of the car and of the engine. He rests his right to indemnity upon this conduct of defendant in permitting a car with so short a draw-bar to be placed upon its track for use, and in augmenting the danger by bringing it into connection with an engine whose draw-bar was likewise, as appears from some of the evidence, much shorter than the draw-bars in ordinary use. Each of these draw-bars was, according to some of the evidence, so much shorter than those in common use that we are inclined to the view that the jury were justified in holding

the defendant negligent on this account. Nor can it be said that the risk attending the use of such short draw-bars—particularly their use in connection with each other—was one of the ordinary risks of the employment, in the usual sense of that phrase. The evidence discloses that they were so short that when their ends came together there was only about 10 inches between the end of the car and of the locomotive, whereas the usual space, according to the evidence, is from about 24 to 30 inches. To so diminish this usual standing room that an employe is almost sure to be caught when in the discharge of his duty between a heavy standing car and an engine whose momentum, because of its weight, is tremendous, however slow its speed, would seem to be some evidence of negligence. If the space is too narrow for the body, serious injury is almost inevitable in case the servant is caught. There is respectable authority for the proposition that these facts warrant a finding of negligence. Railroad Co., v. Fredericks, 71 Ill. 294; Greenleaf v. Railroad Co., 29 Iowa, 14; Belair v. Railroad Co., 43 Iowa, 662; Crutchfield v. Railroad Co., 78 N. C. 300; Railroad Co. v. Callbreath, 66 Tex. 526, 1 S. W. Rep. 622.

Assuming that the jury were justified in finding the defendant guilty of negligence, it remains to be considered whether the plaintiff was not guilty of contributory negligence as a matter of law. The question arises not under ordinary circumstances. The defendant appears expressly to have imposed upon plaintiff duties in addition to those which the law would imply from an ordinary contract of employment of a switchman. At the time the plaintiff entered into the service of the defendant, the latter presented to plaintiff for signature certain regulations, and plaintiff, in answer to the question printed thereon, "Have you read and do you understand the following extract from the book of rules of the Northern Pacific Railroad Company?" replied in his own handwriting: "I have read and understand them." So far as they are here material, these rules are as follows: "Great care must be exercised by all persons when coupling cars. Inasmuch as the coupling apparatus of cars and engines cannot be uniform in style, size or strength, and is liable to be broken, and as from various causes it is dan-

gerous to expose between the same the hands, arms or persons of those engaged in coupling, all employes are enjoined before coupling cars or engines to examine so as to know the kind and condition of the draw heads, draw-bars, links and coupling apparatus, and are prohibited from placing in the train any car with a defective coupling until they have first reported its defective condition to the yardmaster or conductor. Sufficient time is allowed, and may be taken by employes, in all cases to make the examination required." Our first concern is to ascertain the true scope of this regulation. It will hardly be claimed that it was the purpose of defendant to impose upon the plaintiff all the duties of a car inspecter, so far as the proper discharge of such duties were essential to the protection of the plaintiff. Such an interpretation would in effect exempt the defendant from liability for its own negligence, however gross. The same facts which would convict the defendant of carelessness would, under such a view of the rule, likewise convict the plaintiff of contributory negligence in every instance. The employer would thus save itself from liability, although negligent in the discharge of the duties of a master. It is an elementary rule of construction that the courts shrink from so interpreting the language employed by a common carrier as to exempt it from the consequences of its own negligence. No such interpretation will be adopted, unless by the use of the word "negligence," or by other explicit language, the court is driven to such view. Then the provision so exempting from negligence is often struck down as opposed to public policy. (Whether the doctrine relates to an employe as well as to the public it is not necessary to decide.) It would be unreasonable to give the rule this construction. It would not be practicable for one employed in coupling cars to devote the same amount of time to and exercise the same degree of care in the inspection of the apparatus employed in the coupling of cars, and of such parts of the car as are immediately connected therewith, as a car inspector must. To exempt the company from liability, something more than a short examination must be made by the car inspector. There may be obscure defects which the exercise of due care renders it imperative he should discover, and for

his failure to discover and remedy which the company would be responsible; and yet for the master to insist that a trainman or a switchman should be held to the obligation of making such an investigation as would result in their disclosure would seriously cripple the power of the company to handle and ship the freight intrusted to it. It would be an unreasonable and impracticable requirement that all the dangers to an employe which a proper car inspection should bring to light should be discovered every time two cars are coupled together, or one car is coupled to a locomotive. It would be exacting of the trainman or the switchman more onerous duties than those imposed upon the expert car inspector. The company would require the less expert servant to discover at his peril a defect which the more expert employe had failed to detect. With less skill in such matters, and less time to investigate, it would be a gross wrong to allow the master to dictate to his servant the condition that he would have no redress for the injury occasioned by the master's carelessness because he, the servant, had not complied with a regulation which it would be impossible for him to observe. But it is within the domain of possibility for the employe to obey this rule, when reasonably construed. There are defects which will appear when extra care is used. We think the reasonable construction of this rule is that more than ordinary care must be exercised by the employe; that he may not rely implicitly upon the uniform discharge by the master, through his servants, of the duty of using ordinary care in furnishing proper and safe appliances and machinery, and in keeping them in repair, and that he must in some measure be on his guard against injury from the occasional negligence of those who are charged with the performance of the master's duties to his employes. No matter what degree of care is exercised in the selection of the servants by whom these master's duties are to be discharged, negligence will sometimes characterize their conduct. Said the court in Smith v. Potter, 46 Mich. 258, 9 N. W. Rep. 273: "When a brakeman handles any car, he knows that there is at least a possibility that he may be injured unless he examines it carefully. It may not always be legal negligence in him to rely with some assurance on the accuracy of the

persons who should have examined it before it comes to him. But he is bound to know that omissions of such care are possible, and are dangerous if they occur. And he is also bound to know, as all men know, that it is impossible for employes to completely guard against it." It would be contrary to sound policy to suffer the master to exonerate himself from liability in all cases, even by agreement with the servant. But there are defects resulting from the careless performance of the master's duties, so patent that it is very reasonable for the master to charge an employe with the duty of discovering such defects at his peril. Even in the absence of any regulation, the servant is often held accountable for his failure to guard against such defects. In this case the regulation but augmented this obligation. It called the servant's attention to the fact that the very difficulty which occasioned the injury sometimes existed. It notified him that the coupling aparatus of cars and engines were not uniform in size; this embraces differences in length. It apprised him of the danger of the work; enjoined upon him the duty of examining so as to know the kind and condition of the draw-heads, draw-bars, links, and coupling aparatus; prohibited him from placing in the train any car with a defective coupling; and, that the rule might be faithfully obeyed by the servant, it explicitly granted to him ample time to observe its behests. The language is unmistakable: "Sufficient time is allowed, and may be taken by employes in all cases, to make the examination required." It was insisted at the bar of this court that this rule was not ordained in good faith; that it was never expected that an employe would observe it; and that any servant who took sufficient time to follow and obey its requrements must inevitably look for discharge. On what principle this court is asked to attribute a Machiavellian policy to the defendant, we are at a loss to determine; and, should we find that only grasping self-interest, without one touch of humanity, was the motive for this rule, still we must adjudge that its grant of sufficient time to make the examination enjoined was written in good faith, when the rule receives, as we believe it was the purpose of the defendant that it should receive, a reasonable construction. In the light of such an interpretation of it, it is

obvious that the use of this time by the servant will not seriously discommode the master or delay the shipment of its freight. And, on the other hand, the master has a deep interest in the safety of the servant; for, no matter how perfect the former's defense to a claim for damage, the making of that defense is always attended with expense. Unadulterated selfishness would prompt the adoption of a regulation, the observance of which would save such expense, while not materially reducing the servant's efficiency or affecting the volume of work he can perform. It is without force to assert that the master would discharge an employe who would take the necessary time to make the required examination. Should he discharge the servant before his term of employment had expired, for no other reason, the law would give the servant redress; and, if no time of employment is prescribed, it is the master's legal right, as it is the legal right of the employe, to terminate the relation at any time, without any excuse at all, or for any reason, however unjustifiable in ethics. We would not, however, be understood as asserting that the master could insist upon a rule when the master's conduct in the discharge of its employes, or in any other manner, indicated a purpose not to accord to the latter the necessary time without which the master's command to the exercise of a higher degree of care could not be obeyed. Its actions must not belie its words. This record discloses no such condition of affairs. Neither the plaintiff nor any other employe of the defendant has been discharged, or threatened with discharge, because he sought in good faith to comply with this regulation, and took the necessary time for that purpose. Nor are we confronted with the difficult question as to the rights of the plaintiff, had some one in superior authority commanded a disregard of the rule; neither was the press of business such that a full observance of its behests was not practicable. There was no exigency. The plaintiff, with the defects in full view—one immediately beneath his gaze, and one before his eyes only a short distance away—moved slowly toward his fate, oblivious of danger, because, as is conceded, he took no precautions to discover an open peril. He seeks to excuse his omission to examine the length of the draw-bar by his statement, upon

which the verdict of the jury has set the seal of truth, that he was engaged in looking for a pin with which to make the coupling. The pin could have been found as well after he had observed the defendant's rule, that he must examine to ascertain whether there was any danger from the size of the draw-bars of the engine and of the car. The same argument would exonerate him from blame had the coupling apparatus and the deadwoods been entirely wanting. He testified that he knew every road had different cars, with different length draw-heads; that prior to the accident he did not notice the length of the draw-heads of the car and of the engine; that, if he had known of the undue shortness of these draw-heads, he could have escaped injury, as there was plenty of time for him to have stepped down and out from the end of the foot-board upon the ground, so as to clear himself from the flat-car before he was hurt; and that he knew that, if two cars met upon a curve, the distance between them would be shorter on the inside than on the outside of the curve. It is clear that plaintiff made no effort to obey the rule requiring him to make an examination of the coupling apparatus. He does not pretend to have obeyed it. He disavows any such obedience. That an observance of its requests, giving it a reasonable interpretation, would have saved him from injury, cannot admit of doubt. The defects were patent; the difference between the combined lengths of these draw-bars and the combined lengths of those in ordinary use was 14 to 20 inches. The ratio was about 10 to 30. One was directly beneath his gaze; the other was almost directly before his eyes. There was time for inspection while the engine was moving slowly backwards. Further time might have been taken, if necessary, under the rule. To fail to discover, under these circumstances, that these draw-bars were only about one-third the usual length, must be negligence, particularly in view of the express warning contained in the rule, the injunction to examine so as to know the kind and condition of the coupling apparatus, and the granting of sufficient time for that purpose. When warned of the danger generally, and afforded time to pause and examine whether it existed in the particular case, the

servant may not, with thoughtless imprudence, rush headlong upon peril at the expense of his master.

Said the court in Karrer v. Railroad Co., 76 Mich. 400, 43 N. W. Rep. 370, after quoting a regulation of the defendant very similar to the one in the case at bar: "It was plaintiff's duty to examine into the coupling arrangements of both cars before he attempted to couple them, and as they were only a rod apart at most before he started the train back, and as he says the defect was visible at once to any one looking, one or two seconds would have furnished all the time needed to satisfy himself had he been acting under any one else's orders; but, as he had personal direction of the engineer's movements and could move when he pleased, the case, as he presents it, was an aggravated one of the grossest carelessness, for which he, and no one else, was responsible." Said the court in Darracutts v. Railroad Co., 83 Va. 288, 2 S. E. Rep. 511, 514: "At all events the evidence shows that the dangerous condition of the coupling was obvious, and that the plaintiff, in violation of the rules of the company, voluntarily put himself in a position of danger, in consequence of which he was injured. Under these circumstances, in the eye of the law, he was the author of his own misfortune; that is to say his negligence, or, what is the same thing, his failure to use reasonable care and caution, was the proximate cause of the injury complained of. The action is not therefore maintainable." In Railroad Co. v. Smithson, 45 Mich. 212, 7 N. W. Rep. 791, there was no rule giving warning, enjoining examination and according sufficient time for that purpose; and yet it was held fatal to recovery that the plaintiff, a brakeman, had failed to notice that there were double dead-woods on the cars he was coupling, instead of a single dead-wood on each, it being contended that it was negligence for the defendant to receive and transport cars equipped with double dead-woods. Said Judge COOLEY: "If, therefore, a switchman were to declare that he had attempted to couple the double dead-woods without noticing how they differed from the cars of defendant, the conclusion would be inevitable that he had gone heedlessly in the performance of a duty requiring great care, and that he had not allowed his eyes to inform him what was before him. * * * The

best notice is that which a man must of necessity see, and which cannot confuse or mislead him. He needs no printed placard to announce a precipice when he stands before it." In a similar case, Hathaway v. Railroad Co., 51 Mich. 253, 16 N. W. Rep. 634, the court said: "In this case the danger consisted in the brakeman being caught between the two dead-woods as they came together. The dead-woods were in plain sight. They were really the most prominent objects on the end of the cars. The plaintiff had a full opportunity of examining the one by which he stood some moments before the cars came together. Its size, shape, and the location of the draw-bar were before him. He had only to look at it to be informed of any peril surrounding it. The moving car, at a distance of 20 feet, with its dead-wood and draw-bar in plain view, slowly approached the one where the plaintiff was standing. It does not appear that there was any hurry about the business. How could the plaintiff have been better warned? Certainly he knew the car was coming, and could see the dead-woods and draw-bar thereon as well as if he had made the coupling a thousand times before. He could not fail to see it, if he looked at all." See, also, Kelley v. Railroad Co., 21 Am. & Eng. R. R. Cases 633; Railroad Co. v. Black, 88 Ill. 112; Brewer v. Railroad Co., 56 Mich. 620, 23 N. W. Rep. 440; Railroad Co. v. Rice, 51 Ark. 467, 11 S. W. Rep. 699. In several of the cases referred to, the master had not, as in the case at bar, imposed upon the servant the duty of extra care, nor had he expressly granted to him sufficient time to enable him to examine the coupling apparatus before making the coupling. It must further be remembered that plaintiff was on the short side of the switch. He testified that he knew the distance would be shorter on the inside than on the outside of the curve. But he seems to have paid no attention to this obvious law. Being upon the shorter side, it was all the more important for him to ascertain whether there would be sufficient room between the car and the engine for him to stand with safety on the foot-board in making the coupling. It does not seem to be strenuously insisted that a charge of negligence can be predicated upon the curve of the switch. There is no evidence of the degree of the

curve, and there is eminent authority for the proposition that, unless the curve is abnormally sharp, the courts will not regard it as evidence of carelessness. Tuttle v. Railroad Co., 122 U. S. 189, 7 Sup. Ct. Rep. 1166. The language of the court in this case, both on this point and the further point of contributory negligence, because the injured servant stood upon the inside of the curve in making the coupling, is very applicable here: "The perils in the present case arising from the sharpness of the curve were seen and known. They were not like the defects of unsafe machinery which the employer has neglected to repair, and which his employes have reason to suppose is in proper working condition. Everything was open and visible, and the deceased had only to use his senses and his faculties to avoid the dangers to which he was exposed. One of these dangers was that of the draw-bars passing each other when the cars were brought together. It was his duty to look out for this, and avoid it. The danger existed only on the inside of the curve, and this must have been known to him." On the question whether it was negligent to build a switch and with so sharp a curve, the court observed: "We have carefully read the evidence presented by the bill of exceptions, and, although it appears that the curve was a very sharp one at the place where the accident happened, yet we do not think that public policy requires the courts to lay down any rule of law to restrict a railroad company as to the curves it shall use at its freight depots and yards, where the safety of passengers and the public is not involved, much less that it should be left to the varying opinion of juries to determine such an engineering question." It is true that in the Tuttle case there was no one standing on the foot board on the outside of the curve, as in the case at bar; but, if the brakeman was bound in the Tuttle case to know that it was dangerous to stand on the inside when there was no one on the outside, surely the plaintiff in this case was bound to know that his position was one of danger, although there was some one standing on the outside. The fact that another stood in one of the places of safety did not render the place occupied by plaintiff any less dangerous or obscure his sense of that danger. The other place of safety was outside of the space

between the car and the engine, on the ground. Perhaps he might not have found room with the foreman on the outside of the curve on the foot-board, but he might have gone ahead, and set the pin, and, if the jar of the collision had not been sufficient to cause the pin to fall down into its place, then he could have inserted it in the aperture with his hands without the slightest danger, or, at least, he then would have plainly seen the danger of going between the engine and the car on the short side of the curve, and could have completed the coupling on the long side. The plaintiff has sustained severe, and perhaps permanent, injuries. His case appeals to our sympathy, and he may be a not unworthy object of charity, but justice will not seize his master's property to compensate him for the consequences of his own imprudence. There seems to be marked unanimity on the point that, where disobedience to or disregard of a reasonable rule or regulation of the master contributes to the injury, there can be no recovery. Sloan v. Railroad Co., 86 Ga. 15, 12 S. E. Rep. 179; Cahill v. Hilton, 106 N. Y. 512, 13 N. E. Rep. 339; Karrer v. Railroad Co., 76 Mich. 400, 43 N. W. Rep. 370; Railroad Co. v. Wallace, (76 Tex., 636 Sup. Ct.), 13 S. W. Rep. 565; Railroad Co. v. Thomas, 51 Miss. 640; Deeds v. Railroad Co., 74 Iowa 154, 37 N. W. Rep. 124; Railroad Co. v. Rice, 51 Ark. 467, 11 S. W. Rep. 699; Sedgwick v. Railroad Co., 76 Iowa 340, 41 N. W. Rep. 35; Wolsey v. Railroad Co., 33 Ohio St. 227; Railroad Co. v. Whitcomb, 111 Ind. 212, 31 Am. & Eng. R. R. Cases 149.

Plaintiff may not ask us to speculate whether, by the exercise of due care, he would have discovered the peril, and avoided the danger, had he made the examination which the rules of the company required. We think an observance of this reasonable rule would have saved him from injury. If he had stopped and looked, and then failed to discover the peril that menaced him, possibly a different case might have been presented. But this is doubtful. The exercise of proper care must have revealed the danger. We hold that this record discloses the fact that plaintiff's own negligence contributed to his injury, and the judgment and order denying the motion for a new trial must therefore be reversed, and a new trial granted.

A single question as to the admissibility of certain evidence remains to be considered. The wife of plaintiff was allowed, against the defendant's objection, to testify to exclamations of pain made by the plaintiff on waking up during the night. She said: "Well, he has more than once woke up—more than once in the night—groaning; and I asked him what was the matter." The record discloses nothing further on this point. It does not appear that she testified touching his answer to her inquiry as to what was the matter with him. We are very clearly of the opinion that this evidence was admissible, both on principle and under the great weight of the adjudications. There was no attempt to prove a narration by him of a past transaction. He was not stating that the night before he had suffered pain. He was making no communication whatever to her. It was only the involuntary expression of suffering. True, it might have been simulated, but that was a question for the jury. The evidence of the physician relating to the extent of his injuries must have rested in some degree upon statements of the plaintiff to him, and therefore what is more truly hearsay than exclamations of pain. The testimony of the medical expert may often be founded mainly upon such interested declarations of the patient, and yet its competency cannot be seriously questioned. On the other hand, the rule allowing the proof of the expression of present pain will rarely result in imposition upon juries or other triers of questions of fact. Other facts in the case will generally aid them in determining how much of real and how much of fictitious pain the expression of suffering shadows forth. We think the true rule is stated in Railroad Co. v. Newell, 104 Ind. 264-269, 3 N. E. Rep. 836: "Where, however, it becomes important to illustrate the physical or mental condition of an individual, either at the time an injury is received, or from thence to the time of an inquiry as to its severity, effect and nature, we think expressions or declarations of present existing pain or malady, whether made at the time the injury is received or subsequently to it, are admissible in evidence; [citing many authorities.] Expressions of pres-

ent existing pain, and of its locality, are exceptions to the general rule which excludes hearsay evidence. They are admitted upon the ground of necessity, as being the only means of determining whether pain or suffering is endured by another. Whether feigned or not, is a question for the jury. Such declarations and expressions are competent, regardless of the person to whom they are made." See, also, cases cited in opinion, and State v. Gedicke, 43 N. J. Law, 86; Eckles v. Bates, 26 Ala. 655; Yeatman v. Hart, 6 Humph. 374; Hangenlocher v. Railroad Co., 99 N. Y. 136, 1 N. E. Rep. 536. Reversed and new trial ordered. All concur.

HERMAN BOSS, Plaintiff and Respondent *v.* NORTHERN PACIFIC RAILROAD COMPANY, Defendant and Appellant.

Injury to Servant—Contributory Negligence—Proximate Cause—Instructions.

1. It is incumbent upon a railroad employe whose duty requires him to ride upon one of the company's trains to ride in such places as the railroad company has provided for that purpose; and, if he is injured while riding in a more dangerous position, the law will presume that his negligence contributed to such injury. But this presumption may be overcome by evidence that such employe occupied such dangerous position through no fault or negligence of his own, and not of his own free will.

2. An employe, upon entering the service of a railroad company, has the right to assume that the railroad and its appurtenances are so constructed as to render him safe in the performance of his duties, and that he will not needlessly be exposed to extraordinary risks of which he has no notice, or of which he is not chargeable with notice.

3. Such employe does not assume the risk arising from the erection and maintenance of a switch stand and target of such height, and in such position and condition, that the target will sometimes come in contact with the sides of the cars of passing trains; particularly when such employe of the company knows that the rules of the company

prohibit the erection of any such switch stand within less than six feet of the track.

4. In an action for damages upon the ground of a neglect of duty on the part of the defendant, it must appear that the neglect of duty was not only the cause, but the proximate cause, of the injury; but, to enable a defendant to shield himself behind an intervening cause, such intervening cause must be one that severs the connection of cause and effect between the negligent act and the injury.

5. Where the negligent act of one responsible party concurs with the negligent act of another responsible party in producing an indivisible injury to a blameless third party, such third party has his right of action against either of the negligent parties.

6. While the statute requires the charge of the trial judge to the jury to be exclusively in writing, yet where a party sits by and hears the trial judge give the jury parol instructions, and fails to object thereto at the time and upon that ground, he is concl usively presumed to have waived the error.

(Opinion Filed July 31, 1891. Re-hearing Denied Aug. 29, 1891.)

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

John C. Bullitt, Jr., and *Ball & Smith*, for appellant. *Taylor Crum* and *S. G. Roberts*, for respondent.

Action by Herman Boss against the Northern Pacific Railroad Company for personal injuries. Verdict and judgment for plaintiff. Defendant appeals. Affirmed.

John C. Bullitt, Jr., and Ball & Smith for appellant:

Railroad companies have the unrestricted right to put up structures on their right of way whenever and wherever they see fit, subject only to liability for such injuries as are caused by such structures to employes while engaged in their proper sphere of duty and to passengers while riding in their proper places on the cars. Gibson v. Railroad Co., 63 N. Y. 449; Randall v. Railroad Co., 109 U. S. 485; Railroad Co. v. Sentmeyer, 37 Am. Rep. 684. It is not necessary that an employe have actual knowledge of the defective structure or machinery. Bresnahan v. Railroad Co., 49 Mich. 410. In the case at bar it ap-

pears that plaintiff had passed this switch stand for fifteen or sixteen days preceding the injury. See Railroad Co. v. Stricker, 51 Md. 47, 34 Am. Rep. 291; Debit v. Railroad Co., 50 Mo. 302; Rains v. Railroad Co., 71 Mo. 164, 36 Am. Rep. 459; Clark v. Railroad Co., 49 Am. Rep. 394; Thompson on Neg., Vol. 2, p. 1008; Railroad Co. v. Austin, 40 Mich. 247. The location and condition of the switch stand in question was not the proximate cause of the injury to plaintiff. Proximate or immediate and direct damages are such as are the ordinary and natural results of the negligence, such as are usual and might have been expected; but does not include such as are the result of an accidental or an unusual combination of circumstances not to be reasonably anticipated and over which the negligent party has no control. Henry v. Railroad Co., 50 Cal. 183; Thompson on Neg., p. 1083, note 1. The defendant is not liable if there was any intervening, efficient cause of injury not put in motion by the defendant. Beach on Contr. Neg., p. 32; Addison on Torts, p. 6; Cooley on Torts, pp. 68-9, Fairbanks v. Kerr, 10 Am. Rep. 664. There must be a natural and probable sequence between the negligent act and the injury and no intervening efficient cause. Fent v. Railroad Co., 57 Ill. 349; Railroad Co. v. Pilke, 5 Dak. 444. On the proposition as to what constitutes contributory negligence appellant cites Whittaker's Smith on Neg., pp. 373, 374, 387; Beach on Contr. Neg., pp. 7, 9, 14, 15, 36; Railroad Co. v. Munger, 5 Denio 255; Railroad Co. v. Gross, 17 Wis. 428; Colgrove v. Railroad Co., 20 N. Y. 492; Simpson v. Keokuk, 34 Iowa 568; Railway Co. v. Smith, 3 S. E. Rep. 397; Railroad Co. v. Monday, 4 S. W. Rep. 782; Baumeester v. Railroad Co., 34 N. W. Rep. 414; Masser v. Railroad Co., 27 N. W. Rep. 776; Scheffer v. Railroad Co., 21 N. W. Rep. 711; May v. Railroad Co., 16 Pac. Rep. 210; Daggett v. Railroad Co., 34 Iowa 284; Mertenson v. Railroad Co. 15 N. W. Rep. 569; Railroad Co. v. Thomas, 79 Ky. 160; Railroad Co. v. Langdon, 92 Pa. St. 21. Where contributory negligence is established, the question becomes one of law and the plaintiff may be nonsuited or a judgment given for the defendant. Railroad Co. v. Houston, 95 U. S. 697; Randall v. Railroad Co., 109 U. S. 485; Schofield v. Railroad Co., 30 Minn. 484; Morrison v. Railroad Co., 59 N. Y. 302.

Taylor Crum for respondent:

The court will presume nothing in favor of the party alleging error. Carman v. Pultz, 21 N. Y. 547; People v. Whiting, 53 Cal. 420; Viele v. Railroad Co., 20 N. Y. 184. The party appealing must show from the facts that the law is necessarily in his favor. Grant v. Morse, 22 N. Y. 324; Ford v. Pearson, 15 Pac. Rep. 535. The party alleging error must show it specifically. Briant v. Trimmer, 47 N. Y. 96; Acker v. Carver, 23 Minn. 567. The presumption of law is that there was evidence to sustain every fact found. Dale v. Anderson, 27 Cal. 250; Lyon v. Lenbeck, 29 Cal. 139. Under the facts of this case, as shown in the statement, there were presented questions of fact for the determination of the jury. Railroad Co. v. Jones, 95 U. S. 441; Bank v. Guttchlick, 14 Pet. 19; Railroad Co. v. Pollard, 22 Wall. 341; Richardson v. Boston, 19 How. 263; Railroad Co. v. Stout, 17 Wall. 657; Dewire v. Railroad Co., 19 N. E. Rep. 523; Torry v. Railroad Co., 18 N. E. Rep. 213; Scanlon v. Railroad Co., 18 N. E. Rep. 209; Pidcock v. Railroad Co., 19 Pac. Rep. 191; Railroad Co. v. Boudron, 37 Am. Rep. 707; Spooner v. Railroad Co., 54 N. Y. 234; Nolan v. Railroad Co., 87 N. Y. 67; Willis v. Railroad Co., 34 N. Y. 675; Clark v. Railroad Co., 36 N. Y. 135; Colgrove v. Railroad Co., 20 N. Y. 492; Sullivan v. Railroad Co., 4 Am. St. Rep. 239; Dobieki v. Sharp, 88 N. Y. 204; Werle v. Railroad Co., 98 N. Y. 650; Ginna v. Railroad Co., 67 N. Y. 596; Railroad Co. v. Gregory, 58 Ill. 272; Railroad Co. v. Welch, 52 Ill. 183; Railroad Co. v. Russell, 33 Am. Rep. 54; Spencer v. Railroad Co., 17 Wis. 503; Barton v. Railroad Co., 14 Am. Rep. 418; Railroad Co. v. Pondrom, 2 Am. Rep. 306; Farlow v. Kelley, 108 U. S. 288; Breen v. Railroad Co., 16 N. E. Rep. 60; Dohlberg v. Railroad Co., 21 N. W. Rep. 545; Dickinson v. Railroad Co., 18 N. W. Rep. 553; Robel v. Railroad Co., 27 N. W. Rep. 305; Railroad Co. v. Rowan, 3 N. E. Rep. 629; Railroad Co. v. Irwin, 16 Pac. Rep. 150; Railroad Co. v. Johnson, 4 N. E. Rep. 383; Holden v. Railroad Co., 2 Amer. & Eng. R. Cas. 102; Nugent v. Railroad Co., 38 Id 52. A general verdict having received the sanction of the trial court must be treated as a finding of every thing necessary to sustain the general finding.

Elerick v. Braden, 15 Pac. Rep. 887. Plaintiff's care may be inferred from instincts of self preservation. John v. Railroad Co., 20 N. Y. 65. It was negligence to run defendant's train through the yard at a speed greater than six miles per hour. Corrill v. Railroad Co., 18 Am. Rep. 22; Thompson v. Railroad Co., 17 N. E. Rep. 691. As to the crowding on the platform: Railroad Co. v. Cummings, 106 U. S. 700; Clark v. Soul, 137 Mass. 380; Cone v. Railroad Co., 81 N. Y. 207; Cunningham v. Railroad Co., 7 Pac. Rep. 779; Cayzier v. Taylor, 10 Gray 274; Booth v. Railroad Co., 73 N. Y. 38.

The opinion of the court was delivered by

BARTHOLOMEW, J. On the 15th day of December, 1885, plaintiff was in the employ of defendant as a section hand, and was engaged in unloading wood in defendant's yards at Fargo. On that day, and while riding on one of defendant's trains from the round house to the depot—a distance of about one mile—plaintiff was struck by a switch signal, and knocked from the train, and injured. This action was brought to recover damages for such injury. The train on which plaintiff was riding was known as the "Jamestown accommodation." It consisted of an engine, tender, freight caboose car, and an ordinary coach. This caboose car was equipped, as it appears such cars usually are on defendant's road, with a platform and steps at each end, with a door in each end, and side doors in the front part. The front end of this car was being used as a baggage car, and the rear end as a smoking car. The end door in front was habitually locked, but there was no notice or anything to indicate that entrance could not be made at that end. Ordinarily, these cars, when in proper use on freight trains, are not locked at either end. This train regularly made a brief stop at the round house, and passage on the train was free to all parties from the round house to the depot. The section foreman of the gang in which plaintiff worked had directed the men under him who did not bring their dinners with them to ride on this train to the depot in going to dinner, and plaintiff and others of his fellow-workmen had been in the habit of so riding for a number of days. They had, however, been directed by the conductor

and brakemen to ride in the caboose car and not in the coach. On the day of the accident, plaintiff and the others were working about 500 or 600 feet from and north of the point where the train would stop. When the train whistled the men started in a run to reach the point where it would stop. Plaintiff seems to have been in front. He crossed the track to the south side in front of the engine, and passed back until he reached the front steps of the caboose car, where he climbed upon the platform. Access to the train was from the ground on either side. About the same time others of the workmen were getting on the front platform of the caboose from the north side. Plaintiff tried the door in the front end of the car, and found it locked. It does not appear that he made any effort to leave the front platform and get aboard at the rear of the car. The train started almost immediately. One of the section men who went to the rear of the caboose testifies that the train was moving when he got on. There are two parallel tracks from the round house to the depot. This train came in on the south track, but before reaching the depot it was thrown through a switch on the north track. When the train started there were so many of the section hands on the platform that plaintiff was crowded down until he sat upon the second step, with his feet resting on the lower step. As the train was thrown onto the switch he arose to his feet, he says, to enable him to hold on better. As the train passed from the switch onto the north track a sudden lurch of the car threw plaintiff to the south until his head passed the line of the outside of the car, and was struck by the target on the switch stand at that point. When struck, plaintiff was not looking to the east in the direction the train was running, but was looking to the southwest. The train was running at more than double the speed allowed by the rules of the defendant company inside the Fargo yard limits. The switch stand by which plaintiff was injured was about seven feet high, and was located four feet from the track. The target at the top extended nine inches in each direction. When the stand was erect this target would be within eight inches of a passing train. The switch stand was bent, throwing the top still nearer the train, and it had been known to come in contact with pass-

ing cars. The rule of the defendant—with which plaintiff was familiar—required all switch stands of this height to be placed not less than six feet distant from the track. Where a switch stand was required to be erected within less than six feet of the track, a low pattern was used. This switch stand had been in use for two years prior to plaintiff's injury. Defendant's road-master had notified the proper division superintendent, long prior to the injury to plaintiff, that this switch stand was too high and dangerous. Immediately after the injury to plaintiff it was removed, and the low pattern substituted.

There was a general verdict for plaintiff. The facts as recited are either uncontradicted, or supported by such evidence that the jury might fairly find them to exist. There was a motion to take the case from the jury at the close of plaintiff's testimony and repeated when the testimony was all in; but as the same points are preserved and presented under the exceptions to the instructions, and to the refusal of the court to give certain instructions asked, the motion need not be specially noticed. The negligence of defendant would seem to be established too clearly to be seriously questioned. The learned counsel for defendant contend, however, that the facts do not establish any negligence of which this plaintiff can take advantage; that the defendant had the unrestricted right to erect structures on its right of way where and when it pleased, subject only to liabilities for such injuries as might be caused by such structures to employes while engaged in their proper sphere of duty, and to passengers while riding in their proper place in the cars. As a general proposition the contention is correct. Whether at the time of the injury plaintiff be regarded as a passenger or an employe, we think he was lawfully upon the train; that he was not a trespasser. But as the case has been submitted to us on the theory that his rights were only those of an employe, and the duty and liability of the defendant to him were only such as it owed to its employes, and as that view is the more favorable to the defendant, we will accept it, in passing upon the case. The plaintiff was, then, lawfully on the train, in obedience to the orders of his foreman. He had no duty to perform on the train except to ride in such

places on the caboose car as defendant had provided for that purpose. If he failed to do so; if he occupied a more dangerous position—and the steps to a platform would be a more dangerous position—that would raise a presumption of such contributory negligence on his part as would defeat a recovery, admitting the negligence of defendant. To overcome that presumption of contributory negligence, and entitle himself to a recovery, it would be necessary for the plaintiff to establish the fact that he occupied such position through no fault or negligence of his own, and not from choice. On this point the learned trial court fully and correctly charged the jury. If plaintiff succeeded in establishing the facts as above indicated, he would then be in a position to take advantage of defendant's negligence. But it is insisted that plaintiff failed to show that he was not in this dangerous position from choice, because he failed to show that he made any effort to get on board at the rear platform after he found the front door locked. But it was the duty of the jury to consider all the circumstances. It is apparent that it required a vigorous effort on the part of the plaintiff and his fellow workmen to reach the train before it would start. Plaintiff got on board at the first available point. There was nothing to notify him that he could not gain entrance in that way. He had been in the employ of defendant for years, had been accustomed to ride in their freight caboose cars when they were in proper use on freight trains, and knew that both doors were habitually unlocked when the car was in use. He had no knowledge that the front door of this car was kept locked, and only learned that he could not gain entrance when he tried the door. The train was expected to start every moment, and did start almost instantaneously. Plaintiff was compelled to remain on the platform, or take his chances of getting on board from the ground with the train in motion. His only choice was a choice between two dangers; and whether or not, in taking the course he did, he was guilty of any negligence was a question for the jury. We cannot say that they were warranted in finding that plaintiff, at the time he was injured, was on that platform without fault on his part, and not of his own free will.

It is further urged that the risk of his being injured as he was injured was assumed by plaintiff when he entered the employ of defendant. It is beyond legal controversy that the employe, when he enters upon the service, assumes the ordinary risks incident to such service, and also the extraordinary risks of which he has notice, or of which, in the usual exercise of his faculties, he ought to have notice. It is equally well settled that an employe, upon entering the service of a railway company, has the right to assume that the railway and its appurtenances are so constructed as to render him safe in the performance of his duties, and that he will not needlessly be exposed to any extraordinary risk of which he has no notice. Railroad Co. v. Irwin, 37 Kan. 701, 16 Pac. Rep. 146; Railroad Co. v. Rowan, 104 Ind. 88, 3 N. E. Rep. 627; Railroad Co. v. Orman, 49 Tex. 342; Railroad Co. v. Swett, 45 Ill. 197; Railroad Co. v. Russell, 91 Ill. 298. Nor does he assume the risk arising from the erection of a high switch stand and signal so near the track that, at best, it clears the cars but a few inches, particularly when he knows the rules of the company forbid the erection of any such structure in such position. Pidcock v. Railroad Co., 5 Utah 612, 19 Pac. Rep. 191; Scanlon v. Railroad Co., 147 Mass. 484, 18 N. E. Rep. 209; Boss v. Railroad Co., 5 Dak. 308, 40 N. W. Rep. 590. Nor can we say that plaintiff, in the ordinary exercise of his faculties, was bound to know the condition of that switch stand. It is true that he had passed it upon this train nearly every day for two weeks; but he had no duty to perform in connection with the running of the train—nothing in any manner that would be likely to call his attention to the condition of this switch stand. Under such circumstances it would be only natural that he should pass it without notice. We do not see why he should be charged with knowledge of its condition simply because he had passed it, any more than any passenger who had passed it an equal number of times. Railroad Co. v. Irwin, *supra*, and Pidcock v. Railroad Co., *supra*. It is undisputed that plaintiff had no actual knowledge of the existence of this danger. Had he seen it, duty and self-preservation alike would have required him to avoid it, if possible. Had he known of its existence, or had he been chargeable with such

knowledge perhaps it would have been negligence on his part not to have watched for and guarded against it. But it cannot be said, as a matter of law, that plaintiff was negligent in not looking for an object of the existence of which he had no knowledge, and which he had a legal right to presume did not exist. Railroad travel is so rapid that it has frequently been held negligence for a party, while riding in the cars, to voluntarily expose his person beyond the outer line of the car. In this instance, however, the evidence tends to show that plaintiff was thrown to the south and beyond the line of the car by a sudden lurch of the train as it passed through the switch, caused, doubtless, by the improper speed at which the train was running. We cannot say as a matter of law that this exposure was the result of any negligence on plaintiff's part; and we wish to add here that the law on the subject of contributory negligence, so far as it applies to this case, was very fully and fairly stated in the charge of the learned trial court to the jury, and the evidence nowhere discloses a state of facts that would warrant the court in taking that question from the jury.

Appellant insists that its negligence in maintaining the switch stand was not the proximate cause of plaintiff's injury, and that, as the facts were undisputed, the court should have so instructed the jury as a matter of law; and in support of this contention counsel cite West Mahoney Tp. v. Watson, 116 Pa. St. 344, 9 Atl. Rep. 430, and Railroad Co. v. Trich, 117 Pa. St. 390, 11 Atl. Rep. 627. It is claimed, first, that as it appears that plaintiff was crowded down upon the lower step and into a dangerous position by his fellow workmen upon the platform, therefore the superseding or responsible negligence of a third party intervened between the negligent act of defendant and the injury. As to this point, a perusal of the cases cited at once discloses that they are not applicable to the case at bar. In the first case, action was brought against the township to recover the value of a team by reason of the negligence of the township in suffering its highways to become obstructed. An ash heap had been allowed to accumulate in the highway, which overturned plaintiff's sleigh, and the team ran away. After running some distance, they went upon the railroad track, but

were frightened off by a train, and their direction changed. After running some two miles the other way, they again went upon the track, and were killed by another engine. The court very properly held that the accident at the ash heap was not the proximate cause of the death of the horses. There was an all-sufficient subsequent intervening cause in that case. And the case in 117 Pa. St., and 11 Atl. Rep., is similar in principle. A street car was stopped to enable a passenger to get on at the rear platform. Just as the passenger reached the platform, the driver, suddenly and without notice, whipped up his horses to avoid a runaway team. The sudden start threw the passenger back on the ground, and she was injured by the runaway team. The court held that the negligence of the driver in suddenly starting the car was not the proximate cause of the injury. In this case, too, there was a subsequent intervening cause. These cases from Pennsylvania reiterate and confirm the rule first announced in that court in Railroad Co. v. Kerr, 62 Pa. St. 353, and repeated in Hoag v. Railroad Co., 85 Pa. St. 293, as follows: "The immediate, and not the remote, cause is to be considered. This maxim is not to be controlled by time or distance, but by succession of events. The question is, did the cause alleged produce its effect without another cause intervening, or was it to operate through or by means of this intervening cause?" In this case the injury—the hurt—was caused by the switch stand, and that alone. It is true that if any one of a great many circumstances that preceded that injury, including the crowding on the platform, had never occurred, plaintiff would not have been where he was, and would not have been injured; but no one of these circumstances was directly or indirectly the cause of the injury. The intervening cause, to be a shield to defendant, must be such as to actually break all connection of cause and effect between the negligent act and the injury. To be a superseding cause it must alone, and without the slightest aid from the act of defendant, produce the injury, and to be a responsible cause it must be the culpable act of a responsible party. Shear & R. Neg. §§ 31, 32, and cases cited. But the direct connection of cause and effect between the improper switch stand and the injury remains un-

impaired in this case. The utmost latitude that could be given the evidence would only warrant the conclusion that the culpable act of the fellow workmen concurred with the existing, continuing, negligent act of defendant in producing the injury. But the concurrent negligence of the fellow workmen is of no importance. Where the negligent acts of two parties concur in producing an indivisable injury, the injured party has his right of action against either. Pastene v. Adams, 49 Cal. 87; Martin v. Iron Works, 31 Minn. 407, 18 N. W. Rep. 109; Ricker v. Freeman, 50 N. H. 420; Atkinson v. Transportation Co., 60 Wis. 141, 18 N. W. Rep. 764; Railway Co. v. Salmon, 39 N. J. Law, 309.

"The breach of duty on which an action is brought must be not only the cause, but the proximate cause, of the damage to plaintiff." Under this familiar language, it is urged that the breach of duty in this case was not the proximate cause of the injury in the sense that the injury was not one that could have been naturally and reasonably anticipated as a result of such breach of duty. There is not an entire uniformity of holding upon this point. The rule most generally followed, and which we adopt, was announced in Railroad Co. v. Kellogg, 94 U. S. 469, as follows: "But it is generally held that in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of the injury, it must appear that the injury was the natural and probable consequence of the negligent or wrongful act, and that it ought to have been seen in the light of the attending circumstances. These circumstances, in a case like the present, are the strength and direction of the wind, the combustible character of the elevator, its great height, and the proximity and combustible character of the saw mills and piles of lumber." But the argument in this case is that defendant could not reasonably have foreseen or anticipated the circumstances that led up to the injury. We think this is a misconception of the rule. Shear & R. Neg. § 29, thus states the rule: "The practical solution of the question appears to us to be that a person guilty of negligence should be held responsible for all the consequences which a prudent and experienced man, fully acquainted with all

the circumstances which in fact exist, whether they could have been ascertained by reasonable diligence or not, would have thought, at the time of the negligent act, reasonably possible to follow if they had been suggested to his mind." The supreme court of Wisconsin, which fully approves the rule announced in Railroad Co. v. Kellogg, *supra*, say in Atkinson v. Transportation Co., 60 Wis. 141, 18 N. W. Rep. 764: "The circumstances which do in fact exist are to be determined by the jury from all the evidence, and, where they have determined what the circumstances were at the time, then they can with some reasonable degree of certainty determine the question whether the result could reasonably have been expected to occur in the light of such circumstances." As we have said, defendant's negligence was a continuing act. In the light of the circumstances, as the jury was warranted in finding them to exist at the time, the injury was in a high degree probable. The action of the court in refusing to take the question of proximate cause from the jury was entirely correct. What we have already said will obviate the necessity of any detailed consideration of the errors assigned upon the instructions given and refused. The charge of the court, which we deem fair in all respects to the defendant, was substantially in accord with the views here expressed. The instructions asked and refused embodied defendant's views of the propositions we have already discussed. The main charge of the court to the jury was in writing, but the court read the sections of the statutes defining the various degrees of negligence, and made some oral comments to the jury in connection therewith. All that was said by the court was taken down by the stenographer. It does not appear that it was not written out and given to the jury upon their retirement. No exception was taken at the time to the manner of giving the instructions. The statute (§ 5048, Comp. Laws), requires the instructions to be in writing. At the close of the instructions, counsel agreed in open court "that, at any time within which a stay was granted, either party might take his or its exceptions to the charge, or any part thereof;" and within the life of this stay defendant took exception to the giving of oral instructions, but not to the matter of the instructions so given.

We hold that the agreement could cover exceptions to the matter of the charge only. It is not competent for counsel to sit by and make no objections to oral instructions when given on that ground, and by agreement save their exceptions weeks later. Such a course is not fair to the court, and has the support of no adjudicated case, so far as we know. When counsel so sit by without objection, they must be held to have waived the error. Sack. Instruct. Juries, 14; Garton v. Bank, 34 Mich. 279; State v. Sipult, 17 Iowa, 575; Vanway v. State, 41 Tex. 639. Many errors are alleged upon the rulings of the court in the admission or rejection of testimony. We have examined them all, and consider them not well taken. Their reproduction here would be an unwarranted use of space. The judgment of the district court is in all things affirmed. All concur.

WALLIN, J., having been of counsel, did not sit on the hearing of this case; Judge WINCHESTER, of the Sixth district, sitting by request.

JAMES B. POWER, Plaintiff and Appellant *v.* J. D. LARABEE, Defendant and Respondent.

Taxation — Assessment — Description of Lands — Board of Equalization — Time of Meeting — Notice — Vacation of Tax Deed — Terms.

1. The plaintiff's lands were sold for the alleged taxes of 1886 to defendant, and subsequently defendant received a tax deed in due form therefor, and recorded his deed. Defendant voluntarily paid the alleged taxes on the land for the years 1837 and 1888. Such lands did not appear on the assessment roll or tax list of the county where they were located in either of said years, otherwise than as follows:

DESCRIPTION.	SECTION.	TOWNSHIP.	RANGE.
W. 2 of W. 2	7	143	57
E. 2 of E. 2	13	143	58
W. 2 of S. E.	15	138	58
N. 2 N. W.	3	139	58

—*Held*, that said attempted description of the lands is insufficient as a basis of taxation, and that no valid assessment was made or could be made on such pretended description. The description is not ex-

pressed in common language; nor are the characters and abbreviations employed such as are used by conveyances in describing real estate; nor do the people generally use such a combination of words, letters and figures in referring to or describing land. A description of real estate is essential to its assessment, and, there being no sufficient description in this case, there is no assessment, and consequently no tax.

2. The county board of the county where the lands are situated did not assemble as a board of equalization in either of the years in question on the day fixed by statute nor on the following day. *Held*, that the omission to hold a session at the time and place designated by law also operated to defeat the alleged taxes. The board of equalization cannot lawfully assemble at a time and place other than that fixed by statute. The public is not chargeable with notice of any meeting of such board except that designated in the statute. Taxpayers are invited by the law to attend at an appointed session of the board, and present to the board any grievances which they may have on account of assessments made on their property. No other opportunity for a hearing is given, and, if no session is had at the time and place prescribed, there is no chance to be heard at all. This is fatal to the tax in all cases where the law bases the tax upon an official valuation, and in terms gives the taxpayer an opportunity to be heard. Actual injury need not be shown; the law will presume an injury on grounds of public policy. The items paid by defendant at the tax sale and in subsequent years as taxes were not taxes in law, nor within the meaning of § 75, c. 28, Pol. Code (Comp. Laws, § 1640); and hence it was error to require, as the trial court did require, that said sums should be paid by plaintiff to defendant as a condition upon which the worthless tax deed would be vacated as a cloud on plaintiff's title. BARTHOLOMEW, J., dissenting.

(Opinion Filed Aug. 1, 1891. Rehearing Denied Aug. 29, 1891.)

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

J. E. Robinson and *Chas. A. Pollock*, for Appellant. *George K. Andrus* and *Edgar W. Camp*, for Respondent.

Action to quiet title. Judgment for defendant. Plaintiff appeals. Judgment modified.

J. E. Robinson and Charles A. Pollock, for appellant:

The tax sale and tax deed being confessedly void, there is no presumption of the regularity of any anterior proceeding. A tax deed loses its character as evidence when it is shown that in

any essential particular the proceedings on which it depends were irregular. Lacy v. Davis, 4 Mich. 140-157; Case v. Dean, 16 Mich. 12, 34, 37; Amberg v. Rogers, 9 Mich. 332; Grosbeck v. Sealy, 13 Mich. 414; Rayburn v. Kuhl, 10 Iowa 92; Cooper v. Shepardson, 51 Cal. 299; Bidleman v. Brook, 28 Cal. 75; Thompson v. Ware, 43 Iowa 453; Butler v. Delano, 42 Iowa 350; Williams v. Kirkland, 13 Wall. 306; French v. Edwards, 13 Wall. 514; Blackwell on Tax Titles, 83 D. Note; 2d Desty on Taxation, 961, 969; Johnson v. Elwood, 53 N. Y. 431. The assessment was void on account of there not being a proper description of the lands. Even a tax judgment is void that described land as S 2 N E 4 of a designated section, town and range. Keith v. Hayden, 26 Minn. 212; Tidd v. Rines, 26 Minn. 208. There was no board of equalization. When the statute fixes a time for the meeting of the board of review, and it fails to meet, or for return and filing of the assessment roll for inspection, and it is not filed, the proceeding becomes ineffectual. Wiley on Assessments, 224 and 154; Blackwell on Tax Titles, 131, 118, 122; French v. Adams, 13 Wall. 506. Notice and an opportunity for a hearing is indispensible. Wiley on Assessments, § 154. And see Pierre Water Works v. County of Hughes, 37 N. W. Rep. 733. There was no record of any levy of taxes. Every essential proceeding in the course of a levy of taxes must appear in some written and permanent form in the record of the bodies authorized to act upon them. Cooley on Taxation, 247; Desty on Taxation, 1087; Nosme v. White, 29 Mich. 59. There was no legal sale for the reason that the amount of taxes due, given in the notice prescribed by statute, was only stated by placing opposite the description of each tract, under the heading "amount," certain figures or numerals without anything to show what they indicated. That was clearly insufficient. Wood v. Freeman, 1 Wall. 399; Bradley v. Seaman, 30 Cal. 612; Lawrence v. Fast, 20 Ill. 338; Lane v. Bommelmann, 21 Ill. 143; Eppinger v. Kirby, 23 Ill. 469; Wiley on Assessments, § 225; Cooley on Taxation, 2d Ed. 411; People v. Savings Bank, 31 Cal. 132; Tidd v. Rines, 26 Minn. 208. The trial court found that there was no return to the sale. There must be a lawful return to support a statutory sale and convey-

ance. Desty on Taxation, 857; Upton v. Kennedy, 36 Mich. 215. An agreement or understanding between bidders at a tax sale, either express or tacit, that they shall take turns in bidding and not compete against each other, is a fraud upon the law and renders the sale void. Blackwell on Tax Titles, 111.; State v. Maxwell, 6 Wall. 276; French v. Edwards, 13 Wall. 506; Kerr v. Allen, 31 Iowa 578. In this case tender or payment is not required. Barker v. Evans, 27 Minn. 92; Dawson v. Life Insurance Co., 27 Minn. 411; Baker v. Kelly, 11 Minn. 370; Harper v. Row, 53 Cal. 238; Homestead Co. v. Railroad Co., 17 Wall. 153; Conway v. Cable, 37 Ill. 82; Philleo v. Hiles, 42 Wis. 531; 2d Desty on Taxation, 105.

George K. Andrus and Edgar W. Camp, for respondent:

A description which is insufficent to make the tax title good, may be sufficient to give the purchaser at the tax sale a lien for the sum paid. Cooper v. Jackson, 99 Ind. 566; State v. Casteel, 11 N. E. Rep. 219; Reed v. Earhart, 88 Ind. 159; Milliken v. City of Lafayette, 20 N. E. Rep. 847; Ford v. Kolb, 84 Ind. 198; Sloan v. Sewell, 81 Ind. 180. The action was in effect one in equity. Steele v. Fish, 2 Minn. 153; State v. Batchelder, 5 Minn. 223; Brand v. Wheaton, 52 Cal. 430; Leet v. Rider, 48 Cal. 623; Auld v. McAllister, 23 Pac. Rep. 165; Wygart v. Dahl, 26 Neb. 735. See also Clark v. Smith, 13 Pet. 195; Holland v. Challen, 110 U. S. 15; Lamb v. Farrell, 21 Fed. Rep. 5; Basey v. Gallager, 20 Wall. 770.

The opinion of the court was delivered by

WALLIN, J. This is an action to quiet title, brought under § 5449, Comp. Laws. The complaint alleges in effect that the plaintiff is the owner in fee-simple of certain lands described in complaint, situated in the County of Barnes; that defendant claims an interest in the land adverse to plaintiff, and asks that such adverse claim of the defendant be determined and adjudged to be void. The defendant's answer denies plaintiff's ownership and alleges ownership in himself, and as an affirmative defense states in substance that on the 3d day of October, 1887, the lands were sold to the defendant for the taxes as-

sessed upon them for the year 1886; that in pursuance of such sale the county treasurer of said county of Barnes issued a tax certificate therefor, and subsequently, to-wit, in October, 1889, said county treasurer executed and delivered a tax deed thereof to the defendant. A copy of such deed is annexed to and made a part of defendant's answer. The answer further states that defendant paid out at said tax sale as taxes and for said tax certificates, a certain sum, and subsequently, in February, 1888, defendant paid out a certain other sum as and for the taxes on said lands for the year 1887; and later, to-wit, in June, 1888, paid the taxes on the land for 1888; and that all of said sums were paid prior to the commencement of this action. Defendant further charges "that plaintiff has made no tender to the defendant of the several or diverse sums of money so paid by him for taxes as before set forth, nor has the plaintiff paid the same, as provided in § 75, c. 28, Pol. Code of this state, and prayed that the action be dismissed. Plaintiff served reply to the answer, alleging in detail certain irregularities in the tax proceedings in Barnes county for the years 1886, 1887 and 1888, viz, irregularities in the assessment, equalization, and levy of all of said taxes; also certain irregularities in the sale and return made by the treasurer in 1887, and upon which said certificates and tax deed were made and delivered, as above stated. Plaintiff claimed that by reason of the alleged irregularities set out in the reply said tax deed and all of said taxes and tax proceedings are absolutely void. The trial court found all of the alleged irregularities to be true in fact, and certain of them will be referred to hereafter. The case was tried by the court, and there were voluminous findings of fact, but it will be unnecessary to set out any of the findings except the following: "On the trial of the case the defendant abandoned the claim that by the tax sale he had become the owner in fee of the land, or had any further interest therein except a lien for the taxes which he had paid and interest." "That the tax deed set forth in the answer is a true copy of the deed made to defendant by the treasurer of Barnes county." That in the assessment roll and tax list of Barnes county for the years 1886, 1887 and 1888, said lands were only described as follows:

DESCRIPTION.	SECTION.	TOWNSHIP.	RANGE.
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—The court finds in substance that the county commissioners of Barnes county did not in either of said years meet as a board of equalization commencing on the first Monday or the first Tuesday of July, and did not meet in the year 1886 until "Thursday, the 8th day of July, 1886." The court, at the defendant's request, found the following as additional findings: "At the time of the assessment, levy, and sale for the taxes of 1886, the plaintiff was the owner in fee of the lands mentioned in the complaint." "The said lands were assessed for taxes by the proper officer in the year 1886. The plaintiff has never paid taxes on said lands for the year 1886. Said lands were sold for the delinquent taxes for the year 1886 by the proper officer on the 3d day of October, 1887, and were bid in by the defendant, or his agent, for the sum of $49.85, which was the amount of taxes, interest, penalty and costs of sale, including fifty cents for the certificate of sale." The court also found that "to protect his interest in said lands arising out of said tax sale" defendant paid the taxes, as alleged, for the years 1887 and 1888, and that none of the taxes paid by defendant have ever been repaid or tendered by the plaintiff. The trial court found the following conclusions of law: "And as a conclusion of law the court finds that the sale of said lands and the deed under which defendant claims title is void, and that the same ought to be adjudged void; and that defendant and all persons claiming under him since the commencement of this action, be barred of any right, title or interest in said land, and enjoined and perpetually restrained from asserting title thereto under said tax sale or deed; and that defendant is entitled to have and recover of plaintiff his costs and disbursements. That the plaintiff ought to pay to defendant the amount which he paid for taxes for the years 1886, 1887 and 1888, with interest thereon at 30 per cent. per annum up to the time for the issuing of tax deeds, and thereafter at 7 per cent. per annum; and that, upon

payment to defendant or into court for the use of defendant, the sum of $217.83, and the further sum of $——, the costs of defendant, to be taxed, the plaintiff should have his decree adjuging and decreeing that defendant has no right, title or interest in or to said lands or any part thereof." Upon these findings the district court entered a judgment which conforms in substance to the conclusions of law heretofore set out.

The errors assigned here are in brief that the trial court erred in its conclusions of law based on the facts contained in the findings of fact in this, that the trial court awarded judgment in favor of the plaintiff only on condition that plaintiff should advance and pay defendant's costs of suit; also the sums paid by defendant at the tax sale for the lands, and the sums paid subsequently by defendant as taxes for 1887 and 1888. At the trial defendant abandoned all claim of title to the land which he had alleged in his answer and based upon the tax sale of 1887 and the deed delivered him by the county treasurer in pursuance of such sale; and hence the trial court could not well do otherwise than find as it did, as a conclusion of law, "that the sale of said land and deed under which defendant claims title is void."

The court below does not anywhere state on what particular grounds it bases its conclusion that the tax sale and deed are void, but an examination of the findings of fact, as above set out, furnishes abundant vindication of the conclusion of law as one proper to be made in the case. We find no difficulty in reaching the conclusion from the record that none of the alleged taxes had any legal validity or inception whatever, and that consequently, the tax sale and deed were wholly inoperative as a means of transferring title to the land from the plaintiff to the defendant; and this on account of fundamental defects which go to the groundwork of the alleged taxes. While it is true that the trial court in one of its additional findings states, "said lands were assessed for taxes by the proper officer in the year 1886," yet this general conclusion of the court is practically annulled by another specific finding of fact in which the court declares in substance that said lands were only described in the assessment roll and tax list of said county in the years 1886, 1887 and 1888, in manner and form as detailed in the

finding, which finding we have already quoted. We hold that the alleged description is wholly insufficient as a description of the lands in question, or of any lands, and that it cannot be sustained as a means of identifying the lands for purposes of assessment for taxation, or for the ulterior purpose of transferring the title of the reality from the general owner to the tax title holder and his successors in interest. The alleged description is neither written out in words nor is the same expressed by characters or abreviations commonly used by conveyancers, or generally understood and used by the people at large in describing land. The description of realty placed in an assessment roll is the means of identifying or describing the land for all the subsequent steps in the process of taxation and sale, if a sale is made. The official who makes the tax list and duplicate, and the official who collects the tax, or sells and conveys the land, or certifies to its redemption from sale, are governed by the original description in the roll and are not authorized by law to change the same. It follows that the description of realty in the assessment roll in order to be legally sufficient, must be reasonably full and accurate, though it need not be technically nice and scientifically exact. This view has the support of much authority and we shall adopt it as the safer rule, and be governed by it in this case. Subject to this test, it is unnecessary to say that the pretended description in the assessment roll and lists in question were wholly insufficient. Keith v. Hayden, 26 Minn. 212, 2 N. W. Rep. 495; Williams v. Land Co., 32 Minn. 440, 21 N. W. Rep. 550; Black, Tax Titles, § 38; Cooley, Tax'n, 404. The description in the tax deed is governed by that in the assessment list. Turney v. Yeoman, 16 Ohio, 26; Kipp v. Fernhold, 37 Minn. 132, 33 N. W. Rep. 697; Bower v. O'Donnall, 29 Minn. 135, 12 N. W. Rep. 352; People v. Cone, 48 Cal. 427, also 431; People v. Mahoney, 55 Cal. 286. The lands referred to in the complaint never having been described in the assessment roll or tax list for the years 1886, 1887 and 1888, it follows necessarily and legally that no tax whatever was assessed against said lands in those years, and also follows that the treasurer of Barnes county had no authority or jurisdiction to sell the lands on account of the alleged

tax of 1886. It is axiomatic that no tax can be laid, under a statute which requires a tax to be laid upon the value, until the value is officially ascertained and declared substantially in the manner the law points out. In other words under our general revenue system there can be no tax upon any piece of land until it is assessed and valued officially, and in substantial compliance with the requirements of the statute which regulates assessments. The process of assessment as it relates to realty is pointed out by statute and is briefly as follows; *First*, the land must be described by separate tracts in lists furnished for the use of the assessor; *second*, the assessor must view the land and reach a conclusion in his own mind as to its value; *third*, the assessor is required to write out opposite each tract in the roll the value as he ascertained it to be, and, *finally*, the assessor is required to swear to the assessment thus made, and annex the proper affidavit to the roll, and then return it to the county clerk or auditor. It is obvious that the whole of this process depends vitally upon the primary act of describing the land. Without a description in writing followed by a valuation stated in writing there can be no assessment of land under the law; and, as before stated there can be no tax without a valid assessment. There can be no such thing as a parol assessment of land. The law requires a definite record, and no other evidence of the assessment is competent. Sections 4, 5, c. 28, Pol. Code, (Comp. Laws, § 1544 *et seq.*); Welty, Assessm. § 4; Black, Tax Titles, § 27. The city tax was held void by this court on the ground of an invalid assessment in Farrington v. Investment Co., 1 N. D. 102, 45 N. W. Rep. 191. See, also, Cooley, Tax'n. 339; Burroughs, Tax'n, 211.

The record also discloses another irregularity in the tax proceedings in question, which, in our opinion, is jurisdictional, and fatal to all of the alleged taxes. It appears that the board of equalization for Barnes county did not, as the law requires, in either of said years assemble on the first Monday in July, nor upon the following day. Whether it assumed to assemble at all in those years is wholly immaterial. Failing to meet at the time designated or upon the following day—a two-day session being prescribed by statute—the county board were with-

out power to assemble and hold a pretended session as a board of equalization in the same years. The law names the date of the meeting, and the public is chargeable with notice of a meeting on the day named in the law; but there is no notice to the public of any session of the board which meets neither at the time stated nor at an adjourned day named as a lawful meeting. Under the system which obtained at the time in question, our revenue laws did not afford an opportunity to the taxpayer to be heard by any officer or board touching the assessment to be made against his property, except at a public session of the county board sitting as a board of review and equalization, at the time and place named by the statute. But if no such session is had in any given year, then no opportunity is given that year to the taxpayer to be heard, and hence any so called "taxes" which may be exacted by the officers under color of law are mere arbitrary burdens upon the taxpayer. This is not "due process of law" within the meaning of any system of taxation which expressly authorizes and provides that the taxpayer may have a hearing upon the question of the valuation to be placed upon his property for taxation purposes. It is no answer to this to state that it does not appear that the plaintiff was injured by the non-assembly of the board at the time designated. From grave considerations of public policy the law will presume an injury. Sections 28, 29, Pol. Code (Comp. Laws, §§ 1584, 1585;) Black, Tax Titles, § 42; Maxwell v. Paine, 53 Mich. 30, 18 N. W. Rep. 546; Welty, Assem. § 154*a;* San Mateo Co. v. Southern Pac. R. Co., 8 Sawy. 270, 13 Fed. Rep. 722; Cooley, Tax'n (2d Ed.) p. 751; 1 Desty, Tax'n, 592; Commissioners v. Nettleton, 22 Minn. 356. In the case of Farrington v. Investment Co., 1 N. D. 102, 45 N. W. Rep. 191, a majority of this court held that where the plaintiff had appeared before the county board while it was sitting and acting as a board of equalization, and while there presented a petition to the board, and was accorded a hearing upon the subject-matter of the valuation to be placed upon certain lands of the plaintiff, the plaintiff was not in a position to come into a court of equity and pray for relief upon the ground that the session was not a lawful session. Under the circumstances existing in

that case, the court declined to go into the question of the legality of the session of the board which the plaintiff was then assailing; but no such facts exist in the case under consideration. We believe that the views which we have taken of the rights of taxpayers and the limitations which the law has placed upon the arbitrary as well as the careless conduct of officials who are charged with the responsibility of raising the revenue for public purposes are highly important and salutary, and that they have the support of the decided weight of authority. It follows from what we have said that the alleged taxes for which plaintiff's lands were sold to defendant, and those subsequently paid voluntarily by the defendant were illegal, and absolutely void, for the reasons already detailed. This fact appearing, the plaintiff was manifestly entitled, under the law and the issues made by plaintiff's reply to the answer, to have defendant's tax deed declared null and void.

Section 75, c. 28, Pol. Code (Comp. Laws, § 1640), has given the courts and the bar much trouble in their attempts to ascertain its proper construction; but of one thing we are clear, and that is that the legislature never intended by this section that mere arbitrary sums exacted by the taxing officers and miscalled "taxes," but which were never lawfully assessed against the land, should be tendered or paid as a condition precedent to bringing suit to quiet title. We think the contrary view would result in rendering the section unconstitutional, because such a construction would involve the taking of the taxpayer's property without due process of law. Black, Tax Titles, § 229; Philleo v. Hiles, 42 Wis. 527; Tierney v. Lumbering Co., 47 Wis., 248, 2 N. W. Rep. 289. It follows that it was error in the trial court to require the plaintiff to tender or pay into the court the sum of $217.84, which defendant had paid out at the tax sale of the land and as subsequent taxes thereon, as a condition upon which plaintiff could enter judgment setting aside the worthless tax deed as a cloud upon his title. It is in a broad sense a moral obligation resting upon every taxpayer to pay a fair and equal tax upon his property. Such obligation, however, does not become legal and enforceable in the courts unless the tax is a substantially legal one. Barber v. Evans, 27

Minn. 92, 6 N. W. Rep. 445. It results from what has been stated that the judgment of the court below must be so modified as to grant the relief demanded by the complaint unconditionally, plaintiff to have and recover costs and disbursements in this court. Such will be the order.

CORLISS, C. J., concurs.

BARTHOLOMEW, J. (*concurring specially.*) I concur in a modification of the judgment in this case upon the first ground stated in the opinion of my Brother Wallin; but upon the second ground I dissent. I do not understand the proceedings of board of equalization to be so far jurisdictional that their inadvertent or unavoidable failure to meet on the day specified in the statute renders the entire tax for that year void. I think the contrary is held in Mills v. Gleason, 11 Wis. 493, and Land Co. v. Crete City, 11 Neb. 344, 7 N. W. Rep. 859; and in effect in Burt v. Auditor General, 39 Mich. 126, and Mining Co. v. Auditor General, 37 Mich. 391 (concurring opinion of Judge Cooley.) It is true, as stated in San Mateo Co. v. Southern Pac. R. Co., 8 Sawy. 270, 13 Fed. Rep. 722, cited in the majority opinion, that no citizen can be deprived of his property without due process of law, and that the meeting of the board of equalization is a part of the legal process, when property is to be sold for taxes. But no citizen was ever deprived of his property by its being taxed. He is only deprived of it when it is sold. There is a wide distinction between a void tax and a void sale. Had the only defect in this case been the failure of the board of equalization to meet, as required by statute, the tax deed would have been none the less void, but, in my judgment, the tax deed holder would have been entitled to reimbursement under our statute. Modified.

CORLISS, C. J. (*concurring specially.*) In view of the importance of the questions involved, of the dissent upon one of the points discussed, and of the opinion in Bode v. Investment Co., 1 N. D. 121, 45 N. W. Rep. 197, in which I concurred, I deem it my duty to express my views in a separate opinion. Our safest guides are the landmarks of principle. The de-

cisions, it must be confessed, are in an unsatisfactory state. Falling back upon the very elements of the law, we find it is the undoubted constitutional right of the citizen to insist that at some step of the tax proceedings he shall be heard. This right to a hearing is fundamental and indestructable. Without it taxation is confiscation. The amount of the tax demanded of the citizen is an arbitrary exaction if he has had no legal right to be heard. It is true that the hearing, to constitute "due process of law," need not be the same in tax proceedings as in ordinary proceedings in courts of justice. Such a rule would cause intolerable delays. It cannot be doubted that our law providing for a hearing before the boards of equalization, and designating the time when such a hearing may be had, if desired, by the taxpayer, is not vulnerable to the constitutional objection that the property of the citizen is taken without "due process of law." Hagar v. Reclamation Dist., 111 U. S. 701, 4 Sup. Ct. Rep. 663; Davidson v. New Orleans, 96 U. S. 97; Trustees v. City of Davenport, 65 Iowa 633, 22 N. W. Rep. 904; Kelly v. City of Pittsburgh, 104 U. S. 78; Lent v. Tillson, 72 Cal. 404, 14 Pac. Rep. 71; Railroad Co. v. Commonwealth, 115 U. S. 321, 6 Sup. Ct. Rep, 57; State v. Tax Cases, 92 U. S. 575-610. But it is equally well settled, and it stands upon adamant, that there shall be a hearing of some kind before some person or body. Hagar v. Reclamation Dist., 111 U. S. 701, 4 Sup. Ct. Rep. 663; Stuart v. Palmer, 74 N. Y. 192; Thomas v. Gain, 35 Mich. 164; San Mateo v. Railroad Co., 13 Fed. Rep. 722–751; Santa Clara v. Railroad Co., 18 Fed. Rep. 385; Davidson v. New Orleans, 96 U. S. 97; Mulligan v. Smith, 59 Cal. 206; Kuntz v. Sumption, 117 Ind. 1, 19 N. E. Rep, 474; Railroad Co. v. Seneca Co. (Ohio), 1 West. Rep. 94; Trustees v. City of Davenport, 65 Iowa 633, 22 N. W. Rep. 904; Boorman v. City of Santa Barbara, 65 Cal. 313, 4 Pac. Rep. 31; Cooley, Taxation, 265–267; Investment Co. v. Parrish, 24 Fed. Rep. 197–204; Butler v. Supervisors, 26 Mich. 22; Hutson v. Protection Dist., Cal., 16 Pac. Rep. 549. Of course, if the tax is of such a nature that a hearing would be of no avail to the taxpayer—as taxes for licenses, etc.—no hearing need be provided for. Indeed, the grant of a hearing would be idle. The dis-

tinction between this class of taxation and taxation where values are to be determined is clearly stated in Hagar v. Reclamation Dist., 111 U. S. 701, 4 Sup. Ct. Rep. 663. Its importance in the examination of the authorities on this question of notice is so great as to justify a quotation of that part of the opinion in which it is expressed: "Of the different kinds of taxes which the state may impose there is a vast number of which, from their nature, no notice can be given to the taxpayer, nor would notice be of any possible advantage to him, such as poll taxes, license taxes (not dependent upon the extent of his business), and generally, specific taxes on things or persons or occupations. In such cases the legislature, in authorizing the tax, fixes its amount, and that is the end of the matter. If the tax be not paid, the property of the delinquent may be sold, and he be thus deprived of his property. Yet there can be no question that the proceeding is due process of law, as there is no inquiry into the weight of evidence or other element of a judicial nature, and nothing could be changed by hearing the taxpayer. No right of his is therefore invaded. Thus, if the tax on animals be a fixed sum per head, or on articles a fixed sum per yard or bushel or gallon, there is nothing the owner can do which can affect the amount to be collected from him. So, if a person wishes a license to do business of a particular kind or at a particular place, such as keeping a hotel or restaurant, or selling liquors, cigars or clothes, he has only to pay the amount required by the law and go into the business. There is no need in such cases for notice or hearing. So, also, if taxes are imposed in the shape of licenses for privileges, such as those on foreign corporations for doing business in the state, or on domestic corporations for franchises, if the parties desire the privilege, they have only to pay the amount required. In such cases there is no necessity for notice or hearing. The amount of the tax would not be changed by it. But where a tax is levied on property, not specifically, but according to its value, to be ascertained by assessors appointed for that purpose, upon such evidence as they may obtain, a different principle comes in. The officers, in estimating the value, act judicially, and in most of the states provision is made for the correction of errors

committed by them through boards of review or equalization, sitting at designated periods provided by law, to hear complaints respecting the justice of the assessments. The law, in prescribing the time when such complaints will be heard, gives all the notice required; and the proceeding by which the valuation is determined, though it may be followed, if the tax be not paid, by a sale of the delinquent's property, is due process of law." See, also, as stating this distinction, Santa Clara Co. v. Railroad Co., 18 Fed. Rep. 409, and Scott v. Toledo, 36 Fed. Rep. 385. This distinction renders sound the language of Justice Miller in McMillen v. Anderson, 95 U. S. 37, in which there is an intimation that no notice or hearing of any kind is necessary in case of a licensed tax. But the decision in that case stands upon the ground that the taxpayer had a right under the statute to contest the validity of the tax in a court of justice, and enjoin its enforcement. There can be no room for doubt as to the right of the citizen to a hearing where his share of the public burden is not a fixed sum, but depends upon the ratio which the value of his property bears to the value of all the assessed property within the taxing district. Deny him this right, and caprice, prejudice, or malice will hold unchecked sway in the adjustment and apportionment of this burden.

Did the failure of the board of equalization to meet at the time prescibed by law destroy the tax? Where there is a legal tax, mere irregularities will not justify the tax payer in enjoining the enforcement of the tax, or in appealing to equity for relief from the cloud overshadowing or threatening to overspread his title, unless he pay this lawful tax grounded upon the compliance with the law in those provisions which are matters of substance. But at the threshold looms up the inquiry, is there a legal tax? Our statute, in place of payment or tender requires the court to render judgment for the tax. Bode v. Investment Co., 1 N. D. 121, 45 N. W. Rep. 197; § 1643, Comp. Laws. This, however, does not obviate the necessity of this preliminary interrogatory. There must be a legal tax. A tax, without a lawful levy or a lawful assessment is an impossibilty. To say that the court must render judgment for a tax which has no legal existence is worse than nonsense. There seems to be

somewhat of a disposition on the part of some of the courts to entertain loose notions touching the question whether there is a legal tax to be paid or tendered as a condition precedent to relief in equity. Where the legislature has prescribed certain proceedings as preliminary to a valid assessment and a valid levy, the citizen, so far as they affect his constitutional rights at least, has a valuable interest in them. If these steps are disregarded, I am at a loss to know on what principle the court will indulge the presumption that what is in mere legal effect a mere arbitrary exaction is exactly commensurate with the debt the citizen owes to the public. If there was no consummated legal assessment in this case then there is no tax for which judgment should be rendered. Is it essential to the validity of an assessment that the statutory opportunity for a hearing should have been accorded to the taxpayer? On principle I am clear that it is. Until such an opportunity is given, the tax proceedings, as to the assessment, are in their incipiency. Preliminary steps have been taken to make a valid assessment, but they have not been consummated. The sovereign, through its agent, the assessor, has apprised the citizen by the assessment and its proper return to the proper office that in the apportionment of the levy his property will be valued at a certain sum. So far he has had no hearing. The law provides for this at a later date. Is the arbitrary valuation of the assessor, without the chance of contesting its accuracy, a complete assessment? If so, then the allegation of the plaintiff is a final judgment against the defendant without any hearing or opportunity to to be heard. The assessment is no more than the statement of the case of the public against the citizen as to the valuation of his property as the basis of taxation. Final judgment can be pronounced—the assessment can be regarded as final and complete—only after an opportunity for hearing has been accorded. Then, and only then, is there a legal assessment. In the interim the proceedings with respect to the assessment are unfinished. The doctrine that the taxpayer must either tender or pay or must aver that the tax is unjust, although the right to a hearing has been denied by the failure of the proper board to assemble at the proper time and place for that purpose, is sub-

versive of the statute, and takes from the citizen his constitutional right to a hearing in the very tribunal which the legislature has prescribed. The right to be heard in the tribunal so designated is as much a part of his constitutional right as the right to be heard at all. It is the only tribunal in which the hearing can be lawfully had. The legislature with full and exclusive authority over the subject (no constitutional right being violated), have constituted it for that express purpose, to the exclusion of all other tribunals. If the citizen has no constitutional right to be heard there he has no constitutional right to be heard at all. But equity assumes that this arbitrary exaction is just, and literally forces the tax payer to litigate its justice in a different tribunal, taking from him the constitutional right to contest it before the only body to which the legislature has delegated such power, and casting upon him the burden of showing that this arbitrary valuation is unfair. If he will not litigate it there, he must pay or tender the pretended tax, or under a statute like ours, judgment for this pretended tax will be rendered, or he must submit for all time to have the market value of his property impaired by a cloud upon his title. It seems to my mind anomalous to treat in equity the fiat of the assessor as everything in the constitution of a legal assessment and the right to be heard as nothing. The essence of a just and lawful assessment is not a mere valuation of property, but a valuation which has or could have been subjected to examination before a tribunal or officer upon due notice to the taxpayer. If the law had failed to provide any hearing no one would seriously urge the legality of the tax, even in equity. But it cannot matter how this constitutional right is invaded. The opportunity for a hearing is as effectually denied when the proper tribunal fails to assemble as when there is no provision in the law for a hearing.

There is nothing in the suggestion that the plaintiff should have shown that he made an attempt to be heard. The law does not require that the citizen should perform an idle ceremony to protect a constitutional right. His appearance where and when the board should have assembled would not have secured him a hearing. He was as effectually debarred of a

hearing as if the law had provided for none. Where there is no legal right to be heard under the law there is a conclusive presumption that the assessment is unjust. The law stigmatizes as arbitrary every such proceeding. But not only is this presumption not conclusive where the proper tribunal denies a hearing, but there is no such presumption at all. On the contrary, the pendulum has swung almost as far to the other side. The presumption is now in favor of the justice of this arbitrary assessment. Why, no one can explain, or even discover. The language of Judge Cooley in his great treatise on Taxation is very applicable in view of this claim that the taxpayer must litigate the question of the justice of the assessment in a tribunal different from the one which the law has constituted for that express purpose: "All these provisions being of vital importance to the taxpayer, must be regarded as compulsory, and a compliance with them as conditions precedent to any further step to charge him with a tax. When they fix a certain time for the meeting of a board of review and the board fails to meet, or a certain time for the return and filing of the assessment for inspection before the meeting of the board, and it is not filed, whereby opportunity for inspection is lost, the tax proceedings must be regarded as having failed to become effectual, because of the failure of the officers properly to follow them up, as required by law. No argument can be admissible, in such a case, which proposes the acceptance of something else as a substitute for the securities the statute has provided. To substitute anything would require legislation, and even legislation for that purpose would be of doubtful validity if it failed to provide what would fully accomplish the same purpose. Such regulations for the protection of individual rights are reasonable and they are demanded by justice and general convenience. On general principle they must be regarded as mandatory and a strict observance of their provisions held to be essential." Cooley, Tax'n, p. 267.

The language of the court in the Railroad Tax Cases, 13 Fed. Rep. 722-750, is very pertinent, and it is also a complete answer to the possible suggestion that the fact the taxpayer is required to furnish the assessor a list of his property consti-

tutes a hearing in the constitutional sense. "The presentation to the state board by the corporation of a statement of its property and of its value, which it is required to furnish, is not equivalent to a notice of the assessment made, and of an opportunity to be heard thereon. It is a preliminary proceeding, and until the assessment the corporation cannot know whether it will have good cause of complaint. No hearing upon the statement presented is allowed and when the assessment is made the matter is closed. No opportunity to correct any errors committed is provided. The presentation of the statement can no more supersede the necessity of allowing a subsequent hearing of the owners than the filing of a complaint in court can dispense with the right of the suitor and his contestant to be heard thereon. There being, then, no provision of law giving to the company notice of the action of the state board and an opportunity to be heard respecting it, is the assessment valid? Would the taking of the company's property in the enforcement of the tax levied according to the assessment be depriving it of its property without due process of law? It seems to us that there can be but one answer to these questions. There is something repugnant to all notions of justice in the doctrine that any board of men can be clothed with the power of finally determining the value of another's property, according to which it may be taxed, without offering to him an opportunity of being heard respecting the correctness of their action. * * * We cannot assent to any such doctrine. It conflicts with the great principle which lies at the foundation of all just government—that no one shall be deprived of his life, his liberty or his property without an opportunity of being heard against the proceeding."

This opinion so far has not taken notice of the fact that the board did not fail to meet at all, but only failed to meet at the time prescribed by statute. The board is required to begin its session on the first Monday of July in each year, and to hold a session of not less than two days. Comp. Laws, § 1584. The board did not meet on the first Monday, nor did it assemble on the first Tuesday. It failed to organize until the 8th of July. I can see no difference, so far as the question of "due process

of law" is concerned, whether there is a failure to meet at the time fixed by law or an omission to meet at all. It must not be lost sight of in this discussion that a mere opportunity for a hearing is not sufficient to constitute "due process of law." There must be legal notice of such opportunity for a hearing. It would be mockery to assert that the citizen had been protected because there had been afforded a general opportunity for a hearing, of which he had no legal notice. "It is not customary to provide that the taxpayer shall be heard before assessment is made, but a hearing is given afterwards, either before the assessors themselves or before some court or board of review; and of the meeting of that court or board the taxpayer must in some manner be informed, either by personal notice, which is reasonably certain to reach him, or—which is equivalent—by some general law which fixes the time and place of meeting, and of which he must take notice. Said Justice Field in the Railroad Tax Cases, 13 Fed. Rep. 722–751: "Notice is absolutely essential to the validity of the proceedings in any case. It may be given by personal citation, and in some cases it may be given by statute; but given it must be in some form." All the adjudications speak the same language. It is undoubtedly well settled that when the statute, as in this state, fixes the time of the hearing, every citizen is deemed to have sufficient notice of that fact to constitute the proceedings "due process of law" if the opportunity for hearing is not denied. In the Railroad Tax Cases the court said: "Notice to him will be deemed sufficient if the time and place of hearing be designated by statute." And in Hagar v. Reclamation Dist., 111 U. S. 701, 4 Sup. Ct. Rep. 663, the court observed "that the law in prescribing the time when such complaints will be heard gives all the notice required." See, also, Railroad Co. v. Washington Co., 3 Neb. 30–42; Black, Tax Titles, § 30; Cooley, Taxation, p. 266. But what notice had the plaintiff of this late meeting of the board of equalization? He had no personal notice; nor would that, in my judgment, have been sufficient, for the only notice which the law recognizes as legal is that which the law itself prescribes. Certainly he has no notice by virtue of the statute, for that informed him that the board would meet upon only

two days—*i. e.*, the first Monday and the first Tuesday of July—unless its session was continued by adjournment. It distinctly informed him that the board would not meet for the first time to his surprise and disadvantage at some future day. If it did not so inform him, then he must be on the alert for an indefinite time, momentarily expecting the board to assemble without authority of law and in direct defiance of its mandates. This is true of the rest of the community. A doctrine which would keep the people constantly on the watch at the place where the meeting is required to be held, with the danger of losing a hearing if they should for a moment slack their vigilance, would be intolerable. The principle which underlies the decision in Kuntz v. Sumption, 117 Ind. 1, 19 N. E. Rep. 474, is controlling. That principle is that the citizen has no notice that the board of equalization will act without the line of their authority. The board in that case increased the amount of an assessment. Their action was held to be without jurisdiction, for the reason that the law provided for no notice to the taxpayer, no notice of such action, and that the fact that he may have been notified and may have appeared before the board was entirely immaterial. The law is to be tested by what the citizen may of right demand under its provisions. Said the court: "The statute does not provide for notice to taxpayers whose taxes it is proposed to increase; and this infirmity destroys it in so far as it affects such citizens. It is not enough that in fact the taxpayer does have some notice or information, for the law must provide for notice, or else no legal notice can be given. A man may be subpœnaed as a witness in an action pending against him, but, unless he is summoned or notified as a party under some law authorizing a summons or a notice, the proceedings are utterly void. A man may be served with a written notice that a petition for a ditch is pending; but if there is no law authorizing notice it will be unavailing. A notice not authorized by law is, in legal contemplation, no notice." See, also, Stuart v. Palmer, 74 N. Y. 188. The opportunity for a hearing which the law gave, and of which plaintiff had legal notice, was never afforded to him by the board. The alleged opportunity for a hearing was one of which he had no legal or

actual notice; and, as the law provided for no notice of such a belated opportunity for a hearing, actual notice would not have made it his duty to be present at a pretended meeting of the board when it had no power to organize as a board of equalization. Even assuming actual notice, and that this would be sufficient, yet there was no opportunity for hearing, because the board of equalization never met at all. It assumed to meet at a time when its powers to initiate a session had expired. To hold that the provision of the law as to the time when the board should assemble to hear complaints is merely directory strikes at the very substance of the citizen's constitutional right to a hearing. He is denied a hearing if the board at its own pleasure or caprice may assemble at any other time without notice of its meeting, for to require him and all other citizens to dance daily attendance at the place fixed by law for the meeting, until, after the lapse of a month or two, the board should see fit to convene, would be a doctrine grotesque in its absurdity, monstrous in its injustice, and subversive alike of the spirit and of the letter of the law.

As has been before stated, a loose notion appears to prevail in some jurisdictions upon this subject of the validity of a tax in equity. It cannot be doubted that where there is a valid tax no mere irregularities in subsequent procedure will destroy it, and of course equity should insist upon or demand its payment where the citizen appeals to equity for relief. But there must be a valid tax. Equity has no power to levy a tax or make an assessment, and there is no other than the statutory procedure recognized by the law by which the share of the public burden to be borne by any citizen can be determined. It is illogical for a court of equity to decree the payment of what it terms the suitor's fair proportion of the taxes to be collected, where the proceedings by which alone that fair share can be determined are defective in those statutory requirements in which are bound up the constitutional rights of the citizen. There can be no tax in law or in equity where there are omissions of such a nature in the proceedings to create a tax, if the constitution is to continue to shield the citizen in the enjoyment of his property against arbitrary exactions under the

guise of taxation. In this age of vast encroachments upon what had long been regarded as the domain of constitutional right, it is well to uphold and enforce the guaranties of the fundamental law in the full vigor of their manifest spirit. It has been urged that this ruling will extensively affect and impede the collection of taxes throughout the state. The answer is that we cannot make laws and we dare not fritter away the sacred rights of the citizen because of an exigency. Legal principles cannot be put aside, constitutional rights must not be impaired because public officials have neglected to follow the law in those particulars affecting the substantial rights of the citizen. We dare not make a fissure in the dike, however small, to meet an exigency, however great, lest the opening in time widen to an enormous breach, and constitutional rights be overwhelmed, confounded and swept away. And here it is well to answer the argument that the rights of the public should not be at the mercy of the board of equalization. This argument, when legitimately extended would warrant the taking of property and life, without due process of law. It would uphold an assessment never made, a tax never levied, because it is in the power of the officers charged with the performance of these duties, wholly to neglect them. The truth is, that, in this sense, the public is constantly at the mercy of its servants in a multitude of cases. Protection to human life is in this sense at the mercy of courts, of jurors, and of prosecuting attorneys. Failure of duty on their part might encourage and enormously increase the number of homicides; but who would urge this as a legal reason why the accused should be condemned and executed without a trial. Omission of duty is not the equivalent of its full discharge where the citizen can point to the constitution as a guaranty that that duty shall be performed before his property shall be taken. But the people are not at the mercy of their servants. Experience has shown that the sanction of the criminal law, the force of public opinion and the general disposition of men to obey the law and discharge their duties are sufficient protection against the evils of official dereliction of duty. How stands the question upon authority? The case of Mills v. Gleason, 11 Wis. 493, is cited. The opinion shows that it does not sustain the

position that the failure of the board of equalization to meet is of no moment in equity unless the citizen avers the injustice of the tax. The court said: "It is also objected that the assessors did not meet for the purpose of hearing objections as required by the charter. We are unable to say from the evidence that this objection is true in point of fact. It appears from the evidence on both sides that the assessors did meet and the most that can be said is that it does not appear that they were all present at any one time. We shall not determine what would be the effect of an entire omission of this meeting by the assessors." In the case of Land Company v. City of Crete, 11 Neb. 344, 7 N. W. Rep. 859, the opinion merely states the conclusion of the court on this point without any attempt to justify that conclusion by reasoning or fortify it by authority. The case of Cowell v. Doub, 12 Cal. 273, is not in point. The assessment was, after it had been irregularly made, confirmed by an act of the legislature; and it was of the hearing accorded to the taxpayer by this act of which it was insisted he did not have the statutory notice. But there was nothing in the case to show that the original assessment, before it was confirmed, was not sufficiently legal to sustain a tax in equity. There was nothing to warrant the conclusion that a full opportunity for a hearing had not been accorded the taxpayer under the original proceedings. The irregularities may, for aught the report of the case discloses, have been in matters which do not affect the substantial rights of the citizen. Surely, if the tax was so valid before the passage of the confirming act that it could not be assailed in equity without payment or tender, the enactment of that statute did not detract from such validity. Mining Co. v. Auditor General, 37 Mich. 391, is not directly in point. The court expressly held that the taxpayer was not deprived of a hearing. The facts and an extract from the opinion will show this conclusively. The assessment was made by a supervisor of a township in the year 1874. In making the assessment he took the original assessment roll for the year 1873, and made in it certain changes of valuation. This was all done before the time he was required to have his roll ready for review. No other changes, with a single trifling exception, not in any man-

ner affecting the rights of the taxpayers, were made after the time fixed for a review of the assessment roll. After this time had expired, the supervisor then made up the formal assessment roll, which was an exact copy of the roll of 1873 as changed prior to the day fixed by law for review, with the unimportant exception referred to. Said the court at page 393: "For all the purposes of this review parties whose property was assessed could at the time fixed obtain as full and accurate information from the assessment roll of 1873, as altered, as they could had a copy of the same been made and then altered, or an entirely new assessment been made, without any reference whatever to the roll of 1873. The roll as changed and as exhibited at that time no longer stood for the roll of 1873 for that purpose, and as it then stood it was the roll for 1874; and the fact that it became necessary after the supervisor had reviewed and completed this roll, for him to make a literal copy thereof, to which his certificate should be attached, and which should afterwards be examined by the board of supervisors, equalized and certified to by their chairman, and which should thereafter be and remain the original roll for 1874, would not, in my opinion render such roll or the taxes afterwards assessed upon the basis thereof, illegal and void. It may frequently become necessary, on account of the imperfect manner in which the assessment is first made and the changes and corrections made during the review thereof, that a new roll or copy should be made and used thereafter as the original roll, and I should hesitate to hold, where such a necessity existed in the opinion of the supervisor, and a legible and correct copy thereof had been made and adopted and used thereafter as the assessment roll, that third parties, with no other foundation to stand upon, could with the aid of a court of equity, escape the payment of their just proportion of the public burdens." It is apparent that the court considered that the taxpayer was not deprived of his hearing; that there was exhibited to him on the day for review the assessment against him as it was afterwards transcribed; and that he could have had no greater opportunity to challenge its accuracy had it been transcribed before the day fixed for review. In Burt v.

Auditor General, 39 Mich. 126, the substantial rights of the taxpayer were not at all involved. There was no pretense that the board of equalization did not assemble at the proper time. The only defects were the failure of the board of review to attach the proper certificate and the omission of the president of the board to sign the certificate of equalization. The case of Frost v. Flick, 1 Dak. 131, 46 N. W. Rep. 508, it is true, was cited in the prevailing opinion in Bode v. Investment Co., 1 N. D. 121, 45 N. W. Rep. 197, but this particular point was not then involved and the writer feels free to express his dissent from that case in so far as by its reasoning and its conclusion it conflicts with the views here expressed. The whole trend of the opinion seems to be that the general duty of the citizen to pay some taxes warrants a court of equity in presuming an apportionment based upon an arbitrary assessment—for any assessment is arbitrary where the right to a reasonable hearing on reasonable notice is denied—represents his fair share of the taxes to be paid. But there is no mode of ascertaining that share except the statutory mode; and if in the assessment of his property he has no hearing, there is nothing to prevent such a disproportionate assessment against him as will ultimately result in a confiscation of his entire estate. What, then, becomes of the constitutional guarantee of equality in taxation? His duty is not to pay all the taxes, or to pay a penny more than his just share in view of the value of his property in connection with the value of all the property assessed. The statute has prescribed an exclusive mode of procedure by which that share shall be ascertained. There shall be notice and a hearing. These are the sacred and inalienable rights of the humblest. On what principle does any court build up a presumption that this fair share has been ascertained upon a denial of these rights which are the only safe guaranty that the assessment will be just? The presumption that any officer will do his duty cannot be allowed to obtain in such a case. This would render presumptively valid an assessment where there was no hearing provided for by the law a palpable absurdity. The decision of the Nebraska supreme court in Railroad Co. v. Washington Co., 3 Neb. 30-42, is more satisfactory than the

naked statement of a conclusion in the case reported in 11 Neb., already referred to. It is true that the proceeding was not in equity, but the language of the court shows that the failure of the board of equalization to meet at the time prescribed by law is fatal to the tax in equity as well as in law. "The time of meeting is definitely fixed by statute, and it seems clear that it was the intention of the law-givers that this time fixed by statute, should operate as notice to all persons who might feel aggrieved. Therefore, this provision of the statute cannot be regarded as directory merely or simply as a matter of form, but as a matter of substance."

On the question of description, I concur in the majority opinion; and in answer to the statement in the petition for a rehearing, that the description adopted is the customary one, I would reply that 2 is not $\frac{1}{2}$, nor 4 $\frac{1}{4}$, and no usage should be allowed to change their significance. It would be as reasonable to give effect to a custom that the points of the compass should in such cases be represented by certain figures respectively.

THOMAS ILLSTAD, Plaintiff and Respondent, *v.* EDWARD ANDERSON, Defendant and Appellant.

Reference—Findings—Appeal.

1. An order of reference referring "the action" to a referee, "with the usual powers," based upon the consent of the defendant in open court that the case be referred to take the testimony and roport, warrants the referee in making and reporting findings of fact and conclusions of law.

2. Defendant, having objected to referee making any rulings whatever, and having failed to take any exception to the action of the referee in receiving evidence over his objection, cannot raise the question whether such evidence should have been received, the objection not having been renewed before the court on application for judgment on the report, and no exceptions having been taken on such application.

3. A motion to dismiss, made at the close of plaintiff's case, is waived, unless renewed after all the evidence is in.

4. Errors not specified in bill of exceptions, where motion for a new trial is made on a bill, must be disregarded by the trial court and on appeal.

(Opinion Filed Aug. 14, 1891.)

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

A. J. O'Keefe and *O. H. Boyeson*, for appellant. *Bangs & Fisk*, for respondent.

Action by Thomas Illstad against Edward Anderson for a dissolution of a co-partnership and an accounting. Judgment for plaintiff. Defendant appealed. Affirmed.

A. J. O'Keefe, for appellant:

The order of reference should have directed the referee as to whether he was to hear and try the case or simply to take an account between the parties, and if the reference was to take the account only he had no power to pass upon its validity or upon objections made. Sutt v. Wegner, 43 N. W. Rep. 167; *in re* May, 6 N. Y. Sup. 356; Fox v. Moyer, 54 N. Y. 125; Gill v. Russell, 23 Minn. 362; Brotherton v. Brotherton, 15 N. W. Rep. 347; Scott v. Williams, 14 Ab. Pr. 70. The order of reference should direct the referee to find facts if that was the intent of the court when the order was made. Bigne v. Danie, 21 Pac. Rep. 52. If it does not his findings are void. Royal v. Baer, 17 Ind. 332; Thornburg v. Alleman, 17 Ind. 434; Board of Trustees v. Huston, 12 Ind. 276. On the other hand if the referee was appointed to hear, try and determine the action by findings, it was error if he neglected to pass upon objections taken, make rulings and allow exceptions that might afterwards be heard and considered by the court. Wallace v. Douglas, 9 S. E. Rep. 453; Leigh Stove Co. v. Colby, 24 N. E. Rep. 282; Belts v. Selcher, 46 N. W. Rep. 193; Hall v. Able, 10 N. Y. 581. He has exclusive jurisdiction to pass on exceptions just as a judge has in a case submitted to him. Railroad Co. v. Moyer, 17 Atl. Rep. 461; Woodruff v. Dickie, 31 How. Pr. 164; Hoyt v. Hoyt, 8 Bosw. 511. The referee cannot reserve his decisions on questions raised and make his rulings after the case has

been submitted. Bloss v. Morrison, 47 Hun 218. The referee was guilty of error in failing to make rulings, if he had the power to hear the case and make findings. And if he had not that power, he was then guilty of error in assuming the functions of a trial court and finding facts and conclusions of law. He was acting in one capacity or the other, and in either capacity he was guilty of error, which prejudiced the defendant and deprived him of a fair trial. Peck v. York, 47 Barb. 131; Clussman v. Merkel, 3 Bosw. 402; Brooks v. Christopher, 5 Duer 216; Smith v. Kobbe, 59 Barb. 289; Wagner v. Finch, 65 Barb. 493; Barren v. Sanford, 1 Hun 625; Lathrop v. Brainhill, 3 Hun 394; Kerslak v. Schoonmaker, 1 Hun 436. For these errors of the referee a new trial should have been granted. Beach v. Cooke, 86 Am. Dec. 260; Allen v. Way, 7 Barb. 585. On the point of the improper admission of certain evidence before the referee appellant cites Meyers v. Betts, 5 Denio 81; Monble v. Sykes, 2 So. Rep. 701; Rabette v. Orr, 3 So. Rep. 420; Clark v. Crandall, 3 Barb. 612; De la Reva v. Berreysa, 2 Cal. 195; Phelps v. Peabody, 7 Cal. 50; Goodrich v. Mayor, 5 Cal. 430; Plant v. Fleming, 20 Cal. 92. Appellant denies that a partnership existed, but granting this to be the fact the plaintiff cannot recover, because he seeks to recover profits made from the sale of intoxicating liquors, sold, so far as he is concerned, without a license, and hence illegally, and the law will not aid him in recovering. State v. Commissioners, 22 Fla. 1; Mitchell v. Scott, 62 N. H. 596. Holding that a landlord cannot recover rent for a building used for the sale of intoxicating liquors without a license. Adams v. Hackett, 59 Am. Dec. 376; Webb v. Fulchire, 40 Id 419; Lemon v. Grosskopff, 99 Id 65: O'Donnell v. Sweeney, 36 Id 336; Miller v. Davidson, 44 Id 417; Gravier v. Carroby, 36 Id 608. Where the law prohibits a business without a license, and one contracts to exercise such calling and has no license, he cannot sue upon the contract. De Well v. Lander, 39 N. W. Rep. 349. The imposition of a penalty for doing an act implies prohibition, and a contract based upon the performance of such an act is void. Solomon v. Dreschler, 4 Minn. 278; Ingersoll v. Randall, 14 Minn. 400. This action is in effect an action to recover the

profits made by him on the sale of intoxicating liquors sold without a license, and he cannot recover. Melchior v. McCarthy, 31 Wis. 252; Insurance Co. v. Harvey, 11 Wis. 394; Clemens v. Clemens, 9 Am. Rep. 709; Gregory v. Wilson, 13 Am. Rep. 451; King v. Winants, 17 Am. Rep. 11; Hardy v. Stonebraker, 31 Wis. 647; Griffith v. Wells, 17 N. Y. Com. Law 339.

Bangs & Fisk, for respondent:

Where the record admits of two interpretations, that one which will sustain the ruling of the court below will be adopted. Railroad Co. v. Cowgill, 24 Pac. Rep. 475. Appellant objected to the referee making any rulings whatever, and hence cannot predicate error upon his failure to do so. A party cannot assign that for error which he himself has invited the court to commit. State v. Beaty, 25 Mo. App. 214; Chambers v. Walker, 6 S. E. Rep. 165; Golder v. Mueller, 22 Ill. 527. Objections made before the referee and not renewed before the court, are deemed abandoned. Fox v. Moyer, 54 N. Y. 125; Gill v. Russell, 23 Minn. 362; Railroad Co. v. Moyer, 17 Atl. Rep. 461. A report of a referee and the rulings of a trial judge will be presumed to be correct until the contrary is shown. West v. Von Tuyl, 23 N. E. Rep. 450. The findings of a court or referee are conclusive as to the facts found, if there is any evidence tending to establish such facts. Runnels v. Moffat, 41 N. W. Rep. 224; Burtel v. Mathias, 24 Pac. Rep. 913; Bank v. Judson, 25 N. E. Rep. 392; Morgan v. Botsford, 46 N. W. Rep. 230; Yocum v. Haskins, 46 N. W. Rep. 1063; Holmes v. Roper, 32 N. Y. S. Rep. 470; Musgrove v. Buckley, 21 N. E. Rep. 1021; Ensign v. Ensign, 120 N. Y. 655. And this rule applies in equitable as well as legal actions. Wells v. Wells, 24 Pac. Rep. 752. The conclusions of a master in matters of fact have every reasonable presumption in their favor. Callaghan v. Myers, 9 Sup. Ct. Rep. 177; Wilson v. Railroad Co., 21 N. E. Rep. 1015. No exception will lie to the allowance of a leading question by a referee. O'Neill v. Howe, 31 N. Y. S. Rep. 272. The admission of incompetent or mere cumulative evidence is not prejudicial error where the same facts are established by competent evidence. People v. Latti-

more, 24 Pac. Rep. 1091; Campbell v. Carnahon, 13 S. W. Rep. 1098; Odom v. Woodward, 11 S. W. Rep. 925; Insurance Co. v. Hayden, 13 S. W. Rep. 585; Gas Co. v. Insurance Co., 71 Wis. 454; Columbus v. Strassuer, 25 N. E. Rep. 65; Partridge v. Ryan, 25 N. E. Rep. 627; in re Crawford, 113 N. Y. 560. It will be presumed that improper evidence was discarded from his consideration by the trial court or referee when deciding the case. Wilson v. Railroad Co., 21 N. E. Rep. 1015; Creager v. Douglass, 77 Tex. 484; Railroad Co. v. Lewis, 20 Pac. Rep. 310; State v. Denoon, 11 S. E. Rep. 1003. A judgment will not be reversed on account of errors where the whole record discloses that substantial justice has been done. State v. Finney, 25 N. E. Rep. 544. If the partnership contract was illegal, it is well settled that the illegality of a contract, if relied upon as a defense, must be pleaded. Railroad Co. v. Miller, 21 N. W. Rep. 452; Norton v. Blum, 39 Ohio St. 145; Suit v. Woodhall, 116 Mass. 547; Cardoze v. Swift, 113 Mass. 250. A defendant who has not pleaded illegality in the contract sued on, has no right to offer evidence of such illegality, or even to avail himself of it when disclosed in plaintiff's testimony, if the court does not refuse to entertain the case. Granger v. Ilsley, 2 Gray 521; Bradford v. Tinkham, 6 Gray 494; Libby v. Downey, 5 Allen 299; Goss v. Austin, 11 Allen 525. It is well settled that after the illegal contract has been executed, one party in possession of all the gains and profits resulting from the illicit traffic and transaction, will not be tolerated to interpose the objection that the business that produced the fund was in violation of law. Gilliam v. Brown, 43 Miss. 641; Farmer v. Russel, 1 B. & P. Rep. 296; Tenant v. Elliott, 1 B. & P. Rep. 3; McBlair v. Gibbs, 58 U. S. 232; Kinsman v. Parkhurst, 59 U. S. 385; Bank v. Bank, 16 Wall. 483; Brooks v. Martin, 2 Wall. 70; Pfeuffer v. Maltby, 54 Tex. 454. The relations of partners are that of trustees for each other. Each member of a partnership must account to it for everything that he receives on account thereof. When appellant received the profits of the concern he acted in a fiduciary capacity, and an implied contract arose that he would account therefor. Compiled Laws, N. D., §§ 3911, 3934, 4036, 4038; Betts v. Letcher, 46 N. W. Rep. 198.

The opinion of the court was delivered by

CORLISS, C. J. Most of the alleged errors in the case are not properly before us. The action was for dissolution of a co-partnership between plaintiff and defendant. The issues coming on for trial at a regular term, the court made an order of reference, referring the action to a referee, "with the usual powers." One of the errors assigned is the action of the referee in reporting findings of fact and conclusions of law. It is insisted that the order of reference is not broad enough to warrant the exercise by the referee of such power. The answer to this claim, is the consent of the defendant and appellant, made in open court, that the case be referred "to take testimony and report." In all cases it is the duty of the referee to report the evidence, and the word "report" in the consent is unnecessary, unless it be construed as embracing the report of findings of fact and conclusions of law. Moreover, the order in terms referred the action, *i. e.*, the whole case, and was not limited to any specific issue or fact. Where the order is upon consent, it may direct the reference to all or any of the issues. Assuming that this was an order of reference upon consent, all the issues must be regarded as having been referred, not only because the whole case is referred, but also because no particular issues are designated in the order. Laws 1889, c. 112, § 1. If it is a reference without consent the same conclusion is inevitable. It is apparent from § 2 of this act that unless the reference is limited by this order to some specific question of fact, the referee is authorized to hear and decide all the issues. On the trial by a referee, practically the same proceedings are had as on a trial before the court. The referee must not only report the evidence, but also his findings and conclusions. This is what he has done in this case, and this it was his duty to do under the statute and the order of reference and defendant's consent.

It is next insisted that the referee, if he had full authority to try the issues, erred in not ruling upon certain objections to evi-evidence offered by plaintiff and received by the referee. No exception having been taken before the referee, the defendant cannot avail himself of these objections. Section 3 of chapter 112 of Laws of 1889, requires the referee to report to the court

all exceptions taken on the hearing. This clearly contemplates that exceptions must be taken as on trials before the court to entitle a party to challege on appeal the ruling of the referee. This rule is confirmed by the general provision that "the trial by referee shall be conducted in the same manner as a trial by the court." Neither did the defendant take any exception to the referee's ruling when the case was before the court on application to confirm the referee's report, and for judgment, nor did he there renew his objections and except to the refusal of the court to sustain him in his objections to the evidence received by the referee. A still more decisive aswer to these objections is that defendant by his affirmative action has sealed his lips against urging them here. Preliminary to the hearing before the referee, the defendant himself objected "to the referee making any rulings whatever." The referee, therefore, merely followed the wishes of the litigant, who now insists that the referee erred in acceding to his request.

It is further urged that the court erred in not dismissing the action, because it is claimed that it appeared that the business in the prosecution of which were earned the profits, to recover his share of which the plaintiff instituted this action for dissolution and accounting, was the sale of intoxicating liquors, and that such business was illegal, because the plaintiff held no license authorizing him to conduct the same, the only license being issued to and held by the defendant. There are several answers to this objection. The defense is not pleaded. Therefore defendant had no right to offer evidence on the point, nor could he avail himself of evidence sustaining it, although disclosed by plaintiff's own case. Cardoze v. Swift, 113 Mass. 250. Said the court in this case: "In such an action a defendant who has not pleaded illegality in the contract sued on has no right to offer evidence of such illegality or even to avail himself of it, when disclosed in the plaintiff's testimony, if the court does not refuse to entertain the case." See, also, Railroad Co. v. Miller, 16 Neb. 661, 21 N. W. Rep. 451-453. The question is not before us for another reason. The error, if any, in denying the motion to dismiss was an error of law occuring on the trial. It should have been specified in the bill of exceptions. Comp.

Laws, § 5090, subsec. 2. No such specification having been made, it was the duty of the trial court to disregard the point on the motion for new trial, and this we must assume he did in denying the motion for new trial. A third reason for our ruling is the failure of the defendant to renew his motion to dismiss after he had finished his case, the motion having been made at the close of plaintiff's case. Bowman v. Eppinger, 1 N. D. 21, 44 N. W. Rep. 1000. There was a substantial conflict in the evidence on the question of partnership, and therefore the finding that there was a co-partnership between plaintiff and defendant will not be disturbed. The judgment is affirmed. All concur.

WALLIN, J. (*concurring.*) The opinion of the court in this case, as formulated by the chief justice meets with my approval. For reasons stated in the opinion of the court, the appellant is not in a position to avail himself of the irregularities of practice occurring at the trial. In the interests of a sound practice, however, I deem it proper to add, as my individual opinion, that the order of reference in this case is very faulty. An order sending a case to a referee "with the usual powers" is blind and confusing, and necessarily so in view of the obvious fact that the "usual powers" of a referee will depend wholly upon what the referee is to do in the particular case. The referee's powers are defined and limited, not only by the statute, but by the terms of the order of reference. In all cases the order of reference should be clear and explicit with respect to the duties required of the referee. If the court making the order desires the referee to determine the action and report findings of law and fact as well as the evidence, it should be so stated in the order; if less than this is intended, the limited nature of the referee's duties should be clearly defined by the order of submission.

SAMUEL LITTLE, Plaintiff and Respondent *v.* HELEN M. LITTLE, Defendant and Appellant.

Dissolution of Partnership—Effect of Settlement—Setting Aside Contract.

1. Referee's report examined, and the findings *held* to be supported by the testimony.

2. Where co-partners, who have had differences arising out of their joint business, voluntarily and at arms length enter into a written contract dissolving their partnership relations, and by its terms make full and detailed arrangements for a separation and a division of their joint property, and provide fully for the payment of the firm debts, *held* that, in the absence of allegation and proof to the contrary, all of such differences will be presumed to have been merged and adjusted by the contract of dissolution.

3. *Held further*, that in the absence of proper allegations and proof that such contract was obtained by duress or fraud, or was entered into under a mistake of fact, such contract will not be set aside on the sole ground that one of the parties did not read the same or know the contents before it was signed.

5. The referee made his report embracing findings, whereupon the plaintiff moved for jugment thereon. Defendant opposed the application, but did not raise the point that an order confirming the report had not been previovsly made. The trial court on such application did not direct the entry of judgment, but resubmitted the case to the referee, and, after taking additional evidence, the referee made his final report embracing his findings. Plaintiff applied for judgment based upon the final report. Defendant's counsel did not appear, but duly waived notice of such final application for judgment, and at no time in the court below raised the point that the final application for judgment was not preceded by an order confirming the report of the referee. *Held*, that defendant has waived the irregularity, if such it was, and cannot raise the point for the first time in this court.

5. Whether, under existing statutes, in cases like this, it is proper practice to procure an order confirming the referee's report before applying for judgment, not decided.

(Opinion Filed Aug. 21, 1891.)

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

A. B. Levisee (*M. A. Hildreth*, of counsel), for appellant. *Carmody & Leslie*, for respondent.

Actions by Samuel Little against Helen M. Little for the recovery of money due on dissolution of a partnership. Judgment for plaintiff. Defendant appeals. Affirmed.

A. B. Levisee (M. A. Hildreth, of counsel), for appellant:

Plaintiff could not sue for a money judgment, as there had been no settlement of the firm accounts. Bates on Partnership, Vol. 2, § 849 and cases cited; Harkell v. Adams, 7 Pick. 59; Williams v. Henshaw, 12 Pick. 378; Carey v. Bruth, 2 Caines 293; Murry v. Bogart, 14 Johns. 318; Paine v. Thatcher, 25 Wend. 450; McGilvray v. More, 23 Pac. Rep. 96. The wrongful acts of the plaintiff in this case dissolved the partnership. Story on Partnership, 272; Soloman v. Hollander, 21 N. W. Rep. 336. The rendering of the statement of account was not conclusive upon the defendant. Rehill v. McTaque, 5 Cent. Rep. 704; Collyer's Law of Partnership, § 298; 1 Story, Equity, § 523; Bates on Partnership, Vol. 2, § 959 and cases there cited. Defendant was entitled to affirmative relief without setting up a counter-claim. Hutchinson v. Paige, 29 N. W. Rep. 908; Scott v. Pinkerton, 3 Edw., Ch. 70; Boyd v. Foot, 2 Bos. 100; Johnson v. Butler, 31 N. J. Eq. 35; Atkinson v. Cosh, 79 Ill. 53.

Carmody & Leslie, for respondent:

If a settled account is impeached for errors, particular errors must be stated and proved. Lindlie on Partnership, Vol. 2, §§ 513 and 514, and cases cited. Findings of fact will not be disturbed where there is any evidence to sustain them. Where the evidence is conflicting the findings will not be disturbed. Bottsford v. Sweet, 13 N. W. Rep. 385; Rohe v. Pearson, 14 Pa. St. 297; Chambers v. Appleton, 5 N. E. Rep. 442; Bourgeois v. Shingle, 34 N. W. Rep. 96; Lyons v. Harris, 34 N. W. Rep. 864; Vittoe v. Richardson, 12 N. W. Rep. 603; Kumler v. Ferguson, 7 Minn. 442; Hardware Co. v. Wolter, 3 S. W. Rep. 865; Moore v. Ligon, 3 S. E. Rep. 572; City of Winona v. Huff, 11 Minn. 119; Carroll v. Little, 40 N. W. Rep. 582; Hardy v. Scott, 26 W. Va. 710; Boyd v. Gunnison, 14 W. Va. 1; Graham v. Graham, 21 W. Va. 698. Where the bill of ex-

ceptions does not contain all of the evidence the findings will not be disturbed. Bonton v. Grow, 1 N. W. Rep. 11; Hotel Co. v. Frederick, 1 N. W. Rep. 827; Turner v. Turner, 10 N. W. Rep. 545. Where findings are incomplete and insufficient, as defendant claims in this case, the remedy is by motion for more specific findings, and not by appeal. Foster v. Voightlander, 13 Pac. Rep. 777; State v. Graham, 36 N. W. Rep. 372; Englehart v. Rickert, 14 Minn. 140; Mast v. Lockwood, 17 N. W. Rep. 543. To obtain a review of the decision of a referee a motion for a new trial is necessary. Light v. Kennard, 7 N. W. Rep. 539; Reed v. Barnard, 40 Cal. 628.

The opinion of the court was delivered by

WALLIN, J. After the two actions entitled as above were at issue they were consolidated by an order of the district court, and, without objection, were tried as a single action in equity for an accounting between partners. In the action first begun the complaint states in effect that plaintiff and defendant entered into a co-partnership and instituted a business as retail merchants and saloon-keepers, at Caledonia, on February 15, 1886, and that said firm continued in business until September 10, 1886, at which time it is alleged that the firm dissolved by mutual consent. It is further stated in the complaint that by agreement of the parties, reduced to writing, said defendant put into said concern as a part of her capital stock certain book accounts and notes. By the terms of said agreement it was stipulated that any part of said book accounts and notes which might not be collected at the stipulated time at which the firm was to be dissolved, should be charged to the defendant. The complaint charged that when the firm dissolved (September 10, 1886), a part of said book accounts and notes of the face value of $566.79, was uncollected. Plaintiff demanded judgment for one-half of said sum, to-wit, for $283.39, with interest. Defendant answered the complaint, and admitted the formation and dissolution of the firm at the time stated in the complaint, but specially denied that the dissolution of the firm was by mutual consent, and alleges that the same was forcibly dissolved by plaintiff to her damage in the sum of $500, which defendant pleads as a

counter-claim. As a basis of the counter claim defendant charged, in effect, that at the time said firm was instituted, and for years prior thereto, defendant had been engaged in the business of a merchant at Caledonia, and had a large and profitable trade there; and further charges that plaintiff "during all the time he was a partner in said firm, did in various and sundry ways, by word of mouth, and by acts at various and sundry times, use and exert all the influence his position and opportunity gave him to alienate the former established customers and friends of this defendant, to depopularize this defendant as a merchant, and to impair, injure and ruin the good name, credit and business prospects of this defendant as a merchant," etc. The complaint in the second action was substantially the same as in the first, with the additional statement that when the firm dissolved it owned notes and book accounts to the amount of $1,128; that all the debts of the firm were paid; and that plaintiff had demanded an accounting and that defendant had refused to account. Plaintiff prayed for an accounting and for a division or sale of the assets of the firm. The answer put the material averments of the complaint in issue, except that it admits the formation and dissolution of the firm; that the debts of the firm are paid; and that the firm owns notes, book accounts, and other property subject to division. The plaintiff served a reply to each answer, putting the new matter pleaded as a counter-claim in issue. The actions being at issue and upon the trial calendar, the district court, without objection, so far as appears of record, ordered that a reference be made in the consolidated action, and directed that the same be referred to J. F. Selby, Esq., an attorney at law, to find and report the facts and the testimony herein to the trial court.

At the time and place agreed upon, the parties, represented by their counsel, appeared before the referee, and the testimony on both sides was taken and duly submitted to the referee, whereupon the referee made his report of the testimony and the findings of fact thereon. Upon the coming in of the report a motion was made for judgment thereon, whereupon the trial court, after an examination of the report, and deeming the same incomplete, and upon motion of plaintiff's counsel

therefor, directed that said action be again referred to said referee to find certain additional facts, which were specified in the order, and also to find all facts necessary to definitely settle the issues raised by the pleadings and report the same to the court. In obedience to the said last mentioned directions of the court, the referee in the presence of the parties, represented by counsel, took additional evidence, and subsequently reported all of the evidence to the court, together with certain findings based upon all the evidence adduced, which findings are as follows:

"That the defendant, Helen M. Little, under and in pursuance of said contract of co-partnership, turned over to the said firm as a part of her share of the capital stock thereof book accounts belonging to her, the said Helen M. Little, amounting to the aggregate amount of $2,829.58, and that it was agreed between both the parties that any of said book accounts that remained uncollected at the expiration of their co-partnership should be charged back to the account of the defendant. That at the expiration of the time that said partnership was to exist there remained of said book accounts which had been turned into the capital stock of said firm by defendant accounts amounting in all to the sum of $566.79, which were still uncollected, and that that sum, with interest since the date of the expiration of such time, to-wit, the 15th of February, 1888, should be charged to the account of the defendant in said firm accounts; and the plaintiff in this matter is entitled to judgment against defendant for the sum of one-half of such amount, the interest being at seven per cent. per annum, to-wit, the sum of $283.39, and interest thereon at seven per cent. per annum since February 15, 1888. That in the month of June, 1886, the plaintiff purchased lot No. 1, in block 34, in the village of Caledonia, in said county, with the store building thereon, and purchased on his own account from one Lewis Olson a considerable quantity of merchandise, amounting in all to about $1,200, which he afterwards placed in stock as a part of a store of general merchandise started by himself on his individual account on the lot and in the store building above described; and on or about the 3d day of July, 1886, the plaintiff removed from the

store of said firm, of which he was a member, a quantity of merchandise, estimated at from $700 to $1,000 in value, and placed them with his stock of merchandise in the store building on said lot No. 1; and I further find that such goods were removed openly and fairly, and with the knowledge of defendant's clerk. That on the 22d day of July, 1886, plaintiff and defendant entered into a contract in writing dissolving the co-partnership existing between them, and that the terms of such dissolution as made in such contract were unsatisfactory to the defendant, and not successfully carried out; and that, owing to the dissatisfaction of such parties with the terms of such contract of dissolution, plaintiff and defendant again, on the 10th day of September, 1886, entered into another contract of dissolution of their co-partnership business, and that they there, fairly and with a full understanding of their previous difficulties, amicably settled their affairs, and separated from their joint or partnership business. That the books and book accounts of said firm were, by the terms of said last mentioned contract of dissolution, to be, and they in fact were, turned over to one C. B. Anderson for collection, and that said Anderson was to account to each of the parties hereto for the one-half of all accounts he could so collect; that the terms of said contract were complied with by said Anderson so far as he collected any such accounts; that said books while in said Anderson's possession were held by him absolutely, and yet either of the parties could have and did have free access thereto on request. That the debts of said co-partnership have all been paid in full, and that there remains an amount of said book accounts of said firm, amounting to the sum of $1,128.58, which are still uncollected. That in the opinion of this referee, gathered from the evidence herein, and he so reports, it is expedient and best for both the parties hereto that a receiver be appointed by this court to take (and with power so to do) such uncollected book accounts, and sell the same either at private sale, or at public vendue to the highest bidder, either of the parties hereto to have the privilege of purchasing at such sale, and to pay from the proceeds of such sale the costs and expenses of such sale, including the fees of such receiver, and then pay the proceeds of such sale to the

parties hereto, one-half to each. That to collect the same without a sale of such accounts would take several months and years, and prevent the affairs of such partnership from being finally settled for several years. I further find that the dissolution of such partnership as finally consummated was fair and open, and amicably adjusted and satisfactorily executed at the time of such final contract of dissolution and determination thereof; that no fraud was practiced by either party in bringing about that settlement or dissolution, and that while an unhappy and unfriendly spirit of unfriendship existed between the parties at the time, yet I find that there was no violence of gestures or force of language used by the plaintiff sufficient in its character to set aside the settlement and dissolution of the affairs of said firm as stated. Respectfully submitted. J. F. Selby, referee."

Defendant prepared and submitted to the referee a series of proposed findings, embracing both law and fact, but the same were refused by the referee, and not found, to which refusal defendant duly excepted. Defendant also excepted to the findings of fact as reported by the referee, and specified wherein, as defendant claimed, the findings of the referee were not justified by the evidence. These specifications and exceptions were allowed, and the same, with the report and the testimony, are all properly before this court. Subsequent to the filing of the referee's final report, as above set out, the plaintiff made application to the trial court for judgment in his favor, based upon such final report. The defendant by her counsel expressly and in writing waived notice of plaintiff's said application for judgment. The trial court entered judgment in substantial conformity to the findings embodied in the report of the referee. Defendant appeals from the judgment.

We have carefully read and examined all the evidence offered in the case, and are convinced that it tends strongly to sustain and justify the findings reported by the referee. The evidence is conclusive and the decisive fact is conceded that the parties entered into a formal agreement in writing, whereby, on the 22d day of July, 1886, they agreed not only to dissolve the then existing co-partnership, but in the same instrument, undertook

fully and in detail to specify just how the assets, including the tangible effects and bills receivable, belonging to the firm, should be separated and divided between the partners; and also stipulating how the firm debts should be discharged, and also made provisions for collecting and disposing of the book accounts due the firm. It further appears that the parties, in pursuance of their agreement to dissolve, proceeded to take an account of stock, and to divide the merchandise, and place the bills receivable in the hands of the collector chosen by them; but for some reason not clearly apparent from the testimony, the terms of the original contract of dissolution were not fully carried out; and it further appears that defendant refused to carry out and complete the terms of the dissolution until she had first consulted counsel. After consulting counsel of her own selection a new contract of dissolution was entered into, which apparently covered and disposed of all the questions then pending and about which the partners were at loggerheads. This contract was in writing, signed by the parties and bears date the 20th day of September, 1886. There is neither allegation nor proof that either of the said contracts of dissolution were entered into by the defendant under any duress, mistake of fact, or that the same was procured by any deceit or fraudulent practice whatsoever. In making the contracts of dissolution the parties dealt at arms length, and the defendant in the negotiations resulting in the written agreements to dissolve the concern, was constantly aided by the advice of her husband, who was her business manager, and who brought the final contract to her, and advised her to sign the same. Under such circumstances, the defendant's claim that she was ignorant of the contents of the final agreement for dissolution is evidently unavailing as a legal defense, and such claim must be disregarded by this court, as was done by the referee and trial court. All differences complained of and which had arisen between the partners in their joint business venture had arisen and were in existence prior to the time when the parties entered into their final treaty of dissolution and settlement. All such differences, including defendant's claim for damages to her reputation as a merchant, and her claim arising

out of the alleged wrongful removal of a part of the goods from the store building are, in contemplation of the law, merged in the agreement whereby the parties, by their own voluntary and deliberate act, undertook to adjust and wind up their own business affairs, and finally settle the basis upon which the concern and its business and effects should be disposed of. The solemn agreements of the parties cannot be disregarded by the courts, and the judgment of the trial court in effect declares that the stipulations made by the partners concering their business affairs should be made effectual. We cannot disturb such a judgment.

We need consider only one other matter. It is assigned as error that "no motion was ever made by the plaintiff to confirm the report of the referee." We think this point is not available to the defendant. As has been shown, the referee made two distinct reports to the trial court, embracing both evidence and findings. Application was made for judgment in favor of the plaintiff and based upon the first report. The defendant appeared, and opposed the application, but the report discloses no objection on the ground that the report of the referee had not been previously confirmed by an order of the court. The trial court sent the case back to the referee, and, after taking additional evidence, the referee made a final report of his findings and all of the evidence. Plaintiff then made application for judgment based upon the final report. Defendant's counsel waived notice of the final application, and thus voluntarily absented himself from court at a time when he might have been heard upon any objection which he had to the entry of judgment. No exception to the action of the court in entering judgment without an order confirming the report has been saved, and we are clear that the point is waived, and cannot be raised in this court for the first time. We do not wish to be understood as holding, and do not hold, that in cases such as this the report of a referee must be confirmed by a separate order before the trial court can direct judgment to be entered upon the report. We only decide that defendant is not in a position to raise the question. We have examined the other assignments of error and we think none of them will

justify a reversal of the judgment. The judgment must be affirmed. All concur.

In the Matter of the Application of RUDOLPH EVINGSON for a Writ of *Certiorari* to WILLIAM G. DANCE, Justice of the Peace in and for the Town of Norman, in the County of Cass, and State of North Dakota.

Jurisdiction of Justice of the Peace—Entry of Judgment—Certiorari—Contradiction of Return.

1. Under our statutes justices of the peace are required to perform all their judical acts within the township and county for which they were elected. They are also required, where a case in justice court is tried by a jury, to enter judgment at once upon the verdict; and any judgment entered in disregard of either of these provisions may be avoided in any proper proceeding for that purpose.

2. The writ of *certiorari* authorized by our statute cannot be directed to an ex-official after he has parted with the record sought to be reviewed.

3. In *certiorari* proceedings, the duly authenticated transcript of the record and proceedings kept by the inferior tribunal, and returned to the superior court in obedience to the writ, imports verity, and cannot be contradicted by the parol return of the officer who made the record; and this prohibition extends to all necessary presumptions arising from the record.

(Opinion Filed Aug. 29, 1891.)

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

W. E. Dodge and *W. E. Purcell*, for appellant. *Benton & Amidon*, for respondent.

Application by Rudolph Evingson for a writ of *certiorari* to William G. Dance, a justice of the peace, to compel him to send to the district court a transcript of certain records. Writ granted and judgment entered. Respondent appeals. Judgment reversed and the court below directed to quash the writ.

W. E. Dodge and W. E. Purcell, for appellant:

The writ of *certiorari* will be granted only where there is no writ of error or appeal, nor, in the judgment of the court, any

other plain, speedy and adequate remedy. People v. Betts, 55 N. Y. 600; Sundberg v. District Court, 16 N. W. Rep. 724; Fogg v. Parker, 11 Iowa 18; School District v. District Court, 48 Iowa 182; Duggen v. McGruder, 12 Amer. Dec. 527: Commonwealth v. McAlister, 26 Amer. Dec. 70. The acts complained of in the petition are purely ministerial and could not operate to divest the court of jurisdiction or destroy the verdict which was duly entered, and the docketing of which was equivalent to the entry of judgment. Lynch v. Kelly, 41 Col. 232; Overhall v. Pero, 7 Mich. 316. The return to the original writ discloses a perfect docket record, correctly entered at the proper time and place, and that record must control and cannot be contradicted or impeached by the return of the justice, or his predecessor. Weaver v. Lammon, 28 N. W. Rep. 905; Mudge v. Yaple, 25 N. W. Rep. 298; Galloway v. Corbitt, 52 Mich. 460; Hauser v. Wisconsin, 33 Wis. 678; Goodnough Horse Shoe Co. v. Rhode Island Co., 95 U. S. 19; Harris v. Barber, 129 U. S. 366; National Tube Works Co. v. City of Chamberlain, 5 Dak. 54.

Benton & Amidon, for respondent:

By failure to render and enter judgment at once upon receiving the verdict of the jury, the justice lost jurisdiction of the action, and the judgment was an absolute nullity. Watson v. Davis, 19 Wend. 371; Sibley v. Howard, 3 Denio 72; Barrian v. Olmstead, 4 E. D. Smith 279; Wiseman v. Railroad Co., 1 Hilt. 300; Gillian v. Spratt, 41 How. 36; Gillingham v. Jenkins, 40 Hun 594; Saunders v. Tioga Manufacturing Co., 27 Mich. 520; Brady v. Tabor, 29 Mich. 199; McNamara v. Spees, 25 Wis. 539; Hull v. Malony, 14 N. W. Rep. 374; Guthrie v. Humphrey, 7 Iowa 33. The failure to enter the judgment at once upon receiving the verdict operated as a discontinuance of the action. Watson v. Davis, 19 Wend. 371; Bloomer v. Merrill, 29 How. 262. The judgment of the justice was an absolute nullity because upon receiving the verdict of the jury he adjourned his court indefinitely, without specifying any time or place at which the court would sit for further proceeding in the case. Roberts v.

Warren, 3 Wis. 736; Brown v. Kellogg, 17 Wis. 475; Campbell v. Bacon, 20 Wis. 639; Grace v. Mitchell, 31 Wis. 533; Bramstead v. Ward, 44 Wis. 591. The judgment of the justice was void because it was rendered and the costs taxed in the absence of the defendants, and without any notice to them, at a private office, distant from the place at which the case was tried. Clark v. Reese, 5 N. J. Law 487. The judgment of the justice was an absolute nullity because it was rendered and entered by him while outside of his territorial jurisdiction. State ex rel. v. Marvin, 3 N. W. Rep. 991; Block v. Henderson, 3 Law. Rep. 325; Phillips v. Thralls, 26 Kan. 790. The judgment of the justice was void because illegal costs were taxed and included in the same. Stokes v. Kerr, 11 Wis. 407. The judgment in this case being an absolute nullity would not support an appeal. Guthrie v. Humphrey, 7 Iowa 23; Gillingham v. Jenkins, 40 Hun 594; Harrington v. State, 50 Wis. 68; May v. Dooley, 59 Ind. 287; Morton v. Sawyer, 59 Ind. 587; Harrison v. Sager, 27 Mich. 476. The court of review is not limited to the technical record of the justice, but has authority to require the justice to certify to it any fact or evidence which is necessary to the court of review in passing upon the question of jurisdiction. Blair v. Hamilton, 32 Cal. 50; Whitney v. Board of Delegates, 14 Cal. 550. The district court properly issued the second writ of *certiorari* to A. W. Kuhn, notwithstanding the fact that at the time he had gone out of office and turned over the records to his successor. Harris v. Whitney, 6 How. Pr. 175; Conover v. Devlin, 15 How. Pr. 470.

The opinion of the court was delivered by

BARTHOLOMEW, J. The facts giving rise to this case, briefly stated, are as follows: One A. W. Kuhn was justice of the peace in Norman township, Cass county. An action, properly brought on for trial before said justice and a jury on January 3, 1890, at a point in said township agreed upon by the parties thereto, and in which the petitioner in this case was one of the defendants, resulted in a judgment against the defendants. On March 22, 1890, the petitioner obtained from the judge of the district court of Cass county a writ of *certiorari* to review said

judgment. In the interim the official term of said Kuhn had expired and his docket had passed to the possession of his successor, one William G. Dance. The writ was directed to Justice Dance, requiring him to send up a transcript of the records and proceedings in the case and of all the pleadings and papers on file in his office relating thereto. The return of this officer to the writ showed a complete and legal judgment. Every entry which the law required should be made had been made. We do not understand that this is questioned. At the end of the formal judgment and preceding the signature of the justice, were the words, "Dated at Kindred, Cass county, N. D., January 3rd, 1890." Kindred is a village in Norman township. When this return was in, petitioner applied for and obtained a supplemental writ, directed to Ex-Justice Kuhn, requiring him to return a full "statement" of all his proceedings in said action. This supplemental writ was issued upon an affidavit tending to show that the statements in the record were in fact false. When the response of Mr. Kuhn to the supplemental writ was received, it stated that when the verdict of the jury was returned he adjourned court, without fixing time or place of further meeting, and took his docket and went to the city of Wahpeton, in Richland county, where on January 5, 1890, the judgment was entered and signed. If the statements contained in the return of Ex-Justice Kuhn be true, he lost jurisdiction of the case when he adjourned as stated, and all his subsequent acts were without authority. Our statute—§ 6104, Comp. Laws—requires the justice, when a trial is by jury, to enter judgment at once in accordance with the verdict; and by § 6109 this judgment must include the costs allowed by law to the prevailing party. These provisions are mandatory. Hull v. Mallory, 56 Wis. 355, 14 N. W. Rep. 374; McNamara v. Spees, 25 Wis. 539; Brady v. Taber, 29 Mich. 199. Nor could Justice Kuhn legally enter judgment or tax costs or exercise any other judicial function outside the township and county for which he was elected. Section 6041, Comp. Laws, requires justices of the peace to keep their offices and hold their courts at some place within such county and township; and for a construction of similar provisions, see State v. Marvin, 26 Minn.

323, 3 N. W. Rep. 991; Phillips v. Thralls. 26 Kan. 780. But when the return of Ex-Justice Kuhn was received, the defendant moved the court to quash the supplemental writ and return upon the following grounds, among others: *First*, that the writ of *certiorari* cannot be directed to an ex-official after he has parted with the record that is sought to be reviewed; *second*, that a parol return made by an ex-official is not competent to contradict the record kept by him at the time of the transactions. This attack was unsuccessful in the district court, and the defendant brings the questions to this court by appeal.

The points above specified were well taken, and the motion should have been sustained. To sustain the position that the writ of *certiorari* may be directed to an ex-officer after he has parted with the record respondent relies upon Harris v. Whitney, 6 How. Pr. 175, and Conover v. Devlin, 15 How. Pr. 470. The cases do not go far enough. There is no allusion to the real point here. Those cases do hold that the writ may run to an ex-officer, but there is no suggestion that such ex-officer was not in each of those cases in possession of the record to be reviewed. On the contrary, in Conover v. Devlin, the writ directed the ex-officer "to certify to this court the proceedings had before him in this matter *and the record thereof*" (the italics are ours), thus clearly showing that such ex-officer had the record in his possession. And to support the position that the writ was properly directed the court quote the following from Bac. Abr. "*Certiorari*," F: "If the person who ought to certify a record, as a justice of the peace who hath taken a recognizance, or a judge of *nisi prius* who hath taken a verdict, or a coroner who hath taken an inquest, die with the record in his custody, the *certiorari* may go to his executor." Certainly that authority would never be cited to show that the writ could run to one not in possession of the record. Neither can it be said from what appears in the case that the party to whom the writ was directed was not in the possession of the record in Harris v. Whitney. There was in that case no motion to quash the return, but it was claimed that the return was a nullity on the authority of Peck v. Foote, 4 How. Pr. 425, where the court held that the return was an official act, and could only be made

by an officer. The case of Harris v. Whitney overrules the case in 4 How. Pr., and holds that the return may be made by an ex-officer—a holding that would be generally followed to-day, even as to the common law writ, if such ex-officer still retained the record to be reviewed. It is true, however, that the return made by the ex-officer in Harris v. Whitney was of matter not of record. So far as any report shows, there was no transcript in the return; certainly there was nothing in the return to contradict the record made below. But how far short this case falls of being an authority under our statute and in this state will become clear when we remember that the court upheld the subject-matter of that return upon the theory—and expressly so state—that it was competent for an ex-officer to make his return by affidavit; and that, if such ex-officer died before return made, the case could be heard on the affidavits of bystanders, and that each party could prepare such affidavits and serve on opposite party; thus clearly showing that in the judgment of the court, under the statute then governing them, an issue of fact might be determined by the superior court on *certiorari*. The authorities hereafter cited will show that such a proceeding is unknown under the common law writ. Our statute seems conclusive upon the point that the writ cannot run to an ex-officer who has parted with the record. Section 5509, Comp. Laws, reads: "The writ may be directed to the inferior court, tribunal, board, or officer, or to any other person having the custody of the records or proceedings to be certified." It is only when such "other person" has the custody of the record or proceedings that the writ can be directed to him. Again, § 5510 reads: "The writ of *certiorari* shall command the party to whom it is directed to certify fully to the court issuing the writ, at a specified time and place, and annex to the writ a transcript of the record and proceedings, describing or referring to them with convenient certainty, that the same may be reviewed by the court; and requiring the party in the meantime to desist from further proceedings in the matter to be reviewed." What does the statute mean by a transcript? Webster defines it: "That which has been transcribed; a writing or composition consisting of the same words as the original; a

written copy." There can be no transcript of that which never had a prior existence. How, under that statute, can a matter resting purely in the memory of an ex-justice, and by him reduced to writing for the first time after the writ is served upon him, have any standing in court as a return to a writ of *certiorari*? But, more, the very definition and office of the common law writ preclude its running to any one who has not possession of the record to be reviewed. In Bac. Abr. it is thus defined: "A *certiorari* is an original writ, issuing out of chancery or the king's bench, directed to the judges or officers of inferior courts, commanding them to return the records of a cause depending before them, to the end that the party may have the more sure and speedy justice before him or such other justices as he shall assign to hear the cause." The substance of this definition has never been departed from except where the statute has broadened the scope of the writ: "In Donahue v. Will Co., 100 Ill. 94, it is said: "It [the writ of *certiorari*] requires no return of the evidence or certificate of facts outside the record, and the trial must be had upon the record alone." Again, from the same court: "The common law writ of *certiorari* simply brings before the court for inspection the record of the inferior tribunal or body, and its judgment affects the validity of the record alone—that is, determines that it is valid or invalid." Hyslop v. French, 99 Ill. 171. If only the record can be returned or considered, then only the custodian of the record can make return. In Iron Co. v. Schubel, 29 Wis. 444, it is held that the party who has the custody of the record, and he alone, can make return to the writ. Wood, Mand. p. 173, thus states the rule: "It [the writ of *certiorari*] is addressed to all the persons whose return is necessarily to enable the court to determine the regularity or validity of the proceedings of the officer or tribunal sought to be reviewed, and the fact that the person is out of office is no objection if he has the custody of the record." In addition, on this point, see State v. City of Fond du Lac, 42 Wis. 287; Crawford v. Township Board, 22 Mich. 405; People v. Supervisors, 1 Hill, 195; People v. Commissioners, 30 N. Y. 72; State v. Noonan, 24 Minn. 125; Wadsworth v. Sibley, 38 Wis. 486; Roberts v. Com-

missioners, 24 Mich. 182; People v. Hill, 65 Barb. 171; Farmington River Water Power Co. v. County Commissioners, 112 Mass. 206; Com. v. Winthrop, 10 Mass. 177; Rutland v. Commissioners, 20 Pick. 71.

Upon the theory that the supplemental return contradicts the record entries, and to show the competency of such return for that purpose the case of Blair v. Hamilton, 32 Cal. 50, is relied upon by respondent. That case is based upon Whitney v. Board, 14 Cal. 479, and Lowe v. Alexander, 15 Cal. 300. No other cases are cited. The California statute is identical with our own, so far as the scope of the writ is concerned, though their practice act gives a wider range of investigation under the writ than we have; but that is immaterial. But these cases are hardly authority for the position. In Whitney v. Board and Blair v. Hamilton it was held that the superior court had the right to have before it the evidence on which the inferior tribunal based the conclusion that it had jurisdiction, and that, where this evidence did not establish jurisdiction as matter of law, the action of the inferior tribunal could be set aside. No effort was made in either of those cases to contradict any statement of fact contained in the record by matter resting in parol. In Lowe v. Alexander there was no question on *certiorari* before the court. An incidental reference was made to the holding in the Whitney case. The learned judge who wrote the opinion in the Whitney case used this language, at page 500: "The provisions of our statute are merely in affirmance of the common law. The nature and effect of the writ remains unchanged. Its functions are neither enlarged nor diminished, and the rules and principles which govern its operation are still the same." Our statute being identical with that of California, of course all the decisions under the common law writ should have proper weight in this state. Many of the cases already cited announce in positive terms that the reviewing court can consider only the record made by the inferior tribunal, which is simply declaring in another form that the record cannot be contradicted. This is specially true of the cases cited from Illinois and Massachusetts. The point is emphasized that the record cannot be contradicted, but the case must be decided

upon an inspection of the record. In State v. Kemen, 61 Wis. 494, 21 N. W. Rep. 530, it is said: "Upon a writ of *certiorari* nothing can be inquired into except what appears of record in the inferior court or body, and upon the return no parol testimony is allowed to establish any issue made by the return to the allegations contained in the petition for the writ." Weaver v. Lammon, 62 Mich. 366, 28 N. W. Rep. 905, was *certiorari* to a justice of the peace. He made return of a transcript of the record, and also of certain matters not of record, and these matters contradicted the record. Said the court: "The judgment as it appears entered in the docket must control. The record of his judgment in his docket cannot be contradicted by his return to the writ." That case cannot be distinguished in principle from this case, except that the return of the extraneous matter was an official act of the justice before his term expired. Miller v. McCullogh, 21 Ark. 426, was an attack by *certiorari* on a justice court judgment. The petition for the writ alleged that the defendant was not served with process in the proper township. The transcript sent up by the justice in obedience to the writ showed service in the proper township, but the defendant in the *certiorari* proceeding admitted in open court that service was not made in the township stated in the return. Held, that on *certiorari* the record was conclusive even as against such admission. See, also, Prall v. Waldron, 2 N. J. Law, 135; Inhabitants, etc., v. Commissioners, 5 Allen 13; Cassidy v. Mellerick, 52 Wis. 379, 9 N. W. Rep. 165. It is seldom that a case can be cited so entirely in point to the matter under discussion as is this last case from Wisconsin. That case was *certiorari* to a justice of the peace. There had been an adjournment in the case, and it was claimed that the justice failed, prior to such adjournment, or while the parties were present, to enter in his docket any place to which said cause was adjourned, but that at some subsequent time he had added to the docket entry the following words: "At my office in the town of Poysippi. S. B. HALLECK, Justice of the Peace." It was also claimed that on the adjourned day the case was not called at the office of the justice, but at a town hall some miles distant. The justice was required to make a return as to these

allegations, and his return showed the allegations to be true; but the record certified up in obedience to the writ showed the quoted words regularly entered in connection with the time of adjournment. The court, after a review of the authorities, say: "These decisions clearly indicate that in reviewing a judgment of a justice court upon a common law writ of *certiorari*, the record imports verity notwithstanding the statements of the justice to the contrary, even upon matters of jurisdiction. The cases also dispose of the question as to the place of calling the suit at the time to which it was adjourned. Upon such a writ it must be conclusively presumed that it was called at his office. To allow the return to have any effect as against the record and the presumptions arising from it would be to authorize issues of fact as to what did or did not occur." To our minds the conclusion thus reached is unavoidable on principle. To permit the record to be impeached by the recollections of the justice is, in effect, contradicting the return by parol evidence; and there is such an avalanche of authority against that proceeding that no one would claim that it could be done. If the supplemental return was properly received in this case, then we are reduced to this position: When Justice Dance certified the record in obedience to the writ, had the petitioner sought to bring in Ex-Justice Kuhn, and show by his affidavit or his oral testimony in open court that the statements in the record were untrue, such a course would not have been tolerated for a moment. But Mr. Kuhn, a private citizen, is allowed to make an unsworn statement out of court, dignify it with the name of a "return," and by the magic of that name the statement is powerful enough to scatter a record which the same matter, coming from the same party under the solemnity of an oath, would be powerless to touch. Further, the statute makes the transcript *prima facie* evidence of all the facts therein stated. The supplemental return contradicts the transcript. The transcript is entitled to as much weight as the unsworn statement of a private citizen. Suppose the truth of that statement be questioned, how is a court to reach a decision? No evidence can be introduced to fortify or defeat either the transcript or the statement. By what instrumentality is the court to solve the

dilemma? By the allowance of the supplemental return an issue of fact would be formed in a proceeding where the trial of an issue of fact is postively prohibited by law. It is true that in nearly all the states there now exists some form of statutory writ of *certiorari* broader in its scope and more flexible in its operation than the common law writ to which we are confined.

It is urged upon us, however, that the return to the supplemental writ does not, in fact, contradict the record of the justice as the statute requires it to be kept; that the statute nowhere requires the justise to enter the time or place of entering judgment; and that the words, "Dated at Kindred, Cass county, N. D., January 3rd, 1890," not being required by statute, form no part of the record proper, and hence can be contradicted by parol. It is true that entry is not specially enjoined. We may erase it, and still the difficulty is not removed, because the facts stated in that entry are necessarily presumed from what the law does require to be made matter of record. In every case in justice court when all the entries that the law requires to be made are made (and there is no claim that the transcript as returned in this case does not show all the entries required by statute), the record must necessarily show a valid judgment; otherwise a judgment of a justice of the peace could not be proven by the docket or a transcript thereof. But, as we have already seen, the judgment in order to be valid, must be entered at once on the return of the verdict, and the justice must make the entry while in the proper township and county. Hence, in this case, with the quoted entry erased, we must presume from the record that the judgment was entered on January 3, 1890, in Norman Township, Cass county, N. D.; otherwise we would have a judgment containing every entry that the statute requires, yet void on its face. To allow the necessary presumptions arising from a record to be contradicted by parol would be just as fatal to the record in every case as to allow the express words of the record to be contradicted. In Cassidy v. Millerick, *supra*, the justice stated that he called the case at the town hall three miles from his office, but the court said: "Upon such a writ [*certiorari*] it must be conclusively pre-

sumed that it was called at his office. To allow the return to have any effect as against the record and the presumptions arising from it would be to authorize issues of fact as to what did or did not occur." The evil that would result in cases of this character from holding that the record imports verity is far less than the evil that would result from permitting court records to be frittered away by the memory of man. Nor do we think the petitioner was without remedy in this case; but that question, while important, is not controlling. It often happens that a party is without remedy except against the offending official. It was well said in Cassidy v. Millerick: "The question is not whether the defendant had a remedy, but was he entitled to the one he sought in this writ?" For the reasons above stated the district court is directed to reverse its judgment, and quash the supplemental writ and the return thereto. All concur.

CORLISS, C. J. I concur on the ground that the record of the case showed that the judgment was entered at the proper time and place, and that this record connot be overthrown by the parol return. There can be no stronger presumption that an officer will make a false record than that he will make a false return. The issue between the record and the return cannot be litigated; and as one or the other must prevail, it is consonant with sound principle to give verity to the record.

THE FIRST NATIONAL BANK, of Fargo, Plaintiff and Appellant, *v.* MATILDA M. ROBERTS and THOMAS W. HANSON and GEORGE E. OSGOOD, Co-Partners as HANSON & OSGOOD, Defendants and Respondents.

Payment — Application — Notice — Pleading — Weight of Evidence.

1 Evidence *held* sufficient to sustain verdict of payment.

2. Allegation of payment in answer upon information and belief *held* sufficient.

3. It is not necessary that a debtor should direct application of payment at the precise time the money is paid. A direction some time

prior to such payment, but not changed at or before such payment, is a manifestation at the time of the intention or desire of the debtor as to the application of such payment, within the meaning of § 3457, Comp. Laws.

4. A different application by the creditor will not bind the debtor, who has no knowledge thereof; and the delivery by the former to the latter of a roll of notes of the latter, which does not include the note which the debtor directed should be paid out of the money received by the creditor does not constitute constructive notice of the creditor's different application of the payment, where such delivery is accompanied by a statement naturally inducing the belief that the debtor's direction has been obeyed.

(Opinion filed Aug. 29, 1891. Re-hearing denied Sept. 25, 1891.)

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

Stone, Newman & Resser, for appellant. *Benton & Amidon, Ball & Smith*, and *M. A. Hildreth*, for respondents.

Action by the First National Bank, of Fargo, against Matilda M. Roberts and others on a promissory note. Judgment for defendants. Plaintiff appeals. Affirmed.

Stone, Newman & Resser, for appellant.

The answer of the defendant Roberts was frivolous and judgment should have been rendered against her on application. San Francisco Gas Co. v. San Francisco, 9 Cal. 453; Humphrey v. McCall, 9 Cal. 59; Brown v. Scott, 25 Cal. 190; Wing v. Dugan, 8 Bush 583; Shearman v. Mills, 1 Ab. Pr. 187; Bliss on Code Pleading, § 326. The pleader must allege positively that which is presumptively within his knowledge or which he has the means of ascertaining definitely. Stacy v. Bennett, 18 N. W. Rep. 26; Morton v. Jackson, 2 Minn. 219; Smalley v. Isaacson, 42 N. W. Rep. 352. The main question involved is, does the record show the note in suit to have been paid? The request of defendant's agent that the note be paid out of the proceeds of a certain loan, if made as claimed, was not such a direction as would, under the co le, bind plaintiff; but assuming even that such directions were sufficient and had not been changed, the action of defendant Roberts in receiving from plaintiff the

notes paid by the loan and retaining them, without complaint or objection for more than two years, and for more than one year after she admits knowledge that the note in suit was not among them, and never claiming to plaintiff until the trial of this action that the loan was not properly applied, was a ratification of the application made by plaintiff of the money received from that loan. Cardinele v. O'Dowd, 43 Cal. 586; McLean v. Hunsicker, 30 La. Ann., Part 2, 1225; Penn. Coal Co. v. Blake, 85 N. Y. 226; Flarsheim v. Brestrup, 45 N. W. Rep. 438; Shaw v. Bank, 16 Ala. 708; Munger on App. of Payments, 63; Cox v. Wall, 11 S. E. Rep. 137. On the point that Hanson & Osgood were principal debtors and their obligation original and not collateral, counsel cite: Brown v. Curtis, 2 N. Y. 225; Pitts v. Congdon, 2 N. Y. 352; Cardell v. McNeil, 21 N. Y. 336; Milks v. Rich, 80 N. Y. 269; Sheldon v. Butler, 24 Minn. 513; Johnson v. Gilbert, 4 Hill 178; Durham v. Manlow, 2 N. Y. 533; Nichols v. Allen 22 Minn. 283.

Benton and Amidon, for respondents:

The defendants had a right to allege payment of the note upon information and belief. Bennett v. Leeds Manufacturing Co., 110 N. Y. 150; Cumins v. Lawrence Co., 46 N. W. Rep. 182. The request of Charles A. Roberts that the note be paid out of the Erskine loan was a sufficient direction to satisfy the statute. Went v. Ross, 33 Cal. 650; Clark v. Scott, 45 Cal. 56. To constitute ratification the acts set up for that purpose must have been done with full knowledge of the material facts. Dean v. Bassett, 57 Cal. 640; Owings v. Hull, 9 Pet. 607, 629; Bennecke v. Insurance Co., 105 U. S. 355; Seymour v. Wickoff, 10 N. Y. 213. On the question whether the defendants Hanson & Osgood are guarantors or principal debtors, with respect to the note in question: Leonard v. Vredenburg, 7 Johns. 29; Mallory v. Gillett, 21 N. Y. 412; White v. Rintoul, 108 N. Y. 222; Van Brunt v. Day, 81 N. Y. 251; Irons v. Bank, 36 Fed. Rep. 843; Humphreys v. Hayes, 94 N. Y. 594; Fuller v. Tomlinson, 12 N. W. Rep. 127; Smith v. Sheldon, 35 Mich. 4—.

The opinion of the court was delivered by

CORLISS, C. J. The defendants having obtained judgment below, the plaintiff appeals. The note sued upon was executed by defendant Roberts, and the payment thereof was guaranteed by defendants Hanson & Osgood. It was the last renewal of a note given by defendant Roberts to Hanson & Osgood for wheat sold by them to her. They desiring to turn the original note into cash had it discounted by the plaintiff, they guaranteeing the payment of it. All of the renewal notes were likewise guaranteed by them. One of the defenses was payment. It appears that in the month of August, 1886, the plaintiff held a large amount of paper on which the defendant Roberts was liable. About this time Mrs. Roberts secured a loan of $20,000 on her real estate from M. B. Erskine. The understading was that the proceeds of this loan were to be paid to the bank, and applied in extinguishment of her indebtedness to the bank so far as the money would apply. This indebtedness was somewhat in excess of $20,000. While negotiations for the loan were progressing, the husband of Mrs. Roberts, who was agent for her in these transactions, stated to the president of plaintiff that the note sued upon in this action must be paid out of this money. He also testifies that he never changed this application of the money, and that he did not know that the plaintiff had disregarded his instructions until the summons was served in this action. It is true that there is a conflict in the evidence on this question. The cashier, Mr. Lyon, states that he and Mr. Roberts went over the notes to be paid, and that he told Mr. Roberts that the plaintiff was not willing to cancel the note in question, and that Mr. Roberts consented that it should not be canceled. It would not be urged here that the verdict of the jury should be disturbed if there was any substantial denial of Mr. Lyon's statement, but it is insisted that there is no issue in this respect. Mr. Roberts, when interrogated on cross-examination about this alleged conversation, stated that he did not recollect anything of that kind; that he did not think that he and Mr. Lyon went over the notes; that he did not recollect it. The jury have found that he did not recollect such conversation. This is surely evidence from which the jury might find that such

conversation never took place. Moreover, Mr. Roberts distinctly swears that he never changed his direction that this note be paid out of the $20,000 loan. But it is further urged that the application of this money to the payment of this note was not made at the time of the payment of the money to the bank, but some time prior thereto; and that under the provisions of our statute, the debtor must manifest his desire as to the application of the payment at the very time the money is paid. § 3457, subd. 1, Comp. Laws. We think this a too technical construction of the statute—one which loses sight of its obvious purpose. It was not designed to change the rule of the common law. The owner of money assuredly may determine the terms on which another shall receive it from him when he voluntarily parts with it. It is his, and he may control it up to the time he surrenders his control over it. He may insist that the creditor shall apply it in a certain way as the only condition on which he, the debtor, will pay it to the creditor. It is sufficient if the will of the debtor is manifested to the creditor at the time. This is all the statute, in its most technical wording, requires. If, as in this case, in the course of negotiations and dealings connected with the future payment of money to a creditor, the debtor distinctly manifests his intention as to the application of it or of any part of it, and that purpose is not changed before the receipt by the creditor of the money, then in truth the intention—the design—of the debtor is manifested at the time the money is paid. If the statute is to have a technical construction—one which makes it necessary for the debtor to speak his mind at the precise moment he parts with the money—he must take care that no appreciable time elapses after he has expressed his will, and before he actually makes the payment. We cannot, by such an interpretation, shut our eyes to the palpable spirit of this enactment.

Some time after the receipt by the plaintiff of the proceeds of this $20,000 loan, the money being paid directly to the bank by the lender, and not by Mrs. Roberts, she was in the bank, and Mr. Lyon, the cashier, handed her a package of notes, rolled up and fastened with a rubber band, saying to her at the time, "Here are the notes which the loan was made to take up."

Mrs. Roberts did not look at the notes, but assumed that the matter was all right. Neither she nor her husband knew that the note in suit was not in the package until after this action was commenced. It is urged that by her conduct in accepting the package of notes as paid by the loan she ratified this, the creditor's application of the money by the creditor, and that she cannot now be heard to assert the contrary. This reasoning assumes that she accepted these notes and assented that the note in suit should not be included. She in fact said nothing of the kind. Nor can she be held to have consented to this change as a matter of law. The plaintiff, in view of the finding of the jury, had been informed that the note sued upon must be paid out of this loan. When the cashier handed her the package of notes, stating that they were the notes which the loan was made to pay, his statement was not true, so far as that particular note was concerned. We do not say that there was conscious falsehood on the part of Mr. Lyon. He may not have thought anything about the direction given by Mr. Roberts to pay that note out of the loan. But certainly Mrs. Roberts might rely on the statement; and that, in the light of the original direction, was an affirmation by the plaintiff that the note in question was in the package. The plaintiff cannot raise up an estoppel out of defendant's reliance upon the representation of one of its own officers. We find nothing in the authorities cited opposed to our view. The one most relied on is not at all in point. Flarsheim v. Brestrup, 43 Minn. 298, 45 N. W. Rep. 438. The syllabus accurately states the decision: "After acquiescing in the application of a payment in extinguishing one demand, and accepting the benefit of it for that purpose, a debtor cannnot avail himself of the same fund to extinguish another demand, although when he made the payment he directed its application to the latter." The vital element of acquiescence in the new application by the creditor of the payment is wanting in this case. There could be no aquiescence before suit, for neither the defendant nor her husband had any knowledge of the fact until after the action had been brought. We will not charge this innocent defendant with constructive notice of a fact where the conduct of the plainitff in wrapping up the notes so they would not be readily seen (without, we believe,

however, any intention to deceive), and its statement, through its cashier, that the notes to be paid by the loan were in the package, had a direct and natural tendency to cause her to believe that the fact was different from what it actually was. Against her so-called duty to plaintiff to examine the notes we offset her right to rely on the performance by plaintiff of its duty to follow her husband's instructions touching the payment of this note, and the declaration of its cashier clearly importing that this duty had been faithfully discharged. The voice that allays suspicion may not be heard to condemn or criticize because the confidence and security it inspired have produced their natural result.

It is further urged that the answer of defendant Roberts is insufficient because it avers payment upon information and belief; and it is therefore insisted that the trial court should have given judgment against defendant Roberts on the pleadings, there being no other defense set up and all the material averments of the complaint being admitted. In this connection plaintiff cites cases which hold that a denial of any information sufficient to form a belief of alleged facts, of the existence or non-existence of which it is possible for the defendant to make himself personally acquainted—as whether a certain record exists—is not a good denial. These decisions are, doubtless, sound. It being in the power of the defendant to deny positively and of his own knowledge the fact alleged in the complaint, in case it does not exist, his failure to make such positive denial is very properly taken as an admission of its existence. The courts will not suffer a litigant to close his eyes, and, hiding behind the forms of the law, delay the administration of justice. Such a denial, under such circumstances, is a palpable fraud. But the defense of payment is not necessarily within the knowledge of the debtor. In this day, when a vast volume of business is conducted by agents, payments are often made by agents without the personal knowledge of the principal. To allege such a payment in positive form would be reprehensible. The principal would be guilty of perjury. He would state that he had personal knowledge of that of which he knew he did not have personal knowledge. He must aver payment, under such cir-

cumstances, upon information and belief; the information of his agent who personally made the payment inducing belief in the principal's mind of the truth of the allegation. It is not necessary for the defendant to set forth that the fact of payment is not within his personal knowledge, for the very form of the allegation unmistakably shows a lack of personal knowledge on his part. Nor can this form of answer be used to retard the administration of justice. The defendant cannot shield himself from the charge of perjury if he in fact had no information, or if his so-called belief in what he sees fit to characterize as information is but a pretense for delay. This is not the case of a denial of information of a fact as to which information is readily attainable, but the averment of a fact upon information and belief where information may be, and often is, the only source of defendant's knowledge of that fact. Moreover, payment is frequently made by one of several parties to an instrument, as in this case, without the personal knowledge of any of the other parties thereto. All except the one who made the payment must allege such payment upon information and belief. The finding of payment being sustained, the other questions discussed are not involved, and hence will not be considered. The judgment and order are affirmed. All concur.

WALLIN, J., having been of counsel, did not sit on the hearing of this case; Judge WINCHESTER, of the sixth judicial district, sitting by request.

STATE OF NORTH DAKOTA, Defendant in Error, *v.* JOHN HAAS, Plaintiff in Error.

Intoxicating Liquors—Constitutional Law—Title of Act.

Chapter 110 of the Laws of 1890, entitled "An act to prescribe the penalties for the unlawful manufacture, sale, and keeping for sale of intoxicating liquors and to regulate the sale, barter, and giving away of such liquors for medicinal, scientific, and mechanical purposes," is not in conflict with § 61 of Article 2 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 Oct. 30, 1891.)

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

Tilly & Stewart, for plaintiff in error. *C. A. M. Spencer*, Atty. Gen., *L. A. Rose*, States Atty. for Cass Co., and *Chas. A. Pollock*, for the State.

John Haas was convicted for an illegal sale of intoxicating liquors, and brings error, claiming the statute prohibiting the sale in certain cases to be unconstitutional. Affirmed.

The facts and authorities cited by counsel are fully set forth in the opinion.

The opinion of the court was delivered by

CORLISS, C. J. The plaintiff in error, having been convicted under the provisions of chapter 110 of the Laws of 1890 of the offense of keeping and maintaining a place for the sale of intoxicating liquors, and in which such liquors were sold, in violation of law, now and here insists that the judgment of conviction is void because of the unconstitutionality of this act. No other question is raised. The portion of the state constitution alleged to be violated by this law is § 61 of article 2, which provides that "no bill shall embrace more than one subject, which shall be expressed in the title, but a bill which violates this provision shall be invalidated thereby only as to so much thereof as shall not be so expressed." We are clear that chapter 110 of the Laws of 1890 does not embrace more than one subject. An analysis of this law will make this apparent. Section 1 declares unlawful the manufacture, importing for sale or gift, the keeping for sale, the selling or offering for sale, gift, barter, or trade, of any intoxicating liquors, and prescribes penalties for a violation of the section. By a proviso, registered pharmacists are excepted from the section, and it is provided that they may sell such liquors for medicinal, mechanical, and scientific purposes, and wine for sacramental purposes, as thereinafter provided.

The balance of the act, excepting §§ 2, 3, 4, 5, 7, and 24, "prescribes," to quote the language of counsel for plaintiff in error, "remedies, procedure, etc., in furtherance of the enforcement of the prohibition of the unlawful sale as a beverage." The excepted sections regulate the sale of such liquors for medicinal, mechanical, scientific, and sacramental purposes. This bare statement ought to suffice to show how utterly groundless is the claim that the act embraces more than one subject. It relates solely to the one subject of regulating the manufacture and sale of intoxicating liquors. A system which prohibits the sale for certain purposes, and permits a sale for certain other purposes, under specific restrictions and regulations, is a system whose single purpose and operation are the regulation of the sale of intoxicating liquors. Every provision of the law is subsidiary to and in furtherance of this great object. There is nothing in the law foreign to this single subject. All the provisions of it converge to this one point. It is difficult to find in the books a case where it has been claimed that an act embraced more than a single subject with less to justify the claim than in the case at bar. There is nothing in the point that the constitution has, by prohibiting the sale of intoxicating liquors as a beverage, made that a subject distinct from all other control of the traffic in such liquors. A constitution cannot make foreign to each other those provisions which are in their nature germane; nor can any such purpose be tortured by construction out of this constitutional inhibition. It is hardly necessary to cite authorities in so plain a case. It is impossible to refer to all which sustain our view. We will select only a few out of the great mass: Hronek v. People, 134 Ill. 139, 24 N. E. Rep. 861; Evansville v. Bayard, 39 Ind. 450; Ramagnano v. Crook, 85 Ala. 226, 3 South. Rep. 845; Fahey v. State, 27 Tex. App. 140, 11 S. W. Rep. 108; Hart v. Scott, 50 N. J. Law 585, 15 Atl. Rep. 272; Easton v. Railroad Co., 52 N. J. Law 267, 19 Atl. Rep. 722; State v. Madison, 43 Minn. 438, 45 N. W. Rep. 856; People v. Haug, — Mich. —, 37 N. W. Rep. 21. It seems to be urged that the law is a prohibition law, and also a law regulating the liquor traffic. It is only the latter. Every law regulating the sale of liquor is necessarily prohibitory in some

respects. A license law prohibits all who are unable to procure a license. It usually embodies a prohibition of sales to minors, drunkards, etc. It forbids sales on the Sabbath and between specified hours of the day on week days. The law in question only prohibits the sale as a beverage. A case peculiarly in point is Hart v. Scott, 50 N. J. Law, 585, 15 Atl. Rep. 272. It was there insisted that the title, "An act to regulate the sale of intoxicating and brewed liquors," did not express the provision in the body of the act, which prohibited the sale of such liquors by the small measure. In adjudging this contention unsound the court said: "Assuming that the extreme effect of this legislation is to forbid the sale by small measure, in my judgment it must be regarded as a law regulating the sale of intoxicating and brewed liquors. It regulates the sale by prohibiting it in small quantities. Every license law is to some extent a prohibitory law. It prohibits the sale by all persons who have no license. But it is said that the prohibition is absolute within the sphere in which the law operates—that is, as to the sale by the small measure. So is the law which absolutely forbids the sale by the small measure on Sunday or election day. So would be a law which prohibited a sale to minors, or within a certain distance from a college. Such laws are, therefore, none the less regulations of the liquor traffic. They operate as a check—as a partial restraint—upon the sale, not an absolute inhibition, and are in the strictest sense regulations. The regulation becomes more or less stringent as you increase or diminish the extent to which it operates to prevent sales, but it reaches the point of prohibition and ceases to be regulation only when it wholly inhibits the traffic." There is only one point in which it is claimed that the title fails to express what is embodied in the act, The title is as follows: "An act to prescribe penalties for the unlawful manufacture, sale, and keeping for sale intoxicating liquors, and to regulate the sale, barter, and giving away for medical, scientific, and mechanical purposes." It is urged that it is not disclosed by this title that the act declares, as it does, the manufacture, sale, and keeping for sale of liquors as a beverage to be unlawful. But the constitution had already made that declaration, and all that was needed to supplement the

fundamental law were penalties, to be prescribed by the legislature. Every one, therefore, was informed by the title that that law, among other things, would prescribe penalties for the manufacture, sale, and keeping for sale of liquor as a beverage, such conduct having already been declared unlawful by the organic law; and no one was deceived because the act in terms reiterated the prohibition of the constitution, nor was any force added to that prohibition by the prohibition of the statute. The judgment of the district court is affirmed. All concur.

JOHN L. GRANDIN and WILLIAM J. GRANDIN, Plaintiffs and Respondents, *v.* E. G. LABAR, Defendant and Appellant.

Appointment of Receiver—Notice—Ex parte Application.

1. In an action in equity to quiet title to real estate, and enjoin the defendant, who resided upon and cultivated the land as a farm, pending the action and permanently, from tilling the land in question, the complaint was verified only on information and belief, and by one of plaintiff's attorneys. A verified answer was served, denying the facts and equities set out in the complaint. After the service of the answer, and before a trial was had, the plaintiffs, without notice to defendant or his counsel, applied to the district court for an order appointing a receiver of the crops planted by the defendant and growing upon the land. An *ex parte* order was made appointing such receiver. The application was based upon an affidavit setting out, among other things, defendant's insolvency, and that the crops were "liable to be mortgaged," but no attempt was made to support the original equities set out in the complaint. *Held*, that such appointment was error.

2. Where, in such cases, plaintiffs' original equities are denied by answer, and are without support from evidence extrinsic to the complaint, a receiver should not be appointed, even after notice and a hearing; much less should the defendant be dispossessed summarily by *ex parte* proceedings.

3. The practice of appointing receivers *ex parte* is not tolerated by the courts except in cases of the gravest emergency, and to prevent irreparable injury.

(Opinion Filed Oct. 30, 1891.)

APPEAL from District Court, Traill County. Hon. WILLIAM B. MCCONNELL, Judge.

J. E. Robinson, for appellant. *Carmody & Leslie*, for respondents.

Action in equity by John L. Grandin and William J. Grandin against E. G LaBar to quiet title to land. Before trial, and without notice to defendant, a receiver was appointed to take the crops planted by defendant on the land, and from the order making such appointment defendant appeals. Reversed.

J. E. Robinson, for appellant:

The appointment of the receiver *ex parte* was error. It is only in cases of the greatest emergency that such should be done. High on Receivers, § 111; Verplank v. Insurance Co., 2 Paige 438; Sanford v. Sinclair, 8 Paige 373; People v. Railroad Co., 55 Barb. 34; Id v. Id, 38 How. 228; Field v. Ripley, 20 How. 26; Bison v. Curry, 35 Iowa 72; French v. Gifford, 30 Iowa 148; Blondheim v. Moore, 11 Md. 452; Whitehead v. Wooten, 43 Miss. 523; Rogers v. Dougherty, 20 Ga. 271; Wusbaum v. Stein, 12 Md. 315; Field v. Ripley, 20 How. 26; How v. Ripley, 18 How. 138. Where an injunction is ample to protect the property until a motion can be made for a receiver, it is improper to deprive a party of possession without notice. McCarty v. Peake, 18 How. 140. See also People v. Simonson, 10 Mich. 335; Salling v. Johnson, 25 Mich. 489; Port Huron v. Judge, 31 Mich. 456; McCombs v. Merryhew, 40 Mich. 725; Arnold v. Bright, 41 Mich. 207; Railroad Co. v. Judge, 44 Mich. 482; Jones v. Schall, 45 Mich. 379; Book v. Railroad Co., 45 Mich. 453. A suit in equity cannot be maintained when full relief can be obtained at law. Hipp v. Babin, 19 Howard 271; Parker v. Manufacturing Co., 2 Black 545; Grand Chute v. Winegar, 15 Wall. 373; Lewis v. Cocks, 23 Wall. 466; Killian v. Ebbinghaus, 110 U. S. 568. The complaint in this action is framed as a bill in equity and avers that plaintiffs have no remedy at law. At law they cannot succeed for want of a legal title. Hardin v. Jordan, 140 U. S. 371. In actions for the possession of realty a receiver may not be appointed. Sedgwick &

Wait on Trial of Titles to Land, §§ 631, 632; High on Receivers, §§ 553, 557 and cases cited.

Carmody & Leslie, for respondents:

A receiver may be appointed *ex parte*. Williams v. Jenkins, 11 Ga. 595; Maple v. Scot, 4 Ill. App. 268; Gregory v. Gregory, 33 N. Y. Sup. Ct. 1; Association v. San Francisco, 60 Cal. 223.

The opinion of the court was delivered by

WALLIN, J. On June 29, 1891, after issue was joined in this action by service of an answer denying the material allegations of the complaint, but before trial, the district court, on plaintiff's application and by an order made herein, wholly *ex parte*, appointed a receiver of certain growing crops which were sown by defendant upon the lands in question, upon which the defendant then resided and long had resided. Upon due notice defendant moved in the district court to vacate the order appointing a receiver. The court denied the motion to vacate such order, and in the order denying the motion the district court enlarged the powers of the receiver by making him receiver of the land in controversy, as well as the crops thereon. The case comes to this court on appeal from each and all of said orders.

The action is brought in equity, to quiet title to land. The specific relief prayed for by plaintiffs as follows: "For judgment decreeing that these plaintiffs are the equitable owners of the land; that defendant has no right, title, or interest therein; that the defendant be restrained, during the pendency of the action, and permanently restrained from tilling said land, or in any manner interfering with the same. Plaintiffs also pray generally for other and further relief." The complaint further states, in substance, that the land—the S. W. ¼ of section 7, township 146, range 50 west—is in Traill county, and situated within fifty miles of the line of the Northern Pacific Railroad as such road is finally located and built and situated, within the ten-mile limit of said railroad, commonly called the "indemnity belt." That said tract is "among the lands, from which the said company were given the right to select lands in lieu of lands which

were within the original land grant of twenty alternate sections on each side of said road," and which were, at the time the company filed its map of definite location, not available to the company by reason of having been previously reserved, sold, granted, settled upon, or otherwise appropriated by the United States government. The complaint alleges, in effect, that prior to the filing of any map of definite location by the railroad company, large quantities of the land within the original limits had been settled upon, reserved, and otherwise disposed of by the government, and that, in consequence thereof, the railroad company had, under the provisions of the acts of congress relating thereto, become entitled to select lands—odd-numbered sections—within the ten-mile limit in lieu of such lands in place as were lost to the company as aforesaid. The complaint further states that after it became known that quantities of land had been lost to the railroad company as aforesaid, "the secretary of the interior directed the manner in which the said railroad company should select the lands in lieu of those so lost; and that, in accordance with the directions so given by the secretary of the interior, the said railroad company did make selection of lands in lieu of many of the lands so lost by them, and in and among other parcels of land the said Northern Pacific Railroad Company did select the particular land above mentioned in making such selection in the manner as directed by the secretary of the interior; and that at the time of the making of such selection as aforesaid the land was wholly unoccupied, and was not subject to any contests, and had not been in any way disposed of or alienated by the United States, but at the time of the said selection thereof the said United States had full title to said land." The complaint avers that after the land in question had been selected by the company as above stated, and in September, 1876, the railroad company sold and conveyed the same to the plaintiffs, and that ever since such conveyance to plaintiffs "they have been the owners of said land in equity if not law," and have a right to a deed patent to the same. The complaint also states that long subsequent to such conveyances to plaintiffs, to-wit, in the month of October, 1887, "the defendant wrongfully and unlawfully entered upon

said land, and has ever since that time been wrongfully and unlawfully in the possession of said land, and has cultivated and broken and harvested and raised crops on said land, and is injuring the same, and sapping the said land and the soil thereof of its goodness and strength, and doing great and irreparable injury to the said land and to the right of possession thereof." The complaint further charges that the defendant is wholly insolvent and financially irresponsible. The complaint is verified on information and belief by C. E. Leslie, one of the plaintiffs' attorneys, but the affidavit of verification fails to state why it was so verified, or why it was not verified by plaintiffs.

Defendant answered the complaint, and, after admitting the incoporation of the Northern Pacific Railroad Company, further answered: "Defendant further answering the complaint herein, denies that he has any knowledge or information thereof sufficient to form a belief, and, therefore, denies each and ever allegation not specifically admitted or otherwise denied. Defendant alleges that on the 20th of September, 1887, he, being a married male person and the head of a family, and over the age of twenty-one years, and a citizen of the United States, made settlement in person with his family, consisting of a wife and four children, upon the land described in the complaint. That said land was and is public land of the United States, not mineral, and subject to pre-emption. That said lands, with other lands, were declared to be a part of the public domain, and open for settlement under the general laws of the United States, by an order of the honorable secretary of the interior, duly made on August 15, 1887. That defendant settled peaceably upon said land. That it was then wholly unoccupied, wild prairie land, and without any improvements of any kind or nature whatsoever, and this defendant settled peaceably upon said land as a pre-emptor, and duly filed his declaratory statement of his intention to claim said land as a pre-emption right under the laws of the United States in the United States land office at Fargo, N. D., on the 20th of October, 1887. That he then established his residence on said land, and has inhabited, cultivated, and improved the same continuously since said date, and has erected a dwelling house, barn, and other build-

ings thereon, dug a well, and made improvements to the value of $2,000. That in the United States land office, before the honorable commissioner of the general land office, a contest is now pending to determine the rights of the parties herein to said land, in which E. G. LaBar is plaintiff, and the Northern Pacific Railroad Company, the alleged grantor of plaintiffs, is defendant. That no patent for said tract of land has been granted by the United States to any person whomsoever. That no improvements have been made on said tract by the plaintiffs or any other persons whatsoever, save such as made and owned by defendant. That no person other than this defendant and his family have ever been or are in actual possession of said land or any part thereof." The answer, it appears, joins issue on all material allegations of fact set out in the complaint as grounds of action and also pleads affirmatively a state of facts, which, if true, fully justifies the defendant in settling upon the land and in continuing to reside upon and cultivate the same as a pre-emption settler. If it be true, as claimed by counsel, that the court will take judicial notice that this tract of land is situated within the said "indemnity limits," it will still be necessary to prove at the trial that said railroad company, after losing certain of its lands in place within the original limits of its grant fixed by law, did, with the approval of the secretary of the interior, select, among other lands the tract in question in lieu of such lost lands, and made such selection when such tract was free from all other lawful claimants thereof; and if after such selection, the land was, before the entry of defendant, conveyed to these plaintiffs, as alleged in the complaint, then it would follow that the plaintiffs would be in a position to apply to the courts for appropriate relief as against the defendant. But all of these essential averments of fact are put squarely in issue by the pleadings. As the case has never been tried on the merits in the court below, it would be improper for this court to enter upon a discussion of the merits of the issues presented by the pleadings, particularly as the questions most material in the case are matters of pure fact. Elling v. Thexton, 7 Mont. 330, 16 Pac. Rep. 931.

The record shows that the action was commenced July 30, 1890, by the personal service of the summons and complaint. An injunctional order was also served upon defendant at the same time. This order—after a hearing, which was had on August 5, 1890—was so modified as to permit defendant to harvest the crop then growing upon the land, but forbade defendant from doing any plowing or other acts looking towards a further tilling or cropping of the land. The injunctional order was disobeyed by the defendant, and he was brought before the district court in November, 1890, and a fine of $10 was entered against defendant for the contempt involved in disobeying such injunctional order. It appears that the fine was not paid, and no attempt was made to enforce its payment. In April, 1891, the defendant began seeding the land, and, that fact being made to appear by affidavit, the district court cited defendant into court to show cause on April 20, 1891, why he should not be punished for contempt in that he had disobeyed said order of the district court made on August 5th preceding. On the hearing the defendant showed cause by affidavit setting out the facts and circumstances of his occupation of the land in detail, and justifying such occupation upon substantially the same grounds stated in his answer. The district court—Judge TEMPLETON presiding by request—discharged the defendant, and did not punish him for the alleged contempt. On the 25th of June, 1891, an order was made appointing one H. D. Hurley receiver in the action, "with full power to harvest the crops now growing on said land, and to secure and thresh the same, and to hold the proceeds thereof, after paying the expenses of harvesting, threshing, and marketing the same, subject to the further order of the court, upon his executing a bond, as required by statute, in the sum of $1,000, and taking oath as required by law." This order was wholly *ex parte*. The order appointing a receiver was served upon defendant in Traill county on July 29, 1891. The order purports on its face to be made wholly upon affidavit. It reads: "On reading the foregoing affidavit and considering the same." We find that the affidavit referred to in the order was made by C. E. Leslie, Esq., the same attorney who verified the complaint on information and belief. It will be unnecessary

to set out the affidavit at length. It will suffice to say that it does not attempt to set out nor refer to any facts tending in the least to corroborate the material facts stated in the complaint, and constituting plaintiffs' alleged cause of action and their equities. The affidavit does state that defendant has disobeyed the injunctional order of August 5, 1891; reiterates the alleged insolvency of defendant; that the crop is liable to be mortgaged; and alleges that plaintiffs will be remediless if a receiver of the crop is not appointed; "that the issues are so involved with the proceedings being had in the land department and before the secretary of the interior of the United States that it is very doubtful if the issues herein can be determined at the next term of this court," etc. On August 6, 1891, a motion was made before the district court on the pleadings and proceedings then had herein to set aside and vacate the order appointing H. D. Hurley receiver. At the hearing of the motion both parties were represented in court by counsel. The motion was based upon the following grounds: (1) Because said order was made *ex parte*, and without any notice to defendant; (2) because the records and proofs show no ground for the appointment of a receiver." In deciding the motion the following order was made: "Ordered that the above motion be, and the same is hereby denied; and on motion of plaintiffs, H. D. Hurley is appointed receiver of said land, as well as the crops thereon, during the pendency of this suit." The making of all of the said orders is assigned as error in this court, and we are called upon to determine whether they were legally and properly made, and nothing further.

We have no doubt for various reasons that it was an abuse of discretion to make the *ex parte* order appointing a receiver of the crops sown and planted by defendant upon lands where defendant long had resided. The affidavit upon which the order was made showed no exigency which would justify such an arbitrary and harsh proceeding, if, indeed, it would be proper in such a case to appoint a receiver at all before judgment. Where an injunction is ample to protect property until a motion can be made for a receiver, it is manifestly improper to deprive a party of possession without notice. McCarty v. Peake, 18 How.

Pr. 139, 140. In this case it would seem quite unnecessary, on plaintiff's theory of the case, to resort to the appointment of a receiver in any event. The complaint is framed upon the theory that the plaintiffs, upon the facts set out, can invoke a preliminary as well as a permanent injunction restraining defendant from tilling or interfering with the land in question. This is the relief specifically demanded in the complaint, and plaintiffs applied for and obtained a preliminary injunctional order, which was served upon defendant long before the receiver was applied for, to-wit, in 1890. This order has not been appealed from, and, as modified, it in terms forbade the defendant from tilling the land or planting any crop thereon. If the plaintiff's theory of the case is sound—and the district court seems to have adopted it in issuing the preliminary injunction—then such order, not having been appealed from, could have been enforced. If the order had been enforced, the crop placed in the hands of the receiver could not have been planted nor harvested by defendant, and no receiver would have been necessary. Why the injunctional order was not enforced does not appear in the record, but it is quite clear to our minds that, if such an order could not be enforced under the complaint, the more drastic remedy of a receiver would be improper on the same state of facts. Much less was it proper, under such circumstances, to deprive defendant of the possession of the crops without notice or a hearing, when defendant, who was living on the land, could have been notified of the application. In Verplanck v. Mercantile Ins. Co., 2 Paige, 450, Chancellor WALWORTH says: "In every case where the court is asked to deprive the defendant of the possession of his property without a hearing, or an opportunity to oppose the application, the particular facts and circumstances which render such summary proceedings proper should be set forth in the bill or petition upon which such application is founded." See, also, French v. Gifford, 30 Iowa, 148. The affidavit upon which the summary order was made in this case failed to state any facts or circumstances tending to show that summary action without notice was necessary. The statement that defendant was liable to

mortgage the crop was the mere opinion of plaintiff's counsel, not supported by any facts alleged.

It is doubtless true that receivers are sometimes—though very rarely—appointed *ex parte*. Our statute (§ 5017, Comp. Laws), contemplates such a possibility. But to justify such a summary proceeding the facts and circumstances must create a very grave exigency, and above all, the application must be of such a strong and convincing nature that the court is reasonably certain to decide the case finally in favor of the applicant. "In suits between conflicting claimants of land, especially between parties claiming under legal titles, a receiver will not ordinarily be appointed." 3 Pom. Eq. Jur. § 1333. See, generally, High, Rec. § 111; Sedg. & W. Tr. Title Land. § 631. Plaintiff does not show a case coming within either of the classes mentioned in the statute (§ 5015, Comp. Laws), in which a receiver is expressly authorized, nor do the facts set out show that this is a case where "receivers have heretofore been appointed by the usages of courts of equity." Railroad Co. v. Iosco Circuit Judge, 44 Mich. 479, 7 N. W. Rep. 65. But the appointment of the receiver in the case at bar, even if notice had been given and a hearing granted, would have been in flagrant violation of established practice in such cases. The plaintiffs' equities, as stated in the complaint, are not supported by the plaintiffs' affidavit or otherwise; nor is the complaint verified by any person who claims to have personal knowledge of the facts set out. The verification is made on information and belief by one of plaintiffs' attorneys, if the pleading can be properly considered as verified by an attorney where, as in this case, the affidavit fails to state, as the statute requires, why the attorney verified it. The *ex parte* order shows on its face that it was based on an affidavit of the same attorney who attempted to verify the complaint; but such affidavit, as already stated, does not anywhere allude to the original grounds of the action. But if the complaint was before the court, and constituted a part of the showing made by plaintiff, the result is that the *ex parte* order ousting defendant of the possession of crops planted by him and growing upon the land upon which he had long resided, and the orders enlarging the powers of the re-

ceiver by making him receiver of the land as well as the crops, were based only on equities set out in a complaint verified by attorney on information and belief, and such orders were made also after a verified answer had been served, putting the material facts and equities pleaded in the complaint in issue. High, Rec. § 24. Under the circumstances, the several orders were improperly made, and made in violation of well-settled and salutary rules of practice. The orders must be reversed, and it will be so ordered. All concur.

CHARLES H. GOULD, Plaintiff and Appellant, *v.* DULUTH & DAKOTA ELEVATOR COMPANY, Defendant and Appellant.

New Trial on Motion of Court.

1. A general verdict was returned in plaintiff's favor December 10, 1890. On April 6, 1891, a bill of exceptions was allowed on defendant's application. No notice of intention to move for a new trial was ever served, nor was such service waived. Prior to the allowance of the bill plaintiff had served notice of a motion for judgment on the verdict, which motion, after postponement, came on to be heard on the day the bill was allowed. After hearing counsel on such motion, the court denied the motion for judgment, and its order denying such motion also directed that the verdict be set aside, and granted a new trial. The order is predicated upon error, as shown in the record by the bill of exceptions. No application was ever made for a new trial by either party. *Held*, that the order vacating the verdict and granting a new trial was without authority of law and is reversible error.

2. It is not claimed that such order was made or could be made in the case under authority of § 5091, Comp. Laws, allowing such orders to be made by the court upon its own motion. Nor should a new trial be granted without the application of either party, where, as in this case, a long period of time had elapsed after the verdict, and where both parties had initiated proceedings based upon the verdict.

(Opinion Filed Nov. 2, 1891.)

CROSS-APPEALS from district court, Cass county; Hon. WILLIAM B. MCCONNELL, Judge.

J. E. Robinson, for plaintiff. *A. C. Davis*, for defendant.

Action by Charles H. Gould against the Duluth & Dakota Elevator Company for conversion. Verdict for plaintiff. From

an order setting aside the verdict and granting a new trial, both parties appeal. Reversed.

The opinion of the court was delivered by

WALLIN, J. This action is for the conversion of wheat. The complaint sets out two separate causes of action—one for the conversion of wheat covered by plaintiff's chattel mortgage; the other for the conversion of wheat upon which plaintiff claims a seed lien. On December 10, 1890, a jury trial was had, resulting in a general verdict in plaintiff's favor for the sum of $484.00. No notice of intention to move for a new trial was ever served, but on defendant's application, and with the consent of plaintiff's counsel, a bill of exceptions was settled and allowed on April 6, 1891. Prior to settling the bill of exceptions plaintiff's counsel had served on counsel for defendant the following notice: "Please take notice that on the pleadings, proceedings and verdict herein, on the 4th day of April, 1891, at 3 o'clock p. m., at the court house in Fargo, N. D., the plaintiff will move the court that the second cause of action mentioned in the complaint herein be withdrawn and dismissed without prejudice, for the reason that the defendant has on record objected to any recovery thereon on the ground that it is not assignable, and on the ground that the evidence failed to show that the seed wheat had been sown on the land described in said lien; and plaintiff will move the court that the verdict stand for the amount due on the mortgage mentioned in the complaint, being $268.00 at the date of said verdict, and that plaintiff have judgment therefor, with costs." After hearing the motion the court made the following order: "The motion of plaintiff for judgment on the verdict herein coming on for a hearing as per notice annexed, and plaintiff having moved for judgment for $484.00, or $268.00 as per said written notice, J. E. Robinson appearing for plaintiff and A. C. Davis for defendant, and defendant claiming error in the record as shown by the bill of exceptions this day settled and allowed, and the court being of opinion that there was error, it is by the court ordered that the verdict herein be, and the same is, set aside, and a new trial is hereby granted." To this order of the district court

defendant's counsel then excepted, and on May 30, 1891, defendant perfected an appeal to this court from said order. Subsequently the plaintiff duly appealed to this court from the same order. In this court defendant's appeal was dismissed on defendant's own motion, and counsel for defendant argued in favor of sustaining the order of the trial court granting the new trial. We do not consider it proper upon this appeal to pass upon the merits of any of the errors alleged in the bill of exceptions. The only question which will be considered is that of the validity or invalidity of the order vacating the verdict and granting a new trial. The order is clearly erroneous, and cannot be sustained without making a precedent which would tend to unsettle and confuse the law and the practice regulating the granting of new trials in the court below. When the order was made no intention to move for a new trial had been served, although more than three months had then elapsed after the verdict came into court; nor was there a motion for a new trial pending before the court. No such motion was ever made by either party, nor was a new trial sought for or requested by either party at any time prior to the order granting a new trial. The order was a surprise to both parties, and was promptly excepted to by the defendant, and afterwards appealed from by the defendant. When the order was made the parties were before the court on a wholly different matter—a motion for judgment—and in the order denying plaintiff's motion for judgment the trial court set aside the verdict, and granted a new trial. It is true that a bill of exceptions was settled on the day the order was made, but the court did not hear counsel on any motion for a new trial based on the bill, and, as before stated, no such motion was ever noticed, made or entertained by the district court. The statute affords ample facilities for moving for a new trial, and sets out plainly what shall be done as preliminary to such motion. The motion may be made either upon the minutes of the court, upon affidavits, upon a bill of exceptions, or statement of the case; but in all of these methods a notice of intention to move is indispensible to the motion unless waived. None of these prerequisites to the motion had been complied with except to settle a bill of excep-

tions, which bill, so far as appears, was not intended to be used on a motion for a new trial. Certainly the bill could not have been used as a basis for a motion without plaintiff's consent to waive the notice of intention, and no such consent is pretended. The order, under the circumstances, was made in disregard of plain statutory requirements. Defendant's counsel has filed no brief in this court, and no case is cited or known to this court which lends the least countenance to such practice. The order recites that the court, "being of opinion that there was error" in the record, etc., ordered that the verdict be set aside, and a new trial granted. But before the district court could lawfully grant a new trial, as has been stated, a notice of intention must have been served or waived, and an opportunity to be heard must have been accorded to the plaintiff. We find, on inspecting the bill of exceptions on file in this court, and which properly came up as one of the documents on which the order was granted, that such bill, and all of the exceptions contained in it, would, under the statute, be disregarded upon a motion for a new trial, for the reason that none of the errors in the bill have been particularly specified, as is essential when a motion for a new trial is based on exceptions or a statement. Subdivision 3, § 5090, Comp. Laws. Nor is the case one which falls under § 5091, Comp. Laws, allowing the district court to vacate a verdict and grant a new trial on its own motion. The court instructed the jury as follows: "The plaintiff has made a case, and is entitled to a verdict for some amount; so that it will not be necessary for you to consider anything further than the amount of grain taken by defendant into the elevator, the time when it was taken and the value of it." The verdict does not disregard this instruction, but, on the contrary, conforms to it; nor does the verdict disregard the evidence in such a plain way as to indicate that it was rendered under the influence of passion or prejudice. Moreover, the order granting the new trial in terms precludes the idea that it was made under § 5091; nor is it claimed by counsel that the court assumed to act under that section in vacating the verdict. In this state, and in the late territory, the instances of vacating verdicts and granting new trials without application of the parties have been exceed-

ingly rare, and no such summary action should be taken except in cases falling clearly within the statute, and then the order should be made promptly on coming in of the verdict. In no case should such an order be made after a delay of some months, and where the parties have taken action predicated upon the verdict. Hayne, New Trial & App. §§ 10, 11, pp. 50, 51. The order will be reversed. All concur.

GEORGE H. FULLER, Plaintiff and Respondent, *v.* NORTHERN PACIFIC ELEVATOR COMPANY, Defendant and Appellant.

Review on Appeal—Sufficiency of Evidence.

1. The conflict in the evidence that prohibits a court from interfering with the verdict of a jury on a question of fact should be a substantial and not an illusory conflict.

2. Whenever an appellate court conscientiously and irresistibly reaches the conclusion that a verdict is against the truth and the undoubted weight of the submitted evidence, and could only have been reached by the failure on the part of the jury to exercise an unbiased and unprejudiced judgment, such court should unhesitatingly reverse the order of the trial court refusing to vacate such verdict.

(Opinion Filed Nov. 7, 1891.)

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

A. C. Davis, for appellant. *W. J. Kneeshaw*, for respondent.

Action by George H. Fuller against the Northern Pacific Elevator Company for services rendered. Judgment for plaintiff. Defendant appeals. Reversed.

The opinion of the court was delivered by

BARTHOLOMEW, J. This action was brought to recover an alleged balance due on a contract of service. Plaintiff alleges that defendant employed him to work and labor for it, and take charge of one of its elevators for a term of one year, at a monthly salary of $50, commencing August 15, 1889, and that

he worked for one year under the contract, but that defendant paid him for seven months only, and he asks judgment for the balance. The defendant admits a hiring at $50 per month, but alleges that it was for no definite time, and that plaintiff was discharged at the end of seven months. The contract was made by correspondence, and the trial judge instructed the jury that the contract was for no definite period, and left it to them to say how long the plaintiff worked for the defendant under the contract. There was a verdict for plaintiff for $250. Defendant moved for a new trial on the ground that there was no evidence to warrant the jury in finding that plaintiff worked for any period longer than seven months. Motion was denied, and defendant appeals, and assigns this denial as error. There is no question in the case except a question of fact. The learned attorney for the respondent makes no attempt in this court to defend the verdict further than to invoke for its protection the rule which prohibits courts from interfering with the verdict of a jury on matters of fact where there is a conflict in the testimony. This court has frequently adhered to that rule. Observance of the rule is absolutely necessary for the proper discharge of the separate functions of the court and jury. But an abuse of the rule is usually followed by a failure of justice. It is not the duty of any court, nor has it the right, to close its eyes to obvious facts. Courts were instituted to promote justice, and not to perpetuate error. A court may not substitute its judgment for that of the jury, but it should say whether or not the judgment of the jury has been fairly and impartially exercised, or whether or not the result shows the unmistakable presence of passion, or prejudice, or a disregard of the evidence submitted. Appellate courts have been cautious and reluctant about disturbing the verdict of a jury on questions of fact, but to prevent a miscarriage of justice they were forced to abandon the old rule as to a *scintilla* of evidence, and adopt the safer and more reasonable rule that now prevails almost universally, and which permits and requires a court to set aside a verdict that the court considers wrong, unless there be a substantial conflict in the evidence. Whenever an appellate court conscientiously and irresistibly reaches the conclusion that a ver-

dict is against the truth and the undoubted weight of evidence, and could only have been reached through passion or prejudice, or a failure to exercise a sound and unbiased judgment on the part of the jury, such court should unhesitatingly reverse the ruling of the trial court refusing to vacate such verdict. The following are some of the cases that have covered this ground: Reynolds v. Lambert, 69 Ill. 495; Manufacturing Co. v. Reeves, 68 Ill. 403; Blake v. McMullen, 91 Ill. 32; Branson v. Caruthers, 49 Cal. 374; Heifrich v. Railroad Co. (Utah), 26 Pac. Rep. 295; Lester v. Sallack, 31 Iowa 477; McKay v. Thornington, 15 Iowa 25; Carlin v. Railroad Co. 37 Iowa 316; Reid v. Colby, 26 Neb. 469, 42 N. W. Rep. 485.

In this case the correspondence shows that plaintiff desired to be employed by defendant for a year, but defendant expressly refused to contract for any specified length of time, but did state that, if plaintiff could handle at the elevator, of which he was to have charge, a certain amount of wheat, the defendant could afford to pay him $600 for so doing. Plaintiff had charge of the elevator from August 15, 1889, until March 15 or 17, 1890. At that time, according to plaintiff's testimony, there was but little wheat left tributary to that station—about one car-load scattered around among the farmers. Plaintiff had handled about two-fifths of the specified amount, for the handling of which defendant had said it could afford to pay him $600. About the close of each month plaintiff received a check from the defendant's Minneapolis office for the amount of his month's wages. About March 17, 1890, a general agent of defendant visited plaintiff for the purpose of closing the elevator. The agent testifies that he told plaintiff that he had come to close the house; that he ordered all the grain shipped out at once, which was done; that he took away all the books and all of the money, except $50, which plaintiff retained as salary for the past month, and left the key with plaintiff. Plaintiff in his testimony admits that the agent said he came to close the house; admits that the grain was shipped out and the books and money taken away; but he says that the agent did not close the house, because he (plaintiff) told the agent he was hired for a year—a statement which he ought to have known

was false, although he testified to it on the stand prior to the production of the letters. He also testifies that the agent said he thought the books would be returned, though for what purpose is not apparent. He also testifies generally that he was not discharged, but that is a conclusion which the law will draw from what was said and done. Plaintiff does not claim to have performed any specific work for defendant after that time, but says he was ready and willing to work. No specific words were necessary to constitute a discharge. If by what defendant said and did it intended to discharge plaintiff, and plaintiff so understood it, that was enough, and all that could be accomplished by any language. This plaintiff was hired for an indefinite time for the purpose of buying and receiving and shipping wheat for defendant at a certain elevator. By the action of the agent he was left without a penny to purchase wheat, without a book in which to record a transaction, and there was practically no wheat in the country to be purchased, and he knew it. The agent told him he came to close the house. It is difficult to conceive how he could have had a more emphatic notification that the defendant no longer required his services as a wheat buyer at that station. That he did so understand it is perfectly clear from what followed. Prior to that time he had been required to forward to the home office what were called daily reports. After that he made no such reports, nor were any required of him. Prior to that time he had received his salary promptly at the end of every month. After that time he received no salary, nor did he ask for any, or in any manner mention the subject of salary until after the year had expired, when, without asking for any explanation and without any salary having been refused, he demanded five months' pay, and accompanied his demand with a threat to sue, this furnishing strong evidence that he expected his claim to be denied; and upon what possible ground could he expect such denial, except that he understood the defendant to consider him discharged? Some time during the season he bought that scattered car-load of wheat in his own name, and shipped it in his own name, consigned to defendant, and it was sold on his account, and an account of sale rendered to him. Giving the broadest scope to plain-

tiff's testimony, he swears that the elevator was not closed, because he imposed a false statement upon the agent sent there to close it. To that statement—shown by the correspondence to be absolutely false—he susequently swears positively. These circumstances tend to discredit him. The agent testifies that the house was closed and plaintiff discharged. All of plaintiff's subsequent acts are consistent with that theory, and cannot possibly be reconciled with the opposite theory. If plaintiff honestly believed himself still in the employment and pay of the defendant, good faith and common integrity, under the circumstances, required him to so notify it. On the contrary, he was scrupulously careful to convey no such impression. There is no substantial conflict in the evidence. Some stress is laid upon the fact that the agent left the key to the elevator with plaintiff. The question was asked the general agent: "How did you come to leave him the key of the house?" He replied: "The same as we do with other agents when we close a house." Had the purpose of the agent been to terminate a tenancy, the leaving of the key with plaintiff would have been significant. But, where an elevator building was to stand closed for several months, it would seem a most natural, if not necessary, thing to leave the key with some one in the immediate vicinity, to be had in case of fire or any other accident to the building; and it would seem very natural, too, that the key should be left with the party who had for two seasons, as the evidence shows, acted as agent for the owner of the building. We do not deem the matter of leaving the key of any weight as bearing upon the question of plaintiff's discharge. As we are clear that this verdict has no sufficient evidence to support it, and is an injustice to defendant, we are compelled, however reluctant we may be, to direct the lower court to set the same aside, and order a new trial. Reversed. All concur.

SECOND NATIONAL BANK, of Grand Forks, Plaintiff and Respondent, *v.* JAMES K. SWAN, Defendant and Appellant.

Mortgage—Foreclosure—Right to Crops—Priorities.

1. The holder of a certificate of sale of land upon foreclosure has no interest by virtue of such certificate in the crop raised and harvested on the land during the year of redemption.

2. A contract by the fee-owner, purporting to convey such crop to the certificate holder, either as security or absolutely, cannot prevail against a prior mortgage by the fee-owner of such crop, or against a subsequent mortgage, taken without notice or such contract, and given while the fee-owner was in possession.

(Opinion Filed Nov. 7, 1891.)

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

Bosard & Van Wormer, for appellant. *Burke Corbet*, for respondent.

Action by the Second National Bank against James K. Swan for the value of certain wheat. Judgment for plaintiff. Defendant appeals. Affirmed.

Bosard & Van Wormer, for appellant:

An owner of an equity of redemption has the right to assign, sell or transfer the same. Jones on Mortgages, § 6; Freeman on Executions, § 190; Yovle v. Richardson, 23 Am. Dec. 722; Batty v. Snook, 5 Mich. 231; Armstrong v. Sanford, 7 Minn. 34; Goodenow v. Ewer, 16 Cal. 461; McMillan v. Richards, 99 Am. Dec. 655. The contract between Barnes and Brennan is one of sale and purchase of land, and Brennan would not be allowed to deny the right of Barnes to the possession of the land. Jackson v. Miller, 21 Am. Dec. 316; Lacy v. Johnson, 17 N. W. Rep. 246; Wellington v. Gale, 7 Mass. 138; Portu v. Millett, 9 Mass. 101; Seabury v. Stewart, 58 Am. Dec. 254; Holmes v. Schofield, 29 Am. Dec. 346. Brennan having failed to make the payment he agreed to make, the title to the crop never passed. Dunlap v. Gleason, 16 Mich. 158; Marquette Co. v. Jeffery, 49 Mich. 283; Budlong v. Cottrel, 20 N. W. Rep. 166. The same principle is

applicable to this contract as would apply did the relationship of landlord and tenant exist. Lloyd v. Power, 22 N. W. Rep. 492; Smith v. Meech, 26 Vt. 233; Farnum v. Hefner, 16 Pac. Rep. 324; Wentworth v. Miller, 53 Cal. 9.

Burke Corbet, for respondent:

Nowhere in the agreement does it appear, nor was it found to be the case by the court that Barnes extinguished the debt due to him from Brennan; that debt remains unpaid to-day and can be enforced. If a conveyance merely secures a debt, it is a mortgage. If it extinguishes the debt it is a sale, notwithstanding the reservation of the right to redeem. Parish v. Gates, 29 Ala. 254; Smith v. Betty, 31 N. Y. 542; Hauser v. Camp, 3 Pa. St. 208; Todd v. Campbell, 32 Pa. St. 250; Blodgett v. Blodgett, 52 Vt. 32; Wilmerding v. Mitchell, 13 Vroom 476; Robinson v. Willaby, 65 N. C. 520; Ruffimer v. Womack, 30 Tex. 332; Reeves v. Sebern, 16 Iowa 232; Cooper v. Brock, 41 Mich. 488; Musgat v. Pumpelly, 46 Wis. 660; Slowey v. McMurray, 37 Mo. 113; Moore v. Murdoch, 26 Cal. 514.

The opinion of the court was delivered by

BARTHOLOMEW, J. This action was brought to recover the value of certain wheat grown in the year 1889 upon certain described land in Grand Forks county. The case was tried to the court, and the findings established the following facts: One John Brennan had been the owner of the land, and had executed a mortgage thereon, which, on October 6, 1888, was foreclosed, and the land sold, and the time for redemption would expire October 6, 1889. In December, 1888, Brennan executed to plaintiff a chattel mortgage upon all the crops to be grown upon said land in the year 1889, and in March, 1889, he executed to plaintiff a second chattel mortgage upon the same security. Both mortgages were properly filed. On January 2, 1889, said Brennan entered into a written contract with one Edward A. Barnes, as follows: "This agreement, made and entered into the 2d day of January, 1889, between Edward A. Barnes, of Detroit, Mich., party of the first part, and John Brennan, of Turtle River, Dakota, party of the second part, witnesseth, that

whereas, the lands hereinafter described have been foreclosed at mortgage foreclosure as the property of the said John Brennan; and whereas, said John Brennan is indebted to the said Edward A. Barnes, now this agreement witnesseth, that the said Edward A. Barnes, in consideration of the agreements and covenants on the part of the said John Brennan hereinafter contained to be performed, agrees to purchase the said mortgage upon which the land has been foreclosed, and to purchase the sheriff's certificate of sale thereto, and to hold the same until the period of redemption shall have expired, and then to take a deed from the sheriff in his own name for said property, unless the said property shall be duly redeemed in the meantime; and, if the said property shall not be redeemed, and said Edward A. Barnes shall receive a sheriff's deed for the said property, then the said Edward A. Barnes agrees to sell and convey unto the said John Brennan, and said John Brennan agrees to buy, all those certain lots and parcels of land situated in the county of Grand Forks, territory of Dakota, and described as follows to-wit: 'The west ½ of the southwest ¼, and the south ½ of the northwest ¼, of section 22, township 154, range 51, containing 160 acres, according to the return of the surveyor general'—for the sum of $1,995.71 lawful money of the United States; and the said John Brennan, in consideration of the premises, agrees to pay to the said Edward A. Barnes the said sum of $1,995.71 in lawful money of the United States as follows, to-wit: $195.71 on or before the 1st day of November, 1890, and $300 on or before the 1st day of November in each of the years 1891, 1892, 1893, 1894, 1895, and 1896, with interest at the rate of 12 per cent. on the whole sum unpaid, payable on the 1st day of November in the year 1889, and on the first day of November in each year thereafter, until the whole amount of debt and interest shall have been fully paid; and the said John Brennan agrees to pay all taxes or assessments of whatsoever nature which are or may become due on the premises above described. In the event of a failure to comply with the terms thereof by the said John Brennan, said Edward A. Barnes shall be released from all obligations in law or equity to convey said property, and the said party of the second part shall forfeit all right thereto; and

the said Edward A. Barnes, on receiving such payments at the time and in the manner above-mentioned, agrees to execute and deliver to the said John Brennan, or his assigns, a good and sufficient deed for the conveying and assuring to the said party of the second part the title to the above described premises, which the said Edward A. Barnes shall acquire as aforesaid free and clear of all incumbrances thereon caused or suffered by the said Edward A. Barnes; and it is understood that the stipulations aforesaid are to apply to and bind the heirs, executors, administrators, and assigns of the respective parties, and that said John Brennan is to have immediate possession of said premises as the agent and servant of said party of the first part; and the title to all crops grown upon said land in each year shall remain in the said Edward A. Barnes until the payment herein provided to be made in that year shall have been paid." This contract was never recorded, and plaintiff had no knowledge, actual or constructive, thereof. Barnes took up the sheriff's certificate of sale, but took no deed thereon. During the season of 1889, Brennan, entirely at his own costs and charges, raised a crop on said land. Subsequently the defendant, acting for Barnes, seized the crop under the terms of the contract, and sold it against plaintiff's protest and claim, under its mortgages. The judgment below was for plaintiff. The case hinges entirely upon the construction of the written contract hereinbefore set out. The trial court held that, in so far as the crops raised on said land in 1889 were concerned, said contract was, in effect, a mortgage only, and, as it was junior to plaintiff's first mortgage, it must be subordinate thereto; and that, as said agreement was not executed or filed as a chattel mortgage, and plaintiff took its second mortgage without knowledge, actual or constructive, of the existence of the contract, the lien of the second mortgage was superior to the lien under the contract. This holding is as favorable to appellant as contract will admit, and must be sustained, and in sustaining it we need not pass upon, and do not pass upon the ultimate effect of the contract upon title to the land. But when the contract was executed the fee to the land was in Brennan, with an absolute right of possession and right to redeem, extending to the following

October, prior to which time the crop of 1889 would be secured. Brennan's interest could only be divested by a conveyance in writing. The contract does not purport to convey this interest. It contemplates no title in Barnes except such as he obtains through the foreclosure proceedings. Brennan's right to redeem was not impaired by the contract, and title under the foreclosure could not attach in time to affect the succeeding crop. It is true, the contract recites that Brennan is to have immediate possession of the land as agent of Barnes, and the title to the crops "shall remain" in Barnes; but that refers to his title to the crops by virtue of his title to the land. Even if it amounted to a sale of the crop of 1889, it could not prevail as against this plaintiff, because the vendor was left in possession, and the contract was never recorded. The judgment of the district court is affirmed. All concur.

ST. PAUL FIRE & MARINE INSURANCE COMPANY, Plaintiff and Respondent, *v.* HIRAM D. UPTON, Defendant and Appellant.

Insurance—Payment of Premiums by Mortgagee.

Mortgage clause in insurance policy construed, and *held* to embody the promise of the mortgagee to pay insurance premium in case of the failure of the mortgagor to pay it.

(Opinion Filed Nov. 12, 1891.)

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

William A. Scott, for appellant. *Bangs & Fisk*, for respondent.

Action by the St. Paul Fire & Marine Insurance Company against Hiram D. Upton for insurance premiums. Judgment for plaintiff. Defendant appeals. Affirmed.

William A. Scott, for appellant:

There is no privity of contract between the plaintiff and defendant alleged in the complaint, and no such privity exists.

Mahoney v. McLean, 26 Minn. 415; Davis v. Insurance Co., 135 Mass. 251; Bank v. Insurance Co., 29 Conn. 374. This action being brought on a written contract to recover for a breach of the agreement cannot go beyond the agreement nor bind a party who has not bound himself by signing and executing the agreement. Sencobox v. McGrade, 6 Minn. 334; Ferley v. Stewart, 7 Sanford 101; Davis v. Shields, 26 Wandell 341.

Bangs & Fisk, for respondent:

The acceptance of an agreement need not be in writing, but may be acted wholly or in part. 3 Amer. & Eng. Ency. of Law 858. In general a mere oral assent to what has been written out for a contract will, at common law, suffice. Bishop on contracts, § 342; Farmer v. Gregory, 78 Ky. 475; Baron v. Daniels, 37 Ohio St. 279; Dutch v. Mead, 36 N. Y. Sup. 427.

The opinion of the court was delivered by

CORLISS, C. J. This appeal presents the sufficiency of the complaint, the court sustaining it on demurrer. There are three causes of action, but, so far as the question to be considered is concerned, they do not differ. Each cause of action is an alleged indebtedness for an insurance premium. The policy was in favor of the owner of the property insured. The defendant is sought to be charged with a liability for the premium due thereon by virtue of a mortgage clause attached to and made a part of the policy. The construction of this clause determines the question of the liability of the defendant, the mortgagee, to whom the policy, with this clause forming a part of it, was delivered, and by whom it was accepted. That clause provides as follows: "Loss, if any, payable to Hiram D. Upton, mortgagee, or his assigns, as hereinafter provided; it being understood and agreed that this insurance, as to the interest of the mortgagee only therein, shall neither be invalidated by any act or neglect of the mortgagor or owner of the property insured, nor by the vacancy of the premises, nor by the occupation of the premises for purposes more hazardous than are permitted by the terms of this policy, provided that, in case the mortgagor or owner neglects or refuses to pay any premium

due under this policy, then, on demand, the mortgagee shall pay the same; provided, also, that the mortgagee shall notify this company of any change of ownership or increase of hazard which shall come to his knowledge, and shall have permission for such change of ownership or increase of hazard duly indorsed on this policy; and provided, further, that every increase of hazard not permitted by the policy to the mortgagor or owner shall be paid for by the mortgagee on reasonable demand, and after demand made by the company upon and refusal by the mortgagor or owner to pay according to the established schedule of rates."

Does the clause contain an express promise on the part of the defendant, the mortgagee, to pay the premium in case of the default of the mortgagor? It is insisted that it merely prescribes a condition, on the performance of which the mortgagee may entitle himself to the benefits of this clause. But why should this agreement be so construed as to give the mortgagee the option to avail himself of its provisions while the insurance company are to have no choice? If this was the intention of the parties, why did not the provision read as follows: "Provided, that the mortgagee, in case of the default of the mortgagor, shall have paid the premium at the time he claims the benefit of this clause." This would have left in him an option. But the clause, as it does read, is an absolute engagement to pay the money on the default of the mortgagor—"then, on demand, the mortgagee shall pay the same." The clause provides that no neglect or act of the mortgagor, nor shall the vacancy of the premises, invalidate the policy. If defendant's contention is sound, this provision would be nugatory, if the mortgagor should pay the premium on time, for it is only in case of the mortgagor's default that the mortgagee can perform this condition of payment, and defendant insists that it is only on performance of such condition by him that he can have any rights under the mortgage clause. This construction would destroy its effect in many cases. It would often deprive the mortgagee of any benefit from the provision that he should not be prejudiced by any act or neglect of the mortgagor, nor by reason of the vacancy, etc., of the premises. The

maxim, *ut res magis valeat quam pereat*, is a safe guide. The mortgage clause gave the mortgagee immunity from certain forfeitures resulting under the policy from the mortgagor's acts or omissions, and the mortgagee in terms agreed to pay for this immunity the premium in case of the mortgagor's default. This is the clear import of the agreement. The court below sustained the complaint, and its judgment is therefore affirmed. All concur.

AUGUST W. LINTON, Plaintiff and Respondent, *v.* MINNEPOLIS & NORTHERN ELEVATOR COMPANY, Defendant and Appellant.

Principal and Agent—Authority of Agent—Instructions.

Instruction to jury *held* misleading, under the evidence.

(Opinion Filed Nov. 18, 1891.)

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

Hall & Smith, for appellant. *M. A. Hildreth*, for respondent.

Action by August W. Linton against the Minneapolis & Northern Elevator Company to recover the price of certain wheat. Judgment for plaintiff. Defendant appeals. Reversed.

The opinion of the court was delivered by

CORLISS, C. J. The plaintiff has recovered the value of certain wheat on the theory that defendant converted the same to its own use. The plaintiff's original ownership of the wheat is undisputed. It was drawn to the defendant's elevator by a number of men who were employed by plaintiff to assist him in threshing. The defendant's agent having paid these men the price of the wheat, the defendant refused to pay the plaintiff therefor. Hence this litigation. The amount of wheat so drawn and delivered to defendant's elevator and the value thereof are not in controversy. The sole question is whether plaintiff authorized these men to

draw this wheat to the elevator, and pay themselves from the proceeds. There is a direct conflict in the evidence on this point. The verdict of the jury must be held to have settled this matter finally, unless the charge of the court submitted the case to them in such a manner that it is uncertain whether they have ever decided this issue of fact against the defendant. It seems that the plaintiff gave certain authority to one McLain. The utmost scope of that authority was that in Mr. Linton's absence McLain was put in charge of the business of threshing and hauling wheat. Mr. Linton says that McLain was attending to his (Linton's) place while he was away. It is apparent from this statement of McLain's authority that he was not empowered to revoke any authority previously granted to the men to draw wheat and pay themselves out of the proceeds. There is ample evidence that such authority was given them by Linton, although the fact is controverted by plaintiff. But the court in its charge did not leave merely this question of authority to the jury. The objectionable portion of the charge was as follows: "Of course, if you find that these men were authorized to go over there and sell it by Mr. Linton, and you find that McLain was put in possession, that is, put in as foreman, as the head agent of Mr. Linton, and went over and notified this company not to pay them, and it afterwards paid them, if that is in the evidence, the elevator company should not have paid on notice. That is to say, that, if they had notice that these men had no right to sell, of course it would be notice to them." The jury were thus told that although they found that the men were authorized to take and sell the wheat, and pay themselves out of the moneys received, yet if McLain notified the defendant not to pay them the defendant is liable. But such notice from McLain could not be a revocation of any previous authority given to the men by Linton to pay themselves out of the proceeds. McLain had no power to revoke such authority. So long as the authority continued, the defendant was fully protected in paying the men. The charge, therefore, was in this respect erroneous, and we cannot say that it was without prejudice. For ought we know, the jury may have found that the men had such authority to pay themselves out of the wheat

money, which would have constituted a perfect defense; and they may have based their verdict solely on the finding as a fact that notice had been given by McLain to the defendant's agent before the money was paid. There are circumstances in this case which incline us to the view that it was merely on this issue of notice that the jury based their verdict, and that they have never determined the issue of authority against the defendant. For this error the judgment of the district court is reversed, and a new trial ordered. All concur.

THE TRAVELERS' INSURANCE COMPANY, a corporation, Plaintiff and Respondent, *v.* C. L. MAYER, Justice of the Peace in and for the City of Wahpeton, County of Richland, North Dakota, Defendant and Appellant.

Mandamus—Procedure—Issuance of Peremptory Writ—Appeal.

1. Where on the return of an alternative writ of *mandamus*, defendant showed cause by answer, and issue was joined by a demurrer to the answer, after hearing counsel for the respective parties, an order was made sustaining the demurrer and dismissing the answer. Such order did not recite in terms that it was made "by the court," and it was signed "W. S. Lauder, Judge." *Held*, that the order was an order of the district court, and was not an order made "at chambers."

2. Without further proceedings, and without obtaining an order adjudging that the peremptory writ of *mandamus* should issue, such writ did issue, and was served on defendant. The issuing of the writ was excepted to, and in the exception thereto the writ was styled an "order." No appeal was taken from the order sustaining the demurrer or from the peremptory writ denominated an "order," but, after the time for appeal had expired, a motion was made to vacate such writ, and an order of the district court was made refusing to vacate the same; and defendant has attempted to appeal from the last mentioned order to this court, under subdivision 5, § 24, c. 120, Laws 1891. *Held*, that the appeal will not lie. Under § 4828, Comp. Laws, the district court is "always open," except for the trial of issues of fact in actions; and hence an appeal will lie from an appealable order of the court whether the same is made out of term or in term.

Whether the district court acts upon a given matter cannot be determined by the form of the order or the style of the judge's signature thereto.

3. This case follows and is governed by Insurance Co. v. Weber, *post*, 50 N. W. Rep. 703, the opinion in which is handed down with this.

(Opinion Filed Nov. 18, 1891.)

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

W. E. Purcell and *L. B. Everdell*, for appellant. *McCumber & Bogart*, for respondent.

Application of the Travelers' Insurance Company for a writ of *mandamus* to C. L. Mayer, a justice of the peace for Richland county, to compel him to issue execution on a certain judgment. Writ allowed. Defendant appeals. Appeal dismissed.

The opinion of the court was delivered by

WALLIN, J. On January 3, 1891, an alternative writ of *mandamus*, signed by "W. S. Lauder, Judge," was issued, commanding the defendant, C. L. Mayer, justice of the peace, to issue execution out of his court upon a judgment therein in favor of this plaintiff and against one Gertrude Weber, or "show cause before the judge of this court, in chambers, at his office in the city of Wahpeton," etc. Defendant showed cause by answer setting up certain defenses. A general demurrer to the answer was interposed, and plaintiff also moved to strike out the answer. After a hearing the following order was made: "This action coming on to be heard on the foregoing demurrer on the 10th day of January, 1891, and after hearing the argument of the attorneys for the respective parties herein, it is ordered that the said demurrer be, and the same is hereby sustained, and the answer in said action dismissed. Dated January 10th, 1891. W. S. LAUDER, Judge." On the same day an exception was taken and allowed to said order. So far as appears of record, no separate order or judgment was made directing the peremptory writ to issue; but on the said hearing

upon which the demurrer to the answer was sustained and the answer dismissed, a peremptory writ did issue in due form, directed to the defendant in this proceeding, and which, among other things, recites that it appears by affidavit "and by the evidence adduced in said action on the trial thereof this day," etc. The concluding and mandatory part of the peremptory writ is as follows: "Therefore we do cammand you that immediately after the receipt of this writ, upon the payment or tender of your lawful fees therefor, you issue an execution in favor of the said plaintiff and against the said defendant in said action for the restitution and possession of said premisses. Dated January 10th, 1891. W. S. LAUDER, Judge." An exception was allowed as follows: "To the foregoing order the defendant by his attorney excepts. W. S. LAUDER, Judge." Service of the above was admitted by defendant's counsel on January 10, 1891. No appeal to this court has been taken from the order sustaining the demurrer and dismissing the answer, or from the peremptory writ. A peremptory writ does not regularly issue in a *mandamus* proceeding until the court, by an order of judgment, awards such writ. The practice in New York is indicated in 5 Wait, Pr. 591, also 594–596. Our statute contemplates that a judgment shall be entered. § 5527, Comp. Laws. See, also, Hayne, New Trial & App. 981; and as to appeals in *mandamus*, see § 5536, Comp. Laws. In this proceeding, as has been said, no order or judgment was made or entered in terms awarding the peremptory writ. The writ issued at once after the order was made sustaining the demurrer and dismissing the answer. In strictness and in fact, though not in terms, the order sustaining the demurrer was in this case the final order in the proceeding, and the court below assumed that no further order or judgment was necessary to award the writ. This order, under the circumstances, liberally construed, would be an appealable order. It sustained a demurrer, and in this proceeding was, in effect, "a final order affecting a substantial right made in a special proceeding." Subdivision 2, 3, § 24, c. 120, Laws 1891; State v. Webber, 31 Minn. 211, 17 N. W. Rep. 339. The peremptory writ does in a sense embody an order, and also an adjudication in the nature of a judgment,

but, to prevent confusion in practice, it must be distinguished from an order, and must preserve its identity. It is a peremptory writ, and is so denominated in all works of practice, as well as in the statute. If the writ could be regarded as a judgment, an appeal would lie from it to this court, under § 5536, Comp. Laws. But no appeal to this court has been taken, either from the order sustaining the demurrer or from the peremptory writ of *mandamus*, miscalled an "order." More than sixty days after the order sustaining the demurrer was granted, and after the peremptory writ issued and was served, proceedings were taken in the court below, which indicate that the court, as well as defendant's counsel, acted upon the theory that the writ, and not the order sustaining the demurrer, was a final order in a special proceeding. The defendant moved in the trial court to vacate the peremptory writ, describing it as an "order." The motion was made under subdivision 5, *supra*, upon the theory that the so-called "order" was a mere "chamber's order." After hearing counsel, the trial court made the following order: "This action coming on to be heard before me, at my chambers in the city of Wahpeton, county and state aforesaid, on the 13th day of March, A. D. 1891, upon a motion of Purcell & Purcell, attorneys for the defendant herein, to vacate and set aside an order heretofore made, to-wit, on the 10th day of January, 1891, directing the said defendant to issue an execution in an action wherein the Travelers' Insurance Company, a corporation, is plaintiff, and Gertrude Weber is defendant, in favor of the said plaintiff and against the said defendant in said action, for the restitution and possession of the premises described in the complaint of the plaintiff in the said action, and the whole thereof, after hearing the argument of W. E. Purcell on behalf of the defendant and in support of the said motion, and of P. J. McCumber on behalf of the plaintiff and against said motion, now, on motion of P. J. McCumber, attorney for plaintiff, it is hereby ordered and adjudged that the said motion be, and the same is hereby denied. By the court, W. S. LAUDER, Judge. Dated March 13th, 1891."

From the last mentioned order an appeal has been attempted to be taken to this court by the defendant. The position is

taken in this court by respondent's counsel that the order sought to be reviewed is not an appealable order. We think the point is well taken. Certainly such order is not in terms made appealable by the statute. But counsel for the appellant insist that an appeal will lie under subdivision 5, *supra*. Counsel argue that the order refusing to vacate is an order made "by the court" refusing to vacate an appealable order made "at chambers." In our view, this position is untenable, even from the standpoint of appellant's counsel, for the reason, as we have shown, that the motion to vacate was not leveled at an appealable order, but was leveled at the peremtory writ. But, as the question involves an important practice question, we prefer to place our ruling distinctively upon another ground. The court had occasion, in considering a case argued with this proceeding, and closely associated with it, to pass upon what are essentially the same questions of practice presented in this record. The decision in that case is handed down with this, and will govern this. We refer to Insurance Co. v. Weber, 50 N. W. Rep. 703. Appellant's counsel cite Gere v. Weed, 3 Minn, 352 (Gil. 249.) The case is not authority for appellant's position. That decision was sound when and where it was made, but it was made before that state adopted the system now prevailing there as well as here—*i. e.*, the system under which district courts are "always open," except for the trial of issues of fact. When that case was decided, conditions differed radically from those existing in this state at present in this: The district court there was not "always open" except for trials of issues of fact in actions; *second*, the common-law powers of a judge or chancellor at chambers could be exercised by constitutional functionaries styled "court commissioners," as well as by the judge of the district court; *third*, at that time, and by virtue of special statutes, the district court had authority to exercise its power as a court, in certain cases, out of term and in vacation. This class of cases, denominated "vacation business," was clearly distinguished from "chambers business" proper. See opinion in Gere v. Weed. Here we have no "vacation business," nor orders "in chambers" deciding court matters, no court commissioners wielding the

authority of a judge at chambers. Here, with the exceptions stated in the statute, the district court is "always open." Comp. Laws, § 4828. But when our present appeal law was originally adopted in the state of Wisconsin, from which state we borrowed it, a condition of affairs existed much the same as that in Minnesota when Gere v. Weed was decided, and subdivision 5, *supra*, was framed to meet the practice then existing in that state, but which does not exist here; and, as was intimated in Insurance Co. v. Weber, that subdivision can have only a limited application here. In this state, where a court matter, after a notice and a hearing, has been decided, and an order made, whether signed by the judge or by the court, or put in the minutes, such order is not an order at chambers, but is an order of the district court, and, if the same is appealable, the appeal must be taken from such order within the time allowed by statute. Nor will a motion made after the time elapses for an appeal prolong such time. See authorities cited in Insurance Co. v. Weber. From these views it follows that the appeal must be dismissed. Such will be the order. All concur.

THE TRAVELERS' INSURANCE COMPANY, a Corporation, Plaintiff and Respondent, *v.* GERTRUDE WEBER, Defendant and Appellant.

Appeal From Justice—Dismissal—Order of Judge—Vacating Order—Right to Appeal.

1. An order, made by a judge of the district court to show cause why an appeal from a justice's court should not be dismissed, cited the appellant to "show cause before the court at chambers," etc. An order was made dismissing the appeal, which recited that it was made after hearing both sides on the return of the order to show cause. The order of dismissal was not made at a general or special term of the district court, nor did it recite in terms that it was made "by the court." Only the following words were appended to the judge's signature to the order: "Judge District Court, Richland County, N. D." *Held*, that it appears from the record that the order of dismissal was an order of the district court, and was not a mere "chambers order."

3. *Held further*, that, inasmuch as the statute (§ 4828, Comp. Laws) declares that district courts are "always open" except for the trial of issues of fact in actions, it follows that a judge of the district court cannot, at his option, and by the form of an order, or the style of his signature thereto, determine whether a given matter is or is not a court matter.

3. No appeal to this court was taken from the order dismissing the appeal, but after the time allowed for appeal had expired a motion was made before the district court to vacate the order of dismissal. The motion was denied, and defendant has attempted to appeal from the order refusing to vacate the first order. *Held*, that the order refusing to vacate the order dismissing the appeal is not appealable. This court will not take jurisdiction of an order of the district court refusing to vacate an appealable order made by the district court; nor can the time for appeal to this court be extended by an order of the court below vacating or refusing to vacate an appealable order. Whether an order dismissing an appeal from a justice court to a district court is appealable, is not decided.

(Opinion filed November 18, 1891.)

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

W. E. Purcell and *L. B. Everdell*, for appellant. *McCumber & Bogart*, for respondent.

Action by the Travelers' Insurance Company against Gertrude Weber for unlawful detainer. Judgment for plaintiff. Defendant appeals. Appeal dismissed. The facts and authorities cited are set out fully in the opinion.

The opinion of the court was delivered by

WALLIN, J. This action originated in a justice's court under the forcible entry and unlawful detainer statute. The justice of the peace rendered judgment in favor of the plaintiff on December 15, 1890. Within the time limited by statute the defendant appealed from said judgment to the district court upon questions of both law and fact, and in the notice of appeal demanded a new trial. On January 5, 1891, plaintiff's counsel, acting upon the theory that (for certain reasons appearing hereafter) an appeal would not lie from such judgment to the district court, obtained the following order to show cause.

"Now, therefore, on motion of McCumber & Bogart, attorneys for plaintiff, it is hereby ordered that the defendant in the above entitled action show cause before this court at chambers, at the office of Hon. W. S. Lauder, judge of the district court in and for said county and state, on the 10th day of January, 1891, at 1 o'clock P. M., of said day, why the said appeal allowed by the said justice should not be dismissed. Dated January 5th, 1891. W. S. LAUDER, Judge." After a hearing, the following order was made: "This cause coming on to be heard on the order to show cause why the appeal allowed therein by the said justice to the district court in and for said county should not be dismissed, after hearing the arguments of counsel for the respective parties in support of and in opposition to such dismissal, and it appearing therefrom and from the affidavit of P. J. McCumber, made in support of such dismissal, and from all the papers and records in said action, that judgment for restitution and possession of the premises described in the complaint in said action was entered therein in favor of said plaintiff and against said defendant on the 15th day of December, 1890, and that no statement of the case has been made in said action, and no appeal taken on questions of law alone, and that no answer was made by the defendant in said action, but that the same was tried on the complaint and evidence of plaintiff, and that no issue was joined in the trial of said action, and that notice of appeal on both questions of law and fact was made in said action, and an appeal allowed by said justice therein; and it further appearing that said appeal was without authority of law; now, therefore, it is ordered that the said appeal be, and the same is hereby dismissed, and the clerk of said district court is hereby ordered to return to said justice all papers and records sent him in said action by said justice. Dated January 10th, 1891. W. S. LAUDER, Judge District Court, Richland Co., N. D." No appeal has been taken to this court from said order of dismissal, but after time to appeal from the order had expired, and on March 13, 1891, defendant moved the district court to vacate said order. After hearing both sides, the motion was denied. The material part of the order denying the motion is as follows: "Now, on motion of P. J. McCum-

ber, attorney for plaintiff, it is hereby ordered and adjudged that the said motion be, and the same is denied. Dated March 13th, A. D. 1891. By the Court: W. S. LAUDER, Judge." The last order is sought to be appealed to this court.

The appellant assigns numerous errors based upon the record transmitted to this court; but, as we view the case, such errors cannot be reached by this court for jurisdictional reasons. The point is made that the order attempted to be appealed from—the order refusing to vacate a previous order dismissing the appeal—is not an appealable order under our statute regulating appeals. We are of the opinion that the point is well taken, and must be sustained. The appellant has assumed by the appeal—and respondent does not discuss the point—that an order of the district court dismissing an appeal, if made by the court, is an appealable order, under subdivision 1, § 24, c. 120, Laws 1891, which reads as follows: "(1) 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." Without deciding the point, we will assume, for the appellant's benefit, that an order of the district court dismissing an appeal from a justice court, if made by the court, is an appealable order. But appellant's counsel takes the position, inasmuch as the order of dismissal was not on its face an order made "by the court," but was an order signed as follows, "W. S. LAUDER, Judge District Court, Richland Co., N. D.," that such order was not a court order at all, but was a mere "chambers order," made by the judge out of court, and that such an order, under subdivision 5, § 24, c. 120, Laws 1891, was not appealable, and that the order refusing to vacate, which reads on its face, above the judge's signature, "By the court," is appealable under said subdivision 5. We cannot yield our assent to this reasoning. In the first place, it appears from the record that the order to show cause why the appeal should not be dismissed cited defendant to "show cause before the court at chambers," and the order of dismissal recites that it was made after hearing both parties upon such order to show cause. From these recitals it appears from the record that the order of dismissal was a court

order—*i. e.*, an order made after hearing both sides in court. Furthermore, it is clear to our minds that the mode and style adopted by a judge of the district court in appending his signature to an order disposing of what is essentially a court matter cannot, under our statutes, determine the character of the order made. To assent to the notion that a judge of the district court is permitted at his option to determine by the phraseology of an order, or by the style of his signature thereto, whether in deciding a matter he is exercising powers vested by the constitution in the district court, or whether he is acting in some other capacity not defined, would be to sanction a state of things closely resembling jugglery.

Referring to district courts, § 4828, Comp. Laws, declares: "These courts are always open for the purpose of hearing and determining all actions, special proceedings, motions, and applications of whatever kind or character, and whether of a civil or criminal nature arising under the laws of the territory, and of which the district courts have jurisdiction, original or appellate, except issues of fact in civil and criminal actions." The statute further provides that all matters except the trial of issues of fact in actions may be heard and determined at any place in the same district where the matter is pending. This statute is plain and unambiguous. It declares that district courts are "always open," except for the trial of issues of fact in actions. By this statute the distinction is abrogated which from ancient times has existed at law and in chancery between the powers of a court when sitting at a general or special term and those other and different powers which could be exercised out of court by a judge thereof when in his chambers. What could be done by a judge of a court of law or by the chancellor at chambers was perhaps fairly well settled by the practice at an early day in England; but in this country the powers of judges at chambers have been much modified and enlarged by legislation, and hence differ widely in the different states. To explore the authorities for the purpose of tracing the lines of demarkation separating the powers of courts from those of judges out of court in other states would be of little or no practical value where, as with us, the line itself has been effaced by law. The reason why a judge,

out of term, sitting in his chambers, could not formerly exercise the power and authority of the court was simply because the court at such times was not open for the transaction of business. Formerly there was and could be no court open except at a general or special term appointed to be held pursuant to law. But in this state the district court is "always open." It is quite true, as well as somewhat confusing, that our statute does in a few instances in express terms confer powers upon the judges of the district courts which essentially belong to courts as such, and which under the old procedure, were exercised only by courts in term time. Section 4675, Comp. Laws, is an example of this class of statutes. As a rule such statutes were ingrafted upon our laws from the older states, and were passed prior to the departure made in 1887, whereby it is declared by statute that the district courts are always open. The district courts being always open, it is of course entirely superfluous to confer upon the judges powers which they already possess as district courts. The court being open, it does not matter vitally whether an order of the court is embodied in the minutes or reduced to writing and filed with or without the words, "By the court," if the thing done is in its nature an exercise of the powers of the district court. In all cases where the decision is made after notice and a hearing it is the court which acts, and not the judge. Nor can the form of the order or the style of the judge's signature thereto determine the matter. Where, by virtue of the statute, district courts are clothed with authority to hear and determine court cases out of term, an order in such cases, made after a hearing brought on by notice of motion or order to show cause before the "judge at chambers," is an order of the district court, and must be so regarded. In such cases it is much better practice to cite parties before the court and not before the judge, as it is the court which acts. Yale v. Edgerton, 11 Minn. 271 (Gil. 184); Rogers v. Greenwood, 14 Minn. 333 (Gil. 256); State v. McDonald, 26 Minn. 445, 4 N. W. Rep. 1107; McLane v. Granger, 74 Iowa 152, 37 N. W. Rep. 123. It is true, nevertheless, that under existing statutes, which were for the most part adopted prior to 1887, judges of the district courts are authorized to make, and are constantly making, certain orders wherein

they assume, somewhat illogically under the present system, to act as judges and not as courts. Such orders are made to facilitate the hearing of causes pending in court or about to be commenced. This class of orders is quite similar in character, and practically the same orders which under the old system of procedure, were made by judges out of court, and were known as "chambers orders." This class of orders is usually made with little deliberation, and *ex parte*, and is intended to be preliminary only. Familiar examples of this class of orders are the orders to publish the summons in actions about to be commenced (§ 4900 Comp. Laws); orders of arrest in arrest and bail proceedings under § 4946; injunctional orders, made *ex parte*, under § 4984; orders appointing receivers *ex parte*, under § 5017; also orders staying proceedings, orders to show cause, orders enlarging time to plead, and the like. Whenever any of this class of orders are improperly made, a remedy by motion brought before the court on notice will lie to vacate the same. If the motion to vacate is granted or denied, an appeal will lie, if at all, under subdivision 5, § 24, c. 120, Laws 1891, which gives an appeal to this court only where the original order was appealable. Our present appeal law is a transcript from a Wisconsin statute, which was enacted in that state as a part of a system in which the circuit court (corresponding to our district courts) was not "always open," and where only certain court business proper could, under special statutes, be done by the "judge at chambers." Hence some parts of the appeal law are out of harmony with our present system of procedure in the district courts, and only a thorough revision of the statutes will give entire smoothness to a system of practice now somewhat incongruous and discordant. But in the case under consideration no difficulties of practice arise. The order dismissing the appeal from the justice's judgment is not one in its nature preliminary nor was it made *ex parte;* but, on the contrary, after notice and a hearing from both sides, it was judicially determined that the action was not appealable, and not legally pending in the district court, and hence the appeal was dismissed. The decision was obviously made by the court, and at a time when the district court was in session, for the

purposes of the case, as completely as it could be under any circumstances. No appeal was taken to this court from the order dismissing the appeal to the district court. We are now asked, on an appeal from another order made in court — the order refusing to vacate the order dismissing the appeal—to review the first order and pass upon its merits. It is obvious that, if the first order is not appealable, the last cannot be, under subdivision 5, *supra*. Besides, to hold otherwise would be tantamount to saying that this court could take jurisdiction and review a case indirectly in which the statute gives no appeal. This would be beyond the power of this court. The right of appeal is wholly statutory. As we have seen, the order dismissing the appeal was made by the district court. This gives rise to the question whether the supreme court of this state can take jurisdiction on an order of the district court refusing to vacate an appealable order of the district court. This question must be answered in the negative. Henly v. Hastings, 3 Cal. 342; Higgins v. Mahoney, 50 Cal. 446; Holmes v. McCleary, 63 Cal. 497; Larkin v. Larkin, 76 Cal. 323, 18 Pac. Rep. 396. Nor can the time allowed for an appeal be extended by an order refusing to vacate or vacating an appealable order. Thompson v. Lynch 43 Cal. 482; Kittredge v. Stevens, 23 Cal. 283. In what we have said no reference is made to such orders as the district court may, under the statute (§ 4939, Comp. Laws), vacate on a showing that they were made by mistake, inadvertence, or excusable neglect. No such showing was made or attempted in this case. It follows that the appeal to this court attempted to be made in this action must be dismissed. Such will be the order. All concur.

HAXTUN STEAM HEATER COMPANY, Plaintiff and Respondent, *v.* MARTIN L. GORDON, ET. AL., Defendants; THE DAKOTA INVESTMENT COMPANY, Defendant and Appellant.

Mechanic's Liens—Priority—Mortgages.

1. Under our mechanic's lien law, a party who furnishes labor and materials which are used in the construction of a building has a lien for the value of such labor and materials upon such building, and the

land whereon it stands, superior to the lien of a mortgage upon such land executed after the commencement of the building, although no part of such labor and material was furnished until after such mortgage was executed and recorded.

2. Alterations in the original plans and specifications for the building, although made after the execution of such mortgage, and not at that time contemplated by either the mortgagor or mortgagee, cannot be effectual to deprive the party who furnishes the labor and material for such alteration of the benefits of such superior lien, provided such alterations do not change the design and purpose of the building, so that the whole, when finished, is substantially a different building from the one first commenced.

(Opinion Filed Nov. 18, 1891.)

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

Burke Corbet, for appellant. *Fred B. Lathrop* and *Cochrane & Feetham*, for respondents.

Action by the Haxtun Steam Heater Company against the Dakota Investment Company and others to determine the priority of liens on real estate. Judgment for plaintiff. Defendant appeals. Affirmed.

Burke Corbett, for appellant:

Error is claimed by the trial court, striking out certain testimony of defendant's witnesses, citing to sustain the point: Soule v. Dawes, 7 Cal. 575; Crowelly v. Gilmore, 13 Cal. 54; Mutual Life Co. v. Rowland, 26 N. J. Eq. 389; Wells v. Canton county, 3 Md. 234; Knox v. Stark, 4 Minn. 20; Taylor v. LaBar, 25 N. J. Eq. 222; Tompkins v. Horton, 25 N. J. Eq. 284; Parrish Appeal, 83 Pa. St. 111; Aiken v. Kennison. 5 At. Rep. 757. A mechanic's lien for materials for improving or enlarging a building does not take priority over an existing mortgage. Jessup v. Stone, 13 Wis. 466; Getchell v. Allen, 34 Iowa 559; Insurance Co. v. Slye, 45 Iowa 615. Provisions of a mechanic's lien law giving such lien priority over incumbrances on the land created before the making of the contract and decreeing that the deed, etc., takes precedence of any other title, is void. Myers v. Berlandi, 39 Minn. 438.

Fred B. Lathrop, for respondent:

The material which enters into the construction of a building prior to its completion, pursuant to a contract with the owner, is a part of the building, and the material-man has a lien dating from the commencement of the building. This is the sole test to determine priority. Nelson v. Iowa, etc., 44 Iowa 75; Davis v. Alvord, 94 U. S. 545; Insurance Co. v. Sly, 45 Iowa 615; Davis v. Belsland, 85 U. S. 659; Brooks v. Burlington, 101 U. S. 443; Hydraulic Co. v. Bormen, 19 Mo. App. 665; Douglas v. St. Louis, etc., 56 Mo. 400; Page v. Betts, 17 Mo. App. 381; Insurance Co. v. Pringle, 2 S. & R. 138; Reading v. Hopson, 90 Pa. St. 497; Dubois v. Wilson, 21 Mo. 214. The mortgagee takes his mortgage with notice of this. The fact of the improvement gives notice to the world. Loan Association v. Rowland, 26 N. J. Eq. 392, and cases cited. The commencement of the building is the first labor done on the ground—the excavation for the foundation. Conrad v. Star, 50 Iowa 481. Boilers imbedded in brick and stone and a steam heating apparatus are a part of the building when furnished during its construction. Dimmick v. Cook, 8 At. Rep. 627; Watts v. Geuning, 3 N. Y. Sup. 869; Boynton v. Reid, 3 N. Y. Sup. 224; Schwar v. Allen, 7 N. Y. Sup. 5; Schaper v. Bibb, 17 At. Rep. 935; Goss v. Hilbrig, 19 Pac. Rep, 277; Short v. Miller, 14 At. Rep. 374; Donahue v. Cromartie, 21 Cal. 86.

The opinion of the court was delivered by

BARTHOLOMEW, J. This is a contest for priority between plaintiff, the Haxtun Steam Heater Company, a mechanic's lien holder, and the defendant, the Dakota Investment Company, a mortgagee. There was a decree below for the plaintiff, and the investment company appeals. Section 5478 of our Compiled Laws reads as follows: "The liens for labor done or things furnished shall have priority in the order of the filing of the accounts thereof, as aforesaid, and shall be preferred to all other liens and incumbrances which may be attached to or upon said building, erection, or other improvement, and to the land on which the same is situated, or either of them, made subsequent to the commencement of said build-

ing, erection, or other improvement." The unquestioned facts are these: One Gordon was the owner of certain lots in the city of Grand Forks, upon which he desired to erect an hotel building. On August 12, 1889, he commenced the erection of said building. August 17, 1889, Gordon executed to the appellant a mortgage upon said lots for the sum of $10,550. That said mortgage was properly recorded on August 19, 1889. That in October, 1889, Gordon entered into a contract with the respondent, by which respondent agreed to place a steam heating apparatus in said building, which was furnished and put in place in November and December of that year, and before the completion of the building; and within the required time respondent furnished and filed the necessary documents to perpetuate its lien for the unpaid amount due for such heating apparatus. The appellant introduced certain evidence, which, on motion of respondent, was subsequently stricken out by the court as immaterial. This action of the court is assigned as error. The rejected evidence showed that before the building was commenced Gordon procured an architect to make plans and specifications therefor; that there was no general contractor for the erection of the building, but that Gordon contracted with various parties for different lines of material and work as the same were needed; that said plans and specifications were always used as the basis upon which such contracts were made; that said plans and specifications contemplated heating said building with stoves, and not by steam, but included a smoke stack for future use, as it would be cheaper to put it in then than afterwards; that said plans and specifications, and the submission of bids by different contractors thereunder, formed the basis upon which appellant made the loan to Gordon; that after such loan was perfected, and the mortgage executed and recorded, the plans for said building were so far changed as to substitute a steam heating apparatus for stoves; that said change was made at the solicitation of respondent's agent, and when made, and when the contract for the steam heating apparatus was entered into, respondent had both actual and constructive notice of the mortgage to the appellant. This statement uncovers the contention of the parties. Respondent

claims that under the statute its lien has priority over any mortgage on the lots made subsequent to the commencement of the building, although prior to the time when respondent made its contract with Gordon and furnished any part of its labor and materials. The appellant, on the other hand, insists that, as it parted with its money and took its security on the basis of the plans and specifications as they then existed, it is by law entitled to priority over any lien for labor or materials subsequently furnished for purposes not then contemplated in the plans and specifications of the building then being erected; that as to the steam heating apparatus furnished by respondent it was so far a change of and enlargement upon the originul building that as to it, and the inception of a lien therefor, the building was not commenced, in the sense of the statute, until the contract for such apparatus was entered into. All of the errors assigned are but different methods of bringing forward this one claim, and the case presents but the single question.

Mechanic's lien statutes, containing provisions similar to cr identical with the section quoted from our statute, exist in many of the states, and have been frequently before the courts. The precise point here raised has not been often ruled, nor, unfortunately, have the rulings been uniform, yet we are clear that the holding of the lower court has the support of the decided weight of authority as well as sound principle. Appellant cites us to the case of Welch v. Porter, 63 Ala. 232. That case was decided under a statute which declares that the lien conferred thereby "should attach and be preferred to all other incumbrances which may be attached to or upon such buildings, erections, or other improvements, or the ground, or either of them, subsequent to the commencement of such buildings or improvements." It must be admitted that this case fully sustains appellant's position, and goes even further, for the court say: "Nor do we doubt that when, by the terms of the contract, one person is to do the labor, and another is to furnish the material, the lien of each attaches from the time he commences the performance of his contract." And again: "If we were to hold that, because a building had been commenced, a subsequent contractor or material-man could acquire a lien which would

take precedence over an intervening incumbrance, we think we would shock the moral sense of the profession, and fail to carry out the intent of the legislature." In that case there was no question of alteration in the original plans, or enlargement upon the building, and the court holds that the lien of each mechanic or material-man attaches only from the time he commences the performance of his contract. The case stands alone, however. No other case can be found going to the same extent. Appellant also cites in support of its position Soule v. Dowes, 7 Cal. 575. But in that case the facts were of an entirely different character. There the lot owner entered into a contract for the erection and completion of a building for a consideration certain, to be paid part in money and part by the conveyance to the contractors of certain other realty. While the building was in progress of erection the owner mortgaged the property where the building stood to a party who was thoroughly conversant with the terms of the contract with the contractors. After the building was completed the contractors waived the conveyance of the realty that was to be taken in part payment, and took the owner's note for the amount, and subsequently filed a lien, and sought to have it declared superior to the mortgage. But the court held that the parties could not change the terms of payment to the detriment of the mortgagee. The language used by the California court was entirely pertinent to the facts in that case, but certainly never was intended to apply to the facts of a case like the one before us. This case was again before the supreme court in 14 Cal. 250. At that time a new element was introduced into the case in the form of a claim for extra work not covered by the compensation fixed in the original contract. The court allowed the claim as superior to the mortgage, but upon the theory that the extra work was done with the mortgagee's knowledge, and without any objection on his part, and the language used would indicate that the claim would not have been allowed under other circumstances. The cases that have held that the lien for labor or material was paramount to the lien of the mortgage executed after the building was commenced, but before such labor or material was furnished, are very numerous. The leading ones are Neilson v. Railway

Co., 44 Iowa 71; Dubois v. Wilson, 21 Mo. 213; Insurance Co. v. Pringle, 2 Serg. & R. 138; Gordon v. Torrey, 15 N. J. Eq. 112; Meyer v. Construction Co., 100 U. S. 457; Davis v. Bilsland, 18 Wall. 659; Parrish & Hazzard's Appeal, 83 Pa. St. 111; Insurance Co. v. Paulison, 28 N. J. Eq. 304. In some states, also, the mechanic's lien attaches to the particular structure or improvement for which the labor or materials were furnished, in preference to a mortgage on the land executed prior to the commencement of such structure or improvement. See Brooks v. Railway Co., 101 U. S. 443, and cases there cited. But this is only true where such structure or improvement is of such a nature and so built that it can be sold separately, and severed, and removed without injury to the realty, as it existed prior to the building of such structure or improvement. Getchell v. Allen, 34 Iowa 559; Insurance Co. v. Slye, 45 Iowa 613. It has also been repeatedly held that, when a building was once finished, the lien for labor or material subsequently furnished for additions, enlargements, or alterations thereto did not attach from the commencement of the original building, but only from the commencement of such additions, enlargements, or alterations. See Phil. Mech. Liens, § 220, and cases cited. The cases where the subsequent labor or materials, for which a lien superior to the intervening mortgage is claimed, were furnished and used in the construction of the building before its completion, but for purposes not contemplated in the original plans, or when the mortgage was executed, are less numerous. Phillips on Mechanic's Liens thus states the principle: "The criterion would seem to be that everything done before the building is finished, according to the original plan or design, whether agreeably to that plan or not, may be made the subject of a lien, which will relate back to the period when the building was commenced, to the exclusion of intervening incumbrances. * * * So long as any part of a building is incomplete the whole is so, and may be moulded into any shape to suit the wishes of the owner, without excluding the alterations so made from the benefit of the lien law." § 220.

Norris' Appeal, 30 Pa. St. 122, is an instructive case, and discusses many of the principles that ought to govern this case.

In that case a party commenced the erection of a building for the purpose of manufacturing saws by hand. Before it was entirely completed he conceived the idea of changing it into a steam manufacturing establishment, which required the erection of additional buildings and the outlay of much more money. He paid off all mechanic's claims up to that date, and mortgaged the premises. Subsequently he began the erection of the additional buildings which, when completed, formed, with the building first erected, one establishment. A lien was filed for labor and material that went into the additional buildings, but the court held such lien junior to the mortgage, on the ground that the steam manufacturing establishment was an entirely different structure from the one first erected, and was not commenced until the additional buildings were commenced. Judge SHARSWOOD in his opinion, adopted by the court, says: "The true question then is, was the whole establishment erected on substantially one plan and design from the commencement, or was the plan or design so materially changed during the progress of the work as to make the whole a different building from that which was or would have been erected had no such change taken place? I use this language cautiously, to exclude the idea that any project of subsequent alteration, whether vague or certain, whether entertained at the commencement or suggested during the progress of the building, and not embodied in the actual plan upon which it was commenced and carried on, could make any difference." Further on he says: "It may be safely conceded that unimportant alterations in the plan, such as the height or number of the stories, the arrangement and finish of the rooms, or even the addition of one or more outhouses, not materially altering its character, would not affect the rights of subsequent claimants." See, also, Pennock v. Hoover, 5 Rawle, 307; Insurance Co. v. Slye, *supra*. In this case the heating apparatus was furnished and placed in the building in the course of its erection. That it became a part of the structure is not questioned. The law would presume, in the absence of all testimony, that the heating apparatus augmented the value of the building in an amount equal to its cost. The building, when completed, was

the same building that was commenced before the mortgage was given. "The purpose of its design" was in no manner changed. It had the same dimensions, the same general arrangement, and was furnished and fitted for the purposes originally intended. That it was heated in a different manner is of no more significance than would have been the addition of another coat of paint or plaster. From the time of its commencement there was, so far as the record shows, no cessation or delay in its erection until it was completed. It is idle to say that there can be two points of time at which such a building is commenced. We cannot add to the statute. These statutes have generally been liberally construed to give effect to the benefits they are intended to secure. To deny the respondent a lien for its labor and materials that went into that building, superior to the lien of a mortgage that, confessedly, was executed five days after the building was commenced, would be in clear disregard of the statute. It may be that there is an element of hardship in it. It may be that the mechanic or material-man could protect himself by searching the record, but experience shows that line of business is not usually done in that manner. It may be that the person who takes a mortgage upon realty whereon a building is in process of erection assumes some risks that he cannot accurately measure. But so the law is written. Nor is there any great hardship in it. The mechanic or material-man is entitled to no lien until he has augmented the value of the property, and then only to the amount, theoretically and presumptively, of such augmented value. This increased value of his security is directly beneficial to the mortgagee. It is true that to save his mortgage lien he may be required to make an increased investment in the security, but the increased investment is measured by the increased value. One lien or the other must be superior, and the legislature, in its wisdom, has seen proper to require that the mortgagee should take care of the mechanic's lien—usually insignificant in amount as compared with the mortgage—rather than that the mechanic, often a day laborer, should take care of the mortgage of the capitalist. As under the statute the respondent's lien was superior to the lien of ap-

pellant's mortgage, the excluded evidence was immaterial, and the conclusions of law drawn by the trial court from the undisputed facts were entirely correct. Judgment affirmed. All concur.

JOHN T. PIRIE, GEORGE SCOTT, ROBERT SCOTT, and ANDREW MCLEISH, Co-Partners under the firm name and style of CARSON, PIRIE, SCOTT & Co., Plaintiffs and Respondents, *v.* GEORGE GILLITT, WILLIAM GILLITT, and HARVEY GILLITT, Co-Partners doing business under the firm name and style of GILLITT BROS., Defendants; HARVEY GILLITT, Defendant and Appellant.

Directing Verdict—Evidence of Partnership.

1. When the court directs a verdict for either party, the evidence of the opposite party must be considered as undisputed, and it must be given the most favorable construction for him that it will properly bear, and he must have the benefit of all reasonable inferences arising from his testimony; and it is only where his testimony, thus considered, could not legally sustain a verdict in his favor, that a court is warranted in directing a verdict against him.

2. The fact that a party was a member of a co-partnership cannot be proven by the unauthorized statements and representations of one who was a member of the firm.

3. Nor can the fact that a party was not a member of a co-partnership be proven by his own prior statements to that effect, even where such statements were made to an agent of the party seeking to hold him as such partner.

(Opinion Filed Nov. 23, 1891.)

APPEAL from district court, Richland county; Hon. D. E. MORGAN, Judge, presiding.

W. E. Purcell and *L. B. Everdell*, for appellant. *Ball & Smith*, for respondents.

Action on account for goods sold. Verdict for plaintiffs by direction. Motion for new trial denied, and judgment entered on the verdict. From the judgment and order refusing a new trial defendant Harvey Gillitt appeals. Reversed.

W. E. Purcell and L. B. Everdell, for appellant:

The unauthorized statements of a person that a partnership exists between certain persons will not bind the person so charged. Lawson on Rights and Practice, § 642; 2 Greenleaf on Evidence, § 484; McPherson v. Rathbone, 7 Wend. 216; Whitney v. Ferris, 10 Johns. 66.

Ball & Smith, for respondents:

A partner, retiring from the firm, must give notice of his retirement or he will be liable to creditors of the continuing firm on purchases made by them after his retirement. 2 Bates on Partnership, § 606; Graves v. Merry, 6 Cow. 701; Williams v. Bowen, 15 Cal. 321; Bank v. Howard, 35 N. Y. 500; Amidon v. Osgood, 58 Am. Dec. 171.

The opinion of the court was delivered by

BARTHOLOMEW, J. There must be a new trial in this case. The action was on account for goods sold by the plaintiff firm to the firm of Gillitt Bros. Harvey Gillitt only made defense, and the sole issue was as to his membership in the firm of Gillitt Bros. The case was tried in February, 1891. The court, on motion, directed a verdict for the plaintiff, and Harvey Gillitt appeals. The respondents began dealing with the firm of Gillitt Bros. in 1887. The goods for the value of which the action was brought were sold in August, 1888. To prove that Harvey Gillitt was or had been a member of the firm of Gillitt Bros., respondents introduced in evidence three certain exhibts. Two of these exhibits bear date May 18, 1888. The first purported to be a contract, by the terms of which George H. Gillitt and W. H. Gillitt purchased the interest of Harvey Gillitt in the mercantile business of the firm of Gillitt Bros., and stating the amount to be paid therefor, and the terms of payment, and from which it would appear that Harvey Gillitt had owned a half interest in the business. This contract is signed by the three parties. The second instrument is a bill of sale from Harvey Gillitt to George H. and W. H. Gillitt of such interest. The third instrument is a summary of the inventory taken in January, 1888, and would appear to be the basis upon which the other instruments

were drawn. These exhibits were found in the court records of that county, having been introduced by Harvey Gillitt in the case of Harvey Gillitt against John Miller, tried some time previously. It seems that Miller, as sheriff, had levied upon certain property as the property of Gillitt Bros., and Harvey Gillett brought an action as mortgagee to recover the same, and these papers were introduced for the purpose of establishing the indebtedness secured by the mortgage. It may be readily conceded that, if the statements and recitals in those exhibits were uncontradicted and unexplained, the law would at once and conclusively say that, on and prior to May 18, 1888, Harvey Gillitt was a member of the firm of Gillett Bros. But respondents never extended any credit or took any action in any manner upon the strength of those exhibits. There is no element of estoppel in the case. In this case either party was at liberty to contradict any of the matter contained in those exhibits. In fact, the contrary is not for a moment claimed in this court, but it is claimed that there has been no substantial contradiction of those matters. This, we think, is a misapprehension of the evidence. The appellant went upon the stand and testified, in substance and in detail, that prior to 1885, and for about 15 years, he had been engaged in mercantile business at Hastings, Minn. That the business was conducted in the name of H. Gillitt, and no person but himself was interested in it. In 1885 he desired to go out of business, and to that end gave his sons, George H. and William H. Gillitt, one-half of the entire stock, with an agreement and understanding that they (the sons) were to take entire charge and control of the business and pay him for one half of the stock, the title to the one-half to remain in him until the goods were paid for. That the sons constituted the firm of Gillitt Bros., and after October 1, 1885, he (witness) had no interest in the business or in the profits or losses. That in August, 1886, the sons moved the entire business to Wahpeton, N. D. That soon after he desired the sons to make him evidences of indebtedness for what was coming to him, but that was never consummated until in May, 1888. That the exhibits signed by him were sent to him at Hastings, and he signed them in consummation of their former business transactions, and, as

he understood it, as a settlement between him and his sons. That the transaction did not take place as of the date of the instruments, but at the former date. That he "was doing business with his sons, and supposed everything was all satisfactory," and that his only object in turning the business over was that he might get out of business, and the sons establish a business for themselves. That he was never a member of the firm of Gillitt Bros.

Without indicating whether or not this explanation would be satisfactory to the reasonable mind, this, at least, is true: It is not inherently impossible, nor so strikingly improbable as to warrant a court in saying, as a matter of law, that it is false. If appellant's testimony were the only testimony in the case upon the issue involved, it certainly would, as we think, have a tendency to establish that issue in appellant's favor. If we are right, then there was a substantial conflict in the evidence. Had the jury found the issue for the appellant on all the testimony, no court could safely say that such verdict was so far against the weight of evidence as to unmistakably point to the presence of bias, passion, or prejudice in the jury. When a court directs a verdict for either party, the evidence of the opposite party must be considered as undisputed, and it must be given the most favorable construction for him that it will properly bear, and he must have the benefit of all reasonable inferences arising from his testimony; and it is only where his testimony, thus considered, could not legally sustain a verdict in his favor, that a court is warranted in directing a verdict against him. See 11 Amer. & Eng. Enc. Law 245, and authorities there collated.

What we have said is sufficient to dispose of the case, but as two other points that are presented may arise again upon another trial we will notice them. Against appellant's repeated objections for incompetency, the respondents were permitted to prove, by the credit man in their employ, the representations and statements made to him by George H. Gillitt to show that Harvey Gillitt was a member of the firm of Gillitt Bros. There was no attempt to show that Harvey Gillitt ever authorized any such statements to be made, or knew that they had been

made, or in any manner ratified them. The evidence was clearly improper. 2 Greenl. Ev. § 484, and cases cited; 1 Lindl. Partn. p. *85; Bates, Partn. § 1157. Respondents in their evidence referred to one Fishborn, an employe, and stated his position to be that of "a general salesman, who is acquainted with the trade, and controls the trade, so to speak." Appellant, when on the stand, was asked what business he had done with this man Fishborn, acting for the house. An objection to the question was sustained, whereupon appellant's counsel offered to show by the witness that, at different times previous to the formation of the firm of Gillitt Bros., witness had transacted business with plaintiff firm through Mr. Fishborn as agent; that he had made purchases through him; had paid money through him, and received credit for the moneys so paid; that he had done business of a general nature relating to his business with the plaintiff firm through said Fishborn. Further, that in June, 1888, witness met said Fishborn on the cars, and stated to him fully all of the facts in regard to his sale of the business, and of his retirement therefrom, and expressly stated to him that he had no interest whatever in the profits and losses of the business of Gillitt Bros., but had turned over the business entirely to them. This was objected to on the ground that, under the offer and the evidence, notice to Fishborn would not be notice to the firm, and the objection was sustained. This ruling was correct. Whether or not the offered evidence was vulnerable to the particular objection urged we need not decide. It was clearly immaterial and incompetent. As we have said, there was no question of estoppel in this case—no claim of partnership liability on that ground; the sole issue being whether Harvey Gillitt was in fact a member of the firm of Gillitt Bros. Appellant could not show that he was not such partner by proving his former statements to that effect, whether such statements were made to an agent of the firm, a member of the firm, or a stranger. Such statements were entirely incompetent. For the reasons hereinbefore stated the district court is directed to vacate its judgment and order a new trial. Reversed. All concur.

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

NILS N. FORE, Administrator of the Estate of NILS L. FORE, Deceased, Plaintiff and Appellant, *v.* THE ESTATE OF LARS N. FORE, Deceased, Defendant and Respondent.

Allowance to Widow—Rights in Homestead.

1. Under § 5779, Comp. Laws, it is the duty of the probate court to set apart, for the use of the family of the decedent, personal property, in addition to the specific articles mentioned in § 5778, Comp. Laws, not to exceed in value the sum of $1,500, and the property so set apart does not belong to the assets of the estate to be distributed to the heirs of the decedent.

2. When the decedent left a widow, but no minor child, the property thus set apart for the use of the family becomes the absolute property of such surviving widow, under § 5784, Comp. Laws.

3. When a party dies seized in fee of land occupied and used by himself and family as a homestead at the time of his death, his surviving widow is entitled, as against his heirs or devisees, to occupy and possess the whole of such homestead as long as she preserves its homestead character by maintaining her home thereon, and the fact of her second marriage does not impair this right.

(Opinion filed December 2, 1891.)

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

A. B. Levisee, for appellant. *F. W. Ames*, for respondent.

Proceeding by Nils N. Fore, administrator of Nils L. Fore, deceased, against the estate of Lars N. Fore, deceased. Judgment for defendant. Plaintiff appeals. Affirmed.

The facts and authorities relied on by counsel are fully set out in the opinion of the court, which was delivered by

BARTHOLOMEW, J. On appeal from an order entered by the probate court of Traill county to the district court this case was submitted upon an agreed statement of facts, which we re-

produce so far as necessary for a proper understanding of the points decided. Lars N. Fore died intestate in Traill county, in January, 1887, leaving surviving him a wife, but no issue, and his father, Nils L. Fore, as his only heirs at law. In due course an administrator of the estate was appointed and qualified, and proceeded to the discharge of his duties. At the time of his death Lars N. Fore was the owner of 240 acres of land, upon 160 acres of which, all lying in one body, he, with his wife, resided, using the same as a homestead. The inventory of his personal property amounted to over $1,800. After the death of Lars N. Fore his widow continued to reside on the homestead, and in about nine months she intermarried with one Frigstadt, and still continued to reside and make her home, with her second husband, on such homestead. Under the orders of the probate court the administrator turned over to the widow property known as "absolute exemptions," to the value of $153, and, in addition thereto, other personal property, for her use, of the value of $1,496. In the final settlement the administrator was credited with said amounts, and the probate court refused to include the homestead in the property distributed to the heirs of Lars N. Fore in the final decree settling the estate. While the case was pending in the district court, Nils L. Fore died, and his administrator, Nils N. Fore, was substituted as a party to the action. The district court sustained the action of the probate court, and the administrator of Nils L. Fore appeals the case to this court.

The appellant claims that the court erred in allowing the widow personal property to the amount of $1,496 in addition to the absolute exemptions, and in postponing the distribution of the land embraced in the homestead of Lars N. Fore to his heirs, until after the surviving widow ceased to occupy the same as a home. Section 5778, Comp. Laws, reads as follows: "Upon the death of either husband or wife, the survivor may continue to possess and occupy the whole homestead until it is otherwise disposed of according to law; and upon the death of both husband and wife the children may continue to possess and occupy the whole homestead until the youngest child becomes of age; and, in addition thereto, the following personal property must

be immediately delivered by the executor or administrator to such surviving wife or husband, and child or children, and is not to be deemed assets, namely: (1) All family pictures; (2) a pew or other sitting in any house of worship; (3) a lot or lots in any burial ground; (4) the family Bible and all school books used by the family, and all other books used as a part of the family liabrary, not exceeding in value one hundred dollars; (5) all wearing apparel and clothing of the decedent and his family; (6) the provisions of the family, necessary for one year's supply, either provided or growing, or both, and fuel necessary for one year; (7) all household and kitchen furniture, including stoves, beds, bedsteads, and bedding, not exceeding one hundred and fifty dollars in value." Section 5779 contains the following: "In addition to the property mentioned in the preceding section, there shall also be allowed and set apart to the surviving wife or husband, or the minor child or children of the decedent, all such personal property or money as is exempt by law from levy and sale on execution or other final process from any court, to be, with the homestead, possessed and used by them." We first notice the objections to the allowance of personal property amounting to $1,496 to the widow for her use. Section 5127, Comp. Laws, absolutely exempts from levy and sale on execution all the specific property mentioned in § 5778, above quoted, except the 7th subdivision. It also specifically exempts the homestead. The following section (5128) reads as follows: "In addition to the property mentioned in the preceding section, the debtor may, by himself or his agent, select from all other of his personal property, not absolutely exempt, goods, chattels, merchandise, money, or other personal property, not to exceed in the aggregate fifteen hundred dollars in value, which is also exempt, and must be chosen and appraised as hereinafter provided." The argument is that the property that may be set apart for the use of the widow under § 5779 cannot be the same property mentioned in § 5128, because the property to which the widow is entitled is "all such personal property or money as is exempt by law from levy and sale on execution," while the property mentioned in § 5128, it is claimed, is not exempt by law, but by the act of the debtor in selecting the

same. But this construction, as is readily apparent, destroys the statute. The legislature had already, by § 5778, set off to the widow all the specific property that the law absolutely exempts, and more; and hence, if appellant's construction be correct, there was nothing whatever for § 5779 to act upon, and its presence in the statute is entirely superfluous. The wording of the statute does not require any such narrow construction. Section 5128 exempts "goods, chattels, merchandise, money, or other personal property, not to exceed in the aggregate fifteen hundred dollars in value, which is also exempt, and must be chosen and appraised as hereinafter provided." The law creates a general present exemption to the amount of $1,500. The debtor, by his selection, converts this general exemption into a specific exemption. The law requires him to make the exemption specific in that manner or waive it. The power that he has is not to create an exemption but to waive one that the law has already created for his benefit. We do not understand the case of Mann v. Welton, 21 Neb. 541, 32 N. W. Rep. 599, cited by appellant, to conflict with those views, but rather to sustain them. In that case there was exempt "the sum of five hundred dollars in personal property." The debtor was required to make a sworn inventory, and that was followed by an appraisement and selection. The debtor took no steps to make the exemption attach to any specific property, but brought replevin against the officer. The court said that when the selection was made, "then, and not until then, does the character or quality of exemption attach to the specific property to the extent that replevin may be maintained for its possession." Had the husband lived, he could, as against any legal process, have held all the property that was turned over to the widow for the support and maintenance of his family. We cannot think that the legislature intended to give the family less protection when the husband and father was dead than when he was living. See Bank v. Freeman, 1 N. D. 196, 46 N. W. Rep. 36.

It is also contended that the property so set apart to the widow is only to be "possessed and used" by her temporarily, and must be accounted for in the final distribution of the estate. Whatever may be the holding in other states, our statutes are

clear and explicit to the contrary. Section 5784, following in the same chapter with the sections specifying what shall be set apart for the use of the family, says: "When personal property is set apart for the use of the family in accordance with the provisions of this chapter, if the decedent left a widow or surviving husband and no minor child, such property is the property of the widow or surviving husband." We quote so much of the section as covers this case, and there can be no doubt of its meaning. The ruling of the court upon the disposition of the personal property was clearly right. The respondent contends that, upon the death of the husband, his widow surviving him, and he being seized in fee of the land then occupied by himself and his family as a homestead, and dying intestate, the fee to the homestead goes to his heirs at law, under the statute of descent; but that the homestead right, incuding the right to possession, whether the husband died testate or intestate, survives, and passes to his widow, to be enjoyed by her so long as she continues to occupy the premises as a homestead. Appellant takes issue upon the last proposition, and claims that the homestead right of the widow, including the possession and usufruct, ceases and determines at the final settlement and distribution of the estate. The decision of the issue involves a construction of that portion of the statute heretofore quoted, which reads: "Upon the death of either husband or wife the survivor may continue to possess and occupy the whole homestead until it is otherwise disposed of according to law." This language which we are called upon to construe was taken from the statutes of Iowa, where it appears in the exact form we find it in our law. Code Iowa, § 2007. The context, however, was somewhat changed to conform to our different policy. In Iowa, the next following section (2008) provides that "the setting off of the distributive share of the husband or wife in the real estate of the deceased shall be such a disposal of the homestead as is contemplated in the preceding section. But the survivor may elect to retain the homestead for life in lieu of such share in the real estate of the deceased." The distributive share thus spoken of is one-third in value of all the legal or equitable estate possessed by the deceased at any time during marriage,

and which has not been sold on judicial sale, and to which the survivor has relinquished no rights. See Id § 2440 And this share is not affected by will, unless the survivor consents thereto. Id § 2452. There is nothing in our law corresponding with §§ 2008, 2440, and 2452 of the Iowa Code. Under those statutes the right of the survivor to possess and occupy the homestead for life has been repeatedly declared. Floyd v. Mosier, 1 Iowa 512; Burns v. Keas, 21 Iowa 257; Size v. Size, 24 Iowa 580; Meyers v. Meyers, 23 Iowa 359; Butterfield v. Wicks, 44 Iowa 310; Mahaffy v. Mahaffy, 63 Iowa 55, 18 N. W. Rep. 685. And it has also been held that during such occupancy the heirs cannot interfere therewith, nor claim partition. Nicholas v. Purczell, 21 Iowa 265; Dodds v. Dodds, 26 Iowa 311. But it has also been held that such occupancy cannot be claimed in addition to the distributive share. Meyer v. Meyer, *supra;* Butterfield v. Wicks, *supra;* Smith v. Zuckmeyer, 53 Iowa 14, 3 N. W. Rep. 782. The survivor holds this distributive share exempt from the debts of the decedent. Mock v. Watson, 41 Iowa 244; Kendall v. Kendall, 42 Iowa 464; Thomas v. Thomas, 73 Iowa 657, 35 N. W. Rep. 693. The supreme court of Iowa, under these statutes, hold that, while the survivor is entitled to occupy the homestead for a reasonable time in which to make a selection between a life-estate in the homestead and the distributive share provided by law (Cunningham v. Gamble, 57 Iowa 46, 10 N. W. Rep. 278), yet continued occupancy of the homestead will be held an election to take the homestead for life (Conn v. Conn, 58 Iowa 747, 13 N. W. Rep. 51; Butterfield v. Wicks, *supra*; Holbrook v. Perry, 66 Iowa 286, 23 N. W. Rep. 671.) By § 2455, Code Iowa, it is provided that, if the intestate leave no issue, one-half of his estate shall go to his family and the other half to his widow. In Burns v. Keas, *supra*, it was held that in such case the widow takes one-third of her distributive share and one-sixth as heir; and in Smith v. Zuckmeyer, *supra*, it is held that in such a case, where the survivor elects to hold the homestead for life, he thereby surrendered the one-third or distributive share only, and that, as to the fraction which he took as heir, it was not affected by his continuous possession of the homestead.

We desire now to call attention to certain further provisions of our statute. The estates of dower and curtesy are unknown to our laws (§§ 2594, 3402, Comp. Laws); nor have we any estate that corresponds therewith. The husband and the wife are heirs at law to each other's estates, the portion which each will inherit in the estate of the other depending upon the presence or absence of certain other heirs, and may be one-third, one-half, or the whole thereof. § 3401, Id. But the entire estate of either husband or wife may be disposed of by will, subject to the homestead rights of the survivor as declared by law. § 2466, Id. While our statute as to the rights of the surviving husband or wife seems to be largely patterned after the Iowa statute, yet it is apparent that the differences are such that the Iowa decisions are largely inapplicable here. With us, the survivor has no "distributive share" whatever. All that goes to the survivor, aside from the personal right to possess and occupy the homestead, is taken as heir. Nor is there any provision or necessity for an election between rights as survior and the rights as heir. There is no intimation that both rights may not be enjoyed, and both at the same time. The only Iowa case on this point that would seem applicable to our condition is Smith v. Zuckmeyer, and that, so far as applicable, is authority for the ruling of the trial court. It is claimed, however, that a fair interpretation of this language of our statute forces the conclusion that some disposition of the homestead estate was thereby intended, aside from a voluntary disposition on the part of the survivor, and aside from possession on her part to the exclusion of the co-heir, and that such disposition would terminate her homestead right without regard to her will or wishes. More felicitious language might undoubtedly have been used to express the single thought that the survivor might continue to possess and occupy the homestead as long as she preserved its homestead character and occupied it as a home. But we think the legislature had in view also the fact that there might exist a mortgage upon the homestead property, executed by both husband and wife, or that the taxes thereon might not be paid, and the homestead become liable therefor under § 2452, Comp. Laws, or that it might be

liable for a mechanic's lien under the same section, or for some portion of the purchase price thereof under the succeeding section. In either of these events it might be disposed of according to law, and the occupancy of the survivor thus terminated. But we do not think it was the intention of the legislature that the survivor should be disturbed in this occupancy, so long as the premises remained the home of the survivor, by any co-heir or devisee, and we will briefly state some of the reasons which force that conclusion. Ample provision for the establishment of the home and maintenance of the family has ever been the fixed policy in this jurisdiction. As we have seen, our exemptions of personalty are unusually liberal; and these exemptions go to the family of a decedent, and cannot be disposed of by will, or taken for debts, except where there are no other assets available for the payment of the expenses of decedent's last illness, funeral charges, and expenses of administration. § 5779, Id. The law also, prior to the passage of chapter 67, Laws 1891, allowed a homestead to the extent of 160 acres of land if in the country, and unlimited as to value. (Under the law last mentioned the homestead is fixed at a valuation of $5,000, independent of quantity, and other changes are made in the homestead law; but, as this case falls under the prior law, and as the changes do not affect the questions at issue, we need not particularly notice them further.) The fee of the homestead may be owned by either husband or wife, but such owner has no power to convey or incumber such homestead without the concurrence of the husbaud or wife. Comp. Laws, § 2451. The homestead of Lars N. Fore was not subject to the payment of any of his debts. Id § 5781. It is too plain for question that these various provisions were intended not for the benefit of the husband and father, but for that of the family—and a widow, though without children, constitutes a family, within the meaning of the homestead law (Id § 2450); and it would be strangely inconsistent if the benefits to which the family were entitled during the life-time of the husband and father should be taken away from them by the law immediately upon his decease—the very time when they most needed these benefits. The widow has no absolute rights in the property of

her deceased husband except her right to the homestead as survivor. All other estate may be devised. If that right extends only during administration, then the law which prevents him from conveying or incumbering that homestead is of no benefit to the family. He is liable for their support while he is living, and if, by will, he can deprive them of that homestead as soon as his estate can be settled, it would seem a useless requirement to prohibit its sale during his life. Again, "subject to the rights of the surviving husband or wife, as declared by law, the homestead may be devised like other real property of the testator." Id § 2466. In no case is a devisee entitled to come into possession of his devise until the estate is settled and distributed. If, as appellant claims, the widow's right of possession as survivor ceases at the same time, why were the devisee's rights made subordinate to hers? The two rights could not clash; one ceasing when the other began. On the other hand, if her right of possession as such survivor continues as long as she continues to reside and make her home upon the property, then the section would have force and be necessary. Again, "upon the death of both husband and wife, the children may continue to occupy the homestead until the youngest child becomes of age." Id § 5778. It is certain that as to the children, when both parents are dead, the right to occupy the homestead does not cease when the estate is settled. It may continue for twenty years longer. If appellant's position be correct, we would have the following results: When a party possessed of a homestead dies, leaving surviving him a widow and children, the law will, immediately upon the settlement of his estate, deprive that family of its home, and the property will go to the devisee, or be subject to partition among the heirs at law, as the case may be. But if that same party die, leaving surviving him children only, the law cannot so seize upon the homestead, but the same may remain in the possession of the children until the youngest attains majority. Can any plausible reason be assigned for this distinction? None suggests itself to us. Keeping in mind the entire statute and the undoubted policy of our laws, it seems clear that the purpose of this law is that, upon the death of the husband and father,

the widow should continue to possess and occupy the homestead with the children during her entire life, if she so elect, and upon her death the children may continue so to possess and occupy the homestead until the youngest child becomes of age, so that at no time, until the youngest child reaches the period when the law declares him able to care for himself, shall this family be without a home, or—in case the homestead be a farm—without the means of obtaining a livelihood. But this occupancy, either of the surviving widow or children, would be terminated by any disposition of the homestead according to law, as hereinbefore indicated. In view of the facts of this case we deem it proper to add that the statutes will be searched in vain for any intimation that the widow's rights as survivor are affected in any manner by the absence of issue or by the fact of a second marriage. This last point is directly ruled in Nicholas v. Purczell, *supra*. To the point made by appellant that a homestead interest cannot attach to property owned in common, we reply that such is the case only where the common ownership is prior in point of time to the initiation of the homestead right. In this case the homestead right existed before descent cast. It existed in the life-time of the decedent, and he was powerless to destroy it. The subsequent ownership in common of the fee cannot affect the prior right. The judgment of the district court is in all things affirmed. All concur.

ARTHUR EDMONDS, J. P. CLARK, JOHN BRENENION and PATRICK KELLY, sueing for themselves and in behalf of all others similarly situated, Plaintiffs and Appellants *v.* PETER HERBRANDSON, C. A. DIGNESS, ALBERT OLSON, G. A. HARSTAD and A. STEENSON, as the Board of County Commissioners in and for said County of Traill; KNUT J. NOMLAND, as Treasurer of said County; ASA SARGENT, as Register of Deeds in and for said County; OLIVER P. CLARK, as Clerk of the District Court in and for said County; H. A. LANGLIE, as Auditor of said County; SVEN N. HESKIN, as Sheriff of said County; J. O. KJELSBERG, as Judge of Probate of said County; and F. W. AMES, as States Attorney of said County, Defendants and Respondents.

Constitutional Law—Special Acts—Change of County Seat—Legislative Powers.

1. Chapter 56 of the Laws of 1890, regulating the relocation of county seats, is unconstitutional, as being repugnant to § 69 of article 2 of the state constitution, prohibiting special legislation locating or changing county seats, because it arbitrarily classifies counties, putting into one class all counties, wherein at the date of the act the court house and jail were worth the sum of $35,000, and forever excluding from this class all counties coming within its description in the future, placing all such counties permanently in a separate class.

2. The constitutional inhibition against special legislation does not prevent classification, but such classification must be natural, not arbitrary; it must stand upon some reason, having regard to the character of the legislation of which it is a feature.

3. It is not the form, but the effect, of a statute which determines its special character.

4. An act relating to all the objects to which it should relate, except one, is as much special legislation as if it had embraced only the object excluded.

5. It is purely a legislative question, subject to no review by the courts, whether in a given case a general or special law should be enacted under § 70 of article 2 of the state constitution, which provides that "in all other cases where a general law can be made applicable no special law shall be enacted."

(Opinion filed Dec. 5, 1891. Rehearing denied Jan. 12, 1892.)

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

A. B. Levisee, Ball & Smith, and *Taylor Crum,* for appellants. *F. W. Ames* and *J. F. Selby,* for respondents. *Joslin & Regan* and *Carmody & Leslie,* for respondents on rehearing.

Action by Arthur Edmonds and others against Peter Herbrandson and others, officers of Traill county, to restrain them from removing the county records from Caledonia to Hillsboro. Judgment for defendants. Plaintiffs appeal. Reversed, construing chapter 56, Laws of 1890, as unconstitutional.

A. B. Levisee, Ball & Smith, and Taylor Crum, for appellants:

The act in controversy offends against our constitutional provision that "all laws of a general nature shall have a uniform operation." The authorities in states having the same provision are all to the effect that unless the law clearly has a uniform operation it cannot be considered as a law of a general nature. Appeal of City of Scranton School District, 6 At. Rep. 158; Ohio *ex rel.* v. Covington, 29 Ohio St. 102; Kelley v. State, 6 Ohio St. 269; Nichols v. Walter, 33 N. W. Rep. 800; State v. Mayor, 18 At. Rep. 694; State v. Board of Freeholders, 11 At. Rep. 135; McCarthy v. Commonwealth, 2 At. Rep. 423. It has been held that the exception of one county from the operation of an act makes it local and special. Davis v. Clark, 106, Pa. St. 384.

F. W. Ames and J. F. Selby, for respondents:

The act is constitutional and should be sustained. Vermont Loan & Trust Co. v. Whithed, *ante;* State v. Oblinger, 34 N. W. Rep. 164; Board of Freeholders v. Board of Freeholders, 19 At. Rep. 972; People *ex rel.* v. Plank Road Co., 86 N. Y. 1.

The opinion of the court was delivered by

CORLISS, C. J. The plaintiffs, as taxpayers of Traill county, in this state, instituted this action against the members of the board of county commissioners and the other officers of that

county to secure an injunction perpetually restraining them, their successors in office, clerks, deputies, agents, and servants, from removing, or attempting to remove, the books, papers, records, etc., belonging at the county seat of such county from such county seat at Caledonia to the city of Hillsboro, in said county, and from locating or establishing, or attempting to locate or establish, the repective offices of such county or any of the same, at such city of Hillsboro, under and in pursuance of the votes cast at a certain election held for that purpose under the provisions of chapter 56 of the Laws of 1890. It is undisputed that at this election all the requirements of this statute were fully complied with. In fact no question upon this appeal is presented, except the single one of the constitutionality of this act. By it a radical change in the manner of relocating county seats was made. Before its enactment, § 565, Comp. Laws, gave the rule. It required a petition of two-thirds of the qualified voters of the county as a condition precedent to the ordering and holding of an election, and two-thirds of the votes actually cast at such election were essential to choice. The act of 1890 requires a petition signed by only one-third of the qualified voters of such county, as shown by the vote cast at the last preceding election for state officers holden in such county, to compel the ordering of an election to relocate the county seat, and three-fifths of the votes actually cast will transfer the county seat to the place having such three-fifths vote. The county seat in Traill county before the election under this statute was located at Caledonia. The proceedings taken under the act were regular and the vote in favor of a relocation at Hillsboro was sufficient to work a relocation of the county seat at that place, if the law in question is valid.

It is undisputed that the proceedings were not efficacious to transfer the county seat, under § 565, Comp. Laws; the petition not being signed by two-thirds of the qualified voters, and the vote in favor of Hillsboro not being equal to two-thirds of the votes cast. The sole inquiry in this appeal, therefore, is respecting the constitutionality of chapter 56 of the Laws of 1890. It is challenged as unconstitutional because of its alleged conflict with § 69 of article 2 of the state constitution, which pro-

vides that "the legislative assembly shall not pass local or special laws in any of the following enumerated cases, that is to say: * * * (3) Locating or changing county seats." The provision of chapter 56 which it is claimed renders that act obnoxious to this constitutional inhibition is the proviso which reads as follows: "Provided, that nothing in this act shall permit the removal to or locating of the county seat of any county at a place not located upon a railroad, nor wherein the court house and jail now erected exceed in value the sum of $35,000." It is undisputed that some of the counties of the state fall within the proviso, and that some of them fall without it, and within the regulation of the act. It is therefore apparent that by this proviso the legislature has classified counties for the purpose of determining under what law a relocation of the county seat can be obtained. The proviso excepts from the provision of chapter 56, counties with respect to which the circumstances are peculiar. These counties are either left under the provisions of § 565 of the Compiled Laws, or there is no statutory rule regulating or permitting the relocation of county seats therein. Whichever of these two views we take, these counties are placed in a separate class by themselves; and the question which naturally suggests itself is whether this particular classification can be sustained under the authorities and the spirit of the constitutional prohibition against special legislation. This section of the constitution must have a reasonable construction. To say that no classification can be made under such an article would make it one of the most pernicious provisions ever embodied in the fundamental law of a state. It would paralyze the legislative will. It would beget a worse evil than unlimited special legislation—the grouping together without homogeneity of the most incongruous objects under the scope of an all embracing law. On the other hand the classification may not be arbitrary. The legislature cannot finally settle the boundaries to be drawn. Such a view of the organic law would bring upon this court the just reproach that it had suffered the legislature to disregard a a constitutional barrier by relegating to it the question where that barrier should be set up. See Pell v. Newark, 40 N. J. Law 71-80; Appeal of Ayars, 122 Pa. St. 266, 16 Atl. Rep. 356.

Where shall the line properly be traced? We believe that in testing this question these inquiries should be made: Would it be unjust to include the classes of objects or persons excluded? Would it be unnatural? Would such legislation be appropriate to them? Could it properly be made applicable? Is there any reasonable ground for excluding them? It is impossible, from the very nature of the case, to state with precision the true doctrine. But it is our opinion that every law is special which does not embrace every class of objects or persons within the reach of statutory law, with the single exception that the legislature may exclude from the provisions of a statute such classes of objects or persons as are not similarly situated with those included therein, in respect to the nature of the legislation. The classification must be natural, not artificial. It must stand upon some reason, having regard to the character of the legislation.

We find in the adjudications no more felicitous statement of the true doctrine than that of Chief Justice BEASLEY in State v. Hammer, 42 N. J. Law 439: "But the true principle requires something more than a mere designation by such characteristics as will serve to classify; for the characteristics which thus serve as a basis for classification must be of such a nature as to mark the object so designated as peculiarly requiring exclusive legislation. There must be a substantial distinction, having reference to the subject matter of the proposed legislation between the objects or places embraced in such legislation and the objects or places excluded. The marks of distinction on which the classification is founded must be such, in the nature of things, as will in some reasonable degree, at least, account for or justify the restriction of the legislation." The whole trend of the authorities is in this line. See Nichols v. Walter, 37 Minn. 264, 33 N. W. Rep. 800; Appeal of Ayars, 122 Pa. St. 216, 16 Atl. Rep. 356; People v. Railroad Co., 83 Cal. 393, 23 Pac. Rep. 303; *In re* Washington St., 132 Pa. St. 257, 19 Atl. Rep. 219; State v. Boyd, 19 Nev. 43, 5 Pac. Rep. 735; Closson v. Trenton, 48 N. J. Law 438, 5 Atl. Rep. 323; Bray v. Hudson Co., 50 N. J. Law 82, 11 Atl. Rep. 135; Township of Lodi v. State, 51 N. J. Law 402, 18 Atl. Rep. 749; Utsy v. Hiott, 30 S.

C. 360, 9 S. E. Rep. 338; State v. Somers' Point, 52 N. J. Law 32, 18 Atl. Rep. 695; Clark v. City of Cape May, 50 N. J. Law? 558, 14 Atl. Rep. 581; Trust Co. v. Whithed, 2 N. D.——, 49 N. W. Rep. 318. This list might be greatly enlarged. We are inclined to the view that under the authorities, had the legislature not closed the door against accessions to the class of counties having a court house and jail exceeding $35,000 in value, the classification would have been proper. But an arbitrary time is fixed, after which no county coming within the same conditions which characterize the class can gain admittance to such class. "Provided, that nothing in this act shall permit the removal to or relocation of the county seat of any county * * * wherein the court house and jail now erected exceed in value the sum of $35,000." This classification is not based upon natural reason, but upon the arbitrary fiat of the legislature. While it may be true that the county seat ought not to be so easily relocated in a county wherein the loss to the taxpayer will be greater by reason of the erection at the existing county seat of expensive buildings as in the county where such loss will be comparatively trifling in amount, it is not reasonable that the mere time when such expensive buildings are constructed should at all enter into the consideration of the matter. This law was approved March 7, 1890. So far as the value of improvements is concerned, it accepts only those counties wherein the court house and jail now erected exceed in value the sum of $35,000. If the word "now" refers to the date of approval of the act, all counties having a court house and jail exceeding $35,000 in value on the 8th of March of that year, but not on the 7th; or if the word "now" refers to the date when the act took effect, *i. e.*, July 1st, all counties in which the court house and jail worth more than $35,000 should be completely erected on July 2d instead of July 1st—would nevertheless be subject to the provisions of the new law, although the natural reason can suggest no justification of such a distinction. If the danger of serious loss to the taxpayer by the removal of a county seat from a place at which expensive buildings have been constructed affords reason for placing counties in which such a condition exists in a separate class, to

be governed by more stringent legislation in this respect, there is no reason why a county in which for the first time such a condition exists on a later day should be excluded from this separate class, any more than a county in which this condition existed the day before. There is no natural reason for a classification of counties in which the same conditions exist, based solely on and arbitrarily upon the period of time before or after which such conditions existed for the first time. Such a doctrine would lead inevitably to unlimited special legislation under the mere guise of classification. It would nulify the constitution so far as it prohibited special legislation. The authorities are unanimous on the point. In Com. v. Patton, 88 Pa. St. 258, the court say: "Said act makes no provision for the future, in which respect it differs from the act of 1874, which in express terms provides for the future cities and the expanding growth of those now in existence. That is not classification which merely designates one county in the commonwealth, and contains no provision by which any other county may, by reason of its increase of population in the future, come within the class." In State v. Donovan, 20 Nev. 75, 15 Pac. Rep. 783, the court say: "All acts or parts of acts, attempting to create a classification of counties or cities by a voting population, which are confined in their operation to the existing state of facts at the time of their passage, or to any fixed date prior thereto, or which by any devise or subterfuge exclude the other counties or cities from ever coming within their provisions, or based upon any classification which in relation to the subject embraced in the act is purely illusory, or founded upon unreasonable, odious, or absurd distinctions, have always been held unconstitutional and void."

Nichols v. Walter, 37 Minn. 264, 33 N. W. Rep. 800, is peculiarly in point. The court said: "Recurring to the law in question, we find it divides the counties in two classes, the classification based upon an event in the past so that no county in one class can ever pass into the other class; and to those in one class is applied what we may call the majority rule, and to those in the other the three-fifths rule. Had the act specified by name those counties in which one rule should apply, and

those in which the others should apply, it would hardly be questioned that the legislation was special, and not general and uniform in its operation throughout the state. But the counties were, at the date of the act, identified, and their *status* fixed for all time by reference to the specified event as fully as though the counties were named. There is nothing in the event which is the basis of classification which suggests any necessity or propriety for a different rule to be applied to the counties to be placed in the two classes. Why one county which had located its county seat by a vote of its electors, twenty-five years or six months before the act passed, should require a vote of three-fifths of its electors to remove it, and the county which should so locate it three or six months after the act passed may again remove or locate it upon a mere majority vote, is impossible to conceive, except that the legislature has arbitrarily so provided. But in such matters the legislature cannot arbitrarily so provide. The act is unconstitutional and void." In Marmet v. State, 45 Ohio St. 63, 12 N. E. Rep. 463, the same doctrine is clearly stated and recognized: "The law is not a special act. It is local and special as to the ends to be accomplished, but general in its terms and operations, applying to all cities of the first grade of the first class. It is not limited to such city as may have been in that class and grade at the date of its enactment. At that time Cincinnati was the only city in the state answering to the description, but there is a possibility, not to say certainty, that other cities in the state will increase in population so that they will pass into this grade, and when that happens they will come within the provisions of this law. In this respect the law differs essentially from that in review in the case of State v. Mitchell, 31 Ohio St. 592. That law was made applicable only to cities of the second class having a population of 31,000 at the last federal census, and inasmuch as Columbus was the only city in the state having that population, and as the act could apply only to that city and never to any other, and as it undertook to confer corporate powers, this court held it to be in conflict with § 1 of article 13, and therefore void. A like objection was found to exist against the act under consideration in the case of State v. Pugh, 43 Ohio St.

98, 1 N. E. Rep. 439, and the distinction above indicated is made apparent with great clearness and force in the opinion rendered by the present chief justice." Without further quotation from opinions, we cite, as sustaining the same view, the following cases: State v. Boyd, 19 Nev. 43, 5 Pac. Rep. 735; Morrison v. Bachert, 112 Pa. St. 322, 5 Atl. Rep. 739; Ohio v. Covington, 29 Ohio St. 102; Devine v. Commissioners, 84 Ill. 592; State v. Herman, 75 Mo. 340; State v. Mitchell, 31 Ohio St. 607; State v. Hunter, 38 Kan. 578, 17 Pac. Rep. 177; Zeigler v. Gaddis, 44 N. J. Law 365; State v. Hammer, 42 N. J. Law 440.

It was urged that the mere fact that those counties in which there were such expensive buildings could never come within the law was insufficient to render the act void; that they, under ordinary circumstances, would never descend into that class; and that the fact that destruction of such expensive improvements might possibly in the future bring them within the description of the class having inexpensive public buildings should not be considered, it being only a remote contingency. But the difficulty with this reasoning is that it ignores the fact that the counties having inexpensive buildings at the date of the passage of the act can never, by the erection of expensive buildings or in any other manner, ascend into the expensive building class. They are kept forever within the particular class in which the act finds them, notwithstanding the fact that in the future change of condition may bring them within the description of the other class. The boundary between these two classes was as permanently fixed when the act was passed as if the counties had by name been placed within these two classes respectively. The line drawn by the legislature is therefore purely arbitrary. It is one thing to assert that all except a single object will be forever kept from the class by circumstances, and another and entirely different thing to attempt to exclude all others by the very terms of the law. A law applicable to all the cities of the state of New York having not less than a million population may never embrace any other city. But, the classification being reasonable, it ought not to be prohibited because no other city may ever enter the class. But, when the act in express terms

prevents any further accession to the class, it is apparent that the classification stands, not upon a reasonable ground based on difference in population, but is purely arbitrary. The act might as well have expressly named the particular objects included, to the exclusion of all others. So far as this particular provision of the constitution against special legislation is concerned, it is immaterial that the act is general in form. The question is always as to its effect. Any other doctrine would render nugatory the prohibition of the fundamental law against special legislation. Under the guise of statutes, general in terms, special legislation, in effect, could be adopted with no inconvenience, and the evil to be extirpated would flourish unchecked. Statutes general in terms have been adjudged void as special legislation because they could operate only upon a part of a class. The authorities are explicit upon this question: People v. Railroad Co., 83 Cal. 393, 23 Pac. Rep. 303; Investment Co. v. School Dist. 21 Fed. Rep. 151; Miller v. Kister, 68 Cal. 142, 8 Pac. Rep. 813; Nichols v. Walter, 37 Minn. 264, 33 N. W. Rep. 800; Com. v. Patton. 88 Pa. St. 258: Devine v. Commissioners, 84 Ill. 592; State v. Michell, 31 Ohio St. 607. Said the court in Nichols v. Walter: "These cases cited from many on the subject are sufficient to show that, in determing whether a law is general or special, courts will look not to its form or phraseology merely, but to its substance and necessary operation." In Com. v. Patton, 88 Pa. St. 258, an act general in form, but so worded that it could apply to only one county in the state, was before the court. It characterized this attempted evasion as "classification run mad." In State v. Pugh, 43 Ohio St., 98, 1 N. E. Rep. 439, the court say, at page 103, 43 Ohio St. and page 448, 1 N. E. Rep.: "It is not the form the statute is made to assume, but its operation and effect which is to determine its constitutionality." It is no answer to the contention that an act is special legislation, to insist that only a single class is excluded. The exclusion of a single person or object which should be affected by a statute is fatal. All must be included or the law is not general. If one may be omitted, where shall this line be drawn? Here authority is in accord with principle. Davis v. Clark, 106 Pa. St. 385; Bray v. Hudson Co., 50 N. J.

Law 82, 11 Atl. Rep. 135; Bowyer v. Camden, 50 N. J. Law 87, 11 Atl. Rep, 137; Manning v. Klippel, 9 Or. 367; Miller v. Kister, 68 Cal. 142, 8 Pac. Rep. 813; Township of Lodi v. State, 51 N. J. Law 402, 18 Atl. Rep. 749. In this last case the court said: "The rule is that in any classification for the purpose of a general law all must be included and made subject to it, and none omitted that stand upon the same footing regarding the subject of legislation. To omit one so circumstanced is as fatal a defect as to include but one of a number. In Davis v. Clark, 106 Pa. St. 384, the court said: "It was not then a general act applicable to every part of the commonwealth. It did apply to a great number of counties, but there is no dividing line between a local and a general statute. It must be one or the other. If it apply to the whole state, it is general. If to a part only, it is local. As a legal principle, it is as effectually local when it applies to sixty-five counties out of the sixty-seven as if it applied to one county only. The exclusion of a single county from the operation of the act makes it local." To same effect is State v. Township of Mullica, 51 N. J. Law 412, 17 Atl. Rep. 941. The case of People v. Plank Road Co., 86 N. Y. 1, is cited as holding a contrary doctrine. We do not so construe that decision. But we would have no hesitation in declaring that doctrine unsound if it adjudged an act to be not special, so far as the constitutional inhibition against special legislation is concerned, be cause it related to all except two counties in the state where there was no reason for classification. If an act is not special because it relates to all except a single county in a state, without any reason for the classification, then the legislature can accomplish indirectly what it is beyond their power to bring about by direct steps. Whenever it is desired to introduce a new rule as to a single county, a general law can be passed establishing that rule in all the counties, and then another law can be enacted re-establishing the old rule in all counties except the one singled out to be governed by the new rule. The first law would be clearly general, and, under what it is claimed is the New York doctrine, the second act could not be assailed as special legislation. This would, indeed, be an ingenious mode of neutralizing the constitutional prohibition against special legis-

lation. We would not give it our sanction, however it might be buttressed by authority,

Can the proviso be stricken out and the act sustained without it? If, in striking out the proviso, the effect is to extend the provisions of the law over counties having expensive buildings, the legislative will is disregarded. If, on the other hand, it is said that the law will reach no further after the provision is eliminated than with the proviso undisturbed, then the act is special legislation, because it is too restricted in its operation. To include such counties is to defy the will of the legislature as expressed in their statute; to exclude them is to defy the will of the people as expressed in their fundamental law. Here again the voice of reason and the voice of authority are one. Nichols v. Walter, 37 Minn. 264, 33 N. W. Rep. 800; Railroad Co. v. Markley, 45 N. J. Eq. 139, 16 Atl. Rep. 436; State v. Sauk Co., 62 Wis. 376–379, 22 N. W. Rep. 572. Said the court in the last case: "It was argued by the counsel for the appellant that although the proviso in the act of 1881 is invalid it does not vitiate the whole act, and that the residue may be upheld as a valid law. The rule is in such cases that unless the void part was the compensation for or inducement to the valid portion, so that the whole act, taken together, warrants the belief that the legislature would not have enacted the valid portions alone, such portions will be operative; otherwise not. * * * In the present case there is no room for the application of this rule, for the reason that the legislature has not enacted that the statute should extend to Grant county, but has expressed a contrary intention. By no possible construction can the statute be held to be operative in Grant county, and it is essential to its validity that it be operative in that as well as in every other county of the state."

It was urged in the appellants' brief that the act was repugnant to § 70 of article 2 of the state constitution, providing that "in all other cases where a general law can be made applicable, no special law shall be enacted." The point appears to have been abandoned on the oral argument, but we will notice it. There are two conclusive answers to this position. In the first place it applies only to cases other than those previously enumerated

in § 69, and this section embraces all laws locating or changing county seats. The second answer is that the question whether a general law can be made applicable is purely a legislative question, and the decision of the law-making power in this respect is subject to no review. Evansville v. State, 118 Ind. 426, 21 N. E. Rep. 267; Wiley v. Bluffton, 111 Ind. 152, 12 N. E. Rep. 165; Brown v. City of Denver, 7 Colo. 305, 3 Pac. Rep. 455; People v. McFadden, 81 Cal. 489, 22 Pac. Rep. 851; Richman v. Supervisors, 77 Iowa 513, 42 N. W. Rep. 422; Owners of Land v. People, 113 Ill. 296; State v. County Court, 50 Mo. 317; McGill v. State, 34 Ohio St. 247; State v. Hitchcock, 1 Kan. 178.

There is much force in the position that the act in question is a law of general nature, within the meaning of § 11 of article 1 of the constitution, providing that all laws of a general nature shall have a uniform operation. Trust Co. v. Whithed, 2 N. D. 82, 49 N. W. Rep. 318; People v. Railroad Co., 43 Cal. 398–432. But see State v. Shearer, 46 Ohio St. 275, 20 N. E. Rep. 335. That the law is not uniform in its operation, within the meaning of the constitution, naturally follows from the arbitrary nature of the classification it attempts to make. See cases cited in Trust Co. v. Whithed, 2 N. D. 82, 49 N. W. Rep. 318-320. The judgment and order of the district court are reversed, and that court is directed to enter judgment in favor of the plaintiffs upon the demurrer for the relief demanded in the complaint. All concur.

OLE J. MOE, Plaintiff and Appellant, *v.* NORTHERN PACIFIC RAILROAD COMPANY, Defendant and Respondent.

Settling Bill of Exceptions—Extention of Time—Review on Appeal—Mistake in Law.

1. Section 5093, Comp. Laws N. D., construed. *Held*, that the authority conferred by said section to extend time and settle bills of exception and statements after the statutory periods for so doing have expired is not an absolute, non-reviewable discretion, but, on the contrary, such discretion is a sound judicial discretion, and can be exercised only upon the conditions named in the statute—*i. e.*, "upon good

cause shown in furtherance of justice." Where the cause shown is spread out in full upon the record in the court below, and an objection to the action of the court below in settling the bill or statement is properly made, this court, upon a motion to purge its records, will review the cause shown; and if, in the opinion of this court, good cause was not shown for settling the bill or statement after time, such motion will be granted, and the bill or statement will be striken out.

2. The bill in this case was not settled, nor sought to be settled, for a period of nearly four years after the verdict for defendant was returned. The only excuse offered to the district court for plaintiff's laches and default in the premises, and as a cause for extending the time after the lapse of so long an interval after the statutory periods had expired, is found in language embodied in the plaintiff's affidavit showing cause, as follows: "Such error was occasioned by deponent's misconstruction of the law in relation to bills of exception upon appeal to the supreme court." This is not "good cause shown," within the meaning of § 5093. *Ignorantia legis non excusat.*

(Opinion filed Dec. 5, 1891.)

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

C. A. Van Wormer, for Appellant. *W. F. Ball* and *John S. Watson*, for respondent.

Action by Ole J. Moe against the Northern Pacific Railroad Company for damages arising from the death of his son, caused by defendant's negligence. Verdict and judgement for defendant under direction. Plaintiff appeals. Affirmed.

The opinion of the court was delivered by

WALLIN, J. This action was tried on June 30, 1887, and on that day and on defendant's motion therefor, the district court, Hon. W. H. FRANCIS, J., presiding, instructed the jury to return a verdict for defendant, which verdict was returned. A stay of ninety days was entered in plaintiff's favor as follows: "Within which to move for a new trial, and perfect and have settled and file exceptions, and perfect appeal to supreme court." No notice of intention to move for a new trial was ever served or filed in the action, but on July 15, 1887, plaintiff's counsel filed a written motion for a new trial, stating in substance, as grounds of such motion, that the court erred in directing a ver-

dict. Judge FRANCIS retired from the bench without acting upon the motion, but his successor in office, by an order made April 29, 1890, denied the motion, and on the same day, on plaintiff's application, judgment for costs was entered in favor of the defendant. Plaintiff appealed to this court from such judgment, and, the case being on the calendar of this court, at the October term, 1890, the appeal was dismissed on motion of appellant, without prejudice. At a term of this court held in October, 1891, the case reappeared upon the calendar of this court, and counsel for the respondent, upon proper notice, made a preliminary motion to purge the record by striking therefrom a bill of exceptions found among the papers certified to this court from the court below. Counsel were heard upon the motion, and also upon the merits of the case, and a decision of the motion was reserved to be disposed of later. It appears by the record, and is conceded, that no attempt was ever made to settle a bill of exceptions or statement in the action until subsequent to the dismissal of the appeal in October, 1890, and that the first move in that direction was made by obtaining an order from the district court to show cause why time for settling a bill of exceptions should not be extended. This order bears date April 3, and was returnable April 21, 1891. The order was based upon the affidavit of plaintiff's attorney. The only features of the affidavit which have any posssible bearing upon the matter of plaintiff's laches and default in not applying sooner for the settlement of a bill or statement, or which have any tendency to show cause for an extension of time, are the following features: "That afterwards this deponent discovered that he had committed an error in causing said action to be placed upon the calendar of the supreme court, without first having a bill of exceptions settled by the judge of said district court; that such error was occasioned by deponent's misconstruction of the law in relation to bills of exception upon appeal to the supreme court. Deponent further prays that plaintiff may be relieved from the consequences of the error made by this deponent as aforesaid, and that the court make an order extending the time in which to settle a bill of exceptions for an appeal to the supreme court in the above entitled action."

On the return of the order defendant appeared before the district court, and objected to any order granting the extension of time. The district court overruled the defendant's objections and by an order granted an extension of time to settle a bill until June 22, 1891, to which order defendant filed its exception as follows: "To the entering of which order the defendant now objects and enters its exceptions on the following grounds: *First*, More than three years have elapsed since said cause was tried to a jury, and it is now too late for the settlement of a bill of exceptions under the statute. *Second*, The alleged cause for granting such motion, showing the affidavit upon which the same is made, is not sufficient, either in form or in substance, to authorize the granting of such relief." "The foregoing objection and exception is allowed, and is hereby made a part of the record in this case." Counsel appeared before the district court on June 9, 1891, at which time the district court, without other showing of cause, and upon the cause shown by said affidavit, settled and allowed the bill in question. Defendant objected, and excepted to such settlement, and filed its written objections thereto as follows: "The defendant, conceding that the foregoing is a true bill of exceptions, herein objects to the settlement and allowance of the same by the court for the following reasons: *First*, That the same was not prepared within the time allowed by law, or within a reasonable time after the trial of the action. *Second*, The reasons set forth in the plaintiff's application to this court for an extension of time within which to prepare and have settled a bill of exceptions in this case were not sufficient to justify the court in granting such application upon the facts shown upon such application. The court was not warranted in granting an order reviving the time within which a bill of exceptions might be served and settled." The objections and exceptions were allowed and made a part of the record.

In support of the motion to purge the record in this court, counsel for respondent, while conceding that the court below, under § 5093, Comp. Laws, possesses the power to extend time and fix another time in such cases, insist that when the statutory time has elapsed the power to extend time and fix another time for

settling a bill can be legitimately exercised by the district court only upon the conditions stated in said section—*i. e.*, "upon good cause shown in furtherance of justice;" and further insist that the cause shown in this case was wholly insufficient to excuse the laches and default of the plaintiff in not procuring the settlement of the bill within the periods allowed therefor by statute, or within any reasonable time after the trial. Upon the other hand, counsel for the appellant claims that the cause shown is good cause, and that the extension of time was in furtherance of justice, because, as counsel claims, the errors at the trial were numerous and gross. Counsel especially urges upon our consideration the fact that the motion for a new trial, which he made in July, 1887, was not decided until April, 1890, and that this fact operated powerfully upon the district court in granting the extension of time, and was a part of the cause shown for such extension. In this behalf counsel claims that his laches did not begin to operate against him until after his alleged motion for a new trial was decided. But counsel offers no explanation of the delay (other than that set out in his affidavit showing cause) which occurred in applying for an extension of time after the motion was denied, and before April 3, 1891—a period of about one year. Before counsel moved to dismiss his first appeal to this court, which motion was made in October, 1890, he certainly became aware of the fact that a bill of exceptions would be essential to a review of the alleged errors occurring at the trial, and yet no attempt is made to excuse the neglect involved in not moving in that direction until long after such dismissal, and not until April, 1891. The excuse of ignorance or "misconstruction" of the law requiring the settlement of a bill is not even offered to explain the last-mentioned period of inactivity, which period covered fully five months' time. Nor can we endorse the view advanced by counsel that under the circumstances of this case his obligation to settle a bill of exceptions did not arise until the entry of judgment on April 29, 1890. That would be true, possibly, in a case where no motion for a new trial is intended to be made. In this case a motion was made and argued by plaintiff's counsel, and such motion was denied, and the order of denial was appealed from.

The fact that such motion was made irregularly, and in disregard of the statutes, does not obliterate the statute nor relieve the plaintiff of its obligations. The day the verdict came in, the court granted a 90-day stay, to give plaintiff ample time for settling a bill, and moving for a new trial; but the stay expired, and no attempt to give notice of intention or settle a bill was made within the stay, or until some years had elapsed after the verdict, and not until after plaintiff's alleged motion for a new trial was denied. Can the fact that plaintiff in good faith proceeded to move for new trial in a manner wholly unknown to the law be legitimately urged as an extenuation for the laches and default involved in disregarding the law? We think not. Briefly stated, the plaintiff's right to have a bill or statement settled began to run in June, 1887, but no attempt to setttle a bill or statement was initiated until April, 1891, and, while no obstacle to such settlement was interposed by the defendant, the bill itself was not in fact settled for nearly four years after the right and duty to settle a bill originated. But appellant's counsel claims that he has met the requirement of the statute by showing good cause for the extension of time, and hence the extension is right. Counsel cites Johnson v. Northern Pacific Railroad Co., decided by this court in 1 N. D. 354. This court held in that case, under § 5093, Comp. Laws, that it was the purpose of the act 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." We also held that "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." This holding imports—and such is our present view of the law—that the district court, under the statute, has been vested with authority in these cases to extend time and fix new time where the statutory limit has run, but that such authority can be lawfully exercised only upon the condition set out in the statute—*i. e.*, "upon good cause shown;" and, further, that cases may arise under the statute where this court will be in duty bound to exercise its supervisory functions

to the extent of reversing the action of the court below when such action is, in our judgment, unwarranted by the statute which confers the power to act at all. In the case under consideration —unlike that cited above—the grounds upon which the court below proceeded to revive and extend the right to settle a bill of exceptions are spread out fully upon the record brought to this court. The entire scope of the alleged cause shown for the action of the lower court is presented in a brief sentence, which we quote from the affidavit showing cause, as follows: "That afterwards this deponent discovered that he had committed an error in causing said action to be placed upon the calendar of the supreme court without first having a bill of exceptions settled by the judge of said district court; that such error was one occasioned by this deponent's misconstruction of the law in relation to bills of exception upon appeal to the supreme court." This showing does not appear to us to present a case of "misconstruction of the law." It nowhere appears that the plaintiff acted upon any construction of the law relating to the settlement of bills and statements until nearly four years after the trial. The showing presents a case of utter disregard of the statute, and the excuse offered to the district court was "misconstruction of the law." To our mind, the excuse offered for plaintiff's laches falls far short of constituting the "good cause shown," upon which alone the district court can lawfully act; and hence that the allowance and settlement of the bill was without authority of law. If an attorney's ignorance of the law of the case could ever be received as a valid excuse for laches, surely this record presents no such case. In this case the defense offered no obstacles and engaged in no dilatory tactics tending in the least to delay or obstruct the plaintiff in settling a bill of exceptions, and yet no move was made in the directon for nearly four years after the right to move arose. The law requiring the settlement of bills of exception was during territorial times, and still is, statutory law; and for this reason the excuse of ignorance would be all the more untenable if offered. In this case, as we have seen, it is not offered, but in lieu of ignorance counsel ask us to accept "misconstruction of the law" as an excuse, although wherein there was any "misconstruction" is not suggested upon

the record, nor was any particular "misconstruction" of law spoken of during the oral argument in this court. We hold that plaintiff's default, resulting from his non-action, was not excused in the showing made in the district court, and upon which the time was extended. *Ignorantia legis non excusat.* The discretion to extend time is not absolute in the district court; and when such discretion is not, in our judgment, a sound judicial discretion, we shall not hesitate to review, and, when necessary, reverse, the same. Welch v. County Court, 29 W. Va. 63, 1 S. E. Rep. 337. The policy of the law demands that the utmost diligence should be exercised in taking the prescribed action necessary to a review of alleged errors made in the trial court. Looking towards prompt action, the legislature has specially limited the time within which the necessary steps preliminary to a review must be taken. The statutory time limited for giving the notice of intention and for having bills of exception and statements settled is ordinarily ample for the purpose. It rarely happens that further time is necessary, but to meet the exigency of exceptional cases the statute permits the trial court, "upon good cause shown," to extend the time. Without the required showing, the power to extend time does not exist. It follows from the views already expressed that the motion to eliminate the bill of exceptions must be granted, and, as no errors appear upon the face of the record when thus purged, the judgment of the court below must be affirmed. All concur.

EDWARDS & MCCULLOCH LUMBER COMPANY, a Corporation, U. C. TUBBS, partners doing business as EDWARDS & MCCULLOCH LUMBER COMPANY, Plaintiffs and Respondents, *v.* L. P. BAKER, Defendant and Appellant.

Sale—Action for Price—Evidence—Pleading—Bill of Exceptions—Review on Appeal.

1. Where, upon trial, the plaintiff proved that it had delivered to defendant an invoice of lumber, to recover the balance of the purchase price of which the action was brought, *held* proper for defendant to prove that he never consciously accepted the paper as containing the contract between the parties, and that he never exan ined it or

knew its contents, there being evidence to show that the price was agreed upon before the delivery of the paper, and that defendant had no reason to believe that the paper embodied any contract or part of a contract. Therefore *held* error to refuse to submit to the jury the question whether the price agreed upon was different from that which appeared upon the face of the invoice. *Held, further*, that defendant was not, as a matter of law, bound by the price stated in the invoice, on reading the same after receipt by him of the lumber; nor was he concluded from showing that an account received and retained by him without objection, in which the price was set down according to the invoice, was erroneous because it incorrectly stated the contract price of the lumber. The action not being upon the account stated, but merely to recover the balance of the alleged purchase price of the lumber, *held*, that defendant could show this error without specially pleading it.

2. An order made after statutory time has expired, settling a statement or bill, operates to extend the time for such settlement to the date thereof.

3. On appeal from a judgment, this court will review errors of law occurring at the trial, whether a motion for a new trial was or was not made in the court below.

(Opinion filed Dec. 7, 1891.)

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

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

Action by Edwards & McCulloch Lumber Company against L. P. Baker to recover for lumber sold. Verdict and judgment for plaintiff. Defendant appeals. Reversed.

W. E. Purcell, for appellant:

A party who receives a paper upon its face purporting to be a contract, as certain railroad and steamship tickets, will be conclusively presumed to have read and assented to its terms. Quimby v. Railroad Co., 25 Mass. 365; Railroad Co. v. Stephens, 95 U. S. 665. But see Brown v. Railroad Co., 17 N. Y. 306; Fonesca v. Steamship Co., 27 N. E. Rep. 665. When a written contract is shown not to embrace all the agreements of a prior parole contract, parole evidence of it may be given. Baker v. Bradley, 42 N. Y. 316.

McCumber & Bogart, for respondent:

The principal objection to the contract in this case is that it was not subscribed by the parties, but if a party assents to a contract, it becomes his contract without his signature and he may base an action on it. Case Machine Co. v. Smith, 18 Pac. Rep. 641; Dressel v. Jordan, 104 Mass. 412; Justice v. Long, 42 N. Y. 493. The contract in this case was something in the nature of a bill of lading, which, so far as it is a contract, cannot be varied by parole. King v. Lady Franklin, 75 U. S. 455; Barber v. Broa, 3 Conn. 9; Railroad Co. v. Putnam, 19 Ohio St. 221; Shaw v. Gardner, 12 Gray 438; Cox v. Peterson, 30 Ala. 608; The Delaware v. Oregon Iron Co., 81 U. S. 579. So of an express receipt. Boorman v. Express Co. 21 Wis. 154. The claim has become stated, as about six months before the commencement of the action defendant received the bill and up to the commencement of the suit made no objection to it. He is therefore bound by it. Lockwood v. Thorn, 11 N. Y. 170; Terry v. Sickles, 13 Cal. 427; Edwards v. Hoeffinhoff, 38 Fed. Rep. 635; Truman v. Owen, 21 Pac. Rep. 665; Bernties v. Bicknell, 3 Pac. Rep. 206; Auzesias v. Nagle, 15. Pac. Rep. 371. Where there has been no objection to the account rendered, there being no evidence of fraud or mistake, it is binding on the parties. Paper Co. v. Moore, 10 N. E. Rep. 181.

The opinion of the court was delivered by

CORLISS, C. J. The trial court having directed a verdict for plaintiff, the defendant appeals. The litigation grows out of the sale of lumber by the plaintiff to defendant. The defense was that the contract price therefor was $450, and that all but forty-eight cents of this had been paid before suit was brought, and defendant tendered in his answer judgment for this amount, with costs up to that time. Plaintiff's contention upon the trial was that defendant was precluded from showing any oral agreement as to the price, because the parties had entered into a written contract on the subject. The plaintiff did business in Fergus Falls, Minn., and shipped this lumber from that point to De Villo, N. D., where defendant was to construct a barn with it. Plaintiff's position is that the alleged written

contract showed upon its face the price of the lumber at Fergus Falls, and that defendant was to pay freight thereon from Fergus Falls to De Villo. Upon this theory of the case, the amount for which the court directed a verdict was correct. But the defendant had a right to have his version of the contract submitted to the jury for their decision, unless it had the effect to contradict the terms of a written contract between the parties. He offered to prove that before the delivery of this alleged written agreement the plaintiff had agreed to deliver this lumber for $450 at De Villo, it to pay all freights. We think the trial court should have received the evidence, and left the question as to the terms of the contract to the jury. The defendant testified that he did not read the paper; that nothing was said about its being a contract when it was handed to him; that he put it in his pocket without looking at it, as he supposed that it was the bill of lumber that he had given one of the plaintiffs to figure from. At the time of the delivery of this paper to defendant the bargain, according to his statement, had been closed. There was therefore no particular reason why he should expect a written contract to be drawn. He says that he did not go there to make a written contract, and that he received no intimation from the plaintiff that this paper embodied any agreement concerning the lumber he had purchased. This is not the case of an attempt to controvert the terms of a written contract. The defendant insists that he had never entered into any written contract at all in relation to the matter. He was not asked to sign the paper, and if he was not aware that the plaintiff regarded the paper as the written contract between it and him, and if he did not so regard it himself, but thought it was merely the bill of lumber he had before handed to one of the plaintiffs, we are at a loss to ascertain on what principle he can be held bound by its terms, so long as they were unknown to him. Authorities would hardly seem to be necessary in support of a principle so obvious. Indeed, the cases go much further than we are called upon to go in this case. Strohn v. Railroad Co., 21 Wis. 562; King v. Woodbridge, 34 Vt. 565; 2 Whart. Ev. § 927; 4 Lawson, Rights, Rem. & Pr. § 1853; Black v. Railroad Co., 111 Ill. 351. Said

the court in Strohn v. Railroad Co.: "It is in the nature of a direct fraud or cheat for the company or its agents, after having entered into a verbal agreement, thus wrongfully to insert a contract of an entirely different character, and present it to the party without directing his attention expressly to it and procuring his assent." It would be a startling doctrine that one who has no reason to believe that a paper handed to him embodies a written contract, or that it is anything other than a paper of his own, which, he having handed to another, is returned to him; who receives no intimation from any one that such paper embodies a written contract or any part of an agreement; who does not receive or know its contents—shall be held to have entered into a written contract by putting such paper in his pocket. The plaintiff easily could have informed him of the nature of the paper handed to him. It is true that there is evidence that it did, but this was a question for the jury, the defendant controverting this evidence. The issue in this case is whether the defendant ever assented to the terms of the so-called written contract. If his receipt of the paper, under the circumstances of this case, should be held to bind him as to the quantity of lumber and the price, he would be bound if an exorbitant price had been charged, or if the plaintiff had inserted in the paper all the lumber in its yards at Fergus Falls. The rule excluding oral evidence has no application in this case, nor can it ever have any application until it is established that a written agreement has in fact been made. "Parol evidence is also admissible to show that the paper was never accepted as a contract between the parties." 4 Lawson, Rights, Rem. & Pr. § 1853. While the evidence which tended to show this fact was received, the question was not submitted to the jury, but the court ruled that the invoice constituted the contract as far as the price was concerned, and on this theory directed a verdict against the defendant. This was as prejudicial as though the evidence on this point had been excluded. The paper handed the defendant is merely an invoice of lumber. There is contained in it no agreement on the part of the plaintiff to sell or the defendant to buy. To prove that defendant was to pay $450 for the lumber described in it does not

contradict any of its terms, for it contains no promise on the part of the defendant to pay any other or different sum. But we prefer to place our decision on the first ground.

It was urged that the statement of the case was not settled in time. But the order settling it operates of itself as an extension of the time until the date of the actual settlement. Johnson v. Railroad Co., 48 N. W. Rep. 227, 1 N. D. 354. Other questions of practice, relating to the motion for a new trial, are raised; but no motion for a new trial was necessary to present the question we have discussed on the merits, as the error of the court was one of law occurring on the trial, and can be raised by an appeal from the judgment, which is the nature of this appeal. Sanford v. Bell, 48 N. W. Rep. 434, 2 N. D. 6. It was urged that defendant had estopped himself from questioning the fact that this invoice correctly stated the price, because he read the same some time before the commencement of the action, and that he received and retained without objection an account in which he was charged for the lumber upon the theory that the price was to be, not as he claimed, but as plaintiff now insists. This was about September 25th. The lumber had already been delivered. If defendant's statement is true, the price had been agreed upon at a different sum, and he was under no obligation to return the lumber on discovering that the plaintiff had made different figures in an invoice handed him, but which contained no promise on his part to pay this price, and which he never had reason to regard as embracing the contract. With respect to the bill received and retained without objection, it is sufficient to say that although, in the absence of any evidence of error, the account might be regarded as conclusive as an account stated, yet it is elementary that the person who receives the same may always show an error therein. See cases cited in note to Lockwood v. Thorne, 62 Amer. Dec. 81-91. There certainly was an error therein if defendant's contention regarding the price to be paid for the lumber is correct. Nor is it any answer that the error in the account stated was not pleaded. Defendant was under no obligation to plead it, because he was not apprised by the complaint that an account stated would be relied upon. The action was merely to

recover the alleged balance due upon the sale of the lumber. Moreover, the plaintiff was put upon its guard on this point by the answer. The facts which defendant would have alleged to show an error in the account stated, had the action been founded thereon, are distinctly set up in the answer. In this answer the plaintiff was notified that on the trial the defendant would insist that the contract price was $450 and no more. The judgment is reversed, and a new trial ordered.

All concur.

JOHN L. JOHNSON, Plaintiff and Respondent, *v.* F. T. DAY, JOHNATHAN T. BACKUS, Trustee, and F. G. BARTLETT, as Sheriff of Sargent County, Dakota Territory, now State of North Dakota, Defendants and Appellants.

Foreclosure of Mortgage—Attorney's Fee—Filing Certificate of Sale.

1. In foreclosure proceedings by advertisement, where the mortgage provided for an attorney's fee, and the mortgagee was represented by an attorney, the failure of such attorney to file the affidavit required by § 5429, Comp. Laws, does not invalidate the sale. But such failure would prevent the mortgagee from recovering such attorney's fee; and if, in such case, the officer making the sale sold the mortgaged property for an amount sufficient to pay the debt, with costs and disbursements, including such attorney's fee, he would be liable, on demand, to the mortgagor for the amount of such attorney's fee.

2. The failure of the officer making such sale to file a duplicate certificate of sale, in the office of the register of deeds where the mortgage is recorded, within 10 days after such sale, as required by § 5420, Comp. Laws, does not invalidate the sale. This section is directory, and not mandatory.

3. In such foreclosure proceedings a mistake in the middle initial of the mortgagor's name is immaterial. The law recognizes but one Christian name.

(Opinion Filed Dec. 8, 1891.)

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

W. A. Gates and *J. E. Bishop*, for appellants. No appearance for respondent.

Action to set aside certain mortgage foreclosure proceedings. Judgment for plaintiff. Defendants appeal. Reversed.

The opinion of the court was delivered by

BARTHOLOMEW, J. This was an action in equity to set aside and cancel certain foreclosure proceedings by advertisement. There was a decree for plaintiff, and defendants appeal. This action was evidently brought on the theory that the sale was absolutely void. Plaintiff does not ask an extension of the time for redemption, and does not tender the amount he admits to be due. He claims that the sale, and the proceedings thereunder, constituted a cloud upon his title, which he asks a court of equity to remove without conditions. There is nowhere in the record a suggestion of any damage resulting to him by reason of the alleged irregularities and omissions in the proceedings prior and subsequent to the sale. There are three findings of fact upon which the lower court rested the decree. They are in substance—*First*, that the mortgagee (defendant herein) appeared in said foreclosure proceedings by attorney, and that said attorney entirely failed to file the affidavit required by § 5429, Comp. Laws; *second*, "that the certificates of sale in said proceedings prescribed by § 5420 were not filed in the office of the register of deeds where said mortgage was recorded within 10 days after the date of said sale," and not until 18 days had elapsed; and *third*, that in the foreclosure proceedings the mortgagor (plaintiff herein) was designated as John S. Johnson, while his true name is John L. Johnson.

If either of these grounds is sufficient to support the decree it must stand. The correctness of these findings is questioned, but we need not enter upon that branch of the case, as we think the findings insufficient to sustain the conclusions. Section 5429, Comp. Laws, reads: "The party foreclosing a mortgage by advertisement shall be entitled to his costs and disbursements out of the proceeds of the sale, and shall also be entitled, in addition, to any attorney's fee agreed upon in the mortgage, upon the making, by the attorney, or, if more than one, by one of the attorneys, employed to foreclose, and filing with the register of deeds at or prior to the time of sale, of an affidavit

to the effect," etc. It seems clear that this affidavit is required to enable the mortgagee to recover the attorney's fee agreed upon in the mortgage, and for no other purpose; hence a failure to file it can only result in the failure to recover such attorney's fee. There is nothing in the case to show us that any such attorney's fee was ever recovered in these proceedings. Even if such fee was included in the amount for which the land was sold, we cannot assume that such fee has been paid to the mortgagee, and the mortgagor is entitled, on demand, to any amount recovered on the sale in excess of what was in fact due on the mortgage. Comp. Laws, § 5424. The fact that the officer making the sale realized more than was in fact due, certainly is not to the disadvantage of the mortgagor. Nor would a mistake of the officer in ascertaining such amount in any manner bind the mortgagor or relieve the officer from liability to him for any surplus beyond the actual amount going to the mortgagee, and, if such excess had been paid to the mortgagee, then both the officer making the sale and the mortgagee recovering the money would be liable to the mortgagor for the amount of such excess upon demand made. Millard v. Truax, 47 Mich. 251, 10 N. W. Rep. 358; Kennedy v. Brown, 50 Mich. 336, 15 N. W. Rep. 498. Section 5420, Comp. Laws, is as follows: "Whenever any real property shall be sold by virtue of a power of sale contained in any mortgage, the officer or person making the sale shall immediately give to the purchaser a certificate of sale containing (1) a particular description of the real property sold; (2) the price bid for each distinct lot or parcel; (3) the whole price paid. And such officer or person shall file in the office of the register of deeds where the mortgage is recorded, within 10 days from the day of sale, a duplicate of such certificate; which certificate must be executed and acknowledged, and may be recorded as provided in case of a certificate of sale of real property upon execution, and shall have the same validity and effect." It will be noticed that it is the duty of the officer or person making the sale to file a duplicate certificate. The section throws no duty upon the purchaser. It is the certificate required by this section that the court found was not filed until 18 days after the sale. The

difficulty lies in ascertaining just what result follows this omission. The statute gives us no light upon that subject, nor has the point ever been adjudicated by the court of last resort in this jurisdiction, nor do we find the specific point passed upon by any court under a statute similar to ours. We are left to such light as we may obtain from general principles and the design and purpose of the enactment. It has been held in New York, in Jackson v. Young, 5 Cow. 269; and in Minnesota, in Barnes v. Kerlinger, 7 Minn. 82 (Gill. 55), under statutes requiring a sheriff's certificate of sale of realty under execution, that such statutes were directory only, and that an entire omission of the certificate would not invalidate the sale. And in Massachusetts, in Robbins v. Rice, 7 Gray, 202, under a statute requiring a sheriff in certain cases of sale of real estate to have his proceedings under the execution recorded in the proper office before he returned his execution, it was held that such requirement was for the protection of subsequent attaching creditors and *bona fide* purchasers, and that the defendant had no interest in its fulfillment. After full consideration we reach the conclusion that the principle of those cases must apply to this case. The mortgagor who executes a mortgage containing a power of sale is bound to know of his own default, and bound to know that by such default the power executed by him becomes as active and efficient in applying the mortgaged property to the payment of the debt secured as would a decree of court, and he is as much bound to take notice of all that is subsequently done under such power as he would be of all subsequent proceedings under a decree of foreclosure; and having, in law, full knowledge of the time, place, manner and amount of the sale under the power, he cannot be benefited in any manner by filing the duplicate certificate, or prejudiced by the failure to file it. The duplicate certificate is to be filed by the person making the sale, and over whom the purchaser has no control, and it may be filed at any time within ten days after the purchaser has parted with his money. It would not be right or reasonable to hold that the purchaser's rights could be destroyed by the subsequent negligence of the person making the sale, and against which the purchaser is powerless to guard.

But, in the absence of such duplicate certificate in the proper office, junior incumbrances, or attaching creditors of the mortgagor, would have no means of knowing whether default had been made by the mortgagor, or when the right to redeem would expire, or the amount necessary therefor. For their protection the filing of the duplicate certificate is highly necessary, and its absence may furnish a ground of action against the negligent party, but does not affect the validity of the sale. The statute is directory, not mandatory. This accords with the well-established rule that where the statute specifies a time within which an act, particularly an official act, shall be done, such statute is to be regarded as directory merely, unless the nature of the act or the phraseology of the statute is such that designation of time must be considered as a limitation of the power of the officer. Suth. St. Const. § 446 *et seq.;* and see San Francisco v. Pixley, 21 Cal. 59; Cunningham v. Cassidy, 17 N. Y. 276; Osman v. Traphagen, 23 Mich. 85; Bunker v. Rand, 19 Wis. 258.

We think there is nothing in the error in the name. It is now quite generally held that the omission of the middle initial, or a mistake in such initial, is entirely immaterial in legal proceedings, whether civil or criminal. The law recognizes but one Christian name. See 16 Amer. & Eng. Enc. Law, p. 114, and cases cited.

In this case, as in others that have been submitted to us, the conclusions of law reached by the trial court and the formal judgment are thrown together in one instrument. This, we think, is bad practice. The statute requires the judgment to be entered in the judgment book. This practice compels clerks of district courts to enter the conclusions of law as a part of the judgment. This is a useless incumbrance of the record, and one never contemplated by the statute. Trial courts should see to it that attorneys in preparing their conclusions of law and final judgments keep the two entirely distinct. The district court is directed to reverse its judgment as to this appellant, and order a new trial. Reversed. All concur.

DANIEL J. DAVIS and THOMAS RANKIN, Co-Partners as DAVIS & RANKIN, Plaintiffs and Respondents, *v.* EMMA C. BRONSON and LORENZO N. BRONSON, Co-Partners as E. C. & L. N. BRONSON, Defendants; LORENZO N. BRONSON, Defendant and Appellant.

Rescission of Contract—Action for Breach.

Defendant having refused to perform a contract for the erection of a creamery by plaintiffs before they had entered upon the performance thereof, *held*, that an action to recover the contract price would not lie, although plaintiffs had, notwithstanding defendant's refusal to perform, completed the creamery according to contract. Plaintiffs had no right to go on with the contract under such circumstances, and recover the contract price; their only remedy being for damages for breach of the contract.

(Opinion filed Nov. 27, 1891. Rehearing denied Jan. 2, 1892.)

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

George W. Newton, for appellant. *Moer & Harris*, for respondents.

Action to recover upon a contract of subscription to the capital stock in a creamery company. Judgment for plaintiffs. Defendant appeals. Reversed.

George W. Newton, for appellant:

It was predjudicial error to admit secondary evidence of the contract. Anglo-American Packing Co. v. Connor, 31 Fed. Rep. 313; Post v. School District, 26 N. W. Rep. 911; Nelson v. Central Land Co., 29 N. W. Rep. 121; *In re* Assignment of Gazett, 29 N. W. Rep. 347; Sebree v. Dorr, 9 Wheat. 555; Myers v. Bealer, 46 N. W. Rep. 479. It was error for the court to refuse to submit the question of damages to the jury and to rule that the measure of damages was the subscription with legal interest from the time the creamery was completed. Danforth v. Walker, 37 Vt. 239; Derby v. Johnson, 21 Vt. 17; Nye v. Taggart, 40 Vt. 295; Clark v. Marsiglia, 1 Denio 317; Spencer v. Halstead, 1 Denio 606; Dillon v. Anderson, 43 N. Y. 237; Moline Scale Co. v. Beed, 3 N. W. Rep. 96.

Moer & Harris, for respondents:

The points made in appellant's brief are all that will be considered by the respondents, as any error of the trial court not pointed out therein, is deemed to be waived. Brewing Co. v. Mielenz, 5 Dak. 136; Martz v. Putnam, 20 N. E. Rep. 270; Express Pub. Co. v. Aldine Press, 17 Amer. Rep. 608. The answer of appellant confesses and seeks to avoid the contract by new matter; no proof of the contract was necessary except as against the defendant, E. C. Bronson, and if the trial court erred as against her it was cured by the verdict of the jury and cannot be urged as a reason for a new trial. Gale v. Shillock, 29 N. W. Rep. 661; Derby v. Gallup, 5 Minn. 119; Gas Co. v. City of Davenport, 15 Iowa 6; Martin v. Sevearengen, 17 Iowa 346; Wollen v. Whitacre, 73 Ind. 198. The contract itself determines the amount appellant agreed to pay and controls in fixing the measure of damages. Davis & Rankin v. Belford, 37 N. W. Rep. 919; Gibbons v. Grinsel, 48 N. W. Rep. 255.

The opinion of the court was delivered by

CORLISS, C. J. The theory on which plaintiffs were allowed to recover against the appellant was that they had fully performed on their part all the conditions of an agreement with appellant and others to erect and equip a creamery at La Moure, in this state. We are compelled to reverse the judgment, because it appears that the plaintiffs were not justified in proceeding with the work under the contract for the purpose of charging the appellant with the full amount which he and his co-partner agreed to pay as their share of the contract price, as it is undisputed that the appellant broke the contract the day after it was made, and plaintiffs received notice of his determination not to carry out the agreement on his part on the second day after the contract was entered into. This was before they had taken any steps under it. Appellant could not, under the facts of this case, rescind the agreement without the assent of all parties thereto. Nor is it claimed that he did rescind it. The utmost that can be urged is that he arbitrarily refused to perform his part of the contract. This would subject him to an action for damages for breach of the contract.

But the plaintiffs could not, in the face of this refusal on his part to perform, undertake and carry to completion the work under the contract to be performed by them, and thereupon insist that they were entitled to recover from the appellant his share of the contract price. The authorities are very clear on this point. Bishop Cont. §§ 837-841; Danforth v. Walker, 37 Vt. 239, 40 Vt. 257; Moline Co. v. Beed, 52 Iowa 307, 3 N. W. Rep. 96; City of Nebraska v. Coke Co., 9 Neb. 339, 2 N. W. Rep. 870; Clark v. Marsiglia, 1 Denio 317; Butler v. Butler, 77 N. Y. 472. No damages for breach of the contract by the appellant were proved, nor was there any allegation of such damages. The action was upon the contract to recover the contract price, and not for damages for breach of it. For this vital error the judgment is reversed, and a new trial ordered. All concur.

ON REHEARING.

It is urged that Kadish v. Young, 108 Ill. 170, and Roebling's Sons' Co. v. Fence Co., 22 N. E. Rep. 518, 130 Ill. 660, are conclusive in favor of the doctrine that one party to a contract cannot, by notice of his determination not to perform, given before the time to begin performance has arrived, create such a breach of the contract as will compel the other party, who does not assent to the breach, to treat the contract as then broken, and limit him to the recovery of such damages as are proper on the basis that the contract is then broken. These cases do sustain such a doctrine, and it is undoubtedly an elementary rule of law. The full scope of these and kindred decisions is that the person who has not broken his part of the compact may, at his option, extend to the person who has signified his purpose to violate the agreement, an opportunity for repentance, measured by the time to elapse between the refusal to perform and the date when performance is to commence. He may, and some cases hold that he must, treat the contract as subsisting, not for the purpose of performing it in the face of a persistent, unchangeable refusal of the other party to carry out, and then of recovering the full contract price, but for the purpose of insisting that such party shall, when the time of per-

formance arrives, finally determine whether he will stand by his agreement or by his former repudiation thereof. All that these cases decide is that the repudiating party may not force the other party to sue for a breach of the contract before the time of performance arrives, and therefore have his damages fixed by the condition of affairs at the time of the premature repudiation of the contract, as though such repudiation had been made on the day of the performance. But when the time to perform arrives, then, if the refusal to carry out the agreement is not withdrawn, there is no principle on which the other party to the contract can perform and sue for the contract price any more than in the case of a refusal made for the first time on the very day of performance. The party keeping the contract need not mitigate the damages by treating as final a premature repudiation thereof, but this is far from establishing the proposition that he may increase the amount to be paid by the other party by completing the contract after notice of repudiation, made on the day of performance, or made before that day, and never withdrawn, but, on the contrary, constantly insisted upon down to and including that day. In Kadish v. Young, 108 Ill. 170-185, the soundness of the cases cited to sustain our conclusion is expressly recognized. After citing some of them, the court says: "It will be observed in each of these cases the time for the performance of the contract had arrived, and its performance had been entered upon. In neither of them was the defendant at liberty, after notifying the plaintiff not to proceed further in the performance of the contract, to demand that he should proceed to perform it. As it was said in Frost v. Knight, L. R. 7 Exch. 111, the defendant was, in case of notice, not to perform a contract the time of performance of which is to commence in the future. In these cases there is no time or opportunity for repentance or change of mind; in those there was." The court quote with approval the language used in Danforth v. Walker, 37 Vt. 244, where the court say: "While a contract is executory, a party has the power to stop performance on the other side by an explicit direction to that effect by subjecting himself to such damages as will compensate the other party for being stopped in the performance on

his part at that hour or stage in the execution of the contract. The party thus forbidden cannot afterwards go on, and thereby increase the damages, and then recover such damages of the other party." It is to be noted that in the case at bar the refusal to perform was not premature. The contract specified no time when performance thereof should be entered upon by the plaintiffs, but it provided that the building, with all its equipments, must be finished within 100 days after the amount had been subscribed. The plaintiffs might, under these provisions, have entered upon the performance of their part of the agreement at once. It was the right of the appellant to notify them immediately of his determination not to carry out his part of the contract, in order to save himself from the increased damage which a partial performance before notice might cause. Daniels v. Newton, 114 Mass. 533, is confidently relied on by respondents. The language used in this and similar cases must be construed in the light of the facts. In the case in 114 Mass. an action for damages was brought before the defendant was under any obligation to perform the contract, the action being based upon defendant's premature refusal to carry out the contract. The decision merely was that the action was prematurely brought; that the defendent might before the time for performance arrived, change his mind, and insist on a performance of the contract. The case does not decide that when one party to a contract may, under its terms, enter upon the performance of it, the other party may not, subject always to liability for damages, prevent the completion of the contract, or prevent the commencement of work thereunder, for the purpose of subjecting him to liability for the full contract price. If respondents' contention is sound, it was beyond the power of the appellant ever to escape the payment of the contract price, although he had been the only party to the contract on his side. He could not break it so as to subject himself to damages and prevent the respondents from completing the creamery and holding him for the contract price until the same had been fully completed and ready for delivery, for only then, it is said, was the appellant bound to do any act on his part under the contract; and when the creamery was finished it was claimed that appellant would not

escape payment of the price, because it is said the title instantly vested in him and his associates in the contract, not only without his assent, but against his will. What, then, becomes of the doctrine that one party to a contract cannot, except in special cases, enforce specific performance thereof, but must make his claim for damages? And what becomes of the authorities recognized as sound by respondents' own cases, which hold that the party who has something to do must not, after notice of refusal from the other party, go on with the work, and thus increase the liability of such other party to him? Respondents seem to urge that at no time is notice of refusal to perform efficacious to prevent performance on the other side except at the moment that the party breaking the compact is bound to perform. Their own cases are against this position. Said the court in Daniels v. Newton, 114 Mass. 533: "The plantiff's rights are invaded by repudiation of the contract only when it produces the effect of non-performance on his part or prevents him from entering upon or completing performance on his part, at a time when, and in a manner in which he is entitled to perform it or have it performed." It may well be true that where the performance by the party notified not to perform consists of a single act—as the tender of a deed—notice before the time for such delivery will not warrant an action for damages; but where the final act of tender is the culmination of other acts which in the nature of the case, must precede it—as where the party is to manufacture or build the thing to be delivered—then it is quite clear that the conduct which before the time of delivery prevents the taking of the preliminary steps—the manufacture of the article or the erection of the building—as effectually prevents, before the day of tender arrives, the possibility of delivery, as though that day in fact had arrived, and a tender of the thing had been rejected. In such a case the contract is as effectually broken by the notice not to go on with it, given before the day of delivery arrives—the person who is to do the work having then the right to enter upon the performance of the same—as though the notice had been given on the very day of delivery. The question in all cases is whether one party has prevented performance by the other party at the time when

performance by him is due. This can be done as well by preventing the taking of those preliminary steps without which the final step cannot be taken as by preventing the taking of such final step itself. These preliminary steps must often precede by many days the time of performance, and it therefore must follow that notice of refusal to carry out the contract in such a case given before the time of performance, will operate as a breach of the contract in case the time has arrived at which the person willing to keep the contract may enter upon the work under the contract.

Counsel refer to the statute touching rescission of contracts, and insist that the appellant has not shown that the case falls within any of the provisions of such statute. In this he is correct. There was no recission of the contract. A lawful recission of an agreement puts an end to it for all purposes, not only to preclude the recovery of the contract price, but also to prevent the recovery of damages for breach of the contract. This is the common law rule, and our statute merely echoes this rule. "A contract is extinguished by recission." § 3588, Comp. Laws. Counsel seem to be unable to make the distinction between the right of one party to refuse to perform his agreement, always subject to his liability for damages, and the recission or utter destruction of a contract for all purposes, resulting from mutual consent, or from the action of one party alone, where by reason of fraud, duress or other legal ground for recission, the right is vested in him to elect to abrogate the contract without liability thereunder for damages or for the contract price. The burden of the argument seems to be that no person can break a contract unless he can and does rescind it. The result is that no compact can ever be violated so as to subject the person attempting to infringe it to damages, for there is no breach on this theory, except in cases where there can be no breach, because by recission the contract is annihilated so effectually that in contemplation of law it has never had any existence, even for the purpose of being broken. The two lines of thought run in diverse directions. One starts with the fact that one party has refused to perform, and leads to the conclusion that the other party must do nothing from the moment he is aware of

such refusal to increase the liability of the one breaking the agreement, and must, therefore, so long as such refusal is not recalled, abstain from going on with the work he has to perform under the contract; the other finds a mutual abandonment of the compact, or an abandonment by one who, under the law, has a legal right to abandon it, and leads inevitably to the conclusion that there is no contract to be performed by any one, and hence that no damages for breach thereof can be incurred, and that no liability for the contract price can possibly exist. That the Massachusetts supreme court, in Daniels v. Newton, did not intend to decide contrary to our views is apparent from the fact that the same court, only six months later, without overruling Daniels v. Newton, or even regarding it as at all bearing on the question, expressly recognized and enunciated the doctrine on which we rest our decision. In Collins v. Delaporte, 115 Mass. 159, that court says: "A party to an executory contract may stop its performance by an explicit order, and will subject himself only to such damages as will compensate the other party for being deprived of its benefits."

It is urged that the plaintiffs were bound to build the creamery despite the defendant's refusal to go on with the contract, because there were other parties to the contract who could have held the plaintiffs liable in damages had they, acting upon defendant's breach of the agreement, refrained from constructing the building. We see no principle on which the other parties could have recovered from the plaintiffs damages under these circumstances. Their agreement was with all the defendants, including this appellant. They did not agree to build a creamery for the other defendants, and take their responsibility for the contract price. It furnishes an ample justification for a failure to go on with the work that one of the contracting parties—perhaps the only responsible one—has by a breach of the contract made it impossible for the plaintiffs to complete the building, and charge such party with the contract price. The contract was entire, and the plaintiffs could not be compelled to perform it as to and for only a portion of the contracting parties. It is illogical to assert that the plaintiffs would have been liable to the other parties had they, acting upon the appellant's

breach, refrained from carrying out the agreement on their part. On what principle does this assertion stand? The general rule is, as we have already stated, that the contracting party who has certain things to do under his contract, has no right to proceed with the execution of the contract, and charge the other party with the expense thereof, after he has been notified that such other party will not stand by his compact. There is no reason why the rule should not apply in the case of a refusal to perform, emanating from one or two. The parties on the same side of a contract are bound together in interest, and there is no reason why all of the rest should not be responsible for the default of any one. The nature of the engagement is that the contracting party will continue bound to perform only on condition that they all continue faithful to their compact, and not on condition of only a portion standing by their engagement. Whether defendant may be liable to his co-contractors for breach of an implied agreement to keep his promise we need not now decide.

It is urged that the decision in Buchel v. Lott (Tex. App.), 15 S. W. Rep. 413, is in point. We cannot see the faintest resemblance between that case and the one at bar. The appellant, with others, had signed a subscription list, aggregating $23,000. The amount subscribed was to be a bonus to be paid on the construction of a line of railway within a specified time. The railroad was so constructed, and in an action against the appellant to recover the amount of his subscription, the court held him liable on the theory that the consideration for his promise was executed; the promise of each subscriber being such a consideration for the promise of the others as rendered absolute the obligation to pay the amount of the subscription, and that, therefore, appellant could not withdraw his subscription. In the class of cases of which this is one the doctrine is recognized that the liability is as absolute as though each subscriber had received as a loan the amount which he agrees to pay as a subscription. There is an obligation to pay the money, which is indefeasible by any act of the subscriber. Said the court in this case: "He became bound upon said contract the moment he signed it for the amount subscribed by him, sub-

ject only to the condition that the railway should not be constructed according to the terms of the contract." This doctrine is by no means recognized universally, and it is not too much to say that the weight of reason and authority is against it. Baptist Church v. Cornell, 117 N. Y. 601, 23 N. E. Rep. 177; Presbyterian Church v. Cooper, 112 N. Y. 517, 20 N. E. Rep. 352; Methodist Church v. Kendall, 121 Mass. 528; University v. Livingston, 57 Iowa 307, 10 N. W. Rep. 738. But this question we are not called upon here to decide, nor is it at all material, for, assuming the decision to be sound, it makes nothing against our position, for here there was a general agreement on the part of all to pay $5,000 for the creamery. Each was bound for the full amount. The plaintiffs agreed to build the creamery for $5,000, and the engagement of the subscribers is to pay, not the amount set opposite their several names, but the sum of $5,000 generally. "We, the subscribers hereto, parties of the second part, agree to pay the above amount for said creamery when completed," etc. The consideration for this joint promise to pay $5,000 was the erection of this creamery. The consideration therefor was not executed, but executory. There did not arise upon the signing of the contract by the appellant an absolute obligation to pay $5,000 or any portion of it, the same as though he had actually received the consideration for the promise—the theory upon which subscribers are held liable in the class of cases to which Buchel v. Lott belongs—but he became bound to stand by his agreement, or, in default thereof, to pay such damages as a breach of his contract would cause. The petition for rehearing is denied. All concur.

BARTHOLOMEW, J., having been of counsel, did not sit on the hearing of the above case, nor take any part in the decision; Judge TEMPLETON, of the first judicial district sitting by request.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff and Appellant *v.* JERRY A. BARNES, County Treasurer of McLean County, Defendant and Respondent.

Constitutional Law—Legislative Powers—Taxation.

1. The taxing power is a legislative power, and such power passed to the territorial legislature of Dakota by virtue of the general grant of legislative power made by congress in the organic act. The power resided in the legislature without any limitations or restrictions whatsoever upon its exercise, except such limitations as were imposed by the organic act itself and the federal constitution.

2. There is nothing in the provisions of § 6 of the organic act under which the territory of Dakota was organized, or the fourteenth amendment of the federal constitution, which prohibited the legislature of said territory from enacting chapter 99 of the laws of 1883.

CORLISS, C. J., dissenting.

(Opinion Filed Jan. 12, 1892.)

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

James McNaught, John C. Bullitt, Jr., and *Hollembaek & Long*, for appellant. *N. F. Boucher, Louis Hanitch*, and *R. H. Copeland*, for respondent.

Action by the Northern Pacific Railroad Company against Jerry A. Barnes, county treasurer of McLean county, to restrain the sale of certain land for taxes. Judgment dismissing the action on demurrer. Plaintiff appeals. Reversed.

James McNaught and John C. Bullitt, Jr., for appellant:

The sale of the plaintiff's land is unauthorized because the taxes are void by reason of defects in the assessment and levy. Morrill v. Taylor, 6 Neb. 236; Clark v. Crane, 5 Mich. 151; Marsh v. Clark County, 42 Wis. 502; Van Rensslaer v. Witbeck, 7 N. Y. 517; Westfall v. Preston, 49 N. Y. 349; Bradley v. Ward, 58 N. Y. 401; Silsbee v. Stockle, 44 Mich. 461; Dickison v. Reynolds, 48 Mich. 158; Brevoort v. City of Brooklyn, 89 N. Y. 128; McClure v. Warner, 16 Neb. 447; McNish v. Perrine, 14 Neb. 582; Lyman v. Anderson, 9 Neb. 367; Westbrook v.

Miller, 30 N. W. Rep. 916; Shattuck v. Bascom, 12 N. E. Rep. 283; Smith v. Hard, 8 Atl. Rep. 317; Bundy v. Wolcott, 10 Atl. Rep. 756; Warren v. Grand Haven, 30 Mich. 24; Grand Rapids v. Blakely, 40 Mich. 367; Crooks v. Whitford, 47 Mich. 283; Griggs v. St. Croix Co., 20 Fed. Rep. 341; Tunbridge v. Smith, 48 Vt. 648; Walker v. Burlington, 56 Vt. 131; Reed v. Chandler, 32 Vt. 285; Sinclair v. Learned, 51 Mich. 335; People v. Towler, 56 N. Y. 253; Plumer v. Marathon Co., 46 Wis. 179; Scheiber v. Kuehler, 49 Wis. 291; Tierney v. Union Lumber Co., 47 Wis. 248; Marshall v. Benson, 48 Wis. 558; Rowe v. Hulett, 50 Vt. 643; Robson v. Osborn, 13 Tex. 299; Woffard v. McKinna, 23 Tex. 36; Davis v. Farnes, 26 Tex. 296; Matteson v. Rosendale, 37 Wis. 254. The county clerk failed to make out in duplicate the tax lists containing each tract valued and taxed separately and with the several species of taxes and the total of all the taxes carried out in separate columns opposite each tract. Either of these defects is fatal to the tax. State v. Williston, 20 Wis. 240; Crane v. City of Janesville, 20 Wis. 321; French v. Edwards, 13 Wall. 506; Terrill v. Groves, 18 Cal. 149; People v. Sierra Buttes Mining Co., 39 Cal. 511; Cadwalader v. Nash, 14 Pac. Rep. 385; Hamilton v. Fond du Lac, 25 Wis. 490; Shimin v. Inman, 26 Me. 228; Barker v. Blake, 36 Me. 433; Sargent v. Bean, 7 Gray 125; Jennings v. Collins, 99 Mass. 29; Willey v. Scoville, 9 Ohio 43; Farnham v. Jones, 32 Minn. 7; Hanscom v. Hinman, 30 Mich. 419; Rayner v. Lee, 20 Mich. 384; Seymour v. Peters, 35 N. W. Rep. 62; 1 Desty on Taxation, 573. Where the assessment fails to distinguish the amounts of the state, county and town taxes, but blends the whole in one aggregate sum, the blending is fatal to the levy. Thayer v. Stearns, 1 Pick. 482; People v. Moore, 1 Idaho 662; Merrill v. Swartz, 39 Ill. 108; State v. Falkinburge, 15 N. J. Law 326; Case v. Dean, 16 Mich. 12; Railroad Co. v. Hillegas, 18 N. J. Law 11. The Political Code provides that the duplicate tax list shall have attached to it the warrant of the county commissioners, which shall be the treasurer's authority to collect the tax. In the case at bar no such warrant accompanied the list, and hence the treasurer has no legal right to collect the tax on plaintiff's property nor sell the same for such taxes.

Cooley on Taxation, 2d Ed. 424; Hilbish v. Horner, 58 Pa. St. 93; Taft v. Barrett, 58 N. H. 447; Pearson v. Canney, 64 Mo. 188; Donald v. McKinnon, 17 Fla. 746; Blackwell on Tax Titles, 168. The notice of sale was not given as required by the statute and hence any sale made by the treasurer will be defective and void. Cooley on Taxation, 2d Ed. 482; Washington v. Pratt, 8 Wheat. 681; Early v. Doe, 16 How. 610; Moulton v. Blaisdell, 24 Mo. 283; Flint v. Sawyer, 30 Me. 226. The notice of sale was not given for the length of time required by the statute, which is as fatal as if no notice had been given at all. Prindle v. Campbell, 9 Minn. 220; State v. Newark, 36 N. J. Law 288; Early v. Doe, 16 How. 610; Haskell v. Bartlett, 34 Cal. 281; San Francisco v. McCain, 50 Cal. 210; People v. McCain, 51 Cal. 360; Kellogg v. McLaughlin, 8 Ohio 114; Westbrook v. Wiley, 47 N. Y. 457; Hilgers v. Quinney, 51 Wis. 62; Stewart v. Meyer, 54 Md. 454; Renshaw v. Imboden, 31 La. 661; Pennell v. Monroe, 30 Ark. 661; Clark v. Rowan, 53 Ala. 400; Dubuque v. Wooten, 28 Iowa 571; Ormsby v. Louisville, 79 Ky. 197; Sheehy v. Hinds, 27 Minn. 259. The lands were not definitely described or designated in the notices and therefore a sale based thereon would be void. Cooley on Taxation, 2d Ed. 486; Farnum v. Buffum, 4 Cush. 260; Bidwell v. Webb, 10 Minn. 59; Bidwell v. Coleman, 11 Minn. 78; Williams v. Central Land Co., 32 Minn. 440. It is admitted by the demurrer that the amount of the taxes could not be ascertained from an inspection of the notices, and this makes a sale thereunder invalid. Braley v. Seaman, 30 Cal. 610; People v. Savings Union, 31 Cal. 132; Tidd v. Rines, 26 Minn. 211; Wood v. Freeman, 1 Wall. 393; Alexlexander v. Pitts, 7 Cush. 503. Injunction will lie to prevent the threatened sales. The rule is that while the mere illegality of the tax will not warrant the interference of a court of equity, yet where the collection of the tax will create a cloud on the title injunction lies to prevent such collection. Union Pacific Railroad Co. v. Cheyenne, 113 U. S. 516; Hannewinkle v. Georgetown, 15 Wall. 547; Dows v. City of Chicago, 11 Wall. 108; State Railroad Tax Cases, 92 U. S. 575; Minnesota Linseed Oil Co. v. Palmer, 20 Minn. 24; Small v. City of St. Paul, 20 Minn. 459; Mayall v. City of St.

Paul, 30 Minn. 294; Dean v. Madison, 9 Wis. 402; Crooke v. Andrews, 40 N. Y. 547; Cooley on Taxation, 2d Ed. 780.

A tax levied under an unconstitutional law, or under a void law, or under no law at all, or on property exempt by law from taxation, is absolutely void, and its collection may be enjoined and the maxim—"he who asks equity must do equity"—which defendant invokes, can have no application for the reason that the defendant has no "equity" to receive such a tax and consequently the plaintiff is under no obligation to pay or tender any part of it. Louisville Railroad Co. v. Gaines, 3 Fed. Rep. 266; Earl v. Duras, 13 Neb. 234; Union Pacific Railroad Co. v. Cheyenne, 113 U. S. 516; Savings Bank v. City of Adrian, 33 N. W. Rep. 304; Morris Canal Co. v. Jersey City, 12 N. J. Eq. 227; Railroad Co. v. Jersey City, 9 N. J. Eq. 434; Jones v. Davis, 35 Ohio St. 474; Cook County v. Railroad Co., 35 Ill. 460; Railroad Co. v. McLean, 17 Ill. 291; Gates v. Barrett, 79 Ky. 295; Railroad Co. v. Warren Co., 5 Bush 243; Christie v. Malden, 23 W. Va. 667; Wright v. Railroad Co., 64 Ga. 796; Smith v. Long, 20 Fla. 697; Gould v. Mayor of Atlanta, 55 Ga. 678; Railroad Co. v. Wright, 68 Ga. 311; Kimball v. Merchants Saving Co., 89 Ill. 611; Ramsey v. Hoeger, 76 Ill. 432; Railroad Co. v. Cole, 75 Ill. 591; Drake v. Phillips, 40 Ill. 388; Knight v. Flatrock Turnpike Co., 45 Ind. 134; Riley v. Western Union Telegraph Co., 47 Ind. 511; Northern Pacific Railroad Co. v. Traill Co. 115 U. S. 600; Minnesota Linseed Oil Co. v. Palmer, 20 Minn. 468; Mayall v. City of St. Paul, 30 Minn. 294; Dean v. Charleton, 23 Wis. 590; Railroad Co. v. Taylor Co., 52 Wis. 37. A tax levied by persons not created by law the proper officers for that purpose, is absolutely void, even though the tax itself may be authorized by law, and its collection may be enjoined, the maxim having no application, for the reason that only those officers can levy taxes to whom the statutes entrusts that duty, and hence a tax not levied by such officers is no tax at all and the plaintiff is under no obligation to pay it. Town of Ottawa v. Walker, 21 Ill. 605; Collins v. Davis, 10 N. W. Rep. 643; Lemont v. Singer Stone Co., 98 Ill. 94; Palmer v. Rich, 12 Mich. 415; Kinyon v. Duchene, 21 Mich. 498; Winston v. Railroad Co., 1 Baxt. 60; Greenwell v. Commonwealth, 78 Ky. 320. A tax which is partly legal and partly

illegal is governed by the maxim as to the legal part, and its collection cannot be enjoined *in toto*, but only as to the illegal part; and then only upon payment of the part conceded and admitted to be legal, the reason being that the defendant has an "equity" to receive the part conceded by the plaintiff to be legal and the latter must "do equity" by paying it. Conway v. Waverly, 15 Mich. 257; Palmer v. Napoleon, 16 Mich. 176; Bank v. Cook, 77 Ill. 622; Binkert v. Jansen, 94 Ill. 283; Miles v. Ray, 100 Ind. 166; O'Kane v. Treat, 25 Ill. 557; Taylor v. Thompson, 42 Ill. 9; Briscoe v. Allison, 43 Ill. 291; Reed v. Tyler, 56 Ill. 288; Barnett v. Cline, 60 Ill. 205; Johnson v. Roberts, 102 Ill. 655; Harrison v. Haas, 25 Ind. 281; Roseberry v. Huff, 27 Ind. 12; Commissioners v. Elston, 32 Ind. 27; Adams v. Castle, 30 Conn. 404; Morrison v. Hershire, 32 Iowa 271; Corbine v. Woodbine, 23 Iowa 297; Casady v. Lowry, 49 Iowa 523; Wilson v. Logendyke, 32 Kan. 267; Twombly v. Kimbrough, 24 Ark. 459; Worthen v. Badgett, 32 Ark. 496; Manufacturing Co. v. Spigener, 49 Ala. 262; City of Montgomery v. Sayre, 65 Ala. 564; Insurance Co. v. Lott, 54 Ala. 499; Cheney v. Jones, 14 Fla. 587; Commissioners v. Union Mining Co., 61 Mo. 545; Overall v. Ruenzi, 67 Mo. 203; Wright v. Railroad Co., 64 Ga. 783; Connors v. City of Detroit, 41 Mich. 128; Hare v. Carnall, 39 Ark. 196; Ottawa Glass Co. v. McCaleb, 81 Ill. 557; Hersey v. Board of Supervisors, 16 Wis. 185; Bond v. Kenosha, 17 Wis. 284; Mills v. Charleton, 29 Wis. 400; Dean v. Borchsenius, 30 Wis. 236; City of Lawrence v. Killam, 11 Kan. 499; Challis v. Hekelnkaemper, 14 Kan. 474; Pritchard v. Madren, 24 Kan. 486; Cartwright v. McFadden, 24 Kan. 662; Miller v. Ziegler, 31 Kan. 42. A tax is not void when the only defect in it consists of mere informalties or irregularities in its levy or assessment, not going to its substance, and the maxim applies so as to prevent equitable relief until the plaintiff pays or tenders the tax, the reason being that such a tax, although subject to formal and technical objections, is nevertheless in substance just and equitable and should in equity be paid. Moore v. Wayman, 107 Ill. 192; Cauldwell v. Curry, 93 Ind. 363; Mills v. Johnson, 17 Wis. 598; Hagaman v. Commissioners, 19 Kan. 394; Challis v. Atchinson Co., 15 Kan. 49; Knox v. Dunn, 22 Kan. 475; Boek

v. Merriam, 10 Neb. 199; Hunt v. Esterday, 10 Neb. 165; Wood v. Helmer, 10 Neb. 65; Fifield v. Marinette County, 62 Wis. 532; Railroad Co. v. Lincoln Co., 67 Wis. 478; Smith v. Commissioners, 9 Kan. 296. Injunction or other appropriate relief lies in favor of a plaintiff in all cases where such defects have occurred in the levy or assessment of the tax as go to its substance, and are not mere informalities or irregularities; or the plaintiff does not concede that the tax or any part thereof is equitably due the defendant, and it does not clearly appear that it is due, the reason being, in the first instance, that the tax is void, and hence defendant has no "equity" to receive it, and in the second that plaintiff is under no obligation to pay a tax not clearly due. Huntington v. Central Pacific Railroad Co., 3 Sawy. 503; Tilton v. Oregon Railroad Co., 3 Sawy. 22; Jenkins v. Supervisors, 15 Wis. 12; Mitchell v. City of Milwaukee, 18 Wis. 99; Crane v. City of Janesville, 20 Wis. 305; Hamilton v. Fond du Lac, 25 Wis. 490; Hassen v. City of Rochester, 67 N. Y. 529; Folkerty v. Powers, 3 N. W. Rep. 857; Dean v. Madison, 9 Wis. 402; Scott v. Onderdonk, 14 N. Y. 9; Hatch v. Buffalo, 38 N. Y. 276; Allen v. City of Buffalo, 39 N. Y. 386; Sewall v. City of St. Paul, 20 Minn. 511; Marion County v. Barker, 25 Kan. 258; Cartwright v. McFadden, 24 Kan. 662; Myrick v. La Crosse, 17 Wis. 442.

The "Gross Earnings Law" exempted from taxation all property lawfully owned and held by the plaintiff, whether used in the operation of its line of railroad or not. But if the statute had gone no further than to declare that the capital stock of the plaintiff should be exempt, all its property would have been exempt. Scotland County v. Railroad Co., 65 Mo. 123; Railroad Co. v. Shacklett, 30 Mo. 550; Baltimore v. Railroad Co., 6 Gill. 288; Railroad Co. v. Mayor, 14 Ga. 275; New Haven v. City Bank, 31 Conn. 106; Commissioners v. Railroad, 47 Md. 592; Bibb Co. v. Central Road Co., 40 Ga. 646; Bank Tax Case, 2 Wall. 200. In the absence of constitutional inhibition the power to make a law like the one in question, commuting taxes on the payment of a certain sum, is undoubted. Daughdrill v. Insurance Co., 31 Ala. 91; State v. Railroad Co., 45 Md. 351; Worth v. Railroad Co., 89 N. C. 291; Piqua Bank v. Knoop, 16

How. 369; Dodge v. Woolsey, 18 How. 331; Jefferson Bank v. Skelly, 1 Black 436; Wright v. Sill, 2 Black 544; Delaware Tax Case, 18 Wall. 206; Gardner v. State, 21 N. J. Law 557; United, etc., Co. v. Commissioner, 37 N. J. Law 240; State Lottery v. New Orleans, 24 La. Ann. 86; Leroy v. Railroad Co., 18 Mich. 233; State Bank v. People, 5 Ill. 303; St. Louis v. Savings Bank, 49 Mo. 574; Bank v. Commonwealth, 6 Bush. 127; Mobile v. Insurance Co., 53 Ala. 570. If there is any doubt as to the meaning of a statute that doubt must be resolved in favor of the validity of the law. The presumption that the legislature intended to act within the constitutional limits operates to resolve a doubt so as to sustain a statute. Endlich on Interpretation of Statutes, 233; French v. Teschemaker, 24 Cal. 554; Palms v. Shawano, 61 Wis. 217; Colwell v. May's Landing Co., 19 N. J. Eq. 249; Attorney General v. City of Eau Claire, 37 Wis. 438; Duncombe v. Prindle, 12 Iowa 8; Iowa Homestead Co. v. Webster County, 21 Iowa 227; Cranda County v. Brogden, 112 U. S. 261; Sykes v. Mayor, 55 Miss. 115.

J. M. Bartholomew, for respondent LaMoure County:

Appellant's position is that it has never acquired any taxable title to these lands, but that it has acquired some indefinite and undetermined equity therein which enables it to ask the protection of a court of chancery. Respondent's position is that appellant has a taxable title to said lands or it has no interest whatever in said lands that gives it a standing in court. Respondent claims that appellant has done every act that it is required by its grant to do to entitle it to a patent for these lands, and if that be true then the lands are clearly taxable. Railroad Co. v. Prescott, 16 Wall. 608; Ross v. Outagamie Co., 12 Wis. 29; Railroad Co. v. Trempeleau Co., 35 Wis. 258; Railroad Co. v. Taylor Co., 52 Wis. 37; Iowa Homestead Co. v. Webster County, 21 Iowa 221; Railroad Co. v. Holdsworth, 47 Iowa 20. But the chief contention in this case arises upon appellant's claim of immunity from taxation by reason of the "Gross Earnings Law." But it cannot be claimed that this statutory provision is more effective and far reaching than a charter provision exempting all property from taxation, and it

is the doctrine that the exemption in a charter only extends to the property necessary for the business of a corporation.

Property beyond the legitimate wants of a corporation for its corporate purposes is not within an exemption of all property from taxation. Desty on Taxation, Vol. 1, p. 146; Bank v. Tennessee, 104 U. S. 497; Railroad Co. v. Berks County, 6 Pa. St. 70; Railroad Co. v. Burlington, 28 Vt. 193; Railroad Co. v. Newark, 25 N. J. Law 317; Railroad Co. v. Commissioners, 23 N. J. Law 510; State v. Love, 37 N. J. Law 60; Navigation Co. v. Berks County, 11 Pa. St. 202; Wayne County v. Canal Co., 15 Pa. St. 351. The statute in question violates the rule of uniformity, which is a part of the organic act. Norris v. Waco City, 57 Tex. 635; Ottawa County v. Nelson, 19 Kan. 234; New Orleans v. Kaufman, 29 La. Ann. 238; People v. Floating Dock Co., 63 How. Pr. 454; Gordon v. Cornes, 47 N. Y. 608; Stuart v. Palmer, 74 N. Y. 183. No property is beyond the reach of the taxing power of the state, unless designedly put beyond it by an unequivocal act of the sovereign power. Robertson v. Land Commisioners, 44 Mich. 274. When a corporation claims exemption from taxation it must show that the power to tax has been clearly relinquished. Railroad Co. v. Reed, 13 Wall. 266.

Heber McHugh and E. W. Camp, for respondent Foster County.

The "Gross Earnings Law" is invalid. If the parts of a statute are so mutually connected with and dependent upon each other, as conditions, considerations or compensations for each other, as to warrant the belief that the legislature intended them as a whole, and that if all could not be carried into effect, the legislature would not have passed the residue independently, then if some parts are unconstitutional, all the provisions which are thus dependent, conditional or connected, must fall with them. Cooley, Const. Lim., pp. 216, 217; Warren v. Mayor, 2 Gray 99; Allen v. City of Louisiana, 103 U. S. 80; Slauson v. Racine, 13 Wis. 398; State v. Commisioners, 5 Ohio St. 497; O'Brien v. Kreuz, 30 N. W. Rep. 458; State v. Harris, 8 Pac. Rep. 462; State v. Pugh, 1 N. E. Rep. 439; Meyer v. Berlandi, 40 N. Rep. 513; Virginia Coupon Cases, 114 U. S. 270. A statute which

is in part invalid must be held to be wholly invalid unless the parts —that which is constitutional and that which is unconstitutional —are capable of separation, so that each may be read by itself. Baldwin v. Franks, 120 U. S. 678; United States v. Reese, 92 U. S. 214; Keokuk v. Keokuk, 95 U. S. 80; Trade Mark Cases, 100 U. S. 82; United States v. Harris, 106 U. S. 629. The "Gross Earnings Law" (if valid at all), does not, properly construed, exempt from taxation the lands in question. Bailey v. Magwire, 22 Wall. 215; Desty on Taxation, p. 108; Cooley on Taxation, pp. 54, 152; People v. Railroad Co., 119 Ill. 83; Appellant v. Irwin, 72 Ill. 452; Cook v. State, 33 N. J. Law 474. See also, State v. Railroad Co., 32 Minn. 294; County of Ramsey v. Railroad Co., 33 Minn. 537; State v. Railroad Co., 38 N. W. Rep. 635;. Railroad Co. v. City of St. Paul, 38 N. W. Rep. 925; Railroad Co. v. Neary, 8 Atl. Rep. 363. The law is not an exemption law, but a scheme for commuting taxes, and the so-called exemption is only co-extensive with the property which produces the earnings. Railroad Co. v. Supervisors, 29 Wis. 116; Gardner v. State, 21 N. J. Law 557; County of Todd v. Railroad Co., 36 N. W. Rep. 109; Tucker v. Ferguson, 22 Wall. 575. Railroad property constitutes a class, and the state may exempt, or commute the taxes on such property, but the marks of distinction on which classification is founded must be such in the nature of things, as will in some reasonable degree account for or justify the restriction of the legislature. State v. Hammer, 42 N. J. Law 435; Nichols v. Walter, 33 N. W. Rep. 800; Lavallee v. Railroad Co., 41 N. W. Rep. 974; New Orleans v. Fourchy, 30 La. Ann. 910. Classification of property for taxation must be based upon the nature and use of the property itself. State v. Taylor, 11 Atl. Rep. 321; Town v. Banks, 2 S. W. Rep. 852; Davies v. Gaines, 3 S. W. Rep. 184; State v. Duryea, 6 Atl. Rep. 524; State Board v. State, 4 Atl. Rep. 578; Graham v. Chatauqua Co., 2 Pac. Rep. 549; Lassen Co. v. Cone, 14 Pac. Rep. 100. To construe the law as exempting these lands from taxation would bring the law into conflict with the 14th amendment to the federal constitution. Santa Clara Co. v. Railroad Co., 18 Fed. Rep. 396; Railroad Co. v. Cailand, 3 Pac. Rep. 134; San Mateo Case, 13 Fed. Rep. 722.

The counties are not estopped from asserting the taxability of the lands by reason of having received and retained part of the moneys paid by plaintiff to the territorial treasurer under the gross earnings law: First, because the act of the plaintiff in paying such moneys was not induced or influenced by any act of the counties. Bigelow on Estoppel, p. 620; Parliman v. Young, 4 N. W. Rep. 139; Maxwell v. Bridge Co., 46 Mich. 278; Ketchum v. Duncan, 96 U. S. 659; Petring v. Dry Goods Co., 3 S. W. Rep. 405; Warden v. Baker, 11 N. W. Rep. 342; Brant v. Virginia Co., 3 Otto 326. Second, because the principle of estoppel can be invoked only in aid of justice. DeMill v. Moffat, 49 Mich. 25; Gull River Lumber Co. v. Keefe, 41 N. W. Rep. 743; Company v. Trustees, 35 N. J. Eq. 181. Third, because in the payment and receipt of the moneys there was no privity between the plaintiff and the counties. Hoople v. Hipple, 33 Ohio St. 116; Mayenborg v. Haynes, 50 N. Y. 675; Deery's Lessee v. Cray, 5 Wall. 795. Fourth, because a public corporation can never be estopped from alleging the invalidity of a law or its own absolute want of power. Snyder v. Studebaker, 19 Ind. 462; Mattox v. Hightshue, 39 Ind. 95; Counterman v. Dublin, 38 Ohio St. 515; South Ottawa v. Perkins, 4 Otto 260; Parkersburg v. Brown, 106 U. S. 608; Bank v. Porter, 110 U. S. 608; Dixon Co. v. Field, 111 U. S. 83; McPherson v. Foster, 43 Iowa, 48; Hopple v. Brown Township, 13 Ohio St. 311.

The errors and irregularities in the tax proceedings furnish no ground for injunction. South Platte Land Co. v. Crete, 7 N. W. Rep. 859; Burt v. Wadsworth, 39 Mich. 126; Otoe v. Mathews, 25 N. W. Rep. 618; Otoe v. Brown, 20 N. W. Rep. 274, 641. For a discussion of the principles on which equity proceeds in cases like the present, see Chicago v. Frary, 22 Ill. 34; Albany v. Auditor, 37 Mich. 391; Wood v. Helmer, 10 Neb. 65; Warden v. Commissioners, 14 Wis. 618; Frost v. Flick, 1 Dak. 131. The fact that the various species of taxes were not carried out in separate columns would be no ground for injunction. Railroad Co. v. Commissioners, 11 N. W. Rep. 332; Wall v. Trumbull, 16 Mich. 228; Torrye v. Milbury, 21 Pick. 64; George v. Dean, 47 Tex. 73; Downing v. Roberts, 21 Vt. 441;

Henry v. Chester, 15 Vt. 460. Even the assessment of several lots at a gross sum, where no fraud is alleged or injury shown, is no reason for setting aside the assessment. State v. Taylor, 35 N. J. Law 184; Dundy v. Commissioners, 1 N. W. Rep. 565. Nor is assessment to the wrong person. Conway v. Younkin, 28 Iowa 295. Nor assessment after the time limited by law. Woodman v. Ely, 2 Fed. Rep. 839. The power of the treasurer to sell is derived from the statute itself and it matters not whether the tax warrant was issued by the commissioners or not. Railroad Co. v. Carroll County, 41 Iowa 153; Parker v. Sexton, 29 Iowa 421; Johnson v. Chase, 30 Iowa 308; Snell v. City of Fort Dodge, 45 Iowa 564; Company v. Dean, 41 N. W. Rep. 504. The plaintiff must tender the amount of the tax in order to have the sale enjoined. Stetson v. Freeman, 14 Pac. Rep. 256; Belz v. Bird, 1 Pac. Rep. 246; Bank v. Lewis, 2 So. Rep. 243 ; Wartensleben v. Haithcock, 1 So. Rep. 38; Alexander v. Merrick, 13 N. E. Rep. 190; Dillon v. Merriam, 34 N. W. Rep. 344; Hershy v. Thompson, 8 S. W. Rep. 689; Gage v. Caraher, 17 N. E. Rep. 777; Morrison v. Jacoby, 14 N. E. Rep. 546; State v. Casteel, 11 N. E. Rep. 219; Rowe v. Peabody, 1 N. E. Rep. 353; Knox v. Dunn, 22 Kan. 683.

The opinion of the court was delivered by

WINCHESTER, J. This action was brought by the appellant in September, 1888, to restrain the respondent, as county treasurer of McLean county, from selling certain lands in said county, and described in the amended complaint, for taxes levied and assessed thereon in the year 1887, amounting to $4,803. The respondent demurs to the appellant's bill, upon the ground that said bill did not state facts sufficient to constitute a cause of action. The demurrer was sustained by the lower court and the action was dismissed. Judgment was duly entered by respondent against appellant, and from this judgment the present appeal was taken by the appellant.

The sole question we have to consider is whether the complaint states facts sufficient to constitute a cause of action. The complaint avers that the appellant is a corporation organized under the act of congress approved July 2, 1864, entitled "An

act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget's sound on the Pacific coast, by the northern route," and under certain subsequent acts and joint resolutions of congress relating to the same subject matter; that, in pursuance of said act of July 2, 1864, and the subsequent acts and joint resolutions of congress, appellant has constructed a line of railroad and telegraph in all respects as required by said acts and joint resolutions, and is now engaged in operating the same; that said railroad and telegraph line has been duly accepted by the United States, as provided for in said acts and joint resolutions, and is in all respects of the material and character specified and required therein; that the line of said road was definitely fixed, and a plat thereof filed in the office of commissioner of the general land office at Washington, D. C., on May 26, 1873; that at all times prior to this date the lands described in the complaint were free from pre-emption or other claims or rights, and had not been sold, granted, reserved, or otherwise appropriated by the United States, and were a part of the public domain of the United States; that said lands were and are situated within either the "place" or "indemnity" limits of the appellant's grant; and that, by reason of the facts above stated, appellant has acquired all the interest in said lands conferred and intended to be conferred by the acts of congress aforesaid. The complaint further alleges that in 1887 the taxing officers of McLean county levied certain taxes on said lands for that year for territorial, county, and other purposes, amounting in the aggregate to the sum of $4,803; that said taxes were and are illegal and void by virtue of the act of March 9, 1883, which provides that, in lieu of all other taxation upon the property of railroad companies, there should thereafter be paid a certain percentage of the gross earnings of such railroad companies; that said act of March 9, 1883, has in all respects been complied with by appellant; and that, notwithstanding these facts, the respondent threatens to sell the said lands to satisfy said taxes, and will do so unless enjoined by the court. The complaint prays for a permanent injunction enjoining such threatened sale.

A court of equity will not interfere, except upon the strongest and most cogent reasons, with the collection of the public revenue. The taxing power of the government has very wisely been delegated to the legislative department, and must necessarily be exercised by that body without interference by any other governmental department. It is true that the legislative, executive, and judicial departments of government are co-ordinate and equal, but it is also true that none of these departments will interfere with any of the other departments unless the person asking for such interference can show that the governmental department whose action is questioned has clearly exceeded its powers, and usurped an authority or power not properly belonging to it. In the case at bar this court is asked to interfere with the usual and ordinary method of procedure of collecting the revenues of the territory of Dakota by enjoining the respondent from selling appellant's lands to satisfy taxes assessed thereon by the proper governmental officers, and which said taxes have, it is conceded, not been paid. This method of procedure has been prescribed by the legislature of Dakota territory in pursuance of a power vested in it by the organic act creating the territory. By that act the legislature of the territory was given by congress full and complete power and authority over all rightful subjects of legislation, subject only to the limitation that the exercise of such power should not conflict either with the federal constitution or the laws of congress passed in pursuance thereof, or the provisions of the organic act itself. 12 U. S. St. at Large, p. 241; Rev. St. U. S. § 1925. By virtue of this grant of power to the territory the taxing power became vested in the territorial legislature, and could be exercised by that body in any manner that it saw fit, subject only to the limitations and restrictions above indicated. The power to tax is a legislative power, which acknowledges no other limitations than those prescribed in the paramount law of the land, and this vast power undoubtedly passed to and was vested in the legislature of Dakota territory by virtue of the provisions of the organic act, under which that territory was formed, and which extended the power and authority of that body to "all rightful subjects of legislation." McCulloch v.

Maryland, 4 Wheat. 415; Bank v. Billings, 4 Pet. 514; State v. Lancaster Co., 4 Neb. 540; Cooley, Tax'n (2d Ed.) c. 2, passim. And, as the actions which are complained of in this case, and against which relief is sought, resulted directly from and flow out of the exercise by the territorial legislature of a power that was unquestionably reposed in it by the organic act, the judicial department of the government cannot and will not interfere unless it clearly appears that either the legislative department has exceeded its power, or that the regularly constituted officers of the territorial government have usurped powers or functions not properly belonging to them, and in carrying out such usurpation will inflict irreparable injury and damage to the appellant.

It appears from the complaint that appellant's lands have been assessed for taxation for the year 1887, and that, as the appellant has refused to pay the taxes so assessed, the respondent threatens to and will sell said lands to satisfy said taxes, unless enjoined by this court. It is admitted that, if the gross earnings law of 1883, hereinafter referred to (Sess. Laws 1883, c. 99), is a valid and constitutional law, and exempts the property in question from taxation, the threatened action of respondent is unlawful. But this conceded fact would not, of itself, entitle appellant to invoke the aid of a court of equity. It is necessary that some additional facts be shown, so as to bring the case under some acknowledged head of equity jurisprudence. Cooley, Tax'n, 760. The case at bar shows such additional facts by reason of the provisions of § 67 of chapter 28 of the Political Code of Dakota territory, which enacts, in substance, that the purchaser of any tract of land sold for taxes shall be entitled to a certificate of sale, describing the land so sold, the sum paid, and the time when the purchaser will be entitled to a deed, and which shall be assignable, "and shall be presumptive evidence of the regularity of all prior proceedings." It is unquestionably true that the issuance of this certificate creates a cloud upon the title to the land described therein, as said certificate is *prima facie* evidence, by the express terms of the statute, of the regularity of all prior proceedings, including the taxability of the lands. It follows that the case at bar presents

sufficient ground to warrant the interference of a court of equity by the extraordinary writ of injunction, if it can be shown that the lands in question were not subject to taxation. The doctrine is well settled that a court of equity will grant proper relief in tax proceedings, in order to prevent the casting of a cloud upon the title of the complainant's land. Cooley, Tax'n, 779; Railroad Co. v. Cheyenne, 113 U. S. 516, 5 Sup. Ct. Rep. 601; Hannewinkle v. Georgetown, 15 Wall. 547; Dows v. Chicago, 11 Wall. 108; State Railroad Tax Cases, 92 U. S. 575; Oil Co. v. Palmer, 20 Minn. 468 (Gil. 424;) Dean v. Madison, 9 Wis. 402; Crooke v. Andrews, 40 N. Y. 547. In the case at bar the court will grant appropriate relief, by injunction or otherwise, if it appear that the lands in question have been unlawfully taxed.

The appellant has urged with great earnestness that the various defects in the levy and assessment of the taxes upon its lands, specified in the complaint, rendered such taxes void *in toto*, and warranted a court of equity in interfering by injunction to stop the sale of said lands to satisfy such void taxes. In the view we take of the case, it is not necessary to consider this point.

The main argument of appellant is that the lands in question were exempt from taxation by virtue of the "gross earnings law" (so called) of 1883. The respondent contends—*First*, that this statute does not exempt the lands in question from taxation; and, *secondly*, that it is unconstitutional. The first point made by respondent must be disposed of before passing to the questions of constitutional law raised; and in order to properly dispose of this point, it will be necessary to briefly review the legislation of Dakota territory in respect of the taxation of railroad companies. Prior to 1879, the property of railroad companies in the then territory of Dakota was taxed in the same manner as other taxable property. In that year the first gross earnings law was passed. Sess. Laws, 1879, c. 46, p. 122. This law specifically provided that the percentage of gross earnings to be paid by railroad companies in pursuance of its provisions should "be in lieu of all other taxation * * * of the roadbed, right of way, station or depot grounds, tracks, rolling stock,

water stations, water tanks, turn tables, engine house, machine shops, depots, and necessary buildings, tools, machinery, materials for repairs, gravel beds, furniture, telegraph instruments and lines, and fuel of such railroad corporation, used in or incident to the operation of such railroad. All property of railroads not above enumerated, subject to taxation shall be treated in all respects, in regard to assessment, equalization, and taxation, the same as similar property belonging to individuals, whether said lands are received from the general government or from other sources." This provision expressly limits the exemption to property actually used in the operation of railroads. But the act of 1883 (Sess. Laws, 1883, c. 99, p. 211), goes further. The first section of this act is as follows: "In lieu of any and all other taxes upon any railroad, except railroad operated by horse-power, within this territory, or upon the equipments, appurtenances, or appendages thereof, or upon any other property situated in this territory, belonging to the corporation owning or operating such railroads, or upon the capital stock or business transaction of such railroad company, there shall hereafter be paid into the treasury of this territory a percentage of all the gross earnings of the corporation owning or operating such railroad, arising from the operation of such railroad as shall be situated within this territory, as hereinafter stated; that is to say: Every such railroad corporation or persons operating a railroad in this territory shall pay to said treasurer each year for the first five years after said railroad shall be or shall have been operated in whole or in part, two (2) per centum of such gross earnings; and for and in each and every year after the expiration of the said five years, three (3) per centum of the gross earnings; and the payment of such per centum annually as aforesaid, shall be and is in full of all taxation and assessments whatever upon the property aforesaid. The said property shall be made one-half ($\frac{1}{2}$) on or before the fifteenth day of February, and one-half ($\frac{1}{2}$) on or before the fifteenth day of August in each year; and for the purpose of ascertaining the gross earnings aforesaid an accurate account of such earnings shall be kept by such company. An abstract thereof shall be furnished by said company to the treasurer of this territory on or before the first (1) day of Feb-

ruary in each year, the truth of which abstracts shall be verified by the affidavits of the secretary and treasurer of said company; and for the purpose of ascertaining the truth of such affidavits and the correctness of such abstracts, full power is hereby vested in the governor of this territory, or any other person appointed by law, to examine under oath the officers and employes of said company or other persons; and, if any person so examined by the governor or other person shall knowingly or willfully swear falsely concerning the matters aforesaid, every such person is declared to have committed perjury. And for the purpose of securing to the territory the payment of the aforesaid per centum it is hereby declared that the territory shall have a lien upon the railroads of said company, and upon all property, estate, and effects of said company whatsoever, personal, real, or mixed, and the lien hereby secured to the territory shall have and take procedure of all demands, decrees, and judgements against said company." Sections 2, 3 and 4 provide the machinery whereby the tax upon the gross earnings of railroad companies shall be collected in case such railroad companies fail to pay the same. Section 5 reads as follows: "The lands of any railroad company shall become subject to taxation in the same manner as other similar property, as soon as the same are sold, leased, or contracted to be sold or leased; and on or before the first day of April of each year each railroad company having lands within this territory shall return to the county clerk of each county full and complete lists, verified by the affidavit of some officer of the company having knowledge of the facts, and of all lands of such company situated in said county sold or contracted to be sold or leased during the year ending the last day of December preceding; and the list furnished on or before the first day of April, A. D. 1883, and in compliance with the terms of this section, shall include a complete list of all lands sold or leased or contracted to be sold or leased prior to the last day of December, A. D. 1882." Sections 6, 7 and 8 are not material in this case.

There is a radical difference between the acts of 1879 and 1883 in respect of the property exempted from taxation. The act of 1879, by its express terms, limited the exemption only to

such property as was actually used in the operation of the railroad. The act of 1883 not only changes the description of the property exempted, but also, by § 5, above quoted, seems to express a clear intention upon the part of the legislature passing said act to exempt from taxation the land grant of appellant and any other railroad company that might have lands of similar character within the then territory of Dakota. If the legislature did not intend to create a greater exemption by the law of 1883 than had previously existed under the law of 1879, then it is difficult to perceive the reason for the change of the phraseology of the latter statute from that of the former, and, indeed, to understand why the latter statute was even enacted into a law. The language of the statute of 1883 is much broader in its scope than that of the law of 1879. It excepts from taxation the "capital stock" of railroad companies. The use of this descriptive term shows an intent upon the part of the legislature to exempt all property actually used in railroad operation. All the property of a railroad company devoted to such use is necessarily represented by its "capital stock;" and it has repeatedly been held that where a statute exempts such "capital stock" from taxation this exemption includes all the real estate, rolling stock, and other property actually and necessarily used in the operation of such railroad. Scotland Co. v. Missouri, etc., R. Co., 65 Mo. 123; Railroad Co. v. Shacklett, 30 Mo. 550; Baltimore v. Railroad Co., 6 Gill, 288; Railroad Co. v. Mayor, 14 Ga. 275; New Haven v. City Bank, 31 Conn. 106; Commissioners v. Railroad Co., 47 Md. 592; Bibb Co. v. Banking Co., 40 Ga. 646; Bank Tax Case, 2 Wall. 200. The statute under consideration, however, goes further. It exempts the "business transactions" of railroads, and also their "equipment," "appurtenances," and "appendages," and adds that any other property shall be exempt. It is unnecessary for us to determine whether this broad and comprehensive description of the property that was to be exempt under the law of 1883 includes the land grant of appellant. It is sufficient to say that, whatever doubt may exist upon the point, that doubt is clearly resolved when we consider § 5 of the law, unless, indeed, we eliminate this section altogether from the statute. This, of

course, cannot be done. The principle is elementary that in construing a statute every word must, if possible, be given some force and effect. It is also elementary that a later statute may be construed by reference to a prior statute relating to the same subject matter. Section 5 of the act of 1883 provides in terms that "the lands of any railroad company shall become subject to taxation in the same manner as other similar property, as soon as the same are sold, leased, or contracted to be sold or leased." The lands involved in this case have not been sold or leased or contracted to be sold or leased by appellant. Section 5, therefore, is tantamount to an express declaration that prior to such selling or leasing, or such contracting to sell or lease, such lands shall not be taxable. As stated in the case of Railroad Co. v. Shacklett, 30 Mo. 559, 560, "when the legislature declared that at a certain period property shall be taxed, it is, in effect, a declaration that prior to the designated time it shall not be taxed." When, therefore, the language used in the law of 1883 in describing the property exempted, together with § 5 of the act, is considered in conjunction with the prior statute of 1879, the conclusion is irresistable that the legislature, in enacting the law of 1883, intended thereby to exempt not only property actually used in the operation of railroads, but also all other property lawfully owned by such companies. It cannot be questioned that in passing the law of 1883 the legislature intended to exempt appellant's land grant from taxation in consideration of the payment by it of the percentage of its gross earnings specified in said law.

The gross earnings law is also attacked by respondent upon constitutional grounds. It is argued that the act contravenes § 6 of the organic act of the territory, which is as follows: "And be it further enacted, that the legislative power of the territory shall extend to all rightful subjects of legislation consistent with the constitution of the United States and the provisions of this act; but no law shall be passed interfering with the primary disposal of the soil. No tax shall be imposed upon the property of the United States; nor shall the lands or other property of non-residents be taxed higher than the lands or other property of residents; nor shall any law be passed im-

pairing the rights of private property; nor shall any discrimination be made in taxing different kinds of property; but all property subject to taxation shall be in proportion to the value of the property taxed." 12 U. S. St. at Large, p. 241; Rev. St. U. S. § 1925. It is also urged that the law is unconstitutional because it violates the fourteenth amendment to the constitution of the United States. As we understand respondent's contention, all the grounds of objection to the statute, in substance, amount to this: That a railroad company, in respect of its land grant, is in precisely the same condition as any other owner of real estate, and therefore the territorial legislature had no power to classify railroad companies by themselves, and provide for a method of taxing their land grants different from that provided for taxing the other lands in the territory. It is claimed that the placing of railroads in a class by themselves for purposes of taxation is, so far as railroad land grants are concerned, an arbitrary and unwarrantable classification, not justified either by any peculiar condition of circumstances of the land itself or the owners thereof. The taxing power is a legislative power, and passed to the territorial legislature by virtue of the general grant of legislative power made by congress in the organic act. The power resided in the legislature without any limitations or restrictions whatsoever upon its exercise, except such limitations as were imposed by the organic act itself and the federal constitution. As was said by Chief Justice MARSHALL in the famous case of McCulloch v. Maryland, 4 Wheat. 415, the power to tax is "an absolute power, which acknowledges no other limits than those expressly prescribed in the constitution." He adds that "it may be legitimately exercised on the objects to which it is applicable, to the utmost extent to which the government may choose to carry it." See, also, State v. Lancaster, 4 Neb. 540; Bank v. Billings, 4 Pet. 514; Cooley, Tax'n, c. 2. The only limitations, then, upon the exercise of the taxing power by the territorial legislature are such as were prescribed either by the organic act or the federal constitution.

We do not think that § 6, which is the only provision of the organic act relied on by respondent, has any bearing on the

case. The language is that "there shall be no discrimination in taxing different kinds of property, but all property subject to taxation shall be taxed in proportion to its value." This provision undoubtedly imposed a limitation upon the taxing power of the territorial legislature, but not of the kind contended for. In the apportionment of every tax it is requisite not only that the subjects to be taxed shall be selected, but also that the rule by which they shall contribute shall be determined. The territorial legislature had the power to determine both of these questions, except in so far as § 6 limited that power. It certainly cannot be doubted that the section did not limit the legislative power in respect of selecting the subjects of taxation. If it did, then it would have prevented the legislature from making any exceptions from taxation whatsoever, and have made it incumbent upon that body to tax all property in the territory which from its nature or character was susceptible of taxation. But it has never seriously been doubted that the legislature had the power to make such exemptions from taxation as it saw fit. The power has certainly been exercised, without question or objection, ever since the organization of the territory. Every revenue law has contained provisions exempting certain kinds and species of property, and it would be with great reluctance, and only upon the most cogent reasons that this court would, at this late day, cast doubts upon the validity of the exercise of a power that has so long been supposed to exist, and that has been exercised for more than 30 years without question or objection.

However, the question whether the territorial legislature had power to exempt any property from taxation is not, in our opinion, before the court, and it is not necessary to pass on that point. If it were necessary to do so, we would unhesitatingly say that the power to exempt existed in the territorial legislature; following upon this point, the case of Ferris v. Vannier, 6 Dak. 186, 42 N. W. Rep. 31, where the supreme court of Dakota territory held that the legislature had full power to make exemptions from taxation. In what way then does § 6 limit the legislative power in respect to taxation? We are of opinion that it only prevents unjust discrimination in taxing property

subject to taxation. But what property is "subject to taxation?" Obviously such property as the legislature has declared to be subject to taxation. Property not so declared to be subject to taxation is necessarily exempt from taxation, and the section cannot possibly have any relation to or bearing upon any such property. When the legislature delared and prescribed the subjects that should be taxed, § 6 became operative upon these selected subjects, and prohibited any unjust discrimination in taxing these subjects. It prohibited the taxing of one class or kind of these selected subjects upon one basis, and the taxing of another kind or class upon another basis, but made it imperative that all classes and kinds "should be taxed in proportion to their value." In the absence of the provision, the legislature would have had the power to prescribe one rule by which one class of selected subjects should contribute, and another and different rule by which another class should contribute, and would thus have had the power to make unjust discrimination in taxing different kinds of property. Section 6 was designed to prevent this by making one uniform, *ad valorem* rule, operating upon all property subject to taxation. It did not limit the power of the legislature to select the subjects, but it did operate upon those subjects as soon as they were selected. Prior to the selection the provision was dead; as soon as the selection was made it sprang at once into life, and attached itself to these selected subjects. This is the construction placed on the provision by the supreme court of Dakota territory in the case of Ferris v. Vannier, 6 Dak. 186, 42 N. W. Rep. 31, where TRIPP, C. J., said: "Congress has prohibited discrimination, which must be construed to mean unjust discrimination—a discrimination in favor of one kind of property as against another; a discrimination which prevents each kind of property subject to taxation from bearing its fair and equal share of the burden imposed on all. In this sense the words are aptly chosen; in any other they are meaningless and lead to absurd results. Under this construction we are free from many perplexities in which courts have found themselves in determining whether laws which were not discriminating were uniform. The disjunctive clause with which this provision is connected further limits and explains it.

Standing alone it might be construed to mean that all property of every kind must be taxed equally without discrimination; but the words 'subject to taxation,' limiting the words and clause of which they form a part, extend their limiting power to the principal clause which the disjunctive clause itself limits, so that the meaning of both construed together, is that there shall be no unjust discrimination in the taxation of the different kinds of property subject to taxation, but all such property shall be taxed in proportion to its value. These words, 'subject to taxation,' are of importance in the construction of this section. Without them, all property would be subject to taxation; with them, only certain property is liable to taxation. Who is to determine what property is 'subject to taxation?' The courts cannot determine. It is a legislative function. It can only be exercised by the legislature or by congress. Congress has not seen fit to exercise it, but has given to the legislature the absolute control over 'all rightful subjects of legislation,' saving and reserving to itself alone the right to modify it or annul the same. This certainly is a rightful subject of legislation, and it follows that congress has given to the legislature the right to apportion and subject property to taxation. The legislature, then, has a right to say what property shall be subject, and what property shall not be subject, to taxation; what property shall be taxed, and what property shall be exempt from taxation—limited only by the provision that all property so subject to taxation shall be taxed without unjust discrimination in favor of one kind of property as against another, so that every kind of such property shall be taxed in proportion to its value." This decision established beyond doubt two propositions, viz: (1) That the territorial legislature had full and plenary power to select the subjects of taxation; and (2) that § 6 became operative only upon such selected subjects, and was absolutely of no effect in respect of property not selected for taxation. As the property of railroad companies was not selected for taxation, but on the contrary, was exempted by the statute of 1883, it follows that the statute of 1883 is not, so far as its constitutionality is concerned, affected by § 6 of the organic act. That section has no bearing whatsoever upon the question raised. It was in-

tended to apply only to property declared to be taxable; and, as railroad property is, by the express terms of the act of 1883, exempt from taxation, the provision is immaterial.

The conclusion that we have reached upon this branch of the case is in accordance with the opinions of every court that has been called upon to pass upon a similar question. The supreme court of Wisconsin, in the case of Railroad Co. v. Taylor Co., 52 Wis. 37, 8 N. W. Rep. 833, was called upon to determine whether a law exempting the land grant of the Wisconsin Central Company from taxation in consideration of a percentage of the company's gross earnings was constitutional or not. The constitutional provision relied upon by the defendant (Taylor county) was that "the rule of taxation shall be uniform, and taxes shall be levied upon such property as the legislature shall prescribe;" and the defendant argued that this provision prohibited the legislature from exempting from taxation the lands granted to railroad companies to aid in the construction of their lines. But the court held that the provision of the constitution was applicable only to such property as was declared to be taxable, and that, as the property of the company was expressly declared to be exempt, the provision was inoperative. We quote at considerable length from the opinion, as the case is, perhaps, the leading one upon this point. CASSODAY, J., in delivering the opinion of the court, said: "Since the legislature are to 'prescribe' the 'property' which must bear the burden of taxation, it follows as a logical sequence that the balance of the property in the state, and which is not so 'prescribed,' must necessarily be exempt from taxation. It is only upon the property so prescribed or designated by the legislature that the rule of uniformity can have any application. It clearly cannot apply to property not prescribed, and which would therefore be exempt. But the right of the legislature to prescribe what property shall be taxed includes the right to prescribe what property shall not be taxed. The right of choosing some from the multiplicity of kinds, classes, species, use, and ownership of property in the state, and the rejection of others, includes the absolute power to discriminate between what shall be chosen and what rejected, except in so far as it may be limited by the re-

quirement of a uniform rule. But what is to be the standard of the rule? The constitution simply defines it as 'the rule of taxation.' As stated in one of the cases cited, this provision of the constitution does not execute itself. It does not say that 'all lands,' etc., 'shall be taxed equally and uniformly.' It simply requires that the rules of taxation shall be 'uniform.' But who makes the rule that is thus to be uniform? Was it made by the constitutional convention, or was it left for the legislature? Most of the constitutions referred to, where the word 'uniform' has been used, have directly or indirectly applied it to property named therein, or valuation, or rate, or taxes, or classes of subjects; but in our constitution it applies to none of these things, but simply to the 'rule of taxation.' What is this rule of taxation? Manifestly it is the act of levying a tax or imposing taxes on the subjects of the state by the legislative power of the state. It is the measure of individual duty in support of the public burdens, and the means of enforcing the same. The rule of taxation is the law of taxation. Such rule or law must be prescribed by the legislature, as well as the property to which it is to be made applicable. But the uniformity does not go directly to the property so prescribed, but only to the 'rule' or law by which contributions are enforced against the owners of such property. The uniformity reaches the property so designated by the legislature, but only through the 'rule' or law prescribed. As the uniformity could, through the rule or law, only reach such property as the legislature should designate as being subject to taxation, it is very evident that it never could reach property not so designated, and therefore exempt from taxation, and hence to which the rule could not apply. The legislature has the exclusive power to designate the property which shall be subject to taxation, and to prescribe a rule or law by which the owners of such property are forced to contribute to the public burden, limited only by the requirements that the rule so prescribed shall be uniform. Uniformity of rule is entirely different from uniformity of subjects to which the rule is applicable. Most general laws are uniform rules, but the diversities in the subjects to which they apply are innumerable. In determining just what the rule of

uniformity shall be in taxation, and how it shall be applied, there is a wide field of legislative discretion."

The constitution of Arkansas by article 7, § 2, tit. "Revenue" provides that "all property subject to taxation shall be taxed according to its value." This is quite similar to § 6 of the organic act of Dakota territory, and was construed in the case of State v. Crittenden Co., 19 Ark. 360. In this case, by act of congress of September 28, 1850, swamp and overflowed lands were granted to the state of Arkansas for certain specified purposes. Thereafter the legislature passed an act to provide for the reclamation of these lands. The fourteenth section of this act provided that "to encourage by all just means the progress and completion of the reclamation, by offering inducements to purchasers and contractors to take up said lands, the swamp and overflowed lands shall be declared exempt from taxation for the term of ten years, or until said lands shall be reclaimed." Subsequent to the passage of this statute, an additional act was passed, repealing it. Prior to the repeal, the lands had been sold to private purchasers, and after the repeal of the statute exempting them from taxation for ten years the assessor of Crittenden county assessed the lands for taxes. The purchasers refused to pay the tax, upon the grounds that the act creating the exemption constituted a contract between the state and the purchasers, and that this contract could not, under the federal constitution, be abrogated or impaired by subsequent legislation. On the part of the state it was contended that the act granting the exemption was unconstitutional and therefore created no contract between the state and the subsequent purchasers, because it was incompetent for the legislature to exempt swamp and overflowed lands from taxation so long as it taxed other lands. The contention of the purchasers of the lands was sustained, the court saying: "We declare the true rule of construction to be that the legislature has the power, under the constitution, to select the objects of taxation, and upon the exercise of this power there is no constitutional restriction. When the legislature has selected the objects, these restrictions attach as to the imposition of taxes upon them, and the end intended to be accomplished is equality and uniformity in the taxation of

all the property taxed, throughout the state, and not equality and uniformity throughout the state as to the whole of each or any particular species of property from which objects of taxation may have been selected. The restrictions relate to the valuation of the property taxed, and to the rate of taxation imposed. They require all the property selected for taxation to be taxed according to its value, and that the rate of taxation imposed shall not be fixed higher upon the property of one taxpayer than upon that of another, no matter whether the property be of the same or of different species; and when this equality of valuation and rate has been observed it necessarily follows that the taxation of the property taxed is equal and uniform." The principle announced in and established by this case has never since been questioned, and was adopted without discussion in the cases of Railroad Co. v. Berry, 41 Ark. 509; Railroad Co. v. Berry, 44 Ark. 17; Railroad Co. v. Parks, 32 Ark. 131; Railroad Co. v. Berry, 41 Ark. 436. In all these cases an exemption of railroad land grants in consideration of a payment of a certain specified percentage of gross earnings was recognized and decided to be valid.

In view of what we have before said it seems unnecessary to enter into any further discussion of the authorities bearing, either remotely or directly, upon the point under discussion. Our opinion is that, so far as the provisions of § 6 of the organic act are concerned, the legislature had full power and authority to enact the gross earnings law of 1883. In addition to the cases heretofore cited, we refer, without comment, to Stratton v. Collins, 43 N. J. Law 562; Mississippi Mills v. Cook, 56 Miss. 40; New Orleans v. Davidson, 30 La. Ann. 554; New Orleans v. Tourchy, Id 910; Crow v. State, 14 Mo. 237; Hamilton v. County Court, 15 Mo. 3; State v. North, 27 Mo. 465; Railroad Co. v. McLean Co., 17 Ill. 291—all of which cases fully support and sustain the views we have expressed.

There is nothing in the provisions of § 6 of the organic act which prohibited the legislature of Dakota territory from passing the law of 1883. As we have before said that section applied only to the second requisite of apportionment, and was intended to prescribe the rule by which the subjects selected

for taxation should contribute. As the property of railroad companies was expressly exempted from taxation by the law of 1883, it follows that § 6 does not refer to or have any bearing on this exempted property.

We must now consider whether the gross earnings law of 1883 is contrary to the provisions of the fourteenth amendment to the federal constitution, which provides that no state shall deny to any person within its jurisdiction "the equal protection of the laws." The respondent contends that, in so far as the lands granted by congress are concerned, the appellant, as owner, occupies exactly the same position as the farmer, settler, homesteader, pre-emptioner, or speculator occupies; that in respect of the ownership of the lands, the appellant, and every other property owner in the territory, occupies the same position; and that a law prescribing a different method of taxation for one of the constituent members of this general class from that prescribed for the taxation of another constituent member of the same class is void, under the fourteenth amendment to the federal constitution. In other words, it is denied that the territorial legislature had the power to place railroad companies in a class by themselves for the purpose of taxation. The law of 1883 unquestionably classifies these corporations by themselves, and seeks to tax them by a method and system far different from the method pursued in taxing the individual citizen or property owner. The question is, can this classification be sustained upon legal grounds? The fourteenth amendment does not prohibit classification by the legislatures of the several states and territories in respect of those subjects properly coming under the exercise of the legislative power. It permits the legislature to create one class of persons or property, subject to and controlled by one law, another class controlled by another law, and so on; the only limitation upon the power being that all the constituent members of the same class must be treated exactly alike. Discrimination between different classes is permitted, but discrimination between members of the same class is not permissible. It has never been doubted that for purposes of taxation persons pursuing certain trades or occupations could be put into classes by themselves, and be re-

quired to pay a special license tax for the privilege of pursuing their calling. Thus, it is very common for legislatures to classify saloon-keepers by themselves, and exact from them a special license tax. But, as a citizen or person, the saloon-keeper stands before the law exactly in the same position as the doctor, the lawyer, the merchant, and every other citizen. Yet the power of the legislature to pick him out from all the other citizens of diverse trades and occupations, and compel him to pay an extraordinary tax for the privilege of conducting his business, cannot be questioned. The only limitation on the power is that all saloon-keepers shall be taxed. And so every other trade and business may be taxed, if all the persons pursuing the same trade or occupation are treated alike.

This power of classification has been repeatedly recognized by the United States supreme court in cases arising after the adoption of the fourteenth amendment. We do not think it is necessary to enter into any extended consideration of these cases, as the principles announced in and established by them are now thoroughly familiar both to the bench and bar. But it may be of use to refer, briefly, to several of them, which seem to us to establish the principles that must govern our decision in this case. In Barbier v. Connolly, 113 U. S. 27, 5 Sup. Ct. Rep. 357, a municipal ordinance prohibiting washing and ironing in public laundries, within defined territorial limits, between 10 o'clock in the evening and 6 in the morning, was held to be valid. This ordinance was evidently intended to operate against the Chinese in the city of San Francisco, but the court declared that, as it operated alike on all persons engaged in the same business within the same territory, it was not within the amendment. In Missouri v. Lewis, 101 U. S. 22, a statute prohibiting appeals to the supreme court of the state from certain designated counties in the state was held to be not obnoxious to the fourteenth amendment. In Hayes v. Missouri, 120 U. S. 68, 7 Sup. Ct. Rep. 350, a statute providing that in all capital cases, except in cities having a population of over 100,000 inhabitants, the state should be allowed eight peremptory challenges to jurors, and in such cities should be allowed fifteen, was held to be constitutional. In Dow v. Beidelman,

125 U. S. 680, 8 Sup. Ct. Rep. 1028, a statute of a state, classifying its railroad corporations by the length of their lines, and fixing a different maximum rate that might be charged for transporting passengers by each class, was sustained. In Railway Co. v. Mackey, 127 U. S. 205, 8 Sup. Ct. Rep. 1161, a statute making railway companies liable to a servant for injuries received by the negligence of a fellow servant, was held not to violate the amendment. In commenting upon these cases, counsel for the appellant use the following language, which we think fairly state the conclusions to be drawn from them: "These decisions establish beyond dispute the principle that the legislature may classify persons, and enact laws applicable to each class, each law operating, in respect both of the privileges conferred and the liabilities imposed, upon the members of its particular class only, and not upon the members of any other class. They establish the further principle that railroad corporations may be placed in a class by themselves, and be subject to new and additional burdens and liabilities." No other conclusion is possible in view of these cases, which, upon the point now under discussion, are binding upon this court. Indeed, the power to classify railroads for purposes of taxation was expressly recognized in the Kentucky Railroad Tax Case, 115 U. S. 321, 6 Sup. Ct. Rep. 57, where a statute was upheld which provided a different method for ascertaining the value of railroad property from that provided for other property.

The power to classify railroads, banks, and other corporations for purposes of taxation, and to accept from them, in lieu of the customary taxes, a specified percentage of their gross earnings, has over and over again been affirmed, and cannot now be questioned. 1 Desty, Tax'n, 145; Cooley, Tax'n, 69; Bank v. Knoop, 16 How. 369; Dodge v. Woolsey, 18 How. 331; Bank v. Skelley, 1 Black 436; Delaware Railroad Tax, 18 Wall. 206; Daughdrill v. Insurance Co., 31 Ala. 91; State v. Railroad Co., 45 Md. 361; Worth v. Railroad Co., 89 N. C. 291; Wright v. Sill, 2 Black 544; Gardner v. State, 21 N. J. Law 557; State v. Commissioner, 37 N. J. Law 240; State Lottery Co. v. New Orleans, 24 La. Ann. 86; LeRoy v. Railroad Co., 18 Mich. 233; St. Louis v. Bank, 49 Mo. 574;

Farmers' Bank v. Com., 6 Bush 127; Mobile v. Insurance Co., 53 Ala. 570; Railroad Co. v. Taylor Co., 52 Wis. 37, 8 N. W. Rep. 833. And the supreme court of this state, in the recent case of Trust Co. v. Whithed, *ante*, held that the power to classify was extensive enough to permit the legislature to enact a statute exempting building and loan associations from the operation of the usury laws. As the reasoning upon which this conclusion was based applies particularly to the case at bar, we quote at some length from the opinion of BARTHOLOMEW, J., speaking for the court, who said: "This is a case which requires implicit adherence to that well established rule which requires courts to respect and enfore the will of the legislature, unless there has been a clear and unequivocal violation of the fundamental law of the state. 'A statute relating to persons or things as a class is a general law; one relating to particular persons or things of a class is special.' Suth. St. Const. § 121. 'Special laws are those made for individual cases, or for less than a class, requiring laws appropriate to its particular condition and circumstances." Id § 127. An inspection of the statute under consideration at once discloses that it does not come within the above definition of a special law. Nor does it grant any privileges or immunities to any citizen that would not equally extend to any other citizen coming within the class to which the exception applies. It is a statute general in form and general in its nature. If its operation be in any manner special, or if it grant privileges or immunities to any citizen or class of citizens that are not granted to all, it is because the statute is not literally uniform in its operation; and it becomes important to determine whether this lack of uniformity is of such a character as to violate the constitutional provision requiring all laws of a general nature to have a uniform operation. This provision is found in the constitution of a number of the states, and it has been before the courts in a large number of cases; and it has also been held that this provision was intended to prevent the granting to any citizen or class of citizens of privileges or immunities which, upon the same terms, should not belong to all citizens. McGill v. State, 34 Ohio St. 237; Suth. St. Const. c. 121; French v. Teschemacher, 24 Cal.

544. A 'general law,' as the term is used in this constitutional provision, is a public law of universal interest to the people of the state, and embracing within its provisions all the citizens of the state, or all of a certain class or certain classes of citizens. It must relate to persons and things as a class, and not to particular persons or things of a class. It must embrace the whole subject, or a whole class, and must not be restricted to any particular locality within the state. Cass v. Dillon, 2 Ohio St. 607; Kelley v. State, 6 Ohio St. 269; Wheeler v. Philadelphia, 77 Pa. St. 338; State v. Wilcox, 45 Mo. 458; State v. Parsons, 40 N. J. Law 123; *In re* Boyle, 9 Wis. 240; McGill v. State, 34 Ohio St. 237. The uniform operation required by this provision does not mean universal operation. A general law may be constitutional and yet operate in fact only upon a very limited number of persons or things, or within a limited territory. But, so far as it is operative, its burdens and its benefits must bear alike upon all persons and things upon which it does operate; and the statute must contain no provision that would exclude or impede this uniform operation upon all citizens, or all subjects and places, within the state, provided they were brought within the relations and circumstances specified in the act. McGill v. State, 34 Ohio St. 246; Smith v. Judge, 17 Cal. 554; Darling v. Rogers, 7 Kan. 592; Leavenworth Co. v. Miller, Id 479; Groesch v. State, 42 Ind. 547; Heanley v. State, 74 Ind. 99; State v. Wilcox, 45 Mo. 458; People v. Wright, 70 Ill. 398; McAunich v. Railroad Co., 20 Iowa 338; Humes v. Railroad Co., 82 Mo. 221; Railway Co. v. Iowa, 94 U. S. 155. From the foregoing propositions it follows of necessity that the legislature has power to classify persons and subjects for the purpose of legislation and to enact laws applying specially to such classes; and, while the laws thus enacted operate uniformly upon all members of the class, they are not vulnerable to the constitutional inhibition under consideration. But this power of the legislature is circumscribed. It is not an arbitrary power, waiting the whim or the will of the legislature. Its exercise must always be within the limits of reason, and of a necessity more or less pronounced. Classification must be based upon such differences in situation,

constitution, or purposes, between the persons or things included in the class and those excluded therefrom, as fairly and naturally suggest the propriety of and necessity for different or exclusive legislation in the line of the statute in which the classification appears. State v. Hammer, 42 N. J. Law 439; Nichols v. Walter, 37 Minn. 264, 33 N. W. Rep. 800; Board v. Buck, 51 N. J. Law 155, 16 Atl. Rep. 698; Railway Co. v. Markley, 45 N. J. Eq. 139, 16 Atl. Rep. 436; Miller v. Kister, 68 Cal. 142, 8 Pac. Rep. 813; City of Reading v. Savage, 124 Pa. St. 328, 16 Atl. Rep. 788; Hanlon v. Board, 53 Ind. 123; State v. Reitz, 62 Ind. 159. The application of these principles to the case before us will advance us towards a correct conclusion. By § 11, above quoted, our legislature placed building and loan associations, incorporated under the laws of this state, in a separate class, and exempted them from the operation of the usury law. Is this such a classification as the legislature had authority to make? The business of money-loaning has its representatives in every community. The almost universal object of the lender is to increase his capital by such sums as the business indiscretion of his neighbors may permit, or their necessities compel them to pay for the use of the money loaned to them. To check the rapacity of capital, and to prevent unconscionable advantage being taken of mismanagement, misfortune, or inexperience, governments, in the exercise of their police power, have seen proper to place a limit upon the amount that may be charged for the use of money, and thus to compel the capitalist to deal with his less fortunate fellowmen in a spirit of fairness and liberality. But the theory and purpose of building and loan associations are entirely different. These associations are, presumably at least, composed of men who are not capitalists, but who desire to form a fund from their mutual earnings, that shall be mutually beneficial. To this end the persons subscribing for the stock of these associations agree to pay therefor in small amounts, at stated intervals, and to continue such payments until the amounts so paid, added to the profits that may be realized on the stock, equal its par value; and provisions are made for fines and forfeitures in case of non-payment. The stock is issued in one series, or in

successive series, and all the stock of any one series, which has not been forfeited, will reach par at the same time, and the purposes of the association as to such stock will then be at an end, and the assets will be distributed and the association dissolved. The fund so accumulated is, primarily, for the use of the stockholders. In the absence of express statutory authority, a building and loan association cannot loan its money outside of its own members. End. Bldg. Ass'ns. 312; Wolback v. Association, 84 Pa. St. 211. Neither can a loan be made to a stockholder in excess of the par value of his stock. When a certain amount (not less than the par value of one share of stock) is accumulated, the money is put up for sale, usually termed 'auction,' and that member who is willing to pay the highest premium, or who is willing to have the largest amount deducted, where a premium is deducted from the loan, receives a loan equal to the par value of the stock held by such party, and assigns his stock to the corporation as collateral security. But his duty to continue his payments upon his stock is not changed, and should he fail in that duty, his stock would become forfeited. Hence he is also required to execute his note for the loan, with mortgage security, and generally to pay interest on the amount until the note is paid. No definite date for payment is fixed. In theory, and generally in practice, the time of payment arrives when the stock reaches par, and the corporation, as to such stock, ceases to exist, and the member receives as his share of the assets his own note and mortgage. Under our statute, the member has the right to pay his note at any time and thus stop the interest; and in that case would, of course, be entitled, on the dissolution of the corporation, to receive the value of his stock in cash. But the effect of the transaction, generally speaking, is simply this: The association uses the fund to purchase the stock of that member who is willing to sell his stock in advance for the least money, and continue the payments on stock subscription until the value of his stock reaches par. It will be noticed that all the stock receives the benefit of the premiums paid, that of the party receiving the so-called 'loan' equally with that of the other stockholders; and the larger the aggregate premium paid, the

sooner the value of the stock will reach par, and the sooner the stated payments on account of stock subscriptions will cease. Endlich on Building Associations, at page 161, says: 'If we consider the reasons which may be assumed to have guided legislatures in conferring upon building associations the extraordinary privileges and immunities which they enjoy, it will be readily understood (and there can be no other apology for it) that at the bottom of it all is a motive of public policy. The primary design of building associations is to encourage the acquisition of real estate, the building of dwellings, the ownership of homesteads, to increase the proportion of property holders among that class of the population whose slow and laborious earnings are, by reason of their pettiness, most fugitive, and generally spent before they reach a sum of sufficient magnitude to back a desire for those guaranties of good citizenship which the policy of our law has always found in landed property. That is the class for whose benefits building associations were originally devised, from among whose numbers their membership was, and for the most part still is, drawn; and all the incidents of membership were designed to accomodate their necessities, and intended to serve their purposes.' The legislature of Dakota territory (§ 3, c. 41, Laws 1889) used the following language: 'As building and loan corporations are aggregations of laborers, mechanics, workmen, and working women, which start without any paid up capital, and as these members pay only each month an assessment in proportion to shares, for the purpose of furnishing a home to each of its members in turn, which assessment stops the moment that every member has thus been furnished with such a home, these associations are hereby declared to be benevolent institutions within the meaning of § 2, c. 28, of the Political Code of 1877.' Rev. Laws. It is at once apparent that the transactions of these associations are separated by essential differences from the ordinary loaning business. * * * It seems very clear to us that the operations of building and loan associations, when confined to their own members, differ so radically from ordinary loan transactions that the legislature was clearly warranted in placing such transactions in a separate class for the purposes of

such legislation as pertains to interest and usury; and, the classification being once established, the extent to which the classes shall be separated is purely a matter of legislative discretion. The legislature has the right to leave such associations untrammeled in the matter of premiums paid for loans, and it has an equal right to leave them untrammeled in the matter of interest proper."

Is the classification of railroad companies for purposes of taxation a purely arbitrary one, or is it justifiable upon the ground that these corporations, by virtue of their peculiar powers and liabilities, differ from the other persons in the community, and constitute a peculiar class by themselves? A railroad is a public highway, operated for the public benefit; and, although it may be owned by a private corporation, yet it is charged with a public use, and the owner, in operating it, has a public duty to perform. Sharpless v. Mayor, etc., 21 Pa. St. 169. He must carry for all alike, and cannot discriminate in favor of any person or individual. When goods are offered him for carriage, he cannot refuse to receive them, or to transport them to the designated place; and after he receives them he is responsible for their safe carriage and delivery, and cannot excuse himself at common law except by showing that the act of God or of the public enemy prevented him from performing his duty. In the carriage of passengers he must exercise extraordinary care to insure his passenger's safety, and the burden is upon him to show that he exercised this degree of care. Such, briefly stated, are some few of the onerous duties and burdens cast by the law upon common carriers. In return for these, railroad companies are given the right to construct and operate their railroads, and are, for these purposes, vested with the power of eminent domain. But in all their operations they are public servants, subject to regulation by the public, and answerable to the public for any dereliction of duty. Indeed, they are public instrumentalities to such an extent that the public may not only be taxed to aid in the construction of their railroads, but, after such construction, may regulate the fares and tolls that are to be charged for the use of the railroads. A merchant may charge as much as he sees fit for his goods, a

farmer for his crops, a mechanic, artisan, or laborer for his work, a lawyer or doctor for his professional services. But railroad companies cannot do this. They may be regulated in the matter of their charges by the public, acting through its proper agents. All these facts, and others which it is not necessary to enumerate, place railroads in a different class by themselves, differing from every other person and individual, and make them legitimate objects of special legislation; as, for instance, the imposing upon them, as employers, of a different rule of liability to any employe for injury received by the negligence of a fellow servant from that governing employers generally (Railroad Co. v. Mackey, 127 U. S. 205, 8 Sup. Ct. Rep. 1161;) subjecting them to a special law to determine, for purposes of taxation, the value of their property (Kentucky Railroad Tax Cases, 115 U. S. 321, 6 Sup. Ct. Rep. 57;) the regulation of the charges which they may make for their services (Munn v. Illinois, 94 U. S. 113; the Granger Cases, Id 155; Stone v. Trust Co., 116 U. S. 307, 6 Sup. Ct. Rep. 334, 388, 1191;) requiring them to fence their railroad tracks, and, in case of failure so to do, to be liable to any person aggrieved in double damages (Railroad Co. v. Humes, 115 U. S. 513, 6 Sup. Ct. Rep. 110;) and compelling one railroad company operating a certain number of miles of railroad to charge one maximum rate for the carriage of passengers, and another company operating another number of miles of railroad to charge another maximum rate (Dow v. Beidelman, 125 U. S. 680, 8 Sup. Ct. Rep. 1028.) We are therefore clearly of opinion that railroad companies may be classified by themselves for the purposes of legislation, and it follows that, as taxation is a legitimate subject of legislation, they may be classified for purposes of taxation. We do not understand that respondent denies this proposition in so far as railroad property actually used in the operation of railroads is concerned. It is, however, earnestly argued that the appellant, in respect of its land grant, is in precisely the same position as any other owner of land, and that to exempt this land grant is, in effect, to cast additional burdens upon such other property owner, and to deny to him the equal protection of the law. The exemption of appellant's land grant

is not gratuitous, but is paid for upon a basis that seemed fair and just to the legislature. Whether it was wise to enact the gross earnings law is not for this court to inquire. If any landowner contends that he is discriminated against, his contention should be addressed, not to the courts, but to the legislature. The appellant pays a certain tax upon its income, and in consideration therefor obtains an exemption from taxation for its lands. No individual property owner in the state (then territory) paid any tax whatsoever upon its income. It would be as reasonable for the railroad companies to contend that the gross earnings law was void because the incomes of other persons were not taxed, as it is for respondent to contend that it is void because railroad lands are, by its terms, exempt.

But is appellant, as owner of its land grant, in exactly the same position as other owners of land? We think not. The individual who owns a city or town lot may erect a dwelling house thereon, and either live in it himself or rent it to another. He may erect a store thereon, or a manufactory, and carry on merchant's or manufacturer's business. He may mortgage the property to secure his debts. In fact, he may do what he sees fit with his land. And the same is true of the owner of country land, who may cultivate it as a garden or farm, or mortgage it, or permit it to lie vacant and untilled. And all individual property owners may at any time sell their lands, and dispose of the proceeds as they choose. But appellant does not have like or equal or similar powers in respect to its land grant. It possesses and holds its lands for certain specified purposes, and cannot exercise the same freedom of action in respect thereof as may be exercised by every other property owner. The act of congress (chapter 217, 13 St. U. S. p. 365) whereby appellant was incorporated provided, by § 1, that appellant should have the power to "lay out, locate, construct, furnish, maintain, and enjoy a continuous railroad and telegraph line, with the appurtenances," etc. By § 2 a right of way was granted to appellant for its railroad and telegraph line over the public lands of the United States, to the extent of 200 feet in width on each side of said railroad, and this right of way was, by said § 2, declared to be exempt from taxation in the territories of the United

States. Section 3 was as follows: "That there be, and hereby is, granted to the Northern Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores over the route of said line of railway, every alternate section of public land, not mineral, designated by odd numbers," etc. Section 5 provided that the railroad and telegraph line should be constructed as therein specified. Section 10 enacts that "all people of the United States shall have the right to subscribe to the stock of the Northern Pacific Railroad Company until the whole capital named in this act of incorporation is taken up, by complying with the terms of subscription; and no mortgage or construction bonds shall ever be issued by said company on said road, or mortgage or lien made in any way, except by the consent of the congress of the United States." Section 11 declared that the railroad should be "a post route and a military road, subject to the use of the United States for postal, military, naval, and all other government service, and also subject to such regulations as congress may impose, restricting the charges for such government transportation." It is obvious from these provisions that congress considered the construction of appellant's railroad to be a matter of national importance warranting the grant of extraordinary aids and concessions by the federal government. In order to carry out the purposes of the act congress granted to the appellant a princely domain, a part of which composes the lands involved in this suit. But it is apparent from the provisions of appellant's charter above given that this land did not pass to appellant absolutely, and free from all restrictions and limitations as to its use. Appellant received the lands, and now holds them, subject to the purposes specified in its charter, and in strict subordination thereto. It holds them in trust, to carry out the object of its creation, as expressed in § 3 of the charter, namely, for the purpose of "aiding in the construction of said railroad, and to secure the safe and speedy transportation of the mails, troops, munitions of war and public stores;" and cannot make any disposition of the lands inconsistent with this pur-

pose. It cannot mortgage the lands, or make or create any lien upon them except by and with the consent of congress. It is true that it may sell them, but undoubtedly the proceeds of such sale must be applied to the purposes for which the lands were granted. It cannot cultivate the lands, because it is not authorized to engage in agricultural pursuits, but only to construct and operate a railroad and telegraph line. It is expressly declared to be a post route and military road, subject to the use of the United States; and it cannot be questioned that, if the necessities of the case require it, the United States could use the railroad to the exclusion of every other person and fix the price to be paid appellant for such exclusive use. Whether the railroad is used exclusively by the United States or jointly with others, the fact remains that the lands of appellant are held by it in order to aid in the operation of the railroad, and secure to its patrons adequate service, and reasonable charges therefor. The entire people of the United States are interested in seeing that the appellant complies strictly with the provisions of its charter. The construction of the railroad was a national undertaking, subsidized by an immense grant of national property; and the people of the United States have a direct interest in seeing to it that the appellant fulfills to the letter the obligations and duties it owes to the government. By § 10 of appellant's charter it is expressly provided that "all people of the United States shall have the right to subscribe to the stock of the Northern Pacific Railroad Company." Every citizen of the United States, whether rich or poor, had the right to invest his earnings in this great undertaking, and to reap the profits of such investment. And as, by the whole tenor and spirit of the charter, the appellant's railroad was made a national institution, so it is that it is now, and always has been, a railroad corporation owing peculiar and extraordinary duties to, and under most supreme obligations to the people of the United States, both in respect of the operation of its railroad and the ultimate disposition of its land grant. It is therefore without any doubt or hesitation that we say that the appellant, in respect of its land grant, does not occupy the same or a similar position as other land owners, and is a legitimate object upon which the territorial legislature

could exercise its power to classify in the matter of taxation. We may also mention here another reason that has influenced us in reaching this conclusion. The right of way of appellant's railroad was expressly exempted from taxation, within the territories of the United States, by § 2 of the charter. There can be no doubt but that if congress had seen fit, it could also have exempted appellant's land grant from taxation within said territories. But congress did not go to this extreme. It left the question to be settled by each territory of the United States through which appellant's road might run. Dakota territory saw fit, by its legislature, to pass the gross earnings law of 1883, thereby exempting appellant's land grant from taxation. The statute is, in its legal effect, in precisely the same position as a similar statute passed by congress would be. The jurisdiction of congress over the territories of the United States is supreme, and corresponds to the powers of a state over its municipal organizations. It has full and compete legislative authority over the people of the territories and all the departments of the territorial governments. It may legislate directly for the territories, and such legislation will be the supreme law of the land, and cannot be questioned or invalidated. Insurance Co. v. Bales of Cotton, 1 Pet. 511; Bank v. Yankton, 101 U. S. 129. But this power was delegated to the legislative department of the territory of Dakota at the time of its organization, and hence that body succeeded to and became possessed of all the powers of congress in respect of legislation in said territory. Nevertheless, congress could at any time withdraw this grant, or could legislate directly for the territory, and could annul any act passed by the territorial legislature. If congress did not choose to annul any act, then such act became valid and binding, and was, to all intents and purposes, the act of congress itself. Dubuque v. Iowa, 12 How. 1; Bank v. Yankton, 101 U. S. 129. By appellant's charter, the right of way of the railroad was exempted from taxation within the territories of the United States; and it cannot be doubted that congress could also have exempted the land grant within said territories, had it seen fit so to do. By the organic act, congress delegated this power to the territorial legislature. The latter body exercised the power

by passing the gross earnings law of 1883; and, as congress had never annulled or repealed the law, it had the same effect as a similar act of congress itself. It must be considered as, and is, an act of congress, and must be given the same force and effect as though duly enacted by that body. Railroad Co. v. Lesueur Co. (Ariz.), 19 Pac. Rep. 157.

The only other constitutional question raised at the argument is whether the law is void because, being concededly invalid in so far as it attempted to tax the earnings derived from interstate traffic, the remaining portions, being inseparably connected with the void parts, must fall with them. The argument of respondent is that the gross earnings law of 1883 is void so far as interstate earnings of railroad companies are concerned; that the legislature would not have passed the law if it had known that interstate earnings could not be taxed; that, by the terms of the act, earnings upon local traffic cannot be separated from interstate earnings for purposes of taxation; that all the earnings of railroads must be taxed or none at all; and hence that, as the tax on interstate earnings cannot be sustained, the entire act falls to the ground. The earnings of railroads, derived from interstate traffic or business, cannot be taxed by the states. Fargo v. Michigan, 121 U. S. 230, 7 Sup. Ct. Rep. 857; Steamship Co. v. Pennsylvania, 122 U. S. 326, 7 Sup. Ct. Rep. 1118. The act of 1883 was expressly declared by the supreme court of Dakota territory to be unconstitutional, in so far as it related to interstate commerce, in the case of Railroad Co. v. Raymond, 5 Dak. 356, 40 N. W. Rep. 538. That case, however, did not touch upon or decide the question now under consideration. It is our duty to construe the act so as to make it constitutional, unless it clearly appears that it cannot be sustained by any reasonable intendment or allowable presumption. People v. Supervisors, 17 N. Y. 241. It is to be presumed that the legislature did not intend to exceed its jurisdiction, and tax earnings of appellant derived from interstate commerce, and this presumption must prevail, unless it is clearly rebutted by the language of the act itself. If that language is susceptible of two constructions, one of which will invalidate the statute, and the other of which will sustain

it, the clear duty of the court is to adopt the latter construction. Endl. Interp. St. 247; Opinion of Justices, 41 N. H. 553. The language of the statute is that "there shall hereafter be paid into the treasury of this territory a percentage of all the gross earnings of the corporation owning or operating such railroad, arising from the operation of such railroad as shall be situated within this territory." This language does not, in terms, extend to earnings on interstate traffic, nor is it, in terms, limited to local earnings. The language is broad and general, and necessarily requires construction by the court to determine its precise meaning. The "gross earnings" which were taxed were derived "from the operation of such railroad as shall be situated within this territory." (If the argument of respondent be correct, then it forces us to the conclusion that it was intended to tax the gross earnings from interstate traffic whenever that traffic passed over a part of any railroad situated within the territory. Thus, if a shipment be carried by appellant from St. Paul to Tacoma, and it receives $100 as freight earnings therefor, the argument of respondent is that these earnings were intended to be taxed by the act.) We think a fair construction of the language does not warrant this conclusion. Nor is there anything in the act which warrants the conclusion that it was intended to tax a proportionate part of these earnings, derived by comparing the number of miles the shipment passed over appellant's railroad within the territory with the total number of miles it passed over appellant's railroad. In order to arrive at such a construction, it would be necessary to insert new and additional words in the statute; and this, of course, is not permissible. To do so, would be to make a new law, not to construe the old one.

What then is the true construction to be placed on the language? If the language is transposed, and placed in its proper order, it would read: "All the gross earnings arising from the operation of such railroad as shall be situated within this territory." It is obvious that the intent of the legislature could not have been to tax all the gross earnings of any corporation that might happen to operate a railroad situated within the territory. And yet a strict grammatical construction would war-

rant this conclusion because the modifying clause, "as shall be situated within this territory," apparently, at first blush, applies to the word "railroad," immediately preceding, and is descriptive of the kind of railroad which the coporation must operate in order to come within the provisions of the act. If, then, this clause modifies the preceding word "railroad," the remarkable conclusion would follow that the appellant, which operates a railroad "situated within this territory," would be compelled to pay a tax on "all the gross earnings" which it might earn over its entire system. Such a construction of the statute would be absurd. We think the only true construction is that the clause modifies the words, "all the gross earnings," and was intended to explain what those words meant. Striking out the unnecessary words for the sake of grammatical correctness, and transposing the modifying clause, we find that the statute, thus construed reads: "All the gross earnings arising from the operation within this territory of such railroad." The gross earnings derived from such operation are the gross earnings on local business, for to construe them otherwise would be to impute to the legislature an intent to do an unlawful act. Any other construction would invalidate the statute, and we do not think there is any warrant for the court, by adopting an unnecessary conclusion, to annul a solemn act of a co-ordinate department of government, passed in due and proper form. As under the gross earnings law all "property" situated in the territory owned by the Northern Pacific Railroad Company was exempt from taxation, these lands were exempt if they were "property" of the railroad company. If they were not "property" of the railroad company, they were exempt as lands of the United States. The complaint sets forth the proceedings by which the railroad company acquired title to these lands, if any it has, from the United States. If those proceedings were insufficent to vest a title in the railroad company, the title remained in the government. All titles to land in Dakota came from the government of the United States, and in the absence of a showing that the United States has parted with the title, the legal presumption is that the title remains in the government. Patterson v. Tatum, 3 Sawy. 170. Consequently, the lands described in the bill were

exempt from taxation at the time of the assessment and levy, and such assessment and levy were void.

The only remaining question is, therefore, does the complaint show such a title in the railroad company as will enable it to maintain this action? Of course, if plaintiff has no interest in these lands, their taxation and sale cannot work any injury to it, and it cannot be heard to complain. The third section of the act of July 2, 1864, granting lands to the Northern Pacific Railroad Company, is as follows: "That there be, and hereby is, granted to the Northern Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores over the route of said line of railroad, every alternate section of public land, not mineral, designated by odd numbers, to the extent of twenty alternate sections per mile on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, and whenever on the line thereof the United States has full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights at the time the line of the road is definitely fixed, and a plat thereof filed in the office of the commissioner of the general land office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the secretary of the interior, in alternate sections, and designated by odd numbers, and not more than ten miles beyond the limits of said alternate section; provided, that if said route shall be found upon the line of any other railroad route, to aid in the construction of which lands have heretofore been granted by the United States, as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act; provided, further, that the railroad company receiving the previous grant

of lands may assign their interest to said 'Northern Pacific Railroad Company,' or may consolidate, confederate, and associate with said company upon the terms named in the first section of this act; provided, further, that all mineral lands be, and the same are hereby excluded from the operation of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands in odd numbered sections, nearest to the line of said road, may be selected as above provided; and provided, further, that the word 'mineral,' when it occurs in this act, shall not be held to include iron or coal; and provided, further, that no money shall be drawn from the treasury of the United States to aid in the construction of said 'Northern Pacific Railroad Company.'" That this act makes a grant *in præsenti* is determined. Says the supreme court: "As seen by the terms of the act, the grant is *in præsenti;* that is, it purports to pass a present title to the lands designated by alternate sections, subject to such exceptions and reservations as may arise from sale, grant, pre-emption, or other disposition previous to the time the definite route of the road is fixed. The language of the statute is 'that there be, and hereby is, granted' to the company every alternate section of land designated, which implies that the property itself is passed, not any special or limited interest in it. The words also import a transfer of a present title, not a promise to transfer one in the future. The route not being at the time determined, the grant was in the nature of a float, and the title did not attach to any specific sections until they were capable of identification, and, when once identified, the title attached to them as of the date of the grant, except as to such sections as were specifically reserved. It is in this sense that the grant is termed one *in præsenti;* that is to say, it is of that character as to all lands within the terms of the grant, and not reserved from it at the time of the definite location of the route." St. Paul & P. R. Co. v. Northern Pac. R. Co., 139 U. S. 5, 11 Sup. Ct. Rep. 389. As the grant is of "every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile on each side of said railroad line," the specific sections granted remain afloat, and are incapable of identification until

the line of road is definitely located. But when that line is definitely fixed, and a plat thereof filed in the office of the commissioner of the general land office, the base line on each side of which the alternate odd-numbered sections are to be taken is determined. Railway Co. v. Dunmeyer, 113 U. S. 640, 5 Sup. Ct. Rep. 566. This act does not, in terms, prescribe a lateral limit within which the land granted is to be taken. It is of lands "to the amount of twenty alternate sections per mile." In this respect it differs from every preceding grant of lands made by congress to aid in the construction of railroads; but, while no lateral limits are made in terms, it by no means follows that the filing of the map of definite location does not identify any of the lands granted. The grant being of "every alternate section" that was free from adverse claims, no license was given the grantee to roam over the public lands, taking odd sections at will. The grant was to be satisfied from the undisposed of, non-mineral, odd-numbered sections nearest to the line of the road. The company was not at liberty to pass beyond lands open to appropriation under the grant, and take lands further removed from the line of its road. This being so, and as all odd-numbered sections within forty miles on each side of plaintiff's road would be required to satisfy its grant, even were there no losses by reason of reservation, sales, grants, or the attachment of pre-emption, or other claims or rights, prior to the filing of the plat of definite location of the road in the general land office, the filing of the plat necessarily identified all of the odd-numbered sections of non-mineral, public land within forty miles of the line as a portion of the grant, and causes the title granted to attach thereto without further selection on the part of the grantee. Wood v. Railroad Co., 104 U. S. 327; Vance v. Railroad Co., 12 Neb. 285, 11 N. W. Rep. 334; St. Paul & P. R. Co. v. Northern Pac. R. Co., 139 U. S. 11, 11 Sup. Ct. Rep. 389.

These considerations justify the conclusion that the act of July 2, 1864, in effect, although not in terms, fixes a lateral limit of forty miles on each side of the line of the road within which every alternate section of non-mineral land, designated by odd numbers, and which was not reserved, sold, granted, or otherwise disposed of, and is free from pre-emption or other

claim or rights at the time the plat of the definite location of the road is filed with the commissioner of the general land office, is identified by fixing the line as granted. The language of the indemnity provision confirms this construction. "And whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, etc., other lands shall be selected, not more than ten miles beyond the limits of said alternate sections"—is intelligible only upon the theory that a lateral limit is to be understood. "Any of said sections or parts of sections" necessarily refers to the sections within the limits of twenty alternate sections, or forty miles on each side of the road; and the provision that the indemnity shall be selected "not more than ten miles beyond the limits of said alternate sections" plainly means that such selections must be made not more than ten miles beyond the forty-mile limit, or not more than forty, and within fifty miles of the road. It is within this indemnity belt that the lands described in the complaint are located. When and in what manner is the title to land within the indemnity belt acquired? The granting terms of the act are such as, standing alone, would make a grant of quantity. U. S. v. Railroad Co., 98 U. S. 334. They are of "lands to the amount of twenty alternate sections per mile." In this respect this grant differs radically from most railroad land grants, which are of "every alternate section per mile designated by odd numbers for six [or ten] sections in width, on each side of said road." But the granting terms are somewhat restrained and modified by the indemnity provisions. By these provisions, as contained in the original act, the limit in which the quantity granted must be satisfied, if at all, is restricted to the belt inclosed within the fifteen-mile limits on each side of the line. And the terms of the act giving the right to select indemnity for such lands as had been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, by implication forbids the taking of indemnity for a deficiency in quantity arising from other causes, if any there are. *Expressio unius est exclusio alterious.* The indemnity provision is broad enough to include all possible modes of disposition of land. But it is not intended to supply a deficiency in the quantity granted of forty sections

per mile arising from the non-existence of such quantity of land within forty miles of the line on each side, and where the grant overlaps large meandering bodies of water. Subject to these modifications, the grant is one in quantity; that is, it grants to the Northern Pacific Railroad Company an amount of land equal to the amount of land included within odd-numbered sections within the limits of a belt forty miles in width on each side of the line of the road, provided that amount can be found within the limits of a belt fifty miles in width on each side of said line; the lands within the forty-mile limit to be first exhausted. The quantity granted is further subject to a reduction by the existence of the state of facts contemplated in the first proviso: "That if said route shall be found upon the line of any other railroad route, to aid in the construction of which lands have heretofore been granted by the United States, as far as the routes are upon the same general line the amount of lands heretofore granted shall be deducted from the amount granted by this act." To this extent the amount of lands granted to the plaintiff is reduced.

By the joint resolution approved May 31, 1870 (16 St. p. 378), congress, anticipating that plaintiff would find difficulty in securing the amount of land granted within the limits designated in the act of July 2, 1864, provided that, "in the event of there not being in any state or territory in which said main line or branch may be located, at the time of the final location thereof, the amounts of land per mile granted by congress to said company, within the limits prescribed by its charter, then said company shall be entitled, under the directions of the secretary of the interior, to receive so many sections of land belonging to the United States, and designated by odd numbers, in said territory or state, within ten miles on each side of said road, beyond the limits prescribed in said charter, as will make up such deficiency on said line or branch, except mineral and other lands, as excepted in the charter of said company of 1864, to the amount of the lands that have been granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of subsequent to the passage of the act of July 2, 1864." The phrase in this resolution, "the amount of lands per mile granted

by congress to said company within the limits prescribed by its charter," includes lands within place and indemnity limits. Railroad Co. v. U. S., 36 Fed. Rep. 282. This language is inconsistent with any idea save that of a grant of quantity. Were the grant of specific sections with a mere right to select indemnity for such portions thereof as had been previously appropriated, there could not be a deficiency at the time of the final location of the road of the "amount of the lands granted per mile." The "amount of the lands granted" would be simply the amount of lands remaining undisposed of within the place limits at the date of fixing the definite location of the road, since the grant is in terms of such unappropriated lands only. The "amount of lands per mile" is obviously the amount of twenty sections per mile on each side of the line, subject to deficiencies arising from their non-existence, or having been previously granted to aid in the construction of another railroad, having its line on the same general route. The description of this amount as "granted by congress" is plainly expressive of the intent of that body. This resolution and the original act are *in pari materia*, and, though enacted at different times, are to be treated prospectively, and construed together, as though they constituted a single act. Suth. St. Const. § 283; Converse v. U. S., 21 How. 463; Railroad Co. v. Barden, 46 Fed. Rep. 602. It is a matter of public notoriety and general history that at the time this resolution was passed the railroad company had not fixed the general or definite route of any portion of its line. It had done nothing. It appears in many of the public documents printed for public distribution by the government that no portion of the general route even was fixed prior to August, 1870. Referring to the amendment to this act made by the act approved July 15, 1870, the supreme court says, in the case of Railroad Co. v. Traill Co., 115 U. S. 600, 6 Sup. Ct. Rep. 201, that the power to amend in that instance was exercised "before the company had built a mile of road, or earned an acre of land, or in any other manner secured an equitable right to the lands." And, although this fact does not appear in the pleadings, we think the court can fairly take judicial notice thereof. Bybee v. Railroad Co., 26 Fed. Rep. 588, 139 U. S. 674, 11 Sup. Ct.

Rep. 641. Under these circumstances the interpretation placed by congress on this resolution in the original act should be adopted and followed by the courts. "If a thing contained in a subsequent statute be within the reason of a former statute, it shall be taken to be within the meaning of that statute; and if it can be gathered from a subsequent statute *in pari materia* what meaning the legislature attached to the words of a former statute, they will amount to a legislative declaration of its meaning, and will govern the construction of the first statute." U. S. v. Freeman, 3 How. 564. "Where it can be gathered from a later act that the legislature attached a certain meaning to an earlier cognate one, this would be taken as a legislative declaration of its meaning there." Endl. Interp. St. § 366. And see Suth. St. Const. § 402; Philadelphia, etc., R. Co. v. Catawissa R. Co., 53 Pa. St. 61; U. S. v. Gilmore, 8 Wall. 330; U. S. v. Alexander, 12 Wall. 180. The indemnity lands are therefore granted equally with the place lands, or lands within the forty-mile limits, by this act. They are of the "amount of twenty sections per mile" granted, and the words, "thereby and hereby is granted," apply to them, and pass the title. The only distinction between the two classes of land is the method by which they are identified. Once identified, the company has the same title to the one as to the other. The indemnity provision does not make an additional grant, but simply points out the method by which lands already granted may be identified. Grants of this nature are not new. By the seventh section of the Nevada enabling act, approved March 21, 1864 (13 St. p. 32), congress provided "that section sixteen and thirty-six in every township, and, where such sections have been sold or otherwise disposed of by any act of congress, other lands, equivalent thereto, in legal subdivisions of not less than one-quarter section, and as contiguous as may be, shall be, and hereby are, granted to said state for support of common schools." The supreme court held that "this was to grant to the state *in præsenti* a quantity of land equal in amount to the sixteenth and thirty-sixth sections, the grant to take effect when the *status* of the lands was fixed by survey and they were capable of identification. Congress, however, reserved, until this was done, the power of disposition,

and if, in the exercise of this power, the whole or any part of a sixteenth or thirty-sixth section had been disposed of, the state was to be compensated by other lands equal in quantity, and as near as may be in quality. * * * Congress said to the people of the territory: 'You shall, if you decide to come into the Union, have for the use of schools a quantity of land equal to two sections in each township, and the identical sections themselves, if on survey no one else has any claim to them.'" Heydenfeldt v. Mining Co., 93 U. S. 634. In Hedrick v. Hughes, 15 Wall. 123, a similar grant received a similar construction. In Minneapolis & St. C. R. Co. v. Duluth & W. R. Co., 47 N. W. Rep. 464, the supreme court of Minnesota held a grant of "an amount of swamp lands equal to ten sections per mile for each mile of said road that may be completed, to be selected within ten miles on each side of said road, and, in case there is not sufficient amount of said swamp lands unsold or unappropriated within each ten-mile section of said road as completed, then said company shall have the privilege of locating the deficiency on any of the swamp lands belonging to or to accrue to the state, not otherwise previously disposed of, within the counties of St. Louis, Lake, and Cook, and no other counties in the state," to be a grant of quantity if that quantity could be obtained within these limits, and to vest title to the lands to be selected outside the ten-mile limits, upon their identification, equally with those within those limits. In Railway Co. v. Brown, 24 Minn. 517, a similar construction was placed upon another grant analogous to that of plaintiff in its provisions.

As we have seen, when the line of the road is definitely located, and a plat thereof filed in the office of the commissioner of the general land office, the grant, previously a float, acquired precision. The sections within the forty-mile or place limits become susceptible of identification. The idemnity limits themselves are defined. The number of acres required to satisfy the grant, and which are to be taken within the indemnity limits, is fixed; and the grant, previously a float, both as to exact quantity and location, becomes a specific quantity to be taken within a defined limit. As said by the supreme court: "When the line was fixed, which we have already said was by the filing of

the plat of definite location in the office of the commissioner of the general land office, then the criterion was established by which the lands to which the road had a right were to be determined. Topographically, this determined which were the ten odd sections on each side of that road where the surveys had been made. This filing of the map of definite location furnished also the means of determining what lands had been previously to that moment sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim had attached; for by examining a plat of this land in the office of the register and receiver, or in the general land office, it could have readily been seen if any of the odd sections within the ten miles of the line had been sold or disposed of, or reserved, or a homestead or pre-emption claim had attached to any of them. In regard to all such sections, they were not granted. The express and unequivocal language of the statute is that the odd sections, not in this condition, are granted." Railroad Co. v. Dunmeyer, 113 U. S. 640, 5 Sup. Ct. Rep. 566. The company, after filing the plat of definite location, has the title to a fixed amount of land, to be selected by it, under the directions of the secretary of the interior, from among the odd numbered sections of unappropriated land within the indemnity limits. To the extent of this quantity the government title to the odd-numbered sections is divested; and, assuming that the government had the right to locate this quantity, and designate the particular parcels to be taken in satisfaction thereof, and the right to say where it should not be taken, with the consequent right to dispose of the surplus before satisfying the grant (an assumption by no means warranted by the language of the act), yet it would be obliged to retain a sufficient quantity of lands to satisfy this grant. U. S. v. McLaughlin, 127 U. S. 428, 8 Sup. Ct. Rep. 1177; Minneapolis & S. C. R. Co. v. Duluth & W. R. Co., 45 Minn. 104, 47 N. W. Rep. 466. The sole purpose of the selection under a grant of quantity is to identify the specific parcels granted, and so attach thereto the vested title. It does not operate to create a new title or interest. It but defines the particular object upon which the previous general gift shall operate; and, if that particular object is ascertained,

or pointed out in any other manner, a selection is unnecessary. Thus, if at the time of the definite location of the line of the road it should appear that there were not more unappropriated lands within the indemnity limits than were sufficient to satisfy the quantity to be taken therefrom, or if at first there were more than sufficient, and the quantity should be subsequently reduced from any cause until the quantity granted equaled the number of acres applicable to the satisfaction thereof, the grant would at once attach to those remaining lands, vesting in the grantee the title thereto without either selection or approval thereof. U. S. v. McLaughlin, 127 U. S. 428, 8 Sup. Ct. Rep. 1177; Minneapolis & S. C. R. Co. v. Duluth & W. R. Co., 45 Minn. 104, 47 N. W. Rep. 466; St. Paul & P. R. Co. v. Northern Pac. R. Co., 139 U. S. 1, 11 Sup. Ct. Rep. 389. When all of the odd-numbered sections are necessary to give the quantity granted, there can, of course, be no selection. There is no choice to be taken from among a number. The indemnity lands would be as fully identified as the place lands. "The title to the alternate sections to be taken within the limit, when all the odd sections are granted, becomes fixed, ascertained, and perfected in each case by this location of the line of railroad." St. Paul & S. C. R. Co. v. Winona & St. P. R. Co., 112 U. S. 726, 5 Sup. Ct. Rep. 334; Wood v. Railroad Co., 104 U. S. 329.

In St. Paul & P. R. Co. v. Northern Pac. R. Co., 139 U. S. 1, 11 Sup. Ct. Rep. 389—an action brought to determine the title to lands within the conflicting limits, both place and indemnity, of congressional grants made to aid in the construction of two roads—it was strenuously urged that there had been no selection shown on the part of the Northern Pacific Company to certain indemnity lands. It was established that there were not, at the time of the definite location of the Northern Pacific Railroad, sufficient lands within the indemnity limits, subject to appropriation for the purpose, to make up for the deficiency within the place limits. Says the court: "As to the objection that no evidence was produced of any selection by the secretary of the interior from the indemnity lands to make up for the deficiency found in the lands within the place limits, it is sufficient to observe that all the lands within the indemnity limits only made up in part for

those deficiencies. There was, therefore, no occasion for the exercise of the judgment of the secretary of the interior in selecting from them, for they were all appropriated." This language is consistent only with the assumption of an existing grant of quantity to be satisfied from the indemnity limits. It is totally inapplicable to a grant of a mere right to initiate a new right or interest in lands by a selection. Of such a right the supreme court has said: "Was there a vested right in the company during all this time to have not only these lands, but all the other odd sections within the twenty-mile limits on each side of the line of this road, awaits its pleasure? Had the settlers in that populous region no right to buy of the government because the company might choose to take them, or might, after all this delay, find out that they were necessary to make up deficiencies in other quarters? How long were such lands to be withheld from market, and withdrawn from taxation, and forbidden to cultivation? It is true that in some cases the statute requires the land department to withdraw the land within these second limits from market, and in others the officers do so voluntarily. This, however, is to give the company reasonable time to ascertain its deficiencies and make its selections. It by no means implies a vested right in said company, inconsistent with the right of the government to sell, or of any other company to select, which has the same right of selection within those limits. Each company, having the right of such selection in such case, and having no other right, is bound to exercise that right with reasonable diligence, and, when exercised in accordance with the statute it becomes entitled to the lands so selected." St. Paul & S. C. R. Co. v. Winona & St. P. R. Co., 112 U. S. 732, 5 Sup. Ct. Rep. 334. Again: "A right to select, then, within certain limits, in case of a deficiency within the ten-mile limit, was alone conferred; not a right to any specific land or lands capable of any identification by any principle of law or rules of measurement. Neither locality nor quantity is given, from which such lands should be ascertained. If, therefore, when such selection was to be made, the land from which the deficiency was to be supplied, had been appropriated by congress for other purposes, the right of selection became a barren right, for until

selection was made the title remained in the government, subject to its disposal at its pleasure." Kansas Pac. R. Co. v. Atchison, T. & S. F. R. Co., 112 U. S. 414, 5 Sup. Ct. Rep. 208. In Railroad Co. v. Price Co., 133 U. S. 496, 10 Sup. Ct. Rep. 341, the court, construing a grant of specific lands, with a right to select indemnity, says of the indemnity lands: "For such lands no title could pass to the company, not only until such selections were made by the agents of the state, appointed by the governor, but until such selections were approved by the secretary of the interior. * * * The government was, indeed, under a promise to give the company indemnity lands in lieu of what might be lost by the causes mentioned. But such promise passed no title, and, until it was executed, created no legal interest which could be enforced by the courts." And to the same effect in the construction of similar grants, see Chicago, M. & St. P. Ry. Co. v. Sioux City & St. P. R. Co. 117 U. S. 406, 6 Sup. Ct. Rep. 790; Barney v. Railroad Co., 117 U. S. 228, 6 Sup. Ct. Rep. 654. The impossibility of reconciling these decisions with the decision in St. Paul & P. R. Co. v. Northern Pac. R. Co., *supra*, except under the theory that the Northern Pacific act vested in the grantee more than a mere right to initiate a title by selection in the indemnity limits, is apparent; and we think the supreme court in that case settled that this act made a grant of quantity. Wherever the area of lands within the indemnity limits subject to the grant exceeds the area of lands granted, the grant remains, within those limits, a float. A selection is necessary to identify the particular lands, and attach thereto the title granted. When the selection and location is made pursuant to the act, of lands subject to selection, the general gift of quantity becomes a gift of the specific lands selected, vesting in the railroad company a perfect and absolute title to the same. Patterson v. Tatum, 3 Sawy. 166; Doll v. Meador, 16 Cal. 320; Minneapolis & St. C. R. Co. v. Duluth & W. R. Co., 45 Minn. 104, 47 N. W. Rep. 464; Railroad Co. v. Wiggs, 43 Fed. Rep. 333; Wardwell v. Paige, 9 Or. 521.

The facts alleged in the complaint sufficiently show—*First*, a deficiency in the amount of lands within what we may call the "place limits" of the grant to which plaintiff was entitled; *sec-*

ond, the existence of the lands at the time of selection, properly subject thereto; *third*, a selection of the lands here involved by the company "under and in accordance with the directions of the secretary of the interior." This phrase appears to us to indicate that the selections were made in the manner required by the regulations promulgated by the secretary in conformity with pre-existing rules. We do not think it imports, as used, an approval of the selection by the secretary. This allegation, objectionable, perhaps, as a conclusion of law, is defined by a statement of the manner of making the selections, thus: "Plaintiff made the selection aforesaid by filing with the register and receiver of the local land office of the district on which said lands were located lists designating the parcels of land so selected, and the tracts within forty miles of the railroad in the territories, and twenty miles therefrom in the states, lost to the company as aforesaid, and in lieu of which the same were selected; and paid to the register and receiver the selection fees required by law. Said lists were allowed and approved by said register and receiver, and said fees were accepted by them, under and in accordance with a circular of instructions to them from the commissioner of the general land office, by direction of the secretary of the interior, by reason of which facts plaintiff claims to have acquired an interest in all of said lands so selected. Said secretary of the interior has, since the selections aforesaid were made, modified and changed the conditions to be performed by the company in completing said selections, and claims the right to require said lists to be modified by said company before he shall finally approve, allow, and adjust said selections; and claims that the railroad company has acquired no legal or equitable title therein." It is said these allegations are insufficient to show a title in plaintiff, in that it is not alleged that the secretary of the interior has approved these selections. We do not think such allegation is necessary. We think the complaint shows a good title in plaintiff to these indemnity lands. We are unable to see in what way this title is dependent upon the secretary's approval of the lists. Certainly the act does not in terms require such approval, nor do we think there is anything in the act from which such a condition precedent to

the vesting of the title in the grantee could be fairly implied. The act in terms provides that for the specified deficiencies "other lands shall be selected by said company in lieu thereof, under the directions of the secretary of the interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond" the forty-mile limit. It has been urged that the phrase, "under the direction of the secretary of the interior," is equivalent to, and is intended to convey the same meaning as "subject to the approval of the secretary of the interior." Such is not the plain and ordinary meaning of the terms used. "Direction," says Mr. Webster, is an "order prescribed, either verbally or written; instructions in what manner to proceed. The employer gives directions to his workmen; the physician to his patient." LORD COLERIDGE, defining the phrase "under the direction of," says: "Work is done by the direction of the board, who were represented by the surveyor. It is to be done in the manner in which they should prescribe, and is therefore done under their direction." Newton v. Ellis, 5 El. & Bl. 124. To make the selections "under the direction of the secretary of the interior" is to make them in accordance with the rules and regulations prescribed by him. The object of this provision is undoubtedly that the interior department and the public may be advised as to what lands are appropriated under the grant, and thereby withdrawn from settlement and entry as a part of the public domain, and that the government may be advised when the quantity grant is satisfied. To secure these purposes and uniformity in the manner of selection, the secretary was authorized to prescribe the procedure to which the company must conform in making the selections. But it is in terms prescribed that the "lands shall be selected by said company." To "select," says Mr. Webster, is "to choose and take from a number; to take by preference from among others; to pick out; to cull." This power of choice is to be from among all the unappropriated odd-numbered sections of land "not more than ten miles beyond" the forty-mile limits. It is to be exercised by "said company." This phrase renders clear the interpretation to be given to the words "under the direction of the secretary of the interior." The clause must be so construed that both these

phrases may stand together, and both be given their full force and meaning. A construction of the phrase "under the direction of the secretary of the interior," which would vest him with power to dispose of the indemnity lands after the right of selection had attached, or vest him with authority arbitrarily to refuse to recognize a selection made by the company in proper manner, upon a proper basis, of lands subject to the right of selection, or by neglect or refusal to approve the selections prevent the title to the indemnity lands from vesting in the grantee, would deprive the company of the right of selection. It would make the words "by said company" surplusage, and deprive them of any effect whatsoever. It is a principle of law that, in the absence of language expressly vesting in the grantee the right to locate a float, the right of location remains in the state. U. S. v. McLaughlin, 127 U. S. 428, 8 Sup. Ct. Rep. 1177. In the Northern Pacific act this right of selection is, in so many words, given to the grantee; and, the intention of congress to alter the ordinary rule being so expressly stated, the statute must receive such a construction as will give that intention effect. This construction is in accordance with the spirit of this act. As we have seen, the intention of congress was to give to the company a certain quantity of lands. Extraordinary care was taken to secure the successful execution of this intention. By the sixth section of the act provision was made for the reservation of the lands from sale, pre-emption, or entry, before or after they were surveyed, immediately upon the fixing of the general route of the road, and long prior to the time when the lands would be defined by filing the plat of definite location. "The object of the law in this particular is plain. It is to preserve the land for the company, to which, in aid of the construction of the road, it is granted." Buttz v. Railroad Co., 119 U. S. 72, 7 Sup. Ct. Rep. 100; St. Paul & P. R. Co. v. Northern Pac. R. Co., 139 U. S. 1, 11 Sup. Ct. Rep. 389. Six years later a second indemnity belt was provided, to be resorted to in certain contingencies, to secure to the company "the amount of lands per mile granted." And it is inconceivable that congress, having taken such extraordinary precaution to secure to the company this quantity of land, yet intended to leave it within

the power of a subordinate official of a co-ordinate branch of the government to defeat this purpose by arbitrarily refusing to sanction with his approval the selections made by the company, or disposing of the lands for other purposes.

The position that approval by the secretary is necessary to the vesting of the title in the grantee undoubtedly has its suggestion in the fact that all preceding railroad grants prescribe such a condition precedent. The indemnity provisions in the grants of Sept. 20, 1850 (9 St. p. 466;) June 10, 1852 (10 St. p. 9;) February 9, 1853 (10 St. p. 156;) June 29, 1854 (10 St. p. 302;) May 15, 1856 (11 St. p. 9;) May 17, 1856 (11 St. p. 15;) June 3, 1856 (11 St. pp. 17–19, 21;) August 11, 1856 (11 St. p. 31;) March 3, 1857 (11 St. p. 195;) May 5, 1864 (13 St. p. 66;) March 3, 1865 (13 St. p. 520;) July 4, 1866 (14 St. p. 83)—are substantially as follows: "But in case it shall appear that the United States have, when the line of said road shall be definitely fixed by the authority aforesaid, sold any section, or any part thereof, granted as aforesaid, or that the right of pre-emption has not attached to the same, then it shall be lawful for any agent or agents, to be appointed by the governor of said state, to select, subject to the approval of the secretary of the interior, from the lands of the United States nearest [or most contiguous] to the tier of sections above specified, so much land in alternate sections or parts of sections as shall be equal to such lands as the United States have sold," etc. In the acts of March 3, 1863 (12 St. p. 772;) May 12, 1864 (13 St. p. 73;) July 1, 1864 (13 St. p. 339;) July 4, 1866 (14 St. p. 87;) July 23, 1866 (14 St. pp. 210, 236;) July 26, 1866 (14 St. p. 87)—the language is: "It shall be the duty of the secretary of the interior to cause to be selected," etc. In the act of March 3, 1865 (13 St. p. 526), it is: "And said lands granted shall be in all cases indicated by the secretary of the interior." In the act of May 5, 1864 (13 St. p. 64) it is: "Then it shall be the duty of the secretary of the interior to select from the lands of the United States," etc. The uniform use of language in these cognate acts plainly requiring the approval of the secretary of the interior before the selections become effective so as to pass the title to the lands, coupled with the failure to use similar appropriate language in the

Northern Pacific act, is very significant, and points to an intention on the part of congress to omit that requirement. "As the same expression is presumed to be used in the same sense throughout an act, or a series of cognate acts, so a difference of language may be *prima facie* regarded as indicative of a different meaning. Indeed, the words of a statute, when unambiguous, are the true guide to the legislative will. That they differ from the words of a prior statute on the same subject is an intimation that they are to have a different, and not the same, constuction." End. Interp. St. § 382. This principle has often been evoked by the courts with decisive effect in statutory construction, and is strictly applicable to such a case as the one before us.

By the act of July 2, 1864, the following things are prescribed as requisite to a selection: *First*, that lands within the forty (or twenty in the states) mile limits of the grant should have been granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of prior to the time the line of the road is definitely fixed, and a plat thereof filed in the office of the commissioner of the general land office; *second*, that the selection must be within ten miles of the place limits of the grant; *third*, they must be of odd sections, or parts of odd sections; *fourth*, they must be non-mineral public lands, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights; *fifth*, they must be made by the company; and, *sixth*, they must be made under the directions of the secretary of the interior. When these conditions are complied with, the land is at once identified, and passes under the grant. This act does not require, and the court cannot import, among the conditions precedent to the acquisition of title to indemnity lands by selection, the further conditions, "subject to the approval of the secretary of the interior." U. S. v. Railroad Co., 98 U. S. 339. The approval of these lists by the secretary would be of great importance to the company. The approved lists, like the patents, would be conclusive evidence that the government, by its authorized agent, had determined that there was a deficiency within the place limits, which the company was entitled to have filled from the indemnity

limits; that the company had selected these lands in the manner prescribed by the secretary, within the indemnity limits; and that they were a portion of the lands subject to selection. So far as the secretary was authorized by law to make this determination, and in the absence of fraud, this determination or certificate by the government that it had satisfied itself upon these points would be conclusive as to these facts upon the government and its privies; but it would not and could not add anything to the title granted to the company by the act itself. The rights of the company depend for their existence upon the act of congress, and the company's compliance with the conditions prescribed. They do not in the slightest degree depend upon the interior department satisfying itself of the existence of the facts showing such compliance, and issuing his certificate therefor, but upon the existence of the facts themselves. As soon as the facts exist, the rights exist. Wright v. Roseberry, 121 U. S. 488, 7 Sup. Ct. Rep. 985; Denny v. Dodson, 32 Fed. Rep. 903; St. Paul & P. R. Co. v. Northern Pac. R. Co., 139 U. S. 6, 11 Sup. Ct. Rep. 389; Doll v. Meador, 16 Cal. 295; Megerle v. Ashe, 33 Cal. 83; Hendrick v. Hughes, 15 Wall. 123; Railroad Co. v. Wiggs, 43 Fed. Rep. 338. In the last case the court had before it the very question presented here, arising as it did, upon one of the few railroad land grants similar in its terms to the Northern Pacific grant. In that case the company selected, as far as it could, without the concurrence of the department, the land in controversy, by presenting a list including the same, prepared in the usual form in use for such selections, to the district land officers, and tendering the necessary fees. The list was presented July 9, 1885, but was rejected because the land had been patented June 12, 1885, to a settler. No question as to there being a deficiency, or that the selection was in proper form, was made. The company filed its bill to have the patent declared null and void as a cloud on its title. The court sustained the action. Judge SAWYER, delivering the opinion, after holding that there was a legislative reservation of the indemnity lands, by reason whereof the patent was void, says: "Although the selection of the lieu lands was to be made under the direction of the secretary of the interior, they were to be 'selected by said com-

pany,' not by him; nor was the selection required to be approved by him, as is required by some other acts; and when there was a deficiency, and the company selected lands open to selection, there was no authority vested in the secretary to arbitrarily refuse to recognize and allow such selection. This would deprive the company of the right of selection expressly given by the statute, and vest it in the secretary, where, as the statute says in express terms, 'other lands shall be selected by said company in lieu thereof.' " The power and duty of the department to examine and pass upon these selections is unquestionable. The duty of issuing patents for indemnity lands properly selected carries with it the additional duty, and consequent power, of determining if they are properly selected; that is, of ascertaining whether there is a proper basis for the selection in the shape of a loss from the place limits; that the selection is of land subject to the right of selection, and is properly made, in compliance with the rules and regulations in force at its date. Where the selections are improperly made, or where the lands are not subject to the right of selection, or where there was no proper foundation therefor, they could properly be rejected and canceled by the department. Such power is necessary to the due administration of the land department. Indeed, if the lands were not subject to the right of selection, or there were no losses, the approval of the selection by the secretary would be ineffectual to pass any title to the company. There is nothing inconsistent in the existence of such authority in the department with the acquisition by the company if an indefeasable title to the lands prior to the approval of such selections, by a selection duly made of lands subject to the right of selection and in lieu of a proper loss. Thus it is the secretary's duty to examine the place lands before patenting the same, to ascertain if they are granted; but such duty on his part does not prevent the title to those of the place lands that fall within the conditions prescribed in the granting act vesting in the grantee immediately upon the fixing of the line of definite location, and long before such duty is performed. Nor will an erroneous decision on his part divest the rights vested by the operations of the act, but the courts will, when the matter is properly brought

to their attention, disregard such erroneous decision, and declare a patent wrongfully issued in accordance therewith void, or, if necessary, at the suit of such grantee, oust from the possession of the land the holders of such patent. Wright v. Roseberry, 121 U. S. 488, 7 Sup. Ct. Rep. 985; Mining Co. v. Campbell, 135 U. S. 286, 10 Sup. Ct. Rep. 765; Morton v. Nebraska, 21 Wall. 660; Francoeur v. Newhouse, 40 Fed. Rep. 620; Railroad Co. v. Cannon, 46 Fed. Rep. 224; Railroad Co. v. Amacker, Id 233; Railroad Co. v. Barden, Id 600. Under the pre-emption law, although the commissioner of the general land office or the secretary of the interior possesses such power of supervision over the district land officers as authorizes the correcting or annulling of entries allowed by them where the lands were not subject to entry, or the parties did not possess the qualifications required, yet, is it held that their power is not unlimited or arbitary? It can only be exercised when the entry was made on false testimony, or without authority of law. It does not prevent a qualified entryman, by a duly made entry of land, open to entry, securing, prior to the approval of such entry by the commissioner or secretary, a vested right therein, and a right to a patent therefor, of which he can no more be deprived by an order of the commissioner or secretary than he can be deprived by such order of any other lawfully acquired property. Cornelius v. Kessell, 128 U. S. 461, 9 Sup. Ct. Rep. 122; Smith v. Ewing, 23 Fed. Rep. 741; Stimson v. Clarke, 45 Fed. Rep. 762. And so, under the homestead law, by an entry properly made, with the district officers, the entryman acquired an interest in the land, indefeasible except by his own default. 17 Op. Attys. Gen. 160; Wilson v. Fine, 40 Fed. Rep. 52. And since it sufficiently appears from the allegations of the bill that the company was entitled to select this area of lands to make up the quantity granted, that the lands selected were of the lands subject to the right of selection, and that the selections were made by the company in the manner prescribed by the secretary, we are of the opinion that it shows the legal title to these specific lands has vested in the plaintiff, notwithstanding the failure of the secretary to approve the selections. The alleged refusal by the secretary to approve these selections

until the selection lists are altered to comply with new regulations, promulgated since the former selection, is without effect so far as the rights of the plaintiff are concerned, and it is wholly unauthorized by law.

It is urged that our conclusions herein are in direct conflict with the conclusions reached by the court in Jackson v. La Moure Co., 1 N. D. 238, 46 N. W. Rep. 449. That decision, however, is not necessarily in conflict with the opinion here expressed. In that case the court says: "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 any part thereof, and that the United States still holds the legal title to the land." Any discussion in that case as to what would be the law if the railroad company had selected the land in question is *dictum*, and is not binding upon the court. It was an opinion delivered upon an hypothetical state of facts not presented to the court, and is not necessary to a decision. The judgment of the district court sustaining the demurrer to the complaint is reversed, this court being of the opinion that the facts alleged and set up in the complaint are sufficient to constitute a cause of action.

CORLISS, C. J. (*dissenting.*) I am unable to agree with the views expressed in the prevailing opinion. The plaintiff invokes the interposition of equity to stay the collection of taxes assessed against its land grant in the county of McLean. It rests its claim for equitable relief upon two grounds: It insists that the land grant was exempt from taxation; it asserts that the tax proceedings were illegal and void. We will discuss these propositions in their order. The contention that the land grant was exempt is based upon the provisions of chapter 99 of the Laws of 1883. This statute, in substance, declares that in lieu of any and all other taxes upon the property of any railroad company there shall be paid a percentage of all the gross earnings of such company "arising from the operation of such railroad as shall be situated within this territory," and that such payment shall be in full of all taxation and assessment upon such property. To plaintiff's claim to exemption founded upon this

statute the defendant presents four answers: *First*, that the statute does not in fact exempt the land grant; *second*, that, if it be susceptible of the construction that it does in terms make such exemption, it is repugnant to the fourteenth amendment to the federal constitution, in that it denies to some citizens the equal protection of the laws of the territory by imposing upon them an increased burden of taxation arising from the exemption of this land grant from taxation; *third*, that it is within the inhibition of § 1925 of the United States Revised Statutes, prohibiting the territory from making any discrimination in taxing different kinds of property, and ordaining that all property subject to taxation shall be taxed in proportion to its value; *fourth*, that so much of the gross earnings law as relates to local earnings on interstate traffic is void, because repugnant to the exclusive grant to congress in the federal constitution of the power to regulate commerce among the several states, in that it taxes a portion of the earnings of such interstate commerce, and that the exemption, resting upon the validity of the entire tax as the consideration for such exemption, falls with the void portion of the tax, and therefore the act in its entire scope, including the exemption feature, is a nullity. The first three of these propositions will not be discussed in this opinion. The conclusion which I have reached as to the fourth answer of the defendant renders an opinion on the other questions unnecessary. The second and third will be sustained, because the federal circuit court has settled them in favor of defendant; and, being federal questions, I deem it our duty to follow that court on such questions.

Is, then, the act of 1883 unconstitutional in part? And, if so, is that part so important—is it of such magnitude—that it cannot be asserted that the legislature would have bargained away the right to tax plaintiff's property in consideration of the portion of the gross earnings tax, which would be constitutional if standing by itself? It seems to be clear, and, indeed, it is undisputed, that, if the act relates solely to gross earnings arising from purely local transportation, it would be constitutional. It would not in any sense interfere with interstate commerce. The plaintiff insists that this is the true construction

of the statute. We can find nothing to support the plaintiff's contention in this regard. The argument advanced is based on a sound principle, but that principle has no application in view of the language of the act and the circumstances surrounding its passage. The principle invoked by the plaintiff in this connection is that every legislature must be presumed to have intended to enact a constitutional law, and therefore, if the language of a statute is susceptible of two interpretations, equally reasonable, one of which will save it from the death-blow of the constitution, such construction must be adopted. This principle would be of controlling weight in this case if it could be seen that there was any room for doubt as to the intent of the legislature—if it could be said with any degree of plausibility that that body intended to tax only local earnings on local traffic. But it is unjustifiable to adjudge that the law-making power has established a rule different from that which it clearly intended to establish, for the sole purpose of sustaining a law in part, which cannot be upheld in its full scope. Such an application of the principle invoked would lead to the substitution by the courts of a deformed, dismembered, and emasculated statute, which the sovereign power would have scorned to enact, in place of a symmetrical and harmonious law. Say the court in French v. Teschemaker, 24 Cal. 554: "If any particular construction has the effect to declare the act, or any part of it, unconstitutional, such construction must be avoided when it can be fairly done, for the legal presumption is that the legislature could not have so intended. This, however, is to be taken with the qualification that, where the language used is unambiguous, and the meaning clear and obvious, an unconstitutional consequence cannot be avoided by forcing upon it a meaning, however plausible it may be, which is, upon a fair test, repugnant to its terms." In Supervisors v. Brogden, 112 U. S. 261, 5 Sup. Ct. Rep. 125, the court said: "But if there were room for two constructions, both equally obvious and reasonable, the court must, in deference to the legislature of the state, assume that it did not overlook the provisions of the constitution, and designed the act of 1871 to take effect. Our duty, therefore, is to adopt that construction which, without doing violence to the

fair meaning of the words used, brings the statute into harmony with the provisions of the constitution." See, also, U. S. v. Reese, 92 U. S. 214. The legislature declared in express terms that the gross earnings to be taxed were all gross earnings of the corporation owning or operating such railroad "arising from the operation of such railroad as shall be situated within the territory." The language is too clear to justify any doubt as to its meaning. The question is whether the gross earnings arose from the operation of the railroad situated within the territory. If so, they are taxed, and "all" such earnings are taxed. On a shipment from Bismarck to St. Paul that portion of the earnings for the transportation from Bismarck to Fargo is as much the result of the operation of the railroad situated within the territory as if the freight had been carried no further than Fargo. The statute includes in express terms all local earnings, whether arising from purely local or from interstate transportation. To give it the meaning contended for by plaintiff, we must interpolate into it a limitation of its broad import by construction. We must say that it relates only to local traffic, when it in terms embraces all traffic, interstate as well as local. While we are loath to declare a law unconstitutional, we are still more loath to set up by a species of judicial legislation a mangled statute in the place of a complete act, simply because the manifest intent of the legislature cannot stand before the supreme law of the land.

In the prevailing opinion, after some preliminary discussions, the conclusion is reached that the gross earnings subject to taxation under the law are "all the gross earnings arising from the operation within this territory of such railroad." I am content to accept this construction for the purpose of the argument, but I am at a loss to understand by what process of reasoning the conclusion is reached on this view of the statute that only local earnings on local traffic are taxed. To demonstrate the unsoundness of this conclusion, let us assume that each of the four states of Washington, Montana, North Dakota, and Minnesota should enact a law taxing all the gross earnings arising from the operation within these states, respectively, of the Northern Pacific Railroad Company. On a shipment from

some point in Washington to some point in Minnesota $1,000 of freight is earned by the company. Under the view adopted in the prevailing opinion, none of these gross earnings—*i. e.*, the $1,000—have arisen from the operation of the railroad within any one of these states. If that opinion embodies a correct interpretation of such a statute, it would be the opinion of the supreme court of each of these states. We would then have the unanimous voice of all these final tribunals declaring that, although this $1,000 had been earned by the operation of the road within these four states, yet in fact none of these earnings arose from the operation of the road within any one of these states. We go further, and say that, even if it could be claimed that the act of 1883 would admit of two constructions equally obvious, still it does not follow that that should not be adopted which would now make the statute unconstitutional, for the reason that when that law was enacted it was the general opinion of the profession and of courts that the federal supreme court had ruled that a tax on the gross receipts of a corporation arising not only from local, but also from interstate, commerce was valid. The supreme courts of Ohio and Missouri had already placed this construction on the federal court decision. We cannot assume that the legislature which passed this law was wiser than courts of eminent standing, which had before and which subsequently held such a law valid; nor that it entertained any other view of the question than that previously expressed by the courts of two of the states, but also by the highest arbiter, the federal supreme court itself; Ohio and Missouri having already declared that the court had so held. The principle underlying the doctrine that the meaning must be chosen which will render the statute constitutional is that the legislature must be deemed to have understood the true scope of the constitution, and therefore that the other construction would render their act void. But this rule can have no application where the profession, the highest courts of states, and, apparently, the highest court of the nation, had agreed at the time the act was passed that, giving it its broadest scope, its obvious meaning, it was nevertheless not condemned by the federal constitution. In short, when the act of 1883 was passed, it was regarded as settled

that the state could tax the local gross earnings of interstate commerce. The legislature so believed, and their language not only indicates that belief, but also that they acted upon it, and gave their enactment the wide scope which contemporary opinion justified as constitutional. It was not until the decision of Fargo v. Michigan, 121 U. S. 230, 7 Sup. Ct. Rep. 857, that it was supposed that a tax on interstate gross earnings was unconstitutional. This case was decided in April, 1887. The case of State Tax on Railway Gross Receipts, 15 Wall. 284, certainly appears to sustain such a tax; and the supreme court of Pennsylvania held that that was the doctrine which that case enunciated, in Steamship Co. v. Com., 104 Pa. St. 109; Car Co. v. Com., 107 Pa. St. 148; and Telegraph Co. v. Com., 110 Pa. St. 405, 20 Atl. Rep. 720. And in the late case of Canal Co. v. Com., 17 Atl. Rep. 175, the same court overruled these decisions, and distinctly states that they were based on the case in 15 Wall. 284, and that they correctly interpreted the scope and effect of that decision, which, however, had been practically overruled by the Fargo Case and the decision in Steamship Co. v. Pennsylvania, 122 U. S. 326, 7 Sup. Ct. Rep. 1118.

In Canal Co. v. Com., 17 Atl. Rep. 175, the supreme court adopted as its opinion the opinion of the trial court. Referring to the two later decisions of the federal supreme court, above cited, the trial court said: "If the cases thus referred to, with others therein quoted, and the language quoted, do not completely overthrow the authority of the State Tax on Railway Gross Receipts, we are at a loss to understand their meaning. Believing that they do, we think it our duty to disregard that decision, and to follow the later cases in holding that a statute which attempts to tax the gross receipts of transportation companies derived, in the language of the act before us, from "tolls and transportation, telegraph business, or express," is not valid, so far as such receipts are derived from commerce between points without the state." There is no doubt that the supreme court of Pennsylvania always has considered, and still does consider, that the case of State Tax on Railway Gross Receipts, 15 Wall. 284, sustained the constitutionality of a tax on the gross earnings of interstate commerce. The Michigan supreme court

placed the same construction on that decision in Fargo v. Auditor General, 57 Mich. 598, 24 N. W. Rep. 538, the case which was reversed in 121 U. S. 230, 7 Sup. Ct. Rep. 857, when the new doctrine was for the first time announced. In answer to the claim that the tax was unconstitutional because it was upon the interstate gross earnings of a corporation, the Michigan supreme court referred to the case of State Tax on Railway Gross Receipts, 15 Wall. 284; and in reply to an attempt to distinguish the case the court in emphatic language declared that that case held that a tax on the receipts of interstate commerce was not repugnant to the federal constitution, saying: "But the point decided was that such a tax was not invalid because in conflict with the power of congress to regulate commerce among the states." The syllabus in the case in 15 Wall. 284, certainly warrants this statement. It is as follows: "A tax levied upon the gross receipts of a railroad company is not in conflict with the constitution of the United States. Such a tax is not a tax upon interstate transportation." In the opinion the court said: "It was claimed in the state court that the act is unconstitutional so far as it taxes that portion of the gross receipts of companies which are derived from transportation from the state to another state, or into the state from another; and, the supreme court of the state having decided adversely to the claim, the case has been brought here for review." The decision of the state court holding the act to be constitutional in its entire scope was affirmed. In Telegraph Co. v. Mayer, 28 Ohio St. 521, the supreme court, in 1876—seven years before the passage of the gross earnings statute in question—held that the case in 15 Wall. 284 had settled the law in favor of the constitutionality of such a tax; the court deciding on the basis of that case that a tax on the gross receipts of telegraph companies was valid, although the gross receipts "arose chiefly from messages pertaining to such commerce, or from messages originating or terminating outside of the state, or were earned on the lines of such companies outside of the state." The same decision was made, and the same construction was placed upon 15 Wall. 284, in the case of Express Co. v. St. Joseph, 66 Mo. 675. This case was decided in 1877—six years before the gross earnings law of

1883 was passed in this territory. The court said: "But it is said, as the business of plaintiff consisted in receiving packages to be transported from St. Joseph to other points outside of the state, to which plaintiff's line did not extend, the tax upon the gross receipts of the plaintiff was violative of that provision of the constitution of the United States confiding to congress alone the power to regulate commerce with foreign nations and among the several states. In the case of Railroad Co. v. Pennsylvania, 15 Wall. 284, it was expressly held that a statute of a state imposing a tax upon the gross receipts of railroad companies is not repugnant to the constitution, though the gross receipts are made up in part from freights received for transportation from that state to another state; that such a tax is neither a regulation of interstate commerce nor a tax on imports nor upon interstate transportation." At the time the act of 1883 was passed there was no adjudication that a tax on gross earnings arising from interstate commerce was a regulation of commerce. There was apparently, and, in the opinion of this and other courts, actually, a decision to the contrary in the federal supreme court and in Ohio and Missouri, and it was the accepted doctrine that such legislation was valid. We agree with counsel for the plaintiff that the legislature must, if possible, be deemed to have intended to enact such a law as would be constitutional. But such a statute as we construe this to be would have been constitutional had not decisions—one of them in the federal supreme court—in force when it was enacted, been subsequently overruled. Not feeling justified in attributing to that body superhuman prescience, I must hold that they believed they had the power to tax the local gross earnings of interstate commerce, and therefore meant to tax them, having so declared in unmistakable terms. The territorial supreme court, in Railroad Co. v. Raymond, 5 Dak. 356, 40 N. W. Rep. 538, practically held that the act of 1883 related to local earnings on interstate as well as on local transportation. It is plain that the court in that case did not deem it possible to put such a construction on the statute as would limit its provisions to a tax on local traffic. This view of the meaning of the law would have obviated the necessity of

passing upon the constitutionality of any part of the act, for it would, under that interpretation, have related solely to a tax on local earnings, conceded to be valid by all the cases, and so held in this very decision. That such a tax is valid, see Sands v. Improvement Co., 123 U. S. 295, 8 Sup. Ct. Rep. 113; State Freight Tax, 15 Wall. 232; Fargo v. State, 121 U. S. 230, 7 Sup. Ct. Rep. 857; Ratterman v. Telegraph Co., 127 U. S. 411, 8 Sup. Ct. Rep. 1127. Courts are loath to hold any portion of an act unconstitutional, and the supreme court in that case would never have adjudged the unconstitutionality of that part of the statute which referred to interstate earnings could it possibly have held that such earnings were not within the purview of the law. Say the court on this point: "It is clear at the outset, and conceded by the attorney general for the appellant, that so much of the act * * * as provides for a tax, or the payment of a percentage in lieu thereof, upon the gross earnings of a railroad company operating in this territory, received for business—the transportation of passengers and property not local, that is, not originating and ending wholly within this territory, but interstate, and therefore coming under the head of interstate commerce—is unconstitutional and void." The attorney general of the territory also construed the statute to refer to interstate gross earnings. In fact, all the officers of the territory charged with the enforcement of this law have adopted the same interpretation, and that construction was acquiesced in by the plaintiff and all other railroad corporations until the decision in the Fargo Case, when the plaintiff insisted, not that the act did not in terms relate to interstate earnings, but that, in so far as it did embrace such earnings, it was, in the light of the ruling in the Fargo Case, unconstitutional and void. The promptness with which the plaintiff seized upon this ground to resist the payment of the tax on interstate earnings furnished strong evidence that it did not consider that the other ground, now for the first time urged, existed.

A construction placed upon a statute by those intrusted with the enforcement of it is strong evidence of its meaning, especially where, as in this case, that construction has been adopted by parties interested, when the contrary interpretation

would have saved them the payment of thousands of dollars of taxes annually. Said the court in U. S. v. Johnson, 124 U. S. 236, 8 Sup. Ct. Rep. 446: "In view of the foregoing facts, the case comes fairly within the rule announced by this court that the contemporaneous construction of a statute by those charged with its execution, especially when it has long prevailed, is entitled to great weight, and should not be disregarded or overturned except for cogent reasons, and unless it be clear that such construction is erroneous." While the construction of this statute had not prevailed for a very long time, it was sustained by the voluntary concurrence of all the corporations interested in defeating such interpretation. In U. S. v. Philbrick, 120 U. S. 52, 7 Sup. Ct. Rep. 413, the court, in stating the rule, eliminated the element of time, saying: "A contemporaneous construction by the officers upon whom was imposed the duty of executing those statutes, is entitled to great weight, and, since it is not clear that that construction was erroneous, it ought not now to be overturned." To same effect, Hahn v. U. S., 107 U. S. 402, 2 Sup. Ct. Rep. 494; U. S. v. Pugh, 99 U. S. 265; Brown v. U. S., 113 U. S. 568, 5 Sup. Ct. Rep. 648, and cases cited. Our statute embodies this principle: "Contemporaneous construction is, in general, the best." § 4722, Comp. Laws. The act of 1889 (chapter 107) is a legislative construction of the act of 1883. Among other provisions, not important to be considered, it declares that "any company which has not complied with the provisions of chapter 99 of the Session Laws of 1883 by paying all taxes claimed on gross earnings, both territorial and interstate," etc. Said the court in U. S. v. Freeman, 3 How. 556: "And if it can be gathered from a subsequent statute *in pari materia* what meaning the legislature attached to the words of a former statute they will amount to a legislative declaration of its meaning, and will govern the construction of the first statute." The soundness of this doctrine is expressly recognized in the prevailing opinion in this case in connection with the construction of the act of congress containing the land grant to the appellant, and it is applied in the case where the subsequent legislative construction of a prior act is much less emphatic and unmistakable than is the interpretation placed upon the gross

earnings law of 1883 by the gross earnings law of 1889. This later act expressly declares that a failure to pay a tax on the gross earnings, both territorial and interstate, is a failure to comply with the terms of the act of 1883. I can see no justification for a distinction which applies this rule of construction when the subsequent act throws but a faint light upon the meaning of the former statute, and utterly ignores this rule of construction in the same opinion with respect to a case where the legislative interpretation is full and explicit. Such interpretation, however, could not prevail against prior judicial construction of the clear meaning of the law. The language of the Michigan act, held unconstitutional in the Fargo Case, was quite similar to the act of 1883, in so far as the question as to what gross earnings were to be taxed is concerned. It provided for the payment by persons or corporations running railroad cars within the state of a fixed tax by a percentage on the "gross amount of their receipts for freight earned within the limits of the state." Yet in both the state and the federal supreme court it was undisputed that local earnings on interstate traffic were within the language of the act, these tribunals differing only as to the power to tax such earnings.

The next question is whether the portion of the act of 1883 exempting plaintiff's land grant (assuming that it does in fact exempt such property) falls within the unconstitutional part of the statute. On such a question authorities are unnecessary. The case is so plain that no case should be followed which would sustain the exemption under such circumstances. It was given for a consideration, six-sevenths of which has failed. In the Raymond Case it appeared that the tax derived from the percentage on earnings of local commerce was about one-seventh that which would be received from a percentage on the earnings of both local and interstate transportation. Nor do we need to test this question by what transpired subsequently to the enactment of the law. The Raymond Case is only an illustration of what every one, including the members of the legislature, knew when the act of 1883 was passed. It was known that the internal commerce of the territory was insignificant, as compared with its interstate commerce. The people were chiefly

engaged in agriculture. The larger proportion of such products must pass beyond the bounds of the territory to find a market. The purely internal shipments would be trifling in amount. But few of the other necessaries, and absolutely none of the luxuries, came from within our borders. Nor must we ignore the fact that the plaintiff's road was known to be one of the great arteries of the nation's business life, through which flowed and was destined to flow a current of strength and volume, not only of the nation's commerce within itself, but of the nation's commerce with foreign lands. With these facts before them, the legislature have declared their intention to tax the local gross earnings not only of local traffic, but also of transportation from points without to points within, from points within to points without, and wholly across the territory from and to points without; and that for such tax they granted the exemption. Shall we hold that they granted it for less, nay, for a pittance, in comparison with the tax they designated as the price? "If the parts of a statute are so mutually connected with and dependent upon each other as conditions, considerations, or compensations for each other as to warrant the belief that the legislature intended them as a whole, and that, if all could not be carried into effect, the legislature would not have passed the residue independently, then, if some parts are unconstitutional, all the provisions which are thus dependent, conditional, or connected must fall with them." Cooley, Const. Lim. (5th Ed.) 213, 214, and cases cited; Meyer v. Berlandi, 39 Minn. 438, 40 N. W. Rep. 513; O'Brien v. Kreuz, 36 Minn. 136, 30 N. W. Rep. 458; Allen v. City of Louisiana, 103 U. S. 80; State v. Denny, 118 Ind. 449, 21 N. E. Rep. 274; Utsy v. Hiott, 30 S. C. 360, 9 S. E. Rep. 338; State v. Harris, 19 Nev. 222, 8 Pac. Rep. 462. In Lathrop v. Mills, 19 Cal. 530, the court said: "In order to sustain the excepted clause, we must intend that the legislature, knowing that the other provisions of the statute would fall, still willed that this particular section would stand as the law of the land." See, also, Baldwin v. Franks, 120 U. S. 678, 7 Sup. Ct. Rep. 656, 763. I therefore hold that the gross earnings law of 1883 is void in its entire scope for the reasons already stated.

I deem it my duty to hold that this law is in conflict also with § 1925 of the organic act of the territory of Dakota, and with the fourteenth amendment of the federal constitution. Such has been the ruling of the federal circuit court sitting in the district of North Dakota in the case of Railroad Co. v. Walker, 47 Fed. Rep. 681. This decision holds that the gross earnings law of 1889 is repugnant to this section of the organic act and to the fourteenth amendment. The act of 1889 and the act of 1883 are, so far as these questions are concerned, identical in their provisions. The decision applies with full force to the act of 1883, and, following this decision, as it is my duty to do under our dual system of government, I am constrained to hold this statute is void because the organic act and the fourteenth amendment are both violated by it. Said Judge CALDWELL in that case: "Property of the same kind, in the same condition, and used for the same purpose, must be taxed by a uniform rule, without regard to its ownership. The legislature having selected land as a subject of taxation, all lands under the same condition are subject to be taxed. The law for the taxation of land must operate equally and uniformly upon all lands the condition and use of which are similar. While property may be classified for the purpose of taxation, between the subjects of taxation in the same class there must be equality. Property of the same kind, in the same condition, and used for the same purpose, cannot be divided into different classes for purposes of taxation, and taxed by a different rule, because it belongs to different owners. But this is precisely what the act under consideration seeks to do. It exempts the lands of the company from taxation simply and solely because they belong to the company, and taxes all other lands, by a uniform rule, according to their value. It was not competent for the legislature, either under the organic act or the fourteenth amendment of the constitution of the United States, to classify the lands in the territory for purposes of taxation into lands owned by railroad companies and lands owned by all other persons, and declare that the former should not and the latter should be taxed." While I am willing to admit that much can be said on the other side of these two questions, and that their solution is not free

from difficulty, I am not willing to admit that we have any right to refuse to follow the construction of an act of congress, *i. e.*, § 1925 of the organic act of the territory of Dakota, and of the fourteenth amendment to the federal constitution, by the federal circuit court. On the contrary, our duty is clear in such a case, under all the adjudications, to follow where the federal court leads. Judicial courtesy, the prevention of unseemly conflict, the undoubted right of every sovereign to have its adjudications construing its own laws and constitution respected by the courts of every other sovereign, all call loudly for the strict enforcement of the rule which is ignored in this case. The federal supreme court never refuses to adopt the interpretation of a state statute or constitution by the state court; and much stronger is the reason why we should follow the construction by the federal court of a federal statute and of a clause of the federal constitution, because the constitution and laws of the United States are the supreme law of the land, and ultimately the state court can always, by judgment of the federal supreme court on writ of error, be compelled to accept such construction. There is no power which can coerce the federal courts, and compel an observance by them of the state court's construction of a state law, statutory or fundamental. While I do not deem it proper, in view of the decision in Railroad Co. v. Walker, to discuss the question whether the organic act is contravened by the exemption contained in the gross earnings law of 1883, there is one feature of the prevailing opinion that seems to me so utterly anomalous and unsound that I cannot suffer it to pass without comment. The position seems to be thus taken that whether this act violates the rule of uniformity in taxation prescribed by congress is not very important, because congress itself, by not disapproving of the act, has in effect ratified it, and it stands as though congress had in fact enacted it. The language of the opinion is: "By the organic act congress delegated this power [the taxing power] to the territorial legislature. The latter body exercised the power by passing the gross earnings law of 1883; and, as congress has never annulled or repealed the law, it has the same effect as a similar act of congress itself. It must be considered as, and is,

an act of congress, and must be given the same force and effect as though duly enacted by that body." The scope of this reasoning is that it is idle for congress, in delegating the taxing power to a territorial legislature, to set limitation to that power, as was done by the provisions of § 1925, because in every case congress must annul an act which sets at defiance this limitation prescribed by congress, or be regarded as ratifying the illegal act by its silence; nay, worse, its silence makes the act which it has already emphatically asserted should not be passed by the territorial legislature an act of congress itself. Having power to set bounds to the authority it delegates, and having unmistakably erected a barrier beyond which the body exercising such delegated authority may not pass, the prevailing opinion asserts the doctrine that nevertheless congress must pursue every usurpation of power by the territorial legislature in defiance of this limitation, and expressly annul such void act, or be deemed to have assented to it. Under such a view, I am at a loss to understand for what purpose the limitation upon the taxing power of the territorial legislature was enacted. The silence of congress, it is said, annuls it; and without it, it is clear that that body could have arbitrarily destroyed the gross earnings law, or any other law the territorial legislature might have passed. The case of Railroad Co. v. Le Sueur (Ariz.) 19 Pac. Rep. 157, is cited to sustain this view of the prevailing opinion. A most casual reading of the opinion discloses the fact that the case stands upon an express statute relating to the territory of Arizona and other territories, providing that "all laws passed by the legislative assembly shall be submitted to congress, and, if disapproved, shall be null, and of no effect." This provision did not apply to the territory of Dakota, but that territory, with others, was expressly excepted from the statute. Rev. St. U. S. § 1850. The opinion of Judge BARTHOLOMEW in the case of Trust Co. v. Whithed, *ante*, is extensively quoted from in the prevailing opinion in this case as being peculiarly pertinent to the question of the power of the legislature to classify as the territorial legislature classified the appellant's land grant by exempting it from taxation. I do not regard this

opinion (in which I concurred) as containing anything which sustains the appellant's contention in this behalf.

Are, then, the averments as to the defects in the tax proceedings such as to warrant the equitable relief sought? We will discuss the question first on the authorities, and then refer to our statute, which had wrought a change in the mode in which the taxpayer is required to do justice. The first irregularity set forth in the complaint is the ommission of the assessor to take and subscribe the statutory oath, and attach the same to the assessment roll. This defect is, however, conceded by the plaintiff and appellant to be insufficient to warrant the maintenance of this action without payment or tender of the tax, or an offer to pay it, set forth in the complaint, in the absence of statutory regulation. No such allegation is made, and therefore, under the authorities, this irregularity must be disregarded in determining whether the plaintiff has any right to be heard in equity, leaving our statute out of consideration for the present. Boeck v. Merriam, 10 Neb. 199, 4 N. W. Rep. 962; Hunt v. Esterday, 10 Neb. 165, 4 N. W. Rep. 952; Wood v. Helmer, 10 Neb. 65, 4 N. W. Rep. 968; Fifield v. Marinet Co., 62 Wis. 532, 22 N. W. Rep. 705; Railroad Co. v. Lincoln Co., 67 Wis. 478, 30 N. W. Rep. 619; Land Co. v. City of Crete, 11 Neb. 344, 7 N. W. Rep. 859; Stell v. Watson (Ark.) 11 S. W. Rep. 822.

The next irregularity pleaded as a ground for equitable relief without payment, tender, or offer to pay is the failure of the county clerk to "make out a tax list containing the description of the lands, * * * with a valuation of each or any of the tracts specified thereon, and the several species of taxes and the total taxes against the said tracts carried out in separate columns opposite each tract, and as nearly as practicable in the form set forth in § 37 and § 39 of chapter 28 of the Political Code of this territory." There is also an allegation in the same language relating to the duplicate list required by law to be furnished the county treasurer by the county clerk. These two defects will be discussed together. These allegations might be strictly true, and yet the defect in the list and in the duplicate list might be in some trifling matter of form which could not possibly affect the tax either in law or in equity. The sufficiency

of the pleadings, having been challenged by demurrer, is to be construed most strongly against the pleader, who, having the selection of the language in which to set forth his facts, can and should plead specifically all the particulars wherein there was a violation of the statute. Equity is loath to restrain tax proceedings, and, if a litigant insist that he has a right to relief without making payment or tender, he must point out the illegality of the tax with the utmost particularity. The speedy and unhampered collection of taxes is of great importance to the life of every government. Public policy, therefore, demands in this class of cases the rigid enforcement of the rule that the suitor must state the facts entitling him to relief clearly and explicitly. These allegations in this case are similar, so far as principle is concerned, to that which was condemned in Southard v. Dorrington, 10 Neb. 119, 4 N. W. Rep. 935, and Dillon v. Merriam, 22 Neb. 151, 34 N. W. Rep. 344. But assume that in neither the original nor the duplicate list was any value of plaintiff's property set down, would that warrant a court of equity in restraining the tax without payment or tender? The ground-work of the tax is not wanting. There is no claim that the levy was illegal, or that the assessment was not properly made. With these *data* lawfully and justly established, the amount of the plaintiff's taxes is a mere matter of calculation. Equity, regarding substance, and not form, seizes upon these two facts, and declares the amount of plaintiff's taxes then settled without further proceedings, basing its decision upon the maxim, *id certum est quod certum reddi potest.* A fixed value and a fixed rate lead inevitably to a fixed tax. Value and rate being justly and lawfully settled, all possibility of injustice to the taxpayer from disregard of statutory requirements vanishes. Nothing subsequent can lessen or enhance the amount of his contribution to the public funds. Under such circumstances, for equity to restrain the collection of the tax would be to aid the taxpayer in escaping a just obligation because of irregularities which could not possibly work him any injury, and which in no manner affected his duty to pay what equity regards as established by the assessment and levy, because it can be made certain by mere calculation. The principle underlying

numerous authorities justifies this view. Frost v. Flick, 1 Dak. 131, 46 N. W. Rep. 508; Moore v. Wayman, 107 Ill. 192; Hagaman v. Commissioners, 19 Kan. 394; Knox v. Dunn, 22 Kan. 683; Albany, etc., v. Auditor, 37 Mich. 391; Iowa Railroad Land Co. v. Sac Co., 39 Iowa, 124-128; Iowa Railroad Land Co. v. Carroll Co., Id 151-154; Challis v. Atchison Co., 15 Kan. 49; City of Lawrence v. Killam, 11 Kan. 499; Railroad Co. v. Tontz, 29 Kan. 460; DuPage Co. v. Jenks, 65 Ill. 275; Nunda v. Chrystal Lake, 79 Ill. 311-314; Trust Co. v. Weber, 96 Ill. 346-357; Parks v. Watson, 20 Fed. Rep. 764.

The other two allegations—that the county commissioners did not attach to the original and duplicate lists their warrants requiring the treasurer to collect the taxes, and that the county treasurer had not given the proper notice to acquire jurisdiction to sell the property for such taxes—are, under all the authorities, insufficient to warrant a restraint of the tax proceedings without payment or tender of the tax. A cloud on the title from illegal tax proceedings will ordinarily warrant a resort to equity to remove it. But a dominant principle of equity intervenes, and requires equity to be done by the taxpayer before he can secure the relief sought. He must, when the tax is valid in equity, pay or tender the tax as a condition precedent to his right of action. In all such cases our statute has substituted a judgment for such taxes in the action in place of tender or payment. It is thus equity is to be done by the taxpayer. The statute provides that the court shall in such cases render judgment for the tax. It treats the judgment for the tax as a substitute for the tax itself. The tax proceedings, being such as to cast or threaten to cast a cloud on the title, must be set aside, but the tax itself, with its penalties and interest, must be embodied in a judgment, on which execution shall issue as soon as the tax is delinquent. The penalties and interest which must be embodied in the judgment when rendered after the tax has become delinquent are those prescribed by law in cases of delinquency. § 1643, Comp. Laws; Farrington v. Investment Co., 1 N. B. 102.

The argument that the county has estopped itself from claiming the tax upon these lands because of having received its

share of the gross earnings tax paid by plaintiff, in lieu of all taxes upon the plaintiff's property, is utterly without foundation in principle. In the first place, there is wanting a vital element of estoppel. The payment by the plaintiff of the gross earnings was not induced by any word or act of the county from which the plaintiff would or did infer that the county, when it ultimately obtained its portion of the tax, would release the plaintiff from the payment of taxes due upon its lands. The receipt by the county of the money in lieu of all other taxes was necessarily after the plaintiff had paid the gross earnings tax to the territory, and this is what the complaint alleges. The plaintiff did not rely on anything said or done by the county when it paid the tax. It relied on its construction of the constitutionality and scope of the law. Moreover, it was not in the power of all the officers combined to estop the county by acts beyond their power. This is elementary law. The power of attorney of all such officers is in the statute. No person can rightfully rely on any assumption of power not found there. There is no estoppel because he knows that the claim of the right to exercise a power not conferred is without foundation. The county did not even agree with the plaintiff to accept its share of the gross earnings tax in lieu of all other taxes. But suppose the complaint had averred that the county had so agreed, what force could such an agreement have? None whatever. The county could act—could bind itself—only through officers of the county. All such officers together could not make such an agreement obligatory upon the county. There is no warrant for the exercise of such an extraordinary power found in the statute in express terms. Nor can such an authority be inferred. Every taxpayer has a direct interest in the payment by every other taxpayer of the county of his share of the taxes collected in and by the county. Every piece of property exempted from taxation increases the burden of all other property in the county. If the county officers can bind the taxpayers by agreeing to accept one dollar in lieu of a legal tax of $100, they can bind such taxpayers by a compact to virtually exempt certain property by a release of every thousand dollars of tax for a cent. Now, expand the exercise of this power until it sweeps over nearly all the

taxable property in the county, leaving only a trifling balance to bear the entire burden of taxation, and we would have presented the spectacle of local and inferior officers vested with particular powers, and exercising specific duties, in effect authorized to confiscate the entire property of the few for the benefit of the many, because this power to indirectly exempt can be so exercised as to throw upon the remaining property a tax equal to its entire value. A position which leads to a conclusion so revolting to reason and justice needs no further attack.

But it is said that by the payment of this tax, and by the receipt by the county of its share, the plaintiff has done equity. The position is untenable, for the reason that it does not appear from the complaint that the plaintiff has paid the tax in controversy, or that the county has received a sum equivalent to that tax by the receipt of its share of the gross earnings tax. Further, if the gross earnings law did not in terms exempt these lands, then the plaintiff has paid no part of the tax upon such lands. But we do not decide that question, for the reason already stated. The burden is on the plaintiff to show that it has done or offers to do not only partial, but full and unstinted equity. Until it avers the payment or tender of the tax in question, or of a sum equal to such tax, equity will lend it no aid, although it should be satisfied that a portion of such tax had, in effect, been received by the county. This reasoning, of course, ignores the statute which has substituted the tax judgment for payment or tender. But the principle is important, for where equity required payment or tender the statute provides for a judgment. 1 N. D. 102. The dissent of Justice WALLIN in that case was not upon this question.

The complaint avers the non-payment by the plaintiff of the cost of surveying, selecting and conveying the plaintiff's land grant within the territory of Dakota. Under the decision in Railroad Co. v. Traill Co., 115 U. S. 600, 6 Sup. Ct. Rep. 201, the lands would not have been taxable because of the lien of the government thereon for such unpaid expenses had congress not taken from plaintiff and other like companies the power to interpose its own dereliction of duty as a barrier against taxation. That act was approved July 10, 1886—a year before the

initiation of these tax proceedings—and provides "that no lands granted to any railroad by an act of congress shall be exempt from taxation by states, territories, and municipal corporations on account of the lien of the United States upon the same for the cost of the surveying, selecting, and conveying the same, or because no patent has been issued therefor; but this provision shall not apply to lands unsurveyed." In justice to the plaintiff's counsel it is proper to add that it is conceded that the failure to pay the costs of survey is of no moment in this controversy, in view of this statute. It appearing that the tax proceedings were so irregular that they would, when they should culminate in a tax deed, cast a cloud upon the plaintiff's title, the plaintiff had a right to maintain this action, in view of the statute and the interpretation placed upon it by this court in Farrington v. Investment Co., 1 N. D. 102; but judgment should have been rendered against the plaintiff and in favor of the defendant, as treasurer, for the amount of the taxes, penalties, and interest, as held by this court in the Farrington Case. The judgment of the district court should therefore be reversed, and that court directed to ascertain the amount of the taxes, with penalties, and interest from date of delinquency, as prescribed by law in cases of delinquency, and render judgment against plaintiff and in favor of defendant, as treasurer, for such amount, and also render judgment for plaintiff annulling the tax proceedings set forth in the complaint.

BARTHOLOMEW and WALLIN, JJ., having been of counsel, did not sit on the hearing of the above case, nor take any part in the decision; Judge WINCHESTER, of the sixth judicial district, and Judge MCCONNELL, of the third judicial district, sitting in their places by request.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff and Appellant, *v.* JERRY A. BARNES, Defendant and Respondent.

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

W. F. Ball and *John S. Watson*, for appellant. *N. F. Boucher*, *Louis Hanitch*, and *R. H. Copeland*, for respondent.

(Opinion filed Jan. 12, 1892.)

The opinion of the court was delivered by

WINCHESTER, J. Following the case of Railroad Co. v. Barnes, *ante* (decided at this term), the judgment of the district court is reversed.

MCCONNELL, J., concurs. CORLISS, C. J., dissents.

BARTHOLOMEW and WALLIN, JJ., having been of counsel, did not sit on the hearing of the above-entitled action, nor take any part in the opinion; Judge WINCHESTER, of the sixth judicial district, and Judge MCCONNELL, of the third judicial district, sitting by request in their places.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff and Appellant, *v.* EDSON D. STRONG, County Treasurer of Foster County, Defendant and Respondent.

APPEAL from district court, Foster county; Hon. RODERICK Rose, Judge.

W. F. Ball and *John S. Watson*, for appellant. *E. W. Camp*, for respondent.

(Opinion filed Jan. 12, 1892. Rehearing denied March 24, 1892.)

The opinion of the court was delivered by

WINCHESTER, J. Following the case of Railroad Co. v. Barnes, *ante* (decided at this term), the judgment of the district court is reversed.

MCCONNELL, J., concurs. CORLISS, C. J., dissents.

BARTHOLOMEW and WALLIN, JJ., having been of counsel, did not sit on the hearing of the above-entitled action, nor take any part in the opinion; Judge WINCHESTER, of the sixth judicial district, and Judge MCCONNELL, of the third judicial district, sitting by request in their places.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff and Appellant, *v.* WILLIAM E. BREWER, County Treasurer of La Moure County, Defendant and Respondent.

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

W. F. Ball and *John S. Watson*, for appellant. *L. C. Harris*, for respondent.

(Opinion filed Jan. 12, 1892. Rehearing denied March 24, 1892.)

The opinion of the court was delivered by

WINCHESTER, J. Following the case of Railroad Co. v. Barnes, *ante* (decided at this term,) the judgment of the district court is reversed.

MCCONNELL, J., concurs. CORLISS, C. J., dissents.

BARTHOLOMEW and WALLIN, JJ., having been of counsel, did not sit on the hearing of the above-entitled action, nor take any part in the opinion; Judge WINCHESTER, of the sixth judicial district, and Judge MCCONNELL, of the third judicial district, sitting by request in their places.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff and Appellant, *v.* DANIEL P. TRESSLER, County Treasurer of Mercer County, Defendant and Respondent.

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

W. F. Ball and *John S. Watson*, for appellant. *E. C. Rice*, for respondent.

(Opinion filed Jan. 12, 1892. Rehearing denied, March 24, 1892.)

The opinion of the court was delivered by

WINCHESTER, J. Following the case of Railroad Co. v. Barnes, *ante* (decided at this term), the judgment of the district court is reversed and a new trial ordered.

MCCONNELL, J., concurs. CORLISS, C. J., dissents.

BARTHOLOMEW and WALLIN, JJ., having been of counsel, did not sit on the hearing of the above-entitled action, nor take any part in the opinion; Judge WINCHESTER, of the sixth judicial district, and Judge MCCONNELL, of the third judicial district, sitting by request in their places.

JOSEPH CLEARY, Plaintiff and Appellant, *v.* THE COUNTY OF EDDY, Defendant and Respondent.

Public Officers—Office Rental—Liability of County.

A public official cannot, on refusal of the board of county commissioners to provide office room for him, rent an office and bind the county for the rent; nor is the county liable to him for the rent he pays. His remedy is to compel by *mandamus* the board to furnish him with an office.

(Opinion filed Feb. 9, 1892.)

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

Joseph Cleary (*Fredrus Baldwin*, of counsel), for appellant. *Edgar W. Camp* and *J. F. Keime*, for respondent.

Proceeding by Joseph Cleary against the county of Eddy to recover for his office rent and for fuel consumed by him while officer of defendant. Judgment for defendant. Plaintiff appeals. Affirmed.

Joseph Cleary and Fredrus Baldwin, for appellant:

The action was properly commenced. Townsley v. County of Ozaukee, 18 N. W. Rep. 840; Waldo v. Manitowoc County, 11 N. W. Rep. 252; Compiled Laws, §§ 610–614. Under a statute where it is not made the duty of a county to provide an office, the court has compelled the county to pay for the same. McCalmont v. County of Alleghany, 29 Pa. St. 417. See also, Iowa City v. Foster, 10 Iowa 192.

Edgar W. Camp, for respondent:

Unless given by statute no action lies against a county for failure to perform a public duty. Dosdall v. Commisioners, 14 N. W. Rep. 458; Eastman v. Meredith, 72 Amer. Dec. 302; Pruden v. Grant County, 7 Pac. Rep. 308. The plaintiff's remedy was by *mandamus*. McLeod v. Scott, 26 Pac. Rep. 1061; People v. Supervisors, 25 Amer. Rep. 461; Bishop v. Oakland, 58 Cal. 574. The New York doctrine is that where the duty relied upon is a duty, not of the county, but of the board of supervisors, no action will lie against the county. Bright v. Supervisors, 18 Johns. 243; Boyce v. Supervisors, 20 Barb. 295; Chace v. County, 23 Barb. 603; Hall v. Supervisors, 32 N. Y. 473.

J. F. Keime, for respondent:

When a statute gives a new right and with that right gives a remedy for its enforcement, that remedy is exclusive. Inman v. Tripp, 17 Am. Law Reg., § 143; Bassett v. Carleton, 54 Amer. Dec. 605; Taylor v. Railroad Co., 55 Amer. Dec. 185; Dudley v. Mayhew, 3 N. Y. 9.

The opinion of the court was delivered by

CORLISS, C. J. This controversy reached the district court for trial by an appeal from the decision of the board of county commissioners of Eddy county rejecting the plaintiff's claim.

This appeal was taken and heard pursuant to the provisions of §§ 610-614 of the Compiled Laws. The issues were tried before the court without a jury, and the only question to be here considered is whether the findings of fact sustain the conclusions of law. The trial court affirmed the action of the county board in rejecting the claim. The court found that between the 5th of August, 1885, and the 25th of April, 1891, the plaintiff held successively the offices of probate judge, of clerk of court, and of district and state's attorney; that during all of this time, with the exceptions of two months, he furnished his own office and fuel; that at divers times he demanded of the board of county commissioners of such county that they furnish him with an office room for his use as a public officer, and that such demand was at all times refused, except during two months, as hereinbefore stated; and that the office so furnished by the plaintiff for his own use as a public officer was furnished by him without the request or direction of the board of county commissioners. The claim presented was for the value of the use of the office, the same being owned by the plaintiff; and also for the value of the fuel used by him in connection with such office. We are clear that the trial court was right in affirming the action of the board. The plaintiff had no contract with the county, or with anyone authorized to represent the county in the matter. He bases his claim entirely on § 606 of the Compiled Laws, which provides: "In any county where there is no court house or jail erected by the county, or where those erected have not sufficient capacity, it shall be the duty of the board of county commissioners to provide for court room, jail, and offices for the following officers: Sheriff, treasurer, register of deeds, district attorney, auditor, clerk of the district court, superintendent of public schools, and judge of probate; to be furnished by such county in a suitable building or buildings, for the lowest rent to be obtained, at the county seat, or to secure and occupy suitable rooms at a free rent within the limits of the county seat, or any of the additions thereto, until such county builds a court house. They shall also provide the courts appointed to be held therein with attendants, fuel, lights, and stationery, suitable and sufficient for the

transaction of their business. If the commissioners neglect, the court may order the sheriff to do so, and the expense incurred by him in carrying the order into effect, when certified by the court, shall be a county charge." Here is a specific duty imposed by law upon the board of county commissioners, and not upon the county. For an omission to discharge this duty the law affords an adequate remedy to the public officer by *mandamus* proceedings to compel the performance of that duty specifically enjoined by law. § 5517, Comp. Laws. The court will, in a proper case, command that the board provide office rooms, etc.; but the board is to judge for itself what conveniences and facilities are proper and necessary in view of the nature of the office whose income demands that he be furnished with office room, and the financial condition of the county, and the volume and character of the public business to be transacted by such officer. No public officer can, upon refusal of the county board to furnish him with an office, substitute his judgment for that of the body to whose judgment the law has left the question, and then hold the county liable for the rent of such office. The question is an administrative one, and the remedy of the citizen is by *mandamus* to compel the board to take some action, and furnish him with some kind of an office, in which to perform his public duties. The county can be held for rent only when a valid contract is made by some officer or body having authority to bind the county in that respect. The law confers upon no officer the power to rent his own office and bind the county. On the contrary, that power is vested exclusively in the board of county commissioners, except as otherwise provided in the last sentence of § 606. Whether that body discharged its duty to the plaintiff was a question exclusively between himself and that body. The bare statement of the facts seems to us to suffice without further argument. We cite as more or less sustaining our views the following decisions: Peck v. Kent Co., 47 Mich. 477, 11 N. W. Rep. 279; Roberts v. Commissioners, 10 Kan. 29; People v. Supervisors, 23 How. Pr. 89; Hendricks v. Commissioners, 35 Kan. 483, 11 Pac. Rep. 450; Commissioners v. Stoddart, 13 Kan. 207. The judgment of the district court is affirmed. All concur.

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

Pleading—Distinct Causes of Action—Demurrer.

The complaint sets out separately three causes of action. The first and second embody claims against the defendant as trustee under a voluntary trust arrangement between the parties, which is stated in both causes of action. The third cause of action is for taking possession of, collecting, and converting the proceeds of a promissory note belonging to the plaintiff and refusing to turn over the proceeds on demand. The defendant demurred to the complaint on the ground that it improperly united different causes of action, in this: that it united a claim at law against defendant for converting personal property, as stated in the third cause of action, with claims against defendant as trustee, as stated in the first and second causes of action. The demurrer was overruled by the district court. *Held*, that the ruling was error.

(Opinion Filed Feb. 15, 1892.)

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

A. C. Davis, for appellant. *M. A. Hildreth* (*C. A. Pollock*, of counsel), for respondent.

Action by John W. Jasper against Arthur H. Hazen to compel him to account for the proceeds of a farm and certain personal property. From an order overruling defendant's demurrer to the complaint, defendant appeals. Reversed.

The opinion of the court was delivered by

WALLIN, J. The complaint in this action contains three causes of action, and each is separately stated. The first cause of action is voluminous, but it need not be set out in full in order to understand the questions involved on this appeal. The first cause of action is fairly summarized in appellant's brief as follows: "Plaintiff having made to defendant an absolute conveyance of his farm to secure the latter against liability as plaintiff's bail, and defendant having been fully exonerated as such bail, plaintiff thereupon became entitled to a reconveyance; but, being in jail and unable to attend to his business affairs in per-

son, he was persuaded to let defendant retain the title to the farm and take possession thereof, with the personal property thereon, upon trust to take charge of, work, and operate said farm, pay off and discharge the incumbrances thereon, and, upon the expiration of plaintiff's imprisonment, to reconvey the farm, restore the personal property, and fully account to the plaintiff. It is alleged that defendant violated said trust by appropriating the subject thereof to his own use, and refusing to account; and an accounting is prayed for." The second cause of action contains a restatement of the principle facts alleged in the first, adding, however, a detailed description of the personal property which it is stated the plaintiff then had in his possession on the farm, and then intrusted to the defendant's keeping, to be held in trust, as stated in the first cause of action. Such personal property consisted wholly of farm property, animals, and household effects then upon the farm. No note was mentioned. The personal property is alleged to be of the value of $1,275, excluding the value of the note, and the allegation is reiterated that defendant has converted both the land and personal property to his own use, and has failed and refused to account. As the contention turns especially upon the third cause of action, we give it in full: "For a third cause of action plaintiff makes part thereof each and every allegation contained in the first and second causes of action herein, so far as the same set forth the promises and agreements made by and between plaintiff and defendant and the obligations arising therefrom; and further alleges (1) that on the said 20th day of March, 1885, plaintiff was the owner of a promissory note theretofore executed to plaintiff by one L. M. Kimball, wherein said Kimball promised to pay the plaintiff the sum of seventy-five dollars on a certain day in the fall of the year 1885, the exact date of the maturity of which note the plaintiff does not now remember; (2) that at the said time the note was in the possession of Fuller, Johnson & Co., and, after plaintiff's removal to the penitentiary, defendant, by means unknown to plaintiff, obtained possession of said note, and collected the amount thereof from said Kimball, and converted the same to his own use, to plaintiff's damage seventy-five dollars; (3) that prior to the commencement of this action

plaintiff demanded of defendant the said money so collected, but that defendant refused to pay the same or in any wise to account therefor to plaintiff." The prayer is that defendant be required to account for the proceeds of the farm, and also for the proceeds of the personal property, including the note, with interest. The following details, which also appear by the complaint, may here be conveniently grouped, viz: That the deed of plaintiff's farm was delivered to defendant on March 20, 1885; that the trust agreement was entered into on April 20, 1885; that the farm and the farm property before mentioned was, in furtherance of the trust, turned over to the defendant on May 20, 1885. The plaintiff was convicted and sent to the penitentiary in June, 1885, and he was not released until March, 1888. Defendant demurred to the complaint, setting up the following ground: "That it appears upon the face of the complaint that several causes of action have been improperly united therein, to-wit, a cause of action against said defendant in the character of trustee for an accounting, and a cause of action at law against said defendant for the conversion of a promissory note." The district court overruled the demurrer, and the defendant appealed from its order, and assigns it as error.

The single question for determination is whether the acts and transactions of the defendant in relation to the $75 note, which are stated separately as the third cause of action, are properly united in the same complaint with those other matters and transactions which are set out in the first and second causes of action. The matters set out in the first and second causes of action are confessedly and clearly of a character which involve a relation of trust between the parties to the action, and hence, as was held by this court on a former appeal of this action, such matters must be heard and disposed of by a court of equity, and not by a court of law. 1 N. Dak. 75. All of the claims of the plaintiff against the defendant, as stated in the first and second causes of action, are clearly such as may be united in one complaint against a trustee as such. Subdivision 7, § 136, Code Civil Proc. (Comp. Laws, § 4932) expressly provides that several causes of action may be united in a complaint where there are "claims against a trustee by

virtue of a contract, or by operation of law." From this it appears that only such claims as are against "a trustee" can be united in an action against a trustee, as such. It follows that unless the $75 note transaction is a claim against the defendant as a trustee it cannot be united in the same action with the other claim against the defendant in that capacity. If the facts as pleaded in the third cause of action show a trust relation with respect to the $75 note transaction, whereby a claim in plaintiff's favor against the defendant as trustee is established, then it follows that the third cause of action is properly united with the others; otherwise such note transaction is improperly united. We are entirely clear that the facts pleaded as a third cause of action do not show a claim against defendant as a trustee. It is not claimed by respondent's counsel that a trust relation is created in express terms, with respect to the note, by any averments found in either the first or second causes of action; nor is the note, or any note, referred to as a part of the personal property which, on May 22, 1885, was on the farm, and delivered to the defendant in trust. Such personal property is carefully enumerated, and its value stated in the second cause of action; but no allusion is made to any note. ' But respondent's counsel contends that certain general language, occurring in both the first and second causes of action, fairly construed, is broad enough to create between the parties in plaintiff's favor a general agency, or a trusteeship covering not only the farm and the property and business connected therewith, but including as well all other property and all other business of the plaintiff, whether turned over or alluded to in terms or not. The language referred to is similar as used in both the first and second causes of action, but is stated more strongly and favorably to the plaintiff in the first cause of action as follows: "Plaintiff let defendant have possession of said farm, together with all the said personal property; and for the same consideration, and no other, gave to defendant the entire management of all his business affairs during the period of his imprisonment." It is elementary that broad and sweeping grants of authority, such as that above quoted, will not operate to create an agency which covers and includes all the

principal's business of every name and variety; but, on the contrary, such general investiture of authority will be strictly confined to the particular kind of business which is actually placed in the agent's hands for control and management. Civil Code, § 1360; Comp. Laws, § 3983. But, should we concur with the views of plaintiff's counsel, and hold that the language of the complaint found in the first and second causes of action is broad enough to create an agency and trusteeship in the defendant, embracing all the business affairs of the plaintiff of every name and nature, we cannot see how such a construction could save the pleading. To constitute a claim against a trustee it is not sufficient to aver generally that at a time stated, and in a particular manner, the defendant was made a trustee, and that the plaintiff is the beneficiary of the trust. The allegations must go further, and show affirmatively that the trustee as such did something; for example, in this case, that defendant, in his trustee capacity, took possession of and collected the note. No such averments are in the complaint. On the contrary, the pleader has been studious to exclude that theory. The purpose to exclude such a theory appears both directly and indirectly. In the first place, if the note transaction is not in fact an independent matter and cause of action, it follows that the rules of pleading will not permit it to be set out separately as an independent cause of action, as it is in fact set out and pleaded. Again, if it were supposed for plaintiff's benefit—the fact not being stated—that defendant as a matter of fact took possession of the note under color of the trust arrangement set out in the first and second causes of action, it would follow that the plaintiff could introduce evidence of such fact under the allegations of the first and second causes of action, and, if they are not broad enough, they could be amended; hence the third cause of action would, upon this theory of the case, be superfluous as well as bad pleading. But the language of the third cause of action, when the words used are construed according to their natural and ordinary meaning, imports clearly that the note transaction was disconnected from the trust pleaded in the other parts of the complaint, and stands upon an independent state of facts. After describing

the note, and stating that the plaintiff was its owner on March 20, 1885, the complaint proceeds in its third cause of action: "That at said time said note was in the possession of Fuller, Johnson & Co.; and, after plaintiff's removal to the penitentiary, defendant, by means unknown to the plaintiff, obtained possession of said note, and collected the amount thereof from said Kimball, and converted the same to his own use, to plaintiff's damage $75." This language states a good cause of action at law for the conversion of personal property, but nothing in the language indicates that the transaction was in its nature a trust matter. Respondent's counsel, conceding that the averment in form sets out a cause of action at law originating in a tort, argues that the plaintiff has a right to waive the tort, and sue for money had and received upon an implied contract. This may be conceded without removing the difficulty. The vital question is whether the note transaction gives rise to a claim against defendant as a trustee, and it does not at all matter whether the claim arises on contract or originates in a wrong.

Counsel further argues that the first paragraph of the third cause of action carries forward and incorporates with that cause of action all allegations in the first and second causes of action, "so far as the same set forth the premises and agreements made by and between plaintiff and defendant, and the obligations arising therefrom." As already shown there are no averments of the complaint connecting the note transaction with any trust between the parties; but we deem it proper to add that the language quoted above cannot, under the rules of pleading, operate to make any allegations of the first and second causes of action a part of the third. Each cause of action must be complete in itself, but some courts permit a reference to be made to distinct allegations or serparate paragraphs in a preceding cause of action, where the same embody distinct averments of fact, and by such reference re-allege the same facts in a later cause of action. This is perhaps the better rule. It appears to be the rule in New York. Simmons v. Fairchild, 42 Barb. 404; Manufacturing Co. v. Beecher, 55 How. Pr. 193. But a recent case in California is strongly adverse to such a rule. Pennie v. Hil-

dreth, 81 Cal. 127, 22 Pac. Rep. 398. But no authority can be found which will support the language in question as a proper mode of alleging a fact by reference to the preceding parts of the complaint. The reference does not point out any particular averment, paragraph, or part of the complaint by number, page, or otherwise; but it leaves court and counsel to explore the voluminous matter referred to in quest of "promises and agreements," and, if any promises and agreements are found, then to scrutinize the same closely, in quest of "obligations" arising thereon. It is obvious that such a vague reference to preceding parts of the complaint is quite ineffectual to point out any particular averments of fact which the pleader desires to reallege as a part of the third cause of action; and consequently the first paragraph of the third cause of action must be eliminated, or not considered, as an additional averment of fact. But this in no way affects the disposition of the case, for, as has been seen, we should reach the same conclusion if all of the preceding parts of the complaint were restated in the third cause of action. Our views of the case will render necessary the framing of the new complaint; and to avoid further delays, occasioned by mistakes of procedure, we now take occasion to suggest that in our opinion the series of transactions which are set out in the first and second causes of action (while they include matters relating to both real estate and personal property, and the title and management of both) form only a single trust arrangement, and the refusal to account gives rise to only a single cause of action or claim against the defendant as trustee. If it be true, by reason of existing facts, which are not alleged in the complaint before us, that the note was taken possession of by defendant under color of the trust arrangement set out in the first and second causes of action, then the note matter can be investigated as an item in that trust arrangement, despite the fact that the note may not have been delivered to the defendant with the other trust property. In no event should the note matter be placed as an independent cause of action against defendant as trustee, unless the note transaction, by reason of its own peculiar facts, gives rise to a distinct and separate trust, and thereby becomes the source of an independ-

ent claim against the defendant in his fiduciary capacity. The assignment of error is sustained, and the order of the district court must be reversed. All concur.

WILLIAM S. CONRAD, Plaintiff and Respondent, *v.* CHARLES W. SMITH, as Sheriff of Cass County, North Dakota, Defendant and Appellant.

Fraudulent Conveyances—Want of Change of Possession.

On the sale of a stallion in the possession of a bailee, the vendor, in the presence of the vendee, notified the bailee of such sale; but the vendor, with the consent of the vendee, continued after the sale to use the horse the same as before the sale, until the animal was seized under attachment by creditors of the vendor. *Held*, that there was not a sufficient, actual and continued change of possession to take the case out of the provision of § 4657 of the Compiled Laws, and the sale was therefore void, under the evidence adduced, as to the creditors of the vendor who had attached the horse.

(Opinion Filed Feb. 17, 1892.)

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

Tilly & Stewart, for appellant. *Ball & Smith*, for respondent.

Action by W. S. Conrad against Charles W. Smith, as sheriff of Cass county, to recover the value of a certain horse. Verdict and judgment for plaintiff. New trial denied. Defendant appeals. Reversed.

Tilly & Stewart, for appellant:

The delivery contemplated by statute must be an actual one and the change of possession must be visible and continuous. Bump on Fraud. Con., pp. 168, 169, 170, 183; Bunting v. Saltz, 24 Pac. Rep. 167; Merrill v. Hurlburt, 63 Cal. 494; Cook v. Rockford, 12 Pac. Rep. 568. See also Norton v. Doolittle, 32 Conn. 408; Meade v. Noyes, 44 Conn. 487. Error was assigned in the trial court permitting a witness to testify as to the value

of the property in suit. The rule is that before a witness can be called upon to give an opinion it must be first shown that he is competent from study, peculiar business or relation to the thing, to have a knowledge of the subject. Town of Independence v. Saunders, 24 Pac. Rep. 506; Nelson v. Insurance Co., 71 N. Y. 453; Jones v. Tucker, 41 N. H. 546; Buffman v. Harris, 5 R. I. 251. An hypothetical question calling for an opinion of a witness must be based on evidence in the case and can only contain such elements as the evidence tends to prove. People v. Vanderhoof, 39 N. H. 28; Meeker v. Meeker, 37 N. W. Rep. 773; Burgo v. State, 42 N. W. Rep. 701; Muldowney v. Railroad Co., 39 Iowa 615. The evidence showed that the vendor exercised the same control over the horse after the sale as he did before, hence appellant was entitled to have the court direct a verdict in his favor. Hesthal v. Myles, 53 Cal. 623; Warner v. Carlton, 22 Ill. 415; Stephenson v. Clark, 20 Vt. 624.

Ball & Smith, for respondent:

The statute has no application to a case where personal property is, at the time of the sale, in the possession or control of a bailee or third person. Thomas v. Hillhouse, 17 Iowa 67; Lansee v. Wilson, 17 Iowa 582; Case v. Burrows, 54 Iowa 679; Campbell v. Hamilton, 19 N. W. Rep. 220. See the following decisions on the question of delivery and actual possession: Ingalls v. Merrick, 108 Mass. 351; Thorndyke v. Bush, 114 Mass. 116; Hobbs v. Carr, 107 Mass. 532; McKee v. Garcellon, 60 Me. 165; Bridge Co. v. Nye, 60 Me. 372; Sawyer v. Nichols, 40 Me. 212; Farwell v. Smith, 64 Me. 74; Reed v. Reed, 70 Me. 504; Smith v. Chrisman, 91 Pa. St. 428; Norman v. Cramer, 73 Pa. St. 378; Woods v. Hull, 81 Pa. St. 451; Stephenson v. Clark, 20 Vt. 624.

The opinion of the court was delivered by

CORLISS, C. J. The plaintiff, as vendee of H. J. McKee, has recovered a judgment against the defendant for the seizure by defendant, as sheriff of Cass county, in this state, under a warrant of attachment against McKee, of a stallion purchased by the plaintiff of McKee prior to such seizure. The defendant,

as sheriff, justifies under the writ, and claims that the transfer of the stallion was fraudulent and void as to the plaintiffs in the warrant of attachment, creditors of McKee, under the provisions of § 4657 of the Compiled Laws. This section declares that "every transfer of personal property * * * is conclusively presumed, if made by a person having at the time the possession or control of property, and not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things transferred, to be fraudulent and therefore void against those who are his creditors while he remains in possession," etc. The trial court refused to submit any other question to the jury than the one of damages, and the defendant is here for the purpose of reviewing this ruling; and he also insists that the trial court erred in refusing to hold as a matter of law, under the facts, that there was not a compliance with § 4657. He claims that there was no fact to submit to the jury, because the undisputed evidence showed a failure to make an immediate delivery, and also established that there was not an actual and continued change of possession. Defendant is not in position to avail himself of this claim on this appeal. His motion that the court direct a verdict in his favor was made at the close of plaintiff's case, and before defendant had established the relation of creditor and debtor between the plaintiffs in the warrant of attachment and McKee. Of course, until this relation had been established, the defendant was not in shape to justify as sheriff, for, as between the parties to the transaction, the sale was valid, and passed a good title. And the defendant waived his motion by failing to renew it after he had offered evidence subsequently to the over-ruling of his motion. Bowman v. Eppinger, 1 N. D. 21. But if he would have been justified in insisting upon the direction of a verdict in his favor, he was certainly entitled to have the question submitted to a jury. The exceptions taken by him to the charge, and the refusal of the court to charge, raised this question. The facts are uncontroverted. On October 1, 1889, McKee sold the stallion to Conrad, the plaintiff, who paid him $500 for the animal. The stallion at this time was in the livery barn of Wil-

liam H. Doyle. On that day McKee and Conrad came to the barn, and the former stated to Doyle, in the presence of Conrad, that the horse had been sold by him (McKee) to Conrad. Had Conrad from this time exercised exclusive control over the stallion, there would have been a sufficient delivery to satisfy the requirements of the statute. It has been repeatedly held, and the doctrine stands upon a sound basis, that when the property sold is at the time of sale in the possession of a third person as bailee, it is sufficient that the former owner notifies such third person of the sale, and abandons all claim to or control over the property, and the bailee thereafter holds it for the vendee. Potter v. Washburn, 13 Vt. 558; Worman v. Kramer, 73 Pa. St. 378; Morse v. Powers, 17 N. H. 286; Stowe v. Taft, 58 N. H. 445; Bump, Fraud. Conv. (3d Ed.) 170; Wait, Fraud. Conv. § 260; Kroesen v. Seevers, 5 Leigh 434. But the plaintiff failed to keep that exclusive control over the stallion which the statute requires. It is uncontroverted that after the sale McKee continued to drive the animal, just as before the sale, and apparently controlled him in all respects the same as before. The plaintiff himself testified that when he purchased the horse he did not take him away, but left him at Doyle's stable; and that McKee paid the horse's board at Doyle's until January 1st, after plaintiff purchased him; that the understanding was that McKee was to have the use of the horse until the 1st of January. Mr. Doyle swore, in substance, that McKee had the same charge and control over the stallion after October 1st—the time of the sale—that he had before that date. He said that he thought that there was no change in the relationship of McKee to the horse from October 1st to November 12th, when the seizure was made, more than from the spring to October 1st; that the same relationship existed all the time; that prior to October 1st McKee drove the horse, paid his board, and handled him; that was about all he did with the horse; and that, after October 1st, McKee drove the horse, and paid his board all the time he was in the stable of the witness Doyle. It appears that McKee drove out with the horse repeatedly after the sale. We do not think there was, under these facts, a sufficient change of possession to comply with the statute, nor

does there appear to have been any actual change of possession at all. The change was merely formal. There was nothing done to apprise the public that the relationship of McKee to the horse had in any respect been altered.

We do not question the soundness of the doctrine that whether the requirements of the statute have been complied with is often a question of fact, to be solved in the light of the character and situation of the property, the relation of the parties to each other, the inconvenience or hardship of requiring any other delivery or any further act of control than the facts disclose, the general usuages of trade, and all the attendant circumstances. The recent decision of the Pennsylvania supreme court in Renninger v. Spatz, 128 Pa. St. 524, 18 Atl. Rep. 405, illustrates the scope of this doctrine that the questions of delivery and actual continued change of possession are sometimes questions of fact, although the evidence is undisputed. It appeared in that case that John H. Spatz became the purchaser of the farm of William D. Suader, and also of his personal property. It was shown that Spatz thereafter took possession of the farm, and hired Suader to work upon it, and leased the house upon it to Mrs. Suader, and also leased to her the personal property bought from Mr. Suader. Renninger, a creditor of Mr. Suader, caused this personal property to be seized on execution against Suader, claiming that this property had not been delivered to Spatz. The court said: "In this case the property which was the subject of the sale was on the farm of the vendee, and intended by him for use there. It was placed in the custody of his tenant by a lease, but it was not removed from the farm. It is true that the lessee of the property was the wife of the vendor, and that they dwelt together after the sale as before; but she rented the house in which they lived, and he was a hired man on the farm, while Spatz owned and had the exclusive possession and control of it. We are of the opinion that the learned judge did not err in refusing to hold as a matter of law that the delivery of possession was insufficient. It was for the jury to find from the evidence whether the sale was in good faith or colorable, and whether the change was all that could reasonably be expected of the vendor, taking into view

the character and situation of the property and the relation of the parties." See, also, cases cited in note to Claflin v. Rosenberg, 97 Amer. Dec. 346, and Murch v. Swenson, 40 Minn. 421, 42 N. W. Rep. 290. But there was nothing in the character of the property or the situation of the parties in the case at bar which renders an actual delivery and utter abandonment by the vendor of all apparent control over the property inconvenient or unreasonable. It was unnecessary that the vendor should have been given authority to continue to use the horse as before the sale. It is not important that he continued to use him as the property of Conrad. There was nothing in his conduct to indicate any change in his relation to the horse; and this conduct, which created an appearance of a continuance of his former ownership, had the express approval of Conrad himself. We do not see how there was anything to submit to the jury on these undisputed facts. When there is nothing in the nature of the property or the situation of the parties to render unreasonable an actual delivery and an absolute severing of the owner's former relations to the property—the utter abandonment of all apparent control over it—then the statute is peremptory, and the question on undisputed evidence is one of law for the court. See cases cited in note to Claflin v. Rosenberg, 97 Amer. Dec. 345; and the recent case of Stephens v. Gifford, 20 Atl. Rep. 542, 137 Pa. St. 219. This is peculiarly in point, as in that state the courts incline strongly to the view of submitting the question to the jury as a question of fact; and yet the court held the sale void as a matter of law in this case. It is impossible to reconcile all the cases, and useless to cite them. Nor would it be wise to attempt to lay down any general rules to govern the application of this statute. We might, however, say that, as the presumption of fraud is conclusive in this state, it will not do to establish too rigid and severe a rule, lest great injustice result. We feel that the statute works a wrong in this case, as it appears to be conceded that plaintiff paid a fair price for the horse, and bought it in good faith, and was governed by no bad motive in leaving it in the possession of McKee. It is a matter for the serious consideration of the legislature whether a statute under which a wrong like that wrought

in this case can be accomplished ought not to be so modified as to leave the question of the good faith of the transaction to a jury as a question of fact, as is the case in many of the states, either by virtue of the statute or because the courts have modified the severity of the old common-law rule. Of course, purchasers can conform to the requirements of the statute, but they are seldom aware of the severe penalties which attach to such conduct as characterized the plaintiff in making his purchase in this case. As new facts may be shown on a new trial, we will reverse the judgment and order herein, and direct a new trial. All concur.

GARR, SCOTT & COMPANY, a Corporation, Plaintiff and Respondent, *v.* B. F. SPAULDING, Defendant and Appellant.

Judgment Roll—Annexing Decision of Court—Waiver of Findings—Presumptions—Practice—Appeal.

1. The statute (§ 5066, Comp. Laws) construed, and held to be mandatory, and not merely directory. It is the duty of the clerk of the district court, in cases tried by the court without a jury, to annex the decision of the trial court to the judgment roll; and where, in such case, no decision is found in the record transmitted to this court on appeal from a judgment, it will be presumed, in the absence of any explanation, that no decision was made or filed in the court below. A decision is a paper "which involves the merits and necessarily affects the judgment;" and hence it forms a part of the statutory roll, under subdivision 2, § 5103, Comp. Laws, unless findings are waived in writing filed with the clerk under § 5068.

2. Where the trial is before the court without a jury, it would be irregular, and reversible error, to enter judgment without first filing the decision of the trial court, in a case where non-waiver of findings appears affirmatively from the record. In such case the judgment would be illegally entered, and invalid on its face. But the mere absence of the waiver from the judgment roll does not show error affirmatively. Such waiver would not be a part of the statutory roll; and, in the absence of a bill or statement bringing the waiver upon the record, this court will presume, in support of the judgment, the contrary nowhere appearing of record, that a waiver of findings was made and filed in the court below.

3. Where the record does not affirmatively disclose the fact of non-waiver of findings, this court will presume, in support of a judgment, that findings were duly waived.

4. Where judgment is irregularly entered, good practice requires that it should be first assailed by motion in the district court. The order made on such motion is appealable, under subdivision 2, § 5236, Comp. Laws. But where a judgment is absolutely void or illegal on its face, it will be reversed by direct appeal from the judgment; but even in such cases the better rule is to begin by motion.

(Opinion Filed Feb. 18, 1892.)

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

Spaulding & Phelps, for appellant. *Francis & Southard*, for respondents.

Action by Garr, Scott & Co. against B. F. Spaulding for the possession or value of certain personal property. Judgment for plaintiffs. Defendant appeals. Affirmed.

The authorities relied upon by the counsel are set forth in the opinion of the court, which was delivered by

WALLIN, J. In this action, plaintiffs sue for the possession or value of certain personal property described in the complaint, and situated in the county of Cass, and claim a special property therein, by virtue of a certain chattel mortgage thereon executed in the state of Michigan. Defendant, by his answer, denies generally the allegations of the complaint, but admits that he is in possession of the property described in the complaint, and sets up ownership in himself, derived by a purchase of the property at a foreclosure sale of a certain other chattel mortgage executed and filed in said county of Cass, and a copy of which is made a part of the answer. The issues involve the question of the respective rights of the parties to the possession of the property in controversy, as such rights are affected and controlled by the two mortgages. On the 20th day of September, 1888, judgment was entered in the action by the district court as follows: "The above-entitled action coming on to be heard and determined this 20th day of September, being at the regular June, 1888, term of said court, a jury being waived, the

court, hearing the evidence introduced, and after argument by Francis & Southard, attorneys for the plaintiff, and B. F. Spaulding, attorney for the defendant, finds that the plaintiff is entitled to judgment as prayed for in its complaint; and now, upon motion of Francis & Southard, attorneys for the plaintiff, it is ordered and adjudged that plaintiff do have and recover judgment against said defendant for the return of the property described in said complaint, or the plaintiff's interest therein, which is assessed at the sum of $993.80, together with the costs and disbursements therein, taxed at $31.75." Annexed to the judgment roll is the following certificate of the presiding judge of the district court in which the judgment is entered: "I, Wm. B. McConnell, judge of the district court of the third judicial district of the state of North Dakota, do hereby certify that the above and foregoing papers, to-wit, complaint, summons, answer, statement of costs and disbursements, and judgment, are contained in and constitute the judgment roll in the above-entitled action, and the whole thereof. WM. B. MCCONNELL, Judge." The enumerated papers in said certificate, and none others, are found in the record filed in this court. No statement of the case or bill of exceptions was ever settled or allowed in the action. The appeal is from the judgment. The only error assigned by the appellant is as follows: "There is manifest error upon the face of the record, in that the district court erred in rendering or entering judgment without a decision in writing and findings of fact being made and filed or waived."

The judgment recites on its face that a jury was waived, and that the court heard the evidence. In such cases the statute explicitly requires that the "decision must be given in writing, and filed with the clerk, * * * and no judgment shall be rendered or entered until after the filing of such decision." "In giving the decision, the facts found and the conclusions must be separately stated." Comp. Laws. §§ 5066, 5067. We are of the opinion that these statutory provisions are mandatory and not merely directory. That such is the legislative intent is emphasized by the amendment (§ 1, c. 25, Sess. Laws 1887) declaring "no judgment shall be rendered or entered until

after the filing of such decision." Before the amendment, the supreme court of California, construing the language of the section as it was originally enacted as a part of the Code of that state, repeatedly held that the requirement was mandatory. Dowd v. Clark, 51 Cal. 263. This court has also made a similar holding in Gull River Lumber Co. v. School Dist., 1 N. D. 500. The question is therefore settled in this jurisdiction.

Counsel for appellant further argues that subdivision 2, § 5103, Comp. Laws, in effect, though not in terms, requires the clerk of the district court, in making up the judgment roll in cases tried by the court without a jury, to include the decision of the district court, embracing findings of fact and conclusions of law, in the judgment roll. This argument is based upon the following language in subdivision 2, *supra:* "All orders or papers in any way involving the merits, and necessarily affecting the judgment," must be placed in the roll, etc. In this we entirely agree with appellant's counsel. The decision is required to be reduced to writing and filed, and must embrace findings of both law and fact. It is obvious, therefore, that the decision which is, in effect, among other things, an "order" for judgment, is both an "order" and a "paper" involving the essential merits, and one which necessarily not only "affects" the judgment, but actually determines the judgment to be entered. It follows that it is the duty of the clerk of the district court to include the decision of the trial court in such cases as a part of the statutory judgment roll, in all cases where a decision has been filed, and to do so as a part of his official duty, not depending upon the request of counsel or the direction of the trial court. Nor should the decision be embraced in either a bill or statement in cases where either one or the other is allowed. The decision is an essential part of the statutory judgment roll, under subdivision 2. Thomas v. Tanner, 14 How. Pr. 426; Reich v. Mining Co., 3 Utah 254, 2 Pac. Rep. 703. We further agree with counsel and hold that the fact that the decision of the trial court is not in the judgment roll, where it belongs, in the absence of any explanation of the omission, will justify this court in presuming that no decision of the district court was

ever filed in the court below. This conclusion becomes irresistible, in view of the fact that the clerk of the district court is required by the appeal statute (§ 5217, Comp. Laws) to transmit the judgment roll to this court, where, as in this case, the appeal is from the judgment. We must assume, until the contrary is made to appear, that the clerk has performed his duty under the statute, and transmitted to this court the entire judgment roll. Moreover, the district court, in compliance with a salutary rule of this court, which is intended to aid in securing the identification of the papers which enter into the judgment roll, has named each paper transmitted to this court in the roll, and declared distinctly that such enumerated papers constitute the judgment roll in the action, "and the whole thereof."

If the decision of the case turned wholly upon considerations already mentioned, it would be the duty of this court to reverse the judgment of the court below as irregularly entered, because, as we have seen, the record, and the presumptions arising from it, disclose the fact that the trial court never reduced to writing and filed its decision in this action. But the whole statute regulating decisions in such cases must be taken into account and construed together; and, when this is done, it will appear that in a class of cases the decision in writing is not indispensable. The decision may be waived. Section 5068, Comp. Laws, reads as follows: "Findings of fact may be waived by the several parties to an issue of fact (1) by failing to appear at the trial; (2) by consent in writing filed with the clerk." In this case findings were not waived by non-appearance at the trial; and hence, if waived at all, the waiver must have been made "by consent in writing filed with the clerk." No such waiver is found in the record sent to this court and no such paper is named in the judge's certificate annexed to the judgment roll. It is strenuously insisted by the appellant's counsel that this court must presume, as it did in the case of the missing decision of the trial court, that no waiver of the findings was made in fact, because if made it must be filed to be effectual under the statute. This reasoning we cannot adopt. The statute (§ 5103, Comp. Laws) does not name such a paper as a written waiver of findings as one which shall form a part of the judgment roll.

Hence the mere fact that no waiver of findings is in the judgment roll raises no presumption either way. Under the statute the clerk could not—no bill or statement embracing such waiver having been allowed—place such a paper in the roll if it were on file; and, if he did so, such waiver could not be considered by this court as a part of the record. Hayne, New Trial & App. p. 690. Nor would such waiver belong to the class of papers which, though not named in the statute, are entitled to a place in the judgment roll, viz: "Papers in any way involving the merits, and necessarily affecting the judgment." The proposition is too plain to need the support of either argument or authority that a waiver of findings could not in any supposable case involve the merits or affect the judgment, in a legal sense. The result is that this court will not presume, for the purpose of discovering error and reversing a judgment otherwise regular on its face, that the court below, in the very teeth of the statute, rendered and entered a judgment without filing a decision, and without a written waiver of such decision being filed. On the contrary, the rule is well settled that a court of review will favor every reasonable presumption necessary to support the judgment of a court of competent jurisdiction. He who alleges error in a court of review as a ground of reversing a judgment must bring the error upon the record, and make it appear affirmatively. It is a well established rule of practice in California, from which state our civil procedure is chiefly drawn, that orders and papers which do not belong in the statutory judgment roll, but are erroneously annexed to the roll by the clerk of the trial court, are alien papers, and will be stricken out on proper motion. Hence, as we have seen, the clerk of the district court could not properly place the waiver of findings in the judgment roll, in the absence of a bill of exceptions or statement which embodied the waiver, nor can the absence of the waiver be construed as error. On the contrary, it is proper, in support of the judgment, to presume, in view of the non-filing of the decision of the lower court, that such decision was duly waived. This identical question has been ruled upon in the same way by the supreme court of California in several cases. Mulcahy v. Glazier, 51 Cal. 626; Smith v. Lawrence, 53

Cal. 34; Carr v. Cronin, 54 Cal. 600; and see Hayne, New Trial & App. pp. 721, 722. If it be true, as contended orally, that no waiver of findings was ever in fact made, such an omission was an irregularity of such a character as would authorize the reversal of the judgment; but, as we have already stated, to be available, the irregularity must be made to appear of record affirmatively, and the mere absence of the waiver from the statutory roll does not make such error appear affirmatively. The legal presumption is that the waiver was filed. Hence the judgment cannot be reversed, and the assignment of error is overruled.

But, reasoning from a different standpoint—one not suggested by counsel—we reach the same conclusion, *i. e.*, that the judgment should be affirmed. It does not appear that the attention of the trial court was called to the alleged irregularity which would be involved in entering judgment without findings, or a waiver thereof being first filed. To enter a judgment in the absence of findings or a waiver would be irregular, and a direct violation of the terms of the statute. Such a judgment would be set aside promptly by the district court on proper application therefor by motion. We suggest that in such cases, and in all cases of an irregular entry of judgment in the district court, a motion is the proper remedy. A motion is the speedier remedy, and in many cases would avoid the more tedious and expensive process of direct appeal. This is the established course of practice in the states of New York, Minnesota, and some other Code states. Thomas v. Tanner, 14 How. Pr. 426; 3 Wait, Pr. 668; 4 Wait, Pr. 637. Whether the irregularity does or does not affect the jurisdiction makes no difference. Remedy by motion is efficacious in either case. Railroad Co. v. Murphy, 19 Minn. 500 (Gil. 433); Covert v. Clark, 23 Minn. 539. Where the defect goes to the jurisdiction a motion to set aside will lie after the expiration of one year after entry of judgment. Lee v. O'Shaughnessy, 20 Minn. 173 (Gil. 157); also, cases cited in Minnesota Index Digest, pp. 299, 300. Should the trial court err in refusing to grant, or in granting, the relief by motion, an appeal would lie from the order, under subdivision 2, § 5236, Comp. Laws. Such order would be a

final order made in a "summary application in an action after judgment." The word "for," as printed in the statute (Comp. Laws), is a clerical or typographical error, and should be read "after." The same section is found in the statutes of Minnesota, and has been there quite properly construed to authorize an appeal from the order in such cases. Stocking v. Hanson, 22 Minn. 542. To correct mere irregularities, which do not affect the jurisdiction of the court to enter the judgment, and especially those which do not appear affirmatively of record, application should be first made by motion in the court below; and where the judgment is entered without jurisdiction a motion is also the better practice. Of course a judgment will be reversed on appeal if it is void on its face, but mere irregularities should be assailed by motion below. This practice was not pursued in the case at bar. It follows that the judgment must be affirmed. All concur.

JOHN C. YEATMAN, Plaintiff and Respondent, *v.* JAMES KING, JR., SARAH KING, FOSTER COUNTY, STATE OF NORTH DAKOTA, JAMES MURPHY, County Treasurer of Foster County, and WALTER M. MOORE, County Auditor of said County, Defendants; FOSTER COUNTY, JAMES MURPHY ET AL., Defendants and Appellants.

Foreclosure of Mortgage—Constitutional Law—Obligation of Contracts—Changing Priority of Liens—Taxation.

1. Chapter 43 of the Laws of 1889, and chapter 152 of the Laws of 1890, in so far as they attempt to make the lien for seed grain furnished thereunder, superior to the lien of a mortgage executed before these statutes were enacted, are repugnant to the provisions of the federal constitution forbidding the impairment by any state of the obligations of a contract.

2. The obligation of the person supplied with seed grain under these statutes to pay the county therefor is not a tax, and cannot be made a tax by the legislature. It is a mere debt.

(Opinion Filed Feb. 23, 1892.)

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

Ben Borton and *Fredrus Baldwin*, for appellants. *John S Watson*, for respondent.

Action by John C. Yeatman against James King, the county of Foster, James Murphy, county treasurer, and Walter M. Moore, county auditor, to foreclose a real estate mortgage. Judgment for plaintiff. The defendant county and its treasurer and auditor appeal. Affirmed.

Ben Borton and Fredrus Baldwin, for appellants:

Under the power of the legislature to allow mechanic's liens, it has been held that under the statute making such liens prior or superior to mortgages, that the law was constitutional. Brooks v. Railroad Co., 101 U. S. 443; Meyer v. Hornby, 101 N. Y. 728. See, also, Bertholf v. O'Reilley, 74 N. Y. 509.

John S. Watson, for respondent:

The lien upon real estate for taxes has no existence unless there be some statute creating it, and such statute must be strictly construed. Desty on Taxation, p. 734; State v. Newark, 42 N. J. Law 38; Carter v. Rodewald, 108 Ill. 351. Taxes are burdens or charges imposed by the legislative power of a state upon persons or property to raise money for public purposes. Blackwell, Tax Titles, 1; Perry v. Washburn, 20 Cal. 318; Loan Association v. Topeka, 20 Wall. 655. To subject the lien of a prior mortgage of land to the claim of the county for the value of seed wheat furnished is, in effect, a tax upon the mortgagee, and as such violates every principle upon which rests the taxing power. People v. Salem, 20 Mich. 474; Weeks v. Milwaukee, 10 Wis. 258; Ryerson v. Utley, 16 Mich. 269; Merrick v. Amherst, 12 Allen 504. On the theory that the seed lien is a tax the particular tracts are subject to a two-fold levy for the purpose of raising a single fund, which is against the policy of the law. Cook v. Burligton, 13 N. W. Rep. 113; Talman v. Butler County, 12 Iowa 534; Rice County v. Bank, 23 Minn. 280. Apportionment of the burden is a necessary element in

all taxation, and any attempt at the exercise of this power without it is absolutely void. Motz v. Detroit, 18 Mich. 495; Woodbridge v. Detroit, 8 Mich. 274. The weightiest objection to the legislation is that it violates the federal constitution, by impairing the obligation of a contract. See Bronson v. Kinzie, 1 How. 311; Howard v. Bugbee, 24 How. 461; Coddington v. Bispham, 36 N. J. Eq. 574; Maloney v. Fortune, 14 Iowa 417; Munday v. Monroe, 1 Man. 68; Heywood v. Judd, 4 Minn. 483; Berthold v. Halman, 12 Minn. 335; Berthold v. Fox, 13 Minn. 501.

The opinion of the court was delivered by

CORLISS, C. J. The contest here is between plaintiff and defendant Foster county for priority of lien. The action is to foreclose a real estate mortgage. Foster county is made a party defendant on the theory that it holds a lien on the mortgaged real property subordinate to the lien of plaintiff's mortgage. This contention of the plaintiff is denied by Foster county, and the latter, having been defeated by the trial court, brings the question before us for review. It is purely an issue of law. The facts are undisputed. Plaintiff's mortgage is dated July 1, 1886, and was duly recorded July 5, 1886. On March 26, 1889, Foster county entered into a contract to furnish, and actually did furnish on that day, to the mortgagor and owner of the mortgaged premises, pursuant to such contract, 150 bushels of seed wheat, to be used by him to raise a crop upon the mortgaged premises in the season of 1889. The seed was actually used for that purpose. All proceedings were duly taken by the county in conformity with the statute to perfect a lien upon the land under the provisions of chapter 43 of the Laws of 1889. This act so far as it is material to this case, provides that, "if the said indebtedness (for the seed grain furnished) be not paid on November 1, 1889, the amount thereof shall be entered upon the tax list of such county for the year 1889 as a tax upon the land upon which such seed wheat was sown, to be collected as other taxes are; and the sum so entered and levied shall be a first lien upon the crop of grain raised each year by the person receiving said seed grain, and also upon the real estate owned

by such person, until the tax is fully paid." On April 14, 1890, Foster county furnished the mortgagor, King, seed wheat for the season of 1890, to be sown upon this same land. It was so sown. The county claims a lien upon the land for the value of this seed, under the provisions of chapter 152 of the Laws of 1890. No question is raised as to the existence of liens on the land for the seed wheat furnished in 1889 and 1890. The only inquiry is whether such liens are paramount to that of the mortgage, which was executed and became a lien upon the land more than two years before the first law was enacted. It is unnecessary to refer to the provisions of the act of 1890, as the law of 1889 confers upon the county greater rights than are conferred upon it by the act of 1890, the lien being in express terms declared to be a first lien under the statute of 1889, while the act of 1890 is silent on this subject of priority. Having reached the conclusion that the provision of the act of 1889, giving priority to the seed lien, cannot, in the face of the inhibition against the impairment by a state of the obligations of a contract, work the destruction or impairment of a prior subsisting lien, created before the act of 1889 was passed, it is, of course, unnecessary to determine whether the act of 1890 does or does not attempt to make the seed lien paramount. The statute which makes the lien a first lien upon the land describes it as a tax lien, and the amount due for the seed grain is declared to be a tax, and the amount thereof, in case of default in its payment, is directed to be entered upon the tax list of the county. But the voice of the legislature cannot alter the essential nature of things. No legislative fiat can make that a tax which is not and cannot be a tax. If the law-making power were vested with unlimited authority to fix the meaning of words, to take cases without the prohibition of the constitution by arbitrary definitions, the fundamental rights of the citizen would be safe only so long as the legislature should abstain from defining away constitutional protections. Due process of law might be defined to embrace arbitrary confiscation; such a thing as an *ex post facto* statute might be defined practically out of existence; and many, if not all, of the barriers erected to shield the fundamental rights of the citizen from legislative

assault—barriers seemingly of adamant, and apparently standing upon abiding foundations—would crumble before the breath of legislative definition. We are confident the agent has no power to define away the limitations upon his delegated authority. Said Mr. Justice MILLER in Davidson v. New Orleans, 96 U. S. 97: "But when, in the year of grace 1886, there is placed in the constitution of the United States a declaration that 'no state shall deprive any person of life, liberty, or property without due process of law,' can a state make anything due process of law which by its own legislation it choses to declare such? To affirm this is to hold that the prohibition of the state is of no avail, or has no application, where the invasion of private rights is affected under the form of state legislation." In the Munn Case, 94 U. S. 113, the language of Mr. Justice FIELD is equally emphatic. Speaking of the provision in the constitution of Illinois declaring certain grain elevators public warehouses, he said: "There is no magic in the language, though used by a constitutional convention, which can change a private business into a public one, or alter the character of the building in which the busi ness is transacted." Chief Justice WAITE, in the same case, after reaching the conclusion that the business of the warehouseman at Chicago, under the peculiar circumstances, was affected with a public interest—was a public business—said: "It may not be made so by the operation of the constitution of Illinois or this statute, but it is by the facts." It is needless to dwell longer upon a principle so obvious.

Is, then, the obligation under the law resting upon the person who has received temporary county aid in the shape of seed grain, to repay to the county the value thereof, a tax in any sense of the word whatever? We are very clear that it is not. If the oracle be consulted we find it gives back no answer that will justify the theory that this obligation is a tax. Says Judge Cooley at the very threshold of his work on Taxation: 'Taxes are defined as being the enforced proportional contribution of persons and property, levied by authority of the state for the support of the government and for all public needs.' The amount to be paid by him who has been supplied by the

public with seed grain is not in any sense a "contribution," but it is a debt owing by him to the county for value received by him in the form of property. If it could be regarded as a contribution, it is not a proportionate contribution, for he who owes the duty to make this payment owes it in addition to his duty to pay his proportion of taxes, and he may be the only person in the county upon whom this extra obligation rests. Neither can it be said to be an "enforced" contribution. Whatever he is bound to pay is owing because of his voluntary purchase of seed grain from the county. There is no coercion. He pays what he agrees to pay and no more. The money is not paid for the support of the government, nor for any public purpose. So far as the statute apportions the burden of furnishing this seed grain among all taxpayers, the sum so apportioned is a proper tax. This we have held under the peculiar phraseology of our constitution, and in view of the trend of legislation in the northwestern agricultural states, acquiesced in by the people, which we regarded as so expanding the significance of the words "public purpose," when applied to taxation, as to make the imposition of taxes for such a purpose constitutional. State v. Nelson Co., 1 N. D. 88. But there is no resemblance—not the faintest—between the enforced obligation resting upon all alike to keep a portion of the population destitute of means and credit from becoming a public charge by affording them temporary relief, and the voluntary obligation assumed by the unfortunate citizen on receiving public aid to pay back to the public treasury the value of that aid. The obligation resting upon him who has been supplied with seed grain, common to all other taxpayers in the county, to contribute the funds to furnish him this seed grain, is, when legally apportioned, a tax. The obligation resting upon him alone to pay to the county the value of this property is a debt pure and simple, without a single element of a tax about it. No part of the money paid by him in discharge of this obligation goes to the support of the government. Not a penny of it is paid to buy seed grain for others. It is paid only to discharge a personal debt to the county for aid received.

Another consideration affords strong evidence that the claim for the value of the seed grain furnished is not a tax, although placed upon the tax roll, to be collected as a first lien out of the real estate. Practically every state constitution embodies a provision for uniformity in taxation. The great purpose of such articles is to prevent unjust discrimination in taxation. Whenever there is a tax violative of the terms of such a provision, we must expect to find the tax an unjust one. Now, it is clear if the obligation to pay for seed grain is a tax, it is in conflict with the terms of § 1925 of the organic act of the territory of Dakota, in force at the time the act of 1889 was passed; and that the act of 1890 is in conflict with the terms of § 176 of the constitution of this state in force when the latter act was passed. These provisions require uniformity of taxation. But, so far from there being any injustice in requiring the person who has been the recipient of aid to pay for the seed grain furnished him, the justice of such a policy is too palpable to justify comment. And yet no one can pretend that there is any uniformity in a system of taxation that imposes upon one or a few citizens, and upon his or their property, in addition to the burden resting upon all alike, an additional sum as a tax. We must therefore conclude that that which creates a plain violation of the terms of such a fundamental provisiou, if regarded as a tax, and yet bears no semblance to unjust discrimination, cannot possibly be a tax at all. The determination of this question is the pivotal point in the case. If this obligation is a tax in a proper sense, then the state may give it a priority of lien. If not a tax, then the legislature cannot, by designating it as a tax, give it any greater preference as a lien than could be given it should no such name be affixed to it. To postpone a legal existing lien upon real property to a subsequent lien by a statute enacted subsequently to the attaching of such prior lien is to impair the obligation of a contract. This object cannot be accomplished by indirection—by calling something a tax which is not a tax. The legislature could not by an act passed after the plaintiff's mortgage had been executed and become a lien upon the property, confer upon any person who should loan or advance money or money's worth to the mortgagor a lien upon

such property prior to that of the existing mortgage. Nor can the legislature lawfully give to a court or other public corporation or subdivision of the state any such priority in such a case unless the claim be for a tax, as a tax is known to the law. Neither can the state itself secure any such priority under such circumstances. When entering into contract relations with individuals, the state, or a municipal corporation thereof, is to be treated the same as an individual. It cannot call or charge up the amount of a loan as a tax, and by that device confer upon the loan all the qualities of a tax. If it could, and in this manner insert a lien for this pseudo tax ahead of existing liens, the holder of security upon real estate would be at the mercy of the state, despite the supreme law of the land preventing the impairing the obligations of a contract by any state. If the state can make this claim a tax, then there is no limit to its power by definition to confiscate the securities of others. The amount advanced to the individual by the state would not affect the right of the state to call it a tax. Neither would the purpose for which the advance was made, nor the exigency to meet which the sum was loaned, limit in any manner the power of the legislature to invest such loan with all the attributes of a tax. The loan by the public supplanting the first lien upon real property might be so great as to work a destruction of the lien supplanted. But it is sufficient to condemn a law that it works any impairment, however slight, of the obligations of a contract. To affect a dollar of a prior lien by subsequent legislation is as vicious before the law as to destroy the lien altogether. Walker v. Whitehead, 16 Wall. 314.

The mortgagee had, when the law of 1889 was enacted, secured a first lien upon the real estate covered by the mortgage. It was for this he had contracted with the mortgagor. Any law affecting the priority of this lien, or giving the mortgagor authority to do so, clearly impairs the obligation of this contract. Said the court in Railroad Co. v. Hamilton, 134 U. S. 296, at page 301, 10 Sup. Ct. Rep. 546: "There was no statute in force at the time the mortgage was executed giving any priority to subsequent mechanic's lien; and by the mortgage the mortgagee took its vested priority beyond the power of the mort-

gagor or the legislature thereafter to disturb." The state cannot interfere with the remedy given by existing laws to enforce a contract when the consequence is an impairment of the creditor's rights. This doctrine has perhaps been more frequently enunciated and applied in the cases of an attempted statutory extention of the mortgagor's right to redeem made after the mortgage had been executed. The courts, including the final arbiter of the question, the federal supreme court, have very properly held that such a law impaired the rights of the mortgagee under his security, as they affected the price which the real estate would bring on foreclosure. No one would be willing to pay as much for a piece of land, the possession of and absolute title to which he could not secure for several years after purchase, as he would be willing to pay for the same land with a right to immediate possession, or possession after the lapse of only one year. A law giving a right to redeem where no such right existed at the time of the execution of the mortgage, or materially enlarging a right of redemption already existing at the time of the execution of such mortgage, would directly and inevitably lessen the value of the mortgagee's security, and therefore impair the obligation of the contract. In Howard v. Bugbee, 24 How. 461, the court adjudged as void, as impairing the obligation of a contract, a statute of Alabama conferring upon a judgment creditor of the mortgagor a right to redeem from mortgage foreclosure sale within two years thereafter, so far as such statute affected mortgages in existence when the law was passed. The court said: "The main ground of the defense in that suit was that the mortgage from Parsons, under which the defendant derived title, having been executed before the passage of the act providing for the redemption, the act, as respected this defendant, was inoperative and void, as impairing the obligation of the contract. The court of chancery so held, and dismissed the bill; but, on appeal to the supreme court, that court reversed the decree below, and entered a decree for the complainant. The case is now here on a writ of error to the supreme court. The only question involved in this case was decided in Bronson v. Kinzie, 1 How. 311. It was then held after a very careful and extended

examination by the court, through the chief justice, that the state law impaired the obligation of the mortgage contract, and was forbidden by the constitution. This decision has since been repeatedly affirmed. 2 How. 612; 3 How. 716. * * * We are entirely satisfied with the soundness of the decision in the above case, and with the grounds, and shall simply refer to them as governing the present case." The same doctrine is enunciated in Scobey v. Gibson, 17 Ind. 580; Inglehart v. Wolfin, 20 Ind. 32; Rucker v. Steelman, 73 Ind. 390; *ex parte* Pollard, 40 Ala. 77; Collins v. Collins, 79 Ky. 88; Coddington v. Bispham, 36 N. J. Eq. 574; Cargill v. Power, 1 Mich. 369; Maloney v. Fortune, 14 Iowa 417; Heyward v. Judd, 4 Minn. 483 (Gil. 375); Goenen v. Schroeder, 8 Minn. 387 (Gil. 344); Carrol v. Rositer, 10 Minn. 174 (Gil. 141); Phinney v. Phinney, 81 Me. 450, 17 Atl. Rep. 405. If a subsequent statute extending the time of redemption impairs the obligation of the mortgage contract, surely an act passed after the execution of the mortgage, which confers upon the mortgagor power to destroy the mortgage lien by creating a lien upon the land superior to that of the mortgage, is a law impairing the obligation of a contract. The district court was right in adjudging the mortgage lien to be superior to both of the liens for seed grain, and the order and the judgment of that court are therefore affirmed. All concur.

FOSTER R. CLEMENT, Plaintiff and Respondent *v.* F. H. SHIPLEY, Defendant and Appellant.

Foreclosure of Mortgage—Rights of Purchaser—Rent.

A purchaser of land under statutory foreclosure of mortgage can recover rent from a lessee of the owner as fast as the rent falls due under the lease, and payment by such lessee to his lessor after notice of the purchaser's rights is no defense.

(Opinion Filed Feb. 23, 1892.)

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

W. A. Scott, for appellant. *D. A. Lindsay*, for respondent.

Action by Foster R. Clement against F. H. Shipley to recover rent. Judgment for plaintiff on demurrer to the answer. Defendant appeals. Affirmed.

W. A. Scott, for appellant:

After a mortgage sale and before the purchaser is entitled to a deed, the rents belong to the owner of the equity of redemption. Aster v. Turner, 43 Amer. Dec. 766; Cheney v. Woodruff, 45 N. Y. 101. The code provisions of this state are identical with California and the statute has been construed in that state in Reynolds v. Lathrop, 7 Cal. 43; Harris v. Reynolds, 31 Cal. 514; Knight v. Truett, 18 Cal. 113; Webster v. Cook, 38 Cal. 425; Walker v. McCusker, 71 Cal. 594. It is fair to presume that our courts will be guided by adjudicated cases upon a statute practically identical. Bank v. Bank, 35 N. W. Rep. 577; Pratt v. Telephone Co., 5 N. W. Rep. 307.

D. A. Lindsay, for respondent:

The defendant was a tenant in possession and obliged to account to the plaintiff for the rent. Harris v. Reynolds, 13 Cal. 515; Walker v. McCusker, 71 Cal. 594. The plaintiff is entitled to recover the rent notwithstanding the defendant has paid it to the mortgagor. Reynolds v. Lathrop, 7 Cal. 43; McDevill v. Sullivan, 8 Cal. 593.

The opinion of the court was delivered by

CORLISS, C. J. The judgment in favor of the plaintiff was rendered upon demurrer by plaintiff to defendant's answer, on the ground that the answer did not state a defense. That judgment is here for review. The facts, which under the pleadings are undisputed, fully warranted the judgment rendered by the trial court. The plaintiff at foreclosure sale purchased certain premises. The foreclosure was by advertisement under the statute. At the time of the sale the defendant was in the possession of the premises as lessee of the mortgagor. The rent he agreed to pay was $10 per month, payable at the end of each month. The purchase was made August 20, 1890, and on September 3, 1890, the plaintiff notified defendant thereof, and demanded that

he should pay to plaintiff all rent falling due subsequently to such purchase. Despite this notice the defendant afterwards paid to the mortgagor, his lessor, the rent for the month of September, and it is for this rent that the action was brought, after the rent was due under the terms of the lease. The trial judge sustained the right of the plaintiff to recover, and we are clear that this decision was sound under these facts. Section 5159, Comp. Laws, provides that the "purchaser from the time of the sale * * * is entitled to receive from the tenant in possession the rents of the property sold." The sale therein referred to is a sale which is subject to redemption. See § 5150, Id. A sale on foreclosure by advertisement is as much subject to redemption as a sale under execution. § 5421, Id. It is not true that § 5159 relates exclusively to execution sales. It refers to "the purchaser" as having this right to recover the rents, and we find on examining § 5150 that "the purchaser" is one who buys property sold subject to redemption. It would be extremely technical to hold that a purchaser on sale under statutory foreclosure should have no right to recover the rents, while a purchaser on sale under execution issued upon a judgment for the mortgage debt, the mortgagor having waived his mortgage lien, and secured a lien upon the same premises by the judgment, should not recover such rents. There should be, and we are clear there is, no distinction expressed or intended by the law between a purchase at an execution sale and a purchase at a mortgage sale. To both the law extends this right to recover the rents the same as the former owner. Our § 5159 is, so far as this question is concerned, an exact copy of the California statute. This act was construed in Reynolds v. Lathrop, 7 Cal. 43 (decided in 1857), long before the same provision became a part of the laws of this state. The case is directly in point. The syllabus states the decision: "A purchaser of land at sheriff's sale can maintain an action for rent against the tenant in possession under the judgment debtor before the expiration of the six months allowed for redemption, and as often as the rent becomes due under the terms of the lease existing when he purchased. The sale operates as an assignment of the lease for the time." See, also, Harris v. Reynolds, 13 Cal. 515; Knight v. Truett, 18 Cal. 113;

Walker v. McCusker, 12 Pac. Rep. 723, 71 Cal. 594, and cases cited. Section 701 of the California Code of Civil Procedure is practically the same as § 5150 of our Compiled Laws, and § 707 of that Code is practically the same as § 5159 of our Compiled Laws. If it is the correct interpretation of § 5159 (§ 706, Cal. Code) that it relates only to execution sales, then the purchaser on sale under decree in foreclosure would have no greater right to claim the benefit of § 5159 (§ 707, Cal. Code) than would a purchaser on foreclosure by advertisement. And yet in Knight v. Truett, 18 Cal. 113, the purchaser who was held entitled to recover the rents was a purchaser under a decree in foreclosure, and not a purchaser on execution sale. So was the purchaser in McDevitt v. Sullivan, 8 Cal. 593, and Walker v. McCusker, 71 Cal. 594. The California courts, under precisely the same statutes, have reached the conclusion we have, and we are firm in our belief that this conclusion is sound. It was no defense that the defendant, after notice of plaintiff's rights, paid the rent to his former landlord. This was done in Reynolds v. Lathrop, 7 Cal. 43, but was not held to constitute a defense. To same effect is McDevitt v. Sullivan, 8 Cal. 593. The judgment is affirmed. All concur.

THEODORUS NORTHRUP, Plaintiff and Respondent, *v.* WILLIAM A. CROSS, Sheriff of Dickey County, Defendant and Appellant.

Exemptions — Selecti on—Claim and Delivery — Alternative Judgment—Damages.

1. An execution d ebtor who undertakes to select his exemptions must indicate to the officer holding the writ the specific property claimed; but this requirement is satisfied by a selection in any manner that the officer cannot, or, under the circumstances, ought not to, misunderstand.

2. The fact that a defendant in an action of claim and delivery gives a delivery bond does not render the proceeding analogous to an action for conversion, and if plaintiff recover an alternative judgment, he is not limited in his damages for the detention to interest on the value, but may recover the value of the use of his property that

has been wrongfully detained from his possession, where such property has an active capacity for earning money.

ON REHEARING.

Where personal property is wrongfully taken by an officer, and sold at judicial sale, and the owner purchases the property at such sale, and receives possession thereof, he is not entitled, in an action of claim and delivery against the officer, to judgment for the value of the property; but, in lieu thereof, he is entitled to judgment for the sum that it cost him to regain possession, with interest on such sum from the date of its payment.

(Opinion Filed Feb. 25 1892.)

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

F. S. Parker and *H. F. Miller* (*Newman & Resser*, of counsel), for appellant. *E. P. Perry* and *Alex. D. Flemington*, for respondent.

Action by Theodorus Northrup against William A. Cross, sheriff of Dickey county, to recover possession of certain personal property. Verdict and judgment for plaintiff. New trial denied. Defendant appeals. Modified and affirmed. On rehearing, reversed, and new trial ordered.

F. S. Parker, H. F. Miller (Newman & Resser, of counsel), for appellant:

The selection made by plaintiff was not sufficiently definite to enable him to recover his exemptions. Friedman v. Sullivan, 2 S. E. Rep. 785. The defendant, as sheriff, was guilty of no neglect of duty. He could not be compelled to select the specific articles for plaintiff. That duty the law puts on the plaintiff. Zielke v. Morgan, 7 N. W. Rep. 283. The action was in fact an action for conversion. Sutherland on Damages, vol. 3, p. 541; Nickerson v. Chatterton, 7 Cal. 568; Bigelow v. Doolittle, 36 Wis. 115; Dorsey v. Manlon, 14 Cal. 553.

E. P. Perry and Alex. D. Flemington, for respondent:

The question as to whether a selection had been made was properly submitted to the jury as the main question in the case.

There being testimony to sustain the finding of the jury, it will not be disturbed. 3 Waite's Practice, p. 405; Estee's Pleaddings, § 4920; Smith v. Wallace, 25 Wis. 55; Vilas v. Mason, 25 Wis. 310. It is proper to charge in replevin, when defendant gives bond, and retains possession of the property, damages for the retention in addition to its value. Hanselman v. Cregel, 40 N. W. Rep. 687; McIntyre v. Eastman, 41 N. W. Rep. 162. In replevin it is only where plaintiff elects to take the value of the property, with damages for the detention, that the rule should be the same as in trover. Bigelow v. Doolittle. 36 Wis. 115.

The opinion of the court was delivered by

BARTHOLOMEW, J. Appellant was sheriff of Dickey county, and as such held an execution issued on a judgment against respondent, under which he made a levy on certain of respondent's personal property. This case arises under the exemption law. Our statute permits a debtor, in addition to certain absolute exemptions, to select and hold other personal property, not to exceed in value the sum of $1,500. But in order to avail himself of the additional exemptions the debtor must, within three days after the levy, deliver to the officer holding the writ a verified schedule of all his personal property. Provision is made for the appraisement of the property thus scheduled; and, if the appraised value exceeds the sum of $1,500, it then becomes the duty of the debtor to select from the appraisement such property as he claims to hold as exempt, not exceeding in value the statutory limit. Comp. Laws, §§ 5128, 5130–5132. The respondent delivered the verified schedule to the sheriff, and the property was appraised, and the appraised value exceeded the sum of $1,500. Appellant claims that respondent failed to select his exemptions. Respondent, on the other hand, claims that he made such selection, and that as the sheriff failed to release the property selected from the levy, but was proceeding to sell the same, he brought this action in claim and delivery to recover the property selected. The sheriff gave a delivery bond, and ultimately sold the property. Both the sworn schedule and the appraisement list are in evidence. In

each it appears that certain articles of property are mentioned; followed by the statement that such articles are mortgaged; giving the name of the mortgagee and the amount secured. Five different mortgages are mentioned in that manner. Then follows a list of articles about which nothing is said. The last article in each list is described in the following language: "One mortgage from Thomas Larkin, $650, assigned to B. F. Gannon as collateral security." The value of the entire list as appraised, less the incumbrances stated, was less than $1,500. It is undisputed that respondent first claimed all the property on the list; and his counsel contended in this court that as the value of all of the property, less the incumbrances thereon, did not exceed $1,500, respondent was entitled as against the execution, to hold the entire amount as exempt. The learned trial court instructed the jury, however, that the exemptions must be selected without reference to the incumbrances; and this charge, not being challenged, must stand as the law of this case. By a fair construction of respondent's testimony, however, he swears that his last demand before bringing this action was for what he denominates the "free property" on the appraisement. This is contradicted, but the jury, in returning any verdict for respondent under the instructions, must have so found. Appellant contends that a selection of the "free property" was too vague and uncertain to constitute any legal selection, and that no burden could be thrown upon him to decide what was or what was not "free property." It is undoubtedly the law that the debtor's selection of exemptions must be so specific and certain that the officer will be appraised of the exact claim made (Zielke v. Morgan, 50 Wis. 560, 7 N. W. Rep. 651; Thomp. Homest. & Ex. § 820 *et seq.*;) and such were the instructions of the court in this case. But the selection made by the respondent fulfills the legal requirement. Appellant had the appraisement in his possession, and he was bound to know on what property he had levied under the execution. Upon the appraisement, certain property was designated as mortgaged, and certain other property was assigned as collateral. The balance was listed without comment, and the term "free property," used in connection with the appraisement, could mean nothing else than property that appeared on such appraisement as unin-

cumbered; and appellant could unmistakably determine what, if any, of such property he had in his possession under the levy. No duty or burden was thrown upon him to determine whether or not any particular property was in fact free. That question was entirely immaterial for the purposes of respondent's selection. The material matter was whether or not he understood exactly what respondent included in the term "free property;" and we hold, under the circumstances, that he must have so understood, and we do so the more readily because appellant, in his testimony, admits that the term was frequently used in the various conversations on the subject, and makes no claim that he did not fully understand it. "It is enough if it [the election] is made to the levying officer in a way in which he cannot, or ought not to, misunderstand it." Thomp. Homest. & Ex. § 834.

But in this connection, and in some manner not disclosed by the record, the jury was permitted to make a serious error. Turning to the verdict, we find among the property, the value of which made up the verdict, the following: "One note and mortgage from Thomas Larkin to plaintiff for six hundred and fifty dollars." Neither the schedule nor the appraisement contains any mention of any note; but this arises from an inaccurate use of terms, as both lists speak of a mortgage for $650 from Thomas Larkin to plaintiff, but describes the same as "assigned to B. F. Gannon as collateral security." The material thing is the note. If that is not contained in the sworn schedule, then, under the statute, it cannot be claimed as exempt. If, on the other hand, it be claimed that the note is sufficiently described by the description of the mortgage that secures it, then most certainly it is excluded from the list of "free property," and was not, under the instructions of the trial court, legally selected by respondent as one of his exemptions. In either event, its value cannot be recovered in this case. The only testimony as to the value of the note is that of respondent himself, who swears that it was "good;" and, as its face value was $650, we are bound to presume that the jury placed it at that sum in making up their verdict. This point as to excessive valuation of property claimed as exempt is fairly raised under

the first assignment of errors. The jury also gave plaintiff damages for the detention of his property in the sum of $200. Appellant insists that when the defendant in claim and delivery gives the proper undertaking, and retains possession of the property, the rule of damages is the same as for conversion, to-wit, interest on the value of the property. In some jurisdictions, where the officer's return shows that he cannot get possession of the property, either because it is beyond the jurisdiction, or because of a counter bond executed by defendant, the action ceases to be for possession. The plaintiff no longer pursues the specific property, but the action is in damages for the value, and defendant cannot satisfy the judgment by delivering the property. In such jurisdictions the plaintiff recovers interest on the value, instead of the value of the use. 3 Suth. Dam. 541 *et seq.* But such cannot be the rule in this state. Here the bond given by defendant is conditioned for the delivery of the property to the plaintiff, if such delivery be adjudged, and, if plaintiff recovers, he takes an alternative judgment. He has the right to insist upon delivery, if a delivery can be had, and on the other hand the defendant has the right to insist upon delivering the property in satisfaction of the judgment for value. Plaintiff's ownership continues during the proceedings; and, being the owner, he is properly entitled to the value of the use of his property wrongfully detained from his possession. In this case it is certain that the amount of damages found by the jury was in no manner affected by the mistake in considering the note. All the evidence of damages pertained to the value of the use of certain teams and machinery, and expense of replacing certain seed grain.

From these views, it follows that the trial court must be directed to modify the judgment for the value of the property by deducting therefrom the value of the note, to-wit, the sum of $650; and as thus modified the judgment of the district court will be affirmed. Appellant will recover costs in this court. All concur.

ON REHEARING.

BARTHOLOMEW, J. A rehearing was granted in this case upon appellant's application, and the question as to what is the

proper rule of damages in cases of this character has been again argued before the court. The questions argued arise, for the most part, concerning a team which the jury found was wrongfully taken by the defendant. When the former opinion was handed down, the court understood that, when the team was taken and sold, plaintiff was permanently deprived thereof as owner. Plaintiff's subsequent possession of the team was supposed to be through some arrangement with the purchaser at the execution sale. It is now insisted that the evidence shows that the plaintiff was in fact the purchaser of this team at the sale, and received it back as owner. On further examination of the testimony, we find there is much in it to confirm this view. There is certainly nothing in the verdict, under the instructions, to negative it. If such be the fact, then the rule of damages as given by the trial court was wrong. When a party whose property has been wrongfully taken by an officer, and sold at judicial sale, buys such property in at such sale, he is not entitled, in an action of claim and delivery against the officer, to judgment for the value of the property, but only for the sum which it cost him to regain possession, with interest on such sum from the time of payment. Of course, this does not affect his claim for damages for the detention while he was deprived of possession. This principle has been applied in a number of cases where the action was for conversion. See Ford v. Williams, 24 N. Y. 359; Baker v. Freeman, 9 Wend. 36; McInroy v. Dyer, 47 Pa. St. 118. In Sprague v. Brown, 40 Wis. 612, it was applied in a case where the plaintiff repurchased the property from a third person who purchased it at the execution sale. In Leonard v. Maginnis, 34 Minn. 506, 26 N. W. Rep. 733, the principle was approved and applied in a case of claim and delivery. It is certainly fair and just, and exactly fulfills the conditions of compensation. The district court will reverse its judgment, and order a new trial. The order heretofore entered in this court will be changed accordingly. Reversed. All concur.

JAMES H. BOSTWICK, Plaintiff and Respondent, *v.* THE MINNEAPOLIS & PACIFIC RAILWAY COMPANY, Defendant and Appellant.

Railroad Companies—Stock Killing—Negligence of Owner—Proximate Cause.

1. In this state the common law rule relative to domestic animals is in force, and every man is bound, at his peril, to keep his stock upon his own premises, and is liable for all damages that his stock may do on the premises of another, whether fenced or unfenced.

2. But the fact that plaintiff's horse was a trespasser upon the railroad track of defendant, without any actual fault of plaintiff, did not relieve defendant, after the presence and peril of the horse were known to it, from the obligation to exercise ordinary care in the management of its trains to prevent an injury to the horse.

3. Where one party has been negligent, and a second party, knowing of such antecedent negligence, fails to use ordinary care to prevent an injury which the antecedent negligence rendered possible, and the injury follows by reason of such failure, the negligence of the second party is the sole proximate cause of such injury.

(Opinion Filed Feb. 29, 1892.)

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

Newman & Resser, for appellant. *McCumber & Bogart*, for respondent.

Action by James H. Bostwick against the Minneapolis & Pacific Railway Company to recover damages for an injury to a horse. Verdict and judgment for plaintiff. From an order refusing a new trial defendant appeals. Affirmed.

Newman & Resser, for appellant:

The horse was a trespasser at the time at which, and the place where the accident occurred. Railroad Co. v. Munger, 5 Denio 265; Robinson v. Railroad Co., 44 N. W. Rep. 779; Neiemann v. Railroad Co., 44 N. W. Rep. 1049; Railroad Co. v. Kerr, 26 N. E. Rep. 316; Railroad Co. v. Kerr, 12 S. W. Rep. 329; Palmer v. Railroad Co., 33 N. W. Rep. 707; Railroad Co. v. Godfrey, 71 Ill. 500. The plaintiff is not entitled to recover

except for willful injury to the horse by defendant. Patterson's Railroad Accident Law, § 199; Van Horn v. Railroad Co., 18 N. W. Rep. 679; Harlan v. Railroad Co., 64 Mo. 480; Darling v. Railroad Co., 121 Mass. 118; Railroad Co. v. Waterson, 4 Ohio St. 424; Bush v. Brainard, 1 Cow. 78; Wright v. Railroad Co., 2 Amer. & Eng. R. Cases, 121; Leary v. Railroad Co., 3 Id 498; Railroad Co. v. Brunson, 19 Id 42; Railroad Co. v. Howard's Ad., 19 Id 98; Schittenhelms v. Railroad Co., 19 Id 111; Railroad Co. v. Hetherington, 83 Ill. 510; Maynard v. Railroad Co., 115 Mass. 458; Volkman v. Railroad Co., 37 N. W. Rep. 731. The rule stated is the general rule and is the rule in a large majority of the states. Patterson's Railway Accident Law, § 204; Palmer v. Railroad Co., 33 N. W. Rep. 731; Scheffler v. Railroad Co., 21 N. W. Rep. 711. The fact that plaintiff's horse escaped from his barn and was wrongfully on the highway, of itself as a question of law, establishes his negligence and would be a bar to a recovery even if defendant had been guilty of negligence. Hance v. Railroad Co., 26 N. Y. 428. The defendant was not guilty of negligence, as it was not bound to keep a lookout for animals wrongfully at large. McAllister v. Railroad Co., 19 Amer. & Eng. R. Cases, 108; Railroad Co. v. Graham, 12 Id 77; Railroad Co. v. Richards, 12 Id 70; Locke v. Railroad Co., 15 Minn. 297. It was not bound to ring its bell at the crossing, for there is no statute requiring it, and if there was defendent did not owe such duty to a trespasser. Harty v. Railroad Co., 42 N. Y. 468; Rosenberg v. Railroad Co., 15 Amer. & Eng. R. Cases 448; Elwood v. Railroad Co., 4 Hun. 808. Defendant was not bound to stop its train. Railroad Co. v. Champ, 75 Ill. 577; Edson v. Railroad Co., 40 Iowa 47; Railroad Co. v. Ganote, 13 Amer. & Eng. R. Cases, 519; Railroad Co. v. Wren, 43 Ill. 77; Railroad Co. v. Bradfield, 63 Ill. 220.

McCumber & Bogart, for respondent:

The question of what facts constitute negligence, or want of ordinary care, is one for the jury. Railroad Co. v. Doggett, 7 So. Rep. 278; Kent v. Railroad Co., 7 So. Rep. 391; Railroad Co. v. Watson, 7 So. Rep. 813; Railroad Co. v. Nash, 24 N. E. Rep. 884; Hanna v. Railroad Co. 21 N. E. Rep. 903; Railroad Co. v.

Gedney, 24 Pac. Rep. 464; Railroad Co. v. Gunn, 8 So. Rep. 648. Even where the facts are undisputed, and different minds might draw different conclusions from the evidence, it is a question for the jury. Lasky v. Railroad Co., 22 Atl. Rep. 367; Williams v. Railroad Co., 14 N. W. Rep. 97; Railroad Co. v. Chambliss, 15 S. W. Rep. 469.

The opinion of the court was delivered by

BARTHOLOMEW, J. We quote from the statement of facts in appellant's brief. "The action was brought in justice court to recover damages alleged to have been done to plaintiff's horse by a passenger train of the defendant. Plaintiff recovered, and on appeal the cause was tried *de novo* in the district court, and a verdict rendered for plaintiff. A motion for new trial was made and overruled, and defendant appealed from the order refusing a new trial. The material allegations of plaintiff's complaint are the fourth and fifth paragraphs, and are as follows: 'That on said last mentioned day plaintiff's said horse casually, and without the fault of the said plaintiff, at the station of Fairmount, in said county and territory, strayed in and upon the right of way of said railroad company; that said company, by its agents, servants, and employes, so negligently and carelessly handled and run its said cars that the same was, at said time and place, run into and over the said horse.' The facts, as shown by the testimony, are as follows: That at the time in question the defendant was running its regular passenger train on schedule time from Fairmount west. The train was in charge of an experienced engineer, who had been running on the road nearly three years. The engine was equipped with all the modern appliances for safety that were at that time in use upon passenger engines, and they were all in good order. The train consisted of the engine and two cars, and was not at any time run at more than the ordinary speed of twenty miles an hour. At and before the time of the accident the engineer was at his position on the right-hand side of the engine, and the fireman on the left-hand side, keeping a lookout. It was necessary for the engineer to remain on the right-hand side of the engine, and the duty of the fireman to keep a lookout on the left.

The country is level prairie, and there was no obstruction to the view from the train along the highway. Plaintiff's house and barn were upon the south side of the track (left hand side of the train), about half a mile east of the place of the accident, and about ten rods from defendant's track, and the same distance west from the track of C., M. & St. P. R. R., which crosses defendant's track at right angles. About half a mile west of this crossing and of plaintiff's barn is the sleigh crossing at which the accident occurred. Plaintiff's horse was in this barn. Plaintiff's servant went to the barn to water the horse, and opened the door and went in. The horse slipped his halter, and ran out, and finally ran onto the public highway, which runs for half a mile parallel to defendant's track, about four rods distant therefrom, and then turns at right angles and crosses the track. The horse ran along this highway west towards the crossing, and plaintiff's servant followed him up as fast as he could. The snow was deep and there was no other track through it than that of the public highway mentioned. When defendant's train started up, after stopping at the C., M. & St. P. R. R. crossing, the horse was on the highway about one-fourth the way from the Milwaukee crossing, going west 'at a pretty good jog.' Defendant's train increased its speed until, at the whistling post, it was running about twenty miles per hour. At this whistling post, eighty rods east of the sleigh crossing where the accident occurred, the engine gave the whistling signal required by the rules of the company. The horse was then fifteen or twenty rods ahead of the train. About fifty or sixty rods east of the sleigh crossing the engineer first saw the horse." We quote now from the engineer's testimony on his direct examination when first put upon the stand: "When I saw the horse I put the air on to stop the engine. I set the air brakes. The engine slowed down materially at that time; came almost to a standstill. I directed the fireman to keep a lookout for the horse, to notify me of its movements. When we got nearly to the track the fireman said, 'George, he is moving towards us.' I put the air on again." It should perhaps be stated that respondent's evidence tended to show that no effort whatever was made to stop the train until about the moment of

the accident. The snow was deep, and the traveled track had become raised somewhat by snow repeatedly blowing upon it, and for this cause the snow was unusually deep on either side of the track. This general condition was known to the engineer, and also the fact that no track led from the traveled way before it crossed the railroad track. The horse had one of its forefeet cut off. The foot was found between the rails. The horse, thus maimed, was on the south side of the track as the train passed it. From this statement of facts the jury were warranted in reaching the conclusion that defendant's servants did not use ordinary care in their efforts to stop the train after the horse was seen by them, and before reaching the highway crossing. If respondent's testimony was true, they used no efforts. If the engineer's testimony was true, it shows that he might easily have stopped the train some distance before reaching the crossing. He says when he first saw the horse he set the air brakes, and brought the train almost to a standstill; that he then directed the fireman to watch the horse and report his movements; that, when they had almost reached the crossing, at a warning from the fireman he "put on the air again." It is clear that, from the time he directed the fireman to watch the horse until he received the warning, he did nothing to stop the train, but, on the contrary, was pulling it ahead. True, he subsequently testified that he did all that could be done to stop the train, but the jury had a right to take his first statement.

At the time the horse was first seen by defendant's servants, did they understand, or ought they to have understood, that the horse was in peril? The engineer says he did not consider the horse in danger. But that was not the test. Were the circumstances, as known to him, such as would have induced the belief in the mind of a man of ordinary prudence that the horse was in danger? Shear. & R. Neg. § 99; Washington v. Railroad Co., 17 W. Va. 190. When the train was at the whistling-post, eighty rods east of the highway crossing, and running twenty miles an hour, the horse was in the parallel highway fifteen or twenty rods ahead of the train. When the train had passed the whistling-post twenty or thirty rods the engineer saw the horse. Certainly the horse could not have gained any upon

the train, and, at most, could not have been more than twenty rods ahead of the train at that time. He was on the traveled track, deep snow on either side, running in fright from the train. If he left the traveled track it would be to go into deep snow, where he could not run, and if he continued upon the traveled track he must inevitably cross the railroad track a very short distance ahead. If train and horse reached the crossing at the same instant, injury to the horse must result. These conditions were known to the engineer. We think the jury warranted in believing that the engineer understood, or ought to have understood, the peril of the horse when he first saw it.

There are errors assigned upon the admission and rejection of certain testimony. None of these assignments raise any question of general interest. We have examined them, but find no prejudicial error.

It is also claimed that the evidence does not support the verdict in certain particulars. We have read the testimony with care, and think that, under the instructions, it has ample support. We will notice one point. It is claimed to be undisputed that the horse ran against the side of the engine, and that the engine did not run against the horse. Perhaps the point is not very material. The engineer swears to it positively. No witness supports him. Two of plaintiff's witnesses, while admitting that from their respective positions they could not be positive, yet they both thought that the horse reached the track ahead of the engine. If the engine moved suddenly and rapidly in front of the horse when he was so near the railroad track that he could neither stop nor turn, we are not able to see why appellant's liability should be different from what it would be if the horse reached the point of intersection an imperceptible instant ahead of the engine. But the engineer testified that the train stopped in the distance of about a car's length after the collision, and then pulled one or two hundred feet beyond the crossing; hence appellant argues that it is undisputed that the train must have been going quite slowly at the time, and that the defendant should no more be held responsible than if the horse had run against a standing engine or the last

car in a lengthy moving train. It is true no witness in terms swears that the train did not stop on the crossing, but two witnesses swore that the speed of the train was not diminished until the collision occurred. At the whistling-post the train was running twenty miles an hour. As men of ordinary judgment, the jury knew that a train running at that speed could not be stopped in a distance of sixty feet. The contradiction was direct in effect, though not in terms. It should be noticed, also, that the conductor of the train, a witness for defendant, testified that the train stopped one or two hundred feet west of the crossing, and mentions no earlier stop, and thinks the train could not have been running twenty miles an hour, because, if so, it could not have been stopped in 200 feet. That testimony indirectly contradicts the testimony of the engineer. In any event, the admitted fact that the horse's foot was cut off by a wheel of the engine, and left between the rails, sufficiently meets the allegation that the engine ran over the horse.

Section 5500, Comp. Laws, reads as follows: "All railroad corporations in this territory shall pay full damages to the owner or owners of horses and other stock and cattle that they may negligently and carelessly kill or damage by their cars, locomotives, agents, or employes, along said railroad or its branches, within the territory of Dakota." Section 5501 is as follows: "The killing or damaging of any horses, cattle, or other stock, by the cars or locomotive, along said railroad or branches, shall be *prima facie* evidence of carelessness and negligence of said corporation." Plaintiff introduced evidence to establish a *prima facie* case under the statute. At the close of this testimony defendant moved the court to direct a verdict, on the theory that the evidence introduced showed contributory negligence on the part of plaintiff of such a character as to defeat a recovery. The motion was denied, and this ruling was assigned as error. At the close of the entire testimony defendant again moved for verdict, urging contributory negligence of plaintiff, and the absence of any negligence on the part of defendant that would render it liable under the circumstances. This motion was denied also, and the ruling assigned as error. Defendant requesed the following instruction: "If the evidence introduced by de-

fendent shows the defendant guilty of no negligence or want of ordinary care, the *prima facie* case made by plaintiff in proving the injury to the horse in question by defendant's train is overcome, and you must find for the defendant unless the evidence introduced by plaintiff shows affirmatively that defendant or its employes were guilty of gross negligence in injuring the horse."

This was refused, and the following instruction given: "If, on the other hand, you shall find from all the evidence in the case that in the killing of this animal the persons in charge of the train at the time were guilty of negligence, that is, they did not exercise that care and prudence which a careful man should have exercised under the circumstances, and that the injury to the animal was the result of want of care on the part of those who had the train in charge, then your verdict must be for the plaintiff for the value of the animal and interest from the time of the injury." The giving of this instruction and the failure to give the one requested are assigned as error. It will be noticed that these assignments involve the same questions raised by the motions for verdict, and the several assignments may profitably be considered together. Two more points are involved, to-wit, the contributory negligence of plaintiff and the degree of negligence necessary to charge defendant with liability. The discussion of the case took a somewhat wider range than it will be necessary for us to take in deciding it. In this state cattle are not free commoners. The common-law rule is in force, and every man is bound, at his peril, to keep his stock upon his own premises, and is liable for all damage done by such stock upon the lands of another, whether fenced or unfenced. Comp. Laws, § 5569. We have no statute requiring railroad companies to fence their tracks. Railroad companies are entitled to the exclusive use of their right of way at the points of intersection with public highways, except as against persons and animals upon the highways for the purposes of legitimate passage. The horse escaped from plaintiff's barn by accident. Plaintiff's servant made immediate pursuit, but before the horse was retaken the injury occurred. The learned counsel for appellant claims that, notwithstanding such fresh pursuit, the horse was a trespasser. It is admitted that had the

horse been lawfully upon the highway in charge of plaintiff or his servant, and accidentally escaped from control, and such fresh pursuit had been made, he would not then have been a trespasser. But it is claimed that the rule is different where the animal escapes from the owner's premises onto the highway. The point is technical, and without deciding it we will assume that the horse was trespassing. We will admit also, without deciding, that defendant owed no duty to this plaintiff to be on the lookout for trespassing animals, and that as to such animals it owed no duty to sound the whistle or ring the bell or slacken the speed of its train upon approaching a public crossing, unless such trespassing animal had been seen by the persons operating the train, and its peril was, or under the circumstances should have been, known by them. Nor would it then be the duty of the defendant to sound the whistle or ring the bell if such signals would be as likely to increase as to diminish the peril of the animal, nor to slacken the speed of the train, if to do so would endanger the safety of the passengers upon the train.

It is urged that the presense of the horse upon defendant's right of way, of itself and as a matter of law, establishes contributory negligence upon the part of plaintiff of such a character as to defeat a recovery; and the case of Hance v. Railroad Co., 26 N. Y. 428, is cited to sustain the point. Other cases might have been cited. Of the case from New York, Mr. Beach, in his work on Contributory Negligence, at page 241, says: It "stands alone in the New York Reports. The rule in that state is clearly the reverse of this." The rule, however, in that state, as we understand it, is based upon a statute requiring railroad companies to fence their right of way. The negligence chargeable to plaintiff is not actual. It is such negligence as exists irrespective of the means by which the animal becomes a trespasser. Plaintiff may have been overpowered and bound hand and foot, and his barn door broken down, and his horse turned into the highway to stray upon defendant's right of way; yet none the less the horse would have been a trespasser, and plaintiff chargeable with that negligence which arises from the mere presence of the animal upon the premises of another, and

which the law must impute to him before it can logically hold him liable for the damage that may be committed by his animal while thus trespassing. The difficult point in the case is to determine what duties devolve upon defendant, admitting that the animal was a trespasser and admitting the negligence of the owner necessarily involved in such trespass.

It is urged upon us with much earnestness and great learning that, under such circumstances, the defendant is liable for willful or wanton conduct or gross negligence. There are many cases which seem to sustain this contention. See Railroad Co. v. Munger, 5 Denio 255, affirmed in 4 N. Y. 349; Van Horn v. Railroad Co., 59 Iowa 33, 12 N. W. Rep. 752; Eames v. Railroad Co., 98 Mass. 560; Darling v. Railroad Co., 121 Mass. 118; Wright v. Railroad Co., 2 Amer. & Eng. R. Cas. 121; Railway Co. v. Stuart, 71 Ind. 500; Shittenhelms v. Railroad Co., 19 Amer. & Eng. R. Cas. 111: Maynard v. Railroad Co., 115 Mass. 458; Railroad Co. v. Stanley (Ind.), 27 N. E. Rep. 316; Bennett v. Railway Co., 19 Wis. 158; Vandegrift v. Rediker, 22 N. J. Law 189. In some of these cases the injury was to persons while trespassers, and in others to animals while trespassers. Possibly there is an inclination to adopt somewhat broader grounds of liability, where the injury is to the person instead of property, but the same general doctrines are announced in all of the cases. A careful perusal of these cases fails to discover any discussion of the duties of the defendants after the peril to the trespassing person or animal was known. In the leading case in 5 Denio, which was an action to revover the value of certain oxen killed by a train, it appeared that the oxen were trespassers, and were lying down upon the track at night. After they were seen all reasonable efforts were made to stop the train, but it could not be done in time to avoid the injury. The negligence alleged was the speed of the train, insufficiency of the headlight and the failure to see the oxen sooner. And in all of these cases—or all to which our attention has been called—it will be found that the negligence upon which a recovery was sought was a failure to see the trespassing person or animals as soon as he or they might have been seen, or a failure to give some signal at a crossing or curve that the law directed should

be given, or running a train at a high rate of speed, or some act of a kindred nature that had no reference to any known obstruction or danger. And in these cases the courts have quite uniformly held, particularly where cattle were not free commoners, that, as the defendant railroad company was under no obligations to anticipate the presence of trespassers upon its track, so it was under no obligation to maintain a watch for such trespassers or to do any act looking to their protection. The language used in some of the cases, notably the New York cases, is broad, and it is stated, without exception or qualification, that, in case of injury to trespassers, there can be no recovery except for the willful or wanton conduct or gross negligence of the defendant; and yet it is apparent at a glance that an entirely different principle is involved when it ceases to be a matter of anticipating trespassers, and their actual presence and peril are known and understood. Another fact will be found to be quite generally present in the above class of cases, and that is that the plaintiff was in actual fault, was guilty of actual negligence, by some act of commission or omission, from which the injury complained of might reasonably be expected to follow. But in this case, as appears from the statement of facts, plaintiff was chargeable with no actual fault or negligence. The trespass was purely technical, and the trespassing animal was seen by the servants of the defendant, and its peril appreciated in ample time to avoid the injury by the exercise of ordinary care and diligence. Under these circumstances we do not think the harsh rule of law that we have been considering applies. Gross negligence is briefly defined as the absence of slight care. It is that course of conduct which indicates an indifference to consequences. If it be for that only that a defendant can be held liable in a case of this kind, then human life and the rights of property have reached a lower valuation than can be found in any other branch of the law. It was well said in one of the cases that no more in law than in morals can two wrongs make one right. Trespassers, particularly mere technical trespassers, have some rights that must be respected. That they are trespassers does not constitute them outlaws, and if seen, and their peril known, they may not ruthlessly be run down and killed where ordinary care—such care as any prudent

man would exercise under the circumstances—would avoid such result. The contrary rule wounds every humane feeling in man's nature; it is opposed to the great golden rule and cannot be sanctioned by reason. We do not think it is, or ever was, the law. Negligence and contributory negligence must not be confounded. Negligence is contributory when, and only when, it directly and proximately induces the injury, in whole or in part. Where the negligent acts of two parties concur in producing an injury, neither being able in the exercise of ordinary care to avoid the consequences of the negligence of the other after it is known, neither is liable to the other. But where one party has been negligent, and a second party, knowing of such antecedent negligence, fails to use ordinary care to prevent an injury which the antecedent negligence rendered possible, and the injury follows by reason of such failure, the negligence of the second party is the sole proximate cause of the injury.

In the case of Isbell v. Railroad Co., 27 Conn. 393, the action was brought to recover the value of cattle killed by defendant's train, and by reason of negligence in its management. The cattle were trespassers, but plaintiff was guilty of no actual wrong or negligence. The case does not disclose whether the cattle were seen or not, and in that respect was weaker than the case at bar. The position of defendant in that case was identical with the position of this defendant, and is thus stated by the court: "The defendants say that, because the cattle were there, it puts the plaintiff, of necessity, in the wrong in the eye of the law, and works a forfeiture of the right to demand the exercise of care on the part of the defendants in running their trains of cars, even though from the want of such care the cattle should be run over and killed." The court in argument say: "A remote fault in one party does not, of course, dispense with care in the other. It may even make it more necessary and important if thereby a calamitous injury can be avoided, or an unavoidable calamity essentially mitigated. Common justice and common humanity, to say nothing of law, demand this; and it is no answer for the neglect of it to say that the complainant was first in the wrong, since inattention and accidents are to a greater or less extent incident to human

affairs. Preventive remedies must therefore always be proportioned to the case in its peculiar circumstances—to the imminency of the danger, the evil to be avoided, and the means at hand of avoiding it. And herein is no novel or strange doctrine of the law; it is as old as the moral law itself, and is laid down in the earliest books on jurisprudence." The court exhaustively reviews the authorities, and reaches the conclusion that, notwithstanding the technical trespass, defendant was liable for the injury caused by the negligent management of the train; and that, before the negligence of the plaintiff can preclude his right to recover, it must be a proximate, and not a remote, cause of the injury.

A more recent case is Needham v. Railroad Co., 37 Cal. 409. In that case plaintiff's mare had trespassed upon defendant's track. In her efforts to escape a train she jumped into a bridge over a dry run. The train was stopped before reaching the bridge, but the animal was injured in being removed by the trainmen. The court charged the jury: "If the mare of plaintiff was injured by the want of ordinary care on the part of the employes of defendant in removing her from the railroad, or by reason of their negligence in doing so, the fact that she was wrongfully upon the road does not protect the defendant from liability," and refused to charge that defendant would be liable only for gross negligence. The trial court was fully sustained on appeal. This case is particularly valuable upon the question of contributory negligence. The court say, on page 419: "About the general rule upon which it is founded—that a plaintiff cannot recover for the negligence of defendant if his own want of care or negligence has in any degree contributed to the result complained of—there can be no dispute. The reason of the rule is that, both parties being at fault, there can be no apportionment of the damages, and not that the negligence of plaintiff justifies or excuses the negligence of defendant. * * * The law does not justify or excuse the negligence of defendant. It would, notwithstanding the negligence of plaintiff, hold the defendant responsible if it could. It merely allows him to escape judgment because, from the nature of the case, it is unable to ascertain what share of the damages is due to his

negligence. He is both legally and morally to blame, but there is no standard by which the law can measure the consequences of his fault, and therefore, and therefore only, he is allowed to go free of judgment. The impossibility of ascertaining in what degree his negligence contributed to the injury being then the sole ground of his exemption from liability, it follows that such exemption cannot be allowed when such impossibility does not exist; or, in other words, the general rule that a plaintiff who is himself at fault cannot recover is limited by the reason upon which it is founded." Upon the main question, the principle decided is thus announced in the syllabus: "If the plaintiff is guilty of negligence, or even of possible wrong, in placing his animals on a railroad track, yet the railroad company are bound to exercise reasonable care and diligence in the use of their road, and, if for want of that care the animals are injured, the company is liable." The law upon this point in this country is largely based upon the case of Davis v. Mann, 10 Mees. & W. 549. In that case an ass was turned into the highway shackled, and was run over and killed. A recovery was allowed, and Lord ABINGER, in reviewing the case, said: "Even if this ass was a trespasser, and the defendant might by proper care have avoided injuring the animal, and did not, he is liable for the consequences of his negligence, though the animal may have been improperly there." The principle of that case has been well stated, as follows: "The party who last has a clear opportunity of avoiding the accident, notwithstanding the negligence of his opponent, is clearly responsible for it." Shear. & R. Neg. § 99. "The mere fact that the plaintiff, when he suffered the injury, was technically trespassing upon defendant's premises, and would not have been injured if he had not so trespassed, is not, of itself, enough to convict him of contributory negligence." Shear. & R. Neg. § 97. Again: "It is now perfectly well settled that the plaintiff may recover damages for an injury caused by the defendant's negligence, notwithstanding plaintiff's own negligence exposing him to the risk of injury, if such injury was proximately caused by defendant's omission, after becoming aware of plaintiff's danger, to use ordinary care for the purpose of avoiding injury to him. We know of no court of last

resort in which this rule is any longer disputed." Id § 99. In the note to Wright v. Railroad Co., 2 Amer. & Eng. R. Cas. 121, cited by appellant, the doctrine is recognized that "the fact that a person is a trespasser on the track does not absolve the company from preventing inflicting an injury upon him, if by the exercise of due care it could be avoided. * * * What is due care on the part of the company, under such circumstances, is necessarily a question of fact, and depends upon the circumstances of each case." Citing Railroad Co. v. Riley, 47 Ill. 514; Stout v. Railroad Co., 2 Dill. 294; Railroad Co. v. Dignan, 56 Ill. 487; Finlayson v. Railroad Co., 1 Dill. 579. Without extending this opinion by further quotations, we cite, in addition to cases already mentioned, and as supporting some or all of the propositions which we announce, the following cases: Railroad Co. v. Todd, 36 Ill. 409; Railroad Co. v. Champ, 75 Ill. 577; Railroad Co. v. Godfrey, 71 Ill. 500; Palmer v. Railroad Co., 37 Minn. 223, 33 N. W. Rep. 707; Locke v. Railroad Co., 15 Minn. 350 (Gil. 283;) Witherell v. Railroad Co., 24 Minn. 410; Scheffler v. Railroad Co., 32 Minn. 518, 12 N. W. Rep. 711; Railroad Co. v. Kerr, 52 Ark. 162, 12 S. W. Rep. 329; Harlan v. Railroad Co., 64 Mo. 480, 65 Mo. 22; Hicks v. Railroad Co. 64 Mo. 430; Isabel v. Railroad Co., 60 Mo. 480; McCarty v. Canal Co., 17 Hun. 74; Harty v. Railroad Co., 42 N. Y. 472; Kerwhacker v. Railroad Co., 3 Ohio St. 172; Railroad Co. v. Lawrence, 13 Ohio St. 67; Washington v. Railroad Co., 17 W. Va. 190; Lawson v. Railroad Co., 57 Iowa 672; Trow v. Railroad Co., 24 Vt. 494; Laude v. Railroad Co., 33 Wis. 640; Railroad Co. v. Brown, 14 Kan. 469; Railroad Co. v. Davis, 31 Kan. 645, 3 Pac. Rep. 301. Section 3603, Comp. Laws, reads as follows: "Every one is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself. The extent of liability in such cases is defined by the title on compensatory relief." We fully agree with appellant that this does not abrogate the common-law rule as to contributory negligence. It but declares and confirms that rule as recognized

and explained in the foregoing cases. But under that statute and the decisions it is clear that the assignments of error which we have been considering are not well taken. It is urged that the instructions did not limit the time in which ordinary care was incumbent upon defendant to the time after the animal was seen. That could not be error in this case. The testimony was all directed to the conduct of defendant's employes after the horse was seen.

The appellant segregates and assigns error upon the following words in the charge: "The plaintiff in the case offered further proof, over and beyond the presumption of law, showing negligence on the part of the company and those in its employ." This language is unfortunate, and the instructions would have been better without it. It is one of those oversights which are well-nigh inseperable from the haste of jury trial. Immediately following this language the court said: "Now, you are instructed that the liability of this defendant, if it is liable in this case, depends entirely upon its negligence. It is not liable simply because it may have killed the horse; and if you find that in killing this animal the railroad company was not negligent—was not guilty—or, rather, did not fail to exercise that care and prudence which a prudent man would under the circumstances, then your verdict must be for defendant. If, on the other hand, you shall find from all the evidence in the case that in the killing of this animal the persons in charge of the train at the time were guilty of negligence, that is, they did not exercise that care and prudence which a careful man should have exercised under the circumstances, and that the injury to the animal was the result of want of care on the part of those who had the train in charge, then," etc. Read with the context, we are clear that the court had no thought of passing upon the weight of testimony, but simply meant that the plaintiff introduced further testimony for the purpose of showing negligence, and we think the jury must have so understood it. We are not inclined to relax in the least the rule that makes the jurors the sole arbiters of the facts, yet, in a case where it is so apparent as in this that exact justice has been done, we are not warranted in reversing the case for a mere oversight of

the trial judge which we are clear in no manner prejudiced the appellant. The judgment of the district court is affirmed. All concur.

MERCHANTS' NATIONAL BANK, of Devils Lake, a Corporation, Plaintiff and Appellant, *v.* FRANK W. MANN and F. W. PARKER, Co-Partners as F. W. MANN & Co., and EVER WAGNESS, Defendants and Respondents.

Mortgage on Crops—Construction—Uncertainty.

A chattel mortgage, which covers all crops to be grown on certain specified land "during the years A. D. 1888, 1889, and for each and every succeeding year until the debt hereby secured is fully paid," is not void as to the crop raised by the mortgagor on said land in the year 1890, by reason of any uncertainty as to the time when the crops covered by said mortgage are to be grown.

(Opinion Filed March 7, 1892.)

APPEAL from district court, Ramsey county; Hon. D. E. MORGAN, Judge.

A. S. Drake, for appellant. *James F. O'Brien*, for respondents.

Action by the Merchants' National Bank, of Devils Lake, against Frank W. Mann & Co. and Ever Wagness for conversion. From an order sustaining a demurrer to the complaint, plaintiff appeals. Reversed.

A. S. Drake, for appellant:

A chattel mortgage given upon property not *in esse* is valid. Bank v. Elevator Co., 43 N. W. Rep. 806; Mitchell v. Winslow, 2 Story 630; McCaffrey v. Woodin, 65 N. V. 459; 4th Amer. & Eng. Enc. of Law, p. 903. The description in the mortgage was ample. Jones on Mortgages, § 55; Rawlins v. Kennard, 41 N. W. Rep. 1004; Page v. Kendig, 7 Atl. Rep. 878; Howell v. Francis, 10 Atl. Rep. 436; Hughes v. Wheeler, 24 N. W. Rep. 251; Scharfenburg v. Bishop, 35 Iowa 66; Stephens v. Pence, 9 N. W. Rep. 215; Cadwell v. Pray, 2 N. W. Rep. 52; Fejavary

v. Broesch, 2 N. W. Rep. 963; Luce v. Moorhead, 35 N. W. Rep. 598; Green v. Rogers, 62 Ga. 166; Dehority v. Paxsen, 97 Ind. 253; Holroyd v. Marshall, 10 H. L. Cases 191; Fuller v. Railroad Co., 43 N. W. Rep. 1085; Bennett v. Bailey, 22 N. E. Rep. 916; Ludlum v. Rothchild, 43 N. W. Rep. 137; Melin v. Reynolds, 19 N. W. Rep. 81; McKay v. Shotwell, 50 N. W. Rep. 622; Sandwich Mfg. Co. v. Robinson, 49 N. W. Rep. 1031; Pennock v. Coe, 23 How. 117.

James F. O'Brien, for respondents:

The description in the mortgage is insufficient to impart notice to the world. Pennington v. Jones, 10 N. W. Rep. 274; Eggert v. Thoren, 13 N. W. Rep. 426; Barr v. Cameron, 28 N. W. Rep. 413; Smith v. Coor, 10 S. E. Rep. 466.

The opinion of the court was delivered by

BARTHOLOMEW, J. This was an action for conversion of certain grain, brought by plaintiff as mortgagee. A demurrer to the complaint was sustained, and plaintiff appealed. The sole question raised relates to the sufficiency of the description in the mortgage. The mortgage was given in March, 1888, to secure a note due December 1, 1888, and the portion of the description upon which the attack is made reads as follows: "All the crops of every nature, name, and description, to be sown, grown, planted, cultivated, or harvested during the years A. D. 1888, 1889, and for each and every succeeding year until the debt hereby secured is fully paid on the following real estate," etc. The grain in controversy was raised by the mortgagor upon the premises described in the year 1890. Section 4328, Comp. Laws, reads: "An agreement may be made to create a lien upon property not yet acquired by the party agreeing to give the lien, or not yet in existence. In such case the lien agreed for attaches from the time when the party agreeing to give it acquires an interest in the thing to the extent of such interest." In the case of Grand Forks Nat. Bank v. Minneapolis & N. Elevator Co., 6 Dak. 357, it was held upon full review of the authorities that under the provisions of this section a party might mortgage a crop to be grown in the future, and

that, when the mortgage was properly filed, the lien attached the moment such crop came into existence; that it required no further act upon the part of the mortgagor to give force to the lien, nor was it necessary for the mortgagee to take possession; that there was no interim during which a lien could attach that would postpone the mortgage. The defendant in this case does not dispute the legal propositions stated in the case in 6 Dak., but contends that the years in which the lien of the mortgage will attach to the crop are so indefinite and uncertain as to render the mortgage absolutely void as against third parties as to all crops except those of 1888 and 1889. We have been unable to reach that conclusion. We think the record ample to give notice to all third parties. When a chattel mortgage is once filed, no presumption arises that the debt thereby secured is paid until the mortgage is satisfied upon the record, or until the lien ceases to be of any force or effect under the provisions of § 4383, Comp. Laws, which fixes three years from date of filing as the limit of a lien under a chattel mortgage as against creditors and subsequent purchasers, unless a proper renewal affidavit has been filed. When a chattel mortgage covers all of a certain line of property that the mortgagor may acquire or produce, until the debt secured by the mortgage is paid, whoever seizes the mortgaged property while the mortgage remains in force, as shown by the record, does so at his peril. In this case the grain was seized in December, 1890. The three years of life that the statute gave the mortgage had not expired; there was no satisfaction of the mortgage of record; hence defendant was bound to know that the lien had attached to and covered the crop of 1890. It could not have been more certain if the year had been named. Yet we understand respondent's position to be that, had the mortgage specifically named any number of years, by filing the proper renewal affidavits the mortgage could be kept good until the end of the term, or at least until the debt was barred by the statute of limitations. But in that case, whether the mortgage was in fact a lien upon the crop of any one year would depend upon the same fact that governs under the description as it is, and that is the fact of payment. The same uncertainty would exist in the one case

that exists in the other. The record would give just the same information in one case as in the other, and no more. True, in the one case there would come a time beyond which the lien could not extend whether the debt was paid or unpaid, while in the other it would cover the crop of every year until the debt was paid; but we see nothing in that fact that would invalidate the mortgage. If the mortgage can cover one crop not *in esse*, it can cover any number; and while it stands in force upon the record it is notice to all the world that it has attached to all the specified crops that have come into existence. None of the cases cited by respondent require us to hold this mortgage invalid for the reason urged. In Pennington v. Jones, 57 Iowa 37, 10 N. W. Rep. 274, the description, so far as it referred to time, read: "To be sowed and raised on the land leased of Barber McDowell, and now occupied by said W. A. McDowell." No year was named, no beginning or end of term specified, or any *data* from which it could be inferred. In Eggert v. White, 59 Iowa 464, 13 N. W. Rep. 426, the description read: "All and the entire crop of flax and wheat and other grain or produce raised on the east half," etc. Held void for uncertainty, as furnishing no notice when such crop was, or was to be, "raised." In Barr v. Cannon, 69 Iowa 20, 28 N. W. Rep. 413, the description was identical with the last description, so far as time was involved, and was held bad for the same reason. And in Luce v. Moorhead, 73 Iowa 498, 35 N. W. Rep. 598, the mortgage covered "all crops growing and to be grown." Held valid as to growing crops and invalid as to crops to be grown, for the reason that no year was indicated in which the crop was to be grown. It will be noticed that in all these cases from Iowa the description is insufficient to raise an inquiry that would result in identification. While under the description in the case at bar the question of identification does not arise, the description covers all crops for every year from the time the mortgage was given until it was paid. The only inquiry required to ascertain the rights of the mortgagee was as to payment, and that inquiry is present under every mortgage, and decisive in all cases where no other question is involved.

Counsel also cites Wooten v. Hill, 98 N. C. 48, 3 S. E. Rep.

846; State v. Garris, 98 N. C. 733, 4 S. E. Rep. 633; Smith v. Coor, 104 N. C. 139, 10 S. E. Rep. 466; Taylor v. Hodges, 105 N. C. 344, 11 S. E. Rep. 156; Loftin v. Hines, 107 N. C. 360, 12 S. E. Rep. 197. These are all North Carolina cases. It had been held in that state that all crops to be planted might be the subject of a chattel mortgage, and the effect of the above authorities is to limit that holding to the next succeeding crop. The court say in Wooten v. Hill: "The authorities do not warrant the conveyance of an indefinite prospective unplanted crop, and we think it should be limited to crops planted or about to be planted, as the crops next following the conveyance." And accordingly, in Loftin v. Hines, that court held, in a mortgage of crops for the years 1888, 1889, 1890 and 1891, that the mortgage was invalid as to the crop of 1889; and in this last case the court also places its holding on the ground of public policy in that state, as evinced by various legislative enactments. But these cases can have no application here. All considerations of public policy are disclaimed by respondent, and there certainly is nothing in our statute limiting the right to create a lien upon property not in existence to property that may come into existence during the next succeeding season. Granted the validity of a mortgage of crops not *in esse*, and we see no difference in principle between the case at bar and the case of a chattel mortgage upon a certain stock of merchandise and all goods that may be added to said stock until the debt secured by the mortgage is fully paid. Yet descriptions of the latter class have repeatedly been held sufficient to cover all after-acquired goods until the debt was in fact paid. Hughes v. Wheeler, 66 Iowa 641, 24 N. W. Rep. 251; Cadwell v. Pray, 41 Mich. 307, 2 N. W. Rep. 52; McCaffrey v. Woodin, 65 N. Y. 459; Fuller v. Railroad Co., 78 Mich. 36, 43 N. W. Rep. 1085. To the profession the policy of authorizing a party to thus indefinitely incumber his future crops may appear of doubtful benefit and of dangerous tendency, but these considerations are for the legislature, and not for the courts. The district court is directed to reverse its judgment and overrule the demurrer. Reversed. All concur.

CORLISS, C. J., in concurring, does not wish to be regarded as approving or disapproving the decision in Grand Forks Nat. Bank v. Minneapolis & N. Elevator Co., 6 Dak. 357.

STATE OF NORTH DAKOTA, *ex rel.* ALANSON W. EDWARDS, Plaintiff and Respondent, *v.* ALFRED C. DAVIS, Defendant and Appellant.

Order Punishing For Contempt—Right of Appeal.

An order punishing a person for contempt in disobeying an injunction, where the contempt proceeding is not and cannot be used as a remedy to enforce obedience to the injunction or to indemnify the party injured by the contempt, is not an order made in an action or special proceeding, and is therefore not appealable. Such a contempt proceeding is not remedial in its character, but purely of a criminal nature, its object being exclusively to vindicate the authority of the court.

(Opinion Filed March 19, 1892.)

APPAEL from district court, Cass county; Hon. RODERICK ROSE, Judge presiding.

Alfred C. Davis and *Benton & Amidon*, for appellant. *S. G. Roberts*, for respondent.

Proceedings on the relation of Alanson W. Edwards against Alfred C. Davis, for contempt of court. From an order adjudging defendant guilty, he appeals. Appeal dismissed.

Benton & Amidon, for appellant:

The judgment is appealable. Brinkley v. Brinkley, 47 N. Y. 40; Railroad Co. v. Railroad Co., 71 N. Y. 430; Carrington v. Railroad Co., 52 N. Y. 583. The judge presiding had no authority or jurisdiction to hear the proceeding, or render judgment. Wells on Jurisdiction, § 174; Klaise v. State, 27 Wis 462; Wallace v. Railroad Co., 25 Pac. Rep. 278; Gale v. Michie. 47 Mo. 326; State v. Shea, 95 Mo. 85; People v. O'Neil, 47 Cal, 109. The alleged restraining order was void because not issued in a case provided by the statute for the allowance of an injunc-

tion. Dickey v. Reed, 78 Ill. 261; Walton v. Develing, 61 Ill. 201; Darst v. People, 63 Ill. 306.

S. G. Roberts, for respondent:

The judgment herein is not appealable. U. S. v. Hudson, 7 Cranch 32; First Cong. Church v. Muscatine, 2 Clark (Iowa) 69; State v. Morrill, 16 Ark. 384; Middlebrook v. State, 43 Conn. 267; People v. Wilson, 64 Ill. 195; Whittem v. State, 36 Ind. 212; *ex parte* Kearney, 7 Wheat. 38; New Orleans v. Steamship Co., 20 Wall. 387; Hagen v. Alsten, 9 Ala. 627; Cassart v. State, 14 Ark. 583; Tyler v. Hammersley, 44 Conn. 393; Watson v. Willins, 36 Miss. 331; Hays v. Fischer, 12 Otto 121; McKicken v. Perin, 20 How. 133; Larrabee v. Selby, 52 Cal. 506; Vilas v. Barton, 27 Vt. 56; State v. Giles, 10 Wis. 101. The power of a court exercising equity power to punish, as a contempt, the violation of an injunction granted by the court, or a judge thereof, has never been questioned. Neal v. Osborne, 15 How. Pr. 81; Wheeler v. Gilsey, 35 How. Pr. 139; Stimson v. Putnam, 41 Vt. 238; Poertner v. Russell, 33 Wis. 193. The order of injunction could only be void for want of jurisdiction to issue it. If it was improperly issued, then it is obligatory until vacated, or reversed by an appellate court, and must be respected until annulled by the proper authorities. *In re* Cohen, 5 Cal. 494; Sullivan v. Judah, 4 Paige 442; People v. Berger, 53 N. Y. 409; Hilton v. Patterson, 18 Abb. 245.

The opinion of the court was delivered by

CORLISS, C. J. This appeal is from a final order made in contempt proceedings adjudging the appellant, Davis, guilty of contempt in advising the disobedience of an alleged injunction order restraining the voting of certain stock by one E. O. Faulkner at a stockholders' meeting held to elect directors of the Argus Printing Company. The appealibility of this order is questioned. It imposed a fine of $75, and ordered that Mr. Davis stand committed to the common jail of Cass county, in this state, until such fine should be fully paid to the clerk of the court making the order. The authorities are in inextricable confusion on the question of the right to appeal in contempt

proceedings. A review of them will profit little. This inquiry is to be solved by our own statutes. Section 1 of the appeal law of 1891 provides that "a judgment or order in a civil action or in a special proceeding, in any of the district courts, may be removed to the supreme court by appeal, as provided in this chapter, and not otherwise." Section 24 of the same act provides that a final order affecting a substantial right, made in special proceedings, may be reviewed by appeal. Chapter 120, Laws 1891. It is obvious that the order appealed from is not an order in an action. It in no manner affects the merits of the action. It has no connection with any step taken or to be taken in the action itself. It determines no question in the action for or against either party. It does not affect the final judgment. The action can proceed as though it had never been made. It is an episode in an action. It is the vindication by the court of its authority. If it can be regarded as a proceeding in the action, still it is not an appealable order. Certainly it is not the final judgment in the action. Nor is it an order affecting a substantial right in an action, which, in effect, determines the action, and prevents a judgment from which an appeal might be taken. It does not involve the merits of an action. Neither is it one of the orders specifically enumerated in section 24 as appealable. It remains to be considered whether the order was one made in special proceedings, within the meaning of the appeal law. The New York authorities are cited to sustain the contention that it is such an order. An examination of these cases will disclose the fact that the contempt proceedings, which were there held to be special proceedings, were instituted, not primarily to vindicate the authority of the court, but under a statute authorizing such procedure to compel the contemnor, by way of fine, to make good to his antagonist the damage done the latter by the refusal of the former to obey an order or decree of the court. In some cases where the order has been held appealable, the proceeding was instituted as process to compel obedience to an order or decree in equity. Where a statute gives to the injured party a right to institute contempt proceedings to indemnify him against loss by reason of the disobedience by his antagonist of an order, judgment or decree, it

is clear that, while the proceeding is in name and form a contempt proceeding, it is not instituted for the sole purpose of vindicating the authority of the court, but as a remedy to the suitor, who has a right to insist on obedience to the mandate of the court, and therefore ought to be allowed to demand, as a matter of right, that, in a proper case, the court give him the benefit of its order or decree in his favor by so exercising its power to punish for contempt, in case of a disobedience thereof, as to indemnify him against injury by reason of such disobedience. The primary object of such a proceeding is indemnity to the litigant. Incidentally the court's authority is vindicated. The court, under the command of the statute, lends its contempt power to the suitor, who has been denied the fruits of an order or decree by the refusal of his opponent to obey it. Such a proceeding is therefore a remedy, and, not falling within the definition of an action, either civil or criminal, it is of necessity a special proceeding. "Every other remedy is a special proceeding." § 4812, Comp. Laws. It is necessary that the contempt proceeding should be remedial in its character to be a special proceeding. It is every other "remedy" that is a special proceeding. In New York the decisions stand upon a statute which expressly gives the injured party the legal right to institute and control contempt proceedings, to the end that the court may therein impose, as a punishment for the contempt, such damages as the injured party has sustained by reason of such contempt. This is apparent from the authorities. The leading case in that state on this point is Sudlow v. Knox, 7 Abb. Pr. (N. S.) 411. Speaking of the nature of the contempt proceedings the order in which was held appealable, the court said: "These were instituted and conducted under the provisions of the statute entitled 'Of proceedings as for contempt to enforce civil remedies and to protect the rights of parties in civil actions.'" The court say further: "Section 21 provides that, in case the fine imposed for indemnity of the party injured shall be paid to and accepted by him, it shall constitute a bar," etc. It is apparent that the contempt proceedings thus held to be special proceedings were, by force of a statute, remedial in their character. The act cited in the opinion

was passed to afford to the successful litigant a legal right to demand that the power of the court to punish for contempt be so exercised to enforce a decree or order in his favor as to indemnify him for damage sustained by the contempt. The other New York authorities follow the decision. The Michigan authorities belong to the same class. In People v. Simonson, 9 Mich. 491, the court said: "This is an appeal from an order made under section 4094 of Compiled Laws, punishing defendants for a contempt for violating an injunction, which the relator moves to have dismissed. The section is as follows: 'If an actual loss or injury has been produced to any party by the misconduct alleged, the court shall order a sufficient sum to be paid by the defendant to such party to indemnify him and to satisfy his costs and expenses, instead of imposing a fine upon such defendant; and in such case the payment and acceptance of such sum shall be an absolute bar to any action by such aggrieved party to recover damages for such injury or loss.' The order is final, and cannot be reviewed unless on an appeal from the order itself. It is more of a civil than of a criminal nature, its principal objects being to compel defendants to make compensation to the relator for the injury they have done him in violating the injunction, rather than to vindicate the dignity of the court and the majesty of the laws. For these reasons we are of the opinion the motion should be denied." In Romeyn v. Caplis, 17 Mich. 449, the court said: "It has been contended before us that the order in this case was not one from which an appeal could be taken, since the appellee did not claim that an actual loss or injury had been produced to the party by the misconduct alleged, and did not ask for any sum to indemnify him. I think that this position cannot be sustained. The injunction was an appropriate civil process, belonging to the remedy in the action in which it issued, and the proceeding for its violation was under the chapter entitled 'Of proceedings as for contempt to enforce civil remedies and to protect the rights of parties in civil actions.' The order complained of was final, and not merely a step in the course of the proceeding contemplating further action by the court in relation to the same matter, and it belonged to that

class of proceedings which are provided to secure obedience to the necessary processes of courts in civil cases. It adjudged the party guilty of willful disobedience of the injunction, and required him to pay a fine, under peril of imprisonment. It did not stop here. It expressly awarded to the complainant the costs and expenses incurred in prosecuting the contempt, and which were fixed in it at $10. This part of the order cannot be reconciled with the claim of the appellee that the prosecution of the contempt was only carried on by the complainant as the friend of the court, and that the infliction was for the sole purpose of vindicating the authority of the court. The essential character of the proceeding indicates very clearly that what was sought to be accomplished, and in fact done, was to be in keeping with the purpose of the statute which has been referred to."

In Wisconsin, as in New York and Michigan, there exist statutes providing for the punishment of contempt for the benefit of the injured party. The same distinction is there made. If the proceeding is carried on for the benefit of the successful litigant, the remedy is a special proceeding, and the order is appealable. Said the court in State v. Giles, 10 Wis. 101: "This is an appeal from an order of the circuit court of Jefferson county by which the sheriff was adjudged guilty of contempt for not executing a writ of assistance, and fined ten dollars and costs. The general rule in relation to conviction for contempt is that there is no appeal. But there is a very clear distinction between those proceedings for contempt which are merely in the nature of civil remedies for the benefit of the party injured, and those ai med at conduct which tends directly to interrupt the proceedings and impair the authority of the court. In respect to the latter, it is essential to the very object of granting the power to punish for contempt that it should not be subject to appeal. Such being the general rule, the order in this case would not be appealable without an express statutory provision." The same distinction is stated *In re* Pierce, 44 Wis. 411-422; State v. Brophy, 38 Wis. 414; and *In re* Murphy, 39 Wis. 286. This last case is peculiarly in point. The appeal was from an order punishing the appellant for contempt in dis-

obeying an injunctional order. There was a fine of $125 imposed. The court held that the order was not appealable, saying: "The defendant was convicted of willful disobedience of an order of the court, and was adjudged in contempt because of such disobedience, and fined therefor. Looking at its results, whatever it may have been in its inception, the proceeding is not a controversy between certain parties to the civil action out of which it arose and the appellant, in which the former seek indemnity for the wrongful act of the latter, but a public prosecution, by which the state seeks to vindicate the authority of one of its courts, and to punish the defendant for an alleged interference therewith. It is quite immaterial that the alleged contempt was committed in the progress of a civil action. It was essentially a criminal contempt, and the court sought to punish it as such by imposing a fine upon the defendant which, if paid, goes to the school fund. No party to the civil cause has any more interest in the conviction and punishment of the appellant than has any other citizen of the state. That an appeal does not lie from a judgment or order in a criminal case or proceeding has been frequently adjudicated by this court, and is now too well settled to be questioned or doubted." After citing the cases the court continues: "In the above cases the distinction between those proceedings for contempt, which merely result in enforcing civil remedies, and those which result in the imposition of criminal punishment, as affecting the right of appeal, is stated and considered." In Shannon v. State, 18 Wis. 604, the contempt order held appealable awarded to the party in whose favor the injunctional order, disobeyed by the appellant, had been made, damages sustained by the former by reason of such contempt. This was under the Wisconsin statute. See this statute, quoted at length *In re* Pierce, 44 Wis. 411, at page 422. In Ballston Bank v. Marine Bank, 18 Wis. 490, the order held appealable was made in proceedings to punish for contempt a third person, having property of the judgment debtor, who refused to answer proper questions in supplementary proceedings. Such a contempt proceeding is clearly a remedy to enforce the rights of the judgment creditor under his order in supplementary proceedings, and is therefore

a special proceeding. We also have a statute giving the judgment creditor this contempt remedy. § 5185, Comp. Laws. The same distinction is clearly stated in an article in the fifth volume of the Criminal Law Magazine, at page 652. After referring to the decision in Yates v. People, 6 Johns. 337, holding that a conviction for a criminal contempt was subject to review on appeal, the learned writer says: "The same question subsequently came before the same court in Yates v. Lansing, 9 Johns. 395, and the doctrine of the former case was overthrown on all points, and has never been the law of New York from that date to this, though, as elsewhere seen, appeals are constantly prosecuted in that state from judgments in proceedings as for contempt to enforce civil remedies;" referring to the leading New York case of Sudlow v. Knox, 7 Abb. Pr. (N. S.) 411, already referred to, and also to the late decision resting upon that case. In Rapelje on Contempt it is said, at page 200: "In New York and several other states final orders punishing a party in remedial proceedings for contempt, *e. g.*, orders imposing a fine in the nature of an indemnity to a party suffering injury by reason of the alleged contempt, are appealable." In this connection the writer cites the cases already referred to in this opinion, with others.

There is another class of contempt proceedings which are purely remedial in their character. This class embraces such contempt proceedings as were resorted to by a successful litigant in equity to secure the fruits of his litigation, in case of the refusal of the defeated party to obey the order or decree made in such action. Such a proceeding, while in form a contempt proceeding, was never instituted primarily to vindicate the court's authority, but for the sole purpose of giving the successful suitor the fruits of his litigation. It was, in legal effect, process to enforce an order or decree. It was one of the remedies by which equity compelled obedience to its mandates. No execution could issue out of chancery. A contempt order was the process of that court. In such a case, as in the case of a proceeding under a statute giving the injured party indemnity for damages because of the contempt of his antagonist, there is a legal right in the suitor to demand that the proceedings be instituted. He

may control them. They are for his benefit. They are the remedy which the law affords him, that he may secure the fruits of his litigation. He may insist that the court shall put forth in his behalf its power to punish for contempt. The proceedings are remedial in their character. In a proper case the suitor has a legal right to an order punishing his opponent for contempt, where the contempt proceedings are of this character. A denial of that right will be reviewed on appeal, and the appellate court will compel the inferor tribunal to give the successful litigant this process to secure the benefits of his victory. Ballston Bank v. Marine Bank, 18 Wis. 490; Livingston v. Swift, 23 How. Pr. 1; Rap. Contempt, § 149; Wyatt v. Magee, 3 Ala. 94.

But the proceeding culminating in the order appealed from in this case was not instituted to give to the party who had obtained the injunction, damages because of the disobedience of such injunction under the advice of the appellant. Nor could such a contempt proceeding be here instituted. We have no statute authorizing it, and it was unknown to the common law. Neither was the order made as a means of securing to the suitor the benefit of his injunction. The order merely imposed a fine to be paid to the clerk of the court, and directed that appellant stand committed until it was paid. The act restrained had been done, and could not be undone. No amount of imprisonment could result in an obedience to the injunctional order. It was beyond the power of the party enjoined to refrain from voting the stock, for the stock had been already voted by him, and the act was irrevocable. The person in whose favor the injunctional order had been made could not, therefore, insist that the appellant be punished, either to indemnify the former or to compel an observance of the injunctional order. He had no right to insist that contempt proceedings be instituted as his legal remedy for the wrong done. Their only possible scope and object was the vindication of the court's authority. A contempt proceeding, when instituted for this purpose is not a "remedy," as that word is used in defining a special proceeding. Perhaps it might be proper, in common parlance, to speak of such a proceeding as the remedy of the state to compel respect for its authority as lodged in its courts. But it is not such a

remedy that the Code contemplates. Such a construction would lead to the result that every proceeding to punish a contempt in open court is a special proceeding, because it is a remedy, and therefore an order made in such a proceeding, refusing to punish a person guilty of such a contempt, would be appealable, because it would be final, and would affect a substantial right —the right of the court to vindicate its own authority. Surely it would be final, and affect a substantial right, if it punished the defendant in the contempt proceeding. It would, indeed, seem anomalous that an appellate court should have power to compel an inferior court to punish a criminal contempt—an insult to the judge or a willful breach of peace in open court, which such inferior court had refused to punish—or that it should have power to review the action of such inferior court, and discharge one whom that court had adjudged guilty of such a contempt. It is true that the judge who presides over the court against which the contempt is directed is not regarded as having any personal interest in the matter. The law punishes the contemnor out of no personal consideration for the judge. The punishment is not meted out as "balm to hurt mind." Nor is there in the law aught of malice against him who is punished. The power is exercised by the court as the representative in this respect of the people—the ultimate sovereigns—and in their interest and for their good. The maintenance of the authority of the judiciary is indispensable to the stability of the government. Having power over neither the purse nor the sword, it is helpless and defenseless, open to wanton insult, the object of universal derision and contempt, unless the people have by necessary implication, vested in the judiciary authority to assert its power, to compel respect and obedience to its orders and decrees and to preserve order and decorum in open court by calling upon the physical power of the state to uphold this independent department of the government in its full integrity. The people, by the very act of creating a judicial department, necessarily vested in it this prerogative. This power to punish for contempt, which inheres in the very constitution of every court, is to be exercised solely for the public good, that a branch of the people's government may not lose its

efficacy, and thus the government be brought to anarchy. But it does not at all follow that, because the state alone has any interest in the punishment of such a contempt, the power to punish it does not reside exclusively in the tribunal insulted or defied. On the contrary, there has been only one thought touching this question. All the cases speak of this power as being lodged in only the tribunal toward which the contempt is directed. Rap. Contempt, § 13, and cases cited.

A superior court, unless such authority is clearly conferred, should not be regarded as having been invested with power by an appeal to punish for such a contempt directed against an inferior court or to discharge one whom such inferior court has adjudged guilty of such a contempt. Of course, when the order is void, the contemnor may be released from imprisonment or the payment of a fine. Whether the remedy is *habeas corpus* or *certiorari*, or whether either may be resorted to, we do not decide. We do not believe that such a contempt proceeding was intended to be designated as a "remedy," in the sense in which that word is employed in defining a special proceeding. We hold that a contempt proceeding, whose sole object is to vindicate the authority of the court, is not such a remedy, and therefore that the proceeding is not a special proceeding. It is immaterial what is the character of the act punished—whether it is defiance in open court or disobedience to the mandate of the court in some action or proceeding therein. The object of the contempt proceeding determines its character. The proceeding culminating in the order appealed from was one in which, as we have already seen, the person in whose favor was made the injunctional order disobeyed had no interest whatever; nor could he, under our laws, have any possible interest therein. See, as stating clearly the distinction between criminal and civil contempts, State v. District Court, 40 Minn. 5, 42 N. W. Rep. 598; People v. Court of Oyer and Terminer, 101 N. Y. 245, 4 N. E. Rep. 259; *In re* Chiles, 22 Wall. 157. As we have reached the conclusion that the appeal must be dismissed, we are not at liberty to pass upon the merits. The order provides for imprisonment in case the fine is not paid. In case it is thus enforced, and perhaps if it is not thus enforced, the appellant

may raise by the appropriate remedy, the question whether that order is void, or whether the injunctional order was not void. If this latter order was void, and not merely irregular, then there was no contempt, and on *habeas corpus* appellant would be discharged. It is not a contempt to refuse to recognize a void order. Rap. Contempt., § 33, and cases cited; *Ex parte* Fisk, 113 U. S. 714-718, 5 Sup. Ct. Rep. 724; Lester v. People (Ill. Sup.), 23 N. E. Rep. 387-389; State v. Milligan, 3 Wash. 144, 28 Pac. Rep. 369; *In re* Sawyer, 124 U. S. 200, 8 Sup. Ct. Rep. 482. It appears that on the hearing on the return of the order to show cause why appellant should not be punished for contempt, the Hon. RODERICK ROSE, judge of the district court of the fifth judicial district, was requested by the Hon. WILLIAM B. MCCONNELL, the judge of the third judicial district, to sit in his place. Judge MCCONNELL was present in the court room at the time, and it is not pretended that he was in any manner disqualified from hearing the matter. The order disobeyed was an order of the district court of the third district. The contempt, if any, was a contempt of that court. That court, and that court only, could punish such contempt. No other judge had authority to act as the judge of that court, except in the manner pointed out by the constitution and the statute. It will be noticed that the act of 1890 (chapter 61) authorizes one judge to hold a term of court in another district upon proper request, whenever the judge of that district is unable for any reason to act. But it is not pretended that Judge ROSE was requested to hold a term of court, nor was he actually engaged in holding such term at the time he made the contempt order appealed from. On the contrary, the request was that he act in this special matter. Now, to authorize a judge of another district to act in any case or cases specially as distinguished from his holding a term of court, the statute says the judge for whom he acts must be disqualified for some reason. Of this there appears to be no pretense. It may therefore be questionable whether the court of the third judicial district has ever made any order punishing appellant for contempt—whether the order is not a lifeless form. The point, however, we do not decide. There could be no such thing as the action of the court of the third district without the

action of the judge of that court. The judge must either be the judge of that court generally or one specially authorized to act as a judge thereof. The appeal from the order herein is dismissed. All concur.

J. V. PARLIN, Plaintiff and Respondent, *v.* MABEL E. HALL and GEORGE BRANDENBURG, Defendants; GEORGE BRANDENBURG, Defendant and Appellant.

Action—When Lies—Party to Contract—Letter of Credit.

1. Agreement set forth in opinion construed, and *held* not to warrant an action thereon by plaintiff, who was not a party thereto, the agreement not being made for the benefit of plaintiff.

2. *Held, further*, that it did not constitute a letter of credit.

BARTHOLOMEW, J., dissenting.

(Opinion Filed April 12, 1892.)

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

Benton & Amidon, for appellant. *Pollock & Scott*, for respondent.

Action by J. V. Parlin against Mabel E. Hall and George Brandenburg on an account for goods sold and delivered to defendant Hall. From a judgment for plaintiff, defendant Brandenburg appeals. Reversed.

Benton & Amidon, for appellant:

The contract sued upon was not made for the benefit of the plaintiff and the rule which allows third persons to sue upon contracts to which they are not parties is of very recent development and as yet obtains only in a few American States. Hare on Contracts, pp. 93 and 171; Pollock on Contracts, p. 200. It has been repudiated in Massachusetts and Michigan. Mellan v. Whipple, 1 Gray 321; Bank v. Rice, 107 Mass. 39; Morrill v. Lane, 136 Mass. 93; Pipp v. Reynolds, 20 Mich. 88; Turner v. McCarty, 22 Mich. 264; Halsted v. Francis, 31 Mich. 112. The

rule which allows third parties to recover upon a contract made for their benefit does not go so far as to hold that every promise made by one person to another, from the performance of which a third party would derive a benefit, gives a right of action to such third party, he being privy neither to the contract or the consideration. Gurnsey v. Rogers, 47 N. Y. 233; Merrill v. Greene, 55 N. Y. 270; Vrooman v. Turner, 69 N. Y. 280; Railroad Co. v. Curtis, 80 N. Y. 219; Bank v. Grand Lodge, 98 U. S. 123; Wright v. Terry, 2 So. Rep. 6; Burton v. Larkin, 13 Pac. Rep. 398; Chung Kee v. Davidson, 15 Pac. Rep. 100; Lorrillard v. Clyde, 25 N. E. Rep. 917.

Pollock & Scott, for respondent:

If the intention of the parties to the instrument could not be determined from the instrument itself evidence to explain it and show how it was acted upon by the parties was proper. 2 Parson on Contracts, 564; Schwartz v. Hyman, 107 N. Y. 562; Bank v. Miles, 73 N. Y. 335; Rindge v. Judson, 24 N. Y. 64. Plaintiff was the real party in interest so far as the guaranty expressed in the contract was concerned, and the one in whose name the action should be prosecuted. Church v. Teed, 120 N. Y. 583. The sale and delivery of the goods by plaintiff under the provisions of the guaranty was a sufficient consideration to uphold the same. Baker v. DaCunha, 126 N. Y. 293. Plaintiff was not bound to give immediate notice to appellant of the sale of the goods. Notice within a reasonable time after such sale was sufficient. Fisk v. Stone, 50 N. W. Rep. 125; Mfg. Co. v. Welch, 10 How. 462. Commercial contracts and letters of guaranty are not to be construed upon the same principles as are bonds and mortgages, but with a more generous interpretation, for the purpose of reaching the understanding and intent of the parties. Bell v. Bruen, 1 How. 170.

The opinion of the court was delivered by

CORLISS, C. J. The plaintiff and respondent sold groceries to the defendant Mrs. Hall. The defendant Brandenburg was joined with her in the suit to recover the price of these groceries, the plaintiff basing his right to recover against Bran-

denburg on a written instrument. The plaintiff recovered judgment against Brandenburg in the trial court. As the construction of this writing is involved, it is necessary to set it forth in full in this opinion: "This agreement, made and entered into this 29th day of October, A. D. 1887, by and between George Brandenburg, of Wheatland, party of the first part, and Mabel E. Hall, of Casselton, D. T., party of the second part, witnesseth, that whereas, the said party of the first part has agreed to guaranty the grocery bill of said second party, contracted for use on the premises hereinafter described, at any place said second party may select to trade, not exceeding the sum of two hundred ($200) dollars in any one season during the continuance in force of a certain agreement dated this day for the purchase of section twenty-two (22) in township one hundred and forty (140) north, and range fifty-three (53) west, the said bill not to exceed one hundred dollars ($100) between April 1st and August 1st, and one hundred dollars from August 1st to the completion of the harvest; and said first party has agreed that he will assist said second party to pay the labor bill in seeding and harvesting the crop on said land aforesaid, with the exception of the labor of said Mabel E. Hall and George R. Hall, her husband: Now therefore, in consideration of the premises, said Mabel E. Hall hereby agrees to pay to said first party all the sums which he pays on said guaranty and advances in pursuance of this agreement, with interest thereon at twelve per cent. from date of such payment by him. Witness my hand and seal, this 29th day of October, A. D. 1887. MABEL E. HALL. [Seal.] GEORGE R. HALL. [Seal.] GEO. BRANDENBURG. [Seal.]"

We fail to see how plaintiff can maintain any action on this agreement. He is not a party to it; neither does it appear to be made for his benefit. It is not a letter of credit. It comes within no definition of such a letter as such letters are defined in the cases or in our statute. See §§ 4312-4316, Comp. Laws; 13 Amer. & Eng. Enc. Law, 237, 238. There is nothing upon its face to indicate that Mrs. Hall was to take this instrument to any person for the purpose of securing credit on the strength thereof. If there was any ambiguity in the contract

it would be proper to look into the surrounding circumstances to discover the purpose of the parties, but the meaning of the agreement is too manifest to warrant extrinsic explanation. It is not even an agreement with Mrs. Hall on the part of Brandenburg to guaranty her grocery bill. It merely recites that such a contract has been made with her in explanation and to limit the scope of the agreement which follows, to pay twelve per cent. interest from date of payment on all sums which Brandenburg should pay because of such recited guaranty. There is not a line, word, or syllable in the instrument expressing any present agreement on the part of Brandenburg to do anything; not even an agreement with Mrs. Hall to guaranty the grocery bill, not to mention its failure to express any contract with plaintiff or any one else to guaranty such bill. The instrument, even if it had contained an express agreement on the part of Brandenburg with Mrs. Hall to guaranty her grocery bill, would not be one on which plaintiff could sue, unless it showed upon its face, or unless the surrounding circumstances demonstrated that the parties intended that Mrs. Hall should use that particular instrument as a means of securing her the necessary credit to make the purchases therein mentioned, or unless it was made for his benefit. The plaintiff, who is a stranger to this contract, can sue on it only on one of two theories. One theory is that the parties, by their conduct, have made that a letter of credit which, upon its face, does not purport to be and is not a letter of credit. Perhaps even then he could not maintain an action on it. The plaintiff was not misled by the paper or by Brandenburg, as he relied on neither in giving the credit, but solely upon Mr. Hall's statement that his wife had a guarantee from Brandenburg. Plaintiff never saw the paper until after the goods were sold. Under all the cases it is necessary that the person claiming the benefit of a letter of credit must have relied thereon in making the sale. 13 Amer. & Eng. Enc. Law 238; Pollock v. Helm, 54 Miss. 1. He can connect himself with the letter of credit only by showing that it was on the strength of the promise therein contained that he made the sale. Said the court in Pollock v. Helm: "The very pith and marrow of the plaintiff's right to recover is

that he was induced to put out his money on Mrs. Willis' bill on the faith of the defendant's letter of credit; and it does not appear by direct evidence that the letter was shown to Pollock or its contents reported to him." The contents of this contract were not reported to plaintiff, Mr. Hall placing his own construction on the paper, stating to plaintiff that Brandenburg had guaranteed to pay a certain sum for groceries. When a letter of credit is given, the person to whom it is addressed, in case it is a special letter, or any one to whom it is presented, in case it is a general letter, connects himself with the letter, and becomes a party thereto by accepting the promise of the writer to be liable, because he sells on the strength of that promise. But there must be something on the face of the instrument showing that the party sought to be charged intended that some one should sell to the bearer of the paper, relying on the promise of the one who has signed it to pay. It is also significant that this paper is signed not merely by Brandenburg, as is usual in the case of a letter of credit, but by Mrs. Hall and her husband also. Can the plaintiff recover on the ground that the case is brought within the principle of those decisions which allow a stranger to an agreement to sue upon it as having been made for his benefit? The paper does not show that either the plaintiff or any other stranger to it was intended to be benefited by it. The mere fact that one not a party to an agreement may be benefited by its performance does not bring him into contractual relations with the promisor in the agreement. He must have been the party intended to be benefited by the promise, and there must have existed at the time thereof such an obligation on the part of the promisor towards the third person as gives him at least an equitable right to the benefits of the promise. This is the rule under the cases. What change, if any, our statute has made in it, is not necessary to decide. Mrs. Hall was under no obligation to the plaintiff at the time this agreement was made.

Without attempting to lay down any general rule which shall mark the line between cases where a stranger to a contract may and cases where he may not sue upon the agreement to which he is not a party, we are clear that under all the anthor-

ities the plaintiff could not maintain an action upon this written instrument. Gurnsey v. Rogers, 47 N. Y. 233; Merrill v. Green, 55 N. Y. 270; Vrooman v. Turner, 69 N. Y. 280; Lorillard v. Clyde, 122 N. Y. 498; 25 N. E. Rep. 917; Wright v. Terry, 23 Fla. 160; 2 South. Rep. 6. Our statute is explicit on this subject. It provides that "a contract made expressly for the benefit of a third person may be enforced by him at any time before the parties thereto rescind it." Comp. Laws, § 3499. The case does not fall within this statute. Referring to a statute couched in this same language, the court say in Chung Kee v. Davidson, 73 Cal. 522, 15 Pac. Rep. 100: "The general rule applicable to cases of this kind is that 'when two persons, for a consideration sufficient as between themselves, covenant to do some act which, if done, would incidentally result in the benefit of a mere stranger, the stranger has not a right to enforce the covenant, although one of the contracting parties might enforce it as against the other.' Railroad Co. v. Curtiss, 80 N. Y. 222."

It is urged that Brandenburg, by his statements and conduct, has himself construed this paper as a letter of credit. It is not and cannot be contended that he has by his actions or by his words estopped himself from insisting that the instrument is not such a letter. The plaintiff, in selling the groceries to Mrs. Hall, did not rely upon the declarations or conduct of Brandenburg inducing belief that he had given a letter of credit, or anything equivalent to it. The plaintiff did not even rely upon the paper itself. He never saw it until all the goods had been sold. He sold on the statement of Mr. Hall as to what Brandenburg had agreed to do. We have examined the evidence, and are clear that Brandenburg has not by his conduct or words transmuted this mere agreement of Mrs. Hall to refund moneys advanced with 12 per cent. interest into a general letter of credit from Branbenburg, or an agreement on his part for the benefit of the plaintiff. We would hesitate long before holding, in the absence of facts constituting an estoppel, that the obvious meaning of a plain contract could in this manner be so radically changed. The judgment of the district court is reversed.

BARTHOLOMEW, J. (*dissenting.*) In a proper case the principles of law stated in the majority opinion would receive my unqualified concurrence; but I am obliged to dissent in this case, because I think these principles are misapplied. The case turns entirely upon the construction of the contract set forth in the opinion. The trial court under the pleadings and proofs held that contract to be a present and general guaranty upon the part of Brandenburg to the extent named. The majority opinion holds that the contract is without force against Brandenburg as a guaranty; that it is a contract on the part of Mrs. Hall to pay interest in which it is incidentally stated, not that Brandenburg had guaranteed, but that he had agreed that he would guaranty; thus making further action on his part necessary before he would incur any liability as guarantor. Plaintiff declared upon the contract as a present guaranty, and set it up *in hæc verba* as a part of the complaint. There was no demurrer. Brandenburg answered, but on the trial objected to the introduction of any evidence under the complaint. In this court he urges in support of his objection that construction of the contract which my associates deem correct. To me it seems that two elementary principals require a different result. The first is that a contract should always be construed as to affect the intent of the parties, unless such construction does actual violence to the language used. The second is that defective averments in a pleading may be cured by the averments of the adversary. When appellant made his objection to the introduction of any evidence under the complaint, his answer, which was on file, contained the following: "This defendant denies that the plaintiff ever extended credit to the defendant Mabel E. Hall as alleged in the complaint, or in any sense or manner whatever, under the provisions of the agreement, a copy of which is attached to said complaint, marked 'Exhibit A,' and denies that the plaintiff, in giving any credit to the defendant Mabel E. Hall, ever relied upon or considered the guaranty expressed in said agreement." Both parties, by their pleadings, treated the agreement as a present guaranty. Plaintiff alleged that "the defendant Bradenburg, for value, and for the purpose of enabling the defendant Mabel E. Hall to purchase goods on

credit for use on said farm, guaranteed in writing the grocery bill contracted for groceries used thereon." Brandenburg, for defense, in effect admits the guaranty, but denies that plaintiff extended the credit upon the strength thereof. Could a court, under those circumstances, be expected to rule that there was no guaranty simply because the language used might more naturally be differently construed? When the court finally charged the jury it had before it, not only the pleadings but the testimony of Mr. Brandenburg, wherein he says: "I never knew the guaranty was used until Mr. Parlin came to me. * * * I told him we had modified the terms of the guaranty as he showed it to me at that time to cover supplies, verbally." And speaking of another merchant to whom the Halls had applied for groceries, he said: "I told him to have them come in and leave the written guaranty." The court also knew that on the day of the date of said guaranty Mr. Brandenburg had contracted to sell to Mrs. Hall a section of land, to be paid for out of the crops to be raised thereon by Mrs. Hall; that this guaranty was given to insure her ability to raise such crops; that there was no claim by either party that there was any guaranty or agreement to guaranty other than or different from the contract set out in the complaint; that this contract, which the majority opinion says was simply a promise on her part to pay interest, was delivered to and left in the possession of Mrs. Hall, to be used by her whenever she required the goods as therein specified. Under these circumstances I think the trial court committed no error in holding that Mr. Brandenburg, when he signed said contract, intended to bind himself as guarantor to any person who should furnish the goods in reliance upon and in accordance with the terms of said contract, and that he knew that Mrs. Hall, in receiving the contract, so understood it. Our statute says (Comp. Laws, § 3564): "If the terms of a promise are in any respect ambiguous or uncertain, it must be interpreted in the sense in which the promisor believed, at the time of making it, that the promisee understood it." The next section reads: "Particular clauses of a contract are subordinate to its general intent." Section 3568 reads: "Words in a contract, which are wholly inconsistent with its

nature, or with the main intent of the parties, are to be rejected." It cannot be disputed that the main intention of the parties to this contract was to create a present guaranty on the part of Mr. Brandenburg and a promise on the part of Mrs. Hall to refund to Mr. Brandenburg all amounts that he might pay under such guaranty, with twelve per cent. interest thereon. If there are any words in the contract inconsistent with that intention they must be rejected. In Belloni v. Freeborn, 63 N. Y. 383, it is said: "In guaranties, letters of credit, and other obligations of sureties, the terms used and the language employed are to have a reasonable interpretation, according to the intent of the parties as disclosed by the instrument read in the light of the surrounding circumstances and the purposes for which it was made." In McNaughton v. Conkling, 9 Wis. 316, it was contended, as in this case, that the agreement was only an offer to guaranty by some subsequent proceeding, but the court said: "We have no doubt that the words of the letter amount to and were designed as a present undertaking of guaranty, needing only to be acted upon by any one for whom they were intended, with notice to the writer in order to bind him. It is true the future tense is used, 'I will guaranty,' etc., but this form is frequently used in instruments which are intended as present agreements without anything further being necessary to bind the party using it." And to same effect see Carman v. Elledge, 40 Iowa 409; Talmadge v. Williams, 27 La. Ann. 653. Nor do I think it correct to say as matter of law that plaintiff did not sell the goods relying upon the guaranty, simply because he had never seen the guaranty. He was informed by the Halls that Mr. Brandenburg had guarantied their bill to a certain amount, and sold the goods relying upon that fact. If, under these circumstances, the contract had been a clear, explicit, and unequivocal guaranty, the liability of the guarantor could not, as I think, be questioned under the authorities cited in the prevailing opinion. And if the contract in this case was properly construed as such guaranty, the same rule would, of course, apply. When a guaranty in fact exists, and a party acts upon the strength of it, and in strict accordance with its terms, it would be unreasonable that the guarantor should not be bound

because such party did not read the guaranty or was not informed of its exact language. In my judgment there is no question of estoppel in the case, and no question of the right of a third party to sue upon a contract made for his benefit. It is, as I think, simply a question between a guarantor and guarantee, and I fear that the court by its too literal adherence to the strict letter of the wording has relieved appellant of a liability that he fully intended to incur when he signed the contract.

STATE OF NORTH DAKOTA *ex rel.* LOUIS W. STOESER, Plaintiff and Respondent, *v.* NORMAM BRASS, Defendant and Appellant.

Constitutional Law—Warehouse Charges—Powers of Legislature—Review on Appeal.

Chapter 126 of the Session Laws of 1891 considered, and §§ 4 and 11 thereof *held* to be constitutional, in so far as they define public warehouses, and in so far as they prescribe maximum rates of charges for elevating and storing grain in the puplic warehouses, as they are defined in § 4 of the act. Munn v. Illinois, 69 Ill. 99, 94 U. S. 113; People v. Budd, 22 N. E. Rep. 670, 682, 117 N. Y. 1; Budd v. People, 12 Sup. Ct. Rep. 468—followed. *Held, further*, that the record does not raise the question of the adequacy of the rate of charges fixed by § 11 of the act, and hence the case is not one which calls for a decision of the point whether the court would in any case assume to review a rate of charges established by the legislature, where it was shown that such rate was ruinously small or noncompensatory.

(Opinion filed April 25, 1892.)

APPEAL from district court, Ramsey county; Hon. D. E. MORGAN, Judge.

J. F. McGee for appellant. *James F. O'Brien*, for respondent.

Proceedings in *mandamus* by Louis W. Stoeser against Norman Brass to compel him to receive into his elevator grain belonging to relator. From an order sustaining a demurrer to defendant's answer, and directing a peremptory writ to issue, he appeals. Affirmed.

J. F. McGee, for appellant:

The mere fact that the legislature has enacted a statute which operates to deprive appellant of his liberty and property, does not constitute "due process of law." Within every theoretical definition of the constitutional guarantees that may be found in the text books and every practical application of those guarantees that may be found in the reports, appellant has been deprived of his liberty and property without "due process of law." Wilkinson v. Leland, 2 Pet. 657; Fletcher v. Peck, 6 Cranch 137; Bank v. Okely, 4 Wheat. 235; Murry v. Hoboken, 18 How. 320; Cummings v. Missouri, 4 Wall. 277, 320; Yates v. Milwaukee, 10 Wall. 497; Pumpelly v. Green Bay Co., 13 Wall. 166; Bartemeyer v. Iowa, 18 Wall. 129; Pennoyer v. Neff, 95 U. S. 714; Davidson v. New Orleans, 96 U. S. 97; Hurtado v. California, 110 U. S. 516; Butchers' Union Co. v. Crescent City Co., 111 U. S. 652; Hagar v. Reclamation District, 111 U. S. 701; Barbier v. Connolly, 113 U. S. 37; Yick Wo v. Hopkins, 118 U. S. 356; Dent v. West Virginia, 129 U. S. 114; Railroad Co. v. Minnesota, 134 U. S. 418; Railroad Co. v. Minnesota, 134 U. S. 467; Railroad Tax Cases, 13 Fed. Rep. 722; Santa Clara Tax Cases, 18 Fed. Rep. 398; State v. Walruff, 26 Fed. Rep. 178; Railroad Co. v. Dey, 35 Fed. Rep. 866; Railroad Co. v. Becker, 35 Fed. Rep. 883; Dorman v. State, 34 Ala. 216; Sadler v. Langham, 34 Ala. 311; Stoudenmire v. Brown, 48 Ala. 699; Zeigler v. Railroad Co., 58 Ala. 594; Railroad Co. v. Baldwin, 85 Ala. 619; Stevens v. Wood, 2 Ark. 291; *Ex parte* Hodges, 87 Cal. 162; Tift v. Griffin, 5 Ga. 185; Lane v. Dorman, 3 Scammon (Ill.) 238; Railroad Co. v. People, 67 Ill. 11; Railroad Co. v. Lackey, 78 Ill. 55; Millett v. People, 117 Ill. 294; Board of Education v. Bakewell, 122 Ill. 339; Beebe v. State, 6 Ind. 501; Searcy v. Patriot, 79 Ind. 274; Towle v. Mann, 53 Iowa 42; Craig v. Fowler, 59 Iowa 200; Sunberg v. Babcock, 61 Iowa 601; Maish v. Littleton, 62 Iowa 105; Commonwealth v. Bacon, 13 Bush. 210; Varden v. Mount, 78 Ky. 86; City of Louisville v. Cochran, 82 Ky. 15; Saco v. Wentworth, 37 Me. 171; State v. Doherty, 60 Me. 504; Eames v. Savage, 77 Me. 212; Baltimore v. Rodeck, 49 Md. 217; *In re* Picquet, 5 Pick. 65; Jones v. Robbins, 8 Gray 329; Denny v. Mattoon, 2 Allen 361; Welch v. Stow-

ell, 2 Doug. (Mich.) 331; Hibbard v. People, 4 Mich. 125; Sears v. Cottrell, 5 Mich. 251; Parsons v. Russell, 11 Mich. 113; Hart v. Henderson, 17 Mich. 218; Weimer v. Bunburg, 30 Mich. 201; Detroit v. Detroit; 43 Mich. 140; People v. Common Council, 70 Mich. 534; Park v. Free Press, 72 Mich. 560; Board of Health v. Van Hoesen, 49 N. W. Rep. 894; State v. Board of Medical Examiners, 34 Minn. 387; Meyer v. Berlandi, 39 Minn. 438; Bank v. Chambers, 8 Smedes & M. (Miss.) 9; Smith v. Smith, 1 How. 102; Griffin v. Mixon, 38 Miss. 424; Quintini v. Board of Aldermen, 64 Miss. 483; Lowry v. Rainwater, 70 Mo. 152; River Rendering Co. v. Behr, 77 Mo. 91; Railroad Co. v. Baty, 6 Neb. 37; Wilch v. Phelps, 14 Neb. 134; Mayo v. Wilson, 1 N. H. 53; Aldrich v. Wright, 53 N. H. 398; Coster v. Tidewater Co., 3 Green (N. J.) 521; Powers v. Bergen, 6 N. Y. 358; Westerfelt v. Gregg, 12 N. Y. 209; Wynehamer v. People, 13 N. Y. 393; Matter of Empire City Bank, 18 N. Y. 200; Rockwell v. Nearing, 35 N. Y. 302; Matter of Townsend, 39 N. Y. 171; Underwood v. Green, 42 N. Y. 140; People v. Haines, 49 N. Y. 587; Weismar v. Village of Douglass, 64 N. Y. 91; Matter of Deansville Cemetery Association, 66 N. Y. 564; Matter of Rhinelander, 68 N. Y. 105; People v. Supervisors, 70 N. Y. 228; Matter of Ryers, 72 N. Y. 1; Stuart v. Palmer, 74 N. Y. 183; Bertholf v. O'Reilly, 74 N. Y. 515; Matter of Cheesebrough, 78 N. Y. 232; People v. Otis, 90 N. Y. 48; Matter of E. B. etc. Co., 96 N. Y. 442; Matter of Jacobs, 98 N. Y. 98; People v. Marx, 99 N. Y. 377: People v. Gillison, 109 N. Y. 389; People v. Budd, 117 N. Y. 1; Taylor v. Porter, 4 Hill 140; White v. White, 5 Barb. 474; Wright v. Cradlebaugh, 3 Nev. 341; Hoke v. Henderson, 4 Dev. (N. C.) 15; State v. Devine, 98 N. C. 778; Norman v. Heist, 5 W. & S. (Pa.) 193; Brown v. Hummel, 6 Pa. St. 86; Ervine's Appeal, 16 Pa. St. 256; Pelairet's Appeal, 67 Pa. St. 479; Railroad Co. v. Boudrou, 92 Pa. St. 475; Godcharles v. Wigeman, 113 Pa. St. 431; State v. Simons, 2 Spear (S. C.) 767; Bowman v. Middleton, 1 Bay (S. C.) 252; Van Zant v. Waddell, 2 Yerg. (Tenn.) 260; Bank v. Cooper, 2 Yerg. 523; Wallys Heirs v. Kennedy, 2 Yerg. 554; Jones v. Perry, 10 Yerg. 59; Budd v. State, 3 Humph. (Tenn.) 192; State v. Staten, 6 Coldw. (Tenn.) 233; Janes v. Reynolds, 2 Texas 251; Grigsby v. Peak, 57 Texas

142; Thorpe v. Railroad Co., 27 Vt. 1; Lincoln v. Smith, 27 Vt. 355; State v. Gilmore, 10 S. E. Rep. 283; State v. Goodwill, 10 S. E. Rep. 285; State v. Fire Creek Co., 10 S. E. Rep. 288; Osborn v. Hart, 27 Wis. 219; Durkee v. City of Janesville, 28 Wis. 464; Culbertson v. Coleman, 47 Wis. 193.

James F. O'Brien, for respondent:

Appellant having based his refusal to comply with the writ upon the unconstitutionality of the law in question, it becomes his duty to prove it beyond all doubt. Railroad Co. v. Riblet, 66 Pa. St. 164; Territory v. Van Gaskin, 6 Pac. Rep. 30; Lunt's Case, 6 Me. 413. Every presumption is in favor of the constitutionality of legislative acts. People v. Gilson, 109 N. Y. 389; St. Louis County v. Griswold, 58 Mo. 192; State v. Able, 65 Mo. 357. Appellant has no absolute right to the property in question. He holds the same subject to the paramount right of the people to control the same for the public good. Beer Co. v. Massachusetts, 97 U. S. 25; State v. Addington, 12 Mo. App. 214; Bertholf v. O'Reilly, 74 N. Y. 509. See also the leading cases of Munn, Budd and Nash.

The opinion of the court was delivered by

WALLIN, J. The statute under which this proceeding was instituted constitutes chapter 126 of the Session Laws of North Dakota for the year 1891. It is entitled "An act to regulate grain warehouses, and the weighing and handling of grain, and defining the duties of the railroad commissioners in relation thereto." The act contains fourteen sections, but we deem it unnecessary for the purposes of this case to do more than to refer to the statute, and then quote §§ 4 and 11 in full. Section 4 is as follows: "All buildings, warehouses, or elevators in this state, erected or operated, or which may be hereafter erected and operated, by any person or persons, association, co-partnership, corporation, or trust, for the purpose of buying, selling, storing, shipping, or handling grain for profit, are hereby declared public warehouses; and the person or persons, association, co-partnership, or trust owning or operating said building or buildings, elevator or elevators, warehouse or warehouses, which are now or

may hereafter be located or doing business within this state, as above described, whether said owners or operators reside within this state or not, are public warehousemen, within the meaning of this act, and none of the provisions of this act shall be construed so as to permit discrimination with reference to the buying, receiving, and handling of grain of standard grades, or in regard to parties offering such grain for sale, storage, or handling at such public warehouses, while the same are in operation." Section 11 is as follows: "The charges for storage and hauling [handling] grain shall not be greater than the following schedule: For receiving, elevating, insuring, delivering, and twenty days' storage, two (2) cents per bushel. Storage rates after the first twenty days, one-half ($\frac{1}{2}$) cent for each fifteen days or fraction thereof, and shall not exceed five (5) cents for six months. The grain shall be kept insured at the expense of the warehousemen for the benefit of the owner." Section 12 provides the penalty for violating the act by declaring that all persons "who shall violate the provisions of any section of this act, or shall do or perform any act or thing therein forbidden, or who shall fail to do or keep the requirements as herein provided, shall be deemed guilty of a misdemeanor, and shall, on conviction thereof, be subjected to a fine of not less than two hundred (200) dollars, nor more than $1,000, and be liable, in addition thereto, to imprisonment for not more than one year at the state penitentiary, at the discretion of the court." Section 5 of the act requires "public warehousemen," as defined in the statute, to file a bond with the railroad commissioners for the faithful performance of their duties as public warehousemen.

On petition of the relator the district court granted an alternative writ of *mandamus*, as follows: "The state of North Dakota to Norman Brass, respondent: Whereas, the following facts have been made to appear to this court by the verified petition of the above-named relator, to-wit: (1) That he is the relator in the above-entitled matter; that he owns and operates a farm containing 540 acres in the vicinity of the railroad station of Grand Harbor, in the county and state aforesaid, and during the year 1891 has raised on said farm about 4,000 bushels of grain, principally wheat. (2) That the relator has not sufficient

storage capacity on his farm or elsewhere for said grain so raised as aforesaid, but is dependent almost wholly upon the grain elevators and warehouses in the vicinity of said farm for storage capacity. (3) That fully fifty per cent. of the grain raised in said Ramsey county, North Dakota, is dependent for storage capacity upon the grain elevators and warehouses at the various towns, villages, and railroad stations in said Ramsey county. (4) That the respondent, Norman Brass, is now and at all the times herein stated has owned and operated a grain elevator at the station of Grand Harbor, aforesaid, for the purpose of buying, selling, storing, and shipping grain for profit. (5) That the relator on the 30th day of September, 1891, hauled fifty-eight bushels of wheat to the grain elevator of respondent, Norman Brass, at Grand Harbor, aforesaid, and tendered the same at said elevator of said Norman Brass for storage, and requested said Norman Brass to receive, elevate, insure, and store said grain for twenty days, and at the time tendered to said Brass two cents per bushel for compensation for receiving, elevating, insuring and storing said grain for twenty days; that said grain, when so tendered as aforesaid, was dry, and in a suitable condition for storage, and there was in said grain elevator of said Brass at Grand Harbor aforesaid at said time storage capacity for over 25,000 bushels of grain, not in use and wholly unoccupied. (6) That said Brass then and there refused to receive said grain for the purpose aforesaid, and wholly refused to store said grain at said price. (7) That the relator endeavored to secure storage for said grain at the only other elevator in operation at said railroad station of Grand Harbor aforesaid, but said elevator refused to receive relator's grain upon the same ground as respondent. (8) That the relator is informed and believes that the owners of grain elevators and warehouses within a radius of fifty miles of Grand Harbor, aforesaid, refuse to receive grain for storage at said price. Now, therefore, this court, in order that justice may be done in this behalf to him, Louis W. Stoeser, relator, does hereby command and enjoin you that immediately upon receipt of this writ you do receive from relator, while your storage capacity at your elevator herein mentioned is sufficient for that purpose, all grain that may be ten-

dered you by the relator, in a dry and suitable condition for storage, at a rate of compensation not exceeding the following schedule, viz., for receiving, elevating, insuring, delivering, and twenty days' storage, two cents per bushel; storage rates after the first twenty days, one half cent per bushel for each fifteen days or fraction thereof, and shall not exceed five cents for six months; or that you show cause to the contrary before this court, at the courthouse in the city of Devil's Lake, Ramsey county, N. D., on the 5th day of October, 1891, at 10 o'clock in the forenoon of said day, or as soon thereafter as counsel can be heard, and how you have executed this writ make known to this court at the time and place aforesaid, and have you then and there this writ. Dated Sept. 30th, 1891. D. E. MORGAN, Judge District Court, Ramsey County, North Dakota."

To which writ appellant made return by answer, as follows: "The return of the respondent to the alternative writ of *mandamus* issued in the above-entitled proceeding shows to the court: (1) That the respondent admits the truth of the facts pleaded in said alternative writ. (2) For a further return to the said alternative writ the respondent alleges that he owns and operates only one grain elevator in North Dakota or elsewhere; that the said elevator is the elevator mentioned in said alternative writ, and is situated at Grand Harbor, a small way station on the line of the Great Northern Railroad, containing a population of less than one hundred people; that there are two other elevators owned and operated by different owners independently of and in competition with each other; that there are about six hundred grain elevators, flathouses, and warehouses in said state of North Dakota, at which grain is bought and shipped for profit, which said elevators, warehouses, and flathouses are owned and operated by over one hundred and twenty-five different owners, independent of and in competition with each other; that the owners of said elevators, warehouses, and flathouses are individuals engaged in buying and shipping grain, millers who use their elevators to supply their mills with grain, farmers' shipping associations, elevator corporations, and individual farmers; that said elevators, flathouses, and warehouses vary in cost of construction from five hundred dollars to five thou-

sand dollars, and vary in capacity from five thousand to fifty thousand bushels; that there are from two to ten elevators, warehouses, and flathouses operated and owned, each by different owners and operators, at every station in North Dakota at which grain is marketed; that land upon which it is practicable to erect other elevators at every station in North Dakota at which grain is marketed is unlimited in area, and can be readily purchased at prices varying from one dollar and twenty-five cents per acre to forty dollars per acre; that respondent's said elevator cost, when constructed and fully equipped, about three thousand dollars; that the capacity of the same is about 30,000 bushels; that respondent's principal business is that of buying wheat at Grand Harbor, N. D., and shipping the same to and selling it at Minneapolis and Duluth, Minn., to which business that of storing grain for third persons has been a mere incident; that all grain purchased by respondent at his said elevator is purchased for the sole purpose of being shipped to and sold at, and is shipped to and sold at Minneapolis and Duluth, Minn.; that respondent in the conduct of his said business contracts with millers and other purchasers of grain at said Minneapolis and Duluth to sell and deliver to said persons at a future and fixed date certain quantities of wheat, and operates and maintains his said elevator for the exclusive purpose of purchasing grain to fill said contract; that in seasons when the grain yield is light, and railroad facilities are such as to enable grain to be moved rapidly, there is space and storage capacity in respondent's elevator in excess of that used by respondent's grain, and particularly when respondent's contracts for the sale of grain are small, while at other times, when the yield is enormous, as in the present year, respondent's contracts are large, and the quantities of grain presented for shipment are beyond the capacity of the railroads to move, then there is not sufficient storage capacity in respondent's elevator to hold and store the grain purchased by respondent in the conduct of his said business; that there are located in Minneapolis and Duluth, Minn., a great number of corporations, persons, and co-partnerships engaged in a business known as the 'grain commission' business; that these grain commission

houses have swarms of agents traveling throughout the state of North Dakota, going from town to town and farm to farm, purchasing grain from farmers in some instances, and in others soliciting farmers to ship their grain to said houses at Minneapolis or Duluth, Minn., to be by the latter sold on commission; that none of said grain commission houses have or own any storage capacity in North Dakota; that if chapter 126 of the Laws of 1891 is valid, and its effect is to compel respondent to receive all grain that may be tendered to him for storage by grain commission men, farmers, grain speculators, and others, without reference to the necessities or condition of respondent's business, at any particular time, the entire storage capacity of respondent's elevator will be exhausted in storing grain for third persons, and the principal business of respondent, to conduct which his capital was invested in said elevator, will be utterly ruined and annihilated, for want of storage capacity to contain wheat purchased by him to fill contracts made by him in the conduct of his said business, and respondent subjected to suits for damages for nonfulfillment of his said contracts; that the relator only offered to pay respondent, for the service which he requested him to perform, the rate fixed by chapter 126 of the Laws of 1891, that is, two cents per bushel; that respondent refused to perform the service for less than two and one-half cents per bushel; that respondent refuses to comply with the provisions of said chapter 126 on the ground that it abridges his privileges and immunities as a citizen of the United States; that it deprives him of his liberty and property without due process of law, and denies to him the equal protection of the laws, and amounts to a regulation of commerce among the states; that for thirteen years last past the rate charged for the storage of grain has been uniform at all elevators, flathouses, and warehouses in North Dakota, and during that time did not exceed the following schedule: For receiving, elevating, insuring, delivering, and fifteen days' storage, two and one-half cents per bushel; after the first fifteen days, one-half cent per bushel for each fifteen days or part thereof, but not to exceed five cents per bushel for six months; that the average farm in North Dakota does not exceed in area 160 acres; that the average yield

in grain of a quarter section of land in North Dakota does not exceed twenty-five hundred bushels; that a granary sufficient in size to safely and securely store twenty-five hundred bushels of grain can be erected on any farm in North Dakota at a cost not exceeding one hundred and fifty dollars; that the business of respondent and all other persons, firms, and corporations engaged in the business of operating grain elevators, warehouses, and flathouses in North Dakota, and the manner in which said business is conducted, are not in any manner unwholesome or deleterious to the health, morals, welfare, or safety of the community or society; that the railroad and warehouse commissioners of North Dakota, on page 33 of their Annual Report to the Governor for 1890, said: 'In view of the fact that, after thorough investigation, the board deem the charges allowed by § 22, c. 187, Laws 1890, and also § 10 of said chapter, as unreasonable, the following rules of storage are recommended: (1) For receiving, elevating, insuring, delivering, and fifteen days' storage, two and one-half cents per bushel. (2) After fifteen days, one-half cent per bushel for each fifteen days or part thereof, but not to exceed five cents for six months.' That the rates referred to by said commissioners as unreasonable were less than the rate recommended by said board; that the respondent denies that the legislature has any power whatever to say whether he shall rent the bins in his elevator or not, and wholly denies the power of the legislature to say what he shall charge for the use of his said elevator, or the bins therein; that since the enactment of § 9 of chapter 126 of the Laws of 1885, the amount of grain shipped directly by farmers, without the intervention of elevators, warehouses, or flathouses, has been increasing, and in 1890, as respondent is informed and believes, nearly fifty per cent. of the entire grain product of North Dakota was shipped to Minneapolis and Duluth, Minn., by farmers; that the amount of grain shipped in that manner is steadily increasing from year to year; that pursuant to § 7, chapter 122, Laws 1890, the railroad commissioners adopted and published the following rules to govern the distribution of cars and other freight, which rules are now in operation in said state of North Dakota, to-wit: 'State of North Dakota. Office of commission-

ers of railroads. Rules for the distribution of cars between stations and shippers. (1) In distributing cars to stations for grain loading, they shall be distributed according to the daily average shipments from such stations. (2) In distributing cars to shippers for grain loading at stations, agents shall first fill each shipper's order for one car to each. After this is done, the balance of the cars shall be distributed among shippers according to the amount of grain in sight offered for shipment by each shipper. (3) Parties desiring to load grain on track shall be furnished cars, and shall be allowed, for loading time, twenty-four hours from the time the car is set on the side track to complete loading and furnish shipping directions. In case shipper fails to complete loading or furnish shipping directions within twenty-four hours, then, in such case, the railway company may collect upon such cars $3 rental for each and every day or part of a day which such cars are delayed after twenty-four hours. The above rule as to time and rental charges shall also apply to grain delayed in unloading on track.' In connection with said rules in said report, said commissioners said: 'We believe that the railroads have labored faithfully to supply cars to shippers, in accordance with these rules, and, so far as their ability to supply the demand permitted, cars have been distributed in conformity therewith. From September 15th to December 15th the demand for cars is double the ability of the roads to supply, and as a necessary consequence delay in supplying cars must ensue. In all cases of complaint as to failure to get cars investigated this year, this has been the case, and cars have been supplied as soon as possible by the railroad companies. The liberal policy of the railroads in the distribution of cars adopted this year has been of great benefit to the farmers of North Dakota.' Wherefore respondent demands judgment quashing the alternative writ of *mandamus*, dismissing this proceeding, and for his costs and disbursements laid out and expended in this action. Dated this 5th day of October, 1891. JOHN W. MAHER, Attorney for Respondent."

The relator interposed a general demurrer for insufficiency to the answer, and, after a hearing upon the issue of law raised by the demurrer, the district court ruled that the demurrer be

sustained. The appellant having made his election to stand upon the answer, the trial court ordered and adjudged that the peremptory writ be issued as prayed for, and from this order an appeal is taken to this court. The principal assignments of error are as follows: "(1) That the court erred in sustaining the relator's demurrer to the appellant's answer and return; (2) that the court erred in holding chapter 126 of the Laws of 1891, and particularly § 11 of that chapter, constitutional."

The grain elevator and warehouse in question, as described in the alternative writ as well as in the answer thereto, is confessedly a building which falls within the statutory definition of "public warehouses;" and the appellant, as sole owner and manager of the elevator and of the grain business carried on within it, at the inception of this proceeding and long prior thereto, was clearly a "public warehouseman," within the terms and meaning of the statute. The answer admits and alleges that "respondent's [appellant's] principal business is that of buying wheat at Grand Harbor, North Dakota, and shipping the same to and selling it at Minneapolis and Duluth, Minn., to which business that of storing grain for third persons is and always has been a mere incident." From this it appears that appellant's warehouse, as well as his grain business, is essentially within the terms and definitions of the act in question. See § 4, c. 126, above quoted. The answer in terms admits all matters of fact set out in the alternative writ, and the demurrer to the answer admits all facts which are well pleaded in the answer to the writ. Hence any averments of mere fact which are embodied in both the writ and the answer are admitted of record to be true as pleaded. It appears that the object of the proceeding is to compel the appellant, as a public warehouseman, to store the relator's grain in appellant's warehouse and grain elevator at the rate of compensation fixed by § 11 of the statute. This appellant refused to do on demand and tender of the prescribed rate of compensation. Appellant's refusal to receive the grain into his warehouse is not based upon any alleged inadequacy of the statutory rate, but was placed solely upon the ground that he was unwilling to lower his charges for storage below the sum he had been receiving in prior years for the

same service. Appellant had empty space in his warehouse which was available, and he was willing as a matter of business to receive and store the grain, but was unwilling to reduce his charges under legislative dictation. Appellant denies the validity of chapter 126, and especially § 11 thereof, and bases his defense wholly upon constitutional grounds; claiming that the statute is invalid because it deprives him of the free, untrammeled use of his property without due process of law, and deprives him of the equal protection of the law, as these fundamental rights are guarded against legislative encroachment by the constitution of the state and of the United States—citing § 13 of the constitution of this state, and § 1 of the fourteenth amendment of the constitution of the United States, in support of his contention. Appellant has purposely limited his defense to the one question of legislative power to regulate his warehouse business by prescribing rates. Nothing is alleged or claimed in argument tending to show that the prescribed rate would be noncompensatory; much less that it would operate practically to confiscate relator's business as a warehouseman and grain dealer. It distinctly appears, moreover, that when relator tendered his grain for storage, not only that appellant owned and operated a grain elevator situated at the railroad station in question, but further appeared "that said grain when so tendered, as aforesaid, was dry and in a suitable condition for storage, and there was in said grain elevator * * * at said time storage capacity for over twenty-five thousand bushels of grain, not in use and wholly unoccupied." The answer to the writ states the entire scope of appellant's contention in the paragraphs quoted below: "The respondent [appellant] refuses to comply with the provisions of said chapter 126, on the ground that it abridges his privileges and immunities as a citizen of the United States; that it deprives him of his liberty and property without due process of law, and denies to him the equal protection of the laws, and amounts to a regulation of commerce among the states;" "that the respondent denies that the legislature has any power whatever to say whether he shall rent the bins in his elevator or not; and wholly denies the power of the legislature to say what he shall charge for the use of his said elevator or the bins therein."

In further explanation of the particular points of this contention, it should be noticed that at the argument appellant's counsel was careful to limit the discussion to the one question of legislative power to enact the statute, and particularly § 11 thereof which prescribes a maximum schedule of rates for the storage, of grain in public warehouses. Counsel did not claim, in argument or otherwise, that at the time in question the appellant was not engaged in the business of storing grain for others; nor pretend that the empty space then existing in his warehouse would be needed by appellant in the prosecution of his other business of buying, selling, and shipping grain. The record is silent as to relator's ulterior purposes in seeking storage for his wheat at appellant's elevator. Whether the storage was sought with a view to shipping the grain by rail to a market at some point within or without the state is not disclosed; nor can the court ascertain, from the record or otherwise, whether it was relator's purpose to hold the wheat in said elevator for sale at a favorable moment in the local or foreign market; or whether he intended the grain for his individual use, as seed or otherwise, and expected to demand and receive a redelivery of the grain to himself at said grain elevator, as, under § 7 of of said chapter 126, relator would have an option to do, *i. e.*, an option to demand a redelivery of the "kind, quality, and quantity of grain" placed in said elevator.

The foregoing explanations will suffice to develop the fact that the only question we are to determine in this case is one of legislative power, with reference to the limitations of such power existing in the constitutions of the state and nation, and hereinbefore referred to. The legislature, by § 4 of the statute, has declared that "all buildings, elevators, or warehouses in this state erected and operated, or which may be hereafter erected or operated, * * * for the purpose of buying, selling, storing, shipping, or handling grain for profit, are hereby declared public warehouses." Other sections of the statute inaugurate a system of state surveillance over such public warehouses and "public warehousemen," and among other regulations is that particularly involved here, viz., that which fixes a maximum schedule of rates or charges for the storage of grain in said

public warehouses for the different periods of time designated in the enactment. *Vide* § 11, *supra*. The issues presented demand the consideration of questions of capital importance, not only to the industrial and property interests within the state, but other questions even more grave and serious than those of property—questions which have to do with the fundamental rights of individuals, to life, liberty, and the pursuit of happiness, as such rights stand related to legislative power when acting within its proper constitutional sphere.

Before stating our conclusions upon the particular facts of the case under consideration, we invite attention to the proposition of fact now familiar to the profession, that as a result of memorable forensic struggles and repeated judicial affirmations by courts of the highest rank in this country, both state and federal, the right of legislative regulation and control over the business carried on in grain elevators and warehouses, to the extent of prescribing their maximum rates of compensation, has become firmly established, and must now be regarded by the courts as beyond the realm of debate. Whatever the principles may be upon which such legislation is sustained, it is undeniable that it has been repeatedly sustained by the ablest courts this country. True it is that dissenting opinions of marked ability have been affixed to the majority opinions in the cases where the doctrine has been enunciated, but the writer knows of no judicial authority denying the existence of the doctrine of legislative control. The doctrine was first broadly asserted in recent times in a noted case decided by the supreme court of the state of Illinois. Munn v. People, 69 Ill. 80. The case arose under a statute which in all essential features is the same as that under consideration. The statute was enacted to give force and practical effect to an amendment (§ 1, art. 13) of the state constitution, which reads as follows: "All elevators or storehouses where grain or other property is stored for compensation, whether the property stored be kept separated or not, are declared to be public warehouses." This amendment was adopted in 1870, and in 1871 the legislature of Illinois divided public warehouses into three classes, prescribed the taking of a license and the giving of a bond, and fixed a

maximum charge for warehouses belonging to class A for storing and handling grain, including the cost of receiving and delivering, and prescribed a fine on conviction for taking rates in excess of that fixed in the statute, and for not giving a bond or obtaining the required license. Munn and Scott possessed no corporate franchises, but as private persons were managers of a warehouse and elevator located at Chicago. They were convicted and fined for not taking out the license, not giving the bond, and for charging rates for storage and handling grain higher than the rates established by the act. The statute divided warehouses into classes and declared that it should be the duty of every warehouseman belonging to class A to receive into his warehouse any grain that might be tendered to him for that purpose. In short, the statutory regulations of the warehouses belonging to class A in Illinois were not materially different from the statutory regulations prescribed in chapter 126 of the Session Laws of 1891, and which are intended to apply to all warehouses and grain elevators within this state which come within the statutory definition of a "public warehouse." The validity of the statute having been sustained by the supreme court of the state of Illinois, the case was removed by writ of error to the supreme court of the United States, and the contention there was that the statute was repugnant to the third clause of § 8 of article 1 of the federal constitution, and to the fifth and fourteenth amendment thereof. The tribunal of last resort in Munn v. Illinois, 94 U. S. 113, affirmed the decision of the court below, and fully sustained the constitutionality of the Illinois statute, two justices publishing their dissent. We refer to the two decisions of the Munn Case already cited for a more complete statement than can here be given of the particular facts upon which Munn was prosecuted under the statute of Illinois.

Turning, now, to the history of a case well known to the profession, and arising in the state of New York, we find that a penal statute similar to that of Illinois, above cited, was approved by the governor of New York on June 9, 1888. It is entitled "An act to regulate the fees and charges for elevating, trimming, receiving, weighing and discharging grain by means

of floating and stationary elevators and warehouses in this state." The following is the act: "Section 1. The maximum charge for elevating, receiving, weighing, and discharging grain by means of floating and stationary elevators and warehouses in this state shall not exceed the following rates, namely: For elevating, receiving, weighing, discharging grain, five-eighths of one cent a bushel. In the process of handling grain by means of floating and stationary elevators, the lake vessels or propellers, the ocean vessels or steamships, and canal boats shall only be required to pay the actual cost of trimming or shoveling to the leg of the elevator where unloading and trimming cargo when unloading. Sec. 2. Any person or persons violating the provisions of this act shall, upon conviction thereof, be adjudged guilty of a misdemeanor, and be punished by a fine of not less than two hundred and fifty dollars and costs thereof. Sec. 3. Any person injured by a violation of the provisions of this act may sue for and recover any damages he may sustain against any person or persons violating said provisions. Sec. 4. This act shall not apply to any village, town, or city having less than one hundred and thirty thousand population. Sec. 5. This act shall take effect immediately." One Budd, who was engaged in the elevator business at Buffalo, N. Y., was indicted for violating the provisions of said statute, and was charged, in substance, with exacting a greater sum for elevator charges in unloading a cargo of grain and corn than the maximum compensation fixed by the statute. He was convicted, and received a sentence imposing both fine and imprisonment. The case was removed to the court of appeals of New York, which affirmed the judgment of the superior court of Buffalo. People v. Budd, 117 N. Y. 1, 22 N. E. Rep. 670, 682. The Budd Case, with two others arising in different parts of the state of New York, but under the same statute, were, by writ of error, removed to the supreme court of the United States. All three of the cases have been decided by the supreme court of the United States, and an exhaustive opinion was handed down quite recently, and since the case at bar was submitted for our determination. Budd v. People and the two other cases are reported in 12 Sup. Ct. Rep. 468. The tribunal of last resort, after citing numerous

cases decided in state and federal courts upholding the doctrine of legislative control over elevators and warehouses as a proper exercise of the internal police power inherent in every government, reaches the conclusion, and so decides, that the conviction of Budd and the defendants in the other cases must be sustained. This decision reaffirms and accentuates the broad doctrine of the right of state legislative control over warehouses and elevators which was announced October, 1876, sixteen years before, by the same court in Munn v. Illinois, 94 U. S. 113. After referring at length to the opinion of the learned court of appeals (People v. Budd, 117 N. Y. 1, 22 N. E. Rep. 670, 682), which seemed to cover every phase of the question, the federal supreme court declares: "We regard these views which we have referred to as announced by the court of appeals of New York, so far as they support the validity of the statute in question, as sound and just." Proceeding, the court say: "This court in Munn v. Illinois, the opinion being delivered by Chief Justice WAITE, there being a published dissent by two justices, considered carefully the question of the repugnancy of the Illinois statute to the fourteenth amendment. It said that, under the powers of government inherent in every sovereignty, the government regulates the conduct of its citizens one towards another, and the manner in which each shall use his own property, when such regulations become necessary for the public good, and that in their exercise it has been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, etc., and in so doing to fix a maximum of charge to be made for services rendered, accommodations furnished, and articles sold. It was added, 'To this day statutes are to be found in many of the states upon some or all of these subjects;' and we think it has never yet been successfully contended that such legislation came within any of the constitutional prohibitions against interference with private property. It announced as its conclusion that, down to the time of the adoption of the fourteenth amendment, it was not supposed that statutes regulating the use, or even the price of the use, of private property necessarily deprived an owner of his property

without due process of law; that, when private property is devoted to a public use, it was subject to public regulation; that Munn and Scott, in conducting the business of their warehouse, pursued a public employment, and exercised a sort of public office, in the same sense as did a common carrier, miller, ferryman, innkeeper, wharfinger, baker, cartman, or hackneying coachman; that they stood in the very gateway of commerce, and took toll from all who passed; that their business tended 'to a common charge,' and had become a thing of public interest and use; that the toll on the grain was a common charge, and that, according to Lord Chief Justice HALE, every warehouseman 'ought to be under a public regulation, viz., that he take but reasonable toll;' that there was no attempt to compel the owners of the warehouses to grant the public an interest in their property, but to declare their obligations, if they used it in that particular manner; that it mattered not that Munn and Scott had built their warehouses and established their business before the regulations complained of were adopted; that, the property being clothed with a public interest, what was reasonable compensation for its use was not a judicial, but a legislative, question. The final conclusion of the court was that the act of Illinois was not repugnant to the constitution of the United States, and the judgment was affirmed." The court quoted extracts from the cases cited below, showing conclusively that the precedent made in Munn v. Illinois had been firmly adhered to, and its doctrines frequently applied, by the supreme court of the United States in later cases: Sinking Fund Cases, 99 U. S. 700, 747; Water Works v. Schottler, 110 U. S. 347, 354, 4 Sup. Ct. Rep. 48; Wabash, St. L. & P. Ry. Co. v. People, 118 U. S. 557, 569, 7 Sup. Ct. Rep. 4; Dow v. Beidelman, 125 U. S. 680, 686, 8 Sup. Ct. Rep. 1028; Railroad Co. v. Minnesota, 134 U. S. 418, 461, 10 Sup. Ct. Rep. 462. To show that the doctrine of Munn v. People had frequently been applied by the state courts, the following cases are cited by the supreme court of the United States in its late opinion: Lake Shore, etc., Ry. Co. v. Cincinnati, S. & C. Ry. Co., 30 Ohio St. 604; State v. Gas Co., 34 Ohio St. 572; Ruggles v. People, 91 Ill. 256; Davis v. State, 68 Ala. 58; Baker v. State, 54 Wis. 368, 12 N. W. Rep.

12; Nash v. Page, 80 Ky. 539; Girard Point Storage Co. v. Southwarck Foundry Co., 105 Pa. St. 248; Sawyer v. Davis, 136 Mass. 239; Brechbill v. Randall, 102 Ind. 528, 1 N. E. Rep. 362; Webster Telephone Case, 17 Neb. 126, 22 N. W. Rep. 237; Stone v. Railroad Co., 62 Miss. 607; Hockett v. State, 105 Ind. 250, 5 N. E. Rep. 178; Chesapeake & P. Tel. Co. v. Baltimore & O. Tel. Co., 66 Md. 399, 7 Atl. Rep. 809; Delaware, etc., R. Co., v. Central S. Y. Co., 45 N. J. Eq. 50, 17 Atl. Rep. 146; Zanesville v. Gaslight Co., 47 Ohio St. 1, 23 N. E. Rep. 55. The opinion further declares: "We are of the opinion that the act of the legislature of New York is not contrary to the fourteenth amendment to the constitution of the United States, and does not deprive the citizen of his property without due process of law; that the act, in fixing the maximum charges which it specifies, is not unconstitutional, nor is it so in limiting the charge for shoveling to the actual cost thereof; and that it is a proper exercise of the police power of the state." The court further say: "On the testimony in the case before us, the business of elevating grain is a business charged with a public interest, and those who carry it on occupy a relation to the community analogous to that of common carriers. The elevator owner in fact retains the grain in his custody for an appreciable period of time, because he receives it into his custody, weighs it, and then discharges it, and his employment is thus analogous to that of a warehouseman. In the actual state of the business the passage of the grain to the city of New York and other places on the seaboard would, without the use of elevators, be practically impossible." In the course of its opinion the court took occasion to refer to the case of Railroad Co. v. Minnesota, 134 U. S. 418, 10 Sup. Ct. Rep. 462, and to say that the opinion of the court in that case did not overrule Munn v. Illinois, as was claimed by Mr. Justice BRADLEY in his dissenting opinion. The court said: "But the opinion of the court did not say so, nor did it refer to Munn v. People, and we are of opinion that the decision in the case in 134 U. S. 418, 10 Sup. Ct. Rep. 462, as will be hereafter shown, is quite distinguishable from the present case." Further on the court, in speaking of the Minnesota case, say: "That was a very differ-

ent case from the one under the statute of New York in question, for in this instance the rate of charges is fixed directly by the legislature. See Spencer v. Merchant, 125 U. S. 345, 8 Sup. Ct. Rep. 921. What was said in the opinion of the court in 134 U. S. 418, 10 Sup. Ct. Rep. 462, had reference only to the case then before the court, and to charges fixed by a commission appointed under an act of the legislature, under a constitution of the state which provided that all corporations, being common carriers, should be bound to carry 'on equal and reasonable terms;' and under a statute which provided 'that all charges made by a common carrier for the transportation of passengers or property should be equal and reasonable.' What was said in the opinion in 134 U. S. 418, 10 Sup. Ct. Rep. 462, as to the question of the reasonableness of the rate of charge being one for judicial investigation, had no reference to a case where the rates are prescribed directly by the legislature. Not only was that the case in the statute of Illinois, in Munn v. People, but the doctrine was laid down by the court in Wabash, St. L. & P. Ry. Co. v. People, 118 U. S. 557, 7 Sup. Ct. Rep. 4, that it was the right of a state to establish limitations upon the power of railroad companies to fix the price at which they would carry passengers and freight, and that the question was of the same character as that involved in fixing the charges to be made by persons engaged in the warehousing business. So, too, in Dow v. Beidelman, 125 U. S. 680, 8 Sup. Ct. Rep. 1028, it was said that it was in the power of the legislature to declare what should be a reasonable compensation for the services of persons exercising a public employment, or to fix a maximum beyond which any charge made would be unreasonable."

The federal supreme court, without deciding whether it would under any circumstances assume to determine whether or not a maximum rate fixed by the legislature of a state was unreasonable, declared, referring to the New York cases, what may be said with equal truth and propriety of the case we are considering, viz.: "The records do not show that the charges fixed are unreasonable." Nor do we feel called upon to anticipate what our conclusions might be in a case where it is made to appear that a rate of compensation prescribed by statute is so inade-

quate that its practical effect would be to deprive the warehouseman of his property without due process of law, or so inadequate as to be non-compensatory in amount. In its recent opinion above cited the supreme court of the United States quoted at length, and with marked approval, the clear and emphatic language employed by the court of appeals of the state of New York in People v. Budd, wherein that learned court repeatedly gave its sanction to the governmental power upon which the warehouse laws of Illinois and New York are based, and upon which such laws can alone be sustained as constitutional laws, viz., the internal police power. While the courts cautiously avoid all attempts to circumscribe this all-pervasive power by definitions descriptive of its entire scope and utmost boundaries, it is also true that the courts of this country recognize the existence of such power as a fact, and as an essential element in all orderly government. In a case properly within the police power of the state, the exercise of that power by the legislature is as vitally important and as essentially constitutional as the exercise of any other governmental power whatsoever. The supreme court of the United States, referring to the views of the court of appeals, say: "The court of appeals said that, in view of the foregoing exceptional circumstances, the business of elevating grain was affected with a public interest, within the language of Lord Chief Justice HALE in his treatise De Partibus Maris (Harg. Law Tracts, 78); that the case fell within the principle which permitted the legislature to regulate the business of common carriers, ferrymen, hackmen, and interest on the use of money; that the underlying principle was that business of certain kinds hold such a peculiar relation to the public interests that there is superinduced upon it the right of public regulation; and that the court rested the power of the legislature to control and regulate elevator charges upon the nature and extent of the business—the existence of a virtual monopoly, the benefit derived from the Erie canal's creating the business and making it possible, the interest to trade and commerce, the relation of the business to the property and welfare of the state, and the practice of legislation in analogous cases, collectively, creating an exceptional case, and justifying legislative regulation."

It therefore appears that in the legislature of the states of Illinois and New York the power exists, under constitutional restrictions substantially the same as those existing in North Dakota, to control the business transacted in elevators and grain warehouses, to the extent, at least, of prescribing the maximum charges for storing and elevating grain. It follows that the same power exists and may be exercised in North Dakota, if like or similar conditions to those found in the other states mentioned exist here. Nor are the same or similar conditions here indispensable to the existence or to the exercise of legislative control over the warehouses and grain elevators of this state. The police power inheres in our state government, and may be put forth by the legislature, within the limitations of the constitution; nor does the exercise of such power at all depend upon whether the police power has been previously asserted in a similar manner, and over the same conditions and subject matter in other states. It may, indeed, become vitally important in the progressive development of our peculiar local industries to assert the legislative authority over departments of business which never before have been subject to legislative control. Should a new exigency arise in North Dakota, the power to meet it by appropriate legislation will be found in our state government as it has been found in other states. But in the case at bar we think no new departure is necessary. In our judgment, this case falls clearly within the reasoning of the two leading warehouse cases arising in the states of Illinois and New York, already cited. While the conditions in the other states differed somewhat in details, we think they were substantially similar to the conditions existing in North Dakota, which led to the enactment of chapter 126 of the Laws of 1891, and we are clear that the principle which has justified the legislation in the other states can be invoked here. The appellant's grain elevator may be taken as fairly representative of the "600 grain elevators, flathouses, and warehouses" which it appears by the answer exist in North Dakota. It stands at a railroad station, adjoining the track, which track leads to a market within and without the state. Its uses are numerous and variant, and all of its uses are closely connected with the principal productive

industry of this state, viz., that of grain raising for shipment to market. In the shipping seasons an agent of the elevator can always be found in attendance there to receive, weigh, grade, and distribute the grain—principally wheat—in different compartments in the building, according to the grade to which it belongs. Usually the proprietor of the elevator is himself a buyer of grain as well as a warehouseman, and the station where the elevator is located is practically the only place in the vicinity, or for miles around, where the producer can find either storage or a buyer for his grain. It is conceived to be important to the seller that this grain should be in hand, and accessible at the railroad station, where it can be disposed of on any day when the market is favorable or when necessity compels a sale. The elevators and warehouses of the state have grown up as an inseparable adjunct of the farming interests of the state. They reciprocally depend upon and sustain each other. It is in fact difficult to conceive of a system in which the peculiar grain raising and shipping industry of this state can be successfully carried on independently and without the practical co-operation of the elevators and warehouses located at the stations. These structures are well adapted to the uses for which they are built, and, while it is true that the railroads in the state are required by statute to furnish box cars to those who may desire to ship in carload lots, yet it appears in this case, and it is a fact of common knowledge here that this mode of shipping grain is wholly inadequate as a means of transporting to market the surplus grain produced in this state, where the yield is as large as it frequently has been in years past. Nor is shipping by carload lots so convenient to small producers, who more frequently than otherwise would be unable to hold a box car at a station long enough to enable them to haul their grain from a distance and fill such car. The course of business which has gradually grown up at the elevators is for the farmer to deliver his grain at the elevator, and there it is weighed and graded by the agent in charge. The farmer receives a warehouse receipt, specifying the quantity and grade delivered, and thereafter the farmer never sees his wheat. It is shipped out from day to day to suit the convenience of the elevator. The farmer, if he

so elects, can demand a redelivery of the same quantity of grain and of like quality as that specified on his receipt; but the amount of grain so redelivered is so small as to be nonappreciable—the mass of the grain put in the elevators at railroad stations moves out of the country by rail after being placed upon cars by instrumentalities provided by the elevators and adapted to that purpose.

With the existing limited facilities for storing, handling, and shipping grain in this state, it is not an exaggeration to say that it would be impossible to market the larger part of the surplus grain raised in this state, in any year of an average yield of wheat and other cereals, without the aid of elevators and warehouses now standing at railroad stations, and placed there for the express purpose of receiving, grading, and storing the grain and delivering it upon the cars. In brief, the elevators and warehouses are indispensable auxiliaries of the producers in conveying their grain to market. These explanations, it is hoped, will suffice to show that the business carried on at the warehouses and elevators erected at the railroad stations in North Dakota has a relation to the entire public which is unique. Not only are these structures peculiarly related to the producers of the grain who deal with them directly, but they have an exceptional relation also to that larger public, whose vital interests are inseperable from those of the producing class. It is true that our warehouses do not possess corporate privileges, and hence cannot be subjected to legislative control as legal monopolies; but they have such a large and decisive work to do in the matter of transferring grain from the hands of the producer to the common carrier and to the buyer that their business has a relation to the public which is peculiar to them, and which lifts such business out of the common business pursuits of our people, and places it in a separate class. We adopt and approve the language of the court in Ruggles v. People, 91 Ill. 256: "The legislature of this state has the power, under the constitution, to fix a maximum rate of charges by individuals as common carriers, warehousemen, or others exercising a calling or business public in its character, or in which the public have an interest to be protected against extortion or oppression."

We deem it superfluous to cite additional authority in support of our conclusions. We are not unaware of the fact that the right of legislative control of any kind of business is liable to abuse. But it is equally a matter of common observation, and one abundantly verified by history as well as by current events, that the untrammeled right of individuals or corporations to make their own charges for services which are indispensable to the public is likewise liable to abuse. There are many checks and safeguards which surround the property and the liberties of the citizen which will operate powerfully to prevent anything like a wholesale assumption of paternal authority over the citizen or over his business pursuits. Before any business can be severed from the mass of private occupations, and be made subject to legislative regulation, there must first be a popular demand for such control, crystalizing into law; and when a statute is enacted which assumes control the citizen has a right of appeal to the courts, and the courts have authority to annul as unconstitutional any statute which erroneously assumes to declare a business to be impressed with a public character when in fact it is only a private pursuit. The court of appeals of New York well said (People v. Budd, 22 N. E. Rep. 680) "that no serious invasion of constitutional guaranties by the legislature could withstand for a long time the searching influence of public opinion, which was sure to come sooner or later to the side of law, order, and justice, however it might have been swayed for a time by passion or prejudice, or whatever abberations might have marked its course." Without further amplification, we unhesitatingly declare, and so hold, that the warehouse and elevator business, as conducted in this state, is a "business peculiarly affected with a public interest," and as such is subject to legislative regulation to the extent of fixing a maximum rate of charges for storing and handling grain in the public warehouses.

One further consideration may be mentioned. If the court entertained doubt of the constitutionality of chapter 126 of the Laws of 1891 much more serious than we do in fact entertain, we should yet deem it to be our duty to give the statute the benefit of such doubts. This course is in accord with an

established rule of statutory construction. State v. Fraser, 1 N. D. 425. Besides, by overruling constitutional objections urged against the statute, the case will be in a position to be reviewed by the supreme court of the United States; while, on the other hand, should we declare against the validity of the statute, no such review could be had. The whole people will cheerfully acquiesce in the conclusions reached by the court of *dernier ressort*, and we are glad to be able conscientiously to so determine the case as to facilitate its review in that court. We have limited our inquiries and conclusions to the one matter of the right of legislative control of public warehouses and elevators to the extent of prescribing maximum charges, and have not considered possible questions which, under other averments of fact, might arise touching the validity and binding force of the rules and regulations prescribed by the commissioners for the government of the public warehouses of the state. We think no such question can legitimately arise under the pleadings, and no such question is presented in the briefs of counsel. The order sustaining the demurrer to appellant's answer, and directing the peremptory writ of *mandamus* to issue, is affirmed. It will be so ordered.

BARTHOLOMEW, J., concurs.

CORLISS, C. J., (*concurring specially.*) I agree to the judgment in this case with reluctance. I am of opinion that the doctrine of the Munn and Budd Cases is unsound. I admit that all authority is in favor of the opinion in this case, but I have an abiding conviction that the dissenting opinions in the Munn and Budd Cases embody the true conception of American liberty. While it is true, as an abstract proposition, that the state courts may give to that liberty a wider scope than the federal courts give to it, yet the question is so national in its character that it occurs to me that there should be only one rule for the whole nation. That rule, of course, must be for the present, and while those cases stand, the rule that the nation's highest tribunal enunciated in the Munn Case, and which it has very recently affirmed in the Budd Case in the most emphatic manner, although by a bare majority. Liberty should

not be one thing under the federal constitution, and an entirely different thing under a state constitution, containing the same guaranties, couched in the same language, and written in the same spirit. The mind cannot conceive of a question more purely national in its character than the extent of that liberty which is the birthright of every citizen in every state and territory in the land. It is one of the fundamental rights; not one thing in one state or section and something different in another state or section, but an all pervading principle, interwoven with the very structure of our polity, state and national. The nation was builded that all of its citizens might enjoy a distinctively American liberty. To the nation's tribunal the people committed the preservation of that liberty against state encroachment by the fourteenth amendment. By this very act the people lifted the question from one of state control into the broader field of national control. In its essential nature it was national before, although prior to that time each state might by its own constitution have settled for itself the boundaries of that liberty. Not so now. The right to trace those boundaries is now lodged with the federal supreme court. The question of liberty being national in its character, the spirit of the fourteenth amendment is that the nation's court shall determine the scope of that liberty, that it may be the same throughout the nation. The mere want of power in the federal supreme court to compel the state courts to give the citizen no greater liberty than the former court accords him affords no reason why such courts should refuse to follow the line of less extended liberty drawn by the federal court. While there is great difference between the facts of the case and the facts in the Munn and Budd Cases, it may be that this difference is not of such a nature as to distinguish this case from those in principle. My associates are clear on this point. I confess that I have doubts about it. My views, however, cannot affect the decision, and the federal supreme court must ultimately determine this question. Whatever I think about it will be of no weight before that court, which must settle for itself the limits of the doctrine it has enunciated. If that doctrine is to be much extended, I greatly fear that our boast of liberty will be

found "full of sound and fury, signifying nothing." I could add nothing to what has been said in the dissenting opinions in those cases, with such power of reasoning. Nor do I regard this as the court in which to express a dissent as to the doctrine. Such dissents are proper in that court which ought to declare the rule on this subject for the whole nation, in all its courts, state and national. No question of the reasonableness of the statutory compensation is involved. The issue is purely one of power. No other point is before us on this record. Yielding my individual judgment to higher authority to which I feel it my duty to submit, I agree to the affirmance of the judgment.

STATE OF NORTH DAKOTA, Defendant in Error *v.* EDWARD FALLON, Plaintiff in Error.

Criminal Law—Proof of Collateral Offense—Variance.

1. Where an information charges the defendant with the crime of an assault with a dangerous weapon, to-wit, a pistol, with intent to commit a felony, and describes the assault as committed by then and there shooting a loaded pistol at and against the party assaulted, with intent to rob him, and the evidence shows that the assault was committed by thrusting the pistol in the face of the party assaulted, and demanding his money, and that the pistol was not discharged until after the assailant had started to make his escape, there is a fatal variance between the allegations and the proof.

2. In such a case the jury may not, in the absence of any evidence to support it, indulge the presumption that at the instant the pistol was fired the defendant conceived the intent to return, and persist in the attempt to commit robbery.

3. When a prisoner is on trial charged with a specific offense, it is not error to admit proof of a collateral offense committed by the prisoner, when such collateral offense is connected with the specific offense in such manner that proof of the commission of the collateral offense has a legal and logical tendency to establish some fact necessary to be established in proving the specific offense.

(Opinion Filed May 18, 1892.)

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

M. A. Hildreth, for plaintiff in error. *L. A. Rose*, State's Atty., and *C. A. M. Spencer*, Atty. Gen., for the State.

Prosecution againt Edward Fallon for an alleged assault with intent to commit robbery. Verdict of guilty, and judgment thereon. Defendant brings error. Reversed.

The opinion of the court was delivered by

BARTHOLOMEW, J. Edward Fallon, the plaintiff in error, was informed against, with one Howard, charging them with the crime of making an assault with a dangerous weapon, to-wit, a pistol, with intent to commit a felony, and the circumstances of the offense were charged in the following language: "That at said time and place, the said defendants, in and upon one Charley Curfman, did then and there unlawfully, feloniously, and with premeditated malice make an assault, and then and there, at and against him, the said Charley Curfman, did unlawfully and feloniously, and with premeditated malice, shoot a certain pistol, then and there loaded with gunpowder and a leaden ball, with the intent then and there upon and against him, the said Charley Curfman, to commit the crime of robbery." Sections 6481, 6482, Comp. Laws, read as follows: "Robbery is a wrongful taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear. To constitute robbery, the force or fear must be employed either to obtain or to retain possession of the property or to prevent or overcome resistence to the taking. If employed merely as a means of escape, it does not constitute robbery." The state may fairly claim that the evidence establishes the following facts: The assault occurred between 8 and 9 o'clock on the evening of October 29, 1891, in the bright rays of an electric light, very near the west end of what is known as the "North Bridge" across the Red river, in the city of Fargo. Curfman, the party assaulted, had started to go east across the bridge. Before reaching the bridge he passed the plaintiff in error, who

found "full of sound and fury, signifying nothing." I could add nothing to what has been said in the dissenting opinions in those cases, with such power of reasoning. Nor do I regard this as the court in which to express a dissent as to the doctrine. Such dissents are proper in that court which ought to declare the rule on this subject for the whole nation, in all its courts, state and national. No question of the reasonableness of the statutory compensation is involved. The issue is purely one of power. No other point is before us on this record. Yielding my individual judgment to higher authority to which I feel it my duty to submit, I agree to the affirmance of the judgment.

STATE OF NORTH DAKOTA, Defendant in Error *v.* EDWARD FALLON, Plaintiff in Error.

Criminal Law—Proof of Collateral Offense—Variance.

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2. In such a case the jury may not, in the absence of any evidence to support it, indulge the presumption that at the instant the pistol was fired the defendant conceived the intent to return, and persist in the attempt to commit robbery.

3. When a prisoner is on tri[illegible] ific offense, it is not error to admit proof of [illegible] mitted by the prisoner, when such collater[illegible] the [illegible] offense in such manner that [illegible] the [illegible] offense has a legal and log[illegible] [illegible] sary to be established in [illegible]

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asked him for the price of a drink, which was refused. After passing, Curfman noticed plaintiff in error following him. Just before reaching the bridge Howard, coming from the opposite direction, met Curfman, and ordered him to halt, and presented a revolver in his face. At the same time plaintiff in error ordered him to throw up his hands. They exchanged a few words, when plaintiff in error grabbed Curfman's watch chain, and said, "Give us your money." At that instant footsteps were heard approaching, and the assailants started to run. When fifteen or twenty feet distant from Curfman they wheeled, and Howard fired the pistol, hitting Curfman in the jaw. The assailants then immediately disappeared in the darkness in some woods south of the bridge. At the proper times counsel for the plaintiff in error raised the point that there was a fatal variance between the allegations in the information and the proofs, and asked the court to advise an acquittal for that cause. The request was denied.

Counsel contends that, while the information charges that the shooting was done with intent to commit robbery, yet the evidence shows that the assault with intent to rob was a completed event before the shooting was done, and that the shooting was done for the purpose of facilitating the escape of the assailants, and, without claiming the evidence insufficient in the absence of proof of the shooting to establish the charge of an assault with a dangerous weapon with intent to commit robbery, it is urged that, as the pleader saw fit to allege the particular circumstance and acts descriptive of the assault, the assault must be proven in the manner and by the means alleged, or the variance will be fatal. This proposition is supported by the following authorities, among others: Greer v. State, 50 Ind. 267; Dennis v. State, 91 Ind. 291; Gray v. State, 11 Tex. App. 411; Withers v. State, 21 Tex. App. 210; State v. Newland, 7 Iowa, 242; State v. Vorey, 41 Minn. 134, 43 N. W. Rep. 324; Com. v. Richardson, 126 Mass. 34—and is undoubtedly among the elementary principles of criminal procedure. The learned counsel for the state frankly admits the proposition, but seeks to avoid its force by claiming that the jury were warranted in finding that when the shot was fired the assailants

intended to persist in their purpose of robbing Mr. Curfman. Two insurmountable objections to that position suggest themselves: First, the question was not submitted to the jury. They were not told that, if they found the shooting was done to facilitate the escape of the assailants, it would be their duty to return a verdict of not guilty. The instructions were silent upon that point, and, in the absence of all restraint in that direction, under the facts stated, a verdict of guilty was virtually a foregone result. Again, if the jury had been so instructed, a conviction would not stand. There is nothing in the evidence to show that at the instant the shot was fired the assailants had any intent whatever to persist in their purpose to rob Mr. Curfman. Rather, the whole evidence shows that all intent to commit robbery had been abandoned, and the assailants were bent solely upon making their escape from the parties whose approach was heard, and from the consequences of their acts. It is possible the other intent may have been present, but no man should be convicted when the pivotal fact upon which guilt depends is a mere matter of conjecture. For this error the judgment must be reversed, and a new trial awarded.

But another ruling is assigned as error, which may arise upon another trial, and hence it becomes proper for us to notice it. The state introduced as a witness one Fiest, who, against the objection of plaintiff in error, was permitted to testify that on the evening of the alleged assault, and only a very short time before the occurrence, he saw plaintiff in error and said Howard on the same street and but a short distance from the place where the assault was made upon Mr. Curfman; that Howard pushed a revolver in his (witness') face, and ordered him to get off the street. It is claimed that the state ought not to have been allowed to prove a distinct and collateral offense. It is often difficult to distinguish the effect of prejudice from the effect of proof. When a prisoner is on trial charged with a special offense, the proof of a commission by him of a distinctively collateral offense, or of any number of collateral offenses, whatever be their character, is, as a general rule, no proof whatever of the commission of the offense charged. Yet such proof would produce most damaging prejudice in the minds of

the jurymen. A party must not be convicted of crime upon proof of a criminal disposition, however depraved or however pronounced. Nor should a prisoner on trial be expected to be prepared to defend his entire past record. No such demand is made upon him. He is simply required to defend against the specific offense for which he is on trial. For these reasons courts have almost uniformly held that proof of a collateral crime could not be introduced, unless there was such a logical connection between the collateral offense and the offense charged that the proof of the collateral offense furnished some legal evidence tending to establish some fact necessary to be established in proving the crime charged. There are some exceptions to this rule pertaining to offenses of a peculiar nature, but they do not affect this case, and need not be specifically noticed. The whole subject, including the cases on both sides and the exceptions, will be found fully discussed and exhausted in the great case of State v. LaPage, 57 N. H. 245, 2 Amer. Crim. Rep. 506.

But, keeping this rule in view, we do not think the court erred in admitting the testimoney of the witness Fiest. That testimony tended directly to establish the fact that the prisoner was in the immediate locality where the crime charged was alleged to have been committed, at or near the time of its commission. That fact might have been shown, however, without going to the extent of proving the assault upon the witness Fiest. But proof of such assault had a direct tendency to establish method and system in the conduct of the prisoner and Howard, and to explain the character and purpose of their further acts. If they contemplated a criminal enterprise, and were there for that purpose, they would naturally object to having witnesses to their conduct, and, if they drove the witness Fiest from the locality, the inference is legitimate and logical that they then contemplated a criminal enterprise. We think the testimony was proper, under State v. LaPage, *supra;* and see, also, Guthrie v. State, 16 Neb. 667, 21 N. W. Rep. 455; Kramer v. Com. 87 Pa. St. 299; Thayer v. Thayer, 101 Mass. 111. But for the error hereinbefore pointed out the district court is directed to set aside the judgment heretofore entered in this case, and proceed in a manner not inconsistent with this opinion. Reversed. All concur.

STATE OF NORTH DAKOTA, Defendant in Error, *v.* FRANK SMITH, Plaintiff in Error.

Indictment—Several Offenses—Burglary and Larceny.

An information charging both burglary and grand larceny at the same time, in the pursuit of a single criminal enterprise, charges two offenses, and it therefore cannot be sustained when attacked by demurrer, for the reason that § 7244, Comp. Laws, declares that only one offense must be charged in an indictment.

(Opinion filed May 19, 1892.)

ERROR to district court, Cass county; HON. WILLIAM B. MCCONNELL, Judge.

M. A. Hildreth and *J. A. McEldowney*, for plaintiff in error. *L. A. Rose*, State's Atty., and *C. A. M. Spencer*, Atty. Gen., for the State.

Prosecution against James Smith for an alleged burglary and grand larceny. Defendant was convicted, and he brings error. Reversed.

The opinion of the court was delivered by

CORLISS, C. J. The plaintiff in error demurred to the information on the ground that it charged two distinct offenses. The demurrer was overruled, and the accused convicted. By this appeal the plaintiff in error challenges the legality of the information. No other point is made. That the information does charge two offenses cannot admit of doubt. It sets forth specifically and in detail all the facts necessary to establish the offense both of burglary and of grand larceny. These are two distinct offenses, although they both happen to be committed in pursuit of the same criminal enterprise. Breaking and entering with intent to steal must by some appreciable time precede the actual theft. The crime of burglary is complete the moment the breaking and entering with the criminal intent are consummated. The subsequent stealing adds nothing to the offense, nor will the failure of the accused to accomplish his ultimate purpose of theft take from the

already completed offense any of its essential elements. In the pursuit of a single criminal enterprise, two offenses have been committed, each independent of the other—one, the ulterior purpose, the theft; and the other, the means adopted from necessity to effect it, the breaking and entering the building, the criminal intent all the time accompanying the act. Authorities are cited by the learned state's attorney to sustain the form of the information he has employed, but this case stands upon a statute, and not upon adjudications. Formerly distinct offenses might be set up in the same indictment in different counts. This rule, however, would not avail the state's attorney, although there had been no statutory change in this respect, as these two offenses in this case are charged in the same count. This, as a general rule, could not be done. But there were exceptions to such a rule. Without stating other exceptions, it is sufficient, for the purposes of this case, to say that one of these exceptions would justify the course adopted by the state's attorney in this case. It was proper to charge burglary and grand larceny in the same count, when both offenses were committed in pursuit of the same criminal enterprise. It is urged that our statute merely declares the common-law rule. This is a mistake, and the fallacy of the reasoning which leads to this conclusion lies in the assumption that it was a part of the common-law doctrine against duplicity that burglary and larceny might, under such circumstances, be charged in the same indictment. It was not a part of that doctrine, but an exception to the rule. Our statute declares the rule in the most comprehensive manner, without the qualification of any exception. "The indictment must charge but one offense." § 7244, Comp. Laws. We have no right to ingraft an exception upon the statute. We must infer that it was for the purpose of abrogating the exception that the rule was declared by the legislature without such exception. That the right to charge burglary and larceny in the same count was an exception to the rule against duplicity, and not a part of it, cannot well be questioned in view of the explicit language of the authorities. In Breese v. State, 12 Ohio St. 146, the court say: "The general rule undoubtedly is that two distinct crimes or offenses

cannot properly be joined in the same count of an indictment, and that such joinder will be fatal on demurrer or on motion to quash. Whart. Crim. Law 192, and cases cited. But this rule is by no means of universal application, and one of the exceptions as well established as the rule itself is that a burglary and larceny committed at the same time may be united. Id 192, 614. In such cases the burglarious entry with intent to steal, and the consummation of that intent by actual theft, are so connected that the two crimes may be charged in the same count, in order, it is said, to convict of the one on the failure to establish the other. Whart. Crim. Law 614; 1 Hale P. C. 560; Rex. v. Withal, 1 Leach, Club Cas. 88."

From this opinion it is obvious that the court regarded that two distinct offenses were charged, and that the case would have been within the rule but for the exceptions thereto, which, as the court said, was as well established as the rule itself. In Ben v. State, 22 Ala. 9, the court say: "It is certainly true that an indictment must not be double; that is, the defendant must not be charged with having committed two or more offenses in any one count. For example, it is not permissable to charge the defendant in the same count with having committed murder and robbery. Mr. Archbold says the only exceptions to this rule are to be found in indictments for burglary, in which it is usual to charge the defendant with having broken and entered the house with intent to commit a felony, and also with having committed the felony intended," etc. Here, this practice is justified, not under the rule, but as an exception to it. Wharton mentions this practice as an exception to the doctrine against duplicity. "Prominent exceptions to the rule before us are to be found in indictments for burglary, in which it is correct to charge the defendant with having broken into the house with intent to commit a felony and also with having committed the felony intended." Whart. Crim. Pr. & Pl., § 244. See, also, U. S. v. Byrne, 44 Fed. Rep. 188.

The failure of the legislature to perpetuate in express language this exception to the rule, when declaring the rule itself, is conclusive against the continued existence of the exception. The authorities are not in a satisfactory condition. See, as sustaining our

view, People v. Garnett, 29 Cal. 622, cited with approval in People v. De Coursey, 61 Cal. 135, and in State v. Ridley, 48 Iowa 370–378. The dissent in the case in 29 Cal. was not directed against the doctrine in the prevailing opinion, and Judge SAWYER in his dissenting opinion expressly says that two distinct offenses were charged. "The court correctly stated that the indictment covered both a burglary and a larceny." And again he says: "As to the proposition that the case was tried upon the theory that the indictment charged a burglary only, I only deem it necessary to say that the evidence as well as the indictment covers both offenses and that we do not know that the case was tried upon such theory." He in effect agreed with the *dictum* in the prevailing opinion by these statements that the indictment covered both offenses, and by his conclusion that it was proper for the jury to convict of grand larceny under the indictment because it charged that crime as well as burglary. He dissented upon a ground which in no manner touched the *dictum* in the prevailing opinion that the indictment was bad for the reason that it charged two offenses. The point was not properly raised below, and he states in his opinion that "no question is made as to the propriety of including the two offenses in the same indictment." While the case is not an authority, we regard it as indicating the views of the court on the point, and we are entirely satisfied with the reasoning and conclusion expressed in the prevailing opinion, and in no manner challenged, but, on the contrary, practically assented to in the dissenting opinion. Said the court: "The indictment would have been bad on demurrer had one been interposed, upon the ground that it contains two separate offenses, burglary and grand larceny. At common law there are two kinds of burglary: (1) Complicated and mixed with another felony; and (2) simple burglary, for which different punishments were inflicted. 1 Hale, P. C. 549. Hence at common law an indictment for the first necessarily comprised two offenses — burglary and such other felony as may have been committed in connection therewith; and the defendant could be acquitted of the burglary, if the case was so upon the evidence, and found guilty of the other felony only. Id 559. Our Criminal Code, however, describes

no such offense as burglary complicated and mixed with another felony. It describes simple burglary only. Hence, under our practice, burglary cannot, more than any other offense, be united in the same indictment with another offense. If, in addition to burglary, another offense has been committed, it must be made the foundation of a separate indictment." This reasoning is applicable to our statutes defining "burglary." Here the crime is never complicated with another offense. Another offense may and usually does accompany it; but no other offense can, under our statute, enter into its constitution as a component part thereof. The breaking and entering with the criminal intent constitutes the crime. Whatever is done subsequently adds nothing to it, but will, if criminal in its character, constitute a separate offense. Comp. Laws, §§ 6736–6742.

In Farris v. Com. (Ky.), 14 S. W. Rep. 681, the statute perpetuated this crime of burglary when complicated with another offense. It in substance declared the offense to be burglary, not only when there was a breaking and entering with felonious intent, but also when some other felony was committed in connection with such breaking and entering. Under such a statute, to charge the stealing, as well as the breaking and entering, is only to charge a constituent element of the crime, not necessarily a part of the crime, as either the intent or the consummation of the deed intended will, under such a statute, in connection with the breaking and entering, make up the crime of burglary, but still as much an element as the criminal intent itself. The actual stealing was in this case a part of the one crime of burglary, and so made a part by statute. To set it forth in the indictment was therefore proper. The language of the opinion conclusively shows that this construction, which we have given the decision in this case, that it was proper to charge the stealing as well as the breaking and entering, is correct. Said the court: "Where the breaking with intent to steal is shown, the offense is complete; but the legislature saw fit to add to the statute, 'or shall feloniously take therefrom,' not as establishing the breaking, but as showing the felonious intent. The statutory offense is the breaking with the intent to steal, or the breaking followed by a stealing, which evinces the felonious in-

tent merely, and which may therefore be charged in the indictment." It is obvious that the decision turned on the peculiar language of the statute, and that the court considered that the indictment which followed the statute in charging the offense did not charge larceny as a distinct crime, for the court in this case held it error for the trial court to submit the case to the jury on the theory that they might convict of either burglary or larceny. The authorities in Iowa are in an unsatisfactory state. The rule there is to regard the charge of larceny as surplusage. The court treats it as the mere pleading of evidential facts to establish the intent to steal. We cannot agree to this doctrine. It is not customary to set forth evidence in any pleading, civil or criminal, and we do not understand on what principle a separate, specific charge of larceny, embodying all the facts essential to the establishment of such an offense, stated by themselves, independent of the facts constituting the crime of burglary, and set forth with all the particularity requisite to a good information or indictment charging larceny, should be regarded as mere surplusage. The prosecution is under no obligation to plead evidence of the criminal intent with which the breaking and entering were committed. It is always proper, under an information charging burglary, to prove larceny as evidence of the intent with which the accused broke and entered the building, without averring that larceny was in fact committed. If so specific a charge of larceny may be regarded as surplusage, we see no reason why an information charging a breaking and entering for the purpose of committing murder, and in addition the actual commission of murder, with all the particularity essential to a good indictment for murder, should not be regarded as charging only the crime of burglary, and as setting forth the actual murder merely as an evidence of the intent which prompted and accompanied the breaking and entering. We think the point well taken, and the judgment of the district court is therefore reversed.

All concur.

STATE OF NORTH DAKOTA, Defendant in Error, *v.* MARTIN O. HAZLEDAHL, Plaintiff in Error.

Discharge of Juror During Trial—Information—Verification.

1. In this state, when, during the trial of a criminal case, and before the case has been finally submitted to the jury, a juror becomes sick and unable to sit further in the case, the court may order such juror discharged, and a new juror sworn to complete the panel, and that the trial begin anew; or the court may discharge the entire jury, and then or subsequently impanel another jury to try the case.

2. When the first course is pursued, the prisoner is not thereby entitled to again exercise all the peremptory challenges given him by statute, or to peremptorily challenge any one of the eleven remaining jurors; and in procuring the new juror the prisoner may exercise only such of his peremptory challenges as he has not already exhausted in procuring the other eleven jurors.

3. The information was filed by the state's attorney under chapter 71, Laws 1890, and verified by the state's attorney, as follows: "That the allegations therein contained are true to his best knowledge, information, and belief." *Held*, that the information was sufficiently verified. Whether such verification is sufficient when made as a foundation for a warrant of arrest, or when made by a person other than the state's attorney, not decided.

4. Where the information was not entitled in an action, and it nowhere appears by the information that the defendant was prosecuted in the name or by the authority of the state of North Dakota, proper and timely objection to the information being made, *held*, that the information was invalid, for the reason that it did not conform to the requirements of § 97, article 4, of the state constitution, which contains the following language: "All prosecutions shall be carried on in the name and by the authority of the state of North Dakota."

(Opinion Filed May 31, 1892.)

ERROR to district court, Richland county; Hon. W. S. LAUDER, Judge.

M. A. Hildreth, for plaintiff in error. *C. A. M. Spencer*, Atty. Gen., for the State.

Prosecution against Martin O. Hazledahl for embezzlement. Verdict of guilty, and judgment thereon. Defendant brings error. Reversed.

The opinion of the court was delivered by

WALLIN, J. The plaintiff in error was convicted of the crime of embezzlement, and sentenced to a term in the penitentiary at Bismarck. The bill of exceptions embraced in the record shows that, after the jury had been sworn, and a portion of the testimony introduced, a juror was taken sick, and was unable to sit further on the jury. The court thereupon made an order discharging such juror, entering the reasons therefor in the order, and directed that a new juror be called and duly sworn as a juror in the case, and that the trial of the case begin anew. In the formation of the original jury plaintiff in error had used nine of the ten peremptory challenges to which he was entitled under the statute. When a new juror was called into the box he was peremptorily challenged by the plaintiff in error, and such challenge allowed by the court. The second juror called was likewise challenged, and the challenge disallowed by the court, to which ruling plaintiff in error duly excepted. Such juror was sworn and served as a juror in the case.

Section 7401, Comp. Laws, reads as follows: "If before the conclusion of a trial a juror becomes sick, so as to be unable to perform his duty, the court may order him to be discharged. In that case a new juror may be sworn, and the trial begin anew, or the jury may be discharged, and a new jury then or afterwards impaneled." Under this section plaintiff in error contends that upon the discharge of the sick juror he was entitled to all his challenges, both as to the eleven jurors remaining in the box and the new jurors called, the same as though no jury had been previously selected. This section appears in our territorial Code of 1877, and is an exact copy of a section in the California Code of Criminal Procedure. We have not found the statute elsewhere. Subsequent to its adoption by the territory of Dakota it was construed by the supreme court of California in People v. Stewart, 64 Cal. 60, 28 Pac. Rep. 112, and later in People v. Brady, 72 Cal. 490, 14 Pac. Rep. 202. The construction placed upon the section in those cases fully sustains the position taken by the learned counsel for the plaintiff in error. But under the circumstances, the case comes before us as an original question. Many provisions in our statutes were

copied from California, and in their construction our labors have been greatly assisted by the opinions of the very able and painstaking court of that state, but in this instance we are unable to follow where that court leads. In Stewart v. People, the court say: "What is implied by the clause, 'and the trial begin anew?' The title of the chapter which provides for the challenging the jury is: 'Of proceedings after the commencement of the trial and before judgment.' We think, within the meaning of the Code, a trial commences when the case is called for trial, unless the trial is then postponed; that everything that transpires in the case after that and before judgment is a part of the trial. That being so, it follows that the defendant was entitled after the change had been affected, to all the challenges which the law gave him in the first instance. Within that limit he not only had a right to challenge the new juror but likewise any or all of the original eleven." To our minds that reasoning goes too far. If the word "trial" in the phrase "and the trial begin anew" includes everything from the time the case was called, then, necessarily, the names of the remaining eleven must go back in the clerk's box to be redrawn. There cannot be eleven jurors in the jury box when the case is called. If the trial is to "begin again" at the calling of the case, necessarily the jury must be impaneled again, and of course must first be discharged from the prior panel. And we think the reasoning in People v. Stewart leads to that result unmistakably. If the accused has the right to challenge any or all of the remaining eleven, then it must be true that there is not an accepted juror in the box. But there were twelve accepted jurors before the one was taken sick, and they could only be relieved from that condition by being discharged. Hence, in every case the practical effect of discharging the one sick juror is to discharge the entire jury under that construction. But that could not have been the intent of the legislature, because in the same connection it is provided that the court may discharge the sick juror, and swear another to fill his place, or may discharge the entire jury and impanel another. It does not meet the point to say that, unless the accused challenges the remaining eleven, or some of them, they retain their character as jurors. That would always place

it in the power of the accused to discharge the entire jury or not, at his election. The law places the election with the court. Moreover, the character of juror cannot attach while the right to challenge remains. Under the English practice when, during the progress of a trial, a juror becomes sick and unable to sit, the jury is always discharged. The names of the eleven men are immediately recalled, and another name taken from the panel to complete the number. The accused is then given all his challenges to the twelve, after which each juror or the person substituted by the challenge must be sworn *de novo*. See Whart. Crim. Pl. & Pr., note to § 508. It thus appears that in England, where the jury is always discharged, the process is precisely the same in effect that is announced in People v. Stewart, when the jury is not discharged.

The word "trial" is sometimes used in a broad sense, including all the steps taken in a case prior to final judgment, but in its restricted sense it includes the investigation of facts only. Jenks v. State, 39 Ind. 9. We think it is used in the restricted sense in the statute under construction. Our statute defines a trial to be "the judicial examination of the issues between the parties, whether they be issues of law or fact." Comp. Laws, § 5031. A jury trial would be the examination of an issue of fact. The first definition of the word "trial" in Anderson's Law Dictionary is: "The examination of the matter of fact in issue." Mr. Wharton, in his note on the English practice, already cited, after stating that the jury must be sworn *de novo*, and charged with the prisoner, adds: "The trial must then begin again." We think that generally where the word "trial" is used in connection with the jury it means the examination of the issue of fact. The sequence of the wording of the statute would indicate that it is so used. It says: "A new juror may be sworn, and the trial begin anew." The trial begins anew after the new juror is sworn. The statute uses the singular number—"juror;" neither "jurors" nor "jury." Under our practice jurors are sworn separately. Territory v. O'Hare, 1 N. D. 30. We think the statute clearly intends that when the sick juror only is discharged the condition of the remaining eleven is not affected. They stand as accepted and

sworn jurors, subject to no challenge, and but one other man is to be sworn as an additional juror to complete the panel. The condition of the jury after the discharge of the sick juror is identical with its condition when but eleven jurors had been secured. The word "trial," as used in the first part of said § 7401, is certainly used in the restricted, and not the broad, sense. It says, "If before the conclusion of a trial," etc. Turning to § 7413, we find what course is to be pursued if a juror is taken sick after the jury has retired. Certainly the "trial" mentioned in § 7401 terminates with the termination of the investigation of the facts, otherwise § 7413 would be superfluous. This indicates that the word "trial," as used in § 7401, is restricted in its significance to the investigation of the facts, commencing after the jury is sworn and ending with the charge of the court. The meaning of the word is so limited by both § 7401 and § 7413. This construction deprives the accused of no constitutional right, and involves no hardship. In securing the twelfth juror he may, as he always may, use any peremptory challenges that he has not already exhausted in procuring the eleven. If he has already exhausted all his peremptory challenges, then, in this case, as in every other, the first man called against whom no challenge for cause can be interposed must be sworn as a juror. But the accused exhausted no peremptory challenges in disposing of the sick juror. He has used all the peremptory challenges which the statute gives him in securing the jury of twelve men by whom he is tried, and he has no ground for legal complaint. We think it radically unsound to assume that the legislature intended to place the accused, so far as his peremptory challenges were concerned, in the same position when one juror was discharged as when twelve men were discharged. To prevent all possibility of prejudice to accused parties, the statute has given the trial court full discretion to discharge the entire jury, and we must presume the court will adopt that course in all cases when there could be a suspicion of prejudice to the rights of the prisoner in adopting the first course. We think the trial court committed no error in the formation of the jury.

Two other errors are assigned, both arising upon the information upon which defendant was tried, viz.: (1) That the information was verified upon "information and belief," and was not verified positively; (2) that the information omits to state in terms or in any other manner that the prosecution of the defendant is instituted either in the name or by the authority of the state of North Dakota. We think the assignment of error relating to the verification of the information is not well taken. The statute allowing an information to be filed in lieu of an indictment in criminal cases (§ 3, chapter 71, Laws 1890) declares: "The state's attorney, prosecuting witness, or some other person shall verify the information." The manner of verification is not prescribed in the statute, nor does the statute expressly provide, as is the case in the statute regulating verifications in civil cases, that an attorney may in certain cases verify a pleading to the effect that the same is true to his "best knowledge, information, and belief." But, inasmuch as the statute allows the state's attorney to verify the information in all cases, it would, in our opinion, be unreasonable to say that that officer must swear to the information positively and without qualification in all cases. We think such a construction would, in a majority of cases, necessarily prevent a verification by the state's attorney, and in not a few cases prevent a verification by any witness; in which event, of course, no information could be filed, as all informations are required by the statute to be verified. It rarely occurs that the state's attorney has such personal knowledge of the essential facts of a crime as will permit him to swear to their existence in positive and unqualified terms. In many cases the crime can only be proven as a result of the testimony of several witnesses, each giving testimony as to separate links in the chain of evidence necessary to convict. In such cases no witness would be prepared to testify to all the essential facts constituting the crime positively and without qualification. This view is sustained by the Michigan cases. Mentor v. People, 30 Mich. 91; Washburn v. People, 10 Mich. 372. See, also, State v. Montgomery, 8 Kan. 351; State v. Nulf, 15 Kan. 404. We think the verification sufficient, and hence overrule the assignment of error on that point. But we limit

the decision to the facts of this case, and do not wish to indicate in advance what we should hold in a case where it appeared that the information had been verified on information and belief as a foundation for issuing a warrant of arrest, or by a witness or person other than the state's attorney, or in a case where no preliminary examination had been held or waived.

The remaining assignment of error presents a question of great difficulty. The information was first attacked by a motion to set it aside, and, that motion being denied, defendant demurred to the information, and the demurrer was overruled. Subsequently the defendant moved the court to arrest the judgment. In all these modes of assailing the information defendant's counsel claimed, among other things, that the information is invalid, because it does not appear by the information that the prosecution of this defendant is carried on either in the name of the state of North Dakota or by its authority. The information is not entitled in an action in which the state appears as a party, nor in any action, nor does the information aver in terms or indirectly that the defendant is prosecuted either in the name or by the authority of the state. It does appear on the face of the information that it was filed by the acting state's attorney of Richland county in the district court of said county and state of North Dakota. In support of his contention defendant's counsel cites § 97, art. 4, of the state constitution, which contains the following language: "All prosecutions shall be carried on in the name and by the authority of the state of North Dakota." In support of the information the attorney general cites the case of City of Davenport v. Bird, 34 Iowa 525. This case is one where the city prosecutes under its charter for violating a city ordinance forbidding loud and unusual noises in the streets. The supreme court of Iowa, construing a section of the constitution of Iowa substantially like that above quoted, say, in effect, that such prosecution is not one which should be had in the name of the state, because the language in the constitution does not relate to such prosecutions, but has reference wholly to cases brought in the courts established by the constitution, and for offenses arising under the criminal laws of the state. For this reason the prosecution

was sustained, but the court say further: "It is fitting and appropriate that prosecutions for the violation of criminal laws of this state should be carried on in the name of the government." We think the case tends to sustain the position of defendant's counsel. See Sain v. State, 14 Tex. App. 144; note to 10 Amer. & Eng. Enc. Law, p. 708; Jefferson v. State, 24 Tex. App. 535, 7 S. W. Rep. 244; Hay v. People, 59 Ill. 94; Gould v. People, 89 Ill. 216; Calvert v. State, 8 Tex. App. 538; Donnelly v. People; 11 Ill. 552. The omission in the information could, before trial, on leave of court, have been readily supplied by amendment, (10 Amer. & Eng. Enc. Law, p. 709) but nothing appears in the record showing that leave to amend was asked by the prosecutor. We are aware that the caption or commencement of indictments and informations is merely preliminary and formal, and not a part of the accusation proper, and hence courts have gone a great length in construing such formal parts, and have uniformly held that informalities and omissions in them are curable by amendment, and comparatively of small account, inasmuch as they cannot prejudice the substantial rights of the accused upon the merits. But in the case at bar the omission to state, either directly in the information or indirectly by means of entitling it in an action, that the prosecution of the case is carried on in the name of the state and by its authority, is nothing less than a plain violation of the explicit mandate of the state constitution. It may be that the requirement is formal and arbitrary, and that to disregard it would not prejudice the defendant in his substantial rights; but we do not feel at liberty to completely ignore any provision of the organic law. On the contrary, our duty is to give effect to all of its terms. Our conclusion is that the information in this case is invalid, because it does not conform to the requirements of the state constitution. An indictment, moreover, is required, among other things, to contain the title of the action specifying "the names of the parties." § 213, Code Crim. Proc.; § 7241, Comp. Laws. Informations are to be tested, as near as may be, by the statutes regulating indictments. Chapter 71, Laws 1890.

Defendant objected to being tried before the new jury impaneled after the discharge of one of the original jurors on account of his illness, and based his objection upon the theory of a former jeopardy. But the discharge of the juror, when he became unable to perform his duties, was entirely proper, as it was occasioned by an obvious legal necessity. In such cases, the plea of former jeopardy cannot be allowed under the modern decisions. What. Crim. Pr. & Pl. (9th Ed.) § 508, and cases cited. The judgment will be reversed, and a new trial ordered. All concur.

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ACTION.

AFFIDAVIT.

AGENCY.

AGREEMENT.

ANSWER.

APPEAL.

3. On appeal from a judgment, this court will review errors of law occurring at the trial, whether a motion for a new trial was or was not made in the court below. *Edwards & McCulloch Lumber Co., v. Baker, 239.*

Appeals From Inferior Courts.

4. After an appeal upon questions of law and fact by a defendant from a judgment of a justice of the peace to the district court, where a demand for a new trial is embodied in the notice of appeal, the defendant cannot deny the jurisdiction of the district court over his person, although the justice of the peace rendering the judgment appealed from never acquired jurisdiction over his person. Whether such justice acquired such jurisdiction by litigating the cause on the merits after motion to dismiss for want of jurisdiction had been overruled, not decided. *Lyons v. Miller, 1.*

Appealable Judgments and Orders.

5. After an appeal from a judgment in favor of the plaintiff a transcript of the proceedings had at the trial, embracing the evidence as extended by the stenographer, was, by order of the district court, annexed to the judgment roll, and the same was sent up to this court as a part of the record. No proposed bill of exceptions or statement of a case was ever served, and no notice was given to plaintiff's counsel, stating the time and place when and where a bill or statement would be presented to the trial court for settlement and allowance; nor did the trial court make an order puporting to be an order settling or allowing a bill or statement. No attempt was made in the transcript to specify errors of law, or to indicate wherein the evidence is insufficient to justify the findings of fact. *Held*, that such transcript of the proceedings, embracing the evidence, is neither a bill of exceptions nor a statement of a case, and constitutes no part of the judgment roll; nor is the same an order "involving the merits," within the meaning of Comp. Laws, 1887, §§ 5103, 5237. See De Lendrecie v. Peck, 1 N. D. 422. *Wood v. Nissen, 26.*

6. Where on the return of an alternative writ of *mandamus*, defendant showed cause by answer, and issue was joined by a demurrer to the answer, after hearing counsel for the respective parties, an order was made sustaining the demurrer and dismissing the answer. Such order did not recite in terms that it was made "by the court," and it was signed "W. S. Lauder, Judge." *Held*, that the order was an order of the district court, and was not an order made "at chambers" *Travelers' Insurance Co. v. Mayer, 234.*

7. Without further proceedings, and without obtaining an order adjudging that the peremptory writ of *mandamus* should issue, such writ did issue, and was served on defendant. The issuing of the writ was excepted to, and in the exception thereto the writ was styled an "order." No appeal was taken from the order sustaining the demurrer or from the peremptory writ denominated an "order," but, after the time for appeal had expired, a motion was made to vacate such writ, and an order of the district court was made refusing to vacate the same; and defendant has attempted to appeal from the last mentioned order to this court, under subdivision 5, § 24, c. 120, Laws 1891. *Held*, that the appeal will not lie. Under § 4828, Comp. Laws, the district court is "always open" except for the trial of issues of fact in actions; and hence an appeal will lie from an appealable order of the court whether the same is made out of term or in term. Whether the district court acts upon a given matter cannot be determined by the form of the order or the style of the judge's signature thereto. Travelers' Insurance Co. v. Weber, 2 N. D. 239, followed. *Id.*

8. An order, made by a judge of the district court to show cause why an appeal from a justice's court should not be dismissed, cited the appellant to "show cause before the court at chambers," etc. An order was made dismissing the appeal, which recited that it was made after hearing both sides on the return of the order to show cause. The order of dismissal was not made at a general or special term of the district court, nor did it recite in terms that it was made "by the court." Only the following words were appended to the judge's signature to the order: "Judge District Court, Richland County, N. D." *Held*, that it appears from the record that the order of dismissal was an order of the district court, and was not a mere "chambers order." *Travelers' Insurance Co. v. Weber*, 239.

9. *Held, further*, that, inasmuch as the statute (§ 4828, Comp. Laws) declares that district courts are "always open" except for the trial of issues of fact in actions, it follows that a judge of the district court cannot, at his option, and by the form of an order, or the style of his signature thereto, determine whether a given matter is or is not a court matter. *Id.*

10. No appeal to this court was taken from the order dismissing the appeal, but after the time allowed for appeal had expired a motion was made before the district court to vacate the order of dismissal. The motion was denied, and defendant has attempted to appeal from the order refusing to vacate the first order. *Held*, that the order refusing to vacate the order dismissing the appeal is not appealable. This court will not take jurisdiction of an order of the district court refusing to vacate an appealable order made by the district court; nor can the time for appeal to this court be extended by an order of the court below vacating or refusing to vacate an appealable order. Whether an order dismissing an appeal from a justice court to a district court is appealable, is not decided. *Id.*

11. Where judgment is irregularly entered, good practice requires that it should be first assailed by motion in the district court. The order made on such motion is appealable, under subdivision 2, § 5236, Comp. Laws. But where a judgment is absolutely void or illegal on its face, it will be reversed by direct appeal from the judgment; but even in such cases the better rule is to begin by motion. *Gaar, Scott & Co. v. Spaulding*, 414.

12. An order punishing a person for contempt in disobeying an injunction, where the contempt proceeding is not and cannot be used as a remedy to enforce obedience to the injunction or to indemnify the party injured by the contempt, is not an order made in an action or special proceeding, and is therefore not appealable. Such a contempt proceeding is not remedial in its character, but purely of a criminal nature, its object being exclusively to vindicate the authority of the court. *State ex rel. Edwards v. Davis*, 461.

Objections Not Made Below.

13. The referee made his report embracing findings, whereupon the plaintiff moved for judgment thereon. Defendant opposed the application, but did not raise the point that an order confirming the report had not been previously made. The trial court on such application did not direct the entry of judgment, but resubmitted the case to the referee and, after taking additional evidence, the referee made his final report embracing his findings. Plaintiff applied for judgment based upon the final report. Defendant's counsel did not appear, but duly waived notice of such final application for judgment, and at no time in the court

ASSESSMENT.

See *Taxation*.

ATTORNEY'S FEE.

In foreclosure of mortgages, see *Mortgages*, 1.

ATTORNEY AND CLIENT.

ATTORNEY GENERAL.

Duty of in mandamus, see *Mandamus*, 5.

BILL OF EXCEPTIONS.

See *Appeal*, 1.
See Practice in *Civil Cases*.
What constitutes, see *Appeal*, 5.

Extension of Time for Settling.

1. Section 5093, Comp. Laws N. D. construed. *Held*, that the authority conferred by said section to extend time and settle bills of exception and statements after the statutory periods for so doing have expired is not an absolute, non-reviewable discretion, but, on the contrary, such discretion is a sound judicial discretion, and can be exercised only upon the conditions named in the statute—*i. e.*, "upon good cause shown in furtherance of justice." Where the cause shown is spread out in full upon the record in the court below, and an objection to the action of the court below in settling the bill or statement is properly made, this court, upon a motion to purge its records, will review the cause shown; and if, in the opinion of this court, good cause was not shown for settling the bill or statement after time, such motion will be granted, and the bill or statement will be stricken out. *Moe v. Northern Pacific Railroad Co.*, *282*.

2. The bill in this case was not settled, nor sought to be settled, for a period of nearly four years after the verdict for defendant was returned. The only excuse offered to the district court for plaintiff's laches and default in the premises, and as a cause for extending the time after the lapse of so long an interval after the statutory periods had expired, is found in language embodied in the plaintiff's affidavit showing cause as follows: "Such error was occasioned by deponent's misconstruction of the law in relation to bills of exception upon appeal to the supreme court." This is not "good cause shown," within the meaning of § 5093. *Ignorantia legis non excusat. Id.*

3. An order made after statutory time has expired, settling a statement or bill, operates to extend the time for such settlement to the date thereof. *Edwards & McCulloch Lumber Co. v. Baker*, *289*.

BOARD OF EQUALIZATION.

See *Taxation*.

BUILDING AND LOAN ASSOCIATIONS.

May be exempted from provisions of usury law. See *Constitutional Law*, *13*.

CERTIFICATE OF SALE.

Filing same in foreclosure proceedings, see *Mortgages*, 2.

CERTIORARI.

Conflicting Returns:

1. In *certiorari* proceedings, the duly authenticated transcript of the record and proceedings kept by the inferior tribunal, and returned to the superior court in obedience to the writ, imports verity, and cannot be contradicted by the parol return of the officer who made the record; and this prohibition extends to all necessary presumptions arising from the record. *In re Dance*, *184*.

Directing Writ to Ex-official.

2. The writ of *certiorari* authorized by our statute cannot be directed to an ex-official after he has parted with the record sought to be reviewed. *In re Dance, 184.*

CHATTEL MORTGAGES.

Delivery.

1. Where the undisputed evidence shows that a creditor requested security from his debtor, and the debtor promised, by letter, to give security, but mentioned no property upon which such security would be given, and subsequently a chattel mortgage from the debtor to the creditor was filed in the proper office, and the creditor at once notified by the debtor of such filing, and the creditor accepted such security, and procured a certified copy of the mortgage, *held*, as between the mortgagee and an execution creditor of the mortgagor whose lien on the property did not attach until months after the mortgage was filed, that there was no question as to delivery and acceptance of the mortgage to be submitted to the jury. *Keith v. Haggart, 18.*

Execution.

2. In an action between the mortgagee and the representative of a creditor of the mortgagor whose debt existed prior to the execution of the mortgage, where it was claimed that the mortgage was void under the statute as against the creditor, because not properly witnessed, and therefore not entitled to record, where the only evidence that the mortgage was witnessed by the parties whose names appeared thereon as witnesses came from a witness against whom the other party introduced impeaching testimony, and where the evidence also tended to show that one of the parties whose names appeared as witnesses left the territory of Dakota two days before the mortgage was executed, and did not afterwards return, *held*, that the court erred in refusing to submit to the jury the question of the proper execution of the mortgage. *Keith v. Haggart, 18.*

On Crops to be Sown.

3. A chattel mortgage, which covers all crops to be grown on certain specified land "during the years A. D. 1888, 1889, and for each and every succeeding year until the debt hereby secured is fully paid," is not void as to the crop raised by the mortgagor on said land in the year 1890, by reason of any uncertainty as to the time when the crops covered by said mortgage are to be grown. *Merchants' National Bank v. Mann, 456.*

Sale and Removal of Mortgaged Property.

4. Plaintiffs were the owners of a chattel mortgage, properly filed. Among other provisions contained in the mortgage were the following: "And it is hereby agreed that if default be made in the payment of the said debt, or any part thereof, or if any attempt be made to remove or dispose of said property, or if at any time said mortgagees shall deem the said debt unsafe or insecure, or whenever they shall choose to so do, they are hereby authorized, either by themselves or agent, to enter upon the premises where the said property may be, and remove and sell the same," etc. While the mortgage was in full force and unsatisfied defendant unlawfully took possession of the property covered by the mortgage, and converted the same to its own use. *Held*, that under the

power to "remove and sell" the property the owner of the mortgage was authorized to take possession upon condition broken and that, having the right to take possession, they were also in a position to maintain an action against the defendant for the value of the mortgaged property, which defendant had unlawfully taken and converted. *Sandager v. Northern Pacific Elevator Co.*, 3.

5. The plaintiff held a chattel mortgage given by K. upon wheat, and the mortgage was filed in the proper office. After the filing, and while the debt secured by the mortgage was due and unpaid, K. sold and delivered the wheat to the defendant, the elevator company, and the company received the wheat into one of the warehouses located in the county where the wheat was sold and where the mortgage was filed. A warehouse receipt for the wheat was made out in the name of K., and by his direction it was delivered to Bell, the defendant, who claimed the wheat. Defendant cashed the warehouse receipt, and took it from Bell. There was no evidence that the elevator company mixed the wheat with other grain, or sold it, or any part of it. Plaintiff sues for the value of the wheat, and alleges that the defendant had refused to deliver the wheat upon his demand therefor, and had unlawfully converted the wheat. At the trial no demand was shown, and the only evidence of conversion was the sale, delivery, and payment, as above stated. At the close of the testimony the elevator company requested the trial court to direct a verdict in its favor, upon the ground of failure of proof of demand and refusal before suit, and failure of proof of conversion by the elevator company. The motion was denied and an exception was saved. *Held*, error. *Sanford v. Duluth and Dakota Elevator Co.*, 6.

6. The case was given to the jury, but, on the request of the elevator company so to do, the trial court refused to charge the jury respecting the law governing the conversion of property. The court stated as a reason for its refusal that the undisputed testimony showed a conversion of the wheat. Defendant excepted. *Held*, that the refusal was error. *Id.*

7. Under the provisions of the Civil Code of North Dakota, (Comp. Laws, §§ 4330, 4338, 4346, 4348, 4356 and 4358), the title to chattels does not pass from a mortgagor upon the execution and delivery of the mortgage, or upon a breach of its conditions; nor does the title pass until a foreclosure has been completed. After default, as well as before, the mortgagor of chattels is the legal and equitable owner thereof, and as such has a vendible interest in the chattels. A purchaser of such chattels, who merely buys, pays for, and takes possession, and does no act which is inimical to the rights of the mortgage holder, is not necessarily a wrongdoer. Such purchaser does not convert the property. *Id.*

8. An action for the value cannot be maintained in such a case by the mortgagee against the purchaser without a demand and refusal to deliver before suit; no affirmative title being alleged by the purchaser. *Id.*

9. Section 6933, Comp. Laws construed, *held*, that a purchaser who has no notice or knowledge that the mortgage is unpaid, or that the mortgagee has not consented to the sale, may assume that, in selling, the mortgagor is not committing a felony. Under such circumstances the title will pass to the purchaser, even if the act was a crime as to the seller. *Id.*

CLAIM AND DELIVERY.

Damages in.

1. The fact that a defendant in an action of claim and delivery gives a delivery bond does not render the proceeding analogous to an action for conversion, and if plaintiff recover an alternative judgment, he is not limited in his damages for the detention to interest on the value, but may recover the value of the use of his property that has been wrongfully detained from his possession, where such property has an active capacity for earning money. *Northrup v. Cross*, 433.

2. Where personal property is wrongfully taken by an officer, and sold at judicial sale, and the owner purchases the property at such sale, and receives possession thereof, he is not entitled, in an action of claim and delivery against the officer, to judgment for the value of the property, but, in lieu thereof, he is entitled to judgment for the sum that it cost him to regain possession, with interest on such sum from the date of its payment. *Id.*

CLERK OF DISTRICT COURT.

Duty of, to annex decision to judgment roll, see *Appeal*, 14.

COLLATERAL OFFENSE.

Proof of, when charged with specific offense, see *Criminal Law* 3.

CONCLUSIONS OF LAW.

In referred case, see *Reference*, 2.

CONSTITUTIONAL LAW.

See *Usury*.

General Law—What Constitutes.

1. A public law of universal interest to the people of the state, and embracing all the citizens of the state, or all of a certain class or certain classes of citizens, and not limited to any particular locality, is a general, and not a special, law, as the term is used in the constitutional inhibition against special legislation. *Vermont Loan and Trust Co. v. Whithed*, 82.

2. A statute that grants no privileges or immunities, except such as would apply to all citizens under the circumstances and conditions expressed in the statute, does not violate the constitutional provision against granting special privileges and immunities. *Id.*

3. The constitutional requirement that all laws of a general nature shall have a uniform operation is satisfied if the benefits and burdens of such law fall equally upon all members of the class or classes upon which it does operate. *Id.*

Special Legislation.

4. Chapter 56 of the Laws of 1890, regulating the relocation of county seats, is unconstitutional, as being repugnant to § 69 of article 2 of the state constitution, prohibiting special legislation, locating or changing county seats, because it arbitrarily classifies

CONTRACTS.

CONVERSION.

COUNTIES.

Classification of, see *Constitutional Law*, 4.

Failure of County Board to Furnish Office Room.

A public official cannot, on refusal of the board of county commissioners to provide office room for him, rent an office and bind the county for the rent; nor is the county liable to him for the rent he pays. His remedy is to compel by *mandamus* the board to furnish him with an office. *Cleary v. Eddy County*, 397.

COUNTY SEATS.

Re-location of, see *Constitutional Law*, 4.

CRIMINAL LAW.

When felony not committed, see *Chattel Mortgages*, 9.

Variance Between Allegations and Proof.

1. Where an information charges the defendant with the crime of an assault with a dangerous weapon, to-wit, a pistol, with intent to commit a felony, and describes the assault as committed by then and there shooting a loaded pistol at and against the party assaulted, with intent to rob him, and the evidence shows that the assault was committed by thrusting the pistol in the face of the party assaulted, and demanding his money, and that the pistol was not discharged until after the assailant had started to make his escape, there is a fatal variance between the allegations and the proof. *State v. Fallon*, 510.

Presumption by Jury.

2. In such a case the jury may not, in the absence of any evidence to support it, indulge the presumption that at the instant the pistol was fired the defendant conceived the intent to return, and persist in the attempt to commit robbery. *Id.*

Proof of Collateral Offense.

3. When a prisoner is on trial charged with a specific offense, it is not error to admit proof of a collateral offense committed by the prisoner, when such collateral offense is connected with the specific offense in such manner that proof of the commission of the collateral offense has a legal and logical tendency to establish some fact necessary to be established in proving the specific offense. *Id.*

Information Charging Two Offenses.

4. An information charging both burglary and grand larceny at the same time, in the pursuit of a single criminal enterprise, charges two offenses, and it therefore cannot be sustained when attacked by demurrer, for the reason that § 7244, Comp. Laws, declares that only one offense must be charged in an indictment. *State v. Smith*, 515.

Discharge of Juror During Trial.

5. In this state, when, during the trial of a criminal case, and before the case has been finally submitted to the jury, a juror becomes sick and unable to sit further in the case, the court may

order such juror discharged, and a new juror sworn to complete the panel, and that the trial begin anew; or the court may discharge the entire jury, and then or subsequently empanel another jury to try the case. *State v. Hazledahl, 521.*

Defendant's Right of Challenge.

6. When the first course is pursued, the prisoner is not thereby entitled to again exercise all the peremptory challenges given him by statute, or to peremptorily challenge any one of the eleven remaining jurors; and in procuring the new juror the prisoner may exercise only such of his peremptory challenges as he has not already exhausted in procuring the other eleven jurors. *Id.*

Verification of Information.

7. The information was filed by the state's attorney under chapter 71, Laws 1890, and verified by the state's attorney, as follows: "That the allegations therein contained are true to his best knowledge, information and belief." *Held*, that the information was sufficiently verified. Whether such verification is sufficient when made as a foundation for a warrant of arrest, or when made by a person other than the state's attorney, not decided. *Id.*

Information—Requisites in.

8. Where the information was not entitled in an action, and it nowhere appears by the information that the defendant was prosecuted in the name or by the authority of the state of North Dakota, proper and timely objection to the information being made, *held*, that the information was invalid, for the reason that it did not conform to the requirements of § 97, article 4, of the state constitution, which contains the following language: "All prosecutions shall be carried on in the name and by the authority of the state of North Dakota." *Id.*

DAMAGES.

In claim and delivery, see *Claim and Delivery, 1.*
For breach of contract, see *Contracts.*
For withholding property, see *Ejectment.*
Caused by stock, see *Railroad Companies, 1.*

Evidence.

1. In an action for personal injuries, exclamations and expressions of present pain may be proved by any one who hears them, although made subsequently to the injury. *Bennett v. Northern Pacific Railroad Co., 112.*

2. In an action for damages upon the ground of a neglect of duty on the part of the defendant, it must appear that the neglect of duty was not only the cause, but the proximate cause, of the injury; but, to enable a defendant to shield himself behind an intervening cause, such intervening cause must be one that severs the connection of cause and effect between the negligent act and the injury. *Boss v. Northern Pacific Railroad Co., 128.*

DECISION OF COURT.

What constitutes, see *Appeal*, 14.
Must be filed before entry of judgment, see *Appeal*, 15.

DEED.

Reservations in.

1. Where the Northern Pacific Railroad Company conveyed a portion of the land granted to it by Congress to a private person, "reserving and excepting therefrom, however, a strip extending through the same * * * of the width of 400 feet—that is, 200 feet on each side of the center line of the Northern Pacific Railroad, or any of its branches—to be used for right of way, * * * in case the line of said railroad or any of its branches, has been or shall be located on or over * * * said described premises," *held*, that such reservation covered one such strip only, and that the railroad company could not claim a right of way, both for its main line and a branch line, over the tract so conveyed under such reservation. *Dunstan v. Northern Pacific Railroad Co.*, *46*.

2. *Held, further*, that where a separate corporation entered upon and located and constructed a line of railroad across said tract, and subsequently leased the same to the Northern Pacific Railroad Company, which latter company operated the same as a branch of its main line, that, whatever interest in or right to the right of way of such road the latter company had, it obtained and held under its lease, and not under the reservation. *Id.*

DISTRICT COURT.

Always open, see *Appeal*, 7, 9.

EJECTMENT.

Damages.

In an action of ejectment, and to recover damages for withholding the property, where it appears that plaintiff has conveyed the land pending the litigation, he is still, under § 5454 of the Compiled Laws, entitled to judgment for whatever damages the evidence may establish.

EQUALIZATION.

See *Taxation*.

EQUITY.

Jurisdiction in certain actions, how obtained, see *Husband* and *Wife*.

EVIDENCE.

See *Negotiable Instruments*, 1.
Of delivery and execution of mortgage, see *Chattle Mortgage*, 1, 2.
Admission of as to foreign law, see *Statutes*, 2.
In actions for goods sold, see *Sale*, 1.
In personal injury cases, see *Master and Servant*, 3.
Used in granting new trial, see *New Trial*, 3, 4, 5, 7.

How Considered when Verdict is Directed by Court.

1. When the court directs a verdict for either party the evidence of the opposite party must be considered as undisputed and it must be given the most favorable construction for him that

EX PARTE ORDER.

FINDINGS OF FACT.

FORECLOSURE.

FOREIGN LAWS.

HOMESTEAD.

Right of Widow in.

When a party dies seized in fee of land occupied and used by himself and family as a homestead at the time of his death, his surviving widow is entitled, as against his heirs or devisees, to occupy and possess the whole of such homestead as long as she preserves its homestead character by maintaining her home thereon, and the fact of her second marriage does not impair this right. *Fore v. Fore*, *260*.

HUSBAND AND WIFE.

Compelling Husband to Support Wife—Jurisdiction in Actions, How Obtained.

The district court can obtain jurisdiction of the proceedings authorized by chapter 167 of the Laws of 1890 to compel a husband to support his wife only by service of a summons, as in other cases in equity. *Bauer v. Bauer*, *108*.

INFORMATION.

INJUNCTION.

INSTRUCTIONS TO JURY.

INSURANCE.

The Contract.

1. Mortgage clause in insurance policy construed, and *held* to embody the promise of the mortgagee to pay insurance premium in case of the failure of the mortgagor to pay it. *St. Paul Fire & Marine Insurance Co. v. Upton*, 229.

Discretion of Commissioner of Insurance.

2. The insurance commissioner of this state, in granting or revoking a certificate authorizing insurance companies to transact business within the state acts within the limits of a discretion expressly conferred upon him by statute. Such official discretion, when once it has been exercised, cannot be controlled or reviewed by *mandamus*. *State v. Carey*, 36.

INTOXICATING LIQUORS.

See *Statutes*, 1.

JUDGMENT.

See *Appeal*, 1, 2, 3, 11.
See *Claim* and *Delivery*, 2.
Void, will be reversed by direct appeal, see *Appeal*, 11.
When entered without first filing decision of trial court, void; see *Appeal*, 15, 16.
On report of referee, see *Reference*, 1.
How entered by justice, see *Justice of the Peace*.

JURISDICTION.

Want of, see *Appeal*, 4.
Of district court, see *Husband* and *Wife*.

JURY.

May not indulge in presumption, see *Criminal Law*, 2.
Court may discharge, see *Criminal Law*, 5.
Right of challenge by defendant in criminal action, see *Criminal Law*, 6.

JUSTICE OF THE PEACE.

Appeal from, see *Appeal*, 4, 10.

Duties of Justice.

Under our statutes justices of the peace are required to perform all their judicial acts within the township and county for which they were elected. They are also required, where a case in justice court is tried by a jury, to enter judgment at once upon the verdict; and any judgment entered in disregard of either of these provisions may be avoided in any proper proceeding for that purpose. *In re Dance*, 184.

LETTER OF CREDIT.

See *Agreement*, 1.

LIEN.

Changing priority of, see *Constitutional Law*, 15.

On Crops.

1. In an action to foreclose the seed lien given by our statute it is not necessary to allege in the complaint that the seed was sold to be sown on any particular tract of land. It is enough on this point if the complaint shows that the seed was sown on land "owned, used, occupied or rented" by the purchaser. *Joslyn v. McMahon*, 53.

2. A party does not waive his right to a statutory lien by taking other security for the debt, unless the security taken or credit extended is such as to evidence an intent to waive the lien and rely exclusively on the security given. *Id.*

For Seed Grain—Enforcement as a Tax.

3. The obligation of the person supplied with seed grain under these statutes (Chap. 43, Laws 1889, and Chap. 152, Laws 1890) to pay the county therefor is not a tax, and cannot be made a tax by the legislature. It is a mere debt. *Yeatman v. Foster County*, 421.

MANDAMUS.

Return to alternative writ, see *Appeal*, 6.
Remedy to compel furnishing of office, see *Counties*.
To control action of Insurance Commissioner, see *Insurance*, 2.

Proceeding in—Defined.

1. Under the territorial statutes now in force in this state, the remedy by *mandamus* is in some respects assimilated to a civil action, but is not in strictness a civil action, and is a special proceeding. Comp. Laws 1887, §§ 5505, 5536. *State v. Carey*, 36.

Proceeding in—How Entitled.

2. The party prosecuting the writ may be known as the plaintiff, and the adverse party as the defendant; but where the writ is sought to enforce a duty due the state as such, or sought with respect to a right of common concern to a large number of persons, but not a right where the state as such is concerned, or sought to enforce a right peculiar to the relator, the proceeding should be had in the name of the State *ex rel.* the——. *State v. Carey*, 36.

Affidavit in.

3. Where the writ is sought for the benefit of the relator alone, the fact of his special and peculiar right to the writ must be made to appear by the affidavit. *State v. Carey*, 36.

Who May Apply for Writ.

4. Where the subject-matter does not concern the state as such, but is of common concern to a large number of persons—for example, to all citizens of a county, town, city or district—any citizen

MASTER AND SERVANT.

Assumption of Risk.

Contributory Negligence.

MECHANICS' LIENS.

Priority.

MERGER.

MORTGAGE.

Foreclosure of Attorney's Fee.

———, Filing Duplicate Certificate.

———, Mistake in Middle Initial.

———, Rights of Purchaser.

Rights of Holder of Certificate of Sale.

NAME.

NEGLIGENCE.

Right of Action.

1. Where the negligent act of one responsible party concurs with the negligent act of another responsible party in producing an indivisible injury to a blameless third party, such third party has his right of action against either of the negligent parties. *Boss v. Northern Pacific Railroad Co.*, *128*.

Proximate Cause.

2. Where one party has been negligent, and a second party, knowing of such antecedent negligence, fails to use ordinary care to prevent an injury, which the antecedent negligence rendered possible, and the injury follows by reason of such failure, the negligence of the second party is the sole proximate cause of such injury. *Bostwick v. Minneapolis & Pacific Railroad Co.*, *440*.

NEGOTIABLE INSTRUMENTS.

Actions on—Defense.

1. Defendant's answer stated in substance that, while the defendant personally made and delivered the note and received the money therefor from plaintiff, the money so received was to be used for the benefit of one P., whose agent the defendant was; that the plaintiff was informed when the note was made that the money was to be used in defraying the expense of operating a ranch belonging to P., and that P. himself assented to the giving of the note. *Held*, that the answer failed to state any defense. The answer does not state that P. at any time orally agreed to pay the note, but, if such agreement had been made, it would be inadmissable in evidence to vary and contradict the express terms of the written agreement. *National German-American Bank v. Lang*, *66*.

2. *Held*, *further*, where an agent contracts in behalf of his principal he must do so in the name of the principal. If the agent contracts in his own name, he alone is bound. *Id.*

What Constitutes Promissory Note.

3. The defendant for value made and delivered to plaintiff an obligation in the following form: "$1,200. 11th March, 1889. Ninety days after date I promise to pay to the National German-American Bank, St. Paul, at the bank, St. Paul, the sum of twelve hundred dollars, value received. On acct of the ranch. GREGOR LANG." At the trial plaintiff put this paper in evidence, together with evidence showing the amount of interest which had accrued after the paper matured, figured at 7 per cent., and rested the case. Upon defendant's motion the district court nonsuited the plaintiff, and directed a verdict for the defendant. *Held* error. The instrument contains all the essentials of a promissory note; and, while the phrase, viz., "on account

NEW TRIAL.

Granted on Court's Own Motion.

Newly Discovered Evidence—Affidavit.

Grounds.

NOTICE.

OFFICER.

ORDER.

OWNERSHIP.

PARTNERSHIP.

Evidence of.

1. The fact that a party was a member of a co-partnership cannot be proven by the unauthorized statements and representations of one who was a member of the firm. *Carson v. Gillitt, 255.*

2. Nor can the fact that a party was not a member of a co-partnership be proven by his own prior statements to that effect, even where such statements were made to an agent of the party seeking to hold him as such partner. *Id.*

Dissolution and Accounting.

3. Where co-partners, who have had differences arising out of their joint business, voluntarily and at arms length enter into a written contract dissolving their partnership relations, and by its terms make full and detailed arrangements for a separation and a division of their joint property, and provide fully for the payment of the firm debts, *held* that, in the absence of allegation and proof to the contrary, all of such differences will be presumed to have been merged and adjusted by the contract of dissolution. *Little v. Little, 175.*

4. *Held further*, that in the absence of proper allegations and proof that such contract was obtained by duress or fraud, or was entered into under a mistake of fact, such contract will not be set aside on the sole ground that one of the parties did not read the same or know the contents before it was signed. *Id.*

PAYMENT.

Application.

1. It is not necessary that a debtor should direct application of payment at the precise time the money is paid. A direction some

PLEADING.

POSSESSION.

PRACTICE IN CIVIL CASES.

PRIORITY.

PRINCIPAL AND AGENT.

PRINCIPAL AND SURETY.

Revocation of Agency.

In an action for the price of certain wheat belonging to plaintiff, which was hauled to defendant's elevator by plaintiff's employes, it appeared that defendant paid such employes for the wheat, and there was evidence tending to show that they were authorized by plaintiff to receive payment. It also appeared that L., who had charge of plaintiff's farm, had no power to revoke such authority. The court instructed the jury that if they should find that these employes were authorized by plaintiff to sell the wheat to defendant, and that L was put in as foreman or head agent of plaintiff, and notified defendant not to pay them, and it afterwards paid them, defendant had no right to pay them. *Held*, that the instruction was erroneous, and ground for reversing a judgment for plaintiff, as the jury may have based their verdict on a belief that, though the employes were authorized to receive the money, the notice from L. revoked such authority. *Linton v. Minneapolis & Northern Elevator Company*, 232.

PUBLIC OFFICERS.

RAILROAD COMPANIES.

Stock Killing—Common Law Rule Declared.

1. In this state the common law rule relative to domestic animals is in force, and every man is bound, at his peril, to keep his stock upon his own premises, and is liable for all damages that his stock may do on the premises of another, whether fenced or unfenced. *Bostwick v. Minneapolis & Pacific Railroad Co.*, 440.

2. But the fact that plaintiff's horse was a trespasser upon the railroad track of defendant, without any actual fault of plaintiff, did not relieve defendant, after the presence and peril of the horse were known to it, from the obligation to exercise ordinary care in the management of its trains to prevent an injury to the horse. *Id.*

RAILROAD RIGHT-OF-WAY.

RECEIVERS.

Appointment, ex parte.

1. In an action in equity to quiet title to real estate, and enjoin the defendant, who resided upon and cultivated the land as a farm, pending the action and permanently, from tilling the land in question, the complaint was verified only on information and belief, and by one of plaintiff's attorneys. A verified answer was served, denying the facts and equities set out in the complaint. After the service of the answer, and before a trial was had, the plaintiffs, without notice to defendant or his counsel, applied to the district court for an order appointing a receiver of the crops planted by the defendant and growing upon the land. An *ex parte* order was made appointing such receiver. The application was based upon an affidavit setting out, among other things, defendant's insolvency, and that the crops were "liable to be mortgaged," but no attempt was made to support the original equities set out in the complaint. *Held*, that such appointment was error. *Grandin v. La Bar*, *206*.

2. Where, in such cases, plaintiffs' original equities are denied by answer, and are without support from evidence extrinsic to the complaint, a receiver should not be appointed, even after notice and a hearing; much less should the defendant be dispossessed summarily by *ex parte* proceedings. *Id.*

3. The practice of appointing receivers *ex parte* is not tolerated by the courts except in cases of the gravest emergency, and to prevent irreparable injury. *Id.*

REFEREE.

Confirming report, see *Appeal*, 13.

Objections to Evidence.

1. Defendant, having objected to referee making any rulings whatever, and having failed to take any exception to the action of the referee in receiving evidence over his objection, cannot raise the question whether such evidence should have been received, the objection not having been renewed before the court on application for judgment on the report, and no exceptions having been taken on such application. *Illstad v. Anderson*, *167*.

Scope of Submission.

2. An order of reference referring "the action" to a referee, "with the usual powers," based upon the consent of the defendant in open court that the case be referred to take the testimony and report, warrants the referee in making and reporting findings of fact and conclusions of law. *Illstad v. Anderson*, *167*.

RENT.

Of land after foreclosure, see *Mortgages*, *4*.

RESCISSION.

See *Contracts*.

RIGHT OF ACTION.

By third party, see *Negligence*, 1.

SALE.

Action for Price—Evidence—Pleading.

1. Where, upon trial, the plaintiff proved that it had delivered to defendant an invoice of lumber, to recover the balance of the purchase price of which the action was brought, *held* proper for defendant to prove that he never consciously accepted the paper as containing the contract between the parties, and that he never examined it or knew its contents, there being evidence to show that the price was agreed upon before the delivery of the paper, and that defendant had no reason to believe that the paper embodied any contract or part of a contract. Therefore *held* error to refuse to submit to the jury the question whether the price agreed upon was different from that which appeared upon the face of the invoice. *Held, further*, that defendant was not, as a matter of law, bound by the price stated in the invoice, on reading the same after receipt by him of the lumber; nor was he concluded from showing that an account received and retained by him without objection, in which the price was set down according to the invoice, was erroneous because it incorrectly stated the contract price of the lumber. The action not being upon the account stated, but merely to recover the balance of the alleged purchase price of the lumber, *held*, that defendant could show this error without specially pleading it. *Edwards & McCulloch Lumber Co., v. Baker, 289.*

Change of Possession.

2. On the sale of a stallion in the possession of a bailee, the vendor, in the presence of the vendee, notified the bailee of such sale; but the vendor, with the consent of the vendee, continued after the sale to use the horse the same as before the sale, until the animal was seized under attachment by creditors of the vendor. *Held*, that there was not a sufficient, actual and continued change of possession to take the case out of the provisions of § 4657 of the Compiled Laws, and the sale was therefore void, under the evidence adduced, as to the creditors of the vendor who had attached the horse. *Comad v. Smith, 408.*

SERVICE OF PROCESS.

Return may be amended, see *Writs*, 1.

SET-OFF AND COUNTER CLAIM.

When Allowed.

A surety jointly bound with his principal may, independently of statute, offset against such joint indebtedness his individual claim against the creditor in such joint indebtedness, where both the creditor and the principal are insolvent. *Clark v. Sullivan, 105.*

STATUTES.

Title and Object of Act.

1. Chapter 110 of the Laws of 1890, entitled "An act to prescribe the penalties for the unlawful manufacture, sale, and keeping for sale of intoxicating liquors and to regulate the sale, barter, and giving away of such liquors for medicinal, scientific and mechanical purposes," is not in conflict with § 61 of Article 2 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 provison shall be invalidated thereby only as to so much thereof as shall not be so expressed." *State v. Haas, 202.*

Pleading.

2. Where a litigant desires to take advantage of the laws of another state it is incumbent upon him to show by proper averments what such laws are, and wherein they differ from those of this state. If he fails to do so it is error to admit testimony at the trial as to what the foreign law is. In the absence of allegation and proof to the contrary, the courts will presume that the foreign law is the same as that of the forum. *National German-American Bank v. Lang, 96.*

STATUTES CITED AND CONSTRUED.

Political Code.

Civil Code.

Code Civil Procedure.

Probate Code.

Justices' Code.

Penal Code.

Code Criminal Procedure.

Session Laws.

State Constitution.

STENOGRAPHERS' TRANSCRIPT.

See *Appeal*, 5.

STOCK KILLING.

See *Railroad Companies*.

SUMMONS.

Service of, see *Husband* and *Wife*.

TAXATION.

See *Lien*, 2, 3.

Power of legislature, see *Constitutional Law*, 10, 11.

Assessment and Levy.

1. The plaintiff's lands were sold for the alleged taxes of 1886 to defendant, and subsequently defendant received a tax deed in due form therefor, and recorded his deed. Defendant voluntarily paid the alleged taxes on the land for the years 1887 and 1888. Such lands did not appear on the assessment roll or tax list of the county where they were located in either of said years, otherwise than as follows:

Description.	Section.	Township.	Range.
W. 2 of W. 2	7	143	57
E. 2 of E. 2	13	143	58
W. 2 of S. E.	15	138	58
N. 2 of N. W.	3	139	58

Findings by Court.

2. A judgment will not be reversed by reason of the failure of the trial court to make a finding upon a particular point in a case where the result could not have been different if the court had found the fact exactly as alleged by such party. *Joslyn v. McMahon*, 53.

USURY.

Exemption from provisions of general statute, see *Constitutional Law*, 13.

What Constitutes—Usurious Contract—Compensation for Procuring Loan—General Act—Constitutional Law—Uniform Operation—Building and Loan Associations.

Section 4 chapter 184, laws 1890, provides that in all loan transactions the written contract shall correctly state the amount received by the borrower, and the rate of interest to be paid, and a failure so to do renders the contract usurious and void, except as otherwise in the chapter provided. Section 7 provides that a loan broker or other person may receive a compensation for procuring a loan when such compensation, and the interest stated in the contract, together do not exceed 12 per cent. per annum in the aggregate. In a transaction where no middleman was employed, a note was given for $575, due in five years, with 7 per cent interest. The borrower received $500, and no more, $75 being by agreement retained for making the loan; and the amount so retained, added to the 7 per cent., stated in the note, did not exceed 12 per cent. on $500 for five years. *Held*, that if the transaction was usurious, under § 4, it was not saved by the provisions of § 7. *Vermont Loan & Trust Company v. Whithed*, 82.

VERDICT.

Evidence in, when directed by court, see *Evidence*, 1.
Directed by court, see *Negotiable Instruments*, 3.

VERIFICATION.

Of information, see *Criminal Law*, 7.

WAIVER.

Of jurisdiction by appeal, see *Appeal*, 4.
Of findings of fact, see *Appeal*, 14, *et seq.*
Of instructions to jury in writing, see *Trial*, 1.
Of right to a statutory lien, see *Lien*, 2.
Of motion to dismiss, see Practice in *Civil Cases*.

WAREHOUSE CHARGES.

WIDOW.

WRITS.

Amendment—Service of Process—Amendment of Return.

1. After judgment entered in a case where there was no appearance by defendants, the trial court may, in furtherance of justice, and in affirmance of such judgment, permit the sheriff, on his application, and upon notice to the defendants, to amend his return of service of summons in accordance with the truth, and thus bring upon the record jurisdictional facts. ***Mills v Howland***, *30*.

2. Such amended return, when filed, relates back to the original return, and has the same effect as if the amended return had been originally made. *Id.*