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REPORTS OF CASES

DECIDED IN THE

SUPREME COURT

OF THE

STATE OF NORTH DAKOTA

FEBRUARY 1908, TO NOVEMBER, 1908

F. W. AMES
REPORTER

VOLUME 17

BISMARCK, N. D.
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OFFICERS OF THE COURT DURING THE PERIOD OF THESE REPORTS.

HON. D. E. MORGAN, Chief Justice.

HON. CHARLES J. FISK, Judge.[1]

HON. BURLEIGH F. SPALDING, Judge.

F. W. AMES, Reporter.

R. D. HOSKINS, Clerk.

[1] Elected to fill vacancy caused by resignation of Judge Young and qualified January 10, 1907.

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CONSTITUTION OF NORTH DAKOTA

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

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

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH DAKOTA

E. RUTH GRAY v. FRED E. HARVEY, LILLIAN HARVEY, O. W. KERR COMPANY (APPELLANT), OSCAR W. KERR, JOHN F. CASSELS, ELLA M. CASSELS AND WILLIAM A. MARIN.

Opinion filed Nov. 15, 1907.

Mortgage — Bona Fide Purchaser — Notice.

1. A mortgagee in a real estate mortgage, without actual notice of the rights of a vendee in a contract for the purchase of the real estate covered by the mortgage, which contract has been orally assigned as security, is an innocent purchaser, although such vendee is in possession of the land when the mortgage is taken. Patnode v. Deschenes 15 N. D. 100, 106, N. W. 573, followed as to the construction of section 6179, Rev. Codes, 1905

Same — Possession of Owner — Landlord and Tenant.

2. Land which is farmed by a tenant under a lease from the owner is in possession of the owner, and not of the tenant.

Same.

3. Evidence examined, and *held* to show that possession was relinquished by the vendee in a contract for the purchase of land, and taken by the mortgagor before the mortgage in suit was executed and delivered.

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

Action by E. Ruth Gray against the O. W. Kerr Land Company. Judgment for plaintiff. Defendant appeals.

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Affirmed.

Turner & Wright, for appellant.

Such assignment cannot be made an absolute transfer by oral agreement. Rev. Codes 1905, section 5332; Murray v. Walker, 31 N. Y. 399.

Possession of land is notice of possessor's interest. O'Toole v. Omlie, 8 N. D. 444, 79 N. W. 849; Moyer v. Hinnman, 13 N. Y. 181; Paige v. Waring, 103 N. Y. 636; Ewing v. Burnet, 11 U. S. 39, 9 L. Ed. 624; Ellicott v. Pearl, 11 U. S. 411, 9 L. Ed. 475; Murphy v. Doyle, 33 N. W. 221; Costelloe v. Edson, 46 N. W. 300; Simmons Creek Coal Co. v. Coran, 142 U. S. 442, 35 L. Ed. 1063; Morrison v. Kelley, 74 Am. Dec. 169; Gage v. Morosick, 71 N. W. 930; Sauers v. Giddings, 51 N. W. 265; Curtis v. Campbell, 20 N. W. 69; Cook v. Clinton, 31 N. W. 317; Harris v. McGovern, 9 Otto, 161, 25 L. Ed. 317; Murray v. Hudson, 32 N. W. 889; Whitaker v. Erie Shooting Club, 60 N. W. 983; Buck v. Holt, 37 N. W. 377.

Annual cropping is possession. Cook v. Clinton, supra; Dice v. Brown, 67 N. W. 253; Brown v. Volkening, 64 N. Y. 76.

Robert M. Pollock and *Herman Winterer,* for respondent.

A deed is not defeated by an oral defeasance as to one without actual notice. Rev. Codes 1905, section 6179; Patnode v. Deschenes, 15 N. D. 100, 106 N. W. 573.

Morgan, C. J. This is an action to foreclose a real estate mortgage. The Kerr Land Company, one of the defendants, claims that it has judgment liens on the mortgaged premises superior to that of plaintiff's mortgage. These judgments were rendered against one Cassels, who, it is claimed, had an interest in the land under a contract for the purchase thereof when the judgments were rendered and docketed. Executions were duly issued on said judgments, and levies made upon the land involved in the mortgage in suit, and said land sold to the judgment creditors. The plaintiff is the assignee of the mortgage in suit, which was given on December 21, 1904, and assigned to the plaintiff on October 30, 1905. The mortgage was given by one Fred E. Harvey, who was the owner of the legal title and was in possession and control of the premises when the mortgage was given. He became the owner of these premises

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through a conveyance by deed from the Farm Land Company and from the Realty Investment Company; each company being then the owner of 160 acres of the 320 acres covered by the mortgage. These two grantors delivered the deeds to Harvey upon surrender of the land contracts, which had been assigned to him by Cassels, the then holder of said contracts. Harvey received these contracts as collateral security for an indebtedness due from Cassels to him. There were two separate contracts of sale—one from the Farm Land Company, and the other from the Realty Investment Company. One of these contracts was delivered to Homer E. Smith on May 8, 1900, and after several assignments preceding it was duly assigned by one Bryan to Cassels on September 11, 1904. The other contract was assigned to Cassels by an assignee of the vendee on December 10, 1901. It was while Cassels held these contracts thaf the judgments under which the defendant the Kerr Land Company claims a lien on Cassells' interest in the land were rendered. There were no buildings on the land. The land was agricultural in character, and was farmed by Cassels in 1903 and 1904, and in 1905 it was leased to Cassels by Harvey, and Cassels subleased it to one Bells, who put the crop in and accounted therefor to Harvey.

It will be seen that the question is presented whether the original mortgagee, and the plaintiff as assignee, were innocent purchasers as against the judgments of the defendant the Kerr Land Company. It will also be seen that the contracts under which Cassels claims were never of record. Hence neither the mortgagee nor the plaintiff had constructive notice by virtue of the recording acts. If they had any notice at all, it must have been such as was imputed to them by virtue of Cassells' possession when the mortgage was given, if such was the case. Harvey received his deed to this land on December 9, 1904. At that time Cassels had assigned his contract for the purchase of the land to Harvey by an assignment absolute in terms, although as a matter of fact as security only. Cassels had also surrendered possession of this land under his contracts to Harvey and surrendered his contracts to Harvey. The assignments of these contracts were made, one of them on December 29, 1902, and the other on the 4th day of November, 1904. Cassels was in debt to Harvey at these dates, and the assignments were as security for that debt. In the fall of 1904 Cassels and Harvey entered into an oral contract by which these

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assignments became absolute in consideration of the settlement of the indebtedness due from Cassels to Harvey. The contracts were surrendered, and Cassels surrendered his possession under the contracts, and dealt with Harvey as owner of the land by renting the premises from him from December, 1904, to December, 1905. It must therefore follow that Cassels' possession on December 21, 1904, was subordinate to that of Harvey. Cassells' possession was simply under the lease, and not under the contract. It is immaterial, so far as possession of the land is concerned, whether Cassells' former interest in the land under his contract had been foreclosed or not. It is claimed, however, as a matter of law, that Cassells' possession was constructive notice to the plaintiff and to the mortgagee of his interest in the land under the contract. This contention is based on the fact that Cassells retained an interest in the land analogous to that of an equitable owner; that is, that the relations between a vendor and vendee in contracts for the purchase of land are similar to those of mortgagor and mortgagee. Although that is the relation of the parties under such contracts, and although there was no foreclosure of Cassells' interest under such contract, still Cassells' possession would not be constructive notice of the fact that the assignments were as security only, nor that his possession under the oral lease had any relation to the contracts for the purchase of the land.

It is admitted in the printed brief of appellant that neither the plaintiff nor her assignors had actual notice that the assignments were given as security and that Cassels had any interest in the land. That being so, the doctrine of notice of rights in land by virtue of the possession thereof has no application under our statute. The appellant's contention in this behalf ignores the provisions of section 6179, Rev. Codes 1905. That section reads: "When a grant of real property purports to be an absolute conveyance, but is intended to be defeasible on the performance of certain conditions, such grant is not defeated or affected as against any person other than the grantee or his heirs or devisees or persons having actual notice unless an instrument of defeasance duly executed and acknowledged shall have been recorded in the office of the register of deeds of the county where the property is situated." This section was recently construed by this court in a case where the grantor of a deed, absolute in form, but intended as a mortgage, was in possession of the land, and it was held that such possession

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was not notice of existing rights. In that case it was said: "It does not avail the plaintiff to say that he had constructive notice, for the legislature has taken from her the right to contradict the terms of her deed and say that it is in fact a mortgage, except as to her grantee, his heirs or devisees, and persons having actual notice. She cannot, therefore, assert as to the defendant, who took his mortgage from Deschenes without actual notice, that her deed to Deschenes was merely a mortgage." Patnode v. Deschenes, 15 N. D. 100, 106 N. W. 573. Plaintiff, not having actual notice of Cassells' rights under his contract for a defeasance, was an innocent purchaser, and is entitled to foreclose her mortgage.

The judgment is affirmed. All concur.

(113 N. W. 1034.)

CONTINENTAL HOSE COMPANY NO. 1, A CORPORATION, v. THE CITY OF FARGO, A MUNICIPAL CORPORATION.

Opinion filed Jan. 13, 1908.

Municipal Corporations — Fire Department — Insurance Premiums.

1. In an action by a fire company to recover from a city its proportionate share of the 2 per cent of the premiums received upon fire policies, issued on property in such city, under section 2968, Rev. Codes 1905, the plaintiff must show affirmatively that it had the management of at least one steam, hand, or fire engine, hook and ladder truck, or hose cart, during the time wherein it claims to be entitled to such premiums.

Same.

2. Where the officials of the city fire department have sole charge of all fire apparatus for use at fires, all of which was owned by the city, and the duties of the other members of the fire department simply require them to repair to the fire on alarm, and to aid in extinguishing it, the department as companies has no such management of the apparatus named as is contemplated by section 2968, Rev. Codes 1905, to entitle it to a share of the fund received from insurance premiums.

Same — Paid Department.

3. In this case it is shown six members of the fire department of the defendant city were paid annual or monthly salaries, and all other members of the department were paid in accordance with the

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ordinance of the city; $1 for the first hour, and 50 cents per hour for all subsequent time in the daytime, and 75 cents in the night-time, for time spent in actual attendance at fires, and that the amount so paid by the city to its fire department for a period of about 18 months, the time involved in this action, was over $6,000. *Held,* that such department was a paid department within the meaning of section 2968, Rev. Codes 1905.

Statutes — Construction — Meaning of Words.

4. When a technical meaning of a word or term is relied upon to sustain the plaintiff's cause of action, and such meaning is not commonly known or understood, and is not given in dictionaries, encyclopedias, or legal works, and the word or term has a meaning commonly known and understood, the burden is upon the plaintiff to show by competent evidence the technical meaning of such term or word, and in the absence of such showing it will be presumed to have been used in the statute in the sense in which it is ordinarily and commonly used and understood by people in general.

Fisk, J., dissenting.

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

Action by the Continental Hose Company against the City of Fargo. Judgment for plaintiff, and defendant appeals.

Reversed.

W. C. Resser, City Attorney, and *Engerud, Holt & Frame,* for appellant.

Barnett & Richardson, for respondent.

Spalding, J. This action was brought by Continental Hose Company No. 1, a corporation, against the city of Fargo, to recover the sum of $1,060, and interest, claimed to be due it from said city under the provisions of article 9, c. 32, Pol. Code 1905, being sections 2966 to 2971, inclusive, Rev. Codes 1905. It is claimed this is due as its share of the 2 per cent of the insurance premiums collected within the city of Fargo, under the provisions of the law referred to on the 7th day of June, 1904, and the 7th day of June, 1905. It is unnecessary to set forth the pleadings. The case was tried before the court without a jury, and the court found that the plaintiff was a corporation, and that more than five years prior to the commencement of this action the plaintiff was a volunteer fire company and offered its services to the city, which were accepted,

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and during all the time since has performed and rendered to the city of Fargo its services as a volunteer fire company, and has had the management and control of one steam engine, one hook and ladder truck, and one hose wagon, and that it is a member in good standing of the North Dakota Firemen's Association; that it, with two other companies, for more than eight months prior to the 31st of October, constituted the fire department of the city of Fargo, and other facts which are not material to the consideration of the case in this court. As conclusions of law the trial court found that the fire department of the city of Fargo up to the 20th of July, 1904, was an organized volunteer fire department, composed of three volunteer fire companies, of which the plaintiff was one, and that it was entitled to receive its proportionate part of the insurance premium moneys apportioned to the city of Fargo, under and by virtue of article 9, c. 32, Rev. Codes 1905, and entered judgment for the amount claimed in the complaint. From such judgment the defendant appeals.

Under this appeal only two questions are necessary to be determined: First, did the plaintiff during the time in question have the management and control of at least one steam, hand or fire engine, hook and ladder truck, or hose cart? Second, was the fire department of the city of Fargo, during such time, a paid fire department? If either of these questions cannot be answered in the affirmative on the evidence submitted, the plaintiff is not entitled to recover. Before referring to the evidence it may not be improper to consider the evident, and ,we think, conceded, object of the statute in question. It is known by every one that in villages and small towns public-spirited citizens, and particularly public-spirited young men, unite together and form fire companies or fire departments for the purpose of protecting and saving property in case of fire. In the smaller places the individuals composing them almost invariably contribute their services without compensation from the municipality. In some places the municipality owns any equipment or apparatus used, while in others the fire department owns it. The men constituting the fire department in such cases almost invariably have control, care and management of the engines, trucks and other apparatus provided for used in the extinguishment of fires. As the municipality increases in size, and the interests become more varied, exposure to fire greater, and the number of risks greatly increased, there is a corresponding increase

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in the number of fires, until service as firemen requires so frequent attendance at all times of day and night as to interfere with their avocations, and renders such service burdensome. If the municipality continues to increase in size, it finally reaches a point where service becomes so burdensome that the taxpayers conclude that they should not be rendered without compensation, and that the property owners should contribute thereto. When this point is reached, and the city pays the firemen for their services, the department is said to be a paid fire department. Prior to that time it matters not what it is called. The plaintiff in this case assumes that prior to that time, and even afterward, the department may be a volunteer fire department, and that a volunteer department cannot be a paid fire department, even though paid for its services; but the statute nowhere mentions a volunteer fire department or volunteer firemen, so we are not called upon to decide the meaning of the term "volunteer," when applied to this department. On this phase of the case it is only necessary to determine whether the fire department of the city of Fargo, during the time in question, under the ordinance hereinafter to be referred to, was a paid fire department. We shall, however, refer later to the meaning of the term "volunteer." Article 9, c. 32, Pol. Code (Rev. Codes 1905, sections 2966-2971), provides that on compliance with certain conditions an amount equal to 2 per cent of the premiums received upon the policies issued on property in any city, town or village, and when received by the treasurer of the same, shall be paid over to the treasurer of each separate, organized fire companies, or company, in equal proportion, having the management of at least one steam, hand or fire engine, hook and ladder truck, or hose cart, but with this proviso, that in cities, towns and villages having a paid fire department, the amount so received shall be retained by the municipal treasurer to be disbursed by the governing power in maintaining said fire department. We are unable to see but one purpose in requiring this contribution from insurance companies. It is important to all such companies that all property possible be saved from fire, and that the greatest possible effort be exerted in the prevention of fires, and in preventing them from spreading, and in other ways, and it may be assumed that the state, and the insurance companies as well, have recognized as a fact that compensation for the time spent in fighting fires will increase the interest of the firemen, and serve as an incentive to them to exert themselves to their utmost in such

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capacity, and that it is wise policy on the part of both the state and the companies to make provision for compensating them for services, and to this end the law in question was enacted.

It appears that prior to the approval of the ordinance of the city of Fargo, approved February 17, 1903, there had existed in that city a board of control, composed of members of the different fire companies, which board had the control of all the fire apparatus and machinery of the city, and that since that date it has been housed in a building provided by the city and has been under the control and management of salaried members of the fire department, and that the companies composing such department have nothing to do with the control and management of the apparatus, neither have the members of the different companies anything to do with it. Their duty has been to obey the orders of the chief when at fires. The officials of the fire department, it is true, have been taken from the members of the different companies, but we are unable to discover or conclude that that gives the company or any of them the control of the apparatus. The officials are in control and management of it, not as members of the fire department, but as officials of the city of Fargo, as shown by the evidence, and under the law. James W. Sutherland, chief of the fire department, testifies that the drivers of the different rigs, meaning the drivers of the different engines, carts, etc., had the care of the apparatus and equipment of the fire department, and that no one else had the handling of the apparatus, and that the monthly salaries of these drivers was $60 each, during the time in question, and that since December, 1903, when the steam engine was purchased, an engineer of such engine has received a monthly salary of $75. Doubtless there were two objects in requiring companies receiving insurance money to have the control and management of the apparatus used. Such a requirement would have a tendency to insure the money going to bona fide companies organized and actually serving in the capacity of firemen, and it would also furnish something of an incentive to the companies, and their members, to get such apparatus on the ground speedily in case of fire. When the engines and other apparatus are cared for, managed, and controlled by paid officials of the city, such inducement is no longer necessary. As to these facts we discover no conflict in the evidence, and we are unable to conclude that during the time mentioned the plaintiff has had the management and control of either a steam, hand or fire engine,

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hook and ladder truck or hose cart, as required by the law referred to, as a prerequisite to its receiving any part of the insurance premiums.

The second question demanding an answer is whether the fire department was a paid department. The evidence shows without controversy the facts as to this. About six members were paid either by annual or monthly salaries. The members of the department numbering about fifty men received during the time covered by this action pay for services amounting to $6,196.53, under the terms of the ordinance of February 17, 1903, which provided that all firemen attending fires in the city of Fargo between the hours of 7 a. m. and 7 p. m. should receive for their services $1 for the first hour, and 50 cents for each succeeding hour, and while in actual attendance at fires between the hours of 7 p. m. and 7 a. m. $1 for the first hour, and 75 cents for each succeeding hour. The city of Fargo appropriated for the fiscal year commencing September 1, 1903, for the expense of such department, the sum of $8,115, which included the salaries of the officers and men, supplies, fire alarm, and hose, and tax was levied for such appropriation, and the expenditures during such time included the sum of $6,196.53, hereinbefore referred to.

It is argued in respondent's brief that because the title and some of the subtitles to the ordinance referred to them as volunteer firemen they were not paid firemen. We are unable to appreciate the distinction. The law makes no reference to volunteer companies or firemen. And taking the words "pay" or "paid" in their ordinary meaning, they are certainly paid firemen. "Paid" is defined by Webster as "receiving pay; compensated; hired." "To pay" is defined by the Century and Standard Dictionaries as, "To deliver that which is or is regarded as the equivalent or compensation to, as to an employe or a creditor for services or goods; to remunerate; to recompense; to give as pay;" "to requite; remunerate; reward, as to pay workmen or servants." After a careful examination of authorities, including encyclopedias, we are unable to discover any such distinction between volunteer and paid firemen as is drawn by the respondent.

The respondent contends that the distinction lies in the fact that paid firemen are in the sole employment of the city, and are compelled to attend fires, while volunteer firemen may be engaged in other avocations, and their attendance at fires is voluntary, and, in

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effect, that the question of compensation for their services has no application in determining whether the plaintiff comes within the terms of the statute. The definition of "volunteer," cited by respondent from Webster's Dictionary, is "a person who enters into service of his own free will," and that they sometimes serve gratuitously is clearly as applicable to paid firemen as to members of a volunteer fire department. The members of a paid fire department have entered into the service of the city of their own free will. The city does not draft them, and their entering into the service of the city is not compulsory. A person who gives his services without any express or implied promise of remuneration in return is called a volunteer, and is entitled to no remuneration whatever for his services. Black's Law Dictionary, 1224. We are of the opinion that a paid fireman is one who receives from the municipality which he serves fixed compensation for the services rendered. We are also of the opinion that it was not intended by the legislature to authorize the payment of this fund to firemen or to a department, whether consisting of companies or men already paid for their services by the city; but that in such case it was intended, as the express language of the statute indicates, that it should go into the city treasury to assist in reimbursing the city for its outlay in maintaining and compensating the department. It was not intended to duplicate their pay. In effect the contention of the respondent is that the term "paid firemen" or "paid fire department" has a meaning unknown to the public in general, but understood by the members of the fire department as applicable only to those who are under legal obligation to attend fires in the capacity of firemen. If it has any such meaning, it is clear to us that it is not so generally recognized, and that the knowledge of this meaning is confined to those in the vocation of firemen. No testimony was offered to show the meaning of the term, and in the absence of evidence that it has a technical meaning, and of what such meaning is, it must be construed as having the meaning ordinarily and usually accepted by the public at large. If it has a technical meaning, or a meaning applicable to firemen as distinguished from its common meaning, the burden was on the plaintiff to show it as a fact. The burden is on the plaintiff to show that the word has a technical meaning, and to show what that meaning is, and that it was intended that it should be construed in a technical sense (Mansell v. Reg., 92 E. C. L. 109), and this is especially true where

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the court have no knowledge of such meaning being given to the term or word, and when none is to be found in the text-books, reports or encyclopedias. Usage and custom and technical terms seem to be classed together in this respect, and all the courts place the burden of proof upon the party seeking to establish the meaning. 3 Enc. of Evid. 956. In St. Paul & M. Trust Co. v. Harrison, 64 Minn. 300, 66 N. W. 980, the Supreme Court of Minnesota, in construing a contract of warranty on the sale of a stallion, which was warranted to be a breeder, evidence having been admitted to show what the meaning of the word "breeder" was among horsemen, as applied to a stallion, said: "From the face of the instrument the court and jury would probably find it difficult, if not quite impossible, to determine the precise meaning of the word 'breeder' as there used, and held that it was competent, even though both parties understood its meaning, to permit witnesses familiar with the meaning of the word as used in the business to which it is applicable to testify as to such meaning to show how those who employed the term used and understood it." In Lowe v. Lehman, 15 Ohio St. 179, in construing a contract relating to brick to be furnished by the thousand, the Supreme Court approved instructions to the jury that, in the absence of custom, the words "thousand brick" must be taken in the ordinary sense, and only the actual number laid in the walls must be allowed for, to be ascertained by actual count, or by some method giving the actual number as nearly as possible; that usage, in order to give a different meaning to the term, must be shown to have been reasonable, certain, uniform, and generally acquiesced in and understood, by the community. In Wood v. Allen, 111 Iowa, 97, 82 N. W. 451, the Supreme Court of Iowa in passing upon the rejection of evidence to show the meaning of the term "dry goods," and as to whether a contract of sale of a stock of dry goods included certain articles, says: "Custom or usage of the term would have shed much light on this matter, and without such evidence the jury had no certain guide by which to determine the issues." In Maurin et al. v. Lyon, 69 Minn. 257, 72 N. W. 72, 65 Am. St. Rep. 568, the Supreme Court of Minnesota held in construing a contract for the purchase and sale of wheat, which contract contained several abbreviations known to the trade, evidence was competent to show the meaning of such abbreviations as used in the trade. In discussing the subject of usage in Walls v. Bailey, 49 N. Y. 464, 10 Am. Rep. 407, this court says:

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"Not only the existence of such usage, but whether the knowledge of it exists in any particular case, is a question of fact for the jury. Of course, then, it is to be established or negatived in all its essentials, as well as to knowledge as to any other, by the same character and weight of evidence as are necessary to maintain the other allegations of fact." And in Bodfish v. Fox, 23 Me. 90, 39 Am. Dec. 611, the court says, in speaking of the subject of usage: "There must be proof that the contract had reference to it or proof arising out of the position of the parties, their knowledge of the usage, or other circumstances from which it may be inferred or presumed that they had reference to it." We see no other method of informing the court or jury as to the meaning of the term. If such evidence is not requisite, the courts and juries must act in the dark, or go outside the record made, or accept statements of counsel as to its meaning—and in this case the counsel disagreed on this point—or they will be compelled to adopt the meaning of the term as generally understood.

It cannot be questioned that the generally understood meaning of the word "paid" as applied to those who render service to others is that they have received compensation for such services. We are of the opinion that the evidence shows affirmatively that the plaintiff was not entitled to maintain this action, for the reason that it did not have the management or control of either a steam, hand or fire engine, hook and ladder truck or hose cart, and that the payment to every man in the fire department, performing any service therein of a certain fixed salary, either by the year, month or hour, as required by the city ordinance, constitutes a paid fire department. Other points discussed in the briefs are deemed immaterial.

The judgment of the district court is reversed.

MORGAN, C. J., concurs. FISK, J., dissents.

(114 N. W. 834.)

THE STATE OF NORTH DAKOTA v. H. O. NELSON, J. T. SYFTESTAD AND LOUIS RAMSVIG.

Opinion filed Jan. 18, 1908.

Criminal Law — Instruction — Alibi — Burden of Proof.

Defendants were convicted of the crime of grand larceny. In addition to a denial of guilt, the respondents furnished proof tending to

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establish an alibi. The trial court gave the following instructions to the jury, with reference to such defense: "There has been some evidence introduced tending to prove an alibi. The court instructs you that an alibi properly proven is considered a good defense, but it must be of a strong, convincing character, and exclude any reasonable hypothesis except the nonpresence of the accused."

Such instruction was duly excepted to, and the giving of the same was urged, among other grounds, for a new trial.

Held, that the giving of said instruction constituted prejudicial error warranting the trial court in granting a new trial.

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

H. O. Nelson and others were convicted of larceny. From an order granting a new trial, the state appeals.

Affirmed.

R. F. Rinker, State's Attorney, (*C. J. Maddux,* of counsel), for the state.

P. M. Mattson and *S. E. Ellsworth,* for respondents.

Fisk, J. Respondents were convicted in the court below of the crime of grand larceny. The evidence on the part of the state consisted of the testimony of one Nelson, an accomplice, and certain other witnesses, whose testimony the prosecution claimed was sufficient in corroboration thereof to support such conviction. Respondents denied any connection with the crime, and introduced certain testimony tending to prove an alibi. Among other things, the court charged the jury as follows: "There has been some evidence introduced tending to prove an alibi. The court instructs you that an alibi properly proven is considered a good defense, but it must be of a strong convincing character, and exclude any reasonable hypothesis except the nonpresence of the accused." This instruction was duly excepted to, and the giving of the same was specified as error. In due time a statement of the case was settled embracing the evidence, objections, rulings and exception, and also specifications of numerous alleged errors relating to rulings upon the admissibility of testimony, and also to certain instructions given by the court to the jury. A motion for a new trial was in due time made and granted, and from the order granting the same the state appealed, and assigns error upon the granting of such motion.

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If such order was properly granted, upon any ground urged in the motion for a new trial the same must be affirmed. Numerous grounds were urged; but it will be necessary to refer to but one, namely, the giving of the instruction aforesaid. That the giving of this constituted prejudicial error is, we think, too plain for serious debate. By the weight of authority and the better reason, and alibi is no longer considered an affirmative defense, to establish which the defendant has the burden of proof; but, if the proof thereof is, with the other evidence in the case, sufficient to engender in the minds of the jury a reasonable doubt as to the guilt of the accused, he is entitled to an acquittal. State v. Hazlett (N. D.) 113 N. W. 374; Peyton v. State, 54 Neb. 188, 74 N. W. 597; State v. Chee Gong, 16 Or. 534, 19 Pac. 607; Humphries v. State, 18 Tex. App. 302; State v. Child, 40 Kan. 482, 20 Pac. 275; State v. Howell, 100 Mo. 628, 14 N. W. 4; 1 Bish. New Crim. Pro. section 1066; 2 Am. & Eng. Enc. Law (2d Ed.) pp. 53, 57. By the above instruction the minds of the jury were specially directed to this defense; and they were, in effect, told to ignore the same, unless the evidence in its support was clear, strong, convincing and of a satisfactory character, or, in the language of the instruction, "of a strong, convincing character, and excludes any reasonable hypothesis except the non-presence of the accused." Proof of an alibi to such a degree of certainty amounts to proof of innocence, for proof that the accused was elsewhere when the crime was committed is proof that the accused did not commit the crome. The instruction, therefore, in effect, informed the jury that to the extent to which they relied on such defense, defendants had the burden of proof to establish their innocence. This, of course, was palpably erroneous, and highly prejudicial, and was not cured by the further instruction to the effect that the state had the burden of proving the guilt of the defendant. State v. Hazlett, supra.

We express no opinion as to the sufficiency of the other grounds urged for a new trial. We are entirely clear that the motion for a new trial was properly granted, and hence the order appealed from is affirmed. All concur.

(114 N. W. 478.)

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HARRIS BROTHERS, A CO-PARTNERSHIP, THE INDIVIDUAL MEMBERS OF WHICH ARE SIMON HARRIS AND LYMAN HARRIS, v. JESSE E REYNOLDS.

Opinion filed Dec. 19, 1907.

Brokers — Contract with Owner — Evidence.

1. Plaintiffs, who are in the real estate business in Bismarck, wrote defendant, a resident of New York and owner of certain real property near Bismarck, a letter asking information as to defendant's lowest price and best terms on same. Such letter also contained the following sentence: "There are a few buyers coming in here this fall, and we might be able to sell it for you if the price and terms are right." Defendant replied by letter stating among other things: "Would sell for $10 per acre, part down and time for balance;" no mention being made regarding the portion of plaintiff's letter wherein they state that they "might be able to sell it for you." *Held,* that such correspondence was ineffectual to create a contract authorizing plaintiffs to act as defendant's agents for the sale of the property, or for the purpose of procuring a purchaser therefor.

Same — Ratification of Acts.

2. Subsequently, plaintiffs found a person ready, able, and willing to purchase said property on terms stated in defendant's letter, and notified defendant of such fact, inclosing a deed for execution. The defendant thereafter executed such deed, but sent the same to one Reade, together with a letter constituting Reade his agent and authorizing him to deliver the deed and complete sale if in his judgment the terms were the best obtainable, and notifying plaintiffs of this action. Defendant through the said agent Reade refused to accept such terms and refused to deliver such deed. *Held*, that these facts did not amount to an acceptance of plaintiff's proposal or as a ratification of the unauthorized acts of plaintiffs in negotiating with a third person for the purchase of the property.

Same — Evidence.

3. Plaintiffs seek to recover damages against defendant in the sum of $540 and interest, being the amount they would have received as commissions if defendant had accepted the offer of their customer. *Held,* that they wholly failed to establish a cause of action as alleged; and hence that it was not error to direct a verdict in defendant's favor.

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

Action by Simon Harris and Lyman Harris, doing business as Harris Bros., agailnst Jesse Reynolds. Judgment for defendant, and plaintiffs appeal.

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Affirmed.

Andrew Miller, for appellants.

Newton & Dullam, for respondent.

FISK, J. The order appealed from in this case was clearly correct, and must be affirmed. The appellants, who are in the real estate business in the city of Bismarck, seek to recover from respondent the sum of $540 and interest, which sum they claim to be due them as commissions for finding a purchaser for certain real property owned by respondent, near said city, pursuant to the terms of a contract claimed to exist between them. Defendant by his answer put in issue the existence of any such contract. The case was tried to a jury, and at the close of plaintiffs' evidence the trial court, on motion of defendant's counsel, directed a verdict in defendant's favor, and judgment was thereafter rendered upon such verdict. Subsequently a motion for a new trial was made and denied; and, from the order denying such motion, this appeal was taken.

The assignments of error all relate to the sufficiency of the evidence to establish the contract upon which plaintiffs rely to recover the alleged commissions. The defendant resides at Potsdam, N. Y., and the sole proof offered to establish the contract, consisted of the following correspondence between the parties: "Bismarck, N. D., Sept. 28, 1905. Mr. Jesse Reynolds, Potsdam, N. Y.—Dear Sir: Do you own the W. ½ of the S. E. ¼ of section 8-139-80 in Burleigh county, No. Dakota; if so, what is your lowest price and best terms on same. There are a few buyers coming in here this fall, and we might be able to sell it for you if the price and terms are right. An early reply will grealy oblige, we are, Very respectfully, [Signed] Harris Bros." "No. 8 Elm St. Potsdam, Oct. 11th-05. Harris Bros., Agents—Sirs: Yours of the 28 ult at hand. I am the owner of 97 acres of land near Bismarck once owned by Israel P. Hunt. The land cost me $1,600 and over. Would sell for $10.00 per acre part down and time for balance. The land is rented to Hon. Henry L. Reade for one year, which expires in Dec. Yours, etc., J. Reynolds." After the receipt of defendant's letter of October 11th, plaintiffs, evidently assuming that they were authorized to procure a purchaser for the land and to receive and retain as commissions all sums in excess of

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$10 per acre or $960, entered into negotiations by correspondence with one Kriedler of Fullerton, Neb., which culminated in an offer by the latter to purchase said property for the sum of $1,500, to be paid as follows: $840 cash upon delivery of deed, $200 on or before May 1, 1906, $200 on or before May 1, 1907, and $260 on or before May 1, 1908. It is plaintiffs' contention that by finding such contemplated purchaser, who was willing, able and ready to purchase upon the terms above mentioned, that they thereby earned and are entitled to a cash commission of $540. This, no doubt, would be true if there was a contract to this effect between the parties, but we fail to see how the correspondence created any such contract. What language is there in defendant's letter which would warrant a court in holding that defendant thereby constituted plaintiffs his agents to sell this land, or to even procure a purchaser, and fixing plaintiffs' compensation at the excess of the selling price over the sum of $960? In plaintiffs' letter of September 28th they asked for information as to defendant's ownership of the land and his lowest price and best terms on same, adding: "There are a few buyers coming in here this fall, and we might be able to sell it for you if the price and terms are right." In defendant's reply he merely stated that he owned the land, and would sell for $10 per acre, part cash and balance on time. The letter is absolutely silent with reference to the statement in plaintiffs' letter to the effect that they might be able to sell the land for him. How, therefore, can it be claimed that upon the question of plaintiffs' agency the minds of these parties ever met? Can it be said that defendant's silence regarding plaintiffs' proposal to act for him was an implied consent that they might thus act? And, if so, where is the proof that plaintiffs' compensation was ever agreed upon? Was it within the contemplation of defendant at the time he wrote this letter that he was thereby employing plaintiffs as his agents to sell this land, and that they might pocket all the proceeds of such sale in excess of $960? Clearly not. Furthermore, if we concede—which we do not—that plaintiffs' letter contained a proposal to become defendant's agents, and that defendant's silence with reference thereto operated as an implied acceptance of such proposal, the same was too indefinite and uncertain as to terms and conditions to constitute a binding contract. It is, of course, well settled "that contracts may be made by correspondence, but, to constitute a contract by correspondence, one letter must contain a dis-

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tinct proposition and the answer must be an unqualified acceptance." Baxter v. Bishop, 65 Iowa, 582, 22 N. W. 685; Batie v. Allison, 77 Iowa, 313, 42 N. W. 306.

In Krum v. Chamberlain, 57 Neb. 220, 77 N. W. 665, it was said "That a binding contract may result from an offer and acceptance, it is essential that the minds of the parties meet at every point, and that nothing be left open for future arrangements. It has been said 'that an acceptance, to be good, must in every respect meet and correspond with the offer, neither falling within or going beyond the terms proposed.' Knowlton's Anson, Cont. 22." See, also, Wristen v. Bowles, 82 Cal. 84, 22 Pac. 1136; Niles v. Hancock, 140 Cal. 157, 73 Pac. 840; Tilley v. Co. of Cook, 103 U. S. 155, 26 L. Ed. 374. Balkema v. Searle, 116 Iowa, 374, 89 N. W. 1087, cited by appellant's counsel, was an action by an alleged vendee to compel specific performance of a contract to purchase land, entered into with an alleged agent of the owner, and it was merely held that the alleged agent had no authority to make the contract, and hence, the same was not binding upon defendant. It is true that in the opinion the court said that Snyders (the alleged agent) "was defendant's agent to some extent and for some purpose relating to the sale of this land," etc. The decision, however, was placed upon the ground that the alleged agent exceeded his authority, hence is of no weight as an authority upon the question involved in the case at bar. After the receipt of defendant's letter of October 11th, and after plaintiffs had procured a proposition from Kriedler to purchase the land as before stated, plaintiffs wrote a letter to defendant as follows: "Bismarck, N. D., Oct. 21, 1905. Mr. J. Reynolds, Potsdam, N. Y.—Dear Sir: Your favor of the 11, inst., at hand, quoting us your price of $10.00, per acre net to you on the west half and the west 264 feet of the east half of the south east quarter of section 8-139-80. We have sold the above described land as per your letter of the 11, inst., at $10.00, net to you on the following terms: $300 cash, and notes and mortgages properly executed on the above described land for $660, payable as follows: $200.00, on May 1, 1906, $200.00 on May 1, 1907, $260.00, on May 1, 1908; notes payable on or before with interest at 6 per cent, payable annually. We have deposited with us $100.00, $200.00 more will be paid by the time your deed reaches us, and will be paid to the bank by us as soon as your deed arrives. We have left the name of purchaser and consideration blank for our convenience

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in closing sale with our customer. Very respectfully, [Signed] Harris Bros." (Exhibit D.) It is perfectly apparent that, even if plaintiffs were defendant's agents as contended, they exceeded their authority in assuming to sell the land and in fixing the terms of such sale. Appellants' counsel concedes this; but he contends that such unauthorized sale was thereafter fully ratified by defendant. It is contended that defendant's letter (Exhibit G) written to one Reade, defendant's tenant of the land, constituted such ratification, because therein he did not object to the terms or conditions of the sale as stated in plaintiff's letter, Exhibit D. We think this contention devoid of merit. Exhibit G is as follows: "No. 8 Elm St., Postdam, Oct. 24, 1905. Hon. H. L. Reade: About the 1st of October the Harris Brothers wrote inquiring price of my land in Bismarck. I wrote them that the land was rented to you & I could not sell except subject to your claim. To-day I rec'd a deed from them for execution. I wrote them that I must have $10.00 per acre. It seems they have sold conditionally. Now you must help me out if you think you can do better for me than to accept you need not deliver the deed. But if it is as well as I could get you can deliver at the Bank the deed & remit the Three Hundred and the notes or ask the Bank to do so & close the deal. The abstract of title I will send later. Now this sale is net to me. If you are to lose by the deal they must arrange with you. I inadvertently inserted the consideration—if they wish to have it blank as they request they can return the deed & a fresh one for execution. Yours truly, [Signed] Jesse Reynolds. Write soon. I should have referred them to you before stating price—the notes are to be secured on the land." We are unable to perceive how the sending of this letter to Reade authorizing him to deliver the deed which was enclosed therein, if in his judgment the terms were the best obtainable, can be construed as a binding acceptance by defendant of the proposal contained in plaintiffs' letter, Exhibit D, or in any manner constituted a ratification of plaintiffs' unauthorized acts in assuming to sell said land to Kriedler. Surely defendant's letter to Reade authorizing him to either accept or reject the proposal cannot be construed as a ratification of plaintiffs' unauthorized acts. Defendant sent the deed to his agent Reade for the purpose of facilitating the sale in the event Reade considered the terms were the best obtainable. This conduct on defendant's part falls far short of proving an unqualified acceptance or any acceptance

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of the plaintiffs' proposal or a ratification of their said acts. This is too plain for discussion. Our views herein find support in the following cases: Sawyer v. Brossart, 67 Iowa, 678, 25 N. W. 876, 56 Am. Rep. 371; Gilbert v. Baxter, 71 Iowa, 327, 32 N. W. 364; Langelier v. Schaefer, 36 Minn. 361, 31 N. W. 690; Wristen v. Bowles, 82 Cal. 84, 22 Pac. 1136; Niles v. Hancock, 140 Cal. 157, 73 Pac. 840; Weaver v. Burr, 31 W. Va. 736, 8 S. E. 743, 3 L. R. A. 94; Riley v. Grant, 16 S.D. 553, 94 N. W. 427. See, also, section 5306, Rev. Codes 1905.

Plaintiffs, having wholly failed to establish a cause of action as alleged, the order appealed from was correct, and is accordingly affirmed, with costs to respondent. All concur.

(114 N. W. 369.)

F. D. Dibble v. C. B. Hanson.

Opinion filed Nov. 13, 1907. Rehearing denied Jan. 10, 1908.

Appeal — Dismissal — Appealable Order.

An order for the dismissal of an action is not an appealable order, and an attempted appeal from such an order confers no jurisdiction upon the supreme court.

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

Action by F. D. Dibble against G. B. Hanson. Judgment for defendant, and plaintiff appeals.

Dismissed.

Heffron & Current, for appellant.

McBride & Baker, for respondent.

Fisk, J. This is an attempted appeal from an order of the district court of Stark county for the dismissal of the action based upon a motion made by defendant under the provisions of sections 7196, 7198, Rev. Codes 1905. We are without jurisdiction to determine the questions discussed in the briefs of counsel, or in any manner to pass upon the merits of the appeal, for the obvious reason that the order which appellant attempts to have reviewed is not an appealable order. This is not only apparent from the provisions of section 7225, Rev. Codes 1905, but is well settled by numerous

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decisions of this court. In re Weber, 4 N. D. 119; 59 N. W. 523, 28 L. R. A. 621; Field v. El. Co., 5 N. D. 400, 67 N. W. 147; Hanberg v. Bank, 8 N. D. 328, 79 N. W. 336; Cameron v. G. N. Ry. Co., 8 N. D. 124, 77 N. W. 1016; Prondzinski v. Garbutt, 9 N. D. 239, 83 N. W. 23; Lough v. White, 13 N. D. 387, 10 N. W. 1084.

For the foregoing reasons, the appeal must be dismissed, and it is so ordered. All concur.

ON REHEARING.

Since the foregoing opinion was rendered counsel for appellant have filed a petition for rehearing, in which they contend that the well-established rule that an order for judgment is non-appealable has no application in the case at bar, for the reason, as stated, that a judgment had previously been entered in plaintiff's favor, and hence the order appealed from is an order made after judgment and is appealable. Counsel's contention, no doubt, would be sound if their premise was correct; but, as we view it, the fallacy of their argument consists in the erroneous assumption that the judgment entered by the clerk without an order was and is a valid judgment. Such, however, is not the fact, but, on the contrary, the so-called judgment is a mere nullity; the clerk having no authority by law to enter the same without an order from the court or judge thereof.

Counsel evidently rely upon section 7001, Rev. Codes 1905, as conferring such authority, but this section must be construed together with section 7070, which reads as follows: "Judgment upon an issue of law or fact, or upon confession, or upon failure to answer, may be entered by the clerk upon the order of the court or of the judge thereof." It is and always has been, so far as our information extends, the universal practice in civil actions in this state to enter judgments by default or otherwise only upon an order as provided in the last section. This practice, so universal and so long established, is entitled to much weight in construing the provisions of the foregoing section, but, aside from this consideration, we are convinced from the language employed in these sections, when construed together, that the construction thus adopted and followed by the bench and bar of the state is unquestionably sound. In a number of states authority is expressly conferred by statute upon clerks to enter certain default judgments. This is true in California, Minnesota and New York; but it is uni-

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formly held that such authority does not exist except when explicitly granted by statute, and, where thus granted, the clerk in entering such judgments merely acts in a ministerial capacity, and is strictly limited in the exercise of such power to the cases mentioned in the statute. 6 Encyc. Pl. & Pr. 102, and cases cited While there is some diversity of judicial opinion among the courts in states which have adopted this practice as to the validity of a judgment thus entered in cases not strictly within the statute, some holding such judgments void and subject to collateral attack, and others holding them merely voidable, we think the better rule is that such judgments are utterly void. It has been repeatedly so held by the Supreme Court of California. Kelly v. Van Austin, 17 Cal. 564; Glidden v. Packard, 28 Cal. 649; Willson v. Cleaveland, 30 Cal. 198; Oliphant v. Whitney, 34 Cal. 25; Stearns v. Aguirre, 7 Cal. 443; Kennedy v. Mulligan, 136 Cal. 556, 69 Pac. 291. See, also, Adams v. Agnew, 15 S. C. 36. The rule in Minnesota appears to be to the contrary. See Dillon v. Porter, 36 Minn. 341, 31 N. W. 56, and cases cited. The so-called judgment being void, it was no judgment at all, and could be ignored as was done in this case by the trial judge. It follows that the order appealed from is not an order entered after judgment, but is merely an order for judgment; and the well-established rule that the same is nonappealable fully applies.

For the foregoing reasons, the petition for a rehearing is denied. All concur.

(114 N. W. 371.)

THE STATE OF NORTH DAKOTA v. THE MINNEAPOLIS AND NORTHERN ELEVATOR COMPANY.

Opinion filed Jan. 18, 1908.

Constitutional Law — Title of Act.

1. Chapter 113, p. 167, of the Laws of 1907, which is entitled "An act requiring elevator companies transacting business in this state to return certificates of inspection and weighmaster's certificate of weight to the local buyer," and which provides for the return of such certificates by the elevator companies, etc., to their local agents, and also that the latter shall post the same in a conspicuous place in the elevators, does not contravene section 61 of the state constitution,

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which requires that no bill shall embrace more than one subject, which shall be expressed in its title. The subject or object of the act is to furnish information to the public of the facts which such official certificates will impart, and the provisions of section 2 (page 168) requiring local agents to post such certificates in their elevators are germane to the provisions of section 1, and hence to the subject embraced in the title of the act.

Same — Interstate Commerce Clause — Warehouse Regulation.

2. Such act is not vulnerable to the objection that it contravenes the provisions of the interstate commerce clause of the federal constitution, as its operation will not directly or remotely interfere with interstate commerce; but its enactment is a legitimate exercise of the police power of the state.

Foreign Corporations — Regulation by States — Criminal Prosecution.

3. Appellant's contention that the law is void, because it attempts to make acts or omissions committed in a foreign state a crime in this state is not sustained. The conditions on which foreign corporations are permitted to do business in this state are within the legitimate power of the state to prescribe, and defendant corporation, having been authorized to transact business in this state, is amenable to its laws enacted under its police powers to the same extent as its citizens.

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

The Minneapolis & Northern Elevator Company was convicted of violation of the elevator law, and appeals.

Affirmed.

Ball, Watson, Young & Hardy, for appellant.

T. F. McCue, Attorney General, *R. N. Stevens,* Assistant Attorney General, *W. H. Barnett,* State's Attorney, and *Seth Richardson,* Assistant State's Attorney, for respondent.

FISK, J. The defendant and appellant was convicted in the district court of Cass county for the violation of the provisions of chapter 113, p. 167, of the Laws of 1907, and a judgment was rendered imposing a fine against it in the sum of $100, from which judgment this appeal is prosecuted.

This statute is as follows:

"An act requiring elevator companies transacting business in this state to return certificate of inspection and weighmaster's certificate of weight to the local buyer.

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"* * * Every elevator company, corporation, co-partnership or association of individuals, operating any elevator, building or place in this state for the purchase, storage, or deposit of any grain or other farm commodity, shall return to the local buyer at the place where such grain or other farm commodity is purchased, stored or deposited, the official certificate of inspection, together with the weighmaster's certificate for any such grain or other farm commodity sold, whether said grain is sold in this state or in any foreign state where such grain is weighed and inspected. * * * It shall be the duty of the local buyer or agent of the elevator company or other association enumerated in section one of this act, to post in a conspicuous place in such elevator building or place, the official weighmaster's certificate, and the official inspector's certificate, and have the same at all times so that the public may inspect the same. * * * The elevator company or other association enumerated in section one of this act, shall forthwith upon the sale of each car or part of car of grain or other farm commodity, return the certificates provided for in this act. * * * Any elevator company, corporation, co-partnership, or other association of individuals, or any person who shall violate any of the provisions of this act, shall be guilty of a misdemeanor and all right to transact any business in this state shall be forfeited."

A demurrer to the information was interposed upon the ground, as stated in such demurrer, "that it appears upon the face thereof that the facts stated therein do not constitute a public offense, in this: (1) That the act under which the information is drawn is void in its entirety; (2) that said act is void so far as the same applies to the facts set out in the information." The material facts alleged in the information, and which are admitted by the demurrer to be true, are, in substance, as follows: That defendant is a foreign corporation duly authorized to operate a line of elevators or warehouses in this state, and as such it had an elevator at Argusville, in said county, with an agent in charge, which was on May 27, 1907, and prior thereto used by it for the purpose of receiving and storing grain for others and also grain purchased by it; that on said date defendant, having on hand in said elevator certain flax which it had purchased from farmers in that vicinity, shipped the same to Duluth, Minn., where it sold said grain; that the same was regularly inspected and weighed by the state inspector of the state of Minnesota; and that defendant has failed, neg-

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lected and refused to return to its said agent at Argusville an official certificate of the inspection and the official weighmaster's certificate of the weight of the grain so sold by it.

No question is raised by appellant's counsel as to the sufficiency of the facts alleged in the information to constitute the crime defined by said statute, although there are no allegations therein that any official certificates such as are mentioned in the statute were ever in fact issued and delivered to defendant, or that under the laws of Minnesota there is any provision or requirement for the issuance and delivery of such certificates. The necessity for such allegation is to our minds quite apparent. In view, however, of the fact that no such question is raised by the demurrer, we will dispose of the appeal solely upon the grounds urged in appellant's printed brief. But two errors are assigned, and they relate to the same question, to wit, the validity of the act in question; it being appellant's contention, first, that said act is void in its entirety, and, second, that it is void at least so far as it applies to the facts alleged in the information. If either contention be sound, it was error to overrule the demurrer, and the judgment appealed from must be reversed. In disposing of appellant's contention, we must be governed by certain well-established rules of statutory construction, among which are the following: A statute will not be declared unconstitutional unless in plain violation of some constitutional provision. Every presumption is in favor of the validity of a statute, and in case of a reasonable doubt as to its constitutionality it is the duty of a court to sustain it. A statute will be construed, if possible, in harmony with the constitution, and a part may be unconstitutional and the remainder valid, provided the invalid part is so independent of the remainder that it may be eliminated without rendering ineffective the entire statute, unless the invalid portion was evidently the inducement for the enactment of the remainder; but where a law is so emasculated by the elimination of invalid portions that it cannot be said that the legislature would probably have enacted the law in its form as thus emasculated, if it had known that the portions thus eliminated were unconstitutional and void, the whole law must fall. The prime object sought in the construction of a law is to ascertain as far as possible and render effectual the legislative will. The wisdom or policy of a law and the motives which prompted its enactment by the legislature are matters with which the courts have no concern. Keeping in mind

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these rules for our guidance, we will dispose of appellant's points in the order in which they are discussed in the brief.

First. It is asserted that the entire act is void because it contravenes the provisions of section 61 of the state constitution, which requires that a bill shall embrace but one subject, which shall be expressed in its title. The argument, in brief, is that sections 1 and 2 each relate to different subjects; the first to the duty enjoined upon elevator companies to transmit to their local agents the official certificates of inspection and weights, and the second to the duty enjoined upon the local agents to post such certificates. We are entirely clear that such contention is without merit. It is manifest that the act embraces but one subject or object, to wit, the furnishing to the public such information as may be imparted by the posting in the elevators of the official certificates mentioned in the act. In furtherance of this general design, section 1 requires such certificates to be transmitted by the elevator company to its local agent, and section 2 requires the latter to post and keep posted such certificates in a conspicuous place in the elevator. It is thus apparent that these two sections are closely related to the subject-matter of the act. In fact, the provisions of one wuold be rendered abortive without the other. The fact that the title of the act is somewhat restricting in its terms does not render the act void, as the provisions of section 2 which are not expressly referred to in the title are, we think, clearly germane to the subject matter embraced in the title. A reading of the title readily suggests that the body of the act might contain provisions similar to those embraced in section 2; for, without any requirements other than those expressly mentioned in the title, the act would accomplish no useful purpose. This court has so often and so recently passed upon the questions relating to the construction and purpose of the constitutional provision aforesaid that we deem it unnecessary to do more than refer to such decisions. They are the following: State v. Burr (N. D.) 113 N. W. 705; Elevator Co. v. Pottner (N. D.) 113 N. W. 703; State v. Woodmansee, 1 N. D. 246, 46 N. W. 970, 11 L. R. A. 420; State v. Haas, 2 N. D. 202, 50 N. W. 254; State v. Nomland, 3 N. D. 427, 57 N. W. 85, 44 Am. St. Rep. 572; Divet v. Richland Co., 8 N. D. 65, 76 N. W. 993; Richard v. Stark Co., 8 N. D. 392, 79 N. W. 863; State v. Home Society, 10 N. D. 493, 88 N. W. 273; Power v. Kitching, 10 N. D. 254, 86 N. W. 737, 88 Am. St. Rep. 691. For a very recent treatment of this subject, together with

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citations of numerous recent decisions in other jurisdictions, see 6 Current Law, 1531-1535. We accordingly hold that the act in question does not contravene the provisions of section 61 of the constitution.

It is next contended by appellant that the act is void as an unlawful interference with interstate commerce. Our attention is directed to section 8 of the federal constitution, which is familiar to all, and which provides that "Congress shall have power * * * to regulate commerce with foreign nations and among the several states and with the Indian tribes," and we are asked to hold that the statute in question violates this section. As appellant's counsel state, this provision of the federal constitution "has been construed and applied in so many cases that its scope and meaning are no longer debatable. It operates as an effective prohibition upon the states against all interference by legislation with interstate commerce, and it is well settled that whatever constitutes a burden upon interstate commerce, whatever form it may take, is prohibited." This statement, to be strictly accurate, should be qualified to the extent that the interference which is thus prohibited is a direct and substantial interference, as distinguished from an indirect interference. The crucial question is, therefore, whether the act aforesaid in its proper application will operate to directly interfere with commerce between the states. We freely admit that such would be its effect if the construction contended for by appellant's counsel is sound. The claim is made by them that the act by its express terms applies to all shipments and sales of grain made in this or in any other state, regardless of the fact whether such shipments are made to points where there are official inspectors and weighmasters or not. If such is the necessary or proper construction to be given this statute, we should have no hesitation in pronouncing the same unconstitutional and void, as being an unreasonable and direct interference with interstate commerce. We do not agree, however, to this construction. We must, if possible, construe the act so as to give effect to the legislative intention, and at the same time uphold the law as a valid enactment. To say that the legislature intended to require shipments and sales to points only where there are official inspectors and weighmasters, which is the logical result of appellant's contention, seems to us a strained and unwarranted construction. While the meaning and purpose of the law is somewhat obscure, we think by a fair and

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reasonable construction thereof it discloses that the legislative purpose was to require the return of the official certificates only in cases where in the due and regular course of business such certificates are issued and delivered to the elevator company. As thus construed, we see no constitutional objection to the enactment and enforcement of such a law.

A somewhat analogous question was recently before the Supreme Court of Minnesota in State v. Edwards, 94 Minn. 225, 102 N. W. 697, 69 L. R. A. 667. In that case it was held that a statute requiring grain commission merchants to make a report to the consignor within twenty-four hours after the sale is not an interference with interstate commerce. The court there said: "The provisions involved in this case take no account of the grain as an article of commerce until it has been sold, and even then only to require the consignee to make a true report of the transaction within a reasonable time. The subject-matter of the law as applicable to this case no more relates to interstate commerce than the criminal statutes which protect grain from larceny after arrival within the borders of the state. If it be an interference with the prerogative of congress to require commission merchants to make a true report of their dealings with citizens of Dakota or Wisconsin for their protection, why is it not equally an interference with interstate commerce when our criminal laws are put in force to arrest and punish for the larceny of such grain upon arrival within our lines?" It was also held in Atlantic Coast Line R. Co. v. Commonwealth, 102 Va. 599, 46 S. E. 911, that "under its police power a state may reasonably regulate the relative rights and duties of all persons or corporations within its jurisdiction, though incidentally affecting interstate commerce." The court there sustained certain rules relative to storage and demurrage, adopted by a commission. We quote: "The questions raised on this appeal, which have been discussed at length and very ably, * * * are of great importance. They involve the right of the state, under its reserve power, whether that power be called police, governmental or legislative, to regulate the relative rights and duties of persons and corporations within its jurisdiction, so as to provide for the public good and the public convenience by laws which are not inconsistent with the constitution of the state, and which do not, by their operation, directly intrench upon the authority of the United States, or violate some right protected by the federal constitution. * * * The validity of the

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rules and regulations in question, so far as they apply to intrastate commerce, is not denied; * * * but it is insisted that they are wholly invalid, so far as they apply to interstate commerce, * * * upon the ground that that subject is wholly within the jurisdiction of the federal government. That this contention is not true to the extent claimed is well settled by numerous decisions of the Supreme Court of the United States"—citing and quoting from Lake Shore, etc., R. Co. v. State of Ohio, 173 U. S. 285, 297, 19 Sup. Ct. 465, 43 L. Ed. 702, and other cases too numerous to mention.

We are unable to preceive how the necessary effect of the act in question would be to directly, or even remotely, interfere with interstate commerce. It is well settled that a state statute requiring inspection of property, the subject of interstate commerce, does not violate the commerce clause of the federal constitution. Patapeseo Guano Co. v. Board of Agriculture, 171 U. S. 345, 354, 361, 18 Sup. Ct. 862, 43 L. Ed. 191; Territory v. Denver & R. G. R. Co., 12 N. M. 425, 78 Pac. 74; Globe El. Co. v. Andrews (C. C.) 144 Fed. 871, 880; State v. Edwards, supra. In Globe El. Co. v. Andrews, supra, Judge Sanborn, after citing numerous decisions of the Supreme Court of the United States, says: "Under these precedents, it seems clear that the Wisconsin legislature might lawfully prevent fraudulent changes of grades, arbitrary or fraudulent 'dockage' practiced by warehousemen, and shipping out at a higher grade than that on which the grain was taken in. Such regulations would be in aid and furtherance of commerce, by protecting the rights of both buyer and seller. Thus many objections to the Minnesota system, and frauds practiced under it, might be cured. Such regulations, although indirectly affecting interstate commerce, would be wholly local in their character, and would undoubtedly be sustained. Such regulations might even include inspection and weighing for the purpose of detecting and punishing fraud, preventing changes of grades, fraudulent dockage, storage and resale on the weights found before such dockage occurred, etc. All this would be local regulation, to protect the public from fraud and imposition, and as such would not be unlawful regulation of interstate commerce." Inspection laws being constitutional, as a legitimate exercise of the police power of the state, it is entirely clear that a law requiring the result of such inspection to be made public is also constitutional. We must therefore overrule appellant's second contention.

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His third and last contention is "that the act is void in so far as it attempts to make acts or omissions committed in a foregn state a criminal offense." There is no merit in such contention. The assumption that the offense was committed in Minnesota is not true. The statutory offense consists in defendant's failure to deliver to its agent in this state the official certificates aforesaid. The defendant corporation, having been authorized to transact business in this state, is amenable to its laws enacted under its police power to the same extent as its citizens; and, furthermore, it is within the legitimate power of the state to prescribe the conditions upon which foreign corporations may be permitted to transact business within its borders.

We conclude, therefore, that the act in question is not vulnerable to any of the attacks made upon it, and it follows that the judgment appealed from was correct, and should be affirmed. It is so ordered. All concur.

(114 N. W. 482.)

THE STATE OF NORTH DAKOTA v. THE MINNEAPOLIS AND NORTHERN ELEVATOR COMPANY.

Opinion filed Jan. 18, 1908.

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

The Minneapolis & Northern Elevator Company was convicted of violating the elevator law, and appeals.

Reversed.

Ball, Watson, Young & Hardy, for appellant.

J. F. McCue, Attorney General, *R. N. Stevens*, Assistant Attorney General, *W. H. Barnett*, State's Attorney, and *Seth Richardson*, Assistant State's Attorney, for the State.

PER CURIAM. This is a companion case to State v. Mpls. & Northern Elevator Co. (just decided by this court), 17 N. D. 23, 114 N. W. 482. The facts differ from that case only as to the place of the shipment and sale of the grain. As alleged in the information, the shipment was made to and the grain sold at Anoka, in the state of Minnesota, and that, under the law of that state providing for

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the official inspection and weighing of grain, no provision is made for the official inspection or weighing of grain at said place. Following the construction of chapter 113, p. 167, Laws of 1907, adopted in the recent case above referred to, we hold that the facts alleged in the information do not state a public offense under said act.

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

(114 N. W. 485.)

STATE EX REL. NORTH DAKOTA STATE FAIR ASSOCIATION OF FARGO, v. HOLMES, AS STATE AUDITOR OF NORTH DAKOTA, AND STATE FAIR ASSOCIATION OF GRAND FORKS, A CORPORATION.

Opinion filed June 17, 1907.

State Fairs — Appropriations — Compliance With Conditions.

1. Under chapter 46, p. 71, Laws 1905, relating to state fairs, the legislature vested the power to accept the title to lands to be conveyed to the state by the fair association in the governor and attorney general, and further provided that upon failure on the part of either of two state fair associations to be organized under the act, to comply with the provisions of the act, all appropriations should be made to the one complying with the act and the state fair permanently located at the place complying with the provisions of the act.

Held, that the fact that the land conveyed to the state by one fair association had a mortgage thereon could not be urged by the other association as a ground for payment to it of the appropriation after the governor and attorney general had accepted the title, and the association conveying the incumbered title had relied on such acceptance.

Same — Conveyance of Land to State — Decision of Governor and Attorney General on Title Binding.

2. The governor and attorney general having been vested with full authority to accept the title, and having done so, no one but the state can question the legality of such acceptance as to questions of the title of the land, or of the manner of organization of the association.

Same.

3. It was only upon failure to comply with the provisions of the act, as to matters that were preliminary to the acceptance of the title by the governor and attorney general on behalf of the state, that the appropriation could properly be claimed by the association that had complied with the act.

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Same — Management of Fair — Reports — Forfeiture of Appropriation.

4. The failure of one fair association to manage the state fair strictly in accordance with the law, or to use the appropriations and make reports strictly within the terms of the act, is not available to the other association as a ground for the payment to it of the appropriations.

Same.

5. A forfeiture of the appropriation should not be decreed, unless the act under which it is claimed clearly shows that such was the legislative intention.

Application by the state, on the relation of the North Dakota State Fair Association of Fargo, for writ of Mandamus against H. L. Holmes, State Auditor, and the North Dakota State Fair Association of Grand Forks.

Writ denied.

Lee & Towner, Barnett & Richardson, R. M. Pollock and *John S. Watson, Jr.*, Relator. *Guy C. H. Corliss, J. H. Bosard* and *T. F. McCue,* defendants.

MORGAN, C. J. This is an application for a peremptory writ of mandamus against Hon. H. L. Holmes, as auditor of the state, to compel him to issue a warrant in favor of the State Fair Association of Fargo for the sum of $10,000, under the provisions of chapter 46, p. 71, Laws 1905, which is an "act establishing state fairs, locating them at Grand Forks and Fargo, and making an appropriation therefor." The proceeding is brought in the name of the state, on the relation of the North Dakota State Fair Association of Fargo, and the North Dakota State Fair Association of Grand Forks is made a party defendant on the alleged ground that it has an interest in the proceedings.

Section 1 of said act provides for the holding of a state fair biennially at the city of Grand Forks during each odd numbered year, and at the city of Fargo during each even numbered year, subject to the conditions specified in the act, and the location of the state fairs at these cities is declared to be permanent. Sections 2 and 3 of the act specify the conditions to be complied with by the cities of Grand Forks and Fargo before either becomes entitled to receive any appropriation from the state. Section 2 is as follows: "If an organization, to be known and designated as the North Dakota state fair association for Grand Forks, or by some similar name, shall be, during the year 1905, created and organized under and pursuant to the general laws of this state, in relation to

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corporations, with a paid-up capital stock of not less than twenty thousand dollars, such association shall become entitled to receive the appropriations hereinafter named, upon the conditions set forth in this act. The said association may acquire the title to not less than seventy, nor more than one hundred and sixty acres of ground at or near the city of Grand Forks, in said state, and such association may, and it is hereby empowered and authorized to convey the title to the land so acquired by it, unto the state of North Dakota, which property, when so conveyed, shall be held by the state of North Dakota forever for the following purposes and none other: For the purpose of exhibiting thereon under the management of such association, or its successors, biennially, during each odd numbered year the agricultural, stock breeding, horticultural, mining, mechanical, industrial and other products and resources of the state of North Dakota, including proper exhibits of the arts, sciences and all other public displays pertinent to and dependent upon exhibitions and expositions of human art, industry and skill. The said association may use so much of its paid-up capital stock as may be necessary for the acquisition of title to the land so to be purchased by it for use as fair grounds, and the balance thereof shall be and constitute a fund towards the construction of buildings and other permanent improvements thereon." Section 3 is the same as section 2, except that it is made applicable to Fargo. Section 6 of the act provides for the acceptance of the title to the land to be conveyed by the State Fair Association, and that such acceptance shall be made by the governor and attorney general. It further provides that, should the state cease to appropriate the sum of at least $5,000, annually to be awarded as premiums, then the title of said premises shall revert to and become the property of the association that transferred the same to the state. It further provides that the act shall not become binding upon the state as to either association until the stockholders shall adopt and file with the secretary of state an irrepealable by-law relating to the board of directors. Section 7 provides, among other things, for the making of a report by each fair association on or before the first day of January each year following the holding of a state fair, and provides further what such report shall contain. Section 8 provides for an appropriation of $10,000 for the purpose of enabling said association to inclose the grounds and to aid them in the erection thereon of suitable buildings. It further

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provides that no part of said appropriation shall be payable until after a deed of conveyance of the premises upon which the fair is to be held shall be made and accepted by the state, and that such appropriation should lapse and only become available to the association whose conveyance was made and accepted by the state on or prior to June 1, 1906. Section 9 provides for an annual appropriation of $10,000 to be expended by the directors of said association; not more than $5,000 thereof in any one year to be used for the erection of buildings and making permanent improvements, and the other $5,000 to be used and expended as premiums to the exhibitors at said fair. Section 10 is as follows: "This act shall not become binding or effective upon the state as to either of such associations until the stockholders of such association shall adopt a by-law expressly accepting and agreeing to all of the conditions hereof, and file a certified copy of said by-law with the secretary of state." Section 11 is as follows: "In the event of the failure of such associations to comply with the provisions of this act, then the other association shall be entitled to hold a state fair upon its grounds during each year and receive the appropriation herein made for the association failing thus to comply with this act, and such failure on the part of either association shall operate to permanently establish the state fair upon the grounds of the other association."

The writ is demanded by the relator upon the grounds that the State Fair Association of Grand Forks has not complied with the provisions of this act, and the relator's contentions as to such failure may be summarized as follows: (1) The Grand Forks association did not organize with a paid-up capital of $20,000. (2) That said association did not convey the real estate required to be conveyed to the state by said act in the manner contemplated by the same, and did not convey said real estate to the state free from incumbrance. (3) That the said association failed to file a report to the governor within the time and of the character required by the act. (4) That it failed to pay $5,000 to exhibitors at said fair, as required by said act. (5) That it misappropriated about $2,000 of the money to be paid to exhibitors at said fair by paying said sum as purses for horse racing. (6) That it misappropriated about $5,000 of the money appropriated by the state for the erection of buildings, to the payment of a floating indebtedness of the Grand Forks association.

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It will be observed that the relator's contentions necessitate a construction of section 11 of the act, in connection with the facts which are stipulated to be true; that is, it is stipulated that there was a mortgage of $5,000 upon the land conveyed to the state, and that the report was not made within the time prescribed by the act, and that it did not contain all the matters required to be stated therein by section 7 of the act. It is also stipulated that no cash was paid into the treasury of the Grand Forks association when it was organized, although it is contended by the Grand Forks association that it was organized with a paid-up capital of $20,000, the full equivalent of a money capital of that amount. That these omissions and irregularities have forfeited all claim to the appropriation by the Grand Forks association is the contention of the plaintiff. That these admitted omissions and irregularities are not such as to warrant the paying of the appropriation to the plaintiff is the answer of the Grand Forks association to the contentions of the plaintiff. It will be seen that these omissions and irregularities comprise two distinct matters or classes of requirements provided for by the act: (1) Those to be done by each association before the title is accepted by the state. (2) Those to be done by each association from year to year after it has held a fair. Whether a failure to comply with either or all of these provisions by either association transfers the right to the appropriation to the other association, as a matter of law, is the precise question to be determined. This involves a construction of section 11, above quoted. That the language of that section is broad enough to technically include any of these omissions, we might admit. Whether it is within the spirit and intent of the act is a very different question.

In respect to the alleged omissions to comply with the law in respect to matters preliminary to the conveyance of the land to the state, we are satisfied that section 11 should have no application. The governor and attorney general were made and constituted by the act as the agents of the state to accept the title. Sections 7 and 8 unequivocally clothe these officers with power to accept the title to the land deeded to the state. The law does not specify what that title shall be. That is left undisclosed. There is no direction that it shall be unincumbered. The title was to be conveyed to the state. It was conveyed to the state. The acceptance was technically within the terms of the act. If it was

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the legislative intention to demand an unincumbered title, it would have been stated. As it is, the officers did not accept the title tendered, in violation of the terms of the act so far as the mortgage was concerned. The same may be said of the contention as to the want of a paid-up capital in cash of $20,000. In the place of accepting cash for its stock, the association accepted land with improvements thereon and issued its stock to the stockholders in the corporation, which deeded the land to the Grand Forks State Fair Association. This was, as to final results, the same as though the association had sold its stock for cash, and with the cash purchased the land. We do not intend to intimate whether the state could have avoided the action of these two officers in a proper proceeding; but we deem it beyond dispute that the legislature did not intend that either association could avail itself of irregularities in matters preceding or pertaining to the acceptance of the title by these officers. The act as passed did not become effective at once. Certain matters of compliance with its provisions were required of each association before the act could become effective as to it. In accepting the deed, the act became effective as to each association by virtue of the action of the governor and attorney general. It would be an unreasonable construction to put upon the language used to say that either association, after acceptance by the state, through its delegated agents, can intervene and demand the appropriation, thereby completely setting aside and ignoring the action of such officers after the other association has acted in reliance upon the conclusiveness of the acceptance by the state of the title and organization tendered by it.

Section 11 was not intended to give either association the right to avail itself of the appropriation upon failure by the other to technically comply with all the provisions of the act in relation to matters preliminary to acceptance by the state. If either association had failed to become organized, or to deed the required number of acres of land, or to file a by-law under section 10, then the provisions of section 11 could be invoked by the other association as granting to it the right to the appropriation. In other words, if either association had failed to meet the requirements of the act as to fundamental matters, and could under no circumstances fulfill the essential conditions to acceptance, then the

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other would be entitled to the appropriation. We deem this construction to be in accordance with the legislative intention. As to other matters required as preliminary to acceptance by the state, the action of the officers concluded the right of the other association to claim the appropriation. It is argued that the governor and attorney general had no power under the act to conclude the rights of either association to avail itself of failure of the other to technically comply with the provisions of the act. We think otherwise. They were constituted a tribunal to accept the title, and have done so, and we deem this binding upon the Fargo association in this case.

No cases in point have been cited, and we have failed to find any, after careful search. The situation is analogous to issuing certificates of final proof and patents by the Land Department of the United States. Mistakes of fact by this department cannot be taken advantage of by third persons seeking to secure the title to the land, although the government can do so. In Steel v. Smelting Co., 106 U. S. 447, 1 Sup. Ct. 389, 27 L. Ed. 226, it was said: "Necessarily, therefore, it [Land Department] must consider and pass upon the qualifications of the applicants, the acts he has performed to secure the title, the nature of the land, and whether it is of the class which is open to sale. Its judgment upon these matters is that of a special tribunal, and is unassailable except by direct proceedings for its annulment or limitation." See, also, Smelting Co. v. Kemp, 104 U. S. 636, 26 L. Ed. 875; Gale v. Best, 78 Cal. 235, 20 Pac. 550, 12 Am. St. Rep. 44.

The failure of the Grand Forks association to comply with statutory requirements as to making a report, and not paying to exhibitors the required amounts, and paying out money for alleged unwarranted purposes, and the failure to use the money strictly as contemplated by the act, are conditions subsequent to the organization. It is claimed by the plaintiff that the right to the appropriation was thereby forfeited, and that such forfeiture becomes self-executing under the terms of sections 11 of the act. We do not concur in this contention. We must look at the objects intended to be accomplished by the act. The legislature deemed it wise to provide for state fairs at two places, and provided for appropriations for such purpose, and it is not unreasonable to suppose that such appropriations were intended to continue permanently, although necessarily within the power and discretion of future legis-

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latures to cease making such appropriation. These appropriations are to be used for state fair purposes for the welfare and progress of the agricultural interests of the whole state. If these appropriations are cut off, the benefit derived from appropriations that have been made will necessarily cease.

Can it be possible that the legislature intended that failure to comply with some or all of these conditions subsequent was to cut off the appropriation instanter as a matter of law, without a hearing by the association in default? Strictly speaking, the Grand Forks association is not a necessary party to this proceeding, and, if section 11 is to be construed as contended for by the plaintiff, the state auditor is legally bound to pay the appropriation to the association not in default, whenever default has been made by the other association in complying with these conditions as to the way in which the fairs shall be managed and the appropriations expended. Before so harsh a construction should be given to a statute, its language should be clear and unmistakable that such was the intention. A good-faith attempt to comply with these conditions subsequent is a good defense to a demand for the appropriation by the Fargo association. If the act is susceptible of a construction reasonably consistent with the purposes to be accomplished, such construction should be adopted in place of a harsh one that would lead to sacrifice of property, interests of the association in default, and detrimental to state interests.

These reports were called for in order to give the legislature information for its guidance in making future appropriations, and that it might act intelligently in legislating upon the subject. The report was made within time for the purpose intended, and, if it had not been, the state only can complain, as we deem the requirement simply directory as to the time fixed for making it. The same may be said of the alleged failure to pay fully $5,000 in premiums. Under the contention of the plaintiff, the payment of $4,900 in premiums would give it the right to the appropriation upon demand, and that would be true if section 11 gives it such right under the present showing, as that would necessarily follow if the strict wording of the section is to govern. It would be too strict a construction to hold that such technical omissions should inure to the benefit of the other association. Likewise, it must follow that the appropriation does not become forfeited if any portion of the money is expended for unwarranted purposes. We

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do not think that such was the intention of the legislature. Whether the use of a portion of the appropriation for purses for horse racing was illegal we need not determine. It is sufficient to say that the plaintiff association cannot avail itself of the failure to strictly comply with the provisions of the act as to the management of the fair or the expenditure of the state money. That is a matter for the state through legislative action. The legislature of 1907 made no change in the law in reference to these fairs, and continued the appropriation of the same as previously made. It is presumable that it did so with full information as to the manner in which the money was expended. The same may be said of all other irregularities in complying with the provisions of the act that are in the nature of conditions subsequent to the organization. Section 11 does not clearly apply to them. We do not think that the language of that section should be construed to defeat the obvious objects of the law at the sacrifice of property rights. Before this should be done, the language of the act should be clear in favor of such a construction.

Whether mandamus is a proper remedy in this case we do not determine, as the defendants have not properly raised any question thereon.

The writ is denied.

FISK, J., concurs.

SPALDING, J. I concur in the conclusions, but not in all the reasons given therefor by my associates.

(112 N. W. 144.)

STATE OF NORTH DAKOTA v. JOHN P. DAHLQUIST.

Opinion filed Feb. 21, 1908.

Evidence — Freight Receipts — Books of Railway Station Agent.

1. A record describing articles of freight received at a local station, and delivered to the consignee, with his signature acknowledging receipt of such articles, is competent evidence, tending to show the nature of the articles so receipted for.

Same — Agency — Receipts by Agent of Consignee.

2. A drayman, authorized in writing by the defendant to receive and receipt for freight at a local railway station, is an agent of the

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defendant for such purposes; accordingly *held,* receipts for freight, belonging to the defendant, taken from the railway station by a drayman possessing such authority, and receipted for by him, are competent evidence, as tending to show the receipt by the principal of the articles of freight described in the record of the station, containing such receipts.

Reception of Evidence — Motion to Strike Out.

3. The competency of evidence depends on the state of the record when the evidence is offered, and the admission of evidence afterward shown to be incompetent, when no specific motion to strike it out or request to instruct the jury to disregard it is made, is not reversible error.

Intoxicating Liquors — Nuisance — Evidence.

4. A record of the local railway station, describing outgoing freight delivered to it by the defendant, which record is identified by the station agent, who testifies that he received the information as to the character of the freight so shipped as described in the record, from the defendant, is competent evidence, to show the character of such shipments, in the action at bar.

Same.

5. The records of a local railway station, containing receipts signed by the defendant, and others signed by his agent and a description of outgoing freight, described to the agent, and shipped by the defendant, are competent evidence, tending to show the defendant to be conducting the business of dealing in intoxicating liquors or beer, when such records describe large quantities of empty beer cases, bottles, and casks, and especially when the quantity so received was so great as to render it impossible for the defendant to have made personal use of it, during the time covered.

Objection to Evidence — Competent and Incompetent Items of Record.

6. An objection made to the admission of a record as a whole, and without distinguishing or pointing out in the objection the particular items, if any, which were competent evidence, and those which were claimed to be incompetent, when a part of the items were competent, and some of them may have been incompetent evidence, is inadequate, and it is not error for the trial court to admit the whole record.

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

John P. Dahlquist was convicted of maintaining a liquor nuisance and appeals.

Affirmed.

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B. D. Townsend and *Engerud, Holt & Frame,* for appellant.

A record must be identified by the entrant, or his absence accounted for. 1 Greenleaf on Ev., section 436; 2 Phillips on Ev., section 926; Donner v. State, 95 N. W. 40; Traber v. Hicks, 32 S. W. 1146; Howard v. State, 32 S. W. 544; Wade v. State, 35 S. W. 663; Gulf C. & S. F. Ry. Co. v. Frost, 34 S. W. 167; Young v. Miles, 20 Wis. 646; McCornick v. Saddler, 37 Pac. 332.

Entrant must have personal knowledge of the facts that he enters. Chaffee v. United States, 18 Wall, 542, 21 L. Ed. 908; Conn. Mut. Life Ins. Co. v. Schwenk, 94 U. S. 598, 24 L. Ed. 294; Butler v. Estrella Raisin Co., 56 Pac. 1041; Whitney Grocery Co. v. Roach, 42 S. E. 282; Dougan v. Dunham, 42 S. E. 390; Swan v. Thurman, 70 N. W. 1023; Carlton v. Carey, 86 N. W. 85; Price v. Standard L. & A. I. Co., 95 N. W. 1118; New Jerzey Z. & I. Co. v. Lehigh Z. & I. Co., 35 Atl. 915; Mayor of N. Y. v. Sec. Ave. Ry. Co., 102 N. Y. 579, 7 N. E. 905; The Norma, 68 Fed. R. 509; Tingley v. Fairhaven Land Co., 36 Pac. 1098; Walling v. Morgan Co., 28 So. 433.

Barnett & Richardson, for respondent.

Receipts for freight delivered are competent against the party who signs them. State v. Drumright, 29 Ga. 430, 1 Am. & Eng. Enc. of Law, 717; Commonwealth v. Hildreth, 77 Mass. 327.

Acts of an agent bind the principal in a criminal action against him. 12 Cyc. 420; 6 Am. & Eng. Enc. Law, 570; 2 Wigmore on Ev. 1280; Wharton on Criminal Evidence (9th Ed.) 696; State v. Oeder, 61 N. W. 190.

Spalding, J. The defendant was convicted of the crime of maintaining a nuisance in violation of the law known as the prohibition law, at Kindred, Cass county, at divers times between June 1, 1906, and August 31st of the same year. On the trial, evidence was submitted of the sale by the defendant of several bottles of beer and of an analysis by Prof. Ladd of one of the bottles so sold, which Prof. Ladd testified contained 3.78 per cent of alcohol by volume, and 3.1 by weight, and was beer. Several other witnesses testified that they had purchased of defendant, on the premises described, beer or malt, and that they were unable to state which but that it tasted like beer, and one testified that the bottle that he

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was served from was labeled "Beer." No assignment of error is made on this appeal as to the admission of evidence of these witnesses or as to the charge of the court to the jury. The state then introduced the testimony of F. B. Clewer, station agent of the Great Northern Railway Company at Kindred, who testified that he had charge of the freight delivered at that station, and he produced his office record of freight received during the time in question. This contained entries of dates and descriptions of the goods and signatures of parties to whom they were delivered. Among others contained in this record were various articles described as casks, barrels and cases of beer, some of which were receipted for by the defendant in person. The witness identified and testified to the genuineness of the defendant's signature to the receipts. Others were receipted for by one Johnson, the drayman who did the defendant's draying, and a paper, signed by the defendant, upon a regular form furnished by the railway company for that purpose, authorizing Johnson to receive and receipt for freight coming to the defendant's address was received in evidence. The record before referred to contained the receipts of Johnson for one case of beer on June 6th, and 21 other consignments on different dates from June 12th to August 31st, from different consignors, in each instance being one or more barrels or casks of beer, all consigned to defendant. This record was received in evidence as Exhibit B; after which a book known as Exhibit D, being a tissue copy book of waybills for freight going out of Kindred, was identified, and its method of use described, and it was received in evidence. This tissue copy book is the local record of freight shipped out, and is made by copying in the letter press waybills sent with the freight, and he testified was the only record kept of outgoing freight. This exhibit showed the merchandise received from the defendant during the month of August, 1906, and upon it is designated the character of the merchandise. The witness testified that he got his information of such character from the shipper, and entered the character or description of the merchandise upon the waybill, which is copied into the book known as Exhibit D. By shipper, he meant either the shipper himself, or his agent or drayman. He testified that the entries in Exhibit D as to the character of the merchandise were correct according to the information he received, and that the character of the merchandise going out was shown originally by the shipping bill, prepared by the shipper himself, and that, with

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reference to the shipments in question, he received such information from the defendant himself. It appeared that the entries relating to the merchandise in question contained in Exhibits B and D had been made partly by the witness and partly by his clerk, and during part of the time by a relief man sent by the railway company to take his place during his temporary absence. Evidence regarding entries made during this absence was stricken out by the court, and the jury cautioned not to consider it. The witness identified the different entries made by himself and those made by his clerk. The deputy sheriff who made the arrest of the defendant, and who executed a search warrant of the premises in question, testified as to the finding of several bottles marked "Beer" and numerous empty bottles on the premises, together with four barrels and a case either full or partly full of bottles known as beer bottles, and one barrel containing 17 full bottles, one of which barrels was numbered 739, it being the same number attached to one of the barrels described in the record of the railway company's agent, as consigned by the Heilman Brewing Company. The receipts for freight executed by the defendant and the draymen were objected to on the ground that they were incompetent, hearsay, not the best evidence, and no foundation laid, and, more specifically, because they were secondary evidence, hearsay, and being conclusions written by some person not disclosed by the evidence, and parties not being present to vouch for them, and because no evidence showed they were correctly made or the source of information of the persons making the waybills, and because as evidence they could not be admissible as admissions. Objection was made to the admission of the record of the outgoing articles on the same ground, and because it was not the record required by law, and not kept entirely by the witness. These objections were repeated in various forms, but in substance the same, and, after the witness had concluded, motions to strike out such evidence on the same grounds were denied. The admission of this evidence over objection, and the denial of the motions, form the basis of the defendant's assignments of error.

1. The first question for determination is whether it was error to admit the testimony of the witness Clewer, and the records of his office, showing the freight received and receipted for by the defendant. The appellant lays great stress upon this not being the official record required by law, being hearsay, and not all in the

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handwriting of the witness, and some of it made when he was not present. Had this record been offered in evidence and received as a book of account, there might be force to this objection. However, on that point, there is a conflict in authorities, and it is unnecessary on this appeal to determine that question. In our view of the law, this record which contained a description of the articles received and delivered, also the signature of the defendant acknowledging the receipt of the articles specified, and the testimony identifying the record and the defendant's signature, and describing how it was kept and for what purpose, were clearly competent to show an admission by defendant of the receipt of large quantities of beer. The state was attempting to show the receipt by him of beer in such quantities that it could not have been obtained for personal use, and must have been received for sale. Klepfer v. State, 121 Ind. 491, 23 N. E. 287. The defendant did not testify, and he offered no evidence in his own behalf. Had he made a claim that the records misdescribed the articles and that they did not contain beer, he had an opportunity to rebut the admissions, and show that the record which he signed did not state the facts, but in the absence of anything to show the contrary, such receipted record, after being identified, and its use and method explained, furnished at least some evidence that the defendant had received the articles described therein and receipted for by him. We deem it altogether immaterial whether the railway company's agent himself kept the record and made the descriptive entries, or whether he made none of them. The signature of the defendant receipting for the different items as described was the main element, and constituted this record competent evidence as against the defendant, in so far as it related to merchandise receipted for by him. Commonwealth v. Hildreth, 77 Mass. 327. The same rule applies to that portion of this evidence where the receipting was done by Johnson, the drayman. He was a duly authorized agent of the defendant, his authorization being in writing, and the defendant is charged with the knowledge of the agent acquired in the transaction of the principal's business, relating to such business, and the receipt for articles described as beer, signed by Johnson, acting for the defendant, at least furnished prima facie evidence of the character of the property receipted for. 12 Cyc. 420; 6 Am. & Eng. Enc. Law, 570, and cases cited; Rice on Evidence, section 230. Whatever is done by any agent in reference to the business in which he is at the

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time employed, and within the scope of his authority, is said to be done by the principal, and may be proved, as well in criminal as in a civil case, in all respects, as if the principal were the actor or the speaker. Cliquot v. U. S., 70 U. S. 114, 18 L. Ed. 116. When the relation of principal and agent is established in a particular transaction, the agent's admissions may be imputed to the principal if the agency involves the making of such admissions. Wharton, Crim. Ev. 695.

2. Objection was made to the question addressed to the witness Clewer, the station agent, asking him to give dates and description of merchandise addressed to the defendant, and delivered to the drayman Johnson, pursuant to written authority from defendant, as being incompetent, hearsay, calling for a conclusion of the witness, and upon the grounds of the former objection to Exhibit B. The overruling of this objection is assigned as error. At the time this question was asked the evidence showed the agency of Johnson, his signature to receipt for articles described as being consigned to the defendant. The court had a right to presume that he knew the contents of the receipts he had signed, and without further explanation the evidence was admissible. It was only at a later stage in the trial when the testimony of Johnson disclosed that he disclaimed knowledge of the descriptions contained in the receipts signed by him and of the character of the articles, further than that some of the latter were barrels, that it appeared that this question may not have been proper. We do not deem it important to discuss or determine whether it was ultimately proper or not. It was proper as the record stood, when it was asked, and after the testimony given by Johnson, no motion to strike out this evidence was made, and the record shows no request to instruct the jury to disregard it. State v. Vey (S. D.) 114 N. W. 719.

3. The only other question relates to the admissibility of the testimony of the witness Clewer, regarding outgoing freight, and his record which showed the receipt and shipment by him of various beer receptacles. This record contained a description of the articles shipped, and the name of the consignor, he being the defendant, and the witness testified that he obtained his information from the defendant; that the defendant himself made shipping bills for the articles, which described them. It appears to us that with reference to such articles as the defendant himself de-

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scribed in the shipping bills made by him or described to the agent, this evidence is clearly competent, as tending to show that disposition had been made of the beer received, and indicating that the defendant was doing a saloon business. Regarding some of these items, the testimony of the witness was quite general as to information received from the defendant, and while it might be inferred that the defendant personally described to the witness all the articles shipped, yet we think the testimony as a whole indicates that he had no knowledge of some of the articles which were not received by himself, except as he obtained his information from this record. But no objection was made which discriminated or distinguished between the items received by the witness himself, and those which may have been received by the clerk. To have constituted error in the admission of the record, the defendant should have pointed out and objected to the specific items not received by or described to the witness by the defendant, and while the evidence might even then have been admissible, we are satisfied, that if not properly admissible, the objection made was inadequate to exclude it under the circumstances. Had this objection been sustained, it would have excluded the entire exhibit, including the record of the shipment of the articles described by the defendant to the witness, as well as those articles apparently received by the witness's clerk. The record in connection with the testimony of the witness, of the shipment of the items described to him by the defendant was clearly admissible, and, if he desired to exclude the other items, they should have been specified in detail in the objection. It was no part of the duty of the court to sift out the items which were proper, and those which may have been improper. That duty belonged to the attorney making the objection, and the objection should have been presented so the court could have ruled upon the items separately, if necessary. Without determining whether all the items were competent evidence, or whether a proper foundation had been laid for all of them, we deem it beyond question that some of them were competent, and that, therefore, no error was committed in receiving this evidence. The rule is that, where parts of a record are admissible in evidence, an objection to the whole, or an objection which does not specify the parts which are not admissible is properly overruled, and this rule also applies to the motions to strike out. Kolka v. Jones, 6 N. D. 461, 71 N. W. 558, 66 Am. St. Rep. 615; Boylan v. McMil-

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lan (Iowa) 114 N. W. 630; Roeller v. Hall, 62 Minn. 241, 64 N. W. 559; Walrod v. Webster Co., 110 Iowa, 349, 81 N. W. 598, 47 L. R. A. 480; Sullivan v. Nicoulin, 113 Iowa, 76, 84 N. W. 978; Thompson on Trials, section 719; 12 Cyc. 567.

Finding no reversible error, the judgment of the district court is affirmed. All concur.

(115 N. W. 81.)

State of North Dakota v. John S. Murphy.

Opinion filed Feb. 20th, 1908.

Criminal Law — Forgery — Proof of Similar Offense.

1. On a prosecution for the crime of uttering a forged instrument knowingly, with intent to defraud, proof of similar offenses of forgery is admissable only as bearing on the intent with which the act for which the accused is informed against was done.

Same — Intent — Admission of Signature.

2. Proof of similar offenses in such cases is admissible only as having a bearing on the intent, although the accused admits at the opening of the trial that he signed the name of the person to the instrument, whose name is claimed to have been forged, and knew when he uttered the instrument that he had signed the name of such person to such instrument.

Same.

3. Proof of similar offenses in such cases as bearing on the intent alone is admissible, although the jury would be justified in finding a fraudulent intent without such proof, if they found that the accused was not authorized to sign the name of the person whose name is claimed to have been forged.

Same — Hearing Evidence — Res Gestae.

4. Declarations of a party to a contract, as to the terms of the contract, are not admissible as evidence as a part of the res gestæ when made after the contract is completed, and not in the presence of the parties, although made very soon after the parties separated.

Same.

5. Such declarations in this case considered, and *held* not within the exception to the rule against hearsay evidence that such declara-

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tions are admissible as spontaneous expressions made in reference to the contract.

Jury — Entry of Jury Room by Trial Judge — Act Prejudicial.

6. Entering the jury room by the trial judge in the absence of the attorneys, at the request of the jurors, after they have retired to deliberate on their verdict, and having any communication or conversation with the jury in reference to the case, requires the granting of a new trial, without consideration of the question whether such conversation was prejudicial or not.

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

John S. Murphy was convicted of forgery, and appeals.

Reversed.

Barnett & Richardson, John F. Callahan and *W. S. Lauder,* for appellant.

Proof of one crime has no tendency to prove another unless they are so connected or related, that proof of one has a direct bearing upon another. Coleman v. People, 55 N. Y. 81; People v. Chea, 41 N. E. 505; Shaffner v. Com., 72 Penn. St. 60; Com. v. Jackson, 132 Mass. 16; People v. Molineaux, 61 N. E. 286; 1 Bishop's New Crim. Proc., section 1120.

If the intent is fairly deduced from the act itself, proof of other offenses is not admissible. People v. Molineaux, supra; People v. Lonsdale, 81 N. W. 277; People v. Dolan, 78 N. E. 569; State v. Vance, 94 N. W. 204; Bink v. State, 89 S. W. 1075.

Before proof of other offenses is admissible there must be dispute as to the identity of the appellant, the system, or as to his intent. Davenport v. State, 89 S. W. 1077; Bink v. State, supra; Coleman v. People, supra; People v. Corwin, 56 N. Y. 365; People v. Peck, 103 N. W. 178.

Declarations admissible as res gestae must be uttered contemporaneously with, and grow out of the act, and so connected with it, as to form one transaction. Wharton's Criminal Evidence, section 262 (8th Ed.); Underhill on Criminal Evidence, section 93; 1 Greenleaf on Evidence (16th Ed.) 192; 1 Rice on Evidence, section 212; Gillett on Indirect and Collateral Evidence, 290; 2 Am. & Eng. Enc. Law, 523; Lund v. Inhabitants of Tynsborough, 9 Cush. 36; People v. Lane, 34 Pac. 856; People v. Tucker, 38 Pac. 195;

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Cole v. State, 53 S. E. 958; Warwick v. State, 53 S. E. 1027; Johnson v. State, 108 N. W. 55; State v. Mickler, 64 Atl. 148; Stevison v. State, 89 S. W. 1072; Tillson v. Terwilliger, 56 N. Y. 273; 2 Jones on Evidence, section 347.

The visit of a trial judge to the jury room after the case is submitted is fatal to the verdict. State v. Wroth, 47 Pac. 106; 1 Spelling on New Trial and Appellate Practice, 75; Danes v. Pierson, 33 N. E .976.

Judge can only communicate with jurors in open court, in presence of counsel upon both sides. Read v. Cambridge, 124 Mass. 567; Crabtree v. Hagenbaugh, 23 Ill. 289; Fisher v. People, 23 Ill. 218; Bank v. Mix, 51 N. Y. 558; Snyder v. Wilson, 32 N. W. 642; O'Brien v. Insurance Co., 38 N. Y. S. 483; Gibbons v. Van Alstyne, 29 N. Y. St. Rep. 463; Plunket v. Appleton, 51 How. Pr. 469; State v. Alexander, 66 Mass. 148; Fish v. Smith, 12 Ind. 563; Valentine v. Kelley, 54 Hun. 79; Havenor v. State, 104 N. W. 116; Hearst v. Webster Mfg. Co., 107 N. W. 666; Sommer v. Huber, 183 Pa. St. 162; Hopkins v. Bishop, 51 N. W. 902; Quinn v. State, 30 N. E. 300; High v. Chick, 81 Hun. 100; Blashfield Inst. to Juries, Vol. 1, section 179; Moody v. Pomeroy, 4 Denio 115; Seely v. Bisgrove, 83 Hun. 293.

T. F. McCue, Attorney General, *R. N. Stevens,* Assistant Attorney General, *Geo. A. McGee,* State's Attorney of Ward county, and *B. D. Townsend,* for respondent.

In prosecution for forgery guilty knowledge must be shown. Montgomery v. State, 12 Tex. App. 325; Clark v. Commonwealth, Ky. L. Rep. 1029, 63 S. W. 740; Krum v. State, 148 Ind. 401; Higgins v. States, 157 Ind. 573; 3 Greenleaf on Evidence, page 111.

If the act of the trial judge in entering the jury room, and communicating with the juror was without prejudice, it was not error. Kerr v. Hammer, 15 N. Y. Supp. 605; Helmbrecht v. Helmbrecht, 31 Minn. 505; Hart v. Lindley, 50 Mich. 20; Oswold v. Railway Co., 29 Minn. 5; Priest v. State, 34 S. W. 611; People v. Kelley, 94 N. Y. 526; Allen v. Aldrick, 29 N. H. 63; Goldsmith v. Solomens, 2 Strob. 296; People v. Carnal, 1 Park. Cr. Rep. 256.

Where the evidence shows defendant's guilt, the showing of error must indicate that if a new trial were granted, a like conviction could not be had. Leyson v. Davis, 34 L. R. A. 453; People v.

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Fernandez, 35 N. Y. 49; State v. Nelson, 91 Minn. 143; State v. LaGrande, 99 Iowa, 10; State v. DeBord, 88 Iowa, 103; State v. Thompson, 95 Iowa, 464; Rev. Codes N. D., 1905, section 10157.

MORGAN, C. J. The defendant was convicted of the crime of forgery in the third degree, and sentenced to imprisonment in the penitentiary for the period of one year and six months. The offense is charged in the information to have consisted in fraudulently and feloniously uttering a certain road overseer's receipt, knowing that the same was a forgery, which said receipt is in the following words and figures: "Road Overseer's Receipt, North Dakota. $231.30. Minot, Sept. 8, 1904. Received of the Great Northern Railway Company, two hnudred thirty-one 30-100 dollars, in full payment of road taxes levied against its property for year 1904 in Road District No. 1 and 2, township of Ross, county of Ward, North Dakota. Paid in labor upon the public highways of said road district by ——— days work by man and team, and ——— days work by man. Wm. Crowden, Overseer of Highways in Road District No. 1 and 2, Ross Township, Ward County, North Dakota." In the information it is further alleged that in the year 1904 the Great Northern Railway Company was indebted to Ross township in Ward county, N. D., in the sum of $231.30 for road taxes assessed against its property in said township for that year; that one Wm. Crowden was the road overseer of said township, and was authorized to collect taxes from said company and to receipt for the same, and that the defendant was authorized by said Great Northern Railway Company to pay said road taxes by doing work upon the highways of said township pursuant to a contract between him and said railway company, under the terms of which the said company agreed to pay said defendant the amount of said taxes upon presentation to said company of the road overseer's receipt for the full amount of said taxes. Upon this appeal there are many assignments of error, as the trial was a protracted one. The appellant, however, has argued only five assignments of error, and we will only dispose of those that have been argued in the brief. Upon the trial the defendant admitted that the name of Wm. Crowden, or Wm. Crowder, as it is sometimes spoken of in the evidence, was not signed to said receipt by said Crowden or Crowder, but that the same was signed thereto by the defendant himself or by his office clerk under his instructions. On the trial the state, under objection, was permitted to show that num-

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erous other receipts of a similar nature to the one set forth in the information had been uttered by the defendant. These receipts were for taxes in different road districts and for different amounts, and some of them purported to have been receipts for road taxes from the Great Northern Railway Company, and some of them purported to be receipts for road taxes from the Soo Railway Company. The introduction of these other receipts is strenuously claimed to have been erroneous and prejudicial; and the question presented on that assignment is one of the main questions argued on the appeal.

The contention of the state is that such evidence was proper as bearing upon the intent with which the defendant uttered the receipt in question. The statute which it is claimed was violated in this case provides that the uttering of the forged instrument or receipt must have been done with intent to defraud. It therefore follows that, if Crowder authorized the defendant to sign his name to said receipt upon receipt of the money, no offense would be committed in uttering it by presenting it to the railway company in order that he might be reimbursed, as provided for by his contract with the railway company. As has been seen, this contract provided that the defendant was to be paid by the company a certain proportion of the amount assessed against it in any township upon presenting and turning over to it a valid receipt from the proper township officer that the road taxes assessed against said railway company had been fully paid by work upon the highways of said township in compliance with the statute permitting such taxes to be liquidated in such manner. The contention of the state is that the Crowder receipt was forged and presented to the railway company, and the money drawn thereon with intent to defraud the company. The defendant's contention is, as stated before, that Crowder authorized him to sign the receipt, and that he drew the money thereon in good faith, and without any fraudulent intent whatever. The trial court admitted evidence that the defendant had drawn money from the Great Northern Railway Company upon presentation of receipts purporting to have been signed by the road overseers of other townships in Ward county. These other receipts were in like terms with the receipt described in the information, excepting as to the date, the name of the township, the amounts, and the names of the persons purporting to have signed the same as road overseers, and some of the receipts were

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for the taxes assessed against the Soo Railway Company. The contention of the state as to some of the receipts not described in the information is that they were signed by the road overseers, but the amounts were changed and raised after they were signed. From these facts, it is manifest that the question of the defendant's intent in uttering the receipt set forth in the information became an important one at the trial. As the signing of Crowder's name to the receipt and the uttering of it knowing that it had not been signed by Crowder, but by the defendant himself, were admitted by the defendant at the trial, the question whether Crowder had authorized the defendant to sign his name to the receipt and the defendant's intent were the only questions that were in issue before the jury.

By admitting the signing and uttering of the receipt, the defendant did not, of course, admit as a fact that the uttering of the receipt was with a fraudulent intent. Whether this was done fraudulently or in good faith was not and is not ordinarily in such cases capable of proof by direct evidence, nor would it necessarily follow that the defendant uttered the receipt fraudulently, although the jury may have been justified by the evidence in finding that the defendant was not authorized as a matter of fact to sign Crowder's name to the receipt. The legal inference that a person is presumed to intend the natural consequences of his acts, which is sometimes conclusive, is not necessarily of itself of much force in cases of uttering forged paper. For this reason it is generally held that proof of similar acts of forgeries, or of uttering of forged paper, is admissible as bearing alone on the question of the intent with which the forgery or uttering of forged paper for which the defendant has been informed against was forged or uttered. Such collateral proof must be limited within such a period that it may naturally be seen to throw light as to the intent with which the act under investigation was committed. The question of time during which other acts may be proven seems to be largely within the trial court's discretion. Such collateral proof is never admitted as proof of the commission of the criminal act for which the defendant is on trial. Such evidence of collateral facts is irrelevant and inadmissible as proof of the commission of the crime in question, on the theory that the person on trial is a hardened criminal and has committed other crimes. The law takes cognizance of the fact that criminals may not be guilty of all the crimes with which they may

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be charged, and excludes proof that the commission of one crime is proof of the commission of another crime. For the single purpose of showing what a person's intent was in uttering a forged paper, proof of a similar act is, however, admissible, although the proof may show the commission of a distinct offense. This is a general principle well fortified by text-writers and precedents.

In Stephen's Digest of Evidence, art. 11, the rule is laid down as follows: "When there is a question whether a person said or did something, the fact that he said or did something of the same sort on a different occasion may be proved, if it shows the existence on the occasion in question of any intention, knowledge, good or bad faith, malice, or other state of mind, or of any state of body or bodily feeling, the existence of which is in issue, or is deemed to be relevant to the issue." Wharton's Criminal Law (6th Ed.) section 649, says:' "Where the scienter or quo animo is requisite to, and constitutes a necessary and essential part of, the crime for which the person is charged, and proof of such guilty knowledge or malicious intent is indispensable to establish his guilt in regard to the transaction in question, testimony of such acts, conduct or declarations of the accused as tend to establish such knowledge or intent is competent, notwithstanding they may constitute in law a distict crime." In 7 Am. & Eng. Enc. Law ,p. 62, it is said: "When there is a question whether the act was accidental or intentional, the fact that such act formed part of a series of similar occurrences in each of which the person doing the act was concerned is deemed to be relevant." In 3 Greenleaf on Evidence, section 15, it is said: "In the proof of intention, it is not always necessary that the evidence should apply directly to the particular act with the commission of which the party is charged, for the unlawful intent in the particular act may well be inferred from a similar intent proved to have existed in other transactions done before or after that time." In People v. Everhardt, 104 N. Y. 595, 11 N. E. 64, it was said: "Upon the trial the people were allowed to prove against the objection of the defendant the uttering of other forged checks by him upon other occasions. In this there was no error. The defendant by his plea of not guilty had put in issue everything which it was incumbent upon the people to prove. They had no direct or positive evidence that he personally forged the check which he uttered, and it was open for him to show that at the time he uttered it he had no knowledge that it

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was forged, and was therefore innocent of crime; and for the purpose of showing the prisoner's guilty knowledge in such cases it has always been held competent to prove other forgeries. Mayer v. People, 80 N. Y. 364; People v. Shulman, 80 N. Y. 373, note. Such proof is not received for the purpose of showing other crimes than that charged in the indictment; but for the purpose of showing the guilty knowledge and intent which are elements of the crime charged, and it can be considered by the jury only for that purpose. Although the evidence of Gaylord, corroborated as it was, as to the guilty knowledge of the defendant, was quite clear and convincing, yet the people were not bound to rest upon a prima facie case, but had the right to confirm that evidence by the proof as to the uttering of other forged checks." The counsel for the appellant do not attempt to controvert these general principles. Their contention is that the facts of this case bring it within the principle announced in other cases by reason of the fact that the defendant admitted the making and uttering of the receipt. The cases chiefly relied on are State v. Bokien, 14 Wash. 403, 44 Pac. 889; People v. Lonsdale, 122 Mich. 388, 81 N. W. 277; State v. Vance, 119 Iowa, 685, 94 N. W. 204; Bink v. State (Tex. Cr. App.) 89 S. W. 1075. Some of these cases do hold that, where the facts of themselves show with certainty what the intent was, proof of other offenses is inadmissible; but we do not think that they are parallel on the facts with this case. In this case the question of defendant's intent was made an issue by his plea, and he consistently maintained throughout the trial that he acted in good faith, under such circumstances, his intent was in issue and the rightful subject of proof. We do not understand why evidence of other offenses was rendered irrelevant by reason of the fact that the defendant claimed authority for doing what he did, or by reason of the fact that he admitted signing the receipt and uttering it and receiving the money on it. A material ingredient of the crime, the intent, still remained an issue.

The intent to defraud may not have been proven beyond a reasonable doubt in the minds of the jury, although they may have been satisfied that the proof showed beyond such doubt that Crowder did not authorize the defendant to sign his name to such receipt. It might well appear that the defendant believed that he had such authority, although he had none as a matter of fact. A mistake or misunderstanding may and often does occur that

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renders an act without fraudulent intent, although without authority. Under such circumstances, the legal presumption of fraudulent intent that would follow the act would be of no force. The intent to defraud is a fact that must be proven in such cases, and the prosecution may show such intent by facts and circumstances and are not prohibited from showing it by proof of other offenses of similar character, although the effect of such proof be to show the commission of other crimes, although the facts be admitted except the fraudulent intent. The following cases are fairly in point on this question: In People v. Weaver, 177 N. Y. 434, 69 N. E. 1094, it was held: "Where upon the trial of an indictment charging the defendant with having forged an indorsement upon a promissory note and with having uttered it so indorsed, with intent to defraud, the defense is that, while she wrote the indorser's name upon the note without his express authority, she though from prior transactions with him that she had the right to do so, and that she had no guilty intent in signing his name. A prior note purporting to have been executed by the defendant as maker upon which she wrote the name of the same indorser, which he testified had not been indorsed by him, and to which he never authorized her to sign his name, is competent evidence to prove scienter." The mere fact that the name of the same person was forged in this case does not differentiate it in principle from the case under consideration. In Higgins v. State, 157 Ind. 57, 60 N. E. 685, the court said: "It is said that the language used was not equivocal, and the jury had a right to infer therefrom the intent charged. While this may be true, it does not render other proof of such intent or motive incompetent. When a fact is to be proven, the laws require the best evidence attainable, but it does not put any limit upon the amount of proof that may be adduced. * * * We do not think that the admission of any competent evidence can be rendered erroneous by statements or admissions of the accused made to the court and jury during the trial." In Trogdon v. Commonwealth, 31 Grat. (Va.) 862, the court said: "One of the counsel for the accused * * * insisted that, when the accused obtains goods by falsely representing himself a man of property, the jury must infer the guilty intent; and therefore evidence of collateral facts is unnecessary and irrelevant, and can only mislead the jury. It may be conceded that when goods are obtained by false representations of the kind mentioned, and this is the whole case, the

jury may justly infer the fraudulent intent. But it frequently happens in a large majority of cases there are numerous facts and circumstances, sometimes of minute and varied character, throwing light upon the conduct and motives of the accused. It is impossible for the court to foresee what may be developed in the progress of the trial. When evidence is offered of other transactions to show the guilty intent of the accused, is the court to say the intent is already conclusively proved, and the evidence is therefore irrelevant? * * * The opinion of this court in Walsh's Case, 16 Grat. 541, has a strong bearing upon this question. There the distinction is plainly drawn between guilty knowledge or intent as a presumption of law and guilty knowledge or intent as a presumption of fact—a mere inference to be drawn by the jury. In the latter case, while the jury may find the accused guilty upon a given state of facts, they are not bound to do so. They are to wiegh all of the circumstances, and draw from them such conclusion as they may think warranted by the evidence. In Commonwealth v. White, 145 Mass. 392, 14 N. E. 611, the court said: "And it might be thought that in a case like this, when the bills were forged, it would follow almost necessarily that the defendant knew them to be so, and so it might be thought that the evidence of his use of other false bills was unnecessary for the purpose for which it was admitted, while it tended to prejudice the defendant in the eyes of the jury. But the defendant's knowledge was not admitted. On the contrary, it is still argued that there was no sufficient evidence to warrant the verdict, and evidence of knowledge which otherwise would be admissible is not made inadmissible by the fact that there is other strong evidence of knowledge in the case." In Bell v. State, 57 Md. 108, the court said: "It is not often possible to prove by positive and direct evidence that a party who uttered a forged paper has a knowledge that it is false. When it has been proven that the party charged has done the act for which he is indicted, the question still remains whether he committed it with guilty knowledge or whether he acted under a mistake, and evidence which tends to prove that he was pursuing a course of similar acts raises a presumption that he was not acting under a mistake, but with guilty knowledge and intent, and is admissible for that purpose." State v. Myers, 82 Mo. 558, 52 Am. Rep. 389; Higgins v. State, 157 Ind. 57, 60 N. E. 685; Anson v. People, 148 Ill. 494, 35 N. E. 145; People v. Everhardt, 104 N. Y. 591, 11 N. E.

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62. The evidence of similar offenses was therefore competent in this case as an aid in determining what defendant's intent was in uttering the Crowden receipt.

Although the other similar offenses were not connected with the offense with which the defendant was charged, still they were of a similar general character, and related to a general plan or system in procuring money through means of dealings between railway companies and township officials in reference to road taxes. They were therefore substantially similar offenses, although they concerned different persons. One McAllister was a witness in the case, and was one of the overseers of highways with whom the defendant had dealings as to working out the taxes assessed against the Great Northern Railway Company in one of the townships of Ward county, and gave one of the receipts which it is claimed was afterwards altered and the amount increased. The receipt was given and some money paid, and all the conversation in reference to the making of the contract took place between the defendant and said McAllister at the buggy in the highway in front of one Schorb's dwelling house, and from 50 to 100 feet from the house. The conversation was not had in the presence of any one besides the persons named. After the contract was made, the receipt signed and some money paid thereon, the defendant drove away, and McAllister returned to the house, and had a conversation with Mrs. Schorb, who was a witness in the case, and was asked the following question: "When he came in, did he make any statement as to what transaction had occurred outside with Major Murphy?" And the witness was allowed to state what McAllister said, and did so as follows: " 'We are in luck. We have $167 to spend in Surrey township on the roads.' Then, after we talked, he said he didn't have it all to spend now, but he had in part. I think he said 'in part.' About $55 he had in his hands. I think he pulled the money out of his pocket, and laid it on the table. I don't think he had the money in his hands when he came in from outside." The question was objected to as hearsay, and no part of the evidence of a competent transaction. On the trial there was a disagreement between McAllister and the defendant as to what transpired between them while the contract was entered into at the buggy in which the defendant was seated; and especially as to the sum of money then paid to McAllister by the defendant. The state contends that the testimony of the witness as to what

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was said by McAllister was proper as part of the res gestae; but we think its admission cannot be upheld on that ground. The contract had been entered into and the parties had separated, and what was said of McAllister was simply a narration of what had taken place. To render declarations or evidence competent as part of the res gestae, they must be so closely related to the principal fact as to show that they are spoken under the influence of the principal fact, and not in narration of it. The principal fact and the narration of it should be a connected fact, and not two separate disconnected transactions. The conversation between the defendant and McAllister was so disconnected with McAllister's statements to Mrs. Schorb as to be separate and independent acts. No precise rule can be laid down as to the time elapsing since the principal event when declarations may be admissible in relation to it. Each case must be determined under its own facts and circumstances. In this case negotiations had terminated and were not of. such character that McAllister's declarations can be said to have been made under the influence of them. What McAllister thereafter said in reference to the transaction with the defendant is not similar to declarations as to cause of injuries rendered admissible when stated immediately after the injury, on the theory that the declarations were made while the shock of the injury was still present in the mind, and that what is said is the natural and spontaneous result of the excitement produced by the main fact. If sufficient time intervenes between the act and declarations concerning it to afford an opportunity for reflection, the declarations are inadmissible. In this case there was nothing in the nature of the transaction to bring it within any exception to the rule excluding hearsay evidence; and it was so disconnected from the original transaction as to exclude it as evidence of the res gestae. Greenleaf, Ev., sections 108, 162; 2 Elliott on Ev., section 548; Gillett on Indirect Ev., p. 290; 1 Rice, Ev., p. 212; 11 A. & E. Enc. Law, p. 253; Lund v. Inhabitants of Tyngsborough, 9 Cush. (Mass.) 36.

After the jury had been deliberating on their verdict for about forty-eight hours, the trial judge was sent for by the jury, and he appeared pursuant to such request, and the following proceedings were had as stated by the trial judge in the settled statement of the case: "At some time between the hours of 8:30 and 9 o'clock on December 3, 1906, the said Honorable Chas. A. Pollock, on coming to the courtroom and his chambers and being informed that the jury or some of the jurors desired to communicate with him,

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went to the room where said jury were deliberating and were confined, rapped on the floor, and, the door being immediately opened by some one from the inside and being opened from right to left, stepped inside of the door, leaving the jury room door ajar, and while standing in the open space addressed the jury as follows: "Good evening, gentlemen. I understand you want to see me. Have you agreed?' To which the foreman of the jury answered: 'No; I think we cannot agree.' Whereupon the Honorable Charles A. Pollock, after pausing for a second, replied: 'I will ask you to consider the matter further. Good night.' Whereupon the said Honorable Chas. A. Pollock closed the door to the said jury room and returned to his chambers. Thereafter, in a short time, the bailiff reported to the said Honorable Chas. A. Pollock that the jury had agreed. That the visit of the said Honorable Chas. A. Pollock to the said jury room and the conversation there had between himself and the juror, as aforesaid, was had in the absence of the defendant and his counsel, and was without the knowledge or consent of the defendant or his counsel, and that no person or persons were present at said conversation, except the Honorable Chas. A. Pollock and the members of the jury. And that no record was made at the time of what was said and done on the occasion of the said visit of the said judge to the said jury room. I will further state that my addressing the jury as 'Good evening,' or 'Good night,' was nothing more than a salutation, and anything I said to them was not stated in a dictatorial manner, or intended or calculated as a threat. I will add, further, that in doing what I did I simply followed the practice which has obtained in this district so long as I have known anything of the practice, covering a period of 26 years. * * * And in going to the jury room upon the occasion in question the only object the court had was to ascertain whether any one was sick and unable to further deliberate, and also to find out whether they had agreed, and in no manner by word, act or deed attempted to influence their deliberations."

As to the purity of the intentions of the judge in going into the jury room in this case, and there having the brief communication with the jury, no certificate or proof is necessary so far as this court is concerned, as it well knows that his uprightness and sincere desire to be absolutely just and fair in all cases are beyond question. That admitted fact, however, does not meet the ques-

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tion before us, which is: Did he do that which was beyond his judicial functions in respect to the case? We are forced to the conclusion that he did. His presence in the jury room for any kind of communitcation with the jury is not contemplated by any provision of the statute. The opposite is the plain inference from the statute. All communication to the jury in open court is subject to exception by the parties, if deemed improper. If any communication is made to them in the jury room in the absence of the parties, no opportunity is afforded for objections and exceptions at the time. The open court is the place for communications to the jury in the presence of, or on notice to the attorneys. The jury room is for the jury alone, and no communications are allowed with them in the room except upon orders from the court through the officer in charge of them, who is permitted to ask them whether they have agreed upon a verdict. All communications to the jury in reference to the case should be made in open court, and all communications to them in the jury room avoided. In this way all distrust and fear that something improper is said or done will be without foundation, and every act be subject to exception and review. Any communication by word or writing not in open court affects the efficiency of jury trials as a means of accomplishing justice after giving all parties full opportunity of being heard at all stages of the trial. A strict compliance with this practice of having all proceedings in court in the present of counsel, or on notice to them, unless waived, is better than to countenance violations thereof unless prejudice is shown. The state urgently insists that no prejudice could have resulted from what was done or said in this case, but we shall not consider that question. However, the fact that the foreman said that he thought they could not agree when the judge first spoke to them, and that they did agree in five or ten minutes thereafter, would be a stubborn fact for consideration if we entered upon an inquiry as to the effect upon the jury of the words spoken to them and the visit to the room. We think that any communication in this way as to the case should be prohibited and held prejudicial. It is against the policy of the law to indulge in secret communications or conferences with the jury or with jurors in reference to the merits or law of the case. To determine in each case whether prejudice resulted would be difficult, if not impossible, and justice will be better subserved by avoiding such communications entirely. The authorities are

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practically unanimous in condemning such communications, and in holding them prejudicial as a matter of law.

In State v. Wroth, 15 Wash. 621, 47 Pac. 106, the court said: "In the discharge of his official duties, the place for the judge is on the bench. As to him the law has closed the portals of the jury room, and he may not enter. The appellant was not obliged to follow the judge to the jury room in order to protect his legal rights, or to see that the jury was not influenced by the presence of the judge; and the state cannot be permitted to show what occurred between the judge and the jury at a place where the judge had no right to be, and in regard to which no official record could be made." In Hanover v. State, 125 Wis. 444, 104 N. W. 116, the court said: "These rights are clearly of an important nature, and effect the substance of a jury trial and the right of a party to be heard or to bring in review every transaction of the court's proceedings. For the attainment of the best administration of justice, the law requiring that all proceedings of courts be open and public, and in the presence of the parties or their representatives, must be strictly enforced; and, in case of any infringement of this policy, parties are not to be put to the burden of showing that it in fact injured them, even though it be manifest that no improper motives prompted the acts complained of." In Sargent v. Roberts, 1 Pick. (Mass.) 337, 11 Am. Dec. 185, the court said, speaking through Mr. Chief Justice Parker: "As it is impossible, we think, to complain of the substance of the communication, the only question is whether any communication at all is proper; and, if it was not, the party against whom the verdict was is entitled to a new trial. * * * No communication whatever ought to take place between the judge and the jury, after the cause has been submitted to them by the charge of the judge unless in open court. * * * The only sure way to prevent all jealousy and suspicion is to consider the judge as having no control whatever over the case except in open court in the presence of the parties and their counsel. The public interest requires that litigating parties should have nothing to complain of or suspect in the administration of justice, and the inconvenience of the jurors is of small consideration compared to this great object. * * * It is better that everybody should suffer inconvenience than that a practice should be continued which is capable of abuse, or at least of being the ground of uneasiness

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and jealousy." See, also, Danes v. Pearson, 6 Ind. App. 465, 33 N. E. 976; Du Cate v. Town of Brighton (Wis.) 114 N. W. 103.

The other questions argued in the brief will not probably arise on another trial. Hence consideration of them is not material.

The judgment is reversed, a new trial granted, and the cause is remanded for further proceedings.

FISK, J., concurs.

SPALDING, J. (concurring specially). I concur in the reversal of the judgment in this case, but I think the evidence of other offenses, if admissible at all, should be admitted upon other grounds than that of showing intent.

1. The trial of this case occupied several weeks, and a large part of this time was spent in an attempt to prove and disprove the commission of other simlar offenses. The admission of proof of other offenses in a criminal trial, it seems to be, is, at best a dangerous proceeding, and courts should restrain it within very narrow limits. The defendant is placed on trial charged with the commission of a specific act, and to permit the state to introduce evidence of other acts which are claimed to be unlawful, of which the defendant has had no notice—no opportunity to prepare his defense on them—and of which he may be entirely innocent, and yet by reason of the surprise and lack of opportunity, be wholly unable to establish his innocence, may work great injustice. The danger of this is so great that proof of other offenses should not be admitted unless clearly within the well-established rules. Take this case as an illustration. The defendant was tried nearly 400 miles from his home, and from where the offenses were claimed to have been committed. He was informed against on only one offense, yet to all intents and purposes he was placed upon trial for four or five different offenses, and compelled to go this long distance after the trial commenced, to look for witnesses to disprove charges of which he had no prior notice. The rule seems to be that similar offenses in cases of this kind may be shown, first, to prove the intent; second, when they are part of one criminal scheme or system. There is no contention that the other offenses permitted to be shown had any connection with the crime for which the defendant was tried. But it is contended that the proof of the other forgeries was admissible for the purpose of showing the intent. I, however,

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am unable to see that the question of intent properly entered into the proof in this case. The defendant expressly admitted at the commencement of the trial the signing of the name which he was charged with forging to the receipt. He claimed authority from Crowder to do so. Crowder denied having given him such authority. Throughout the entire case it was conceded that the purpose with which the receipt was executed and uttered was to secure the money which it represented from the railway company. There was no occasion to question this intent, and the defendant did secure the money represented by the receipt from the company. This narrowed the issue solely to the question as to whether he was authorized to sign Crowder's name, and the admission of evidence of the other offenses claimed to have been committed in no way shed any light upon that question, and the only effect its admission could have had must have been to prejudice the jury by making it appear to them that the defendant was a confirmed criminal. Again, after the attempted proof of each of the other unlawful acts of the defendant, how was the position of the state improved without proof of the intent with which they were committed? If proof of intent under the circumstances was necessary in the case at bar to have made the proof of similar acts competent, proof of intent should have been made in connection with them. If it was unnecessary to prove the intent in this case by reason of the conceded object to obtain money from the railway company, then proof of other acts was inadmissible. If proof of the intent in the present case was necessary, it was equally necessary in the other instances to constitute them any corroboration of the state's theory by showing intent. As I view the case the question of intent to defraud rested solely upon the question as to whether or not he was authorized to sign Crowder's name, and the only evidence competent was evidence directed to that point. I think this view of the law is sustained by a great number of cases. State v. Bokien, 14 Wash. 403, 44 Pac. 889; Commonwealth v. Jackson, 132 Mass. 16; Shaffner v. Commonwealth, 72 Pa. 60, 13 Am. Rep. 649; Coleman v. People, 55 N. Y. 81; People v. Shea, 147 N. Y. 78, 41 N. E. 505; People v. Molineux, 168 N. Y. 264, 61 N. E. 286, 62 L. R. A. 193; State v. Vance, 119 Iowa, 685, 94 N. W. 204; Bink v. State (Tex. Cr. App.) 89 S. W. 1075; State v. Sparks (Neb.) 113 N. W. 154. If the admission of this class of evidence does not constitute error, it is clear to me that it is because each offense constituted

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part of a general system or scheme, or it might have been so construed.

2. The defense called one De Lance as a witness to prove that Crowder had stated that the receipt in question was worth or could be made worth $2,500 to him, or that he could make it cost the defendant that much, and he was asked whether or not he heard Crowder make such a statement. De Lance was a witness for the state, and appears to have been hostile to the defendant, and, after more or less evasion, he answered in substance that Crowder had made such a statement in his presence and hearing. This was the substance of his testimony. After so testifying, the special prosecutor was permitted, over objection made by defendant, to ask certain questions in cross-examination It is necessary to set out these questions and answers, and it appears to me that no discussion regarding their propriety is necessary. Under the guise of asking questions, the counsel made insinuations and charges against the defendant, if not improper in any case, certainly improper cross-examiation of this witness. These questions were duly objected to, and the overruling of the objections is assigned as error. "Q. Did he [Crowder] appear like a man who was acting like a jackal, going around and blackmailing a man behind his back, did he? I want to find out whether he was mad because some one was trying to commit a crime agaist him, or whether he was trying to commit a crime against somebody else? A. No he did not. I heard what he said, and saw the expression of his face and heard the tone of his voice. Q. Did you get any impression from hearing the way he said it, and the public manner in which he said it, and the tone of his voice, and the expression of his face, that he was contemplating himself committing a crime against Maj. Murphy; or that he was enraged because he found that some one had committed a crime against him? Which was the impression you got? A. Why, he seemed angered at Murphy and the others down there for having forged his name more than anything else. Q. In other words, it seemed that he felt outraged because a crime had been committed against him, rather than that he was planning a crime against some one else? A. It looked that way to me. Q. Was there anything about the expression of his face, or tone of his voice, your mind being refreshed on the subject, that indicated that he had any other feeing than that of a man who discovered his

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name had been forged, and didn't know it before, and he felt outraged, and was angry. Was there anything inconsistent, or anything in his face or manner or expression o'her than that, at the time he made that remark? A. Well, I never had any conversation with a man that had had his name forged before. He was mad—pretty mad, in fact. Q. You know about how a man would feel like Crowder, who had a little farm, who had had his name forged. You know about how he would express himself on the subject when he came back after having asked the party to pay it up. Was there anything in his voice at that time other than a man would naturally expect under these circumstnces?" Objection being interposed that it would be impossible for the witness to tell, the court said: "What was his expression; how did he express himself? Q. And that he compelled those responsible for the forgery to pay up or dig up? And did you not also know by the same process of reasoning by which you arrived at that conclusion. Did you not also know that he would make them fellows dig up, he referred to the man who forged the receipt? A. Or was responsible for it. Q. Was the tone of his voice and the expression of his face during the entire conversation consistent with the statement that somebody had forged his name? A. Yes, sir; it was consistent. Q. Was it the expression you would naturally expect a man to have on finding and honestly believing his name had been forged, and after having compelled the party to settle? A. His face was consistent with a man who was very angry. Q. When he [Crowder] looked vindictive ,you mean by that that he appeared to be angry because his name actually had been forged, and the statement he uttered at that time was true? A. He had that appearance; yes." The object of this line of questions was undoubtedly to corroborate by showing Crowder's appearance and actions, his denial of authority to Murphy to sign the receipt. It may have been competent for the state to show whether Crowder appeared angry or pleased; but these questions go far beyond any proper examination of a witness to show the appearance of a party during a conversation. The witness was not asked to state the conversation which took place, but to give his impressions and his conclusions as put in his his mouth by counsel. The impropriety of this line of questions cannot be doubted, and as counsel for the defendant states in his brief—with which statement I concur—: "Authority upon the subject cannot be cited, for a parallel to this proceeding, we firmly

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believe, cannot be found in all the judicial history of this country." Trial courts in this state are inclined to be over-lenient to counsel in permitting prejudicial questions of this character, and I deem it important to call attention to this phase of the case at bar to indicate that courts should restrain them within proper limits, and that the discretion vested in trial courts can be abused in the permission to make use of charges and innuendoes by question of the counsel.

(115 N. W. 84.)

THE ST. PAUL, MINNEAPOLIS & MANITOBA RAILWAY CO., A CORPORATION, v. ROBERT B. BLAKEMORE ET AL., DEFENDANTS, AND THE COUNTY OF CASS, IN THE STATE OF NORTH DAKOTA, A MUNICIPAL CORPORATION, INTERVENOR.

Opinion filed Feb. 1, 1908.

Certiorari — When Granted.

1. Under section 7811, Rev. Codes 1905, a writ of certiorari will not be granted in any case, unless the inferior court, officer, board, or tribunal has exceeded its jurisdiction, and there is no appeal, nor, in the judgment of the court, any other plain, speedy and adequate remedy.

Same — Remedy By Appeal — Condemnation Proceedings.

2. Construing said section, it is *held* that an order made after judgment in a condemnation suit, by the terms of which order the clerk is directed to retain in his possession certain moneys paid to him in satisfaction of such judgment until the final determination of a certain tax proceeding pending in such court under the Wood law, wherein Cass county as plaintiff seeks to recover certain delinquent taxes claimed to be a lien against the property thus condemned, is an appealable order, and hence the proper remedy for a review of said order is by appeal and not by certiorari. *Held*, further, that the district court did not exceed its jurisdiction in making a similar order in the tax case wherein these petitioners were defendants, and hence petitioners have mistaken their remedy in applying for the writ aforesaid.

Application by the St. Paul, Minneapolis & Manitoba Railway Company for writ of certiorari to Robert B. Blakemore and others. The county of Cass intervenes.

Writ denied.

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Engerud, Holt & Frame, for appellant.

Payment of a judgment ends litigation and subsequent orders are void. Rev. Codes 1905, section 7346; Signor v. Clark, 13 N. D. 36, 99 N. W. 68; Dows v. Meyer, 14 N. Y. 527; Northwestern Tel. Co. v. N. P. Ry. Co., 9 N. D. 339, 83 N. W. 215; Bolton v. Donovan, 9 N. D. 575, 84 N. W. 357; McMahon v. Allen, 12 How. Pr. 45; Sawyer v. Chambers, 11 Ab. Pr. 710.

Intervention cannot be made after judgment. Carey v. Brown, 58 Cal. 180; Owens v. Colgan, 32 Pac. 519; Laugenour v. Shanklin, 57 Cal. 70; Hocker v. Kelley, 14 Cal. 165.

The same presumption and verity apply to judgments in condemnation proceedings as in matters of general jurisdiction. Porter v. Purdy, 29 N. Y. 109; Oberfelder v. Railway Co., 33 N. E. 937; New Madrid Co. v. Phillips, 28 S. W. 321; Burke v. City of Kansas City, 24 S. W. 48; Dunlap v. Fulley, 28 Iowa, 469; Gilkey v. Watertown, 5 N. E. 152; Clark v. Drain Com., 16 N. W. 167; State v. Kinney, 39 Iowa, 226; Hankins v. Calloway, 88 Ill. 155.

Unless set aside by a direct attack a judgment is binding upon all persons. New Richmond Co. v. Phillips, supra. Porter v. Purdy, supra.

County cannot enforce collection of taxes other than by the summary process provided by law. McHenry Co. v. Kidder County, 8 N. D. 413, 79 N. W. 875; Brule Co. v. King, 77 N. W. 107; Cass Co. v. Beck, 41 N. W. 200.

Montezuma v. Bell, 20 Colo. 175; Faribault v. Misener, 20 Minn. 396; City of Camden v. Allen, 26 N. J. L. 398; Andover Turnpike v. Gould, 6 Mass. 39; Crapo v. Stitson, 49 Mass. 393; Cooley on Taxation, page 19 N. 1, and 829, N. 2.

This remedy is not impaired by a condemnation suit to which county is not a party. Harris v. Brewster, 25 Atl. 829; Detroit v. Detroit, etc., Ry., 12 N. W. 904; State v. Eastern Ry. Co., 36 N. J. L. 181.

Murphy & Duggan, for plaintiff. *Barnett & Richardson,* for intervenor.

Where mortgaged premises are converted into money by condemnation proceedings, mortgagee's position is unaltered and he is

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entitled to the money as the equivalent of the land. Platt v. Bright, 31 N. J. Eq. 81; Sherwood v. City, 10 N. E. 89; Bank v. Roberts, 44 N. Y. 192; Ball v. Green, 90 Ind. 75; Calumet v. Brown, 26 N. E. 501; R. R. Co. v. Chamberlain, 84 Ill. 333; Commissioners v. Todd, 112 Ill. 379; Union Mutual Life Ins. Co. v. Slee, 12 N. E. 543; Omaha v. Reed, 96 N. W. 276; Thompson v. Ry. Co., 19 S. W. 77; Ahlhauser v. Doud, 43 N. W. 169.

FISK, J. We are asked by these proceedings to issue a writ of certiorari, directed to the judge and clerk of the district court of Cass county, requiring them to certify to this court certain records for review. The apparent object aimed at is to have reviewed certain orders made by the district court in two separate actions in that court. Strictly speaking, two applications should have been made; but we will dispose of the application upon the merits, as the orders which it is sought to have reviewed relate to the same subject-matter. The facts are fully set forth in the petition for the writ, which petition is as follows:

"To the Honorable the Supreme Court of North Dakota:

"Comes now your petitioners and show to the court: That Robert B. Blakemore is the duly appointed, qualified and acting executor, and that Laura B. Kedney is the duly appointed, qualified, and acting executrix of the last will and testament of Louis A. Kedney, deceased. That on or about the 27th day of October. 1905, the heirs of said Louis A. Kedney, deceased, were the owners in fee simple of the following described property, to wit: Lot A of Magill's subdivision of lots one (1) and two (2) in block thirty-three (33) of Keeney and Devitt's second addition to the city of Fargo, North Dakota. That on said date proceedings were started in the district court of the Third judicial district in and for the county of Cass and state of North Dakota to condemn said property. In said proceedings the St. Paul, Minneapolis & Manitoba Railway Company, a corporation, was plaintiff, and Robert B. Blakemore and Laura B. Kedney, as executors of the last will and testament of Louis A. Kedney, deceased, Ole H. Nelson, Lewis E. Nelson, Earl Fleming, Matt Mattson, Laura B. Kedney, Fred S. Kedney, Harry S. Kedney Louis S. Kedney, minors, and Laura B. Kedney, as guardian of said minors, were defendants. That said Laura B. Kedney is the widow, Fred S. Kedney, Harry S. Kedney, and Lewis S.

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Kedney are the sons, of said Louis A. Kedney, deceased. That said defendants, Ole H. Nelson, Lewis E. Nelson, Earl Fleming and Matt Mattson were the owners of other real property which the plaintiff was seeking to condemn, but had no interest whatever in said lot A, and have not been in any way involved in any of the proceedings had in said case since the entry of judgment therein. That said cause was duly tried, and the value of said lot A was assessed by the jury at $900, and judgment was thereupon and on the 18th day of January, 1906, entered in said cause condemning said lot A to the use and benefit of said plaintiff, and decreeing that the plaintiff pay to said Robert B. Blakemore, as executor, and said Laura B. Kedney, as executrix, the sum of $959.70, principal and costs. That thereafter and on the 19th day of January, 1906, the said plaintiff deposited in said district court for said defendants Blakemore and Kedney said sum of $959.70. That theretofore and on the 18th day of January, 1906, a final order of condemnation was made condemning said lot A in fee to the use of plaintiff in its railway business, which said judgment of condemnation and final order of condemnation are hereto attached and marked 'Exhibit A.'

"That on said 18th day of January, 1906, the county of Cass filed in this case a petition in which it alleged it was the owner of certain taxes against said lot A, which amounted to the sum of $439.13 ,and claimed a lien on said fund so paid into court as aforesaid, and prayed that $439.13 of said fund be distributed to it in payment of said taxes. In this petition the said plaintiff, St. Paul, Minneapolis & Manitoba Railway Company, joined and asked that the money so paid into court be distributed as in said petition requested, and thereupon and on the 18th day of January, 1906, the court issued an order to said defendants Blakemore and Kedney, your petitioners, to show cause why the said petition should not be granted. A copy of said order to show cause and of said petition is hereto attached and marked 'Exhibit B.' That on or about the 14th day of August, 1903, the said county of Cass commenced an action under chapter 161, p. 213, of the Laws of 1903, to collect the delinquent taxes against said lot A, which taxes are the same as those referred to in the paragraph next preceding this, and within the time allowed by law said defendants Blakemore and Kedney duly answered, denying the validity of said taxes, and although said suit has been at issue for more than three years, said

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Cass county has not placed it upon the calendar or taken any other steps to bring it to trial. That on the 30th day of January, 1906, said Cass county filed in said last-mentioned suit a petition setting up the condemnation of said lot A by the plaintiff railway company, the payment into court of the said sum of $959.70, the fact that it was not a party to said condemnation suit, but that it acquiesced in the judgment rendered therein, and praying that a receiver be appointed to hold enough of the moneys in the hands of the clerk of court of said Cass county to pay the taxes sued on in said cause, and thereupon and on the 30th day of January, 1906, said court issued its order to the defendants Blakemore and Kedney, your petitioners, to show cause why such receiver should not be appointed. Said petition and order are hereto attached and marked 'Exhibit C.'

"That theretofore and on the 29th day of December, 1906, the said plaintiff, St. Paul, Minneapolis & Manitoba Railway Company, secured an order from the said district court of Cass county permitting it to intervene in the said action of Cass county to collect the said taxes on said lot A, as defendant. A copy of said order of intervention and the answer in intervention of said Railway company is hereto attached and marked "Exhibit D." That on the same day in which it was permitted to intervene in said suit of Cass county said railway company served on the said Blakemore and Kedney notice of intention to move the said court that the money awarded said Blakemore and Kedney be retained by the court pending the determination of the said suit of Cass county for the collection of said taxes, and that it be distributed as prayed for in the petition of said Cass county above referred to. Said notice, together with the affidavit of C. J. Murphy on which the said notice was based, and the affidavit of R. B. Blakemore in reply thereto, are hereto attached and marked 'Exhibits E and F,' respectively. That said orders to show cause and said motions came duly on to be heard, and were disposed of on the documents hereinbefore enumerated, no other evidence being submitted to the court. But during the hearing thereof the judge of said court stated in open court that while the said condemnation suit was being tried his attention was called to the fact that Cass county had a claim against said lot A for taxes, and he thereupon, and while the trial of said condemnation suit was in progress, brought this knowledge to the attention of W. H. Barnett, Esq., the state's attorney of said

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Cass county, and said that Cass county should intervene in said condemnation suit if it had any claim for taxes on said property.

"On the 28th day of January, 1907, said court entered its order on said orders to show cause and said motions to the effect that the sum of $439.13 be retained by the clerk of said court until the termination of said suit of Cass county to collect its taxes against said lot A; that the balance of said fund be paid over to said Blakemore and Kedney, and that the county of Cass be interpleaded in said condemnation suit as of December 16, 1905, to which order said Blakemore and Kedney duly excepted. A copy of said order is hereto attached and marked 'Exhibit G.' That thereafter and on the 14th day of February the judge of said district court made a further order directing that the sum of $439.13 of said award be held by the clerk of said court until the determination of the said suit of Cass county to enforce its claim for taxes against said lot and that the moneys so held be applied in payment of such tax claims as may be established by Cass county in its said suit. A copy of said order is hereto attached and marked 'Exhibit H.' That said court now has in its possession and custody the whole of said sum of $959.70. That the judgment rendered in said condemnation suit has not been appealed from or modified in any manner but stands in all respects as originally entered, and more than a year has elapsed since the entry thereof. That said order of said district court was and is illegal and void, and in excess of the jurisdiction vested in said court in this to wit: (1) That said order permits the said county of Cass to enforce its claims for taxes against said lot A in a manner not authorized by law. (2) That the order of the district court complained of amounts to a modification of said judgment of condemnation by a collateral proceeding on the demand of a person not a party to the cause in which said judgment was entered. (3) That said order wrongfully withholds from said Blakemore and Kedney the sum of $439.13. (4) That said order wrongfully interpleads as a party defendant in said condemnation suit said Cass county nunc pro tunc as of December 16, 1905.

"Wherefore these petitioners pray that the Honorable the Supreme Court of the state of North Dakota vacate, annul and set aside said unlawful order and proceedings, and if need be that it issue out of said court appropriate writs directed to the judge and clerk of the district court of the said Cass county, requiring them to certify to said Supreme Court all the records, papers and facts

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in the matter herein complained of to the end that it may be fully informed in relation to said matter, and to grant such other relief from said order and proceedings as justice and law may require.

"Engerud, Holt & Frame,

"Attorneys for Petitioners."

In opposition to the granting of the writ it is urged among other things that it is not a proper case for the exercise by this court of its original jurisdiction. Have the petitioners for the writ invoked the proper remedy? If we are required to answer this question in the negative it will be unnecessary as well as improper to notice other questions involved. Petitioners' counsel evidently entertained some doubt as to the propriety of the remedy for they also perfected appeals to this court from the orders complained of, which appeals are now pending. Section 7810, Rev. Codes 1905, provides, in substance, that such writ may issue when inferior courts, officers, boards or tribunals have exceeded their jurisdiction, and there is no appeal, nor any other plain, speedy and adequate remedy. It is therefore apparent that the remedy by certiorari is not authorized in any case where there is a remedy by appeal. This statutory provision is so plain that its meaning is not open to question. See, however, Lewis v. Gallup, 5 N. D. 384, 67 N. W. 137, wherein this court had occasion to construe and enforce it in accordance with the views above expressed; the court holding that the writ of certiorari is not the proper remedy for the correction of errors of law, the proper remedy being an appeal. See, also, the following authorities decided under a statute identically the same as our own: Newman v. Superior Court, 62 Cal. 545; Noble v. Superior Court, 109 Cal. 523, 42 Pac. 155; Central Pacific R. Co. v. Placer Co., 46 Cal. 667; Sayers v. Superior Court, 84 Cal. 642, 24 Pac. 296; Sherer v. Superior Court, 94 Cal. 354, 29 Pac. 716.

It only remains for us to determine, therefore, whether the orders complained of are appealable. As disclosed by the application for the writ, it appears that one of the orders complained of was made in the condemnation action. This order was made after judgment was entered, and after the amount of such judgment had been paid to the clerk, and by the terms thereof Cass county was made a party, and the clerk was directed to retain of the money paid pursuant to the judgment the sum of $439.13, being the amount of

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the taxes claimed to be due the county of Cass on the property condemned in said action. This order recites upon its face that it was made nunc pro tunc as of December 16, 1905, the said judgment having been entered on January 18, 1906. Without intimating an opinion regarding the validity of this order, we are entirely clear that the same was appealable, and hence it cannot be reviewed by certiorari. It is "a final order affecting a substantial right, * * * made upon a summary application in an action after judgment," and hence was appealable under subdivision 2, section 7225, Rev. Codes 1905. See Greeley v. Windsor, 2 S. D. 361, 50 N. W. 630; Lewis v. Ry. Co., 97 Wis. 368, 72 N. W. 976; Weber v. Tschitter, 1 S. D. 205, 46 N. W. 201; 2 Cyc. 600, note 34 and cases cited. It was also appealable under subdivision 4, section 7225, Rev. Codes, which provides for an appeal from an order "when it involves the merits of an action or some part thereof." See Holmes v. Campbell, 13 Minn. 66 (Gil. 58); North v. Webster, 36 Minn. 99, 30 N. W. 429; People's Ice Co. v. Schlenker, 50 Minn. 1, 52 N. W. 219. In the latter case, in construing a statute the same as our own, it was said: "A final judgment determines the rights of the parties to the action, and any order which vacates or modifies it necessarily affects the legal rights of the party in whose favor it is, and hence involves the merits of the action." In Greeley v. Windsor, supra, the Supreme Court of South Dakota held, and we think properly, that an order granting the defeated party a right to file an amended pleading after judgment without vacating the judgment, "involves the merits of the action," and is appealable. This court, in Bolton v. Donavan, 9 N. D. 575, 84 N. W. 357, held that an order bringing in an additional party defendant is appealable.

We have no difficulty, therefore, in reaching the conclusion that the petitioners have mistaken their remedy in so far as the order made in the condemnation suit is concerned. The other order which it is sought to have reviewed was made in the tax case brought under the so-called Wood law, by Cass county to collect these taxes. This order directed the clerk of court to retain out of the money held by him in the condemnation suit the sum of $139.13 until the final determination of the tax litigation. We think the court had jurisdiction to make the order as it did. While these tax proceedings are in a sense purely statutory, we think the court before which such a proceeding is pending has the inherent power to make such orders as it deems necessary during the pendency of the proceed-

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ings to render effectual any judgment which may be recovered therein. The money was in the possession of the court through its clerk, and all the persons in any manner interested in such fund were before the court as parties to the tax proceedings. The plaintiff (Cass county) was seeking to enforce certain alleged tax liens against the property, and it had a right to resort to such fund, which was the proceeds of such property, in lieu of the property, to satisfy any judgment it might recover. We are unable to distinguish this case on principle from the case of Platt v. Bright, 31 N. J. Eq. 81, wherein that court took occasion to say: "Where mortgaged premises are converted into money by virtue of condemnation proceedings, the rights of the mortgage remain unaltered, and he is entitled to the money as an equivalent for the land. And, where the full value of the land has been awarded and paid into this court, equity will protect the condemnor against the lien of an encumbrancer who has not been made a party to the proceedings. * * * The power to extend such protection * * * is inherent in this court." In that case the same contention was made by the mortgagors with reference to their right to the money awarded in the condemnation suit as is made by these petitioners. As stated by the court: "The claim made by Mr. and Mrs. Bright (the mortgagors) is placed wholly upon merely legal grounds. The argument is that, because the award is to them, therefore the money is to be paid to them, at all events, and in utter disregard of any claim under the mortgage. To the suggestion that the mortgagee has an equitable lien on the money arising from the condemnation proceedings. it is replied that the mortgagee's lien upon the land condemned is not affected by the proceedings of condemnation, and that therefore Mr. and Mrs. Bright are to have the award, the full value of the land taken and damaged, and that the company is to protect itself as best it may against the mortgage. Such a position can not be supported in a court of conscience. It is impossible to conceive how they can be injured by applying the money, if their absolute right to it be admitted, to the payment of their debts. * * * They ask substantially that the money received from the condemnation of the mortgaged premises be paid over to them notwithstanding and in utter disregard of any claim of the mortgagee thereon under the mortgage, and that he be compelled to have recourse to the rest of the premises for the payment of his debt, and, if that be insufficient for the purpose, then to the land con-

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demned. The mere statement of the proposition demonstrates its inequitable character and its inadmissibility."

The rule thus announced is, in our opinion, clearly sound, and is amply supported by numerous authorities cited in the opinion.

It follows from what we have above stated that the writ prayed for must be denied.

MORGAN, C. J., concurs.

SPALDING, J. (dissenting in part). I concur in the conclusion of my associates that the writ should be deined, but not in the reasons given relating to the last order of the district court, referred to in the opinion.

(114 N. W. 730.)

THE FIRST NATIONAL BANK OF BOTTINEAU, A CORPORATION, v. N. J. WARNER, P. S. HILLIBOE, AS EXECUTOR OF THE ESTATE OF E. ERTRESVAAG, DECEASED, ADOLPH D. ERTRESVAAG, INGOLPH P. ERTRESVAAG, CARL N. ERTRESVAAG, EDWIN N. ERTRESVAAG, HEIRS AT LAW OF E. ERTRESVAAG, DECEASED, AND V. B. NOBLE, AS GUARDIAN OF THE MINOR HEIRS OF E. ERTRESVAAG, DECEASED, AND ALL OTHER PERSONS UNKNOWN CLAIMING ANY ESTATE OR INTEREST IN, OR LIEN OR INCUMBRANCE UPON THE PROPERTY DESCRIBED IN THE COMPLAINT, AND THEIR UNKNOWN HEIRS.

Opinion filed Jan. 8, 1908. Rehearing denied Feb. 21, 1908.

Appeal — Objections Not Made Below.

1. An objection to the sufficiency of the allegations of the complaint is too late when made for the first time in the Supreme Court, where the complaint would be amended as a matter of course if objection had been made before.

Trial — Evidence — Transactions With Decedent — Sufficiency of Objection.

2. An objection to evidence as incompetent, irrelevant and immaterial is too general to suggest the objection that the evidence is incompetent as relating to a transaction with a deceased person, whose executor and heirs at law are parties to the action.

Same — Officers of Corporations As Witnesses.

3. The cashier of a national bank, which is a party to an action, is a competent witness to testify to the fact of the mailing of a notice

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to a deceased person, whose executor and heirs at law are parties to the action, as section 7253, Rev. Codes 1905, prohibits evidence of parties only in such cases.

Same.

4. The contractor of a building, pursuant to a contract with the owner of the building, is not a competent witness as to payments made on said contract, where the owner of the building has since died, and his executors and heirs at law are made parties defendant with said contractor in an action by the plaintiff to foreclose its lien as a subcontractor.

Mechanic's Lien — Subcontractor — Payments After Ninety Days — Effect.

5. Payment of the full sum due on a contract by the owner of a building to the contractor after 90 days from the time the last materials were furnished, and before the lien of a subcontractor was filed, exempts the building and land from a lien filed after such payment was made, although the owner does not show that payment was altogether made after the 90 days had expired and before the lien was filed. The fact that some payments were made before the 90 days had expired did not prejudice the subcontractor, as the last payment made was more than sufficient to protect it if the lien had been filed in time.

Witnesses — Competency — Transactions With Decedent.

6. Where a contractor and the executors and heirs at law of the deceased owner of a building, erected under a contract between said contractor and the owner, are parties defendant in an action to foreclose a subcontractor's lien, the evidence of the contractor as to when the building was completed is not objectionable as referring to a transaction with a party since deceased, under section 7237, Rev. Codes 1905.

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

Action by the First National Bank of Bottineau against P. S. Hilliboe and others. Judgment for plaintiff, and defendant's appeal.

Reversed and action dismissed.

Noble, Blood & Adamson, for appellants.

Lien statute must be strictly complied with to secure a lien. Philadelphia Seventh Nat. Bank v. Schenandoah Iron Co., 35 Fed. Rep. 442; Cross v. Butler, 72 Ga. 187; Finane v. LasVegas Hotel

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Co., 3N. Mex. 260; Glynn v. Zabriskie, 19 R. I. 215; Shackelford v. Beck, 80 Va. 573; McGugin v. Ohio Riv. R. Co., 33 W. Va. 66; Baumbach Co. v. Laube, 74 N. W. 96; Brown & Haywood Co. v. Trane, 73 N. W. 561; Scott v. Christianson, 85 N. W. 658.

Notice must be given to owner of material furnished to contractor and subcontractor, or lien is void. Whiteside v. Lebcher, 17 Pac. 548; St. Croix Lumber Co. v. Mitchell, 6 Dak. 215, 50 N. W. 624; 20 Am. & Eng. Enc. Law (2d Ed.) 376; Taylor v. Dahn, 51 Am. St. Rep. 312; Robertson Lumber Co. v. Bank of Edinburg, 14 N. D. 511, 105 N. W. 719; McMillan v. Phillips, 5 Dak. 294, 40 N. W. 349.

Weeks & Murphy, for respondents.

Objection to sufficiency of complaint must be taken in lower court. Caledonia Gold Mining Co. v. Noonan, 3 Dak. 189, 14 N. W. 426; McCabe v. Desnoyers, 108 N. W. 341; Zion Church of Evangelical Ass'n of North America in Charles City v. Parker, 86 N. W. 60; Reeves v. Howard, 91 N. W. 896; Strow v. Allen, 98 N. W. 141.

Variance between complaint and proof cannot be challenged for the first time in Supreme Court. Ashe v. Beasley, 6 N. D. 191, 69 N. W. 188.

Objection to evidence as "incompetent and immaterial" does not present a question for review. Caledonia Gold Mining Co. v. Noonan, supra; Kolka v. Jones, 6 N. D. 461, 71 N. W. 558; Bright v. Ecker, 69 N. W. 824; Hooper v. Railway Co., 33 N. W. 314; Taylor v. Wendling, 24 N. W. 40; Olson v. Burlington, C. R. & N. R. Co., 81 N. W. 634.

Where an instrument whose contents are to be proven, is itself a notice, notice to produce original is not necessary to the offering of secondary proof. 17 Cyc. 559; Brentner v. Chicago, M. & St. P. Ry. Co., 12 N. W. 615; Smith v. K. C. St. J. & C. B. R. Co., 12 N. W. 619.

Testimony of agent of a corporation is admissible against a deceased. Muhlback v. So. Baltimore Co., 1 L. R. A. 507.

Failure to file lien within ninety days affects only payments made after that time. Robertson Lumber Co. v. State Bank of Edinburg, 14 N. D. 511, 105 N. W. 719.

Morgan, C. J. Action to foreclose a lien for materials furnished for a building by the plaintiff as a subcontractor. The plaintiff re-

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covered judgment in the district court. The heirs at law of Ertresvaag, deceased, who was the owner of the building, appeal to this court, and demand a review of the entire case, under section 7229, Rev. Codes 1905.

The appellants contend that the complaint fails to state a cause of action for the foreclosure of a mechanic's lien. Their contention on this point is that the complaint fails to allege that the plaintiff did give notice to Ertresvaag that it had furnished to the contractor the materials for the furnishing of which a lien is claimed prior to the filing of the lien and prior to the completion of the building. The complaint alleges that the notice was given on March 15, 1904, and that the lien was filed on March 10th. There was no demurrer to the complaint, and no objection was made to the introduction of evidence under the complaint prior to the taking of testimony, nor was this objection urged during the trial by an objection specifically based on the fact that the complaint showed that the lien was filed before any notice was given. We are of the opinion that this objection to the sufficiency of the allegations of the complaint comes too late when raised for the first time in the Supreme Court. The uncontradicted facts are that the lien was filed on March 11th and that the notice was sent by registered letter, as required by section 6237, Rev. Codes 1905, on March 10th. If objection had been made, and the attention of the court called to the variance between the allegations of the complaint and the evidence, an amendment of the complaint would have been proper and undoubtedly allowed. Appellants claim that this testimony was objected to. Nowhere was the ground of the objection specifically pointed out. The objection was that the testimony was incompetent, irrelevant and immaterial. This objection was too general, and did not apprise the court or opposing counsel of the real ground of the objection. It is now generally held that objections in this form are not specific enough, and that error cannot be predicated upon rulings overruling them. This court has also held objections in that form not subject to assignment of error when overruled. Kolka v. Jones, 6 N. D. 461, 71 N. W. 558, 66 Am. St. Rep. 615.

Conceding, for the purposes of this appeal, that the evidence was inadmisible under the allegations of the complaint, we are satisfied that objections thereto come too late when first presented on appeal. By not objecting in time, and specifically pointing out

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the objection, the trial court had no opportunity of ruling on the objections now raised. The right to object to the testimony, based on variance, was therefore waived. Russell v .Barron (Sup.) 97 N. Y. Supp. 1061; Reeves v. Howard, 118 Iowa, 121, 91 N. W. 896; Strow v. Allen et al. (Iowa) 98 N. W. 141; McCabe v. Des Noyers (S. D.) 108 N. W. 341; Calidonia Gold Mining Co. v. Noonan, 3 Dak. 189, 14 N. W. 426; Zion Church v. Parker, 114 Iowa, 1, 86 N .W. 60; Burgi v. Rudgers, 108 N. W. (S. D.) 253; Collins v, Denny Clay Co., 41 Wash. 136, 82 Pac. 1012. The owner of the building and lots died on April 4th, a few days after the lien was filed. There are many objections to testimony introduced by the plaintiff, based on the ground that it related to transactions with Ertresvaag, the owner of the building then deceased. These objections relate to the evidence as to the time when the building was completed. Also that pertaining to the mailing of the notice by plaintiff that it had furnished materials for the construction of the building. Also the return receipt of the registered letter containing said notice, signed by E. Ertresvaag by Emil Johnsgaard. So far as the evidence as to the time when the building was completed, we are satisfied that it does not relate to a transaction with a deceased person within the meaning of that word as contained in subdivision 2 of section 7253, Rev. Codes 1905, which reads as follows: "(2) In civil actions or proceedings by or against executors, administrators, heirs at law or next of kin in which judgment may be rendered or order entered for or against them, neither party shall be allowed to testify against the other as to any transaction whatever with or statement by the testator or intestate, unless called to testify thereto by the opposite party. * * *" The reason of the rule laid down in said section is to protect the estates of decedents from false testimony which attributes to a deceased party statements or acts concerning which he cannot testify by reason of his death. A transaction, as used in this section, means a transaction in which the decedent took part and was a party to and participated in. 30 Am. & Enc. Law, p. 1027, and cases cited.

When the building was completed was not a matter dependent upon any action or knowledge of the owner of the building. That fact did not rest upon any fact particularly within the knowledge of the owner, and dependent in no way upon any act of his in connection with that of the contractor. The completion of the building

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was the act of the contractor alone, and testimony concerning the same does not relate to a transaction with the owner, and does not come within the prohibition of the statute. This evidence was not therefore objectionable, although given by the contractor who was a party defendant in the action. Parties to an action are not made incompetent to testify in actions in which executors, administrators, or heirs at law of deceased persons are also parties. The statute only renders their evidence incompetent when it relates to transactions with the decedent. The testimony relating to the giving of the notice by mailing that plaintiff had furnished materials was given by the cashier of the plaintiff bank. This testimony is also objected to on the same grounds urged against the evidence as to the completion of the building. The prohibition of the statute covers the evidence of parties to actions or proceedings, and does not include the agents of parties. To hold that agents are also barred from giving such evidence by this statute would be adding to its terms, which it not warranted. As said in Hanf v. Insurance Co., 76 Wis. 450, 45 N. W. 315, in construing a section of the statute of similar import: "That section only excludes the testimony of a party to the action * * * of transactions and communications had by him personally with the deceased or insane person through whom the opposite party claims or defends. It does not exclude the testimony of the agent of the party or person whose testimony is thus excluded. At the common law the testimony of a party to the action was absolutely excluded; but the agent of such party was a competent witness to prove the whole cause of action of the defense, although the opposite party derived his interest in the subject-matter of the controversy through a deceased party. Section 4069 does not exclude testimony which was admissible at the common-law." In Bank v. Enos, Adm'r, 135 Cal. 167, 67 Pac. 52, it was said, in construing a statute in substance the same as ours: "To hold that the statute disqualifies all persons from testifying who are officers or stockholders of a corporation would be equivalent to materially amending the statute by judicial interpretation. Plainly the law disqualifies only 'parties or assignees of parties,' and does not apply to persons who are merely employed by such parties or assignors of parties." See, also, 30 A. & E. Enc. Law (2d Ed.) p. 1048, and cases cited; Merriman v. Wickersham, 141 Cal. 567, 75 Pac. 180. The cashier of the plaintiff bank was therefore a competent witness to give testimony as to the mailing of the no-

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tice to the deceased, even if the mailing of such notice was a transaction with the deceased, which is not decided. The statute requires the giving of notice to the contractor by a subcontractor that materials have been furnished before the contract is completed. Whether the giving of this notice before the contract is completed is in all cases a condition precedent to the right to a lien we need not decide in this case. The contractor testifies that the contract was not completed on the date that the bank gave the notice by registered letter. From this evidence and other circumstances shown by the evidence as to certain work having been done on the building after that date we think that it was established at the trial that the contract had not been completed when the notice was sent, and the trial court so found. The record presents a serious question as to whether the owner of the building had not fully paid for its construction before the lien was filed on March 11, 1904.

It is shown that the last date of the furnishing of the brick by the plaintiff was on October 17, 1903. The ninety days during which the subcontractor had to file a lien so as to protect his lien against purchasers and incumbrancers and the owner, if he made payments after the 90 days, expired on February 17, 1904. Payments made by the owner before February 17th could not be made to defeat the plaintiff's right to a lien, providing the lien was filed within the 90 days. Payments made after February 17th and before March 11th, when the lien was filed, would have been made by the owner without regard to the plaintiff's right to the lien. Payments made after March 11th could not have been made so as to defeat plaintiff's lien. The administrator testifies that the sum of $9,004.19 was paid between October 17, 1903, and March 10, 1904. How much of this sum was paid before February 17th, or how much after that day and before March 11th, is not shown. It is shown, however, that about $1,800 was paid some time in February, after the 90 days had expired; and, according to the administrator's evidence this was the last payment, and paid the contract price in full. The payment was far in excess of all sums claimed to be due the plaintiff by virtue of having furnished the materials for the building, for which the plaintiff claims a lien. The respondent's contention that the owner could not make payments during the 90 days at the expense of the subcontractor is true, providing the lien is filed within the 90 days, but in this case the owner did not make payment in full until about one month after

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the 90 days had expired. If the plaintiff had filed his lien during the 90 days, the payment of the $1,800 would not have defeated the lien. The owner having waited until the 90 days had expired before making final payment, had the right to make payment in full thereafter. The statute protects the owner as to payments made after the 90 days have expired and before the lien is filed. If the lien is filed, it is notice to the owner, and payments thereafter are subject to the lien, although filed after the 90 days have expired. In this case, the notice to the owner that materials had been furnished was not given, nor was the lien filed until after payments in full had been made. If any sum remained unpaid when the lien was filed, the lien would be good to that extent. Robertson Lumber Co., v. Bank of Edinburgh, 14 N. D. 511, 105 N. W. 719. The testimony of the executor, considered by itself, we think fairly sustains the fact of payment in full before the lien was filed. If the testimony of the contractor was admissible, a different question would be presented, as it squarely contradicts the testimony of the executor. The contractor Warner was a party defendant to the action. His testimony as to payments made by the owner was objected to as within the provisions of section 7253, Rev. Codes 1905, supra. The respondent contends that his testimony was not properly objected to. The objection was generally to the evidence and not to the witness, which the respondent contends was not a sufficiently explicit objection. If the contractor had not been a party, the evidence would not have been objectionable; but he was a party, and judgment was prayed for agaist him. It is true that he suffered default; but that fact did not except him from the provision of the statute, nor render him a competent witness. The record shows that the witness was a party to the action, and in one instance the question was objected to as evidence by a party to the action of a transaction with the deceased, and the questions so objected to related to payments. We think that to sustain the objection on the grounds claimed by respondent would be too technical ln view of the fact that the record shows that the witness was a party to the action. Respondent cites no cases to sustain his contention in this regard, and we have failed to find any in point under similar facts.

Respondent also contends that the witness was not a party to the action, nor prohibited from testifying, within the meaning of said section 7253. The contention is that his testimony was admissible on the theory that he was called by the opposite party, the plain-

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tiff. In our opinion the evidence was not admissible. It was antagonistic to the interests of the estate, and the witness was a party. We think that he should be deemed an opposite party to the executor and heirs. The reason why parties are prohibited from testifying as witnesses as to transactions with deceased parties is present in this case. This reason applied to some extent to this witness, although he was a codefendant with the executor and heirs. The plaintiff was seeking to secure a personal judgment against him. 30 A. & E. Enc. Law, p. 1018, and cases cited. The testimony of this witness not being admissible, the question of payment as shown by the defendant through the administrator is uncontradicted, and shows that the building was wholly paid for before the lien was filed, and after the 90 days from the time of furnishing the last item of materials had expired. In this respect this case is within the rule laid down in Robertson Lumber Co. v. Edinburgh Bank, supra. The fact of payment is an affirmative defense to be shown by the defendant. But we cannot agree to the contention that it devolves on the defendant to show that payment of the whole contract was made after the 90 days and before the lien was filed. The plaintiff was not prejudiced if some payments were made before the 90 days had expired, as the owner retained sufficient sums to protect the plaintiff if it had filed the lien within the statutory time.

The judgment is reversed as to defendant Hilliboe, and the action dismissed as to him only. All concur.

(114 N. W. 1085.)

WILLIAM H. BROWN v. LEWIS COMONOW, SARAH COMONOW, WM. G. NIXON, TRUSTEE, AND ALL OTHER PERSONS UNKNOWN, CLAIMING ANY ESTATE OR INTEREST IN OR LIEN OR INCUMBRANCE UPON THE PROPORTY DESCRIBED IN THE COMPLAINT, AND THEIR UNKNOWN HEIRS; AND AARON COMONOW, HENRY COMONOW AND DORA LEAVITT, WHO ANSWERED IN SAID ACTION AS UNKNOWN DEFENDANTS.

Opinion filed Jan. 9, 1908.

Mortgages — Trust Deed.

1. Whether under section 4348, Comp. Laws 1887, being section 6151, Rev. Codes 1905, a person may give a trust deed as well as a

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mortgage upon real property as security for the payment of indebtedness, and whether the instrument referred to in the opinion is or was intended by the parties thereto to be a trust deed as distinguished from a mortgage, is not determined.

Same — Foreclosure by Advertisement — Power of Sale.

2. Such instrument, whether a trust deed or a mortgage, contains no power of sale authorizing any one, except the trustees therein designated, or his successor in trust, to sell the property in case of default; hence the attempted foreclosure by advertisement by plaintiff, who was merely the assignee of the beneficiary under said instrument, was a nullity, and plaintiff acquired no title thereunder.

Same.

3. Express statutory authority is conferred by section 6159, Rev. Codes 1905, upon a mortgagor to designate the mortgagee or any other person to execute the power of sale upon default in the payment of the mortgage indebtedness.

Quieting Title — Evidence.

4. In an action to determine adverse claims to real property, the plaintiff must recover, if at all, upon the strength of his own title, and not upon the weakness of his adversary's title.

Same — Judgment.

5. Even if plaintiff had acquired title under such foreclosure proceedings, the proof shows that he conveyed the same to another prior to the commencement of this action, and having failed to show any title to the property, the judgment of the district court in defendant's favor was proper in so far as it denied any relief to plaintiff. The judgment, however, in so far as it quieted title in defendants, is erroneous, and the same is accordingly modified.

Appeal from District Court, Ramsey county; *Cowan, J.*

Action by William H. Brown against Sarah Comonow and others. Judgment for defendants, and plaintiff appeals.

Modified and affirmed.

Burke & Middaugh and *Engerud, Holt & Frame,* for appellant.

Deed of trust given as mere security is a mortgage. Hoyt v. Fass, 25 N. W. 45; Austin v. Sprague Mfg. Co., 14 R. I. 464; Shaw v. Norfolk Co. I. Co., 5 Gray, 162; DeWolf v. Sprague Mfg. Co., 49 Conn. 283; Turner v. Watkins, 31 Ark. 429; Martin v. Alter, 42 Ohio Stat. 94.

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Such deed is within the scope of the statute as regards power of sale. Tiffany on Real Property, section 555; Cross v. Fombey, 54 Ark. 179; Wolf v. Dow, 13 Smedes & M. 103; Schilaber v. Robinson, 97 U. S. 75, 24 L. Ed. 967; Lawrence v. Farmers Loan & Trust Co., 13 N. Y. 200.

Assignment of a debt secured by a mortgage carries the latter also. Parker v. Randolf, 59 N. W. 722; Ord v. McKee, 5 Cal. 515; Mack v. Wetzlar, 39 Cal. 247.

Godfrey & Molander, McClory & Barnett, for respondents.

Trustee in a mortgage can alone execute its powers conferred by it. Seibert v. M. & St. L. Ry. Co., 53 N. W. 1134; Gasser v. Sun Fire Office, 44 N. W. 252; Chicago R. Co. v. Fosdick, 106 U. S. 47, 27 L. Ed. 47; Gates v. Railroad Co., 53 Conn. 346; Shaw v. R. Railroad Co., 100 U. S. 605, 25 L. Ed. 757; Canada Southern R. Co. v. Gebhard, 109 U. S. 534, 27 L. Ed. 1020; Guilford v. Minneapolis, S., St. M. & A. Co., 51 N. W. 658; Ogden v. Grant, 6 Dana, 474; Burke v. Backus, 53 N. W. 458.

FISK, J. This action was brought to determine adverse claims to certain real property in Ramsey county, the plaintiff alleging ownership in fee of the property in controversy. The complaint is in the statutory form ,and the answer consists of a general denial, and also alleges title in fee in the defendants, and prays that title be quieted in them.

The facts are undisputed, and are as follows: On November 10, 1886, one Lewis Comonow was the owner in fee of the property in controversy, and on said date he and his wife Sarah, one of the defendants, executed and delivered an instrument in form a trust deed of said property to secure the payment of $557 according to the terms of a promissory note executed on that day by the said Lewis Comonow and payable to one William F. Baird. By the terms of the instrument the grantors in form sold and conveyed the premises in question to one William G. Nixon in trust, he being designated in the deed as trustee and party of the second part; and said instrument provides that in case of death, absence or inability to act of the said second party, then one Frank R. Davis is appointed as his succesor in trust, and William F. Baird is designated as party of the third part. The instrument provides that in case the grantors shall pay such indebtedness and all taxes,

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insurance, etc., when due, the same shall be void, otherwse to be of full force and effect. It further provides that upon default in such payment the party of the second part shall be at once clothed with the legal ownership of the property, and become at once entitled to the possession thereof, and to the rents, issues and profits, and upon application of the party of the third part, or the legal holder of said note, shall at once proceed to sell the property at public auction at the front door of the courthouse in said county, first giving public notice stating the time and place of sale, and of the property to be sold, by publishing such notice in a newspaper published in the county. It was also provided by said instrument that the person making said sale shall receive the proceeds thereof, and shall execute a deed of conveyance, which shall be effectual to pass the fee-simple title of said premises to the purchaser, and out of the moneys arising from the sale he shall pay the expenses of such trust and of such sale, including a stipulated attorney's fee, and the amount due on said promissory note. rendering the overplus, if any, to the first party. Other provisions are contained in said instrument, which, however, are not material to the question here involved. On January 4, 1892, the said Baird party of the third part, assigned to the plaintiff herein all his interest in the so-called trust deed, together with the note secured thereby, which assignment was, on May 11, 1899, recorded in the office of the register of deeds of Ramsey county. On said date, and once each week for six successive weeks thereafter, plaintiff caused notice of sale to be published in a newspaper in said county, signing his name thereto as assignee, which notice recited that the premises therein mentioned would be sold at the front door of the courthouse at the city of Devils Lake at 2 o'clock p. m. on June 30, 1899, to satisfy the indebtedness secured thereby. On the latter date the premises were sold pursuant to such notice, the sheriff of Ramsey county making the sale, and the plaintiff becoming the purchaser. Thereafter, and on July 29, 1901, the sheriff of Ramsey county executed and delivered to plaintiff a sheriff's deeds pursuant to such sale, under which plaintiff claims title in this action. Defendant Sarah Comonow is the widow of Louis Comonow, deceased, and the other defendants are his heirs at law, and they claim title as such heirs.

The plaintiff evidently proceeded in such foreclosure proceedings upon the theory that said instrument was a mortgage containing a

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power of sale running to the mortgagee or his assigns, to be exercised in the usual manner in case of default in the payment of the indebtedness secured thereby; and the chief controversy between the parties is whether the instrument aforesaid is a mortgage or a trust deed, and if a mortgage, whether it contains a power of sale which authorized plaintiff as assignee to foreclose by advertisement. Respondents contend that it is not a mortgage, and they assert that, even if it is, it contains no power of sale authorizing plaintiff as assignee to foreclose by advertisement, and this was the view taken by the trial court. Whether the instrument is a trust deed or a mortgage it is unnecessary for us to determine. It is argued by appellant's counsel that because it is an instrument transferring an interest in real property made only as security for the payment of money it is a mortgage. Such is not the test, as the law in force at the time the instrument was executed clearly demonstrates. Section 4348, Comp. Laws 1887, being section 6151, Rev. Codes 1905, reads: "Every transfer of an interest in real property other than in trust, made only as security for the performance of another act, is to be deemed a mortgage," etc. From the language employed by the parties it would seem that the instrument was intended as a transfer of an interest in real property in trust as security for the payment of the indebtedness therein mentioned. By the enactment of the foregoing section with the words "other than in trust" inserted therein it may plausibly be argued that it was the legislative intent to authorize the transfer of property in trust as well as to give a mortgage as security for an obligation. This section, as well as a corresponding section in the Civil Code of California, was borrowed from the Field Code reported to the legislature of New York, but as thus reported the latter code did not contain the words "other than in trust;" but the legislature of California in 1873-74 amended the section by inserting these words, and such amendment was adopted in the territory of Dakota in 1877. The Supreme Court of California has repeatedly construed instruments similar to the one here involved as trust deeds and not mortgages. Koch v. Briggs, 14 Cal. 257, 73 Am. Dec. 651; Grant v. Burr, 54 Cal. 298; Bateman v. Burr, 57 Cal. 480; Godfrey v. Monroe, 101 Cal. 224, 35 Pac. 761; Powell v. Pattison, 100 Cal. 234, 34 Pac. 676; Bank v. Alcorn, 121 Cal. 379, 53 Pac. 813; Savings & L. Soc. v. Burnett, 106 Cal. 514, 39 Pac. 922; Banta v. Wise, 135 Cal. 277, 67 Pac. 129. But whether

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such an instrument is a trust deed, and will operate to transfer the legal title to a trustee as is held in California, is unnecessary for us to decide in this case. The weight of modern authority seems to be opposed to the California doctrine. See 28 Am. & Eng. Enc. Law (2nd Ed.) 752-753, and cases cited; also, In re Packing Co., 138 Fed,627, 71 C. C. A. 75, 2 L. R. A. (N. S.) 560.

Assuming the instrument to be a mortgage, it will not strengthen plaintiff's case, for the very obvious reason that it contains no power of sale authorizing him as such assignee to foreclose by advertisement, hence his only remedy was by an action in equity. The power of sale runs to Nixon as trustee and his successor in trust, and no language is therein contained from which it can be argued that even Baird, the third party and beneficiary under the instrument, could exercise the power, and hence the plaintiff, who is merely his assignee, acquired no such right. Except as otherwise expressly provided by law, the power can be exercised by such person or persons only as may be selected by the grantor of such power. This is well settled. 28 Am. & Eng. Enc. Law, 767, and cases cited. Under the express provisions of our Revised Civil Code for 1905 (section 6159) a power of sale may be conferred by the mortgagor upon the mortgagee or any other person. Godfrey v. Monroe, supra. Furthermore, it is settled in this state that such a power can be exercised only by a person having the legal title to the mortgage. The fact that Baird assigned the note and his interest in the security to plaintiff is not sufficient, as Nixon was the legal owner and holder of the instrument. True he held the same merely in trust, and Baird was the beneficiary under such trust; but this did not constitute Baird the legal owner of the instrument, so as to vest in him the power to foreclose by advertisement. See Morris v. McKnight, 1 N. D. 266, 47 N. W. 375; Clark v. Mitchell, 81 Minn. 438, 84 N. W. 327, and cases cited; Bachus v. Burke, 48 Minn. 260, 51 N. W. 284. In Morris v. McKnight this court said: "From the adjudicated cases, and the wording of the statute, we conclude that, when a party seeks to foreclose a mortgage in this state by advertisement, claiming such right as assignee, the record must show complete legal title to such mortgage in such assignee; otherwise such foreclosure will be a nullity. Any other rule would discourage bidding at such foreclosure sales, and result in the sacrifice of property, and the title so conveyed would remain under suspicion, and values be thereby

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depreciated." In Clark v. Mitchell, supra, it was said:"It has also been held * * * * for clear and obvious reasons that equitable interests in beneficiaries, such as would be recognized and protected in foreclosure by proceedings in court, cannot be given effect in execution of the power of sale by advertisement. Benson v. Markoe, 41 Minn. 112, 42 N. W. 787; Backus v. Burke, 48 Minn. 260, 51 N. W. 284; Burke v. Backus, 51 Minn. 174, 53 N. W. 458; Dunning v. McDonald, 54 Minn. 1, 55 N. W. 864. But both the record and legal title must concur and coexist at the same time in the same person or persons, who alone have the authority to foreclose the mortgage in such cases; and this, without reference to the equitable ownership of interest therein by third parties."

A still further obstacle in the way of plaintiff's recovery is the evidence, which we think was properly admitted, showing that prior to the commencement of this action he parted with any interest he may have had in the property to one Ardery, and so far as the record discloses, he had no interest in the property at the date the action was brought. The case of Galbreath v. Payne, 12 N. D. 164, 96 N. W. 258, cited and relied upon by appellant's counsel, is not in point as we construe the opinion. In the case at bar it does not appear, as it did in Galbreath v. Payne, that the property was adversely held by any one at the date of such transfer, or that plaintiff had not been in possession thereof or receiving the rents and profits therefrom for over one year prior to such transfer.

We conclude, therefore, that plaintiff wholly failed to establish his ownership of the property as alleged. This it was incumbent upon him to do in order to make out his cause of action, as he must recover, if at all, upon the strength of his own title, and not because of the weakness of his adversary's title. Conrad v. Adler, 13 N. D. 199, 100 N. W. 722, and cases cited. "It is only after plaintiff has shown a right in himself * * * that defendant's title becomes material." See, also, Hannah v. Chase, 4 N. D. 351, 61 N. W. 18, 50 Am. St. Rep. 656.

It follows that the judgment of the district court was correct, and should be affirmed in so far as it denied any relief to plaintiff. It does not follow, however, that defendants were entitled to have the title quited in them as was adjudged by the trial court. There was no attempt to show that the indebtedness or any portion thereof secured by the trust deed or mortgage was ever paid or tendered to the owner or holder of the note secured thereby, hence

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we think it was error to award such affirmative relief to defendants. The judgment is modified by eliminating the portion thereof quieting title in defendants, and as thus modified the same will be affirmed, but without prejudice, however, to a proper proceeding by plaintiff, in the event he is still the owner of the indebtedness secured by such instrument, to subject such security to the payment of the indebtedness, subject, of course, to any legal defense which may be urged. All concur.

MORGAN, C. J., being disqualified, took no part in the foregoing decision; CHARLES F. TEMPLETON, judge of the first judicial district, sitting in his place by request.

(114 N. W. 728.)

D. B. SCOTT v. NORTHWESTERN PORT HURON COMPANY.

Opinion filed February 14, 1908.

Pleading—Amendment—Abuse of Discretion.

1. On this case being regularly called for trial, the defendant submitted a motion for a judgment upon the pleadings, whereupon plaintiff asked leave to amend his second amended complaint and the reply to defendant's answer. *Held*, that the record discloses no abuse of the legal discretion vested in the trial court by its refusal to permit such amendments.

Same—Successive Applications to Amend.

2. While trial courts should be liberal in permitting amendments so justice may be done, such rule in granting amendments changes to the disadvantage of the applicant on each new amendment being allowed.

Same—Denial of New Matter in Answer.

3. Under the code an allegation of new matter in the answer, not relating to the counterclaim, is deemed to be controverted by the adverse party. *Held*, that a general denial of new matter contained in the answer, made in a reply, is surplusage, and leaves the issues the same as though no such denial had been made.

Same—Complaint's Defects Supplied by Answer.

4. Supplying by the answer material allegations omitted from the complaint, which is not demurred to, cures the defect occasioned by such omission.

Same—Judgments on Pleadings.

5. Under the pleadings in this case, the trial court was justified in holding proof of breach of warranty inadmissible, but, irrespect-

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ive of any question as to breach of warranty made by the pleadings, other issues were made by reason of which it was error for the court to enter judgment on the pleadings.

Same — Statements by Counsel as to Proposed Proof.

6. In considering a motion for judgment upon the pleadings made when a case is called for trial, the court may properly take into consideration admissions and statements made by counsel for one of the parties showing what he expects to prove and rely upon on the trial.

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

Action by D. B. Scott against the Northwestern Port Huron Company. Judgment for defendant, and plaintiff appeals.

Reversed, and new trial granted.

John Carmody and P. G. Swenson, for appellant.

When there is reasonable doubt as to the propriety of an amendment it should be allowed. Martin v. Luger Furniture Co., 8 N. D. 220, 77 N. W. 1003; Stringer v. Davis, 30 Cal. 318; Smith v. Yreka Water Co., 14 Cal. 201.

Judgments on pleadings should not be granted if there is an issue. Viets v. Silver, 15 N. D. 51, 106 N. W. 35.

When objection to pleadings is first made on the trial, pleadings will be liberally construed. McCormick Harvester Machine Co. v. Falconer, 64 N. W. 163; Zimmerman v. Carpenter, 84 Fed. 747; Plankington v. Gray, 11 C. C. A. 268; Thompson v. Donahue, 92 N. W. 27; Jenkinson v. City of Vermillion, 52 N. W. 1066; Martin v. Graff, 74 N. W. 1040; Rice v. Bush, 16 Col. 484; Denis v. Velati, 31 Pac. 1; McAllister v. Welker, 41 N. W. 107; Malone v. Minn. Stone Co., 31 N. W. 171; Weicher v. Cargill, 84 N. W. 1007; Holmes v. Campbell, 12 Minn. 225; Kelly v. Kriess, 68 Cal. 210 11 Enc. Pl. & Pr. (2d Ed.) 1047; Holtz v. Hanson, 91 N. W. 663; Phillips v. Carver, 75 N. W. 432; Hegenah v. Geffert, 41 N. W. 967; Barton v. Gray, 12 N. W. 30; Bauman v. Bean, 23 N. W. 451; Witbeck v. Sees, 73 N. W. 915; Fire Association v. Ruby, 82 N. W. 629; Johnson v. Burnside, 52 N. W. 1057; Anderson v. Alseth, 62 N. W. 435.

W. E. Dodge, for respondent.

An admission made and relied upon, cannot be taken away by amendment. Zimmer v. Brooklyn Ry. Co., 23 Abb. N. Case, 382.

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Defendant's claim for breach of warranty may be deducted from amount sought by plaintiff. Davis v. Dickey, 23 Atl. 848; Taylor v. Griswold, 32 Ga. 569; Mears v. Nichols, 41 Ill. 207; Hillenbrand v. Stockman, 24 N. E. 370; Roebling Sons Co. v. Winthrop Hematite Co., 38 N. W. 310; Buffalo Barb Wire Co. v. Phillipps, 30 N. W. 295; Smith v. Pattee, 70 N. Y. 13.

SPALDING, J. This is an action to recover damages for an alleged failure to deliver a farm engine ordered by plaintiff from the defendant. The plaintiff's second amended complaint contained the following allegations material to a determination of this appeal: It alleged that on the 22d day of August, 1904, at Hillsboro, N. D., the plaintiff purchased of the defendant, and the defendant agreed to deliver to plaintiff at Cummings, N. D., on or about the 26th day of August, 1904, one new Port Huron engine of a certain description, warranted to be firstclass in material and in other particulars, and that the plaintiff was to pay therefor the sum of $2,415, of which $1,315 was to be paid by delivering to defendant one certain other engine, and $1,100 on the 15th day of September, 1904, in cash, all provided said engine was delivered to plaintiff at Cummings, N. D., on or about the 26th day of August, 1904, and was a new engine, and was as warranted, and that the plaintiff on such contract then and there paid the defendant the sum of $1,315 by delivering to it the secondhand engine referred to and which the defendant still retains; that the value of the engine purchased by plaintiff if delivered at Cummings, N. D., as per agreement, on or about the 26th day of August, 1904, and of the kind warranted, was $2,415, and that it was of the same value to the plaintiff; that plaintiff was ready and willing at the time and place aforesaid to receive the said engine, and pay the balance therefor, provided it was a new engine and as warranted and represented by the defendant, and that the defendant failed to deliver to plaintiff at Cummings, N. D., on or about the 26th day of August, 1904, any new Port Huron engine described or any engine whatever, and that the plaintiff was damaged thereby in the sum of $1,315. As a sixth allegation the plaintiff alleges that he was informed and believes that the defendant did on or about the 6th day of September, 1904, ship to him at Cummings, N. D., one threshing engine, but that the same was not a new engine, but a secondhand engine, and was not of firstclass workmanship and finish, and plaintiff demanded judgment against the defendant for the sum of $1,315,

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with interest. To this complaint the defendant answered, denying each and every allegation thereof, except as specifically admitted, and denying that the plaintiff sustained damages in the sum of $1,315, or any sum whatever. Further answering, the defendant alleged that on or about the 22d of August, 1904, at Hillsboro, N. D., the plaintiff executed and delivered a written order to defendant for an engine, which is set forth. It is sufficient to say that the order pleaded requested the defendant to deliver f. o. b. at its factory or warehouse on or about the 26th day of August, 1904, and ship to Cummings, N. D., one Port Huron engine, 25 horse power (traction rating), simple compound, one straw burning attachment, and one jacket, list price, $2,415, and plaintiff agreed to receive the same on its arrival and pay the freight and charges, and pay to defendant or its agent on or before the arrival of such machinery the sum of $2,415, $1,315 in one engine described, and note due September 15, 1904, for $1,100. The answer also alleges that such order was immediately accepted by the defendant, and that its factory and warehouse referred to were in the city of Port Huron, Mich., and that the time necessarily required to load and ship such machinery from said factory to Cummings, N. D., was at least ten days.

The answer further alleges that within the time specified in the contract, and within ten days from the 26th day of August, 1904, it loaded, shipped, furnished, and offered to deliver to plaintiff the engine and attachments described in said order, and tendered the same to plaintiff, and that the plaintiff then and there wrongfully and unlawfully disregarding the conditions of the contract, failed, neglected and refused to accept or receive the same or any part thereof, and has at all times failed, neglected, and refused to accept or receive the same or any part thereof; that said engine and attachments were in perfect condition, without defect, and strictly in accordance with the provisions of the order, when so tendered. The answer further admits that defendant agreed, as stated in said order, to receive from plaintiff a certain secondhand engine, but alleges that it was falsely represented by plaintiff as worth the sum of $1,315, and then sets forth the facts tending to show that the secondhand engine was not as represented by the plaintiff whose representations the defendant wholly relied upon, and that it was defective, and worthless beyond repair, and could not be utilized for any purpose whatever, and would not be accepted as part payment for

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said engine, and that said engine has been at all times held by the defendant subject to the order of the plaintiff, as plaintiff has been notified and knew, and renewing defendant's offer to deliver the same to the plaintiff. The defendant then pleads as a counterclaim damages in the sum of $1,000 for plaintiff's failure to accept or receive the engine ordered. To this answer the plaintiff replied, denying each and every allegation of new matter pleaded in the answer, and also denying the allegations of the counterclaim, and that the plaintiff was damaged in the sum of $1,000 or any sum by reason of the causes alleged in the counterclaim.

The case came on for trial the 26th day of March, 1906, when the following proceedings took place: The defendant submitted a motion to the court to direct entry of judgment in its favor and against the plaintiff upon the pleadings, consisting of the second amended complaint, the answer, and reply, upon the grounds, first, that the complaint did not state facts sufficient to constitute a cause of action; second, that it appeared from said complaint that the machinery was shipped to the plaintiff at Cummings on or about the 6th day of September, 1904, that it was alleged in the answer that the same was not received or accepted by the plaintiff, which facts were denied by the reply, and that hence from the pleadings as they stood it appeared that the plaintiff received and accepted the machinery in question on or about the 6th day of September, 1904, and it did not appear that the plaintiff had ever returned the same to defendant or offered to do so, or that he had in any way been damaged by the action of the defendant. Whereupon the counsel for the plaintiff asked leave to amend by striking out paragraph 6 of his amended complaint. To this application the defendant objected, stating as its reason for objection that paragraph 6 contained specific admissions on the part of the plaintiff which the defendant had relied upon, and had a right to rely upon in the trial of the case. Whereupon the plaintiff through its attorney stated that he admitted that on or about the 6th day of September, 1904, an engine billed from defendant to plaintiff arrived at Cummings, N. D., that plaintiff refused to accept it for the reason that it was not the kind of an engine called for by the contract, and that it was not shipped or delivered at the time called for by the contract, and asked leave to amend his reply by striking out the general denial therein contained, and, further, to amend it by denying generally and specifically each and every allegation of defendant's counterclaim, and

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that the defendant was damaged in the sum of $1,000 or any other sum by reason of the acts mentioned in the answer. To the request to strike out the general denial contained in the reply, the defendant objected for the reason that, that denial taken together with the first denial in the answer from line 23 to line 29, was equivalent to an admission on the face of the pleadings by the plaintiff that he did receive, accept, and retain the machinery in question, and the defendant was entitled to the legal effect of that admission, and was not prepared with evidence upon the proposition at that time, having relied upon it. Thereupon the court asked counsel for the defendant to state whether, in view of the admission made by counsel for the plaintiff, any evidence was necessary for him to prove his defense which he could not at that time secure in view of the pleadings as they had then been discussed, and upon which it would be necessary for him to make his defense to take testimony. Counsel for defendant replied that there were several facts, and asked the counsel for plaintiff to state to the court that he did not intend to rely upon any one or all of the five warranties pleaded by him. Counsel for plaintiff then stated that he could not admit that, for the reason that, if the jury should find that on the sixth day of September was a reasonable time in which to deliver the engine, the plaintiff would then have his cause of action, because defendant did not deliver the engine agreed to be delivered according to the warranty. Whereupon the court denied plaintiff's application to amend its second amended complaint, and granted the motion of the defendant for judgment upon the pleadings, with the understanding that the counterclaim was withdrawn. The plaintiff excepted to this ruling, and judgment was entered for defendant, that plaintiff take nothing and defendant recover costs. The judgment states that it was entered upon the pleadings and statements of counsel for plaintiff made in open court. From this judgment the plaintiff has appealed, and assigns as error the refusal of the trial court to allow the amendments requested, and the granting of the motion for judment in favor of the defendant.

Respondent submitted a motion to dismiss this appeal, and this motion was heard with the argument of the main case. It was based on the ground that a material portion of the appellant's abstract was never proposed for settlement, and was not settled by the trial court. In this we think the respondent is in error. We find a portion of the files entitled, "Statement of Case," and a certifi-

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cate of the judge settling it as such. The case so settled appears to contain all the proceedings in the trial printed in the abstract, although the papers are not put together in the usual order, and some portions thereof are quite informal, but we think they show clearly what occurred and are properly certified, and it would be extremely technical to dismiss the action by reason of the disorder in which the papers are found.

Two classes of error are assigned by appellant: First, the denial of his applications to amend his complaint and reply; second, the granting of the defendant's motion for judgment on the pleadings and statement of counsel in open court. We cannot say that the trial court erred in refusing to allow the amendment requested by plaintiff to his second amended complaint, or that such refusal was an abuse of discretion on the part of that court. Plaintiff cites numerous authorities to the effect that courts should be liberal in granting amendments, and that the defendant should have demurred. We can concede all plaintiff says, and the soundness of the authorities he cites on this subject, but it must be borne in mind that the plaintiff had already twice amended his complaint, and that these applications for further amendments were made after the case had been called for trial. The rule as to liberality in granting amendments changes to the disadvantage of the applicant on each new amendment being allowed. We could only find error in case of a clear abuse of discretion by the trial court. That court knew what had previously occurred on former amendments being allowed, all the circumstances and facts which must largely govern its discretion were within the knowledge of that court. We do not know the circumstances, and we cannot presume, on the mere statement that the plaintiff desired amendments the third and fourth times, that the knowledge of the trial court was such as to render his decision an abuse of discretion. The denial contained in plaintiff's reply in no manner changed the issues; hence the refusal to allow that stricken out did not constitute error. The record discloses no abuse of the legal discretion of the lower court, but, on the contrary, it tends to show proper use of the power of the court in such matters. The authorities cited by appellant are not applicable to the circumstances of this case.

Whether the granting of defendant's motion for judgment on the pleadings and statements of plaintiff's counsel made in open court was error depends upon the correctness of defendant's position as to

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the effect of the pleadings and such statements. Defendant's first claim was that the complaint did not state a cause of action, by reason of its not alleging the refusal by the plaintiff to accept and retain the machine. It is unnecessary to determine whether this was a fatal omission; because, if it was fatal, the defendant supplied what was lacking, and cured the defect by the allegation made in its answer that "plaintiff failed, neglected, and refused to accept or retain the same or any part thereof and has ever since at all times failed, neglected and refused to accept or retain the same or any part thereof" (Omlie v. O'Toole, 16 N. D. 126, 112 N. W. 677), and for the further reason that the denial of new matter by the plaintiff's reply was surplusage. Under the code of this state an allegation of new matter in the answer, not relating to a counterclaim, is deemed to be controverted by the adverse party, as upon a direct denial or avoidance, as the case may require. Rev. Codes 1905, section 6878; Meyer v. School District, 4 S. D. 420, 57 N. W. 68; Lyon v. Bank, 15 S. D. 400, 89 N. W. 1017. The general denial of the reply, therefore, left unchanged the issues made by the answer. While technically under some circumstances this denial might be deemed to constitute an admission of the receipt and acceptance of the engine, yet, under the facts of this case, to so hold would be altogether too technical a construction. Taking the pleadings as a whole, it appears clear to us that they show a contract for an engine, and that an engine of some kind was shipped, and arrived at Cummings, N. D., on or about the 6th day of September, 1904, but that the plaintiff refused to accept it, because he claimed that it was not the engine he ordered, and because he claimed it should have been delivered there on or about the 26th day of August, 1904, thus making issues as to the identity of the engine and the time of delivery.

In deciding defendant's motion for judgment, the court properly took into consideration the statements made by plaintiff's counsel as to the proof he proposed to rely upon, and, in so far as that proof related to a breach of warranty, plaintiff's evidence on this subject was incompetent under the pleadings, but, as we have indicated under the pleadings there would still be other issues for the trial. We cannot say as a matter of law that the 6th day of September should be construed as complying with the claim of the plaintiff that the engine was to be delivered at Cummings on or about the 26th day of August, because plaintiff alleges

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that it was to be delivered at Cummings at that time, while defendant pleads that the delivery was to be made at its warehouse, which it alleges is located at Port Huron, Mich. This is a fact in issue.

For this reason we are of the opinion that while the trial court was justified in holding, in substance, that proof of breach of warranty could not be admitted, that it erred in directing a verdict with the issues named undetermined. Defendant having waived his counterclaim on consideration of the court directing judgment, and the plaintiff not having accepted the terms of the judgment, the counterclaim should be reinstated.

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

(115 N. W. 192.)

FRANK J. PFEIFER v. T. T. HATTON.

Opinion filed Feb. 14, 1908.

Claim and Delivery — Execution — Effect of Verdict of Sheriff's Jury.

1. In an action of claim and delivery brought by a third person as claimant to the property against an officer who levied upon and took into his possession personal property under an execution as the property of the defendant in the execution, is no defense that a sheriff's jury prior to the commencement of such action found that the title to such property was in the defendant in such execution.

Same — Sheriff's Jury — Indemnity.

2. The sole function of the summary proceeding of a sheriff's jury is to justify the officer in delivering the property to the claimant in the event the jury find in his favor, unless the plaintiff in the execution furnishes indemnity to the officer against the claims of such third person.

Same — Answer.

3. Defendant's answer contained a paragraph alleging the empaneling of such sheriff's jury, and the fact that the jury found against the contention of the claimant. On motion of plaintiff's attorneys such paragraph was stricken from the answer. *Held* not error.

Appeal from District Court, Sargent County; *Allen,* J.

Action by Frank J. Pfeifer against T. T. Hatton. Judgment for plaintiff, and defendant appeals.

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Affirmed.

O. S. Sem, for appellant.

A pleading will not be stricken out as frivolous, if its character is doubtful. Catholicon Hot Springs v. Ferguson, 67 N. W. 615; Stebbins v. Lardner, 48 N. W. 847; Sigmund v. Bank of Minot, 4 N. D. 164, 59 N. W. 966; Bank of Commerce v. Humphrey, 61 N. W. 444; Sifton v. Sifton, 65 N. W. 67; Northwestern Cordage Co. v. Galbraith, 70 N. W. 1048; Minn. Thresher Mfg. Co. v. Schaack, 74 N. W. 445.

Defense of mitigation of damages must be specifically pleaded. McKyring v. Bull, 16 N. Y. 304; Gjerstadengen v. Hartzell, 79 N. W. 872; Kidder County v. Foye, 10 N. D. 424, 87 N. W. 984; Bohn Mfg. Co. v. Keenan, 89 N. W. 1009.

Rourke, Kvello & Adams, for respondent.

Pleas for mitigation are only pertinent to exemplary damages, or to disprove damages. Wandell v. Edwards, 25 Hun. 498; Gorton v. Keeler, 51 Barb. 475.

Verdict of sheriff's jury is no bar to a suit against the officer. Townsend v. Phillips, 10 Johns 96; Phillips v. Harris, 19 A. D. 166; Matheson v. Johnson, 92 N. W. 1083.

Fisk, J. But one question is presented on this appeal, which is the correctness of an order made by the trial court striking out on motion a portion of the answer.

The action is in claim and delivery; the complaint being in the usual form. The defendant, who is a constable, seeks to justify his taking and detention of the property under an execution issued to him upon a judgment rendered in an action wherein one Tisdel was plaintiff and one Ben Pfeifer was defendant. The portion of the answer which was ordered stricken out, and the striking out of which constitutes the only basis for appellant's assignments of error, is as follows: "The defendant further alleges that after the said levy and prior to the 9th day of April, 1906, the plaintiff demanded of the defendant that a constable's jury be called and impaneled to try the right of property in the property described in the complaint, and that the defendant immediately complied with said demand, and that, upon previous notice to plaintiff and the said Lewis Tisdel, he convened such jury before him at his office in De Lamere, in said

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county, on the 2d day of April, 1906, and then and there a trial was had before such jury duly impaneled and sworn; the plaintiff being present and represented by counsel, and the said Lewis Tisdel being present and represented by counsel, and evidence being adduced by both parties and the questions of right of property and possession thereof duly submitted to such jury for adjudication, and that after trial had, and after submitting same to the jury, said jury returned into court with verdict that at the time of the said levy said property was the property of Ben Pfeifer, and not the property of plaintiff, and that, upon such adjudication and verdict, the defendant retained the property until it was taken from him by the sheriff of Sargent county as aforesaid under the demand of plaintiff for a jury as aforesaid." We have duly considered appellant's argument in support of his contention that such ruling was error, and we are entirely clear that there is not merit in such contention. The facts alleged in said paragraph were wholly irrelevant to the issue involved, which was the right to the possession of the personal property at the time of the commencement of the action. Upon no theory can this paragraph be held pertinent or relevant to such issue. The facts therein alleged furnish no justification for the defendant's conduct in taking or detaining the property, nor can they be considered in mitigation of such acts in view of the fact that punitive damages are not claimed in the complaint. Citation of authorities is unnecessary upon propositions so elementary.

The matters embraced in said paragraph cannot be considered a defense in bar of the action, as it is well settled that the verdict of a sheriff's jury is not a bar. Such a verdict is entitled to no weight as an adjudication. It is not a judgment, nor has it any force or effect as such. Townsend v. Phillips, 10 Johns. (N. Y.) 98; Philips v. Harriss, 3 J. J. Marsh. (Ky.) 122, 19 Am. Dec. 166; Matheson v. Johnson, 16 S. D. 347, 92 N. W. 1083. See, also, 2 Freeman on Ex. (3d Ed.) sec. 277, and numerous cases cited. Under the provisions of our code (Rev. Codes 1905, sec 7114), relating to the calling of a sheriff's jury, as well as under the statutes of Nebraska, New York, New Jersey and Ohio, as stated by Mr. Freeman, "the importance of the proceeding is that it justifies the officer in delivering possession to the claimant, if the verdict or judgment is in his favor, and no bond of indemnity is tendered to the officer." It is a mere summary proceeding, and under our Code its only function, as stated by Mr. Freeman, is to justify the officer in delivering the

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property to the claimant in the event the verdict of such jury is in his favor, unless he receives indemnity from the person in whose favor the execution is issued.

It follows that the order appealed from was correct, and is accordingly affirmed, with costs to respondent. All concur.

(115 N. W. 191.)

F. Mayer Boot & Shoe Co., a Corporation v. Robert J. Ferguson.

Opinion filed Jan. 11, 1908. Rehearing denied Feb. 21, 1908.

Attachment — Affidavit — Sufficiency — Personal Knowledge of Affiant.

An attachment based upon an affidavit made by plaintiff's attorney is sufficient if the facts are positively stated in the language of the statute; it being unnecessary that the affidavit should disclose in addition thereto that the affiant possessed personal knowledge of such facts.

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

Action by the F. Mayer Boot & Shoe Co. against Robert J. Ferguson. From an order denying motion to dissolve an attachment, defendant appeals.

Affirmed.

M. A. Hildreth, for appellant.

Affidavit is fatally defective if it shows that affiant had no personal knowledge of the facts sworn to. Tim v. Smith, 93 N. Y. 87; Mech. & Traders Bank v. Louchein, et al., 55 Hun. 396; Thomas v. Dickinson, 11 N. Y. Supp. 436; O'Reilly v. Freel, 37 How. 272; Jones v. Hoefs, 14 N. D. 232, 103 N. W. 751; Sonnesyn v. Aiken, 12 N. D. 227, 97 N. W. 557.

Glassford & Lacy, for respondent.

Failure to deny truth of affidavit does not raise the issue that the attachment was defective as disclosing no knowledge of affiant. Ladenburg v. Bank, 39 N. Y. Suppl. 119.

Issuance of a warrant in North Dakota is a ministerial act and the affidavit was sufficient. Anderson v. Wehe, 17 N. W. 426; White v. Stanley, 20 Ohio State 423; Deering & Co. v. Warren, 44 N. W.

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1068; Simpson v. McCarty, 12 Am. St. Rep. 37, 20 Pac. 406; Eureka Steam Heating Co. v. Sloteman, 30 N. W. 241; Wheeler v. Farmer, 38 Cal. 203.

FISK, J. This is an appeal from an order denying a motion to dissolve an attachment. The ground of the motion was the alleged insufficiency of the affidavit upon which the warrant of attachment was issued. The particular ground of the attack was and is that James W. Glassford, the person who made said affidavit, possessed no personal knowledge of the facts therein sworn to by him. The affidavit is positive, and not upon information and belief; and, in substance, affiant states that he is one of the attorneys for plaintiff, and that the action was brought for the recovery of the purchase price of goods sold and delivered by plaintiff to defendant in June and July, 1906, at the agreed price and of the reasonable value of $621.60, on which no payments have been made except the sum of $50. Then follows a list of the goods thus sold, and which it is stated are subject to levy under the warrant of attachment for the purchase price thereof. Other facts are stated, which, however, are immaterial to the question here involved.

Counsel for appellant contends that Glassford, as plaintiff's attorney could not have possessed personal knowledge of the sale of these goods, and hence that his affidavit, being based upon mere hearsay, was of no validity, and he cites in support of such contention certain decisions from the state of New York. This contention is clearly unsound. Our statute is radically different than that of New York. In this state the warrant of attachment is issued by the clerk in a ministerial capacity upon a verified complaint setting forth a proper cause of action for attachment and upon an affidavit setting forth in the language of the statute one or more statutory grounds for attachment. Sections 6941, 6942, Rev. Codes 1905. In New York, the warrant is issued by the court in a judicial capacity, upon proper proof by affidavit of certain facts required by statute to be shown. It is therefore apparent that the New York decisions upon the question of the sufficiency of the affidavit are not in point in this state, and such is the express holding of this court in Severn v. Giese, 6 N. D. 523, 72 N. W. 922. Wallin, J., there said: "It is well settled that an affidavit framed under either of said subdivisions is sufficient if it sets out the very words of the statute. In setting out grounds of attachment under subdivisions 1 and 2 of the section it would be

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superfluous and improper to plead evidential or explanatory facts in support of the general ground as embodied in the words of the statute itself. This being the case, authorities cited from New York by counsel, which are based upon statutes which require such evidential facts to be set out, are not in point in this state. The crucial question is whether the affidavit states a ground of attachment under the statute of this state when it was made." The fact that most of the property is described in the affidavit in the vernacular of the boot and shoe trade does not render the affidavit void, nor is there any presumption that the plaintiff's attorney who made such affidavit was ignorant of the meaning of the technical terms used in describing such property. We are entirely clear that the affidavit was sufficient, and that the defendant's motion to dissolve the attachment was properly denied. Our views find support in the following cases: Deering & Co. v. Warren, 1 S. D. 35, 44 N. W. 1068; Anderson v. Wehe, 58 Wis. 615, 17 N. W. 426; White v. Stanley, 29 Ohio St. 423; Simpson v. McCarty, 78 Cal. 175, 20 Pac. 406, 12 Am. St. Rep. 37; Gilkeson v. Knight, 71 Mo. 403; Wheeler v. Farmer, 38 Cal. 203.

The order appealed from is accordingly affirmed, with costs to respondent. All concur.

(114 N. W. 1091.)

JOHN MAHON AND J. B. ROBINSON, CO-PARTNERS AS MAHON & ROBINSON v. J. PRESTON FANSETT, AND GREAT WESTERN BANK OF OSNABROCK, NORTH DAKOTA, GARNISHEE.

Opinion filed Nov. 8, 1907. Rehearing denied Feb. 21, 1908.

Garnishment — Answer of Garnishee.

1. It is not incumbent on a plaintiff in a garnishee action to take issue upon the garnishee's answer, where it admits that the garnishee has money or property in his hands sufficient to satisfy the plaintiff's claim.

Appeal — Waiver of Objections.

2. The defendant, in a garnishee action, by not raising the objection before the trial court that judgment has not been entered in the principal action, waives the objection, and cannot raise it for the first time in the Supreme Court.

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Same.

3. Objections to the sufficiency of plaintiff's affidavit in a garnishee action cannot be raised in the Supreme Court for the first time.

Garnishment — Exemptions — Determination of Claim.

4. Whether property in the hands of a garnishee is exempt or not is to be determined as of the day of the service of the garnishee summons.

Same.

5. An answer by the defendant in a garnishee action alleging that the property in the garnishee's hands is exempt (referring to the time of making the answer) does not state a defense, and evidence that such property is exempt at that time is not admissible under such answer.

Same — Transfer of Property.

6 A defendant in a garnishee action is not permitted to dispose of his property between the time of the service of the summons and the service of the answer, and thereby defeat a creditor's garnishment action, on the ground that the property in the hands of the garnishee is actually exempt when the answer is served.

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

Action by John Mahon and J. S. Robinson against J. Preston Fansett and the Great Western Bank of Osnabrock, garnishee. Judgment for plaintiff, and defendants appeal.

Affirmed.

E. R. Sinkler, for appellants.

Defendant may plead exemptions in garnishment. Defendant may plead that property held by garnishee is exempt. Rev. Codes 1905, section 6981; 12 Enc. of Law, 185; chapter 41, Civil Code 1905; article 2, chapter 12, Code Civil Pro. 1905.

Admission of "due and personal service," waives any advantage available before such admission. 19 Enc. Pl. & Pr. 703. Exemptions are not waived by fraudulent conduct unless so provided by statute. 12 Enc. of Law (2d Ed.) 202; Malter v. Henkel, 2 Sawy. 305; Sannoner v. King, 49 Ark. 299; Over v. Shannon, 91 Ind. 99; Duvall v. Rollins, 71 N. Car. 218; Wilcox v. Hawley, 31 N. Y. 648; Boesker v. Pickett, 81 Ind. 554; Mooseley v. Anderson,

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40 Miss. 49; Comstock v. Bechtel, 24 N. W. 465; Elder v. Williams, 16 Nev. 416; Constitution State of North Dakota, section 208.

Debtor cannot be compelled to select exempt property from that mortgaged. Baldwin v. Talbot, 4 N. W. 547; Bayne v. Patterson, 40 Mich. 658.

Exemption can be claimed as of the time of answer. Watson v. Simpson, 5 Ala. 233; Robinson v. Hughes, 10 Am. St. Rep. 45

When no issue is taken on garnishee's answer it is deemed conclusive. Rev. Codes 1905, section 6979; Brake v. Mnfg. Co. 14 So. 773; Cross v. Spillman, 9 So. 362; Case v. Noyes, 21 Pac. 46.

Judgment in main action is prerequisite to trial of issue in garnishment. Rev. Codes 1905, section 6982; Rood on Garnishment, section 364; Streisguth v. Reigelman, 43 N. W. 1116; Moore v. Wayne Judge, 20 N. W. 801; Conway v. Judge of Ionia, 8 N. W. 588.

Gordon & *McIntyre,* for respondents.

Where plaintiff takes issue with garnishee's answer, he waives irregularities therein. 20 Cyc. 1096; Rock v. Collins, 75 N. W. 426; Aultman, Miller & Co. v. Markley, 63 N. W. 1078.

One seeking exemptions must show strict compliance with law. Fletcher v. Staples, 64 N. W. 1150; Murphy v. Harris, 19 Pac. 377; Joyce v. Miller, 13 N. W. 664.

Failure to assert exemptions required by law waives them. 12 Am. & Eng. Enc. Law (2d Ed.) 198; 18 Cyc. 1453; Strouse v. Becker, 80 Am. Dec. 474; Zulke v. Morgan, 7 N. W. 651; Thompson on Homesteads and Exemptions, section 821; 12 Am. & Eng. Enc. Law, 226; Furrows v. Zollars, 67 N. W. 612; Freeman on Exemptions, 214.

Lien of garnishment accrues at time of service of notice. 20 Cyc. 1059.

When lien is fixed by notice, no subsequent act between garnishee and defendant can destroy it. 20 Cyc. 1058; North Star Boot & Shoe Co. v. Ladd, 20 N. W. 334.

When debtor has aliened all his property except such as he desires to select as exempt, the latter can be retained. Cook v. Scott, 6 Ill. 333; Barton v. Brown, 8 Pac. 517; Wagner v. Barden, 41 N. E. 1067; Moffitt v. Adams, 14 N. W. 88; Kilpatrick-Koch Dry Goods Co. v. Callendar, 52 N. W. 403.

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Garnishee must answer as required by statute, or be deemed in default. 20 Cyc. 1091; Peterson v. Lake Tetonka Park Co., 75 N. W. 375; Richardson v. White, 19 Ark. 241; Freeman v. Miller, 51 Texas, 443; Wyman v. Stewart, 42 Ala. 163; Brennan v. McInnis, 53 N. E. 896.

MORGAN, C. J. This is a garnishee action against the bank, based upon an action against the defendant Fansett upon an indebtedness due from him to the plaintiffs. The garnishee summons was served upon the bank and upon the defendant and both have appeared. The garnishee served its affidavit admitting that it held in its possession the sum of $765.81 belonging to the defendant. The defendant answered nealy 60 days after the service of the garnishee summons, and alleged that the money held by the garnishee was exempt at the time of the making of the answer, but it contained no allegation that such money was exempt when the garnishee summons was served. The trial court found in favor of the plaintiffs, and ordered judgment in their favor against the bank for the full amount of the judgment against the defendant in the principal action. The bank appeals, and asks for a review of the entire case under section 5630, Rev. Codes 1899, under which the case was tried.

The appellant contends that the judgment must be reversed for the reason that the plaintiffs did not take issue upon the affidavit of the garnishee, which admitted that it had in its hands certain money belonging to the defendant. This contention is based upon section 6979, Rev. Codes 1905. We do not think that said section is subject to that construction. In case a full disclosure is made by the garnishee to the effect that it has property in its hands, describing it, there is no necessity for taking issue on that allegation. Thereafter that property must remain in the garnishee's hands subject to the order of the court or the dismissal of the garnishee action. Section 6979 provides: "The answer of the garnishee shall in all cases be conclusive of the truth of the facts therein stated, unless the plaintiff shall within thirty days serve upon the garnishee a notice in writing that he elects to take issue on his answer," etc. The affidavit served on plaintiff by the garnishee, which is deemed an answer under the statute, admitted that it held $765.81 of the defendant's funds, and that fact became conclusive on all parties during the litigation. When the garnishee

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serves an affidavit that he has no property in his hands belonging to the defendant, as he may do under section 6975, Rev. Codes 1905, that fact also becomes conclusive unless issue is joined thereon by the plaintiff as provided for in said section 6979. It is only necessary for the plaintiff to elect to take issue on the garnishee's disclosure when the facts therein set forth are those permitted to be set forth under said section 6975. It is also contended that the judgment should be reversed for the reason that no judgment had been entered against the defendant in the principal action. This question is raised for the first time on appeal. The attention of the trial court should have been called to that fact, if true, by some objection, and that court given an opportunity to rule thereon. It is too late to present the question now for the first time. Technical objections are also raised for the first time on this appeal to certain allegations of the plaintiff's affidavit for garnishment, and the claim made that the affidavit is not in compliance with the statute because it contains no direct allegation that the plaintiffs are partners and other similar objections. By not challenging the insufficiency of the affidavit before the trial court, any objection thereto must be deemed waived, and it cannot now be raised for the first time.

It is claimed that the money held by the bank was exempt property, and not subject to process on behalf of any creditor. There is no allegation in the answer that such money was exempt property at the time that the garnishment action was commenced. The answer was served about 60 days after the summons was served. The allegation of the answer is that the property levied on "is exempt" from levy or sale. There is no allegation that it was exempt when the summons was served. The evidence shows that defendant disposed of some of his property after the summons was served and before the answer was served. This raises the question whether the defendant could, by selling his property during the time in which he was allowed to answer, defeat and render valueless the plaintiff's garnishment proceedings. So far as the defendant's right to claim his exemptions, he was as entitled to claim them when the action was commenced as he was when he answered and claimed them. The question is whether the fact that certain property is exempt is to be determined from what property the debtor has when the claim of exemption is made, or at the time when the summons is served in the garnishee action. The com-

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mencement of the action determines the status of the debtor's property as to exemptions. If it was exempt when the summons was served, it does not cease to be exempt by the debtor's act in thereafter selling it.. A lien is created on the debtor's property in the hands of the garnishee when the summons is served upon the garnishee, upon all property in the garnishee's hands at that time, providing it is subject to such lien at all. 20 Cyc. 1058. If that lien can be divested by sale of other property thereafter, and the debtor's property thereby reduced in value within the exempted amount, the object of the law could in all cases be defeated. The garnishment statute is express that the liability of the garnishee attaches from the time of the service of the summons on him. This is generally the rule in all matters pertaining to civil actions; that is, the issues are made and determined as of the date of the commencement of the action, and not as of the date of the answer. To dispose of his property not in the hands of the garnishee when the summons is served, and thereafter claiming the remaining property as exempt, amounts to a fraud upon the plaintiff's rights, and the trial court found that the sale in this case was actually fraudulent. We need not consider whether it was actually fraudulent or not, as it is sufficient to say that the answer must allege that the property was exempt when the garnishment summons was served. Smith v. Spafford (N. D.) 112 N. W. 965; Kilpatrick-Koch Dry Goods Co. v. Callendar, 34 Neb. 727, 52 N. W. 403; Kingen v. Stroh, 137 Ind. 610, 36 N. E. 519; Phenix Ins. Co. v. Fielder, 133 Ind. 557, 33 N. E. 270; North Star B. & S. Co. v. Ladd, 32 Minn. 381, 20 N. W. 334; Wagner v. Barden, 13 Ind. App. 571, 41 N. E. 1067. The answer did not, therefore, properly allege that the money was exempt. The plaintiff objected to all evidence that the property was exempt, and the objection was well founded, as the true issue was whether the money was exempt when the summons was served. The exemption law is not intended to defeat vested rights or rights acquired under liens which accrued while the property was not exempt. The debtor cannot, by his own act relating to his property, make it exempt by sale or mortgage after a lien has been acquired thereon by a creditor. It is true that the constitution and statute give an exemption from sale, but the reasonable construction of these provisions is that rights under a sale are to be determined as of the date of the liens under which the sale is made so far as the exemption of the property is concerned.

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If a lien is secured on property of a debtor prior to judgment or sale, all rights at the sale as to such property relate back to the time of the creation of the lien, and, if the property was not exempt when the lien was acquired, no changes by sale thereafter can inure to the benefit of the debtor. Although exemption privileges are to be liberally construed in favor of the debtor, the principle should not be extended to divest acquired liens nor so as to encourage fraudulent practices. The following cases sustain this principle: Bank v. Vest, 187 Ill. 389, 58 N. E. 229; Baird v. Trice, 51 Texas 555; Bullene v. Hiatt, 12 Kan. 98; Upham v. Bank, 15 Wis. 450; Kelly v. Dill, 23 Minn. 435; Reynolds v. Tenant, 51 Ark. 84, 9 S. W. 857; Avery v. Stephens, 48 Mich. 247, 12 N. W. 211; Hines v. Duncan, 79 Ala. 112, 58 Am. Rep. 596; Watkins v. Overby, 83 N. C. 165. The fact that the property was exempt when the answer was served did not inure to the defendant's benefit.

Under the allegations of the answer, evidence that the money was exempt when it was served was not admissable, and the same will not be considered in this court.

The judgment is affirmed. All concur.

(115 N. W. 79.)

IDA M. CARDIFF v. SIDNEY J. MARQUIS, ET AL AND JESSIE E. MORRIS, SIDNEY J. MARQUIS v. IDA M. CARDIFF, ET AL, AND JESSIE E. MORRIS.

Opinion filed Feb. 1, 1908.

Witness — Transactions With Decedent — Administrator a Party.

1. The fact that a witness is a proper party to an action in which the executor, administrator, or heirs at law of a deceased person are parties disqualifies such witness from testifying to transactions or statements made by such deceased person. The fact that such witness is a party defendant with the administrator, executor, or heirs does not render him competent as a witness in such cases.

Same.

2. The evidence of a witness who is a party in such cases is inadmissible to prove that letters were written and signed by the witness at the request and dictation of the deceased person, whose administrator is a party to the action.

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Same.

3. The evidence of a witness who is a party to an action in which the administrator of a deceased person is also a party is not admissible to prove the contents of lost letters written or received by the witness to or from such deceased person.

Express Trusts — Created by Writing Alone.

4. An express trust in real estate cannot be created or declared except by a writing subscribed by the trustee.

Equity — Enforcements of Trusts — Constructive Fraud.

5. Where a conveyance of real estate is delivered by a daughter to her father under an oral contract that it is given in trust for the daughter, and such contract is proven by declarations of the father at the time the deed is delivered, and it is shown that the trust has not been carried out, a court of equity will enforce the trust, as the refusal to carry it out is a constructive fraud, based on the relations of confidence existing between the parties.

Same.

6. In such a case it is immaterial whether the fraud was intentional or not, or whether it existed when the conveyance was delivered.

Same.

7. In such a case courts of equity do not enforce the trust in violation of the statute of frauds, but relief is granted as based on the constructive fraud and the confidential relation.

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

Action by Ida M. Cardiff against Sidney J. Marquis and others. Judgment for plaintiff, and defendant Jessie E. Morris appeals.

Affirmed.

E. E. Cassels and *Bucklin & Bucklin,* for appellant.

No resulting trust arisies from an instrument of conveyance and reciting a consideration. 2 Pomeroy's Equity Jurisprudence paragraphs 1031, 1033 and 1035. 27 Am. & Eng. Enc. Law 52; Gee v. Thwaikill, 45 Kan. 173; Moran v. Somes, 154 Mass. 200;

Trust must arise at time of conveyance. Dick v. Dick 172 Ill. 578; Reed v. Reed, 135 Ill. 482; Koster v. Koster, 149 Ill. 195.

Where there is an express trust there can be no resulting or implied one. Kingsbury v. Burnside, 58 Ill. 310; Stevenson v. Crapnell, 114 Ill. 19: Mayfield v. Forsyth, 164 Ill. 32; Bispman's Prin.

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of Equity(5th Ed.)par. 80, p. 136; Gibson v. Forte, 40 Miss. 792; Lowry v. McGee, 3 Head 274; Snyder v. Wolford, 33 Minn. 175; Farnham v. Clements, 31 Me. 426; Beers v. Beers, 22 Mich. 42; Hanson v. Berthelsen, 19 Neb. 433; Philbrook v. Delano, 29 Me. 410.

Parol evidence is inadmissable to establish an express trust. Dick v. Dick, supra; Goodwin v. Hubbard, 15 Mass. 218; Montgomery v. Craig, 128 Ind. 48; Feeney v. Howard, 12 Am. St. Rep. 162; Patton v. Beecher, 62 Ala. 579; Kelley v. Karsner, 72 Ala. 106; Dear v. Dear, 6 Conn. 284; Mescall v. Tully, 91 Ind. 96; Columbus, etc. Ry. v. Braden, 110 Ind. 558; Haine v. Robinson, 72 Iowa, 735.

James M. Austin and *Youker & Perry,* for respondents. *W. S. Lauder,* of counsel.

An express trust may be created by several papers provided they are clearly connected, and indicate the nature of the trust. Combs v. Brown, 29 N. J. Law 36; Augustus v. Graves, 9 Barb. 595; Kingsbury v. Burnside, 58 Ill. 310; Moore v. Pickett, 63 Ill. 158; Townsand v. Kennedy, 6 S. D. 47; Malin v. Malin, 1 Wend. 625; Throp v. Hatch, 3 Abb. Prac. 23.

Constructive trust in real property can be proved by parol. Kingsbury v. Burnside, supra; Lantry v. Lantry, 51 Ill. 458; Barrell v. Hanrick, 42 Ala. 60; Perry on Trusts, section 166; Christy v. Sill, 95 Pa. St. 380; Brinson v. Brinson, 7 Am. St. Rep. 189; Wood v. Rabe, 48 Am. Rep. 640; Clark v. Haney, 50 Am. Rep. 536; Brown on the Statute of Frauds, section 95; Goodwin v. McMinn, 74 Am. St. Rep. 703; Seichrist's Appeal, 66 Pa. St. 237; Highberger v. Stiffler, 83 Am. Dec. 593; Whitney v. Hay, 181 U. S. 77; Storey's Equity, section 312; Collins v. Tillou's Adm., 26 Conn. 368; Linsley v. Lovely, 26 Vt. 123; Oliver v. Oliver, 1 Am. Dec. 257; 4 Lawson's Rights, Remedies and Practice, 3392; 3 Pom. Eq., section 1052, 1053.

Confidential relations carefully scrutinized to protect against undue advantage. Archer v. Hudson, 7 Beav. 551; Houghton v. Houghton, 15 Id. 278; Wright v. Vanderplank, 8 DeG., M. & G. 133.

Constructive trust may be shown by parol. Alaniz v. Casenave, 27 Pac. 521; Bartlett v. Bartlett, 19 N. W. 691; Koefoed v. Thompson, 102 N. W. 268; Butler v. Hyland, 26 Pac. 1108; Bowler v.

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Curler, 26 Pac. 226; Gruhn v. Richardson, 21 N. E. 18; Benjamin v. Mattler, 32 Pac. 837; Irwin v. Dyke, 1 N. E. 913; Hackworth v. Zeitinger, 48 Mo. 732; Patterson v. Ware, 10 Ala. 444; Middlesex Co. v. Osgood, 70 Mass. 447; Engelhorn v. Reitlinger, 25 N. E. 297; Wiseman v. Thompson, 63 N. W. 346; Conner v. Hingtgen, 19 Neb. 472; Porter v. Wormser, 94 N. Y. 431; Howe v. Chesley, 56 Vt. 727; Wells v. Monihan, 29 N. E. 232.

Morgan, C. J. This is an action brought by the plaintiff to recover the sum of $2,880, the proceeds of the sale of 160 acres of land alleged to have been owned by her. The complaint alleges her ownership of the land, and that on October 30, 1904, she executed and delivered to her father, Edward L. Marquis, a deed of said 160 acres of land. The complaint further alleges that the said deed was without any consideration whatever, and was made in trust for the plaintiff for the purpose of selling and conveying said land in trust for her; that said land was to be sold to one Malander for said sum, and that said sum was to be paid by said Edward L. Marquis to the plaintiff as soon as said land was sold to said Malander; that on November 9th said Edward L. Marquis did sell and convey said land to said Malander and deposited the deed to said land in escrow with the First National Bank of Oakes, N. D., to be delivered to said Malander as soon as the purchase price therefor was paid, and that said First National Bank did thereafter deliver said deed to said Malander; that before said sum of money was paid by said bank to said Edward L. Marquis he died; that the defendant Crabtree is the administrator of the estate of said Edward L. Marquis; and that said sum of money was paid to him as such administrator by the First National Bank. The complaint further alleges that the plaintiff is the owner of said sum of money, and entitled to receive same. The other defendants, Jessie E. Morris and Sidney J. Marquis, are the other heirs at law of said Edward L. Marquis. They are made defendants as such. The relief demanded in the complaint is as follows: First. That said sum of $2,880 which was received for said land be declared to be the property of this plaintiff, and that the same be declared and adjudged to be a trust fund for the use and benefit of the plaintiff. Second. That each of said defendants be debarred and estopped from asserting any right, title, claim, or interest to said fund. Third. For general relief. The defendant Sidney J. Marquis did not answer. The defendant Jessie E. Morris answered and alleged

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that said Edward L. Marquis was the owner of said land when conveyed to Malander, and that the deed from the plaintiff to him was not a deed in trust for said plaintiff, but that plaintiff's deed to said Edward L. Marquis was made to carry out the terms of a contract by which the deed from said Edward L. Marquis to her was held in trust for said Edward L. Marquis. In the district court this action and another action were submitted under the same evidence under a stipulation that each case should be decided upon the evidence in the record applicable to the case. This other action was brought by Sidney J. Marquis, who is a defendant in this action, and who is a brother of the plaintiff, and was made a defendant in this action as an heir at law of said Edward L. Marquis. The said Sidney J. Marquis brings his action to have the proceeds of another 160 acres of land alleged to have been owned by him declared to be a trust fund, by reason of similar facts as are alleged in the present action. The district court found in favor of the plaintiffs in each of said actions, and adjudged that they were entitled to the proceeds of the sale of said land, and that the defendant Jessie E. Morris, and the defendant Crabtree, as administrator, had no right to the possession of said money. It is stipulated that the following facts are true: That said Edward L. Marquis was the owner of the land involved in this suit on October 7, 1902, and that he conveyed the same to this plaintiff on said day; that the consideration named in that deed was the sum of $2,880; that the record title to this land remained in this plaintiff until October 30, 1904; that on said day she conveyed said land to said Edward L. Marquis; that the consideration recited in this deed was the sum of $2,880, and that on November 9, 1904, said Edward L. Marquis conveyed this land to one Malander; that in the deed to Malander was also conveyed a tract of 160 acres of land owned by said Edward L. Marquis, and also a tract of 160 acres of land, the record title of which was in Sidney J. Marquis, and had been for twenty years; that the consideration named in this deed was the sum of $8,467. It was further stipulated that the land involved in this suit was of the value of $17.50 per acre when the same was deeded to said Edward L. Marquis, and that the 160 acres involved in the suit of Sidney J. Marquis was valued at $18.50 per acre. It was further stipulated that said Sidney J. Marquis conveyed the 160 acres of land involved in this action to Edward L. Marquis on October 24, 1904, and that a consideration of $2,695 was named in

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that deed; further, that the proceeds of the sale of said 480 acres of land came into the hands of said bank, and that Edward L. Marquis died before the money was paid by said bank to him. It is also stipulatetd that said sum of $8,467 was paid by said bank to said administrator, and that said sum was the entire proceeds of the sale of said 480 acres of land to said Malander. It is shown in the record by undisputed evidence that no consideration whatever passed between said E. L. Marquis and said Sidney J. Marquis for the conveyance to said E. L. Marquis by these two plaintiffs. It is also shown by undisputed evidence that the deeds to said Edward L. Marquis were absolute in terms, and contained no recitals as to the alleged trust character of said deeds. The trial court made findings of fact and conclusions of law in favor of the plaintiff in each of said actions, and adjudged that each of said plaintiffs was entitled to a judgment against the administrator for the stipulated value of the land. Judgments were entered pursuant to such findings, and the defendant Jessie E. Morris appeals from these judgments, and demands a trial de novo in this court.

It is the contention of the plaintiff that she is entitled to the proceeds of the sale of her 160 acres of land on account of the fact that it was agreed between her and said E. L. Marquis that the deed to him was made in trust for herself and was given for the purpose of enabling said E. L. Marquis to sell his own land more advantageously. E. L. Marquis was the owner of 160 acres of land adjoining the plaintiff's tract, and also adjacent to the tract owned by Sidney J. Marquis, and it was represented by said E. L. Marquis that he could sell his own land more advantageously if he was permitted to sell the plaintiff's land and also the land of said Sidney J. Marquis. She contends that this was the sole purpose of the conveyance to her father, and that he agreed, upon selling said land, to turn over the proceeds to her. This agreement and contract is amply shown by correspondence between E. L. Marquis and Sidney J. Marquis, and it is amply shown by oral evidence that E. L. Marquis received the deed from this plaintiff under such understanding. The letters which passed between E. L. Marquis and Sidney J. Marquis were written by this plaintiff at the request and dictation of E. L. Marquis, but said letters were not signed by E. L. Marquis, and were signed by this plaintiff. The appellant objects to the introduction of these letters in evidence, on the ground that under the circumstances they constitute statements of transactions with

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a deceased party, and are therefore inadmissable under the provisions of section 7253, Rev. Codes 1905, which is as follows: "No person offered as a witness in any action or proceeding in any court, or before any officer or person having authority to examine witnesses or hear evidence, shall be excluded or excused by reason of such person's interest in the event of the action or proceeding; or because such person is a party thereto, or because such person is the husband or wife of a party thereto, or of any person in whose behalf such action or proceeding is commenced, prosecuted, opposed or defended, except as hereinafter provided: (1) A husband cannot be examined for or against his wife without her consent, nor a wife for or against her husband without his consent, nor can either during the marriage or afterwards be, without the consent of the other, examined as to any communications made by one to the other during the marriage; but this subdivision does not apply to a civil action or a proceeding by one against the other, nor to a criminal action or proceeding for a crime committed by one against the other. (2) In civil actions or proceedings by or against executors, administrators, heirs at law or next of kin in which judgment may be rendered or order entered for or against them, neither party shall be allowed to testify against the other as to any transaction whatever with or statement by the testator or intestate, unless called to testify thereto by the opposite party," etc. It is shown by the record that most of these letters were lost and were not produced at the trial, and as to proof of such fact said Sidney J. Marquis was permitted to state the contents of said letters under objection. It is also shown in the record by the testimony of this plaintiff that the letters were written at the request and dictation of E. L. Marquis. Under said section of the statute it is clear to us that this plaintiff was incompetent to testify to the fact that the letters to S. J. Marquis, signed by her, were written at the father's dictation. These letters were transactions and statements by a deceased person with a party to an action. It is claimed that the evidence of Ida M. Cardiff was admissible in the action in which S. J. Marquis was plaintiff, and that the evidence of S. J. Marquis was admissible in the action in which Ida M. Cardiff is plaintiff. This fact does not remove the objection, as both of these witnesses are parties in each action. Sidney J. Marquis is a defendant in the action in which Ida M. Cardiff is plaintiff, and she is defendant in the action in which S. J. Marquis is plaintiff. The prohibition of the

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statute is against testimony of this character by a party to an action in which an executor or administrator is also a party. The evil designed to be avoided by this statute is present in this case, and its provisions should not be annulled simply for the reason that the party testifying is a co-defendant with the executor or administrator. Both on principle and under the language of the statute this evidence was objectionable. We have recently decided this question in another case where the authorities are collected. First National Bank v. Hilliboe (decided at this term), 17 N. D. 76, 114 N. W. 1085. A letter was received by Sidney J. Marquis from E. L. Marquis in which he stated that he would pay over the proceeds of the sale of the land to said Sidney J. Marquis as soon as the sale was completed. This letter was lost and could not be produced at the trial. The contents of this letter were received in evidence under an objection to its competency. The witness was disqualified to testify as to the contents of the letter. The letter was a statement by the decedent, the administrator of whose estate is a party to the action, and the statement was made to the witness. 30 A. & E. Enc. Law, p. 1036, and cases cited under note 1, page 1037. These letters being inadmissible, it follows that the trust character of the deed was not shown by any writing. An express trust cannot be created by parol. Section 4821, Rev. Codes 1905; Carter v. Carter, 14 N. D. 66, 103 N. W. 425.

In our judgment this fact is not fatal to the plaintiff's recovery. In the absence of any writing to prove that E. L. Marquis was to hold the money received from the sale of the land for the benefit of the grantors in the deeds to him, the record contains evidence that shows that the money derived from the sale was to be paid to these plaintiffs. The husband of the plaintiff said: "Well, there was something said. I said something to him about the consideration, how they are going to get their money out of this here, and he made the remark that so soon as he got the returns from this sale there he would give Ida and Sid their part." This statement of the deceased was made at the time that the Ida M. Cardiff deed was signed and delivered to the deceased, and was not objectionable as contravening the provisions of said section 7253, as the witness was not a party to the action. The plaintiff also testifies that he (meaning the father) "was taking the title so he could sell it for me." There was no objection to this testimony on any ground. This testimony, taken in connection with the relationship of the parties, a relation of confidence and trust, convinces us that the plaintiffs are entitled upon

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equitable considerations to the relief sought. If the father had lived until the consummation of the sale to Malander, and had refused to pay to the plaintiff the price received for her land, it would be a fraud upon the plaintiff, entitling her to equitable relief. It is true that the plaintiffs were of mature age when their conveyances were delivered. However, that fact does not deprive them of equitable relief, where confidence was reposed and the deed given without protecting themselves by strict compliance with the requirements of the statute of frauds. The administrator stands in the same relation to these plaintiffs as the father would have stood in if he were alive. If the father were before the court, the facts would justify a finding against him of constructive fraud. In Perry on Trusts, § 166, it is stated: "If a person obtains the legal title to property by such arts or acts or circumstances of circumvention, imposition or fraud, or if he obtains it by virtue of a confidential relation and influence under such circumstances that he ought not, according to the rules of equity and good consience, as administered in chancery, to hold and enjoy the beneficial interest of the property, courts of equity, in order to administer complete justice between the parties, will raise a trust by construction out of such circumstances or relations; and this trust they will fasten upon the conscience of the offending party, and will convert him into a trustee of the legal title, and order him to hold it or to execute the trust in such a manner as to protect the rights of the defrauded party and promote the safety and interests of society." See 3 Pomeroy, Eq. Juris. (3d Ed.) note "a" to section 1056, where the cases are collected. The doctrine there announced is that relief is granted in such cases not in violation of the terms of the statute of frauds, but that a constructive trust is raised, based on the fraud growing out of the confidential relation, and that it is immaterial that no fraudulent intent actually existed when the conveyance was delivered. In Wood v. Rabe, 96 N. Y. 414, 48 Am. Rep. 640, the court granted relief under facts somewhat parallel. The court said: "The court, in granting relief in case of an oral agreement, proceeds upon the ground of fraud, actual or constructive, and enforces the agreement, notwithstanding the statute, by reason of the special circumstances. * * * There are two principles upon which a court of equity acts in exercising its remedial jurisdiction, which, taken together, in our opinion, entitle the plaintiff to maintain this action. One is that it will not permit the statute of frauds to be used as an instrument of fraud, and the other, that, when a person

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through the influence of a confidential relation acquires title to property, or obtains an advantage which he cannot conscientiously retain, the court to prevent the abuse of confidence will grant relief." See also, Beach on Trusts, § 105; Brison v. Brison, 90 Cal. 323, 27 Pac. 186; Id. 75 Cal. 525, 17 Pac. 689, 7 Am. St. Rep. 189; Bowler v. Curler, 21 Nev. 158, 26 Pac. 226, 37 Am. St. Rep. 501; Sherman v. Sandell, 106 Cal. 373, 39 Pac. 797; Alaniz v. Casenave, 91 Cal. 41, 27 Pac. 521; Bartlett v. Bartlett, 15 Neb. 593, 19 N. W. 691; Gruhn v. Richardson, 128 Ill. 178, 21 N. E. 18.

As we deem the plaintiff entitled to recover upon the grounds stated, it is unnecessary to determine whether the failure to plead the statute of frauds in the answer foreclosed the defendants from relying upon it at the trial, and whether the plaintiffs would be entitled to recover upon the ground that the trust related to personal property and therefore not necessary to be in writing. There is no serious conflict in the evidence as to the fact that the deeds were delivered in trust for the plaintiff. We have examined the evidence proffered by the defendants on this point, but it in no sense overcomes the plaintiff's evidence, and the evidence, considered altogether, makes out a clear case of the existence of the trust character of the deed.

The judgment is affirmed. All concur.

(114 N. W. 1088.)

MARQUIS v. MORRIS.

Opinion filed February 3, 1908.

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

Action by Sidney J. Marquis against Jessie E. Morris. Judgment for plaintiff, and defendant appeals. Affirmed.

E. E. Cassels (*Bucklin & Bucklin,* of counsel) for appellant.

W. S. Lauder and *Youker & Perry,* for respondent.

PER CURIAM. Following the case of Cardiff v. Marquis, 17 N. D. 110, 114 N. W. 1088, the judgment of the district court of Dickey county is affirmed.

(114 N. W. 1091.)

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JAMES SMITH v. PAUL KUNERT.

Opinion filed March 3, 1908.

Appeal — Statement of Case — Transcript of Testimony.

1. The statement of the case contains a literal transcript of the testimony taken and reported by a referee to the district court, without any attempt to condense or eliminate immaterial matter. *Held,* following the rule announced in prior decisions of this court, that such practice is a plain violation of section 7058, Rev. Codes 1905, as well as rule 7 of this court, and does not constitute a statement of the case.

Same — Specifications of Error — Finding of Referee.

2. Certain specifications of error relating to the findings of the referee are *held* insufficient under the statute and rule aforesaid, for the reason that no attempt is made to specify wherein the evidence was insufficient to support the findings complained of.

Same — Assignments of Error.

3. Appellant's assignment of error, based upon rulings and findings of the referee, are not considered, for the reason that the statute and rule above mentioned have not been complied with.

Compulsory Reference — Failure to Object.

4. Under the provisions of sections 7046 and 7047, Rev. Codes 1905, a compulsory reference cannot be ordered without the written consent of the parties, unless the case comes within the provision of the latter section. Mere silence or failure to object or except to the order will not constitute a waiver of a party's constitutional right to a trial by jury.

Same — Constitutional Law — Right to Jury Trial.

5. Subdivision 1, section 7047, Rev. Codes 1905, is not in conflict with section 7 of our state constitution, which provides that "the right to trial by jury shall be secured to all and remain inviolate." The right of trial by jury as thus guaranteed refers to such right as it existed by law at and prior to the adoption of the constitution.

Reference — Long Account.

6. Under the issues as framed by the pleadings in this case, it is *held* that the trial thereof involved the examination of a long account, within the meaning of section 7047, Rev. Codes 1905, and hence that the order of reference was properly made.

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

Action by James Smith against Paul Kunert. Judgment for plaintiff, and defendant appeals.

Affirmed.

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J. A. Dwyer and *Chas. E. Wolfe,* for appellant.

The right of trial by jury means the right as at common law, unless modified by custom, usage or statute. Barry v. Truax, 13 N. D. 131, 99 N. W. 769.

Law authorizing reference, without consent of party, whether a long account is to be taken or not, is unconstitutional. Grim v. Norris, 19 Cal. 140; Benham v. Rowe, 2 Cal. 261; McMartin v. Bingham, 27 Iowa 234; Blair Town Lot Co. v. Walker, 50 Ia. 376; Burt v. Harriah, 22 N. W. 910; Whallon v. Bancroft, 4 Minn. 95; St. Paul Railway Co. v. Gardner, 19 Minn. 132; Mills v. Miller, 3 Neb. 87; LaMaster v. Scofield, 5 Neb. 148; Kinkaid v. Hiatt, 39 N. W. 600; Johnson v. Wallace, 7 Ohio 62; Averill Coal & Oil Co. v. Verner, 22 Ohio St. 372.

Whether reference is authorized is determined by character of plaintiff's claim, not by the issue, or defendant's answer. Gopsill v. Harvey 34 N. J. L. 435; Ludlow v. American National Bank, 59 Barber (N. Y.) 509; Childs v. Mayer, 52 Hun. 537; Betcher v. Grant County, 68 N. W. 163; Kelly v. Oksall, 97 N. W. 11; Ewart v. Kass, 95 N. W. 915.

Necessity of examination of a long account must appear from the pleadings. Betcher v. Grant County, 68 N. W. 163; Ewart v. Cass, supra; Kelly v. Oksall, supra.

Failure to object to reference does not waive right to jury trial. Hanson v. Carlblom, 13 N. D. 361, 100 N. W. 1084; Twp. of Noble v. Aasen, 10 N. D. 264, 86 N. W. 742.

Parks & Olsberg, for respondent.

The case, not involving a long account on either side, was not one for reference. Townsend v. Hendricks, 40 How. Pr. 143; Welsh v. Darrah, 52 N. W. 590; Untermeier v. Beinhauer, 11 N. E. 847; Steck v. Colorado Fuel & Iron Co., 37 N. E. 1; Cassidy v. McFarland, 139 N. Y. 201; Randall v. Kingsland, 53 How. Pr. 512; Martin v. Gould, 13 Civ. Proc. R. 45; Hale v. Swinburne, 17 Abb. N. C. 381; Nachtstein v. Turner, 36 N. W. 637.

Nor where accounts are collaterally and incidentally involved. Kain v. Delano, 2 Abb. Prc. 29; Ronalds v. Mechanics Bank, 37 N. Y. Super. Ct. 208; Camp v. Ingersoll, 86 N. Y. 433; Keller v. Paine, 51 Hun. 316; Doyle v. Metropolitan El. R. R., 32 N. E. 1008.

The account was sufficiently long to warrant a reference. Sutton v. Wegner, 43 N. W. 167; Nachtstein v. Turner, supra, La Cour-

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sier v. Russell, 52 N. W. 176; Chicago & N. W. R. Co v. Faist, 58 N. W. 744; Priest v. Varney, 25 N. W. 551; Briggs v. Hils, 48 N. W. 800; Monitor Iron Works Co. v. Ketchum, 2 N. W. 80; Rolling Stock Co. v. Johnston, 30 N. W. 211.

Literal copy of testimony not reduced to narrative form in referee's report, and in statement of case, precludes consideration by the court. Sup. Ct. Rule No. VII, Rev. Codes 1905, Sec. 7058. Thuet v. Strong, 7 N. D. 565, 75 N. W. 922.

Specifications of error failing to indicate wherein evidence is insufficient, are not sufficient. Sec. 7058, Rev. Codes 1905; Supreme Court Rule No. VII; Hostetter v. Brooks Elevator Co., 4 N. D. 357, 61 N. W. 49.

Fisk, J. This appeal is from a judgment of the district court of Foster county, and comes to this court for review of alleged errors of law. A so-called statement of case was settled, embracing 34 specifications of error, and appellant's counsel have assigned 30 of such alleged errors in their printed brief upon which they rely for a reversal of the judgment. The practice pursued by appellant's counsel in the preparation of the statement of the case discloses a most flagrant violation of the statute and rules of this court governing the same. The case was tried before a referee, and the statement of case contains a literal transcript of the testimony taken and reported to the district court, without any attempt to condense or eliminate immaterial matter. That such procedure is not permissible, and that such a document does not constitute a statement of the case, in an action such as this, clearly appears from a reading of section 7058, Rev. Codes 1905, and rule 7 of this court. See opinions of Wallin, J., in Thuet v. Strong, 7 N. D. 565, 75 N. W. 922, and McTavish v. G. N. Ry. Co., 8 N. D. 94, 76 N. W. 985.

The so-called specifications of error, numbered 24 to 29 inclusive, are also clearly insufficient under the statute and rule above mentioned, for the reason that no attempt is made to point out wherein the evidence was insufficient to support the findings complained of. Jackson v. Ellerson, 15 N. D. 533, 108 N. W. 241. We deem it unnecessary to add anything to what was said in the previous opinions of this court in said cases. The requirements, both of the state and of the rule aforesaid, are plain, and must be observed. For the foregoing reasons we decline to notice any of appellant's assignments of error based upon rulings and findings made by the referee, and will dis-

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pose of those relating merely to the validity of the order of the district court in referring the issues to a referee.

Appellant's counsel contend, first, that the issues were such that appellant had a constitutional right to a jury trial in the absence of an express waiver thereof; and, second, that the case is not one involving the examination of a long account upon either side, within the meaning of our statute, and hence that the order of reference was in any event improvidently issued. The provisions of our code relating to the power of courts to order references are contained in sections 7046 and 7047, Rev. Codes 1905, and, so far as material to the questions here involved, are as follows:

"Sec. 7046. All or any of the issues in an action whether of fact or law, or both, may be referred by the court or judge thereof upon the written consent of the parties.

"Sec. 7047. When the parties do not consent to the reference, the court may, upon the application of either party, or of its own motion, direct a reference in the following cases: (1) When the trial of an issue of fact will require the examination of a long account on either side, in which case the referee may be directed to hear and decide the whole issue or to report upon any specific question of fact therein. * * *"

It is apparent, from the language of these sections above quoted, that without the written consent of the parties, and none appears in this case, a court is powerless to order a reference, except pursuant to the provisions of section 7047. Mere silence or failure to object or except to the order will not constitute a waiver of a party's constitutional right to a trial by jury. Township of Noble v. Aasen, 10 N. D. 264, 86 N. W. 742; Hanson v. Carlblom, 13 N. D. 361, 100 N. W. 1084. By what we have above stated we do not wish to be understood as holding that a party may not by his conduct become estopped to challenge the validity of such an order; but we hold that, under the facts appearing in the record in this case, the order must be sustained, if at all, upon the ground that the trial required the examination of a long account, and this brings us to a consideration of appellant's first contention, which is, in effect, that subdivision 1 of section 7047, in so far as it authorizes compulsory references in actions such as this, is in conflict with section 7 of our state constitution, which provides that "the right to trial by jury shall be secured to all and remain inviolate."

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We think there is no merit in this contention. The meaning of this important provision contained in our organic law was authoritatively, and no doubt correctly, settled by this court in Barry v. Truax, 13 N. D. 131, 99 N. W. 769, 65 L. R. A. 762, 112 Am. St. Rep. 662. In an exhaustive opinion upon the subject, by Young, C. J., reviewing and citing numerous authorities, the conclusion was reached that the framers of the constitution intended by the adoption of said provision to preserve and perpetuate the right of trial by jury as it existed by law at and prior to the adoption of the constitution. We quote in part as follows: "The constitution refers to 'the right of trial by jury' as a right well known and commonly understood at the time of its adoption, and it is the right so understood which is secured by it. * * * It is entirely clear, therefore, that the right of trial by jury, which is secured by the constitution, is the right of trial by jury with which the people who adopted it were familiar, and that was the right which had obtained a fixed meaning in the criminal jurisprudence of the territory, as defined by the statutes which existed prior to and at the time of the adoption of the constitution." At the time the constitution was adopted, and for some time prior thereto, a territorial statute (chapter 112, p. 151, laws 1889) was in force authorizing compulsory references in actions the trial of which involved examination of a long account upon either side, and we think it plain that the practice as thus established was not intended to be interfered with by the adoption of the constitutional provision aforesaid. This territorial statute has been continued in force ever since statehood, and is now embraced in section 7047, Rev. Codes 1905, and during all this time no attack upon its constitutionality, other than the present one, has been made in the courts of this state so far as we are aware, and the same has therefore become firmly settled as a rule of practice in our courts. In the light of these facts we would feel very reluctant to declare the same unconstitutional in any event; but, as before stated, we are convinced that section 7 of our constitution should be construed in the ight of the existing practice as established by law at the time of its adoption, and, as thus construed, the statute in question is constitutional. Appellant's counsel have called to our attention numerous authorities from other states holding similar statutes void under constitutional provisions very similar to section 7 of our constitution; but in most, if not all, of these cases it will be found upon examination that the statute in question was not in force at the time

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of the adoption of the constitution, but was enacted subsequently, and hence these decisions are not in point. As sustaining our views, see, also, 17 Enc. Pl. & Pr. 94, and cases cited; Tinsley v. Kemery, 170 Mo. 310, 70 S. W. 691; Salem Traction Co. v. Anson, 41 Or. 562, 67 Pac. 1015, 69 Pac. 675, and Board of Supervisors of Dane County v. Dunning, 20 Wis. 210, and cases cited.

But counsel for appellant contend that, even though the statute aforesaid be held constitutional, still the order of reference must be held to have been improperly made, for the reason, as claimed, that the trial of the issues of the case at bar did not require the examination of a long account, or any account, upon either side, within the meaning of the statute, and further, that the question as to whether the issues were properly referable must be determined by the character of the plaintiff's claim, and not by the issue made upon it, nor by the nature of the defendant's answer. In this we think counsel are clearly in error. If there ever was a case the trial of which required the examination of a long account on either side, this is certainly such a case, as a mere cursory examination of the pleadings will disclose. The issues framed by the pleadings are very numerous, involving many dealings between the parties growing out of farming transactions under a contract under which the plaintiff farmed certain lands for the defendant; also growing out of sales of personal property of various kinds and at various dates, and for work, labor, and services performed by plaintiff for defendant; also for numerous items or claims for money advanced to and paid out and expended at various dates by each party at the request of and for the benefit of the other. Numerous causes of action set forth in the complaint, as well as those set forth in various counterclaims contained in the answer, are all for the recovery of money upon the contract, and some of the causes of action embrace many separate items of account, all of which are denied by the opposite party. Both the complaint and the answer clearly disclose upon their face a proper case for a reference and accounting between the parties. In fact, the issues are such as to render it practically impossible for a jury to intelligently try and determine the same. That the case was one eminently proper to be referred is, we think, too plain for discussion. As supporting our view, see 17 Encyc. Pl. & Pr. 996 et seq. and numerous cases cited; Sutton v. Wegner, 74 Wis. 347, 43 N. W. 167; Turner v. Nachtsheim, 71 Wis. 16, 36 N. W. 637; La Coursier v. Russell, 82 Wis. 265, 52 N. W. 176; Chicago, etc., Ry. Co. v. Faist,

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87 Wis. 360, 58 N. W. 744; Ittner et al. v. St. Louis Exposition, 97 Mo. 561, 11 S. W. 58; People v. Peck et al., 57 How. Prac. 315; Spence v. Simis, 137 N. Y. 617, 33 N. E. 554; Salem Traction Co. v. Anson, 41 Or. 562, 67 Pac. 1015, 69 Pac. 675; Lewis v. Snook, 88 App. Div. 343, 84 N. Y. Supp. 634; Haig v. Boyle et al., 20 Misc. Rep. 155, 45 N. Y. Supp. 816.

For the reasons above given, the judgment appealed from is affirmed. All concur.

ON PETITION FOR REHEARING.

The petition for rehearing is denied, but in denying the same we desire to say that we do not wish to be understood, by the foregoing opinion, as holding that this court will not for good cause shown, and in furtherance of justice, and upon such terms as may be just, consider errors, although embraced in a statement of the case prepared in utter disregard of the Code and rules of this court. We wish also to say that since the filing of such petition for rehearing, and in order to obviate the possibility of a miscarriage of justice in the case, we have carefully considered the other assignments of error, and fail to see how appellant is prejudiced by any ruling of the referee. We will briefly notice such rulings.

The fifth assignment relates to the ruling of such referee in overruling defendant's objection to the following question asked the witness Hugh Smith: "As such constable you served upon the agent of the Soo Railway Company at Kensal, N. D., a subpoena in the case of Smith v. Kunert, requiring the agent of the aforesaid Soo Railway Company to appear and testify in said cause before the referee appointed by the judge of said court on the 15th day of May, 1905, at the hour of 2 o'clock p. m., to testify in said cause on part of the plaintiff?" The objection was as follows: "Objected to on the ground that it is incompetent, improper, and immaterial, and not the best evidence; the return of the officer on the subpoena being the best evidence." Such ruling was clearly proper. The question was merely preliminary, and, furthermore, was not objectionable upon any ground.

Assignment No. 6 challenges the ruling refusing to strike out the answer of the witness Olander to the question: "You may refresh your memory from such memoranda, and tell the court how many cars were shipped, giving the numbers of the cars, and the

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date of shipment, and the weight of each." This question was not objected to, and was clearly competent. After the witness had fully answered the question, he was saked: "Are you sure that this was all the grain shipped through the Soo Railway Company by the defendant in 1904?" to which the witness answered in the affirmative. Such witness thereafter volunteered the information that the cars overrun at least 3,000 pounds to the car; but later on the witness without objection stated the source of his information to be the weights taken by the company and upon which the charge for freight was made. There was no error in such ruling.

The next assignment relates to the ruling of the referee in permitting the witness Olander to answer, over the objection of defendant, the question: "Are you willing that C. W. McDonald should refresh his memory from the books in your office concerning these shipments for the purpose of testifying thereto; he having made entries therein?" The objection to this question was clearly frivolous, and we fail to see how such ruling could possibly have constituted prejudicial error. The same is true regarding the next assignment, being No. 8.

Assignment No. 9 is predicated upon the refusal to strike out the testimony of the witness Ayers on motion of the defendant. This witness was called for the purpose of proving that he met plaintiff, Smith, during the latter part of the fall of 1903 or the fore part of 1904, at Kensal, on his return from Hankinson, and that he was intoxicated. We are unable to perceive how such ruling was error.

The tenth assignment is clearly frivolous, and is predicated upon the ruling in permitting the plaintiff, Smith, to state that he sold Mr. Kunert a farm during 1903 or the fore part of 1904. The objection was that the testimony was incompetent and immaterial, and not tending to prove or disprove any of the facts at issue. It needs no argument to prove the correctness of such ruling, and, if it was immaterial, as claimed, it certainly could not have been prejudicial.

The eleventh assignment is predicated on the ruling in permitting the plaintiff to answer the following question: "And what share of the crop were you to receive, and what were you to do to get that share?" The objection to this question was well taken, and should have been sustained, as it called for proof of the contents of the written lease; and the same is true of assignment No. 12.

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But such rulings, although erroneous, are not shown to have been prejudicial, and the burden is, of course, upon the appellant to show prejudice. It does not appear that plaintiff's answers to these questions were not strictly in accordance with the written lease.

The next assignment relates to the ruling of the referee in overruling defendant's objection to, and denying his motion to strike out, the answer of the plaintiff to the question: "And there was due on the contract for sale $800?" What we said regarding the last two assignments applies equally to this. No prejudicial error is shown in such ruling.

Assignment No. 14 challenges the correctness of the ruling in permitting plaintiff to answer the following question: "What, if anything, did Mr. Kunert agree to pay you for your interest in this quarter section of land?" The objection was that the same was not the best evidence; but by the following question and answer it appears that the assignment of the contract was not in writing. Hence no error was committed in this ruling.

The next assignment is clearly frivolous; and it is unnecessary for us to notice the remainder of the assignments, as they are also clearly frivolous.

(115 N. W. 76.)

FRED ZINN v. DISTRICT COURT FOR BARNES COUNTY AND EDWARD T. BURKE, JUDGE.

Opinion filed Jan. 11, 1908.

Prohibition — When Writ Allowed.

1. The writ of prohibition is not a writ of right, but is available only when the inferior court, body or tribunal is about to act without any jurisdiction or in excess of jurisdiction.

Same — Criminal Prosecution.

2. The writ of prohibition is not available to arrest further proceedings by a trial court on an indictment found by a grand jury irregularly drawn, summoned, and impaneled, as district courts have jurisdiction to impanel grand juries, and if erroneous rulings are made on these questions no question of the jurisdiction of the subject-matter nor of the person is presented which can be reviewed through a writ of prohibition.

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Grand Jury — Summoning and Impaneling.

3. Various objections to the validity of an indictment found by a grand jury considered, and *held* not to warrant the issuing of the writ of prohibition.

Application by Fred Zinn for writ of prohibition to the District Court for Barnes county and Edward T. Burke, Judge.

Writ denied.

L. A. Simpson, J. M. Hanley and *A. T. Faber,* for plaintiff.

R. N. Stevens, Assistant Attorney General, and *B. W. Shaw,* State's Attorney, for defendant Morton county.

MORGAN, C. J. This is an application for a peremptory writ of prohibition against the defendant Edward T. Burke, acting as judge of the district court of the Sixth judicial district on the request of the judge of said district. The facts on which the writ is prayed for are the following: The judge of the district court of the Sixth district ordered a grand jury to be summoned for the November term of the district court to be held in the county of Morton in said district, and requested the defendant who is the judge of the district court for the Fifth Judicial District to preside at said term, and said defendant did preside at said term. A grand jury was regularly summoned, impaneled and sworn, and proceeded with the performance of their duties, and considered the evidence produced by the state in the action entitled the State of North Dakota v. Fred Zinn, and failed to find an indictment against said Zinn, and reported that fact to the court and recommended a dismissal of that action. Upon the presentation to the court of such report, the district court made an order discharging said grand jury, and recited in the order discharging it that the evidence submitted to the grand jury "was sufficient on which to base an indictment," and said order further recited that "the court being satisfied that said failure to indict in said case was not based upon the evidence, but upon the determination of said grand jury not to enforce the provisions of said prohibition laws, and the court believing that the other cases above mentioned would not receive at the hands of said grand jury fair consideration upon the evidence, by reason of said grand jury's prejudice against the prohibition law, and that it would serve no

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useful purpose to submit said other cases in relation to the violation of the prohibition law to said grand jury, and that the public good would be best subserved by a discharge of said grand jury from further duties at said term of court." The order further recited the necessity for calling another grand jury, and one was ordered to be called at once, and the case of the State v. Fred Zinn was ordered resubmitted to that grand jury. The second grand jury was thereupon drawn and summoned, and 19 of the persons drawn appeared in court. The judge excused two of them upon their request, based upon the fact that they were exempt from service. These two were excused just before the jurors were called together in open court for the purpose of being examined and sworn.

Upon the examination of the jurors by the court and the attorneys on behalf of persons who had been held to answer to the district court for offenses charged against them, two were excused as exempt on account of age, one by consent, and four were excused on challenges interposed and granted. This left ten persons present qualified to act as grand jurors. Thereupon the court ordered that the officers designated by law as a board to draw grand and petit jurors convene and draw the names of four persons to serve in the place of the four persons who were not served with the venire and did not appear. A further order was made at the same time commanding the summoning of nine other persons to serve as jurors in place of the nine persons who were excused on challenges. These were ordered summoned from the body of the county, and George Leonard was appointed as the officer to summon the nine jurors last mentioned. Said Leonard was a deputy sheriff, and was so named in the order. The grand jury was thereafter impaneled and sworn and proceeded upon the discharge of their duties, and found an indictment against said Fred Zinn, and also indictments against others for violation of the prohibition law of the state. Upon being arraigned under the indictment said Zinn moved to set aside the same for the following grounds: (1) That talesmen were summoned by the deputy sheriff and not by the sheriff. (2) That the panel was completed by the summoning of talesmen when it should have been done by ordering names drawn by the officers comprising the board to draw names of jurors. (3) That the discharge of the first jury and the calling of the second jury were unwarranted and illegal. (4) That

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no notice was given to the attorneys of the drawing of the second jury as provided by section 522, Rev. Codes 1905. (5) That the assistant attorney general and other persons were present before the grand jury, not as witnesses, while witnesses were under examination. (6) That the names of all the witnesses examined before the grand jury in said case are not indorsed on the indictment. (7) That the court refused to hear evidence in support of challenges to jurors. (8) That challenges to jurors on account of bias in having formed fixed opinions as to the guilt of the parties under investigation were overruled. (9) That the officers comprising the board to draw names for jurors acted irregularly and threw out names of persons drawn without authority.

Under our view of the law applicable to the facts disclosed by the record, we have but one question to determine, and that question is, do the facts entitle the petitioner to a writ of prohibition? In other words, did the district court have jurisdiction to pass upon and decide the several questions presented to it? It is, of course, not disputed that the district court has jurisdiction to summon and impanel grand juries, and also has jurisdiction of the person of Zinn and of the offenses with which he was charged. Hence it irrefutably appears that the district court has complete jurisdiction to pass upon the legality of all acts of the grand jury and in reference to the summoning and proceedings thereof. There is no merit in the contention that the second jury was an illegal one, which is based on the contention that the first jury was unlawfully discharged. A grand jury is one of the instruments or agencies through which the court acts in the enforcement of the laws. It is called by the court, and is always subject to be excused from further attendance on duty. We have nothing to do with the necessity under which the court deemed it proper to discharge the first jury. The record discloses that the court was convinced that the jury was not acting with a conscientious desire to be guided by the evidence submitted to them, showing a violation of the prohibition law. If such was the case it would be farcical to allow them to continue and further disregard the law and violate their oaths. But we have nothing to do with the policy or wisdom or necessity of the court's action in this regard. We are concerned only with the question as to whether the court had jurisdiction, and it needs no citation of authority to sustain the court's action in this case so far as jurisdiction is concerned.

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Whether the court erred in appointing the deputy sheriff to summon the grand jurors in place of those excused is also a question not affecting the jurisdiction of the court over the persons and the subject- matter concerning which it acted. Ten persons were left on the panel of the grand jury and the court must complete the panel or it could not proceed. The deputy sheriff was an officer of the court and could legally summon the jurors as such without authority from the court, by virtue of holding that office under the sheriff. He summoned the jurors as deputy sheriff and made his return of service in the name of the sheriff. Whether this was strictly in accordance with the statute, we do not determine in this proceeding. If it was erroneous, it was not such error as to deprive the court of further jurisdiction in the cases. The same may be said of every one of the grounds urged by the petitioner for setting aside the indictment. Nothing will be gained by disposing of them separately. They may all be grouped or considered separately, and the same conclusion is forced upon us that they do not affect the jurisdiction of the court even if conceded to be shown to exist by the record. Without further mention of the grounds urged upon the trial court for quashing the indictment, we will consider whether these objections, if admitted to be well founded, warrant the issuing of a writ of prohibition by this court, and thus stop all future proceedings by the court in this case and others submitted on the same application. We are agreed that a proper case for that writ has not been made out. It is elementary that prohibition lies only when there is no jurisdiction in the inferior court or body, or when the inferior court or body is about to act in excess of jurisdiction. The conditions under which this writ is allowed are stated in our statute as follows:

"Sec. 7835. The writ of prohibition is the counterpart of the writ of mandamus. It arrests the proceedings of any tribunal, corporation, board or person, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board or person.

"Sec. 7836. It may be issued by the supreme and district courts to an inferior tribunal, or to a corporation, board or person in all cases when there is not a plain, speedy and adequate remedy in the ordinary course of law. It is issued upon affidavit on the application of the person beneficially interested."

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Spelling on Extr. Relief, § 1716, says: "But the writ of prohibition lies only when the inferior court proposes to exceed its lawful jurisdiction as to the person or subject-matter, or in the enforcement of its rulings in a manner or by a means not intrusted to its judgment or discretion." High on Extr. Relief, § 765, says: "Nor is it a writ of right granted ex debito justitia, but rather one of sound judicial discretion, to be granted or withheld according to the circumstances of each particular case. And being a prerogative writ, it is to be used, like all other prerogative writs; with great caution and forbearance for the furtherance of justice, and to secure order and regularity in judicial proceedings, when none of the ordinary remedies provided by law is applicable. Nor should it be granted except in a clear case of want of jurisdiction in the court whose action it is sought to prohibit." In A. & E. Enc. Law (2d Ed.) p. 200, it is stated: "Where the inferior court has jurisdiction of the matter in controversy, prohibition will not lie. The writ does not lie to prevent a subordinate court from deciding erroneously, or from enforcing an erroneous judgment in a case in which it has a right to adjudicate, and it matters not whether the court below has decided correctly or erroneously; its jurisdiction of the matter in controversy being conceded, prohibition will not lie to prevent an erroneous exercise of that jurisdiction. The exercise of power which it is sought to prohibit must be wholly unauthorized by law. Mere errors or irregularities in the proceedings which do not go to the jurisdiction will not be considered upon an application for a writ of prohibition. The sole question is as to the jurisdiction of the inferior court to take the proposed action, and the merits of the action will not be considered." These several principles are abundantly sustained by decisions of courts and are so numerous as to make citation of them impracticable. They can be found in the books quoted from. In State v. Fisk, 15 N. D. 219, 107 N. W. 191, the same doctrine was enunciated so far as that the writ is available only when the inferior court or body is about to act without or in excess of jurisdiction, and that the use of the writ should be exercised cautiously. The contention that the district court exceeded its jurisdiction in not setting aside the indictments by reason of matters occurring before the grand jury cannot be upheld. These objections did not pertain to jurisdiction at all, but if wrongly decided were erroneous decisions only. It is true that some of the objections to the indictments have been sustained by appellate courts.

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But in the cases where the objections were sustained the objections were raised on direct attack by appeal, and not by resort to collateral attack through the writ of prohibition.

Cases are numerously cited by the petitioner where appellate courts have decided some of the questions raised by him in this case in favor of his contention. But these cases have no relevancy in the case at bar, as the only question involved is one of jurisdiction, and whether these objections would be held good on an appeal is not before us. The only case cited closely in point is that of Bruner v. Superior Court, 92 Cal. 239, 28 Pac. 341. In that case an elisor was ordered by the court to summon persons to complete a grand jury panel without any showing that the sheriff was disqualified. The court held that service by the elisor was without authority, and a majority of the court held that the lower court had no jurisdiction to proceed on the trial of an indictment found by the jury, and that prohibition was an available remedy. This case is not strictly parallel with that case on the facts. In this case, as before stated, the officer appointed had authority to summon these jurors by virtue of being deputy sheriff, and the acts of the deputy were the acts of the sheriff. In any event, whether the service was technically regular or not, we are satisfied the the irregularity did not effect the court's jurisdiction to proceed in the case. To permit a resort to this writ on such objections would seriously impair and delay the enforcement of the laws through means not within the purview and purposes of the writ—to keep inferior tribunals within their lawful jurisdiction.

In a case in the supreme court of Colorado presenting similar questions as in the case at bar as to drawing and impaneling a grand jury, the court said: "If a court has the power to determine such matter, then error in disposing of it results in nothing more than an erroneous judgment based upon an erroneous view of the law. The district court is by law vested with authority to impanel a grand jury. In performing this function it may commit error by failing to observe the statutory or common-law provisions relative to impaneling grand juries, but having by law the authority to impanel grand juries, errors in procedure, however flagrant, do not cause the court to lose jurisdiction, even if such errors should be so gross and irregular as to require that an indictment should be quashed." People v. District Court, 29 Col. 83, 66 Pac. 1068.

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The conclusion and reasoning of the Colorado court is in harmony with our views as to the circumstances under which a writ of prohibition should be granted. It follows that the petition for the writ must be denied. All concur.

(114 N. W. 475.)

FRED ZINN v. DISTRICT COURT IN AND FOR MORTON COUNTY AND EDWARD T. BURKE, JUDGE.

Opinion filed Jan. 11, 1908.

Criminal Law — Change of Venue — Application of State.

1. Under section 9931, Rev. Codes 1905, the state can secure a change of the place of trial in a criminal action under the same circumstances as a defendant in a criminal action may under existing laws, and said section 9931 is a constitutional enactment. Barry v. Truax, 13 N. D. 131, 99 N. W. 769, 65 L. R. A. 762, 112 Am. St. Rep. 662, followed.

Same — Selection of County — Discretion of Court.

2. When a change of the place of trial is obtained by the state on account of the existence of prejudice among the inhabitants against the enforcement of the prohibition or other laws, the selection of the county to which the case must be sent rests exclusively with the presiding judge in the exercise of a sound judicial discretion.

Same.

3. Upon the application of the state for a change of the place of the trial of a criminal action, on account of local prejudice, the presiding judge transferred the cause for trial to Barnes county, being about 140 miles from the county where the action was pending. It was shown that a speedier trial could be secured in Barnes county than in any county in the Fifth judicial district. It was shown that the same prejudice existed in every county in the Sixth district as exists in the county where the action originated. The only other county nearer to the county where the action originated than Barnes county is Stutsman county, which is 35 miles nearer than Barnes county. *Held*, that it was not an abuse of discretion to transfer the trial to Barnes county under such circumstances.

Application of Fred Zinn for writ of certiorari to the District Court of Morton county and Edward T. Burke, judge. Writ denied.

L. A. Simpson, J. M. Hanley, and *A. T. Faber,* for plaintiff.

R. N. Stevens, Assistant Attorney General, and *B. W. Shaw,* State's Attorney, for defendants.

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MORGAN, C. J., This is an application for a writ of certiorari. It is based on the proceedings had in the district court of the county of Morton, on which the application for a writ of prohibition was made, and the issuance of the writ denied by this court, and the opinion therein filed on this day. The same facts are presented on this application, that were presented on that application and in addition to the questions raised on that application an additional one is presented on this. On this application we are asked to review the order of the district court of said Morton county, by which the place of the trial of the indictment found against the defendant was changed from the county of Morton to the county of Barnes on the application of the state, made through the state's attorney. The state's attorney filed an affidavit in which it was set forth that the state could not obtain a fair trial of said action in said county of Morton, by reason of the fact that the people of said county are so prejudiced against the prosecution of the offense with which the said Zinn was charged, that is, the maintenance of a common nuisance in violation of the prohibition laws of the state of North Dakota. In said affidavit the state's attorney recited the fact that violations of the prohibition law were common in said county of Morton, and that said prohibition law was notoriously violated in various sections of said county, with the knowledge and approval of the people generally and that all attempts to punish offenders against said law have generally been met with determined resisttance, and a refusal to convict the persons charged, without regard to the evidence furnished by the prosecution. The affidavit further states that the prejudice existing in the county of Morton against the enforcement of the prohibition law is general in the various counties or judicial subdivisions of the Sixth Judicial district, and that he believes there is no county in the Sixth judicial district in which the state could secure an impartial and speedy trial of the defendant. Upon the filing of said affidavit, the district court made an order changing the place of the trial of the defendant under said indictment from the county of Morton to the county of Barnes in the Fifth judicial district. Upon the making of said order the defendant in that action, and the plaintiff in this proceeding, applied to this court for a writ of certiorari to review the order thus made.

The judge of the district court of the county of Barnes, in the Fifth Judicial district, who was the presiding judge at the November term of the district court in and for the county of Morton, where the

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order under review was made, filed his return to the application of the plaintiff in this case, and in said return the defendant sets forth the following matters: "That in so ordering a change of the place of trial, the district court of said Morton county took into consideration the matter set forth in the affidavit of said B. W. Shaw, upon which said motion was based, and in exercising its discretionary power upon the question of granting such change of the place of trial and the selection of a place for the trial of said cause, took into consideration information and knowledge that had come to the court from acquaintance with a large number of reputable citizens residing in the counties of Morton and Burleigh, where the respondent had frequently held court, and was acquainted with the sentiment of said counties relating to the enforcement of the prohibition laws of the state of North Dakota, and recognized that both the state and defendant were entitled to have said cause removed for trial to a county where both the state and the defendant could have a fair and impartial trial of said cause speedily, and the court considered it proper and fair to all parties concerned that said trial should be changed to such county as would insure an expeditious trial on said indictment. That at the time of making said order changing the place of trial of the said cause to Barnes county in the Fifth judicial district the term of the district court of Barnes county was then about to open, at which term it apepared to said district court the issues upon said indictment could be tried, thus insuring both a fair and expeditious trial of said cause. The court also took into consideration the knowledge it had of general rumor and its knowledge of conditions prevailing in the different counties of the Sixth judicial district. That there was existing in each of the counties of said district a well-defined sentiment of at least a portion of the inhabitants of said district against the enforcement of the prohibition laws of the state."

In this case the change of the place of trial was asked solely on the ground of the prejudice of the people of the county against the enforcement of the prohibition laws. The change was not asked on account of the prejudice of the defendant as presiding judge at that time. Under section 9919, Rev. Codes 1905, the defendant is entitled to a change of the place of trial upon his filing a petition on oath setting forth that he "has reason to believe and does believe, and the facts upon which such belief is based, that he cannot receive a fair and impartial trial in the county or judicial subdivision where

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said action is pending, on any of the following grounds." Subdivision 2 of said section provides as one of the causes for granting a change of the place of trial, "that the people of the county or judicial subdivision are so prejudiced against the defendant or the offense of which he is accused that he cannot have a fair and impartial trial." Section 9931 provides as follows: "The state's attorney, on behalf of the state may also apply in a similar manner for a removal of the action, and the court being satisfied that it will promote the ends of justice, may order such removal on the same terms and to the same extent as are provided in this article, and the proceedings on such removal shall be in all respects as above provided." Section 9921 of the Code provides: "The court being satisfied that cause exists therefor, as defined in section 9919, must order a change of the place of trial to some county or judicial subdivision where the cause complained of does not exist." In Barry v. Traux, 13 N. D. 131, 99 N. W. 769, 65 L. R. A. 762, 112 Am. St. Rep. 662, this court held that said section 9931 was a constitutional enactment, and that a change of the place of trial on the application of the state on the grounds allowable as causes for a change of the place of trial by the defendant was allowable to the state.

The sole question presented in this case is whether the district court acted within its discretion in transferring the trial of the action to the county of Barnes. The county seat of the county of Barnes is situated about 140 miles from the county seat of the county of Morton. The affidavit of the state's attorney on the application for the change, and the defendant's return on the application for the writ of certiorari, conclusively show that the defendant, as judge, deemed it to be a fact the same conditions exist in all the counties of the Sixth judicial district as exist in the county of Morton with respect to the enforcement of the prohibition law. We may therefore take it as amply shown that the district judge was convinced that he could not have transferred the action to any other county in the Sixth judicial district and thereby secured to the state a fair and impartial trial. The question as to what county or district he should transfer the trial of the action was one entirely within his own discretion, subject to be reviewed, if abused, by this court. As stated in Murphy v. District Court, 14 N D. 542, 105 N. W. 728, "the only requirement imposed by the statute is that it must be sent to a county or judicial subdivision 'where the cause

complained of does not exist.' The selection of the county is left to the discretion of the presiding judge. He may select one county in preference to another county and may prefer one judicial district to another, so long as he does not exceed his legal discretion. This we understand, is conceded by counsel for defendant. Their contention is—and this presents the only question in the case—that the presiding judge abused or exceeded his discretion in sending the case to Cass county, and that the record should therefore be sent up to the end that he may be required to select some county nearer to Ward county. * * * The defendant is given the right to secure a change on account of local prejudice, but the power of selecting the county to which the action shall be sent is not given to him, neither is it given to this court." There was but one other county to which the case could have been transferred for trial by the defendant which is nearer the residences of the applicants than Barnes county, to wit, the county of Stutsman, the county seat of which is about thirty-five miles from the county seat of Barnes county. The return shows that the transfer to Barnes county was made solely for the reason that a speedier and earlier trial could be had than if sent to any other county outside of the Sixth judicial district, which the defendant deemed a proper county to send the case to. We are firmly convinced that there was no abuse of discretion in sending the case to Barnes county rather than to Stutsman county, in view of the reason given by the trial judge for sending the same to Barnes county.

It was urged on the argument that the petitioners were prejudiced by the order, for the reason that the trial would be more burdensome to them by reason of the additional expense in going to Barnes county. This matter was considered by this court in the Murphy case, supra, and it was there decided that the additional expense necessarily incurred by reason of the change was not a matter that would warrant this court in holding that the order was an abuse of discretion. The statute in express terms at section 10217 makes provision for the payment of the fees of witnesses in attendance upon trials of persons accused of crime, who are unable to pay for the attendance of their witnesses. The additional expense in going thirty-five miles between Stutsman county and the county seat of Barnes county is so small that it cannot be considered as an argument that should weigh with us in holding that the trial court acted beyond its legal judicial discretion.

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It must be taken as established from the return of the district judge that he deemed it impossible to remove the case to a county nearer to Morton county than Stutsman, and at the same time secure to the state a fair trial. Hence, in considering the question of the expense, we can only consider the additional expense, as before stated, in traveling from Stutsman county to the county seat of Barnes county, and we find that the court acted within legal discretion in transferring the case to Barnes county. This application is made under section 7810, Rev. Codes 1905, providing when the writ of certiorari may issue, and it provides that such writ may issue when inferior courts or tribunals have exceeded their jurisdiction, and there is no appeal, nor in the judgment of the court any other plain, speedy, and adequate remedy. In the Murphy case the application was deemed to have been made under the constitutional and statutory provisions giving this court the power to issue writs supervising or superintending the action of inferior tribunals. In that case the question of the propriety of the writ was not discussed; but from the general tenor of the opinion in that case it was held that if the district court had exceeded its jurisdiction or authority and abused its discretion by transferring the trial of the case to a too remote county, the abuse of discretion or excess of the jurisdiction might be reviewed by certiorari. The members of this court who were not then members of the court do not wish to be considered as indorsing the doctrine that a writ of certiorari is a proper remedy in such a case.

In this case no question is raised as to the propriety of the writ. For these reasons, it follows that the application for a writ of certiorari must be denied. All concur.

(114 N. W. 472.)

Ex Parte Bellamy.

Opinion filed Jan. 9, 1908.

Larceny — Milling Corporation — Refusal to Deliver Grain.

1. Petitioner, who was an officer of a milling corporation engaged solely in the manufacture of flour, is not guilty of larceny under section 2251, Rev. Codes 1905, for neglect or refusal to deliver on demand or to pay the market value of wheat delivered to such corporation by another.

Same — Milling Concerns.

2. Said section is construed, and *held* to apply only to such persons, associations, and corporations as are embraced within the purview of

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section 2244, Rev. Codes, 1905, defining public warehousemen. This section by its terms expressly excepts from its operation milling concerns not doing a shipping business.

Same—Evidence.

3. The evidence before the committing magistrate disclosed that the milling corporation of which petitioner was an officer was not engaged in doing a shipping business. Therefore the commitment under which petitioner is held to answer for the offense of larceny as defined in section 2251, Rev. Codes 1905, aferosaid, is contrary to law and void, and the writ prayed for is granted.

(Syllabus by the court.)

Application by James Bellamy, Jr., for writ of habeas corpus.

Writ granted.

Guy C. H. Corliss and *Hawver & Warner,* for petitioner.

M. Brynjolfson, States Attorney of Pembina county, for respondent.

Fisk, J. The petitioner, James Bellamy, Jr., claiming to be unlawfully restrained of his liberty through a commitment issued by a committing magistrate at the conclusion of a preliminary examination holding him to the district court to answer to the charge of larceny, prays for a writ of habeas corpus. Application for such writ was first made to and denied by the judge of the district court of Pembina county. Counsel for petitioner and respondent have stipulated that the merits may be decided upon the application for the writ. Petitioner is accused of, and was committed for, the violation of section 2251, Rev. Codes 1905, which reads as follows: "Each person and each member of any association, firm or corporation doing a grain, warehouse or grain elevator business in this state, who shall, after demand, tender and offer as provided in the last section, wilfully neglect or refuse to deliver to the person making such demand, the full amount of grain of the grade, or the market value thereof, which such person is entitled to demand of such bailee, shall be guilty of larceny."

It is petitioner's contention, first, that said statute is void for uncertainty, for the reason that one of the ingredients of the crime therein defined is a willful neglect or refusal to deliver the grain "after demand, tender and offer as provided in the last section," and the preceding section makes no provision for any demand,

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tender or offer; second, he contends that the evidence does not establish a willful neglect or refusal to deliver the grain within the meaning of said statute; third, it is contended that such statute, if intended to apply to a person who, through mere negligence, is rendered unable to comply with the demand for the delivery of the grain, without any mala fides on his part, the same is unconstitutional and void, for the reason, as claimed, that it would conflict with article 1 of section 15 of our constitution, which prohibits imprisonment for debt; and, fourth, that said section is a part of the article relating to public warehousemen, and that petitioner, who was an officer of a milling company not engaged in storing and shipping grain for profit, does not come within its purview. In disposing of the petition, we deem it unnecessary to consider the first three points urged by petitioner, the first of which impresses us with much force. We do not wish, however, to place our decision in this matter upon any ground which will nullify the statute, for, by so doing, we would violate a well-recognized rule of statutory construction which requires the decision to be placed upon other grounds when possible. We therefore withhold any expression of opinion upon petitioner's first point, nor do we deem it necessary to notice his second and third contentions. We are firmly convinced that petitioner's fourth contention is sound, and hence that the writ must issue.

Briefly stated, our reasons for this holding are as follows: The evidence discloses that the corporation of which petitioner was an officer was a corporation engaged merely in the business of purchasing wheat and manufacturing the same into flour for sale in the market. It was not, in other words, "doing a grain, warehouse or grain elevator business in this state," within the meaning of this statute. This is apparent from an examination of the act of which said section is a part. The statute was originally enacted as chapter 126, p. 321, Laws 1891, and, with the exception of an amendment in 1899 (page 195, c. 126) and another in 1901, (page 179, c. 140), to section 4, defining public warehouses, and in 1905 (page 217, c. 110) to section 7, relating to the form of storage receipts, the same remains unchanged, and is embraced in article 46 of chapter 24 of the Political Code, being sections 2241 to 2253 inclusive of the Revised Codes of 1905. Section 4 of the original act prescribed that "all buildings, elevators, or warehouses in this state, erected and operated or which may hereafter be erected and

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operated by any person or persons, association, copartnership, corporation, or trust for the purpose of buying, selling, storing, shipping or handling grain for profit, are hereby declared public warehouses," etc. By chapter 126, Laws 1899, this section was amended to read as follows: "All buildings, elevators, warehouses or grist mills, except grist mills doing only a custom or exchange business, in this state, erected and operated, or which may hereafter be erected and operated, by any person, association, copartnership, corporation or trust, for the purpose of buying, selling, storing, grinding, shipping or handling grain for profit, are declared public warehouses," etc. Again in 1901, by chapter 140, page 179, this section, which is now section 2244, Rev. Codes 1905, was amended and reenacted to read as follows: "All buildings, elevators, warehouses, and all grist and flour mills doing a shipping business in this state, erected or which may hereafter be erected or operated and operated by any person * * * * for the purpose of buying, selling, storing, shipping or handling grain for profit, are declared public warehouses," etc. It is therefore quite apparent that the legislature in 1899 construed the original section as not applying to milling concerns of any kind; and, in order to include within its provisions all milling concerns not doing merely a custom or exchange business, the amendment in that year was made. It is equally apparent that by the 1901 amendment it was the legislative intent to include within the provisions of said section only such milling concerns as may be engaged in doing a shipping business. We think the words "engaged in doing a shipping business," as used in the statute, were intended to mean engaged in shipping grain to terminal points, received by customers, in like manner in which elevator companies are thus engaged in doing a shipping business. That the corporation of which the petitioner was an officer does not come within the scope of such section as last amended is, we think, too plain for discussion. The evidence shows that the corporation was engaged in operating a flour mill only, and was not doing a shipping business within the meaning of said section, and we are entirely clear that section 2251, under which petitioner was held to answer for the crime of larceny, relates only to persons, associations, copartnerships, and corporations engaged in the business mentioned in section 2244. The statute in question, when construed as a whole, was evidently designed to create the relation of bailor and bailee between persons

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delivering and receiving grain for storage and shipment, and to make such bailees who willfully neglect or refuse to deliver on demand the grain thus bailed, or its equivalent, guilty of larceny. It was not intended to apply to persons engaged strictly in the milling business. The very nature of such business is wholly inconsistent with the theory of a bailment of the wheat delivered at such mill. A person delivering wheat to a milling concern which is known to be engaged solely in manufacturing such grain into flour must be held to have parted with the title thereto, especially after such wheat has been manufactured into flour, and such flour disposed of in the market. And if, in fact, the milling concern was not engaged in doing a shipping business, and hence it is not included within said statute, it is immaterial that such fact was unknown to the person delivering such grain, or that he delivered the same under the belief that such milling concern was engaged in shipping grain for profit; nor, so far as the question here involved is concerned, is it material that upon the delivery of such grain the usual warehouse receipts or tickets were issued and delivered to the person delivering the same. A criminal statute cannot by contract or estoppel be made to include persons not intended by the legislature to be included within its terms. As before stated, it was the legislative intent to make it a public offense for any bailee coming within the statutory definition of a public warehouseman, who accepts grain of any kind for storage or shipment, to willfully neglect or refuse, on proper demand and payment or tender of proper charges, to deliver to the person making such demand the full amount of grain of the grade or the market value thereof which such person is entitled to demand. Manifestly it was not, and could not have been, the intent of the legislature to subject to a criminal charge persons, who, by the very nature of the business in which they are engaged, could not be expected to keep the same grain or any grain of the same grade or otherwise, so as to be able to redeliver the same on demand.

The evidence disclosing, as it does, that petitioner is not guilty of the crime with which he was charged, and is now held to answer under the commitment, it follows that his imprisonment is unlawful, and he is entitled to his liberty.

Writ granted. All concur.

(114 N. W. 376.)

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STATE FINANCE COMPANY, PLAINTIFF AND RESPONDENT, VS. OLAUS H. HALSTENSON AND MARY S. HODGSON, DEFENDANTS AND APPELLANTS, EDWARD J. HODGSON, SWENSEID & KNOLD, LAMB BROS. & CO., ET AL, DEFENDANTS AND RESPONDENTS.

Opinion filed January 8, 1908.

Champerty—Foreclosure—Sheriff's Deeds.

1. A sheriff's deed, issued on a foreclosure of a mortgage, while another is in possession of the land, is not void for champerty, when such sheriff's deed is based on a mortgage, executed before the claimant went into possession.

Same.

2. Such sheriff's deed is in the nature of deeds issued under judicial proceedings, and is not within the purview of the statute against champerty and maintenance.

Same—Mortgage—Validity.

3. The owner of land in the possession of another may properly mortgage the same without violating the statute against champerty.

Deed—Misnomer—Proof of Identity.

4. The dropping of an initial letter of a name in a conveyance is not such a variance or misnomer as to require extrinsic proof of the identity of the person.

Recording Transfers—Priority.

5. The fact that two mortgages are executed, delivered and recorded on the same day and hour is notice to a subsequent purchaser of the land to put him upon inquiry as to the actual priority of such mortgages.

Same.

6. The foreclosure of a mortgage, simultaneously recorded with another by advertisement, establishes nothing as to the priority of such mortgage.

Same—Laches—Foreclosure.

7. A delay of fourteen years before foreclosure of a mortgage is commenced does not make the mortgage claim a stale one; the statute of limitations not having run against the mortgage, and there being no fact in the case showing an intent to abandon the mortgage.

Appeal—Bringing in New Parties—Discretion of Court.

8. Matters pertaining to amendment of pleadings, continuances and the bringing in of the personal representatives of deceased parties

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at the trial of actions are within the discretion of trial courts, and their action will not be disturbed, except in case of abuse thereof resulting in prejudice.

Evidence—Identity of Names.

9. Evidence examined, and *held* to show that the names Ackerland and Ackenland refer to the same person.

Taxation—Tender—Quieting Title.

10. Payment or tender of all just taxes paid by a party is not necessary before bringing an action to quiet title, where there was no assessment of the land on account of a failure to describe the land.

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

Action by the State Finance Company against Olaus H. Halstenson and others. Judgment for plaintiff, and defendants Hodgson and Mary S. Hodgson appeal.

Affirmed.

Skulason & Skulason, for appellants.

Sheriff's deed was champertous. Revised Codes 1905, Section 8733; Galbreath v. Payne, 12 N. D. 164, 96 N. W. 258; Schneller v. Plankinton, 12 N. D. 561, 98 N. W. 77; Conrad v. Adler, 13 N. D. 199, 100 N. W. 722.

Where different initial letters occur in names of persons in the chain of title to realty, identity must be shown. Ambs v. Chicago, etc., 46 N. W. 321; Anderson v. Wynne, 54 N. W. 1047; Vickery v. Burton, 6 N. D. 245, 69 N. W. 193.

Mortgages contemporaneously given are deemed one instrument. Koevenig v. Schultz, 32 N. W. 320; Stanbrough v. Daniels, 42 N. W. 443; Eleventh Ward Sav. Bank v. Hay, 55 How. Pr. 444; Decker v. Boice, 83 N. Y. 215; Cain v. Hanna, 63 Ind. 408; Cochrane v. Goodell, 131 Mass. 464; Ward Sav. Bank v. Hay, 55 How. Pr. 464; Green v. Warnick, 64 N. Y. 220.

Absence of a note renders a presumption of its payment. 22 Enc. Law 589; 9 Enc. Pl. & Pr. 400; George v. Ludlow, 66 Mich. 176; Pharris v. Surrett, 54 Mo. App. 9.

M. Conklin, Wicks, Paige & Lamb, for respondent.

Identity of name is identity of person, although spelling varies, if sound is the same. Rogers v. Manley, 46 Minn. 403; State v. Loser, 104 N. W. 337; Find v. Manhattan R. Co., 15 Daly 479;

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Mallory v. Riggs, 76 Iowa 748; 17 L. R. A. 824 note; 14 Enc. Pl. & Pr. 292, 288; Jackson v. Woodruff, 9 Cow. 141; Miner v. Boneham, 15 John 226; Claw v. Plummer, 85 Mich. 550; Smith v. Gillum, 80 Tex. 120; Dickerson v. Brady, 23 Ga. 161; State v. Stedman, 7 Port. 495; Beckwith and Beckworth, 4 Black 171; Adamson and Adanson, 7 Black 325; Kamberling and Kimberling, 4 G. Greene, 437; Bernhart and Banhart, 34 Kan. 488; Wilkerson and Wilkinson, 13 Mo. 91, 53 Am. Dec. 137; Blackenship and Blankenship, 21 Mo. 504; Owens D. Havely and Owen D. Haverly, 21 Mo. 498; Bert Samrud and Bernt Sannerud, in State v. Sannerud, 38 Minn. 229. Chamblee v. Tarbox, 27 Tex. 140.

Foreclosure by advertisement does not affect priority of mortgages. Van Aken v. Gleason, 34 Mich. 477.

Assignee of mortgages takes subject to equities. Westbrook v. Gleason, 79 N. Y. 30; Bush v. Lathrop, 22 N. Y. 535; Shaper v. Reilly, 50 N. Y. 61; Gilman v. Moody, 43 N. H. 239.

Claimant of priority of record must prove consideration. Shotwell v. Harrison, 22 Mich. 409; Landers v. Bolton, 26 Cal. 393; Fritz v. Ramspott, 79 N. W. 520; Newton v. Newton, 48 N. W. 450; Roussain v. Patten, 48 N. W. 1122; Fifield v. Norton, 82 N. W. 581; Lloyd v. Simons, 95 N. W. 903; Hoppin v. Doty, 25 Wis. 573; Proctor v. Cole, 104 Ind. 373.

Lapse of time alone is not laches. Jones on Mtgs. Sec. 558; Sis v. Boardman, 11 App. D. C. 116; Demuth v. Old Town Bank, 37 A. 266; Richey v. Sinclair, 47 N. E. 364; Cross v. Allen, 141 U. S. 528; Stevens v. Osgood, 100 N. W. 161; Burke v. Backus, 53 N. W. 458; Morris v. McClary, 46 N. W. 238.

Morgan, C. J. This is an action to determine adverse claims to 160 acres of land in Nelson county. The register's receipt and the patent to this land were issued in the name of Ole Ackenland. The plaintiff claims title by virtue of a sheriff's deed, issued to it on May 13, 1903, under a foreclosure of a mortgage from Ole S. Ackerland, for the sum of $350, on July 24, 1883, to Emma B. Gove, and by her assigned to the plaintiff on February 25, 1902. The consideration recited in the assignment was "$1 and other valuable consideration." The defendant Mary S. Hodgson claims title under a tax deed, issued to her on July 16, 1900, and under a sheriff's deed, issued to her on January 27, 1902, on an assignment of a sheriff's certificate of sale under a mortgage for $35, given to F. T.

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Day by said Ackerland on July 24, 1883, and foreclosed by advertisement on April 25, 1886, and bid in by said Day, and the certificate of sale was thereafter duly assigned by him to Mary S. Hodgson, as before stated. On September 26, 1900, said Day also delivered a quitclaim deed of said premises to said Mary S. Hodgson. Mary S. Hodgson also claims under a quitclaim deed from one Munson, who is alleged to have been the assignee of Day for the benefit of creditors. There is no deed in evidence from Day to Munson. Hence Munson's deed to Mrs. Hodgson conveyed no title, and will not be further considered. The mortgage for $350 and said mortgage for $35 were executed, acknowledged, and delivered on the same day, and filed for record on the same day and hour. There is nothing in the record showing which was first actually filed or numbered for record by the register of deeds. The $35 mortgage was given to Day for commissions for procuring the money for which the $350 mortgage was given. Said Day and one E. J. Hodgson, the husband of the defendant, Mary S. Hodgson, were jointly and equally interested in the $35 mortgage under the general custom of doing business between Day and Hodgson, by which Day procured the money for farm loans, which were made on applications sent by Hodgson to Day. Hodgson did all the work connected with the making of the loans, as well as taking care of their collection, and all commissions were equally divided between them, although the commission mortgages were in Day's name for the benefit of both of them. The defendant Halstenson went into possession of the premises in suit in 1898 and lived thereon continuously with his family after 1901, and made improvements thereon, aggregating in value over $450. He went into possession under a contract for a special warranty deed between him and said E. J. Hodgson. He was in possession of the land at the time the sheriff's deed was issued to the plaintiff under the foreclosure mentioned heretofore. Upon ascertaining that E. J. Hodgson had no title to the land when he gave this contract, Halstenson made no further payments. The contract was never canceled or rescinded. Halstenson paid the sum of $90 in cash in part payment of the purchase price. The defendants Lamb Bros. and Swenseid & Knold claim to be lienholders on account of having furnished building materials to said Halstenson, and have perfected their liens by filing the proper papers. The trial court ordered judgment for the plaintiff, quieting the title, and disallowed the claims of all the defendants to

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the land. The defendants Halstenson and Mary S. Hodgson have appealed and demand a trial de novo under section 7229, Rev. Codes 1905.

The appellants contend that the judgment of the district court is erroneous for the following reasons: (1) That the sheriff's deed to the plaintiff was void as to Halstenson as a champertous deed, he having been in possession of the land when the same was issued; (2) that the plaintiff acquired no title to the land, for the reason that the mortgage foreclosed by it was given to one Ackerland and the land was patented to one Ackenland; (3) that the mortgage under which the defendant Mary S. Hodgson acquired title was prior to the mortgage under which the plaintiff acquired its title; (4) that the claim under which plaintiff acquired title is stale, and a court of equity should not entertain the same, but should presume that the same had been paid and satisfied; (5) that the trial court erred in refusing to allow an amendment to defendant Halstenson's answer, setting forth the value of the improvements placed on the land by him; (6) that the trial court erred in not substituting the personal representative of E. J. Hodgson, deceased, as a party on the suggestion of counsel for Halstenson and Mary S. Hodgson; (7) that the court erred in decreeing the tax deeds invalid without a tender or payment of all just taxes. The claim of maintenance or champerty as to the sheriff's deed to the plaintiff while Halstenson was in possession cannot be sustained. Plaintiff's title was derived through a foreclosure of mortgage from the owner of the land. Section 8734, Rev. Codes 1905, expressly authorizes the giving of a mortgage upon land adversely held by another. Galbraith v. Payne, 12 N. D. 164, 96 N. W. 258. The deed was given pursuant to the mortgage given by the owner of the land before Halstenson went into possession. Deeds given while possession is so held are not deemed champertous, and possession under such deeds is not adverse, when based upon the mortgage. Halstenson's possession was based on a contract for a deed from E. J. Hodgson. Hodgson had not any title to the land when the contract was given. For that reason Halstenson had no rights to the land, as Hodgson had nothing to convey. Halstenson's possession did not therefore make the sheriff's deed champertous under section 7002, Rev. Codes 1899. Sheriff's deeds given pursuant to foreclosure sales do not come within the application of said section. They are in the nature of

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judicial sales, which are never held void under said section. 5 Enc. of L. p. 84, and cases cited.

The contention that Hodgson held title under tax certificate and tax deeds is not borne out by the evidence. The allegations of the answer are not sustained as to payment of taxes or as to the ownership of the land under tax deeds.

It is next claimed that the plaintiff has not title to the land for the reason that the mortgage under which it claims was given by Ole S. Ackerland, while the title is shown to have been in Ole Ackenland. It is claimed as a matter of law that the mortgagor in this mortgage is not the same person that held the legal title. Unexplained, there would be force in the contention. But the record shows sufficient facts to overthrow the contention. It is shown that Ole Ackerland was the entryman under the land laws, and was then known under the name of Ackerland. It is also shown that Ackerland was in possession of the land when the mortgage was given. It further appears as a circumstance having some bearing on the identity of the person giving these mortgages that the original papers from the United States government are produced by the plaintiff. The receiver's certificate was issued on July 23, 1883, and the mortgages were given on July 24th. No person by the name of Ackenland has made any claim to the land, nor is he shown to have been in any way connected with the land or title during the lapse of about 24 years. Further, in the body of the mortgage we find the name of Ole S. Ackerland as mortgagor. The notary certifies that Ole S. Ackenland, who appeared before him, is known to him to be the person who signed the mortgage. This was a statement by the notary that Ole S. Ackerland and Ole S. Ackenland are the same person. Under these facts we think it is shown that no such person as Ackenland was ever the owner of the land, or in any way connected with the title thereto. The name in the patent and register's receipt was evidently inserted by mistake. Conceding, without deciding, that the name Ackenland is not practically the same as Ackerland, and that they are not presumed to be the same person under the doctrine of idem sonans we are satisfied from the record that the patentee of the land and the mortgagor were one and the same person.

The use of the initial "S" in the mortgages, although it was not used in the patent, is immaterial. It is not an unusual occurence to drop an initial in writing a name, and the authorities are general

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that such fact does not constitute a misnomer or variance. Johnson v. Day, 2 N. D. 295, 50 N. W. 701; Enc. Pl. & Pr. vol. 14, 275; Newell, Ejectment, p. 586; Chamblee v. Tarbox, 27 Tex. 140, 84 Am. Dec. 614; Rogers v. Manley, 46 Minn. 403, 49 N. W. 194. The case of Ambs v. Chicago, etc., 44 Minn. 270, 46 N W. 321, is relied on by the defendants as an authority that the presence of an initial letter in the name of a party to a deed is a variance, when the same name with a different initial appears in the chain of title, and that no presumptions will be indulged in that the names refer to the same person. That was a case of conveyance by persons having different initials in their names, and not a case like the one under consideration, where the initial letter in the name was dropped. Under the authorities the mere omission of the initial letter creates no doubt or suspicion as to the identity of the person, requiring extrinsic evidence to show identity.

It is claimed that defendants are entitled to judgment as the holders under the prior mortgage. As stated before, the mortgages were executed, acknowledged, delivered, and recorded at the same time. Plaintiff's mortgage matured four years later than the mortgage under which defendants claim. Defendants' mortgage was foreclosed in 1886, although a deed was not issued until 1900, but the deed was issued before the plaintiff's mortgage was foreclosed. The fact that defendants' mortgage was first foreclosed, and a deed issued, is the basis of defendants' contention that they hold the title free from the lien of the plaintiff's mortgage the same as though their mortgage had been in reality a first mortgage, and that the holder of the mortgage under which plaintiff claims was barred of all rights to the land after the time for a redemption had expired, and had no rights under this mortgage, except to a pro rata distribution of the money derived from the foreclosure sale. We cannot agree to this contention under the facts of this case. Under the evidence, the two mortgages did not stand upon an equal footing. The plaintiff's mortgage was a prior mortgage to that of the defendants', although both were of equal standing and priority, so far as the record is concerned. E. J. Hodgson and Day were engaged in the mortgage loan business in Minnesota, North and South Dakota. They loaned money for eastern capitalists on commission secured by second mortgages. These second mortgages were jointly owned by Day and Hodgson, although taken in Day's name. Day testifies that their customary manner of doing business was to take second

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mortgages for their commissions. He also testifies that the plaintiff's mortgage was to be a first mortgage, and the Day mortgage for commissions was to be a second mortgage. Such was also the testimony of Day's clerk. There is nothing to overthrow this testimony, and it is competent testimony to establish the actual priority of one mortgage over the other. The only objection to it urged by defendants is that it only shows what was the general custom of Day and Hodgson in taking second mortgages for commissions, and that there is nothing to show what the parties to the mortgages intended. Day and Hodgson were agents for Gove, the mortgagee in the mortgage under which the plaintiff claims. Day was the mortgagee in the mortgage under which defendants claim, and testifies that this mortgage was to be a second mortgage to the best of his knowledge and belief. On this question appellants further contend that no arrangement or custom that might have existed between Day and Hodgson would be binding on Mrs. Hodgson, who procured the deed under the foreclosure of the record mortgage. It is claimed that she was an innocent purchaser without notice, actual or constructive, of any priority of either mortgage. Both mortgages were recorded at the same time. The fact that they were recorded at the same time showed nothing as to priority. Their having been so recorded did not preclude either mortgage from asserting a priority, or from having such priority established by extrinsic evidence. Stafford v. Van Rensselaer, 9 Cow. (N .Y.) 315. A foreclosurue by advertisement determines nothing as to the priority of mortgages recorded at the same time. Van Aken v. Gleason, 34 Mich. 477. The fact that they were recorded at the same time was sufficient notice to put Mrs. Hodgson or any purchaser at the sale on inquiry as to priority. The record was notice to all purchasers that either mortgagee might have a superior lien. Having such notice through the records, Mrs. Hodgson cannot be deemed an innocent purchaser, as the record gave her notice of facts which should have put her upon inquiry. It is immaterial whether her claim be based upon the sheriff's deed or upon the quitclaim deed from Day, so far as her claim of being an innocent purchaser is concerned. In either case she had notice that the mortgage unde which Day claimed, and on which the sheriff's deed was issued, was recorded simultaneously with another mortgage. The facts are not the same as though the register's records had shown priority of one mortgage over the other. Inasmuch as the records

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showed no priority, she was bound to inquire, and could not gain priority by foreclosure to the prejudice of rights of priority actually existing in favor of the mortgagee in the larger mortgage. Priority between mortgages simultaneously recorded may be secured by contract between the parties. Corbin v. Kincard, 33 Kan. 649, 7 Pac. 145.

Complaint is made that the court did not require payment or tender of the taxes on the land by the plaintiff before granting it any relief. There is no proof that the Hodgsons or Halstenson ever paid any taxes on the land, and the other defendants have not appealed. The tax deed on which Mary S. Hodgson relies was void on account of failure to describe the land in the assessment roll. The land was described as the S. E. 4, etc.

The appellants Halstenson and Mary S. Hodgson, at the close of their testimony at the trial, suggested the death of the defendant E. J. Hodgson, and suggested the advisability and necessity of bringing in his personal representatives as parties. This was not done, and the failure to do so is urged as ground for a reversal of the judgment. The court has found that the interests of E. J. Hodgson were litigated and adjudicated in this action, and the record so shows. It was discretionary with the trial court whether to postpone the trial at that stage of it in order to have the personal representatives brought in. Sykes v. Beck, 12 N. D. 242, 96 N. W. 844.

The defendant Halstenson asked leave to amend his answer from a general denial to one alleging his possession of the land under color of title and the making of valuable improvements thereon while in possession. The request for the amendment was made after Halstenson's evidence had been taken. It was discretionary with the court whether to allow the amendment or not, and there was no abuse thereof in refusing to do so. No reason was advanced why the application had not been made before trial or at the commencement of the trial. The records showed what plaintiff's claim of ownership was, and the exercise of diligence would have resulted in advising defendant thereof without waiting until plaintiff had produced its testimony at the trial.

Appellants contend that plaintiff's claim is stale, and should be presumed to have been paid and satisfied. They concede that the statute of limitations has not run against the mortgage. The plaintiff's mortgage matured in 1888, and foreclosure was commenced in 1902. There are no facts in the record showing any prejudice on

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account of delay enforcing the mortgage, and while the statute of limitations had not run against the mortgage, and the mortgage having been duly recorded, all parties dealt with the land with notice of the mortgage, and are bound by it. No presumption prevails that the mortgage has been paid until the statute has run against it. Nor will lapse of time give rise to a presumption that the plaintiff's grantor acquiesced in the foreclosure of the Day mortgage. The plaintiff's assignor did nothing to show an abandonment of the mortgage claim, and no act of hers can be urged as ground for an estoppel against her or her assignee being allowed to rely on the mortgage.

Complaint is also made against the judgment because the plaintiff did not produce the notes secured by its mortgage at the trial. This was an action to quiet title, and not to foreclose the mortgage. The regularity of the mortgage or of its foreclosure was not attacked, and whether the notes had been paid was in no way involved.

This judgment was affirmed. All concur.

Fisk, J., being disqualified, Pollock, J., of the Third judicial district, sat by request.

(114 N. W. 724.)

C. A. MORTON, ET AL., PLAINTIFFS AND APPELLANTS, v. JAMES HOLES ET AL., AS MEMBERS OF THE BOARD OF SUPERVISORS OF FARGO TOWNSHIP, AND JAMES KENNEDY, DEFENDANTS AND RESPONDENTS.

Opinion filed February 14, 1908.

Constitutional Law — Illegal Discrimination — Delegation of Legislative Powers.

Chapter 252, page 389, Laws 1907, entitled "An act to provide for paving, curbing or macadamizing the highways in civil townships adjoining incorporated cities of not less than 6,000 inhabitants, and for the construction of sewers and water mains therein connecting with city sewers and water mains or with their own trunk sewers, and for the construction of sidewalks," is *held* to be unconstitutional and void upon the grounds:

First, that it constitutes an unwarranted and illegal discrimination between individuals affected thereby; and

Second, it attempts to delegate legislative powers to individual property owners on certain highways in such townships.

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

Action by C. A. Morton and others against James Holes and others. Judgment for defendants, and plaintiff's appeal.

Reversed and remanded.

Engerud, Holt & Frame, for appellants.

The act infringes the constitutional provision against special legislation. Beleal v. N. P. Ry. Co. 15 N. D. 318, 108 N. W. 33.

Assessment is the exercise of the taxing power. Cooley on Taxation (3rd Ed.) 1181.

Taxing power can be delegated only to a local representative body. Vallely v. Park Com. 16 N. D. 25, 111 N. W. 615; Bradshaw v. Lankford, 11 L. R. A. 582; Shumway v. Bennett, 29 Mich. 451; Cooley Const. Lim. 163, et seq.

Constitutionality of a law is tested not by what is, but what may be done under it. State v. Stark Co., 14 N. D. 368; 103 N. W. 913; Stewart v. Palmer, 74 N. Y. 183.

W. C. Resser, for respondent.

Board can create sewer improvement districts. Webster v. Fargo, 9 N. D. 308, 82 N. W. 732.

Police power and taxation for local improvement are subjects of legislative will. Paulson v. City of Portland, 149 U. S. 30, 37 L. Ed. 29; Willard v. Presbury, 81 U. S. 676, 20 L. Ed. 719; Spencer v. Merchant, 125 U. S. 345, 31 L. Ed. 763; Webster v Fargo, supra.

Special assessments for local improvements are laid under the police, not taxing power. Hamilton's Law on Special Assessments, Sec. 40; Cooley on Taxation (3rd Ed.) 1128; Van Wagner v. Paterson, 67 N. J. L. 455; Adams v. Fisher, 63 Tex. 651; Arnold v. Knoxville, 3 L. R. A. 837; State v. Mayor of Des Moines, 72 N. W. 639.

FISK, J. The sole question involved on this appeal is the constitutionality of chapter 252, p. 389, Laws 1907. This act provides for the making of certain public improvements, such as paving or macadamizing the highways, the construction of sewers, water mains, sidewalks, etc., in those civil townships adjacent to incorporated cities containing at least 6,000 inhabitants, and providing for the payment thereof. The respondents other than Kennedy are

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members of the board of supervisors of Fargo township, which township is adjacent to the city of Fargo on the north, and is within the terms of said act. It is conceded that these respondents as such supervisors, acting strictly within the terms of said statute, proceeded in the summer of 1907 to create a sewer district in said township, and, pursuant to a petition theretofore duly filed, ordered the construction of, and contracted with respondent Kennedy for the construction of a trunk sewer therein, at a cost of about $10,000 and a lateral sewer therein at a cost of about $6,000; also entered into a contract for the paving and curbing of the highway known as North Broadway at a probable expense of $40,000. It is conceded that the intention of the respondent supervisors is to pay the entire expense of such improvements by special assessments upon the property benefited thereby. Appellants brought this action to have the proceedings of the board of supervisors taken under said statute as aforesaid adjudged to be null and void, and to perpetually enjoin defendants from proceeding further with such contemplated improvements. The complaint contains two causes of action alleging all the facts necessary to entitle plaintiffs to the relief demanded upon the theory of the unconstitutionality of said statute. Defendants interposed a general demurrer to the complaint upon the ground that such complaint fails to allege facts sufficient to constitute a cause of action. The trial court made its order sustaining this demurrer, and from such order this appeal is prosecuted.

Counsel for appellants concede that the law in question is not open to the objection that it attempts as between the townships of the state to make an unlawful discrimination by the classification thereof; but they assert that the same creates an unfair and unreasonable discrimination between the property owners within such townships, and hence that it violates the constitutional inhibitions against special legislation found in sections 11, 20 and 69, par. 4, of our Constitution. These sections are as follows:

Section 11: "All laws of a general nature shall have a uniform operation."

Section 20: "Nor shall any citizen or class of citizens be granted privileges or immunities which upon the same terms shall not be granted to all citizens."

Section 69, par. 4: "Special laws shall not be passed regulating township affairs, or [paragraph 23] for the assessment or collection of taxes."

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Does the act in question contravene any of the above constitutional mandates? If so, the same is null and void, and the demurrer should have been overruled.

Section 1 provides, in substance, as follows: "Any civil township in this state adjoining an incorporated city having at least 6,000 inhabitants, and which shall have paved, graded, curbed or macadamized its streets leading to the boundaries of such civil township, or shall have constructed sewers or water mains in such streets, may pave grade or macadamize the highways of such township connecting with such city streets or with such highways so paved, or highways running along the boundaries of such city, or construct sewers or water mains therein as provided by this act. * * *"

Section 2: "Whenever the owners of real property abutting on such highway * * * and representing a majority by feet of the frontage of said property, shall desire to improve such street or highway as herein provided, they shall petition the board of supervisors * * * setting forth and describing specifically * * * the kind, character and extent of the improvement desired, specifying the width and material of pavement, if any, and the size and material of any lateral sewers or water mains, the number and location of manholes and catch basins for such sewers, and the number and location of fire hydrants for such water mains * * * which petition shall be filed in the office of the township clerk. In the case of trunk sewers, the board shall by majority vote order and construct the same, whenever a majority petition is presented for the construction of lateral sewers that cannot be connected with the city sewers."

Section 6: "The board shall deem it necessary when a majority petition, above provided for, shall be filed, to construct or alter any sewer or open, widen, extend, pave, etc., any street, alley, avenue, lane, highway or other public ground within the township limits, or to extend, relay or replace any sewer and watermain. * * *"

Section 7: "After the plans, specifications and estimate mentioned in the preceding section shall have been filed in the office of the township clerk, the board shall, by resolution, declare such work or improvement necessary to be done according to such plans and specifications. * * *"

It will be seen by the foregoing sections that the owners of property abutting on the highways mentioned in section one are granted rights and privileges which are not granted to other property owners in the township similarly situated. These first-mentioned persons

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are given the right under the statute to compel the making of such improvements, and not only this, but they are given the right to absolutely dictate the nature and extent of such improvements. As to the improvements petitioned for by them, the board of supervisors has no discretion or control, while, on the other hand, the property owners on other highways in the township are given no such rights, although the necessity for such improvements may be equally urgent and desirable. As aptly stated by appellants' counsel: "The Broadway property owners are given the right to compel the construction of such improvements as they designate in their petition. Their neighbors, however, who do not own property on Broadway, have no such valuable right. They can get such improvements only as the supervisors see fit to grant. They must depend upon the good will of the supervisors to obtain as a favor those things which their Broadway neighbors can demand as a right." The mere statement of the situation demonstrates to our minds the manifest unfairness and unreasonableness of such discrimination; and, when we consider the fact that under its provisions many property owners in a township may, as is the fact with these appellants, be required to contribute to the expense of such improvements without any voice in determining the necessity therefor, or the nature and extent thereof, we have but little difficulty in reaching the conclusion, which we do, that said statute is unconstitutional and void, as an unjust and unwarranted discrimination.

Upon what theory or principle can it be said that a few property owners upon one highway in a township may be vested with rights and privileges which are withheld from their neighbors who are, so far as the necessity or desirability for such improvements are concerned, in a similar situation? Such a discrimination is clearly unreasonable and wholly arbitrary and capricious, and cannot be sanctioned by this court. The constitutional mandate against such unlawful discrimination is plain, and has repeatedly been recognized and enforced in this state. A mere reference to such cases will suffice, as the rule is fundamental. Beleal v. N. P. Ry. Co., 15 N. D. 318, 108 N. W. 33, and State v. Mayo, 15 N. D. 327, 108 N. W. 36, and cases cited.

Another ground urged against the validity of this law is that it constitutes an unlawful delegation of legislative power. We have carefully considered this contention, and see no escape from the logic of appellant's argument. It is, of course, well settled that the

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function of deciding all matters relative to the public improvements such as are contemplated by the act in question are legislative in their character, and it is equally well settled that the legislative assembly to whom is delegated by the people all the legislative power of the state may, in local matters of an administrative character, delegate such legislative function to local authorities and boards; but it is also equally well settled that such power cannot be delegated to private individuals, or to any class of citizens in their individual capacity. 8 Cyc. 831, and cases cited; 6 Am. & Eng. Enc. Law,1021 et seq. and cases cited; Hutchinson v. Leimbach, 68 Kan. 37, 74 Pac. 598, 63 L. R. A. 630, 104 Am. St. Rep. 384; Wyandotte Co. v. Abbott, 52 Kan. 148, 34 Pac. 416; Board v. Common Council, 28 Mich. 228, 15 Am. Rep. 202; People v. Bennett, 29 Mich. 451, 18 Am. Rep. 107; Winters v. Hughes, 3 Utah, 443, 24 Pac. 759; Ohio, etc., R. Co. v. Todd, 12 Ky. Law Rep. 726, 15 S. W. 56; Parks v. Commissioners (C. C.) 61 Fed. 436; Cooley, Const. Lim. (7th Ed.) p. 163 et seq. The act in question is clearly within the class of legislation prohibited by the above rule, and cannot be distinguished on principle from the cases of Hutchinson v. Leimbach, Board v. Abbott, and Parks v. Commissioners, supra. The act in effect delegates to individual property owners on one highway in the township the legislative functions of determining whether the improvements shall be made, and of what they shall consist and this notwithstanding the fact that the cost thereof is not to be paid alone by such petitioners. The petitioners are expressly given the right to specify the "kind, character, and extent of the improvements desired, specifying the width and material of paving, if any, the size and nature of any lateral sewers or water mains, the number and location of manholes and catch basins, the number and location of fire hydrants,' etc., and section 6 of the act expressly makes it the duty of the board upon the filing of such petition to construct the improvements prayed for. The board has no discretionary powers in the matter, and is made the mere instrument of the law to carry out the will of such favored individuals. This is clearly, in effect, an unwarranted delegation of legislative power to individuals, and hence the law is unconstitutional and void. In Hutchinson v. Leimbach, supra, the Supreme Court of Kansas as late as 1903 had under consideration a statute of that state, the provisions of which are that, "whenever it shall be desired to vacate any block, lot, park, reservation, street or alley

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* * * in any improved townsite or exclude the same, or any unplatted farm land, from the boundaries of any city," a petition shall be presented and notice given, and if certain findings are made the court shall order the "corporate boundaries to be changed by the exclusion of such lands therefrom." In holding the same unconstitutional, as constituting an unlawful delegation of legislative power, the court said: "Is it competent for the legislature to authorize an individual to effect a change in the boundaries of a city, provided that after publishing notice of his intention to do so he can induce a jury in the district court to find that no public or private rights will be endangered, the loss of taxes to the city and of security to its bondholders being excluded from consideration? In the cases arising under the statute authorizing the mayor and council to change the city boundaries, subject to conditions to be determined by the court, the doubtful question was whether a legislative power was thereby conferred upon the court, since it was authorized to pass upon the expediency of the proposed measure. But here there is no such question. Under the statute now involved the court has no discretion. It examines but one question—whether the proposed change would injure or endanger public or private rights—leaving out of consideration any possible rights of the city or its bondholders to look to the property affected for taxes; and, if this is answered in the negative, it must register the will of the petitioner just as the council is in express terms required to accord it by ordinance. The legislative power is not devolved upon the court, but upon the individual seeking the change."

Other reasons are urged by appellant's counsel for holding such statute void, but our views above expressed render it unneccessary to notice them.

The order appealed from is reversed; and the cause remanded to the district court for further proceedings according to law; appellants to recover their costs on this appeal. All concur.

(115 N. W. 256.)

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W. H. Schuyler v. F. E. Wheelon and S. W. Wheelon.

Opinion filed February 21, 1908.

Vendor and Purchaser — Certainty of Description.

1. An executory contract for the sale of an interest in certain real property for townsite purposes, not exceeding thirty acres in extent, to be selected and platted into blocks and lots by the grantee from a larger tract, which is specifically described, *held* not void on account of uncertainty of description.

Same.

2. The contract provides a method for determining the property to be sold, and this was sufficient. The maxim that "That is certain which can be made certain" is applied.

Appeal — Statute of Fraud — Objection Raised Below.

3. Appellant's contention that the contract was void under the statute of frauds is not available to him in this court, as such defense was not raised or passed upon in the court below.

Appeal from District Court, Benson County; *Kneeshaw, J.*

Action by W. H. Schuyler against F. E. Wheelon and S. W. Wheelon. Judgment for defendants, and plaintiff appeals.

Affirmed.

R. A. Stuart, McClory & Barnett, and *Bangs, Cooley & Hamilton,* for appellant.

An instrument void on its face may cloud a title, and action may be sustained to remove it. Revised Codes 1905, section 6626; Power v. Kitching, 10 N. D. 254, 86 N. W. 737; Stokes v. Allen, 89 N. W. 1023.

A contract designed to supersede another, cannot be read to determine the intention of the parties to the latter. Overbeck v. Association, 17 Mo. App. 310.

A contract that fails to show quantity and location of land is void. Nippolt v. Kammon, 40 N. W. 266; Hamilton v. Harvey, 13 N. E. 210; Pierson v. Ballard, 20 N. W. 193; Appeal of Holthouse, 12 Atl. 340; Thompson v. Gordon, 72 Ala. 455; Brockway v. Frost, 41 N. W. 411; Hollenbeck v. Prior, 5 Dak. 298, 40 N. W. 347.

A contract is void under the statute of frauds, that fails to sufficiently describe the land. Alabama Mineral Land Co. v. Jackson, 77 Am. St. Rep. 46.

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Such a contract is a nullity. Wardell v. Williams, 4 Am. St. Rep. 814; Raub v. Smith, 1 Am. St. Rep. 619; Cheney v. Cook, 7 Wis. 413.

T. F. McCue, for respondent.

A contract that provides for sale of land, location to be determined and mode of ascertainment pointed out, is valid. Emshwiller v. Tyner, 44 N. E. 811; Carpenter v. Locker, 1 Ind. 434; Washburn v. Fletcher, 42 Wis. 152; Cheney v. Cooke, 7 Wis. 413; Jemima Branch, ex parte, 72 N. C. 106; Armijo v. Townsite Co., 5 Pac. 709.

Statute of frauds cannot be first urged in Supreme Court. Willard v. Elevator Co., 10 N. D. 407, 87 N. W. 996; Prior v. Sanborn County, 80 N. W. 169; Meldrum v. Kenefick, 89 N. W. 863.

FISK, J. This is an appeal from a judgment in defendants' favor rendered by the district court of Benson county, and comes here for trial de novo of the entire case.

Briefly stated the facts are that appellant, the owner of the S. W¼, section 30, township 152, range 68, entered into a contract with respondent, F. E. Wheelon, on May 6, 1901, as follows:

"This agreement made this 6th day of May, 1901, by and between W. H. Schuyler, party of the first part, and F. E. Wheelon, party of the second part: That whereas, the Northern Pacific Railway Co. has located and is about to construct a railroad over and across the following described land situate in the county of Benson, state of North Dakota, of which the said party of the first part is the owner, to-wit: The S. W. ¼ of Sec. No. 30, Town 152, Range 68. Now, therefore, in consideration of the payment by said second party of one dollar in hand, paid to said first party, the receipt whereof is hereby acknowledged, the party of the first part agrees that upon the location of townsite upon said land and upon the further consideration of the said party of the second part platting or causing to be platted, and advertising, etc., the above mentioned townsite, that he will convey to said second party by good and sufficient warranty deed, the undivided ½ of all lots contained in above mentioned plat at any time said lots may be sold. Said plat to contain thirty acres of any part of above mentioned ¼ section that second party may choose and shall be in close proximity to sidetrack. The party of the first part further agrees that he will not offer for sale any portion of above ¼ section for town-

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site purposes except the above mentioned lots in above mentioned plat until such time as 75% of said lots have been sold. The party of the first part reserves the right to till said lots until such time as they shall be sold.

"In witness whereof, both parties have hereunto set their hands the day and year first above written.

"W. H. Schuyler.
"F. E. Wheelon.

"Signed and delivered in presence of
"T. H. Deshane.
"Francis E. Kain."

The execution of said contract was not acknowledged so as to entitle it to be recorded. Two days later, at the solicitation of said respondent and his attorney, another agreement was entered into between said parties as of the same date as the prior contract. This latter agreement is as follows:

"This agreement made this 6th day of May, 1901, by and between W. H. Schuyler, party of the first part, and F. E. Wheelon, party of the second part: Witnesseth, that whereas the Northern Pacific Railway Company has located a railroad over and across the following described lands, situated in the county of Benson, state of North Dakota, which land is now the property of first party and described as follows, to wit: The southwest quarter of section thirty in township number one hundred and fifty-two north, of range number sixty-eight west of the Fifth P. M. That in consideration of the sum of one dollar in hand paid by the said second party unto the party of the first part, the receipt whereof is hereby ackowledged, and services to be performed as hereinafter described, the said party of the first part hereby agrees to convey by good and sufficient warranty deed an undivided one-half interest of such portion of said southwest quarter of section thirty as second party may deem advisable to lay out and plat into blocks and town lots, which land shall be included in the townsite as located by the Northern Pacific Railway Co., and so much land in addition as second party may conclude to lay out and plat into blocks and town lots, however, not to exceed thirty (30) acres. Said conveyance shall be made by first party as soon as the said land is properly surveyed and platted. Second party agrees in consideration of the covenant of this contract, to properly survey, plat and lay out into

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blocks and town lots said land. First party further agrees in consideration of the covenants of this contract, not to sell or offer for sale, any portion of said land or the aforesaid southwest quarter of section, thirty, town and range aforesaid, except as herein provided, until at least seventy-five per cent of the lots which shall be platted and is to be platted under the terms of this contract by said second party, shall have been sold. It is further agreed by and between the parties hereto, that after said land is platted they shall be owners of all of such lots as shall be platted under the terms of this agreement, share and share alike. First party reserves the right to cultivate all of said lots.

"In witness whereof, the said parties have hereunto set their hands and seals the day and date first above written, in duplicate.

"W. H. Schuyler.
"F. E. Wheelon.
"By S. W. Wheelon, Atty. in Fact.

"[Acknowledgment.]"

It is appellant's contention that the latter contract was intended to supersede the former, and that the same is void because it is too vague and indefinite as to the description of the property affected thereby. The object of the action is to have the latter contract adjudged null and void and canceled of record, and to perpetually enjoin defendants from asserting any rights thereunder. The trial court dismissed the action for want of equity, holding said latter contract valid, and the description of the property sufficiently definite and certain.

It is respondents' contention, and such contention was upheld by the trial court, that the second contract was not intended to supersede the first, but, on the contrary, was intended to be of the same import as the first, and it was entered into solely because the first had been lost, and it was the desire to have the contract acknowledged and recorded. In other words, that it was the intention of the parties that both contracts were to be considered as one and the same. This contention on respondents' part is amply supported by the testimony, but it is unnecessary for us to determine this question. We are clear that the last contract is as definite in the description of the property as the first, and that the same should be sustained. A method was provided in the contract for determining the particular property to be transferred, and this is all that was necessary. The familiar maxim, "That is certain

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which can be made certain" (Rev. Codes 1905, section 6685), when applied to the contract in question, renders the description sufficiently certain. The contract gave respondent F. E. Wheelon the right to lay out and plat into blocks and lots such portion of said southwest quarter, not exceeding 30 acres, as he "may deem advisable," or as he "may conclude to lay out and plat." His act in thereafter laying out and platting the same into blocks and lots would render the description definite and certain. As sustaining such a contract, see Emshwiller v. Tyner, 16 Ind. App. 133, 44 N. E. 811; Washburn v. Fletcher, 42 Wis. 152; Ex parte Jemima Branch, 72 N. C. 106. We have examined the cases cited by appellant's counsel in support of their contention in this respect, and they are not in point. The first case cited by them is that of Nippolt v. Kammon, 39 Minn. 372, 40 N. W. 266. The contract in that case contained no method for determining the land intended to be conveyed, and hence was properly held insufficient. To the same effect are the other cases cited by appellant's counsel. We cannot yield our assent to appellant's contention to the effect that the contract is invalid until a selection is made by defendant of the land by platting the same, and we have found no case, and none is cited, in support of such contention.

Appellant's last contention is that the contract is void under the statute of frauds. No such point was raised or passed on in the court below, and hence, under the well-established practice, this court will not consider the same. 6 Current Law, 1404, and cases cited; Prior v. Sanborn Co., 12 S. D. 86, 80 N. W. 169; Meldrum v. Kenefick, 15 S. D. 370, 89 N. W. 863.

We conclude that the judgment appealed from was correct, and the same is accordingly affirmed. Respondent to recover costs. All concur.

(115 N. W. 259.)

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CATIE PEASE v. ROLAND MAGILL.

Opinion filed February 21, 1908.

Trial — Directing Verdict — Waiver.

1. At the close of plaintiff's case in chief, defendant moved for a directed verdict, which motion was denied. Thereafter defendant introduced testimony in support of his defense. *Held,* that he thereby waived the error, if any, in denying said motion.

Same.

2. Error is assigned in overruling defendant's motion for a directed verdict made at the close of all the evidence, and also his motion for judgment notwithstanding the verdict. These motions were properly overruled. The action was in claim and delivery to recover the possession of a horse. The complaint contained the usual allegations of ownership and right to possession in plaintiff; also, a detention of the horse by defendant and a prior demand for possession, etc. The answer contained no denials, either general or specific, but alleged a right of possession under a chattel mortgage executed by a former owner of the animal. The motions were predicated upon an alleged failure to prove ownership and right to possession in plaintiff and also a demand. Under the issues the sole question in dispute, aside from the question of the value of the horse and damages, was whether at the time plaintiff purchased the horse she had actual or constructive notice of defendant's chattel mortgage, and there was a conflict in the testimony upon this question.

Judgment Notwithstanding the Verdict.

3. Errors in instructions and errors of law occurring at the trial do not constitute grounds for a motion for judgment notwithstanding the verdict.

Trial — Instructions.

4. The refusal to give certain requested instructions which in the abstract embraced correct statements of law *held* not error under the state of the proof.

Same — Exceptions to Charge — Instructions as to Burden of Proof.

5. Error is assigned upon the giving of the instruction relative to the burden of proof. No foundation was laid for such assignment by a proper exception to such instruction, and hence the same cannot be noticed. The exception is too general. The particular portion of the charge complained of must be specifically excepted to, and where the portion of the charge embraces, as it does in this case, several paragraphs and as many distinct subjects, the exception is bad.

Same.

6. Even if such instruction had been properly excepted to, it would not avail defendant as the burden of proof under the issues was upon defendant.

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Chattel Mortgages — Defective Exemption — Filing — Constructive Notice.

7. Defendant's chattel mortgage was not properly witnessed or acknowledged so as to entitle it to be filed; and hence the filing of the same did not operate to give constructive notice thereof.

Same.

8. The instructions given relative to the law of notice examined, and *held* not prejudicial error.

Trial — Order of Proof — Discretion.

9. It was not an abuse of discretion to permit certain testimony to be introduced by way of rebuttal, even if strictly speaking it was a part of plaintiff's case in chief.

Evidence — Admissibility.

10. Certain other rulings regarding the admission and rejection of testimony considered, and *held* not error.

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

Action by Catie Pease against Roland Magill. Judgment for plaintiff, and defendant appeals.

Affirmed.

Chas. S. Ego and *F. S. Thomas,* for appellant.

Renewal of motion to direct verdict at close of all testimony saves the motion therefor at end of plaintiff's case. Bowman v. Eppinger, 1 N. D. 21, 44 N. W. 1000.

To attack a chattel mortgage for lack of proper filing the assailant must show himself "a subsequent purchaser in good faith for value." Rev. Codes 1905, section 6182; Newton v. Newton, 48 N. W. 450; Nolan v. Grant, 5 N. W. 513; Ransom v. Schmela, 12 N. W. 926; Gardner v. Early, 34 N. W. 311; McNeil v. Finnegan, 23 N. W. 540; Wright v. Larson, 53 N. W. 712; Starr v. Stevenson, 60 N. W. 217.

Party is entitled to an instruction applicable to testimony supporting his theory. Moline Plow Co. v. Gilbert, 3 Dak. 239, 15 N. W. 1, 119 U. S. 491, 30 L. Ed. 476; Boyce v. Palmer, 75 N. W. 849; Lansing v. Wessell, 97 N. W. 815; Cunningham v. Fuller, 52 N. W. 836; Botkin v. Cassady, 76 N. W. 722; Lion v. Baltimore City Ry., 44 Atl. 1044; Rhoades v. Chesapeake Ry. Co., 55 L. R. A. 175; Memphis Ry. Co. v. Newmann, 108 Tenn. 666.

Knowledge of circumstances that would reveal the truth if inquired into destroys good faith. Knowlton v. Shultz, 3 Dak. 417, 71 N. W. 550; Bowman v. Metzger, 39 Pac. 3; Schmueckle v. Waters, 25 N. E. 281; State Nat. Bank. v. Bennett, 36 N. E. 551; Tourtelot v. Reed, 64 N. W. 928.

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Rourke, Kvello & Adams, for respondent.

There is no error in refusal to grant motion for judgment at close of plaintiff's case, if plaintiff failed to rest his case, and proceeded with his defense. 6 Enc. Pl. & Pr. 700; Union Pac. R. R. v. Mertes, 52 N. W. 1099; Bowman v. Eppinger, 1 N. D. 21, 44 N. W. 1000.

No proof is required of a fact admitted. 1 Estee's Pleadings, section 204; Tuolumne Redemption Co. v. Patterson, 18 Cal. 416; Patterson v. Ely, 19 Cal. 28; Faulkner v. Rondoni, 27 Pac. 883; Grubu v. Stanley, 28 Pac. 56; In re Doyle, 15 Pac. 125; Kutcher v. Love, 19 Col. 547.

Ownership carries the right to possession. Wilson on Replevin, section 122.

Ownership and prior peaceable possession admitted, presumption of right to immediate possession arises, unless rebutted. Wells on Replevin, section 199.

If any portion of the charge excepted to is proper, exception to the entire charge will not be sustained. State v. Campbell, 7 N. D. 58, 72 N. W. 935; Kennedy v. Falde, 4 Dak. 319, 29 N. W. 667; Calkins v. Seabury Co., 58 N. W. 797; Bouck v. Enos, 21 N. W. 825.

Answer in replevin praying a return and damages, is one for affirmative relief, and burden of proof is with defendant. Acock v. Halsey, 27 Pac. 193; First Nat. Bank v. Parkhurst, 37 Pac. 1001; 3 Elliott on Evidence, section 2607.

Record of a chattel mortgage, neither witnessed nor acknowledged, affords no notice. Wood v. Lee, 57 N. W. 238; Thompson v. Scheid, 38 N. W. 801; Duke v. Markham, 18 A. S. R., 889; J. I. Case Threshing Machine Co. v. Olson, 10 N. D. 170, 86 N. W. 718; Jones on Mortgages, section 553.

FISK, J. This is an action in claim and delivery to recover the possession of a horse, and damages for its taking and detention by defendant. The complaint alleges ownership and right to the possession of the horse in plaintiff; also a taking and detention by defendant, a demand for its return, and damages. The answer contains no general or specific denial of any of the allegations of the complaint, but alleges facts tending to show a special property in such horse in defendant, and a right to the possession thereof by virtue of a chattel mortgage executed and delivered to defendant by one Lasen, a former owner of said horse, and defendant

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prays judgment for a return of the property or for its value in case a return cannot be had, and for damages. The chief issue was whether plaintiff in purchasing the horse from Lasen was chargeable with actual or constructive notice of such chattel mortgage; the execution of said instrument not having been acknowledged or witnessed by two witnesses as required by law to entitle it to be filed, although the same was, in fact, filed in the office of the register of deeds of the county. The case was tried in the district court of Ransom county to a jury, and a verdict returned in plaintiff's favor upon all the issues. Motions for judgment notwithstanding the verdict, and for a new trial were made and denied, and judgment rendered pursuant to the verdict, from which this appeal is prosecuted. Appellant's counsel have assigned eighteen alleged errors upon which they rely for a reversal of the judgment. These will be disposed of in the order presented.

The first assignment is predicated upon the court's refusal to grant defendant's motion made at the close of plaintiff's case for judgment in his favor. Treating this as a motion for a directed verdict, for which no doubt it was intended, we are unable to uphold appellant's contention. Without passing upon the merits of such ruling, it is sufficient to say, conceding such ruling to be error, it was waived by defendant's conduct in subsequently introducing testimony in support of his defense. This is well settled. 6 Enc. Pl. & Pr. 700, and cases cited; Union Pac. R. R. v. Mertes, 35 Neb. 204, 52 N. W. 1099.

The next two assignments relate to the rulings of the trial court in denying defendant's motion for a directed verdict, made at the close of all the evidence, and also in denying his motion for judgment notwithstanding the verdict. We think these motions were properly denied. The motion for a directed verdict was based upon the same grounds which were urged in the motion for judgment at the close of plaintiff's case, which were an alleged failure to prove ownership or right to possession of the horse, and also a failure to prove a demand prior to the commencement of the action. Plaintiff's ownership of the horse was alleged in the complaint, and not denied in the answer. Her right to the possession, which was the principal issue in the case, depended wholly upon the validity of defendant's chattel mortgage as against her, and this, in turn, depended upon the question regarding which there was a conflict in the testimony, whether plaintiff had notice

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of the existence of such mortgage at the time she purchased said animal. Proof of a demand prior to the commencement of the action was clearly waived by the defendant's answer, from which it is apparent that a demand would have been useless. The motion for judgment notwithstanding the verdict was based upon the same grounds as the motion for a directed verdict, and also upon the grounds, as stated in the motion, "that the verdict is contrary to law and the evidence, and, further, that the court erred in its instructions to the jury, and * * * for errors of law occurring at the trial;" also, for the reason as stated that "plaintiff has failed to show that at the time of the commencement of this action she was entitled to the possession of said property as against the defendant." We are entirely satisfied that this latter motion was properly denied. The grounds urged in favor of this motion, in addition to those urged in favor of the preceding motion, were manifestly inadequate to support a ruling in defendant's favor. No specifications were embraced in the motion showing wherein the verdict was contrary to law or to the evidence, nor were any errors in the instructions to the jury or errors occurring at the trial in any manner pointed out by counsel or called to the attention of the court, and, furthermore, such errors do not constitute a ground for such a motion. In so far as these motions were based upon the ground of plaintiff's failure to show any right to the possession of the horse at the time of the commencement of the action, we reiterate, in effect, what we have already stated, that this question depended upon whether plaintiff had notice of the chattel mortgage at the time she purchased said horse, which is a matter over which there is a serious conflict in the testimony, and hence was necessarily a question for the jury.

Appellant's assignments numbered 4 and 5 are predicated upon the trial court's refusal to give certain instructions relative to what constituted notice to plaintiff of the chattel mortgage in question. While these requested instructions were correct as an abstract proposition of law, they were properly denied, for the very obvious reason that there was no basis in the testimony for such instructions. The only competent testimony in the record, so far as we are able to discover, relating to such notice, is that furnished by the witness Lasen and the plaintiff; the former testifying positively to the giving of such notice and the latter as positively denying such

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fact. The instructions given by the lower court upon this feature of the case were eminently fair, full and complete, and leave no legitimate ground for complaint.

Assignments numbered 6 and 7 also pertain to certain instructions given to the jury. We have carefully considered such instructions, and are convinced that these assignments are without merit. The instructions here complained of, while somewhat faulty in expressing the law with the utmost clearness, embraced, we think, a sound and correct statement of the rule involved, and in no way were misleading to the jury. In our opinion no useful purpose would be subserved by a more specific treatment of these assignments. Suffice it to say that these instructions were substantially correct, and that the giving of the same did not constitute reversible error.

Assignment No. 8 is based upon the theory that the trial court committed error in charging the jury as to the burden of proof. Two answers may be made to appellant's contention in this respect: First. No sufficient foundation was laid for such assignment by a proper exception to the instruction complained of. The exception is too general, relating, as it does, to three distinct and separate paragraphs of the instructions relative to as many or more different subjects. Failure to specify the particular portion of the charge claimed as error, the exception is bad. State v. Campbell, 7 N. D. 58, 72 N. W. 935; Kennedy v. Falde, 4 Dak. 319, 29 N. W. 667; Calkins v. Seabury Co., 5 S. D. 299, 58 N. W. 797; Bouck v. Enos, 61 Wis. 660, 21 N. W. 825. Second. Under the issues framed by the pleadings, the instruction as to the burden of proof was correct. As before stated, the answer contained neither a general nor specific denial of the allegations of the complaint, but simply alleged facts tending to establish in defendant a special property in and right to possession of the horse by virtue of a chattel mortgage. These allegations constituted new matter, and cast the burden upon defendant to prove the same. I Enc. Pl. & Pr. 850, and cases cited; Wells on Replevin, section 697; Pomeroy on Remedies and Rem. Rights, section 703; Guille v. Fook, 13 Or. 577, 11 Pac. 277; First National Bank v. Parkhurst, 54 Kan. 155, 37 Pac. 1001; 3 Elliott on Ev., section 2607. Appellant's counsel cite and rely upon Chas. Dodd & Co. v. Smithson, 27 Wash. 89, 67 Pac. 352, but in that case there was a denial as well as a special defense pleaded in the answer. This case is therefore not in point.

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The next assignment is predicated upon that portion of the charge to the jury relating to notice on plaintiff's part of the chattel mortgage in question. What we said regarding the assignment numbered 6 applies also to this assignment. The chattel mortgage, not having been acknowledged or witnessed according to law was not entitled to be filed (Rev. Codes 1905, section 6187), and hence the filing of the same did not operate to give constructive notice thereof (Keith v. Haggart, 2 N. D. 18, 48 N. W. 432; J. I. Case Threshing Mach. Co. v. Olson, 10 N. D. 171, 86 N. W. 718). We think the instruction complained of, when considered in connection with the other instructions, is not open to the criticism made against it; at least in view of the state of the proof, the giving of the same cannot be said to have constituted prejudicial error.

The next five assignments relate to rulings permitting plaintiff to testify in rebuttal to certain facts tending to show a want of notice on her part of the mortgage in question, and which it is contended was only proper in her case in chief. These assignments are wholly devoid of merit. Even if such testimony was proper only as a part of the plaintiff's case in chief, which we do not concede, still it was not an abuse of discretion to permit its introduction by way of rebuttal. Madson v. Rutten (N. D.) 113 N. W. 872; State v. Werner, (N. D.), 112 N. W. 60.

On cross-examination of plaintiff in rebuttal, defendant's counsel asked her the following question: "You know, as a matter of fact, that Lasen was hard up for money?" This was objected to, and the objection sustained, and such ruling constitutes the basis of appellant's next assignment of error. There was no error in such ruling. The answer to the question could have shed no light whatsoever upon the issue being tried as to whether plaintiff purchased the horse in dispute in good faith and without notice, actual or constructive, of the existence of such mortgage. The fact, if it be a fact, that Lasen "was hard up for money," would constitute no evidence that he was dishonest or would be liable to commit a crime by selling mortgaged property.

Appellant complains, also, of the ruling of the court in sustaining plaintiff's objection to the offer in evidence of Exhibit D. This ruling was clearly correct. The exhibit consisted of a certificate by the register of deeds of the filing in his office of the chattel mortgage in question. The fact that such mortgage was filed as the certificate states could not possibly have had any relevancy to the

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issues on trial. It not being entitled to be placed of record, its filing imparted no notice whatever. Plaintiff did not search the records, and was not bound to do so; hence it is immaterial that plaintiff might have acquired knowledge of such mortgage if she had in fact made such search.

The remaining assignments of error are not argued in the brief, and they relate to the sufficiency of the evidence to support the verdict, which question we have already sufficiently considered; hence it is unnecessary to notice these assignments further. We are convinced that appellant had a fair trial, and that justice has been meted out to him.

Finding no prejudicial error in the record it is ordered that the judgment appealed from be affirmed, with costs to respondent. All concur.

(115 N. W. 260.)

E. A. Wadsworth v. C. R. Owens.

Opinion filed March 5, 1908.

Evidence — Presumptions — Owner of Land Entitled to Crops.

1. The presumption that the owner of land is entitled to the crops grown thereon is a prima facie one only, and may be overcome by the contract of the parties in reference to the disposition to be made of the crop.

Claim and Delivery — Judgment — Verdict.

2. In a replevin action for grain grown under a contract, providing that the title to the grain is to remain in the owner of the land until a division thereof, the verdict and judgment should determine the interest of each party in the crop ultimately, although one of the parties is found to be entitled to the present possession.

Impeachment of Witness.

3. Where a party on his cross-examination denies having made admissions to a witness, material and relevant to the issues, it is proper to show by such witness that the party made such admisions, and it is error to strike out the evidence that such admissions were made.

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

Action by E. A. Wadsworth against C. R. Owens. Judgment for defendant, and plaintiff appeals.

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Reversed and remanded.

Dickson & Johnson, for appellant.

Objection to evidence, on ground of motion, must be specific. Kolka v. Jones, 6 N. D. 461, 71 N. W. 558; Caledonia Gold Mining Co. v. Noonan, 3 Dak. 189, 14 N. W. 426.

The evidence of McKechney should have been received, it being admitted without objection. Kolka v. Jones, supra.

Owner of land owns crops thereon, unless title thereto is divested by contract. Elstad v. N. W. Elevator Co., 6 N. D. 88, 69 N. W. 44; 29 Am. & Eng. Enc. Law (2d Ed.) 410.

Fred E. Smith, for respondent.

Testimony of McKechney was proper. Jones on Evidence, section 809, 876.

The products of a thing hired belong to the hirer. Section 5517, Revised Codes 1905; 24 Cyc. 1067; Brown v. Thurston, 96 Am. Dec. 439; Forsythe v. Price, 34 Am. Dec. 465; Deaver v. Rice, 34 Am. Dec. 388; Branch v. Morrison, 69 Am. Dec. 770.

MORGAN, C. J. This is an action in claim and delivery brought for the possession of grain, consisting of wheat, oats and barley grown upon certain lands which are described in the complaint. The complaint contains the usual allegations in claim and delivery actions, and demands the possession of the grain, which is alleged to be of the value of $2,500.

The answer is a general denial, with an admission that the value of the grain described in the complaint was as therein alleged. The issues which have been litigated are as to the title of the grain in controversy. The plaintiff claims that the title and ownership thereof are in him by virtue of the fact that he is the owner of the land on which the crop was grown, and by virtue of the fact that the lease under which the land was farmed provided that plaintiff should retain title and possession of the crops until division thereof. The defendant claims that the title to the crops and the ownership thereof are in him by virtue of the fact that he raised, harvested and threshed the crop. These contentions grow out of the fact that there is a contest as to whether the defendant raised the crop under a lease. The defendant denies that there was any lease between him and the plaintiff for the year 1906. The plain-

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tiff claims that it was mutually agreed between him and the defendant that the defendant should farm said land under the terms of the lease, which was in force between the parties for the year 1905. The issues were submitted to the jury, and it returned a verdict for the defendant. No motion for a new trial was made, and the plaintiff has appealed from the judgment. The errors assigned relate to the admission and exclusion of evidence and to the instructions given by the court to the jury. These instructions were to the effect that the plaintiff under the facts in evidence was not entitled to the crops by virtue of his ownership of the lands alone. These instructions were excepted to by the plaintiff, and the exceptions are relied on on this appeal. The principle contended for by the plaintiff that the presumption is that crops grown on lands owned by a person belong to the person in whom the title to the land is has no application in this case. The defendant was in possession of the land, but was there with the consent of the plaintiff, and that presumption cannot be invoked. It is conceded that the plaintiff placed the defendant in possession of the land with authority to crop it, and furnished the defendant with the seed, and paid the threshing bill, and in every way recognized the defendant's tenancy. It is also conceded that the defendant did all the work in regard to the farming of the lands described. Under such circumstances there is no presumption that the plaintiff is entitled to the possession of all the crops grown. The presumption that the owner of the land owns the crops is only a prima facie one. It may be overcome by the contract and dealings of the parties. The parties to a farming contract may make any lawful contract as to the disposition of the crop satisfactory to themselves, and the title thereto is subject to any such contract between them. Ellestad v. N. W. El. Co., 6 N. D. 88, 69 N. W. 44. In this case the evidence refutes any suggestion that the title to the crop was to follow the prima facie presumption referred to. The parties attempted to agree upon a written contract which would govern all matters of title and disposition of the crop. While the written lease was not entered into, the evidence is sufficient to sustain a verdict for the plaintiff that there was an agreement that the 1905 lease was to control. The 1905 leases provided that the title and possession of all crops should be in the owner of the land until a division of the crop. It is claimed that there was no proof that no division of the crop had been made. There was no express proof of this fact, but

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there are facts and circumstances shown from the record from which no other inference can be drawn except that no division had been made. If the lease of 1905 were in force, the evidence would sustain a verdict that the plaintiff was entitled to the possession of the crop when the action was begun.

At the trial the defendant on his cross-examination denied that he had made statements to one McKechnie to the effect that he had agreed with the plaintiff to farm this land under the terms which were contained in the written leases for the year 1905. After the defendant had rested, the witness McKechnie was placed on the stand, and, without objection, was interrogated and stated that the defendant had admitted to him that he had at one time agreed to farm the land during the year 1906 under the terms of the leases for 1905, except that he had not agreed to do the road work. The defendant thereupon moved to strike out the testimony of the witness on the ground that it was incompetent, irrelevant and immaterial, and not proper rebuttal, and the court struck out the testimony, and the plaintiff excepted to the ruling. This is assigned as error. Upon consideration of the ruling we are forced to the conclusion that the striking out of this evidence was reversible error. One of the issues at the trial was whether the parties had agreed that the land was to be farmed during the year 1906 under the terms of the 1905 leases. The defendant denied that such an agreement had been made. The plaintiff contended that such an agreement had been made. It is therefore evident that the testimony was relevant to the issues, and material. It was clearly rebuttal and in denial of statements made by the defendant upon his examination. The testimony of this witness went directly to the credibility of the defendant, and was relevant to one of the principal issues at the trial, and should not have been stricken out. We think that the ruling was clearly prejudicial. It is alleged that it was error without prejudice, inasmuch as it is claimed that the plaintiff could in no event recover a verdict under the testimony. The reason advanced for this contention is that the land was leased during the year 1905 under two leases, each applying to different lands, and in which the plaintiff was to receive a different share of the crop under each lease. In one lease he was to receive one-fourth of the crop, and in the other lease, one-half of the crop. If the testimony of the plaintiff is to be believed, we think that a reasonable construction of the contract is that each

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tract of the land was to be leased for 1906 under the same terms that the same land was leased under the 1905 lease. Under this construction no difficulty would be met in determining just what share of the crop grown on each tract of land each party would be entitled to. It is claimed in argument that the land farmed in 1906 included 80 acres that were not covered by the 1905 leases. If true, this fact would not defeat the operation of the contract to the extent that the parties agreed upon its terms.

In determining what the relative rights of the parties are, in cases like this, we will say, as a guidance in view of another trial, that the contract of the parties is to determine where the title and right to the possession of the crop are. If the facts should develop on another trial that the title was to be in the plaintiff until a division of the crop, that fact would not warrant a judgment in plaintiff's favor for the full value of the crop. The rights of the parties after the right to the possession is determined are to be determined on equitable principles. This court has so held in an action similar to this one. Although the plaintiff might be entitled to the right to the possession of the crop, that would not mean that the defendant had no interest in the crop. The plaintiff would be entitled to the possession thereof only to the extent of his interest therein, and the verdict should show what that interest is in view of the contract of the parties. That is the decision of this court in Angell v. Egger, 6 N. D. 391, 71 N. W. 547, and the principle there laid down was recently sustained in Aronson v. Oppegard, 16 N. D. 595, 114 N. W. 377.

We have examined the other assignments of error, and find no prejudicial error. For the error in striking out the evidence of the witness McKechnie in rebuttal, the judgment is reversed, a new trial granted and the cause is remanded for further proceedings. All concur.

(115 N. W. 667.)

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FOSTER IMPLEMENT COMPANY v. E. DELAFIELD SMITH.

Opinion filed March 5, 1908.

Pleading — Vendor and Purchaser — Offer of Performance.

1. A complaint, in an action by a vendee against a vendor to recover damages for the breach of an executory contract for the sale of real property, is sufficient, if it alleges a specific written agreement whereby the defendant promised to sell, and the plaintiff promised to purchase, certain described real property upon specified terms alleged in the complaint, and that within a reasonable time thereafter (no specific date having been agreed upon for performance) plaintiff offered full performance of the contract on its part according to its terms, alleging readiness, ability and willingness to perform, and that defendant at the time of such offer refused, and at all times since has refused to perform said contract on his part.

Appeal and Error — Objection Abandoned.

2. Assignments of error not argued in the appellant's brief are deemed abandoned under rule 14 of this court (91 N. W. viii), and hence will not be considered.

Pleading — Demurrer — Effect.

3. By his demurrer to the complaint defendant admitted the truth of all the facts well pleaded therein, one of which facts was his refusal to perform the contract on his part upon offer of full performance by plaintiff. Such refusal placed defendant in default.

Vendor and Purchaser — Tender.

4. An offer of performance in good faith by plaintiff, pursuant to the contract, with the present ability and willingness to perform, was sufficient, without an actual production of the money and notes called for by the contract. A tender of the money and notes as distinguished from a mere offer to deliver the same was not required as a basis for a cause of action for breach of the contract, especially in view of defendant's unqualified refusal to perform.

Appeal from District Court, Foster County; *Burke,* J.

Action by the Foster County Implement Company against E. Delafield Smith. Judgment for plaintiff, and defendant appeals. Affirmed.

Maddux & Rinker, for appellant.

T. F. McCue and *Turner & Wright,* for respondent.

FISK, J. This is an appeal from a judgment of the district court of Foster county in plaintiff's favor. The principal errors assigned relate to the sufficiency of the complaint, which is as follows: "Plaintiff, for its amended complaint, herein complains and alleges: (1) The plaintiff is and during all of the times mentioned in this complaint has been a corporation duly organized and existing under the laws of this state. (2) That on or about the 24th day of September, 1906, the plaintiff and the defendant entered into a written

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contract by the terms of which the plaintiff agreed to buy, and the defendant agreed to sell to this plaintiff, the following described real property situated in the county of Foster and state of North Dakota, to-wit: The east one-half (E. ½), section three (3), the northwest quarter (N. W. ¼) of section eleven (11), and the southwest quarter (S. W. ¼) of section two (2), all in township one hundred forty-seven (147), north of range sixty-four (64), west of the fifth principal meridian, containing 640 acres, according to United States survey thereof. That by the terms of said contract the price agreed upon for said land was $16.50 per acre, to be paid as follows: Cash on delivery of warranty deed $2,500. That the plaintiff was to assume the mortgage indebtedness at said time standing against said land, and to pay the balance of the purchase price in two equal payments, to be due, respectively, on November 1, 1907, and November 1, 1908, with interest at the rate of 7 per cent. per annum payable annually. (3) That at the time of entering into said contract this plaintiff paid to the defendant the sum of $100 as part of the purchase price thereof, which said sum the defendant received, and has ever since retained. (4) That thereafter and within a reasonable time this plaintiff offered to the defendant to perform the said contract on its part and to pay to the defendant the balance of the initial payment, $2,500, and to execute the notes and mortgages for the deferred payments as provided in said contract, and demanded of the defendant the performance of said contract on his part, and that he convey said premises to this plaintiff, subject to the incumbrance as in said contract provided. That defendant at said time refused, and has at all times since failed and refused, to perform the condition of said contract on his part to be performed, although the plaintiff has at all times been, and now is, ready, able, and willing to perform the conditions of said contract on its part to be performed. (5) That said property was at the time of the breach of said contract, as herein alleged, and now is, of the reasonable value of $25 per acre, or $16,000, and plaintiff has been damaged by reason of the defendant's failure to perform in the sum of $5,540. Wherefore plaintiff prays judgment against the defendant in the sum of $5,540, with interest thereon at the rate of 7 per cent. from September 24, 1906, and for the costs and disbursements of this action."

To this complaint defendant demurred upon the ground that the same fails to state facts sufficient to constitute a cause of action. Thereafter the following written stipulation was entered into be-

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tween counsel for the respective parties, to wit: "It is hereby stipulated by and between the attorneys for the above-entitled parties that the demurrer served shall be submitted to the court at Carrington on the 11th day of March, and that, if said demurrer shall be overruled, the defendant shall have two days to answer, and, if the demurrer is sustained, the plaintiff shall have two days in which to serve an amended complaint. It is further stipulated that said case shall be placed upon the calendar for the special term of said court commencing on the 11th day of March. Dated this 5th day of February, 1907. T. F. McCue, Attorney for plaintiff. Maddux & Rinker, Attorneys for Defendant." On March 11th said demurrer was argued and submitted, and an order made overruling the same and permitting defendant to answer within three days on condition that the case be tried at the special term of said court commencing on said date. On March 19th the case, being on the calendar, was reached for trial, and the defendant having failed or declined to answer the complaint, and not appearing in court in person or by counsel, a jury was waived by plaintiff, and proof was introduced in support of the allegations of the complaint, and judgment ordered as prayed for; findings of fact having been expressly waived by plaintiff's counsel. Pursuant to such order, the judgment complained of was entered.

The only assignments of error which are discussed in appellant's brief relate to the sufficiency of the complaint to state facts constituting a cause of action; hence the other assignments are deemed to have been abandoned under rule 14 of this court (91 N. W. viii), and will not be noticed. Does the complaint allege facts sufficient to constitute a cause of action? Its sufficiency is challenged by appellant's counsel for the reasons, as stated by them, that it fails to allege: (1) That defendant had an interest or equity in the property sold. (2) That the defendant represented that he had an interest in said property, title, or possession, or expectation, or possibility, or could secure title, and that plaintiff believed and relied upon such representations. (3) It fails to allege fraud, deceit, or mistake on the part of defendant. (4) It fails to allege that defendant is not in position to convey good title. (5) It does not allege a tender by plaintiff of the $2,500 cash to be paid on delivery of the deed. (6) It fails to allege the drawing and signing the notes and mortgages with the requirements of a sealed instrument, and the tender thereof to the defendant. (7) It fails to allege the date of offer to perform to show a reasonable time for defendant to per-

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fect title and present deed. (8) No specific date for payment of the $2,500 or for delivery of the deed is alleged. (9) It alleges contract made September 12, 1906, and action begun October 29, 1906, with no date for payment of $2,500 or delivery of deed, and affirmatively shows action premature. (10) It affirmatively shows that $2,500 was to be paid on tender of deed, and at no other time. (11) The complaint also fails to allege whether mortgages were to be on personal property, or on real, or both, and fails to describe the property to be mortgaged to defendant. We have considered the foregoing reasons urged against the sufficiency of the complaint, and are obliged to overrule them all. The complaint was apparently drafted with considerable care, and is a model both of brevity and accurateness. It alleges a mutual executory contract entered into between the parties, by which the plaintiff agreed to purchase, and the defendant agreed to sell, the real property described upon certain specified terms, the amount paid thereon and plaintiff's offer, and its readiness, ability, and willingness to comply with the terms of said contract on its part to be performed, also defendant's refusal to do so, together with an allegation of the damages sustained by plaintiff on account of such breach. We are utterly unable to perceive what more could properly be alleged. The contention that the complaint should have alleged that defendant had an interest or equity in the property, or represented that he had such an interest, and that plaintiff relied thereon, is clearly frivolous. The fact that he assumed to sell the land by entering into the written contract is all that it was necessary to allege in this respect. The next contention is equally frivolous. Why plaintiff should allege fraud, deceit, or mistake on defendant's part in entering into the contract or in refusing to comply therewith we cannot understand, and appellant's counsel do not attempt in their brief to enlighten us on this point. Plaintiff's cause of action is grounded upon an alleged breach of contract, not upon a tort.

As to the next contention, all we desire to say is that, if defendant was not in a position to convey good title, it was his fault. Such fact was no part of plaintiff's cause of action. Whether defendant was or was not in a position to live up to the contract he had solemnly entered into was immaterial. If he was not, he must suffer the consequences; if he was, but refused, he is in a like predicament.

The next reason given relates to the failure to allege a tender by plaintiff of the $2,500 cash payment and the notes and mortgages

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called for by the contract. It is appellant's contention that before any cause of action could accrue in plaintiff's favor for a breach of the contract to convey it was obligatory upon plaintiff to tender to defendant the cash payment and the notes and mortgages properly executed. In this we cannot assent. The complaint alleges that within a reasonable time after the making of the contract plaintiff offered to perform by paying said sum of $2,500 and by executing the notes and mortgages, and that it "has at all times since been, and now is, ready, able and willing to perform the conditions of said contract on its part to be performed;" that defendant has at all times refused to perform on his part. We think an offer of performance was all that was requisite. Arnett v. Smith, 11 N. D. 63, 88 N. W. 1037, is relied on as holding that a tender as distinguished from a mere offer of performance was necessary to create a cause of action. Certain language used by Judge Young in the opinion, standing alone, lends force to such contention, but a perusal of the entire opinion clearly discloses that no such rule was intended to be enunciated. In that case the question here presented was not raised nor discussed. Plaintiff, who was vendee in an executory contract for the purchase of certain real property, claimed that there had been a mutual rescission of the contract, and that there was an account stated in plaintiff's favor upon such rescission as to moneys paid under the contract, which constituted the basis of plaintiff's cause of action. Defendant denied such rescission, and sought to compel specific performance of the contract. The court held in defendant's favor on both issues, and in the opinion also held that under the facts plaintiff did not have the right to rescind the contract, because he had not tendered performance on his part by depositing, as the contract provided, the sum of $2,500 in the National Bank of Pontiac, Ill., and executing the notes and mortgage called for by the contract. The opinion then says: "Had the plaintiff brought an action to recover the $500 paid by him to the defendant, basing his cause of action upon the alleged default of defendant, his complaint would not have stated a cause of action in the absence of an averment of full performance or *offer of performance* on his part." The words italicized by us clearly show that all that the court in that case held or intended to hold was that full performance or offer of performance was essential to a rescission, and such, no doubt, is the law. In that case neither a tender nor offer of performance was made. No point was made that either

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would not have answered. We think appellant's contention in this behalf is fully answered by the provisions of our Civil Code relating to performance of obligations. See sections 5244 to 5268, Rev. Codes 1905. Section 5255 reads: "The thing to be delivered, if any, need not in any case be actually produced upon an offer of performance unless the offer is accepted." In any event we are satisfied that defendant's unqualified refusal, as alleged in the complaint, to comply with the contract, would exonerate plaintiff from the necessity of actually producing the cash payment and the notes and mortgage. Defendant's unqualified refusal constituted a waiver of an actual tender, even if required by law. Such refusal also constituted a breach of the contract. As said in Kreutzer v. Lynch, 122 Wis. 474, 100 N. W. 887: "It fully appears in this case that the defendant, Lynch, without waiting for such tender, denied the existence of any contract, and notified the plaintiff that no conveyance of the land would be made for $6,000; and this of itself constituted a repudiation and breach of the contract, and waived the tender of the purchase price as a step necessary to the placing of the defendant in default. Plaintiff was thereby fully informed that, if he presented himself at Lynch's residence at West Bend and tendered the $6,000, it would be in vain."

Another reason assigned why the complaint fails to state a cause of action is that it does not disclose that defendant had had a reasonable time between the making of the contract and the commencement of the action in which to perfect title and furnish deed. The contract was made on September 24th, and the action was not commenced until about October 29th, and surely this was a reasonable time. Furthermore, if defendant desired to rely upon any such ground for refusal, he should have pleaded the same. By the demurrer he admits an unqualified refusal to convey. No claim is made that the title was not perfect, or that defendant could not at any time have conveyed a good title.

The next contention is that the complaint fails to allege a specific date for the payment of the $2,500 and the delivery of the deed. There is nothing in this contention. The complaint alleges that this sum was to be paid on delivery of deed. No time having been agreed upon for the doing of the acts, the law fixed a reasonable time. The complaint was clearly sufficient in this respect. What we have here said applies equally to the next two grounds urged.

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The last reason given why the demurrer should have been sustained is wholly without merit. The complaint alleges that plaintiff offered to perform the conditions of the contract on its part by paying the $2,500 and executing the notes and mortgages for the deferred payments, "as provided in said contract." This was amply sufficient.

This disposes of the assignments of error which are in any way discussed by appellant in his brief. We find no error in the record, and the judgment appealed from is accordingly affirmed. All concur.

(115 N. W. 663.)

In re Beer.

Opinion filed March 27, 1908.

Constitutional Law — Privilege of Witnesses — Self Crimination.

1. A witness, sworn before a grand jury, cannot be compelled to answer questions which would tend to criminate him, and is privileged from answering such questions by section 13 of the constitution, which declares that "no person * * * shall be compelled in any criminal case to be a witness against himself," unless granted unconditional immunity from prosecution for the offense concerning which he is testifying by statute.

Same.

2. Section 9383, Rev. Codes 1905, which provides that "no person shall be excused from testifying * * * by reason of his testimony tending to criminate himself (the witness), but the testimony given by such person shall in no case be used against him," does not grant immunity from prosecution.

Same — Answer Subjecting Witness to Criminal Prosecution.

3. Under section 13 of the constitution the witness is protected from testifying to facts and circumstances from which his connection with, or guilt of, a crime, may be proven through other sources than his answers.

Same — Immunity Statutes.

4. Before a witness can be compelled to answer questions which tend to criminate him, the statute granting immunity must be coextensive in scope and effect with the constitutional guaranty.

Same.

5. The legislature has no power to restrict or abridge the privilege guaranteed by section 13 of the constitution.

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Original application by Anton Beer for a writ of habeas corpus.

Writ issued.

B. D. Townsend, for petitioner.
Guy C. H. Corliss, for defendant.

MORGAN, C. J. This is an application for a writ of habeas corpus. The petitioner, Anton Beer, alleges that he is illegally imprisoned and restrained of his liberty by the sheriff of Burleigh county, and that he is so restrained under a warrant issued by the district court of said county for an alleged contempt against said district court. The facts on which said warrant was issued are the following: A grand jury was duly called, summoned, and impaneled in said county at the June, 1907, term of said court, and among other matters under investigation by the same was a charge against one Edward G. Patterson for a violation of the prohibition law of the state of North Dakota. The petitioner was subpœnaed and appeared before said grand jury as a witness on the investigation of said charge against said Patterson. When said Beer appeared before said grand jury and was sworn, he was asked the following questions: "So far as you know, are all the receipts of the business there carried on by Edward G. Patterson turned over to him, or to some one representing him? Has Edward G. Patterson, during the time you were working for him, had intoxicating liquors shipped in to him? If so, how often, and in what quantities? If intoxicating liquors have been shipped in to him, have they been stored in said hotel building? If so, in what part thereof? Did you ever see any one drinking intoxicating liquor in said hotel? If so, how often have you seen them, and state the different places? How close to said cafe were said intoxicating liquors stored in said hotel, if they were stored therein?" The said Beer refused to answer each of said questions on the ground that his answers thereto might tend to incriminate him. The grand jury reported to the court that said Beer had refused to answer said questions, and, acting on said report, the district court issued an order directed to said Beer that he show cause why he had refused to answer said questions. After a hearing upon said order to show cause the district court adjudged that the said Beer was guilty of contempt of court, and that he be punished for said contempt by payment of a fine of $5, and that he be committed to the cus-

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tody of the sheriff of Burleigh county until such time as he should answer said questions and pay said fine, or until discharged from custody, by the further order of said court. After being committed, the petitioner applied to this court for a writ of habeas corpus, and upon the hearing of said application it was contended by the state that the commitment was legal, and that the petitioner was legally imprisoned.

No question is raised as to the fact that the questions were such that the answers thereto by the witness might tend to incriminate him. The contention of the state is, however, that the witness was not asked any question that would infringe upon his constitutional rights as laid down in section 13 of the constitution, which provides that "no person shall * * * be compelled in any criminal case to be a witness against himself." The reason advanced for this contention is that section 9383, Rev. Codes 1905, grants to the witness sufficient immunity by reason of answering such questions, although the answers may tend to incriminate him. The said section is as follows: "No person shall be excused from testifying concerning any offense committed by another against any of the provisions of this chapter by reason of his testimony tending to criminate himself (the witness), but the testimony given by such person shall in no case be used against him." The petitioner, in answer to the state's contention that said section grants him adequate protection by reason of the possible incriminating tendency of his answers, claims that the protection afforded by the statute is restricted to the one fact that his answers cannot thereafter be used against him. His contention is that, before he is compellable to answer, the statute must grant him absolute and unconditional immunity from prosecution for any offense that may in any way be disclosed or uncovered by or through his answers, and that it is not an adequate protection to him that his answers may not be used against him, but that the constitutional privilege contemplates that facts which may be thereafter disclosed by the prosecution through or based on his answers cannot be used against him. He contends that the constitutional provision would be infringed if any answer given by him would lead to other evidence against him, if such evidence could be used against him, although his answers could not. In other words, his contention is that in no case is he compelled to answer unless the statute grants him immunity from prosecution for the offense under in-

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vestigation, and that immunity is not granted unless the statute is as broad as, and coextensive with, the constitutional privilege. It is patent that the efficacy of the constitutional provision would be seriously impaired if facts disclosed by witness' answers could be proven against him. It is patent also that section 9383, supra, affords the witness no protection from such other testimony, and that the only immunity provided for therein is that the "testimony given" shall not be used against him. The privilege guaranteed by this constitutional provision relates to the personal liberty of the citizen, and it is now a generally accepted principle that such constitutional provisions should be liberally construed and given full force, or the intent thereof will be unavailing. If the witness is subject to criminal prosecution after his answers have been given, where the privilege has been rightfully and in good faith claimed by him, it needs no more than the statement of the fact that the constitutional guaranty has been violated, although the statute prohibits the use of his answers against him.

Facts may be disclosed by the witness, capable of proof by other witnesses that will fully show the witness' participation in, or guilt of, the crime charged.

In Henry Emery's Case, 107 Mass. 172, 9 Am. Rep. 22, the Supreme Court of Massachusetts, in discussing the case of People v. Kelly, 24 N. Y. 74, said: "The terms of the provision in the Constitution of Massachusetts requires a much broader interpretation, as has already been indicated; and no one can be required to forego an appeal to its protection, unless first secured from future liability and exposure, to be prejudiced, in any criminal proceeding against him as fully and extensively as he would be secured by availing himself of the privilege accorded by the constitution. Under the interpretation already given this cannot be accomplished so long as he remains liable to prosecution criminally for any matters or questions in respect of which he shall be examined, or to which his testimony shall relate. It is not done, in direct terms, by the statute in question. It is not contended that the statute is capable of an interpretation which will give it that effect; and it is clear that it cannot, and was not intended so to operate. Failing, then, to furnish to the persons to be examined an exemption equivalent to that contained in the constitution, or to remove the whole liability against which its provisions were intended to protect them, it fails to deprive them of the right to appeal to the

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privilege therein secured to them." This statement is in accord with our views as to the proper construction of our constitutional provision, although the Massachusetts Constitution is not in the same language.

The fifth amendment to the federal constitution contains a provision identically the same as the one under consideration, and section 860 of the United States Revised Statutes [U. S. Comp. St. 1901, p. 661] is of the same import as our section 9383, supra. These federal provisions were construed by the United States Supreme Court in Counselman v. Hitchcock, 142 U. S. 547, 12 Sup. Ct. 195, 35 L. Ed. 1110. In an elaborate and exhaustive discussion of all phases of this question, and after a review of all the authorities that court has made it plain, by the strongest reasoning, that the constitutional guaranty is necessarily invaded, unless the witness is protected from prosecution by a statute as broad and extensive as the constitutional privilege, and that a statute simply providing that the answers of the witness shall not be used against him is not as broad and comprehensive as the privilege guaranteed by the constitution. In that case the court said: "It remains to consider whether section 860 of the Revised Statutes [U. S. Comp. St. 1901, p. 661] removes the protection of the constitutional privilege of Counselman. That section must be construed as declaring that no evidence obtained from a witness by means of a judicial proceeding shall be given in evidence, or in any manner used against him or his property or estate, in any court of the United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture. It follows that any evidence which might be obtained from Counselman by means of his examination before the grand jury could not be given in evidence, or used against him or his property in any court in the United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture. This, of course, protected him from the use of his testimony against him or his property in any prosecution against him or his property in any criminal proceeding in a court of the United States. But it had only that effect. It could not, and would not, prevent the use of his testimony to search out other testimony to be used in evidence against him or his property in a criminal proceeding in such court. It could not prevent the obtaining and the use of witnesses and evidence which should be attributable directly to the testimony he might give under compulsion, and on which he might be convicted,

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when otherwise, and if he had refused to answer, he could not possibly have been convicted. The constitutional provision distinctly declares that a person shall not be compelled in any criminal case to be a witness against himself, and the protection of section 860 is not coextensive with the constitutional provision. Legislation cannot detract from the privilege afforded by the constitution."

The effect given to this constitutional provision by the Counselman case had been declared the true one by Chief Justice Marshall in the Burr trial, when he said: "Many links frequently compose that chain of testimony which is necessary to convict any individual of a crime. It appears to the court to be the true sense of the rule that no witness is compellable to furnish any one of them against himself. It is certainly not only a possible, but a probable case, that a witness, by disclosing a single fact, may complete the testimony against himself, and to every effectual purpose accuse himself as entirely as he would by stating every circumstance which would be required for his conviction. * * * The rule which declares that no man is compellable to accuse himself would be most obviously infringed by compelling a witness to disclose a fact of this description."

It is true that prior to the decision of the Counselman case state courts had variously decided this question. Since that decision, however, the trend of the decisions of state courts has been to follow that decision. In some states former decisions have been overruled, and the Counselman case followed, although not binding on the state courts in a legal sense. The case of People v. O'Brien, 176 N. Y. 253, 68 N. E. 353, is a leading case in following the Counselman case, although that court had previously held to the contrary, as announced in People v. Kelly, supra. In the O'Brien case the court said: "We are of the opinion that the construction given to the very clear and plain words of the constitution in Counselman v. Hitchcock is reasonable, fair, and accords a witness only such protection as the plain letter of the constitution confers. If this is not the proper construction, the witness might be required to disclose circumstances that would enable the public prosecutor to institute criminal proceedings against him, wherein he might be convicted without reading his evidence taken in another case." The following cases, with many others, sustain this construction of this constitutional provision, and that witnesses cannot be compelled to answer questions, the answer to which would tend to

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criminate them, unless granted complete immunity from prosecution: Boyd v. United States, 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746; Brown v. Walker, 161 U. S. 591, 16 Sup. Ct. 644, 40 L. Ed. 819; Hale v. Henkel, 201 U. S. 43, 26 Sup. Ct. 370, 50 L. Ed. 652; Smith v. Smith, 116 N. C. 386, 21 S. E. 196; State v. Murphy, 128 Wis. 201, 107 N. W. 470; State v. Nowell, 58 N. H. 314; Ex parte Carter, 166 Mo. 604, 66 S. W. 540, 57 L. R. A. 654; Miskimmins v. Shaver, 8 Wyo. 392, 58 Pac. 411, 49 L. R. A. 831; Ex parte Clark, 103 Cal. 352, 37 Pac. 230; Lamson v. Boyden, 160 Ill. 613, 43 N. E. 781; State v. Burrell, 27 Mont. 282, 70 Pac. 982; In re Scott (D. C.) 95 Fed. 815; In re Shera (D. C.) 114 Fed. 207; People v. Sharp, 107 N. Y. 427, 14 N. E. 319, 1 Am. St. Rep. 851; People ex rel. Akin v. Butler St. F. & I. Co., 201 Ill. 236, 66 N. E. 349; State v. Gardner, 88 Minn. 130, 92 N. W. 529; Elliott on Ev., section 1011, and cases cited.

It follows that section 9383, supra, infringes on section 13 of the constitution, and is therefore void. It does not grant immunity as extensive as that contemplated by the constitutional guaranty. The legislature is not vested with authority or power to abridge the constitutional guaranty embodied in said section 13.

It is strenuously urged by the state that said section 9383 should be upheld upon the grounds of public policy. It is advanced as a reason in favor of that contention that no witness innocent of crime need ever claim his privilege, and that the constitutional provision should be strictly construed to further an efficient enforcement of the laws. If our interpretation of the true meaning of this constitutional provision were to have the effect of obstructing the enforcement of the criminal statutes, it would be indeed regrettable; but the remedy for the evils described should not be invoked through a denial to any person of a plain constitutional privilege thoroughly intrenched in our jurisprudence from the earliest days. The remedy must come, if the evils are real, through legislative or constitutional amendments, and not through the courts, who have a duty to give effect, under established rules, to constitutional and legislative enactments according to the intent of the framers.

This disposes of the only question raised on this application. We have purposely avoided saying anything concerning questions sometimes arising in connection with cases like the one under consideration. These other questions may some time in the future

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arise, when it will be necessary to decide whether the court or the witness is to determine whether answers to certain questions will have a tendency to criminate the witness, and whether under other circumstances the witness will be entitled to insist on his privilege.

It follows that the writ must be issued. All concur.

SPALDING, J., did not sit on the argument of this case, and took no part in the decision thereof; Hon. CHAS. F. TEMPLETON, judge of the First judicial district, sitting by request.

OLE HANSON v. CARL GRONLIE.

Opinion filed February 21, 1908.

Rehearing denied March 21, 1908.

Justice of the Peace — Pleading.

1. A complaint in justice's court, which is sufficient to apprise a person of common understanding of the exact nature and extent of plaintiff's demand, is all the law required.

Same — Demurrer.

2. The rulings of the lower court in overruling defendant's demurrer to the complaint, and in denying his motion for an order requiring the complaint to be made more specific, are sustained.

Same — Dismissal of Appeal — Trial Upon Merits.

3. Defendant appealed from the justice to the district court upon questions of law alone under section 8501, Rev. Codes 1905, where he was defeated upon every point urged. *Held,* that it was not error to thereafter refuse to grant him a trial upon the facts in the district court. A trial upon the merits is permissible in the district court only where the decision upon such appeal reopens the case for the trial of an issue of fact.

Same — Adjournment — Jurisdiction — Docket Entry.

4. The justice took an adjournment of the case from Saturday evening, December 1st, to Monday, December 3d, at 1 o'clock p. m., the docket entry being as follows: "Case adjourned till Monday, 1 o'clock p. m." Defendant's contention that the justice thereby lost jurisdiction because such docket entry was not sufficiently definite as to the adjourned date was properly overruled.

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

Action by Ole Hanson against Carl Gronlie. Judgment for plaintiff, and defendant appeals.

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Affirmed.

O. S. Sem, for appellant.

The overruling of a demurrer reopens the case for trial on the merits. Grovernor v. Signor, 88 N. W. 278.

A justice's jurisdiction must always affirmatively appear. Spears v. Carter, 48 Am. Dec. 687; Root v. McGerrin, 75 Am. Dec. 49.

Time and place of meeting must be stated in the order continuing. Sluga v. Walker, 81 N. W. 282.

H. B. Thompson and *Rourke, Kvello & Adams,* for respondent.

A pleading sufficient in justice court is sufficient in district court. Kelsey v. Chicago & N. W. Ry. Co., 45 N. W. 204.

Going on with trial waives right to object to jurisdiction. Lyons v. Miller, 2 N. D. 1, 48 N. W. 514; Miner v. Grances, 3 N. D. 549, 58 N. W. 343; Benoit v. Revoir, 8 N. D. 226, 77 N. W. 605.

Statutes affecting appeals from justice courts are strictly construed. Tschetter v. Heiser, 68 N. W. 744.

FISK, J. Plaintiff recovered judgment in justice's court for the sum of $8 and costs. On appeal to the district court this judgment was affirmed, and the case is here on appeal from the judgment of that court.

Appellant assigns error as follows: (1) In overruling defendant's demurrer to the complaint; (2) in overruling defendant's motion to make the complaint more definite and certain; (3) in affirming the judgment of the justice court, and ordering it entered as the judgment of the district court; and (4) in overruling appellant's motion to dismiss the action on the ground that the justice lost jurisdiction by adjourning the case from December 1st to December 3d, without stating on the docket the time when, and the place where, the court would again convene.

A proper understanding of the rulings upon which are predicated the first two assignments of error necessitates an examination of the complaint and demurrer. The complaint is as follows: "For a cause of action against the defendant the plaintiff alleges and shows to the court that on or about the 5th day of August, 1906, the defendant sold to the plaintiff a number of cattle, to wit, 4 heifers and 18 steers, for the agreed price of $22 per head; that when the plaintiff bought the said cattle from the defendant

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they were in a large pasture mingled with other cattle; that plaintiff and defendant went out to the said pasture to look at the said cattle; that when plaintiff and defendant came to the said pasture a portion of the said cattle were near by and the rest of them were far away with other cattle; that plaintiff examined the cattle near by and found they were in good condition, and worth the amount of $22 per head; that by said contract of sale the defendant warranted and represented to this plaintiff that said cattle that were far away in said pasture were in as good a condition as those that plaintiff saw and examined; that they were sound and free from defects and disease; that the defendant warranted and represented to plaintiff that said cattle would be brought to Milnor, sound, healthy and free from defects and disease, and in as good condition as those plaintiff saw and examined; that shortly after said sale the defendant went out to said pasture and brought said cattle to the town of Milnor, the place of delivery; that when the said cattle were taken out of the pasture one of the heifers above mentioned was lame, her leg swollen; that when the said cattle were brought into Milnor the plaintiff was informed of the condition of the said heifer, and he immediately went to examine her in the yard at Milnor, and found her lame, her leg swollen and infected with a disease which the plaintiff believes is a disease commonly called 'hoof rodth'; that by reason of the diseased lameness and condition plaintiff could not ship the same, the said heifer, but that the said heifer was wholly unfit for shipment; that by the warranty and representation of the defendant this plaintiff was induced to purchase the said cattle of the defendant and to pay him therefor the price of $22 per head; that, relying on the warranty and representation of the defendant, this plaintiff did not go to look and examine the cattle that were further away, but bought the same wholly on the strength and representation of the defendant that they were in as good condition as those plaintiff saw and examined; that they were sound and free from disease, and, relying on said warranty and representation, he bought the same, and paid him therefor the price of $22 per head; that by reason of said warranty and representation of the defendant, plaintiff was misled and injured thereby, and that the said heifer above mentioned is of no greater value than $12; that plaintiff has sustained damages by reason of the premises to the amount of $10. Wherefore plaintiff demands judgment against the

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defendant for the sum of $10, and for the costs and disbursements of this action." Following is the demurrer which was interposed: "The defendant demurs to the complaint on the grounds that it does not state facts sufficient to constitute a cause of action against the defendant, in that the same alleges improper measures of damages, the alleged damages being remote and speculative, and that the same is redundant and sham; that several causes of action have been improperly united, and are so blended together that the nature of the cause of action cannot be ascertained; and that it is so vague and uncertain and indefinite that the court cannot make an intelligent judgment thereon, and that the same is bad for duplicity." We think the demurrer was properly overruled, as was also the motion to make the complaint more specific. We do not see how the complaint could be made much more specific. It was certainly amply sufficient to apprise a person of common understanding of the exact nature and extent of the plaintiff's claim. This was all that the law required. Kelsey v. Railway Co., 1 S. D. 80, 45 N. W. 204; 12 Enc. of Pl. & Pr. pp. 707-710, and numerous cases cited. Even if the complaint failed to state facts sufficient to constitute a cause of action, the demurrer was properly overruled, as it does not challenge the sufficiency of the complaint on such ground, and it requires no argument to prove that it is not vulnerable to the attacks made upon it by such demurrer. The demurrer was clearly frivolous.

The next assignment of error is as devoid of merit as the last one. The appeal from the justice to the district court was taken upon questions of law alone pursuant to section 8501, Rev. Codes 1905, and the procedure adopted by the trial court upon affirming the justice was strictly in accordance with said statute. After being defeated on every point raised by the appeal, the defendant was not thereafter entitled to another trial on the facts in that court. If he desired a new trial on the facts in the district court, he should have appealed under the provisions of the other sections relating to appeals generally. The case of Grovenor v. Signor, 10 N. D. 503, 88 N. W. 278, in no way aids appellant. In that case the decision of the district court reversed the justice, and thereby necessarily reopened the case for trial on the facts as prescribed in section 8501, supra. Not so, however, in the case at bar. There is no warrant in the code or in any adjudicated case, so far as we can learn, for the practice contended for by appellant's counsel.

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Appellant's fourth and last assignment is deserving of but brief notice. The record discloses that the justice took an adjournment from Saturday evening, December 1st, until Monday, December 3d, at 1 o'clock p. m. This is shown by the following docket entries: "Case adjourned till Monday 1 o'clock p. m." It is seriously contended that the justice lost jurisdiction of the case by not inserting in his docket the date, month and year to which the adjournment was taken, and this contention is made in the face of the fact that defendant, after being defeated in his motion to dismiss the action upon such ground, made a general appearance, and contested the case upon the merits to final judgment therein, and thereafter appealed to the district court, invoking the jurisdiction of that court, not only to pass upon such jurisdictional question, but also upon questions pertaining to the merits of the litigation. The case of Miner v. Francis, 3 N. D. 549, 58 N. W. 343, cited by appellant's counsel, does not go to the extent of holding that under such facts defendant would not be deemed to have waived such jurisdictional point. We are entirely clear that the lower courts properly denied appellant's motion, and that this assignment of error is as frivolous and devoid of merit as those which have preceded it.

The judgment is accordingly affirmed, and respondent will recover his costs. All concur.

(115 N. W. 666.)

MICHAEL MALONEY v. GEISER MANUFACTURING CO.

Opinion filed March 21, 1908.

Principal and Agent — Accounting — Variance — Evidence.

1. Plaintiff ordered a machine from defendant by written order, which was accepted, and the machine delivered to plaintiff, he paying the freight. The price was not fixed in the order, and the title was to remain in defendant until settlement. After its delivery to plaintiff, he contracted to sell it to another. Before delivery under the latter sale, defendant's general agent agreed with plaintiff that the price of the machine on the sale to plaintiff should be $1,000. Plaintiff then informed the general agent that he had sold it to another for $2,100, and asked the general agent if the company would take this purchaser's security, which the general agent agreed to. and further agreed that plaintiff should have all of said $2,100

over and above the $1,000. The general agent thereafter took the second purchaser's order for the machine, and took the security in defendant's name without mention of plaintiff's interest in the securities, and the company refused to recognize plaintiff's interest in the securities. The complaint alleges a sale of defendant's property by plaintiff as agent. *Held,* that there is no material variance between the proof and the complaint.

Pleading — Variance.

2. Before a variance is to be deemed material it must be shown to the satisfaction of the court to be prejudicially misleading.

Appeal — Harmless Error.

3. In this case, if the variance were material, no claim of prejudice could avail, as the trial court held the case open for further proof by defendant if surprised by the decision that there was no variance.

Same.

4. Objections to certain evidence *held* to be well taken, but that the evidence is not controlling of the decision, in view of other evidence in the record.

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

Action by Michael Maloney against the Geiser Manufacturing Co. Judgment for plaintiff and defendant appeals.

Affirmed.

Turner & Wright, for appellant.

Testimony not tending to support the case made by the pleadings is inadmissible. Woodward v. Ry. Co., 16 N. D. 38, 111 N. W. 627; Leonard v. Fleming, 13 N. D. 629, 102 N. W. 308.

Plaintiff must prevail on the case made in his complaint, or not at all. Barrett v. Wheeler, 24 N. W. 38; Hoffman v. McMorran, 17 N. W. 928; Miller v. Nuchols, 4 L. R. A. (N. S.) 149; Taylor v. Modern Woodmen, 83 Pac. 1099, 5 L. R. A. (N. S.) 283; Lucke v. Clothing, etc., Assembly, 19 L. R. A. 408; Mining Co. v. Johnson, 22 Pac. 459; Browning v. Berry, 12 S. E. 195; Equitable, etc., Co. v. Osborne, 9 So. 861, 13 L. R. A. 267; Fidelity, etc. Co. v. Bank, 25 S. E. 392, 33 L. R. A. 821; Weist v. City of Philadelphia, 200 Pa. 148, 49 Atl. 891; Ry. Co. v. Jennings, 60 N. E. 818.

A material fact alleged and admitted becomes a verity for the purpose of the case. 2 Wig. on Evidence, section 1064; Tisdale v. Delaware & Hudson Canal Co., 22 N. E. 700.

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Guy C. H. Corliss, for respondent.

MORGAN, C. J. This is an action for an accounting, and the complaint alleges the following facts: "That prior to June 3, 1902, plaintiff had in his possession a Peerless traction engine, thresher, straw carrier, and elevator, constituting a threshing outfit, which was then and there the property of the defendant. That on or about the said 3d day of June, 1902, plaintiff, as such agent, sold the said property to one Frank J. Roble, for the sum of two thousand ($2,000) dollars, and one hundred ($100) dollars on account of freight to be paid by the said Roble in the future. That it was understood and agreed between plaintiff and defendant at the time of said sale, and as a part thereof, that the plaintiff might have and receive as and for his commission in connection with said sale all moneys realized by the defendant therefrom except the sum of one thousand ($1,000) dollars. That under the said sale, and as representing the said purchase price, the defendant took from the said Frank J. Roble four promissory notes, all dated June, 1902, as follows: [Here follows a description of the notes.] And to secure the amount of indebtedness secured by the said notes the defendant took from the said Frank J. Roble a chattel mortgage upon said threshing outfit and a real estate mortgage duly executed and delivered by the said Frank J. Roble to the defendant. That the defendant has utterly refused to pay to the plaintiff any part of said commissions, but assumes the right to collect all of said indebtedness from the said Roble and from the security so held by it, and applied the same to its own use as its own property. That all of said notes and mortgages were executed to defendant and taken in its name with the understanding that the defendant would account to the plaintiff for all sums realized therefrom over and above the said one thousand ($1,000) dollars."

The relief demanded is that the defendant account to plaintiff for all moneys collected from said Roble by it upon said notes, and that it be decreed to pay to plaintiff all moneys realized therefrom in excess of the sum of $1,000. And that in case it has collected more than the sum of $1,000, and still has any of said notes and securities in its possession, that it be decreed to assign to said plaintiff the said notes and securities remaining in its hands, in addition to paying to plaintiff all of the moneys collected by it in excess of $1,000. And in the event that said defendant has not collected from said Roble the said $1,000 the plaintiff prays that it

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may be allowed, at its option, to pay to defendant the portion of said $1,000 uncollected by it, on condition that defendant be required to transfer to plaintiff all its interest in said notes and securities. The answer admits that the plaintiff had in his possession the property described in the complaint, and that said property belonged to the defendant, and it also admits that said property was sold by the plaintiff as agent of said defendant, as alleged in the complaint. The answer denies that it was understood and agreed between the parties at the time of the sale that the plaintiff was to receive all sums over $1,000 as commission. The answer further alleges that the plaintiff was its local agent at Granville, N. D., and that the terms of such agency were defined in a written contract between the plaintiff and said defendant, and the answer further alleges that the property described in the complaint was a second-hand outfit, and that under the terms of said contract of agency, the plaintiff was not allowed any commissions for the sale of second-hand machinery. The trial court made findings of fact and conclusions of law in favor of the plaintiff, and found that the plaintiff was entitled to all of the proceeds of said sale over and above said $1,000, and found that the plaintiff was the equitable owner of said notes and mortgages, subject to the obligation of the plaintiff to pay to the defendant the sum of $726.96, with interest from November 16, 1906. This finding is based on the fact that the defendant had collected from said Roble and on foreclosure the sum of $557.53. The judgment gave the defendant full credit for the $1,000 and interest from the date of said notes, less the payments that had been made thereon through payments by Roble and through a foreclosure of the chattel mortgage on the machinery. The defendant has appealed from the judgment rendered on such findings and demands a retrial in this court under the provisions of section 7229, Rev. Codes 1905. The facts shown by the evidence are substantially as follows:

The plaintiff was the agent of the defendant for the sale of machinery at Granville, N. D., and adjacent territory. During such agency the plaintiff sent to the main office a written order for the purchase of the second-hand outfit described in the complaint, and such order was approved by the company at its main office, and the machinery was delivered to the plaintiff at Granville pursuant to such written order. The order did not specify the price to be paid for said machinery; hence the sale was not a com-

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plete one. Under the terms of the written order the defendant warranted that said machinery would do satisfactory work, and it further provided that the title to said machinery should be and remain in the defendant until a settlement was made therefor. After the delivery of said machinery to the plaintiff as aforesaid, the general agent of the defendant was sent to Granville to settle with the plaintiff for said machinery. Before said general agent arrived at Granville, the plaintiff had sold the outfit to one Roble for the sum of $2,000, and freight amounting to $100 to be paid by said Roble. No delivery of the machinery had been made under this sale to Roble when the general agent arrived. After due negotiations between the plaintiff and said general agent, the price of the machinery was agreed on at the sum of $1,000. Immediately thereafter the plaintiff asked the general agent if he had any objections if the security for the machinery should be given by another party, and informed the general agent that he had already sold said machinery to Roble, and told the general agent the price at which the sale was made. The general agent stated that he had no objections to the arrangement, and it was thereafter agreed that the general agent and one of the plaintiff's sons should go to the Roble place and settle for the machinery. The parties saw Roble on the next day, and the general agent took from said Roble an order for the said machinery upon a company blank, and took notes and a mortgage from said Roble to the company, and, so far as the papers were concerned, the transaction was shown to be entirely between the company and said Roble, and nothing was stated in those papers in regard to the understanding of the parties that plaintiff was entitled to all of the proceeds of said notes over and above the sum of $1,000. The facts are not in dispute, and the defendant did not offer any testimony at the trial except the contract of agency between the plaintiff and the defendant, and the order for the machinery taken from Roble by the said general agent.

The appellant's contention is that, under the allegations of the complaint, the plaintiff is not entitled to recover for the reason that he sold said machinery as the agent of the plaintiff, and that under the contract of agency he is not entitled to any commissions. The defendant's theory upon the trial and on this appeal is that plaintiff is not entitled to any commissions for the reason that the sale was made by defendant of second-hand machinery, and that no commissions are allowable on account of such sales under the terms

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of plaintiff's agency contract. The plaintiff's theory of the transaction is that the general agent of the defendant agreed to accept the contract of said Roble for the purchase of the machine, and the notes and security given by Roble as its security for the $1,000 which was agreed upon as the price which plaintiff was to pay for the machinery, and that the excess of Roble's purchase price should belong to the plaintiff.

We do not find defendant's contention to be true, under which it claims that plaintiff was entitled to no commissions for the sale of second-hand machinery. The clause in the agency contract which controls this question is as follows: "The party of the first part reserves the right to sell second-hand machinery in any territory whatsoever, and said sales shall not in any case be subject to commission." The facts proven show that this sale was not made by defendant, but by the plaintiff. On sales made by plaintiff under his contract, this clause has no application. The machine had been practically purchased by plaintiff for himself before he had accepted the order therefor from Roble. He had paid the freight thereon, and had an interest therein to the extent of the freight paid by him thereon. It is true the purchase price had not been agreed on, and the naked title remained in the company. But these matters are not material in view of the agreement of the general agent thereafter made that plaintiff was to pay $1,000 for the machine, and that plaintiff's sale to Roble should stand, and that plaintiff was to receive all of the purchase price over and above the $1,000. This agreement took the sale out of the operation of the agency contract. It was made by a general agent, whose authority to make such a contract is not disproved. Upon being acquainted with plaintiff's claims to the proceeds of the sale after defendant had been paid, we do not understand that the general agent's authority to make such contract ever to have been disputed. On the contrary, it was defendant's contention that no such agreement was ever entered into by the general agent, but, if so entered into, its binding force would not be contested by defendant. There can be, therefore, no question as to the general agent's authority, and there is likewise no basis for the contention that under plaintiff's agency contract no agent had the right to vary or modify its terms, as the sale was not made under the terms of the agency contract. The appellant insists that there is a variance between the allegations of the complaint and the evidence, and in consequence

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thereof there can be no recovery by plaintiff. This claim is based on the evidence received that the sale to Roble was made independent of the agency contract, and as plaintiff's own property.

As we construe the findings, the court did not decide the case on the theory that the sale was made by plaintiff as his own property, but it was decided on the theory that the defendant was the technical owner of the machine when sold, by virtue of the fact that the title was still in the defendant. Plaintiff had in reality contracted to sell his equity in this machine before the price was fixed. Without the consent of the defendant, he could not make a valid sale to Roble, although he had a certain interest in the machinery by virtue of possession, and the payment of the freight. The defendant acquiesced in the Roble sale made by plaintiff, and further agreed to take the security from Roble for the payment of price, and to allow the same to inure to the benefit of plaintiff after the $1,000 was paid. We think the facts proven are within the allegations of the complaint. In effect, it was a sale of the defendant's property by plaintiff as defendant's agent. We deem it immaterial, however, if it were otherwise, and the sale made by plaintiff in his personal capacity, independent of the agency. The variance was clearly without prejudice in view of the order of the trial court allowing the defendant thirty days during which the case was held open for the introduction of any evidence by the defendant, if surprised in a legal sense by the holding of the court that there was no variance between the complaint and the theory on which the case was decided. A variance becomes immaterial unless actually and prejudicially misleading, and shown to the satisfaction of the court to be so and wherein misleading and prejudicial. Section 6879, Rev. Codes 1905; Marshall-McCartney Co. v. Halloran, 15 N. D. 71, 106 N. W. 293. There was no variance "within the entire scope and meaning" of the pleading, and hence it cannot be said to be a failure of proof under section 6881, Revised Codes 1905. However viewed, the defendant cannot justly claim prejudice after the liberal action of the trial court in permitting the right to reopen the case for further evidence if prejudice was claimed.

It is claimed that the plaintiff cannot recover in any event for the reason that defendant has not yet been paid the $1,000. This is not an action for the recovery of commissions as a money demand, but is an action for an accounting and to establish plain-

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tiff's interest in the securities taken in defendant's name under a special contract. There is no claim made to any part of the securities until defendant has been fully paid. The defendant cannot complain when its rights are thus fully protected. All it can insist on is the payment of the $1,000 and interest, less payments made.

It is claimed that the contract provides that no commissions are payable in case of foreclosure to collect the price of the machines. In this case there was only a partial foreclosure, and the real estate security is still unforeclosed. However, plaintiff's rights in this case, as before stated, are not determinable under the agency contract. The plaintiff was the equitable owner of the machine when sold to Roble, although in strictness the title was in the defendant. These facts differentiate it from sales under the agency contract.

Errors are claimed in the admission of secondary evidence of a contract between defendant and the general agent showing his authority. The execution of the contract was not proven. We do not think such evidence admissible, and have not considered it on this appeal. The fact that Martin was the defendant's general agent, and was sent to settle with plaintiff for the machine, sufficiently shows his authority to consummate the deal without even considering the fact that defendant never has repudiated the transaction on the ground that Martin was not authorized to act for the defendant in the premises. Words & Phrases, vol. 4, p. 3049.

The judgment is affirmed. All concur.

FISK, J., being disqualified, did not sit on the hearing of this case, and did not participate in the decision; Hon. CHAS. F. TEMPLETON, judge of the First judicial district, sitting by request.

(115 N. W. 669.)

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NORTHERN PACIFIC RAILWAY CO. v. CARLOS N. BOYNTON, C. C. SAMPSON, WILLIAM E. FRAZER, WILLIAM KRSZESZEWSKI AND EVERETTE L. GILBERT.

Opinion filed March 3, 1908.

Eminent Domain — Objects for Exercise of the Right — Pleading.

1. A complaint in an action by a railway company to condemn certain property as a site for a reservoir for the collection and storage of surface water for use in its engines sufficiently alleges a cause of action if it sets forth the ultimate facts that the property sought to be condemned is necessary for the purpose of obtaining water required in the operation of its trains.

Same — Public Use.

2. Private property cannot be taken under the power of eminent domain except for a public use, but under the law of this state the use of property reasonably necessary for the construction, maintenance or operation of a railroad is a public use.

Same — Pleadings — Conclusions of Law.

3. Ultimate facts are all that is requisite or proper to plead, and hence a complaint in an action by a railway corporation to condemn property is sufficient if it alleges that the use thereof is necessary to its construction, maintenance or operation, without alleging in terms that such desired use is a public use. Such latter allegation would constitute a mere conclusion of law.

Same — Evidence.

4. Evidence examined, and *held* sufficient to sustain the allegations of the complaint as to the necessity for the use of the property and the whole thereof sought to be condemned.

Same — Description of Easement.

5. The description of the easement sought to be condemned for the construction of a pipe line is *held* sufficiently definite and certain.

Appeal from District Court, Burleigh county; *Burke,* Special J.

Condemnation proceedings by the Northern Pacific Railway Company against William Krszeszewski and others. From a judgment condemning certain property and an order denying a new trial, defendants appeal.

Affirmed.

Andrew Miller and *A. T. Patterson,* for appellants.

There is a difference in taking for operation of franchise, and for carrying on business of the road. Avery v. Vermont Electric Co., 59 L. R. A. 817; In re Condemnation Suburban Railway, 52 L. R. A. 879.

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State can condemn for public use alone. Brown v. Gerald, 70 L. R. A. 472; Kane v. Baltimore, 15 Md. 240; Van Witzen v. Gutman, 79 Md. 405; Townsend v. Epstein, 93 Md. 537; Arnsperger v. Crawford, 70 L. R. A. 497; Minn. Canal & Power Co. v. Koochiching Co., 107 N. W. 405.

Railway is not limited to any locality for water supply. In re Suburban Ry Co., supra.

The use must be clearly needful to the public. Varner v. Martin, 21 W. Va. 548; State v. White River P. Co., 2 (N. S.) L. R. A. 842; F. R. B. Cemetery Ass'n v. Redd, 33 W. Va. 262; Minn. Canal & Power Co. v. Koochiching Co., supra; Dodge v. Mission Township, 54 L. R. A. 242.

There must be a finding of public necessity. Grand Rapids N. & L. S. Ry. Co. v. Vandrial, et al., 24 Mich. 409; McClary v. Hartwell, 25 Mich. 139.

Ball, Watson & Young and *Newton & Dullam,* for respondent.

Eminent domain statutes should be liberally construed. Bigelow v. Draper, 6 N. D. 152, 69 N. W. 570; Petersburg v. Peterson, 14 N. D. 344, 104 N. W. 518; Fallbrook v. Bradley, 164 U. S. 112; Clark v. Nash, 198 U. S. 361; State v. Centralia, etc., 85 Pac. 344; Rockinham v. Hobbs, 58 Atl. 46; Strickley v. Highland, etc., 200 U. S. 527.

Legislative determination of public use is final. 10 Enc. Law, 1066; Bankhead v. Brown, 25 Iowa, 540; Hazen v. Essex Co., 12 Cush. 477.

Fisk, J. Plaintiff recovered a judgment in the court below condemning certain real property to its use for alleged railway purposes. From such judgment and from an order denying a motion for a new trial, this appeal is prosecuted.

The purpose for which said property is sought by the railway company, as alleged in its complaint, is to construct a reservoir for the collection and storage of surface water for use in operating its engines, and for the purpose of laying a pipe line therefrom to its railway track at Sterling. A mere easement for the latter purpose is all that is prayed for. The necessity for such use is duly alleged in the complaint. Defendants deny the existence of such necessity, and they contend that the facts alleged and proven do not entitle plaintiff to the relief demanded.

After the first witness was sworn, and before any testimony was offered, defendants objected to the introduction of any evidence, for the reason, as stated, that the complaint shows on its face

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that the court has no jurisdiction of the subject matter, because: (1) The complaint shows on its face that the action is one for condemnation under the law of eminent domain, and that the use for which said premises are contemplated is the private convenience of the plaintiff. (2) The complaint fails to allege that the plaintiff is unable to obtain sufficient water to operate its line at other places. (3) Said complaint fails to state that there is any necessity for said condemnation. (4) Said complaint fails to allege that the condemnation prayed for is for the use or benefit of the public. (5) Said complaint fails to allege that, by condemning the premises sought to be condemned, the plaintiff will be enabled to obtain sufficient water to operate its line of road. (6) Said complaint fails to allege that the premises for which condemnation is prayed are reasonably necessary for the convenience of the public and the operation of its line of road. (7) Said complaint fails to allege that the public will be in any manner benefited by said condemnation. (8) The proceedings contemplated are in violation of the rights of private ownership of property, contrary to public policy, and in violation of section 14 of the constitution of the state, and in violation of the provisions of article 5 of the amendments to the constitution of the United States.

Such objection was overruled, and at the close of plaintiff's evidence defendants moved to dismiss the action on the following grounds: (1) That the evidence introduced fails to establish the public necessity for the condemnation of the premises described in the complaint, or any portion thereof. (2) The evidence fails to show a public necessity for the condemnation of all the premises described and sought to be condemned in this action. (3) The evidence affirmatively shows that no sufficient public necessity exists to warrant the condemnation of the premises or any part thereof. (4) The evidence fails to show that the general public will receive any material benefit from the proposed condemnation. (5) The evidence shows that the object of the proposed condemnation is wholly for the private convenience and profit of the plaintiff. (6) The evidence and the allegations of the complaint are too vague and indefinite, especially in regard to the proposed easement for a pipe line mentioned in the evidence for the court to properly adjudge the condemnation asked. This motion was also overruled, as was a similar motion made at the close of all the evidence. A verdict having been returned in plaintiff's favor, and judg-

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ment entered pursuant thereto, a motion for a new trial based upon substantially the same grounds urged in support of the foregoing objection and motion was made and denied, and the same grounds are urged in this court for a reversal of the judgment and order appealed from. These alleged errors will be disposed of in the order in which they are argued in appellants' brief.

The first contention is that the trial court erred in overruling the first, fourth, sixth and eighth grounds of defendants' objection to the jurisdiction of the court. It is argued by appellants' counsel that the complaint fails to allege that the property is sought to be taken for a public use, but that it discloses, on the contrary, that the use to which the property is sought to be subjected is a mere private use, namely, the private convenience of plaintiff in obtaining a supply of water at said station for its engines. The general propositions of law advanced by appellants' counsel, that private property cannot be taken for other than public uses, and that the complaint must allege the necessity for the taking and that it is intended for a public use, are undoubtedly sound, and it only remains to apply such well-settled rules to the case before us. Is the use to which the property is sought to be applied a public use? If so, the foundation of appellants' argument necessarily falls and with it the superstructure which he has reared. We think section 7575, Rev. Codes 1905, furnishes a complete answer to the above question. This section provides: "Subject to the provisions of this chapter, the right of eminent domain may be exercised in behalf of the following public uses: * * * (4) Wharfs, docks, piers, chutes, booms, ferries, bridges, toll roads, by-roads, plank and turnpike roads, railroads. * * *" Here is an express legislative declaration that the taking of property for a railroad purpose is the taking for a public use. What better authority can be produced? Again, section 4266, Rev. Codes 1905, provides: "Every corporation formed under this article, and every railroad corporation authorized to construct, operate or maintain a railroad within this state shall have * * * the following powers: * * * (3) To acquire under the provisions of the chapter on eminent domain or by purchase all such real estate and other property as may be necessary for the construction, maintenance and operation of its railroads, and the station, depot grounds and other accommodations reasonably necessary to accomplish the object of its incorporation. * * * (4) To lay out its road, not exceeding 100 feet in width

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and to construct the same; and for the purpose of cuttings and embankments and of obtaining gravel and other material to take as much land as may be necessary for the proper construction, operation and security of the road. * * *" Here express legislative authority is given to railroad corporations authorized to construct, operate or maintain railroads in this state to acquire under the provisions of the chapter on eminent domain all such property as may be necessary for the construction, maintenance and operation of such railroads. This is in effect another declaration that property necessary for the construction, maintenance, or operation of a railroad is property necessary for a public use, as section 7574, Rev. Codes 1905, provides that eminent domain is the right to take private property for public use. It is therefore manifest that the allegation in the complaint that the property sought to be condemned is reasonably necessary for the operation of plaintiff's railroad is equivalent to an allegation that the same is reasonably necessary for a public use. The latter allegation, if pleaded, would amount merely to a conclusion of law. Ultimate facts are all that are requisite or proper to plead. Tested by the foregoing rules, the complaint is amply sufficient, and the objection thereto was properly overruled. We do not think that the authorities cited by appellants' counsel support his contention in this case. These authorities are: Brown v. Gerald, 100 Me. 351, 61 Atl. 785, 70 L. R. A. 472, 109 Am. St. Rep. 526; Avery v. Electric Co., 75 Vt. 235, 54 Atl. 179, 59 L. R. A. 826, 98 Am. St. Rep. 818; In re Suburban Ry. Co., 22 R. I. 457, 48 Atl. 591, 52 L. R. A. 879; Eldridge v. Smith, 34 Vt. 848; Minn. Canal & Power Co. v. Koochiching Co., 97 Minn. 429, 107 N. W. 405. Without a full analysis of these cases, it is sufficient to say they merely recognize the general rule that the use for which property may be condemned must be a public as distinguished from a private use, and that it is beyond the power of the legislature to authorize a taking for the latter use. Of course, if the property sought to be condemned is not reasonably necessary to the operation of plaintiff's railroad, no public use is disclosed, but, if it is reasonably necessary for such purpose, it is plain, under our statute, that the taking therefor would constitute a public use. It is true the mere legislative fiat cannot make that a public use which is clearly not such use, but such a statute will be given effect unless the proposed use is clearly a private use. Legislative declaration that railroad corporations may ac-

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quire through eminent domain proceedings such property as may be necessary for the carrying out of their corporate business must be upheld unless it manifestly appears that the proposed use is not a public use. The courts will carefully scrutinize the proposed use, even when expressly authorized by statute, and will refuse to condemn property for any other than a public use.

It is next contended that the trial court committed error in overruling the first five grounds urged for a dismissal of the action. By these grounds of the motion the sufficiency of the evidence as to the necessity for the condemnation of the property and that it is sought to be taken for a public use is called in question. The gist of appellants' contention in this respect is that the evidence shows that the taking is sought solely for the private convenience of plaintiff. An examination of the testimony has convinced us of the fallacy of such contention. Without reviewing the evidence in detail, it is sufficient to say that the undisputed testimony discloses the utter impracticability, if not the impossibility, of securing a suitable supply of water at or in the vicinity of Sterling, except in the manner proposed. In fact, the company has for years attempted by sinking wells to obtain such supply, but without avail, and it has been compelled to haul water in tank cars for such purpose from Bismarck to Sterling, a distance of twenty-five miles. The testimony discloses, and, indeed, it goes without saying, that such water trains are more or less an impediment to the efficient operation of the road by interference with the regular passenger and freight traffic over the same, a matter regarding which the interests of the public are materially concerned. The question, therefore, whether the plaintiff shall be restricted to its present methods of securing such needed water supply by hauling the same from Bismarck, or shall be permitted to carry out its proposed scheme of constructing a reservoir upon the land in question is of vital importance, not alone to the plaintiff railway company, but to the public as well. We are entirely clear that the proof is amply sufficient to show the urgent necessity for the condemnation of this property, and that the use for which it is sought to be appropriated is a public one. We call attention to the following recent authorities cited in respondent's brief bearing upon the question of the necessity for the exercise of the right of eminent domain: Fallbrook v. Bradley, 164 U. S. 112, 17 Sup. Ct. 56, 41 L. Ed. 369; Clark v. Nash 198 U. S. 361, 25 Sup. Ct. 676, 49 L. Ed. 1085; State v. Centralia, etc., 42 Wash. 632, 85

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Pac. 344, 7 L. R. A. (N. S.) 198; Rockingham v. Hobbs, 72 N. H. 531, 58 Atl. 46, 66 L. R. A. 581; Strickley v. Highland, etc., 200 U. S. 527, 26 Sup. Ct. 301, 50 L. Ed. 581; U. S. v. Gettysburg R. R., 160 U. S. 668, 16 Sup. Ct. 427, 40 L. Ed. 576; C. & N. W. Ry. v. Morehouse, 112 Wis., p. 1, 87 N. W. 849, 56 L. R. A. 240, 88 Am. St. Rep. 918. In the following cases the right of a railway company to condemn property for reservoir purposes, as is sought to be done in the case at bar, was expressly affirmed: Dillon v. Ry. Co., 67 Kan. 687, 74 Pac. 251; Strohecker v. Railway Co., 42 Ga. 507. No one would question the right of a railway company to condemn land for gravel for the ballasting of its roadbed, even though it could get such gravel elsewhere by hauling the same for a distance of 25 miles; yet water is just as essential for the operation of the road as gravel is for ballasting the roadbed, and it would be just as reasonable to require a company to haul gravel for a long distance as it would to require it to haul water for a like distance. We conclude that no error was committed in overruling said motion.

It is next contended that it was error to condemn more than 37 acres out of the entire tract of 67 acres. The proof discloses that but 37 acres are proposed to be actually used for reservoir purposes. We think such contention is without merit. The plaintiff's civil engineer testified without contradiction that the entire tract was necessary, although not to be actually used for the storage of water, and an examination of the plat of the proposed reservoir serves to confirm the truth of his testimony. Much latitude is given to the corporation vested with the right of acquiring property by eminent domain in determining the extent of the property necessary to be taken. 10 Am. & Eng. Enc. Law, 1057, and cases cited. The courts are generally concluded by the good faith determination by the corporation or its officers of the necessity for taking any particular land. 2 Elliott on Railroads, § 954, and cases cited. It is, no doubt, true that, if the corporation is seeking to abuse the power delegated to it by asking to condemn more property than is reasonably necessary for the public use contemplated, the courts will interfere to prevent such taking. The testimony in the record fails to show any such abuse in this case.

Appellants' contention that the easement sought to be condemned for a pipe line is not described with sufficient certainty is not sustained by the record. The location of the proposed line is as definite as it is possible to make it. The exact point of its beginning and

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terminus is given together with its length in feet over the land in question.

The remaining assignments of error are sufficiently answered by what we have heretofore said.

Finding no error in the record, the judgment and order appealed from are affirmed. Respondent to recover its costs. All concur.

(115 N. W. 679.)

HENRY LUND v. NATHAN UPHAM.

Opinion filed April 14, 1908.

Rehearing denied April 21, 1908.

Appeal — New Trial — Statement of the Case — Sufficiency of Evidence.

1. The sufficiency of the evidence to sustain a verdict cannot be considered by the trial court on a motion for a new trial, nor by this court on appeal, unless the settled statement of the case contains specifications of particulars wherein the evidence is insufficient to sustain the verdict.

Evidence.

2. Objections to certain questions considered in the opinion, and the rulings thereon *held* not prejudicially erroneous.

Remarks of Counsel — New Trial.

3. Remarks of counsel to the jury considered in the opinion, and *held* not grounds for a new trial under the circumstances shown in the record.

Appeal from District Court, Walsh county, *Fisk,* J.

Action by Henry Lund against Nathan Upham. Verdict for plaintiff. From an order granting a new trial, plaintiff appeals. Reversed, and cause remanded.

E. R. Sinkler, for appellant.

Notice of intention is essential to the grant of a new trial. Gould v. Dakota Elevator Co., 2 N. Dak. 216, 50 N. W. 969; First National Bank v. Comfort, 28 N. W. 855, 4 Dak. 167; Moddie v. Brieland, 70 N. W. 637.

Motion for new trial cannot be entertained one year and six months after notice of entry of judgment. Rev. Codes 1905, Sec.

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7346; Bright v. Juhl, 93 N. W. 648; Kimball v. Palmerlee, 13 N. W. 129; Deering v. Johnson, 22 N. W. 174; Yerkes v. McHenry, 6 Dak. 5, 50 N. W. 485; Richardson v. Rogers, 35 N. W. 270; Pugh v. Reat, 107 Ill. 400; Ferger v. Wesler, 35 Ind. 53.

Motion for new trial and decision thereon must be made before the expiration of the period for appeal from the judgment. Knox v. Clifford, 41 Wis. 458; Whitney v. Karner, 44 Wis. 563; McKnight v. Livingstone, 1 N. W. 14; Sargent v. Kindred, 5 N. D. 472, 67 N. W. 826; Gaar, Scott & Co. v. Collin, 15 N. D. 622, 110 N. W. 81.

Statement of the case must contain specification of particulars wherein the verdict is not sustained by the evidence. Gagnier v. City of Fargo, 12 N. D. 219, 96 N. W. 841.

Exceptions to attorney's remarks must be taken when they are made, not at close of argument. Western Union Tel. Co. v. Apple, 28 S. W. 1022; 2 Enc. Pl. & Pr. 755.

J. H. Fraine, for respondent.

Court can entertain a motion for new trial eighteen months after notice of entry of judgment. Johnson v. N. P. Ry. Co. 48 N. W. 227; King v. Hanson, 13 N. D. 85; 99 N. W. 1085; Grade v. Collins, 66 N. W. 467.

Objection to non-filing of the statement of the case can not be first raised in the appellate court. Plano Mfg. Co. v. Jones, 79 N. W. 338.

The granting of a new trial for insufficiency of the evidence will not be disturbed, except for abuse of discretion in making it. State v. Howser, 98 N. W. 352; Pengilly v. Machine Co. 11 N. D. 249, 91 N. W. 63; Dinnie v. Johnson, 8 N. D. 153, 77 N. W. 612; Gull River Lumber Co. v. Elevator Co., 6 N. D. 276, 69 N. W. 691.

MORGAN, C. J. This is an appeal from an order granting a new trial on the defendant's motion. The action was for the recovery of a judgment against the defendant for damages growing out of his refusal to comply with his alleged contract to pay the plaintiff for threshing done by him for one Johnson. The plaintiff recovered a verdict. Defendant moved for a new trial. The granting of the order for a new trial is the only error assigned. Judgment was entered on the verdict on April 1, 1905. Notice of the entry of judgment was served on April 3, 1905. Notice of intention to move

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for a new trial on statutory grounds was served, and service thereof duly acknowledged on May 25, 1905. The grounds on which a new trial would be asked are specified in this notice as: (1) Errors of law occurring at the trial; (2) insufficiency of the evidence to justify the verdict, and that it is against the law; (3) misconduct of plaintiff's counsel at the trial. The notice contained no specification of the particulars in which the evidence was insufficient to sustain the verdict. This notice further specified that the motion for a new trial would be based upon a statement of the case thereafter to be settled, and upon the files in the action, and upon the minutes of the court at the trial. On said May 25th a proposed statement of the case was served on plaintiff's attorney, and on May 31st, plaintiff's attorney served proposed amendments to said proposed statement, and the same was settled by the trial judge on July 24, 1905, and filed in the clerk's office on February 28, 1907. October 22, 1906, notice was served on the plaintiff that the motion for a new trial would be brought on for argument on November 3, 1906, and the motion was heard and decided on said November 3d.

The appellant claims at the outset, irrespective of any question on the merits of the order, that the trial court had no jurisdiction to grant a new trial, for the reason that the motion therefor was noticed for argument and heard after more than one year after the judgment was entered, and after the time for appeal therefrom had passed. It is unnecessary to determine as a matter of law whether the court had jurisdiction to pass upon the motion for a new trial by reason of the fact that the motion was made and granted after the time for appeal from the judgment had expired. It may be conceded for the purposes of this appeal that the court had jurisdiction so far as that question is concerned. There is, however, a fatal objection to the order on jurisdictional grounds so far as a consideration of the evidence is concerned. The verdict is assailed on the ground of the insufficiency of the evidence to sustain it. Nowhere in the notice of intention to move for a new trial, nor in the motion for a new trial, nor in the specifications of error, are the particulars wherein the evidence is insufficient to sustain the verdict pointed out. The statute regulating proceedings on motions for new trials and appeals makes it the duty of the party applying for a new trial to particularly specify wherein the evidence is insufficient, and prescribes that the specification shall be disregarded unless such insufficiency is particularized. Section

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7058, Rev. Codes 1905; Baumer v. French, 8 N. D. 319, 79 N. W. 340; Mooney v. Donovan, 9 N. D. 93, 81 N. W. 50; Chandler v. Kennedy, 8 S. D. 56, 65 N. W. 439; Gagnier v. City of Fargo, 11 N. D. 73, 88 N. W. 1030, 95 Am. St. Rep. 705.

The question of the insufficiency of the evidence to justify the verdict was not properly before the trial court, and under the peremptory language of section 7058 we must disregard that specification

There are 60 specifications of error set forth in the statement of the case. Fifty-five of them relate to the admission of evidence. A great number of these specifications are not even mentioned in the printed briefs; but we have considered them, and find no error in such rulings. Those specifications that are mentioned in the brief we have also carefully considered, and we find no prejudicial error in any ruling. One of the questions objected to as immaterial was, "Did you rely on Mr. Upham's statement he would pay you for all the threshing?" The action was brought against the defendant on a promise to pay the plaintiff for threshing done by him for one Johnson. One of the issues was whether the defendant had made such promise. As corroborating Johnson's testimony that such promise was made by the defendant, the fact that no lien had been filed by him was shown to show reliance upon the promise. We think this was a competent fact to be shown. If plaintiff had not relied on such promise, it would have been a potent consideration against the fact that such promise had been made. This evidence was not therefore immaterial. Admissions and promises claimed to have been made by the defendant after the threshing to the effect that he would pay for the threshing are also specified as prejudicial errors, but such objections are clearly untenable and without merit. Testimony by plaintiff as to the number of bushels threshed and the disposition of the grain was received under objection, but there was no error in receiving it, as it was a relevant and material question. Evidence of the disposition made of the grain, if not an issue in the case, was received under objection, but we fail to see how its receipt could have been prejudicial. Certain questions asked the defendant on his cross-examination are also objected to, but they were proper as grounds for impeachment. No other objections to evidence worthy of notice were specified as error. It is sufficient to say that they present no erroneous rulings.

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Misconduct of plaintiff's attorney in his remarks to the jury is claimed as ground for a new trial. The remarks were to the effect that defendant would lose nothing by a verdict against him, as he was simply representing some rich estate, which would recompense him on demand, and, as showing the wealth of such estate, that defendant was under $60,000 bonds as its agent. As soon as objection was made to such remarks the court charged the jury that there was no evidence whatever in the record as to these statements, and the jury must totally disregard such statements. The remarks were not objected to until the close of the defendant's attorney's argument. They should have been objected to at once, and there are cases holding that objection comes too late when not made until the close of the argument. 2 Enc. Pl. & Pr., p. 754. Such remarks were improper and deserved rebuke, although they were undoubtedly made thoughtlessly. After the prompt and specific instruction to the jury to wholly disregard such statements, we do not think that the mere statement is ground for a new trial, in view of the caution to the jury. The objectionable language was confined to one sentence, not objected to promptly, and to say that a mere inadvertent statement, not repeated or persisted in, had a prejudicial influence, in view of the court's charge, would be going too far in presuming prejudice. The facts are not parallel with a leading case on this question (Brown v. Swineford, 44 Wis. 282, 28 Am. Rep. 582), where the misconduct was persisted in after admonition from the court. Attorneys, however, are treading upon dangerous ground when they so far forget themselves in the heat of argument that the evidence in the record only should be the basis of their arguments. In this case the judge who presided at the trial did not make the order granting a new trial. Hence this court is in the same situation, so far as determining the probable effect of the language used, as the judge who made the order granting a new trial. The record does not, however, disclose the ground on which a new trial was ordered. In view of the fact that the questions properly before us for review are questions of law purely, nothing is presumed in favor of the rulings of the trial judge. No questions of discretion are involved in such rulings.

Inasmuch as the sufficiency of the evidence to sustain the verdict was not properly before the trial judge, and in view of the fact

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that no prejudicial error was committed at the trial, the order granting a new trial is reversed, and the cause remanded for further proceedings.

SPALDING, J., concurs. FISK, J., being disqualified, did not sit on the argument, nor participate in the decision.

(116 N. W. 88.)

A. N. BEISEKER v. AMBROSE AMBERSON.

Opinion filed March 27, 1908.

Vendor and Purchaser — Contract — Conditional Acceptance of Offer.

1. Plaintiff asked the defendant by letter what the price of certain property was, and stated that he would buy it if the price was reasonable. Defendant answered, stating the price. Plaintiff accepted the offer, but asked the defendant to send the deed to one of two banks, and also asked him to assign the insurance policies and send them with the deed. *Held,* that the acceptance of the offer was not an unconditional one.

Same.

2. Before an acceptance of an offer becomes a binding contract, the acceptance must be unconditional, and must accept the offer without modification or the imposition of new terms.

Same — Breach of Contract — Action for Damages — Tender.

3. An action for damages for a refusal to convey real estate will not lie without a tender of the agreed price, unless it appears that a tender would be a futile act. If the refusal is conditional on future events, a tender is necessary before a cause of action is shown.

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

Action by A. N. Beiseker against Ambrose Amberson. Demurrer to the complaint was sustained, and plaintiff appeals.

Affirmed.

Bessessen & Berry, for appellant.

Mailing acceptance of offer completes the contract. 9 Cyc. 295.

Requests and suggestions do not render acceptance conditional. Kreutzer v. Lynch, 100 N. W. 887; 9 Cyc. 269; 9 Cyc. 290; Stevenson v. McLean, 5 Q. B. D. 346; Clark v. Dales, 20 Barb. 42; Brisban v. Boyd, 4 Paige, 17; Culton v. Gilchrist, 61 N. W. 384; Stotesburg v. Massengale, 13 Mo. App. 221; Philips v. Moor,

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71 Me. 78; Brown v. Cairns, 66 Pac. 1033; Cavender v. Waddingham, 5 Mo. App. 457; Johnson v. Talley, 10 Lea, 248.

Tender is unnecessary when it is apparent that it will not be accepted. 28 Am. & Eng. Enc. Law (2d Ed.) 7; Blight v. Ashley, 1 Pet. 15; Keller v. Fisher, 7 Ind. 718; Sonia Cotton Oil Co. v. Steamer Red River, 106 La. Ann. 42; Girard v. St. Louis Car Wheel Co., 123 Mo. 358; Enterprise Soap Works v. Sayers, 55 Mo. App. 15; Martin v. Fayetteville Bank, 131 N. Car. 121; Sanford v. Royal Ins. Co., 10 Wash. 202.

If for any reason a tender would be idle and useless, it is unnecessary. 29 Am. & Eng. Enc. Law (2d Ed.) 691; Reynolds v. Reynolds, 45 Mo. App. 622; Kester v. Rockel, 2 W. & S. 365; Nau v. Jackman, 58 Iowa, 359; Furman v. Rapelje, 67 Ill. App. 31.

John O. Hanchett, for respondent.

Acceptance of an offer must be in accordance with its terms and unconditional. 11th Cent. Digest Col. 106-109; Carr v. Duval, 39 U. S. 77, 10 L. R. A. 361; Baker v. Holt, 14 N. W. 8; N. W. Iron Co. v. Mead, 21 Wis. 474, 94 Am. Dec. 557; Knight v. Cooley, 34 Iowa, 218; Clark v. Burr, 55 N W. 401; Russel v. Falls Mfg. Co., 82 N. W. 134.

Where no time or place of performance is provided, and the obligations of both are to be simultaneously performed, a tender, demand and refusal must be shown before suit can be maintained. Arnet v. Smith, 11 N. D. 55, 88 N. W. 1037; 11 Century Dig. Col. 1148, 1458, 1460; Hawley v. Mason, 33 Am. Dec. 522; Provost v. Putnam, 19 L. Ann. 84; Brown v. Gammon, 14 Me. 276; Worley v. Mourning, 4 Ky. 254; Morey v. Enke, 5 Minn. 392.

MORGAN, C. J. This is an action for damages claimed under an alleged breach of a contract to sell and convey real estate. The alleged contract on which the action is based is evidenced solely by the following letters which passed between the parties and are made a part of the complaint, viz: On June 6, 1906, plaintiff wrote to the defendant as follows: "A. N. Beiseker * * * A. Amberson, Esq., Snohomish, Wash.—Dear Sir:—Do you wish to sell your store building and lot in Harvey? If so, what is the very lowest spot cash price you will take, if I buy the place within 10 days from the time I get your answer from you to this letter. I have the cash and would buy the building if you wish to sell reasonable.

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Please let me hear from you by first mail and greatly oblige, Yours truly, A. N. Beiseker." On June 20th defendant answered plaintiff's letter as follows: "Mr. A. N. Beiseker, Harvey, N. D.—Dear Sir: Your favor at hand and in reply must say I cannot give you my price on my property in Harvey, at present, on account of a party who is wanting to buy it, but as soon as I hear from him will let you know at once. Yours respectfully, A. Amberson, R. F. D. No. 1." On July 16th defendant wrote to the plaintiff as follows: "Snohomish, Wash., 7-16-06. * * * In reply to your favor of some time ago. My price on my store building and lot in Harvey is $2,500—part cash and on time and $2,300—net cash to me. Please answer at once and oblige. * * * A. Amberson." On July 20th plaintiff wrote to the defendant as follows: "I am just in receipt of your favor of the 16th inst., and contents noted. I will accept your cash proposition on your business building and lot on cash basis, namely $2,300.00, and beg to hand you herewith my check for $100.00 and will ask you to make out the deed to John W. Yelland and send the same to the German State Bank of Harvey, N. Dak., or First International Bank, Portal, No. Dak., with a letter stating for them to deliver this deed to me when I pay the balance of $2,200.00, which I will do as soon as received at either bank. You will have the deed made out and have it signed by you and your wife and then send this with your abstract to which ever bank of the two named above that you wish, and I will pay the balance on receipt of the deed and abstract at the bank. In this way the bank won't deliver the deed or the abstract until I have paid the $2,200.00. You will kindly assign the insurance policies that you have to John W. Yelland and send them along with the deed. This is in accordance with your letter of the 16th inst. in which you say that you will take $2,300.00 net cash to you. Yours truly, A. N. Beiseker. P. S. Please advise me what bank you send the deed to so that I can call at the bank the day it reaches here or Portal and take it up." On July 28th defendant answered plaintiff's last letter as follows: "I inclose you herewith and return to you your check sent to me, as it came a little too late. Hence the party I spoke of in my letter to you accepted my figures and by right is the first although there is a point between us and if we don't agree I will let you know. * * * A. Amberson." Immediately after the receipt of defendant's letter of July 28th, the plaintiff commenced

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this action, and seeks to recover the sum of $500 damages. The complaint is framed on the theory of an offer in writing to sell real estate for a specific price, and an unconditional acceptance of such offer in writing, thereby making a binding contract to sell the real estate. The defendant demurred to the complaint on the ground that it fails to state facts sufficient to constitute a cause of action. The trial court sustained the demurrer, and the plaintiff has appealed from the order sustaining the same.

It is an elementary principle in the law of contracts that an unqualified acceptance by letter in answer to an offer submitted by letter creates a binding contract in writing. It is also equally well eseablished that any counter proposition or any deviation from the terms of the offer contained in the acceptance is deemed to be in effect a rejection, and not binding as an acceptance on the person making the offer, and no contract is made by such qualified acceptance alone. In other words the minds of the parties must meet as to all the terms of the offer and of the acceptance before a valid contract is entered into. It is not enough that there is a concurrence of minds of the price of the real estate offered to be sold. If the purchaser adds anything in his acceptance not contained in the offer, then there is no contract. In this case there was an unqualified acceptance of the offer so far as the price is concerned. After that the acceptance advances terms by the writer as to the carrying out and execution of the contract that were in no manner contained in the offer. Among the new terms imposed by the plaintff was the one asking the defendant to send the deed to one of two banks named in the letter. The defendant was entitled as a matter of law to have the cash price paid to him at Snohomish, Wash., where the offer was made; and without his consent he was not compelled to send the deed to any place or bank until the price was paid. If plaintiff had accepted the offer unconditionally, his right to a deed could have been made effectual only by a tender of the price to the defendant personally; and, by requiring defendant to send the deed elsewhere, a condition was attached to the acceptance which the defendant was not under any legal obligation to comply with.

The appellant contends that there is an unqualified acceptance contained in defendant's letter, and that what is thereafter contained in the letter is offered as a suggestion merely for the most convenient way of completing the transaction. We think that

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the letter is not susceptible of that construction. At what place the price was to be paid was a part of the offer. The defendant was entitled to have the price paid to him simultaneously with the delivery of the deed, and he was not obligated to go to any bank for payment nor to communicate a deal with the bank before the price was paid. The following authorities fully sustain these principles: Harris Bros. v. Reynolds (N. D.) 114 N. W. 369; Gilbert v. Baxter, 71 Iowa, 327, 32 N. W. 364; N. W. Iron Co. v. Meade, 21 Wis. 480, 94 Am. Dec. 557; Batie v. Allison, 77 Iowa, 313, 42 N. W. 306; Wristen v. Bowles, 82 Cal. 84, 22 Pac. 1136; Weaver v. Burr, 31 W. Va. 736, 8 S. E. 743, 3 L. R. A. 94; Baker v. Holt, 56 Wis. 100, 14 N. W. 8; Wilkin Mfg. Co. v. H. M. Loud & Sons L. Co., 94 Mich. 158, 53 N. W. 1045; Nat. Bank v. Hall, 101 U. S. 43, 25 L. Ed. 822; Russell v. Falls Mfg. Co.,106 Wis. 329, 82 N. W. 134; Langellier v Schaefer, 36 Minn. 361, 31 N. W. 690. The appellant relies on Kreutzer v. Lynch, 122 Wis. 474, 100 N. W. 887, as sustaining his contention. We do not think that it does. In that case the court found from evidence not contained in the letter of acceptance that the acceptor did not intend to vary the terms of the offer, but that the additional conditions were offered as suggestions merely. In this case the corespondence only is before us.

There is another condition contained in the letter of acceptance, which we think varies the terms of the offer in a material matter. The defendant is requested to assign the policy of insurance concerning which nothing was said in the offer. The policy of insurance does not follow a conveyance of the land without assignment. It is subject to cancellation before the time of its running expires, and, if canceled, the insured is usually entitled to a rebate of a portion of the premium. The policy, therefore, represented something of value to the insured, which he could not be called upon to assign as a matter of right. By requiring this to be done a condition was added to the acceptance.

Other matters contained in the acceptance are urged as presenting additional conditions, but we do not pass upon them, as they are not argued by the appellant. There was no tender of the purchase price. The respondent claims that no action for damages will lie until such tender or until tender is waived.

The appellant contends that no tender was necessary for the reason that the defendant unqualifiedly refused to comply with the offer, and that a tender is not required before commencing the

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action in case it appears that a tender would be a futile act. This is undoubtedly a general principle of law. On reading the defendant's letter in which he returned the check, it is apparent that the refusal to convey the property was not final. It was to depend upon the fact whether defendant and another purchaser would agree, and defendant expressly stated: "If we don't agree, I will let you know." Under such circumstances, the refusal was not final or positive or absolute, and it is not a proper legal inference from the language used that a tender would have been a futile act.

The order is affirmed. All concur.

(116 N. W. 94.)

LEVI E. FORCE v. THE PETERSON MACHINE COMPANY.

Opinion filed April 3, 1908.

Chattel Mortgage — Conversion by Mortgagee Extinguishes Lien.

1. A mortgagee in a chattel mortgage, who sells the property mortgaged without foreclosure, is guilty of a conversion of the property, and the lien of the mortgage is extinguished.

Same — Sale Without Foreclosure — Damages.

2. Where the mortgagor sues the mortgagee for damages for a wrongful sale without foreclosure, in such cases the mortgagee may plead and show the amount due on the lien of the mortgage in mitigation of damages growing out of the wrongful conversion.

Same — Pleading.

3. The right to show the existence of liens in such cases is based upon equitable principles, but the rules of pleading in equity cases do not apply.

Same — Counterclaim.

4. The right to plead the existence of liens on the property when the conversion took place is not based upon the statute defining what matters may be pleaded as counterclaims.

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

Action by Levi E. Force against the Peterson Machine Company. Judgment for plaintiff, and defendant appeals.

Reversed and remanded.

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Turner & Wright, for appellant.

Where property is converted by the lienee, the lineor can recover the value of the property converted less the amount due on the lien. Lovejoy v. Bank, 5 N. D. 623, 67 N. W. 956; Suth. Dam. 525; Angell v. Egger, 6 N. D. 391, 71 N. W. 547; Clendening v. Hawk, 8 N. D. 419, 79 N.W. 875; Wright v. Bank, 18 N. E. 79, 1 L. R. A. 289; Howery v. Hoover, 66 N. W. 772; Jones v. Horn, 9 S. W. 309; Gauche v. Milbrath, 69 N. W. 999; Brink v Freoff, 6 N. W. 94; Daggett v. McClintock, 22 N. W. 105; Rall v. Cook, 43 N. W. 1069; Pierce v. Underwood, 61 N. W. 344; Van Worden v. Winslow, 76 N. W. 87; Cushing v. Seymour, 15 N. W. 249; Deal v. Osborne, 43 N. W. 835; Powell v. Gagnon, 53 N. W. 1148.

M. C. Spicer and *Geo. P. Gibson,* for respondent.

Sale or conversion of personal property subject to a lien, in satisfaction of the claim, thereby extinguishes the lien. Rev. Codes 1905, section 6145; Lovejoy v. Bank, 5 N. D. 623, 67 N. W. 956; Everett v. Buchanan, 2 Dak. 249, 6 N. W. 439.

Tort action cannot be set up as a counterclaim to an action on contract, nor vice versa. Wrege v. Jones, 13 N. D. 267, 100 N. W. 705; Braithwaite v. Aiken, 3 N. D. 365, 56 N. W. 133; Tallman v. Barness, 11 N. W. 478; Brugmann v. Burr, 46 N. W. 644; Jones v. Swank, 55 N. W. 1126; Schmidt & Miller v. Beckenbak, 12 N. W. 349.

Before equity will assist, the party must plead all his rights to the counterclaim, and that he has done, or is ready to do equity. Braithwaite v. Akin, supra; Clark v. Sullivan, 2 N. D. 103, 49 N. W. 416; Woff v. Jasspon, 85 N. W. 260; Munger v. Bank, 85 N. Y. 588; Smith v. Dickenson, 76 N. W. 766; Pendleton v. Beyer, 68 N. W. 415; Seligmann v. Heller Bros. Clothing Co., 34 N. W. 232; Becker v. Northway, 46 N. W. 210; 25 Enc. Law (2d Ed.) 543; 19 Enc. Pl. & Pr. 764.

MORGAN, C. J. Action for damages for an alleged wrongful conversion of personal property. The complaint alleges that the plaintiff gave the defendant a chattel mortgage on personal property to secure a debt of $341.30 evidenced by a promissory note due April 1, 1904; that the defendant wrongfully took possession of said property on March 11, 1905, and sold the same at a pre-

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tended foreclosure sale at a place not designated by the county commissioners of the county as a place for the sale of mortgaged chattels on mortgage foreclosures; and that defendant thereafter sold the property by private sale to a third party. Damages are demanded for $2,000, the alleged value of the chattels when the conversion took place. The invalidity of the foreclosure sale is not denied. The answer, however, sets forth three counterclaims against the damages shown by the complaint. These counter claims are based upon three mortgage liens held by the defendant upon the property alleged to have been converted at the date of the conversion. The aggregate amount of these liens is the sum of $673.73, with interest. The plaintiff demurred to the answer on the ground that the facts alleged therein do not constitute legal counterclaims. The trial court sustained the demurrer, and defendant has appealed from the order sustaining the same.

The grounds urged in favor of the demurrer are (1) that the lien of the mortgage had been extinguished by the invalid foreclosure, and in consequence thereof no counterclaim is sustainable; (2) that the answer does not state a cause of action arising out of the contract or transaction set forth in the complaint as the foundation of plaintiff's claim, or connected with the subject of the action, as required by subdivision 1, section 6860, Rev. Code 1905, relating to counterclaims; (3) that the insolvency of the plaintiff is not alleged. We are unable to agree with either of these contentions. They do not represent the correct theory under which parties who are guilty of conversion of property on which they had valid liens are permitted to offset such liens against damages caused by conversion. These liens are allowed as offsets in mitigation of damages merely. They are not deemed to be counterclaims within the meaning of said section 6860, and the right to plead the liens for this purpose is in no way dependent upon said section. Since the revision of 1895 the right to offset liens in this manner is statutory. Section 6145, Rev. Codes 1905, provides: "The sale of any property on which there is a lien in satisfaction of the claim secured thereby, or, in case of personal property its wrongful conversion by the person holding the lien extinguishes the lien thereon; provided, however, that in an action for the conversion of personal property the defendant may show in mitigation of damages the amount due on any lien to which the plaintiff's rights were subject, and which was held or paid

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by the defendant or any person under whom he claims." The right to set forth these liens in the answer is therefore an absolute right, in no way contingent upon showing the insolvency of the plaintiff. The statute also grants this right to offset liens once existing on the theory that the lien is extinguished by the conversion. Because the authorities sometimes speak of this right as based upon equitable principles or considerations, it should not be taken or understood as meaning that the defense is not available, unless the pleading complies with the rules of equity pleadings. Since the statute now permits such liens to be shown in mitigation of damages, it will serve no useful purpose to cite precedents which generally sustained this principle before the statute was enacted. It was the rule in this court before the statute was passed. Lovejoy v. Bank, 5 N. D. 623, 67 N. W. 956.

The order is reversed, and the cause remanded for further proceedings. All concur.

(116 N. W. 84.)

STATE EX REL. MCCUE, ATTY. GEN., v. NORTHERN PAC. RY. CO.

Opinion filed April 22, 1908.

Application by the state, on the relation of T. F. McCue, Attorney General, for writ of mandamus against the Northern Pacific Railway company.

Writ denied.

T. F. McCue, Attorney General in pro per.

C. W. Bunn and *Ball, Watson, Young & Hardy,* for defendant.

PER CURRIAM. Following the decision in State ex rel. McCue, Attorney General, v. Great Northern Ry. Co. (N. D.) 116 N. W. 89, just announced, the application for a writ of mandamus is denied.

(116 N. W. 92.)

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FIRST NATIONAL BANK OF KNOX, A CORPORATION, v. NILS O. BAKKEN, SEVERT BAKKEN AND MARTIN BAKKEN, CO-PARTNERS AS BAKKEN BROS.

Opinion filed March 18, 1908.

Rehearing denied April 21, 1908.

Principal and Agent — Question for Jury.

1. Action upon promissory note executed and delivered by defendants to the State Bank of K. The defense is that such bank acted as their agent in the collection of certain drafts drawn against consignments of grain, and in collecting balances due on such consignments, and that it had in its possession enough funds thus collected to liquidate the balance due on such note, and that defendants requested the application of said funds accordingly. Plaintiff bank, the successor of the State Bank of K., contends that one M., who was cashier, and not the bank, acted as such agent, and that no such funds came into the possession of said bank which were not accounted for. At the conclusion of the testimony the trial court directed a verdict in plaintiff's favor. *Held,* reversible error for the reason that the testimony tended to show that a sum in excess of the amount due on said note was received either by the bank or by M., individually, and not accounted for to defendants, and the evidence was sufficient to require a submission to the jury of the question whether the bank or whether M. acted as such agent.

Appeal — Directing a Verdict — Construing Testimony.

2. In reviewing a ruling of the trial court in directing a verdict, the testimony will be construed in its most favorable light towards the party against whom such ruling is made, and all reasonable and legitimate inferences which can be deduced in his favor will be deduced therefrom; and when thus considered, if it can be said that reasonable men may fairly differ in the conclusion to be reached thereon, such ruling will be held reversible error.

Banks and Banking — Acts Ultra Vires — Authority to Collect.

3. If the bank, through its cashier, M, acted as such agent for defendants, and received the benefit of the transaction, it was under a legal obligation to account to defendants for such funds, even though M exceeded his authority in thus acting; but it is held that the bank through its proper officers, had a right to act as such agent, and hence if it did so act, such acts were not ultra vires, and the corporation would be liable to defendants for all funds thus collected.

Appeal from District Court, Benson county; *Cowan,* J.

Action by the First National Bank of Knox against Nils O. Bakken and others. Judgment for plaintiff, and defendants appeal.

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Reversed and new trial ordered.

Siver Serumgaard and *Scott Rex,* for appellants.

When the evidence is such that reasonable men may differ in their conclusions from it, case must go to the jury. Pirie v. Gillitt, 2 N. D. 255, 50 N. W. 710; Vickery v. Burton, 6 N. D. 245, 69 N. W. 193; Warnken v. Merc. Co., 8 N. D. 243, 77 N. W. 1000; Pewonka v. Stewart, 13 N. D. 117, 99 N. W. 1080; Hall v. Nor. Pac. Ry. Co., 16 N. D. 60, 111 N. W. 609; Zink v. Lahart, 16 N. D. 56, 110 N. W. 931.

Bank may act as agent for collections. Rev. Codes 1905, section 4639; Knapp v. Saunders, 90 N. W. 137.

A bank having delegated functions to its cashier, receiving benefit from a transaction, cannot plead ultra vires. Section 5310, Rev. Codes 1905; 10 Cyc. 1066, 1156; Tourtelot v. Whithed, 9 N. D. 407, 84 N. W. 8; Dedrick v. Ormsby Co., 80 N. W. 153; Hunt v. Mtg. Co., 92 N. W. 23; First National Bank v. State Bank, 15 N. D. 594, 109 N. W. 61; Carpy v. Dowdell, 47 Pac. 695; Black Hills Bank v. Kellogg, 56 N. W. 1071; Sturdevant v. Bank, 87 N. W. 156; section 5764, Rev. Codes, 1905; 10 Cyc. 1078; Dowagiac Co. v. Hellekson, 100 N. W. 717.

Where one acts in a dual capacity, his legal responsibility is ordinarily a question for the jury. Knapp v. Saunders, 90 N. W. 137; N. E. Mtg. Co. v. Addison, 18 N. W. 76; Sherwood v. Home Sav. Bank, 109 N. W. 9; Cox v. Robinson, 82 Fed. 283; Nevada Bank v. Portland Bank, 59 Fed. 338; Armstrong v. Bank, 83 Fed. 569; Rich v. Nat. Bank, 29 Am. Rep. 384.

Burke & Middaugh, for respondent.

Bank is not responsible for money received by its cashier, which he was not authorized to receive, and of which it received no benefit. First National Bank v. Michigan City Bank, 8 N. D. 608, 80 N. W. 766; Pelton v. Spider Lake Saw Mill & Lumber Co., 112 N. W. 29; National Bank v. Armstrong, 152 U. S. 346.

FISK, J. Plaintiff recovered judgment in the court below pursuant to a verdict directed by the court. The suit is upon a promissory note executed and delivered by defendants to the State Bank of Knox. The plaintiff is the successor to said State Bank. The defense is that the payee bank came into possession of sufficient

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funds belonging to defendants to pay the balance due on said note, and that defendants requested such bank to apply said funds to the payment of the note. The funds aforesaid consisted of the proceeds of certain shipments of grain made by defendants, the latter contending that said bank acted as their agent in the collection of drafts drawn against such shipments, and in collecting the balances due thereon, while plaintiff's contention is that one Minkler, who was the cashier and the chief executive officer of the bank, acted as such agent in his individual capacity, and that the bank had no authority to act, and did not in fact act, as such agent. This was the principal controversy between the parties. At the conclusion of defendant's testimony the trial court granted plaintiff's motion for a directed verdict, and this ruling constitutes the principal assignment of error, and the only one which it is necessary for us to notice.

Was there sufficient evidence in support of such defense to require a submission of the case to the jury? In answering this question, the familiar rule must be invoked that the testimony will be construed in its most favorable light towards defendant, and all reasonable and legitimate inferences which can be deduced therefrom in their favor will be deduced, and when thus considered, if it can be said that reasonable men may fairly differ in the conclusion to be reached therefrom, it is error to take the case from the jury. Hall v. N. P. Ry. Co., 16 N. D. 60, 111 N. W. 609, and cases cited. When construed in the light of the above rule, we think the evidence is clearly sufficient to require its submission to the jury, and hence it was error to direct a verdict. The evidence showed, or reasonably tended to show, that appellants, who were farmers, with but meager business experience and education, desired to embark in the business of purchasing and shipping grain from Pleasant Lake in this state. There being no banking facilities at that place, and appellants being desirous of drawing drafts against each shipment, when billed by the common carrier, they called upon the Bank of Knox, at Knox, N. D., for the purpose of making such arrangements, where they found J. A. Minkler, its cashier and chief executive officer, in charge. They were unacquainted with Minkler at said time, but they there made arrangements with him by which they borrowed $1,000 from the bank, giving the note in suit, and also opened an account with such bank, and as a part of the same transaction it was agreed that,

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when each car was ready for shipment, appellants were to notify the bank or Minkler, and they were to attend to the billing of the cars and draw drafts upon the consigee or commission firm and look after the collection of the same and of the balances on such shipments, giving appellants credit therefor. Appellants from time to time drew checks against said account with which to purchase other grain and for other purposes. Defendants' testimony tended to show that a sum in excess of the balance due on said note was received either by the bank or by Minkler individually, and not credited or accounted for to appellant. The testimony discloses that most of the shipments were made in the name of Minkler individually as consignor, and drafts were drawn and remittances made accordingly, although there was no prior understanding that this should be done, and no knowledge on defendants' part that it was done until some time later; and defendants were not permitted to testify to their understanding as to whether they were dealing in these transactions, with Minkler personally, or with the bank through Minkler as its representative. The burden was upon the defendants to establish that these dealings were with the bank, and not with Minkler individually; and it was plaintiff's theory, no doubt, as well as the theory of the trial court, that defendants failed to prove or furnish any testimony reasonably tending to prove such fact. In this we are obliged to differ with them. Minkler was a stranger to the Bakkens, and it is reasonable to suppose that when they went to the bank they did so intending to deal with such bank, and not with Minkler. That they trusted or intended to trust the bank, not Minkler, with their money, is, we think, a fair inference which may be deduced from their testimony. We think the jury, under the evidence, would have been justified in finding that Minkler acted for the bank in all these transactions. If he did so act, and the bank received the benefit of the transaction, it is well settled that it would be under a legal duty to account to defendants, even though Minkler exceeded his authority in assuming, on behalf of the bank, to act as defendant's agent in such transactions. Aldrich v. Bank, 176 U. S. 618, 20 Sup. Ct. 498, 44 L. Ed. 611, and cases cited; Tourtelot v. Whithed, 9 N. D. 407, 84 N. W. 8; First National Bank v. State Bank, 15 N. D. 594, 109 N. W. 61; 10 Cyc. 1066-8, 1156, n. 36. If Minkler acted for the bank, the latter would be responsible for his acts, as the bank had an undoubted right to act as defendants'

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agent in the collection of the money due on such shipments. This is well settled. Knapp v. Sanders, 15 S. D. 464, 90 N. W. 137; Charles v. Carter, 96 Tenn. 617, 36 S. W. 396; Tyson v. State Bank, 6 Blackf. (Ind.) 225, 38 Am. Dec. 139; Paint Co. v. National Bank, 4 Utah, 353, 9 Pac. 709; Keyes v. Bank, 52 Mo. App. 323; Stoner v. Zacharay et al., 122 Iowa. 287, 97 N. W. 1098; Gulf, etc. Ry. Co. v. Grain Co., 32 Tex. Civ. App. 93, 74 S. W. 567; Hall v Keller, 64 Kan. 211, 67 Pac. 518, 62 L. R. A. 758, 91 Am. St. Rep. 209; 1 Morse on Banks and Banking (4th Ed.) section 52, and cases cited; 3 Am. & Eng. Enc. Law, 802; 5 Cyc. 493. The case of First National Bank v. Michigan City Bank, 8 N. D. 608, 80 N. W. 766, cited by respondent's counsel is not in point. That was a case where the cashier of defendant bank, without authority and before the bank had opened for business, borrowed certain money in the name of the bank, which he embezzled, the bank receiving no benefit from the unauthorized transaction. The decision cites and relies to a great extent upon Bank v. Armstrong, 152 U. S. 346, 14 Sup. Ct. 572, 38 L. Ed. 470, but that distinguished tribunal in the later case of Aldrich v. Bank, supra, in effect, very materially modified its holding in Bank v. Armstrong. We are not required in the case at bar to consider the question of the liability of a bank under a state af facts similar to those involved in First National Bank v. Michigan City Bank, supra, and hence refrain from so doing. What we hold is that, under the facts of this case, it was for the jury to say whether the defendants dealt with Minkler individually or with Minkler as the bank's representative. This holding finds support in the following cases: Kraninger v. Bldg. Soc., 60 Minn. 94, 96, 61 N. W. 904; Sherwood v. Bank, 131 Iowa, 528, 109 N. W. 9; Cox v. Robinson, 82 Fed. 283, 27 C. C. A. 120; Knapp v. Saunders, 15 S. D. 464, 90 N. W. 137; N. E. Mtg. Security Co. v. Addison, 15 Neb. 335, 18 N. W. 76; Nevada Bank v. Portland Bank (C. C.) 59 Fed. 338; Rich v. Bank, 7 Neb. 206, 29 Am. Rep. 384.

The other assignments of error relate to rulings on the admission and rejection of testimony, and these questions will probably not arise upon another trial. Hence we deem it unnecessary to notice them.

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

(116 N. W. 92.)

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MOLLIE L. ABER v. T. TWICHELL.

Opinion filed April 2, 1908.

Wrongful Attachment — Property of Third Person — Notice — Indemnity to Sheriff.

1. The giving of the notice prescribed by section 6951, Rev. Codes 1905, is not necessary in cases where a sheriff attaches and sells property in the possession of and owned by a third person not named in the writ.

Same — Notice of Claim — Waiver.

2. The demand for and acceptance of an indemnity bond pursuant to a notice of claim to the property attached is a waiver of any defects in the notice.

Trial — Motion for Directed Verdict by Both Parties.

3. Where both parties make motions for a directed verdict, they are deemed to consent to a decision by the court of all questions as questions of law.

Evidence — Bill of Sale.

4. Evidence reviewed, and *held* to show a delivery of a bill of sale in accordance with the intention of the grantor.

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

Action by Mollie L. Aber against T. Twichell, sheriff. Judgment for plaintiff, and defendant appeals.

Affirmed.

Turner & Wright, for appellant.

Bill of sale to have effect must be delivered. Rev. Codes 1905, section 4957; McMain v. Comonow, 10 N. D. 340, 87 N. W. 8; Triber v. Beckwith, 30 Wis. 55, 11 Am. Rep. 546; Munroe v. Bowles, 54 L. R. A. 865.

The object of section 6951, Rev. Codes 1905, is the protection of the sheriff. Bradley v. Miller, 69 N. W. 426; Edson v. Newell, 14 Minn. 228 (Gil. 167); Barry v. McGrade, 14 Min. 163.

Under an allegation of performance of a condition, evidence of waiver is inadmissible. Murray v. Thiessen, 87 N. W. 672; Taylor v. Seymour, 6 Cal. 512.

Barnett & Richardson and *J. W. Tilly,* for respondent.

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Section 6951, Rev. Codes 1905, is to enable the sheriff to procure statutory indemnity. Granning v. Swenson, 52 N. W. 30; Wood v. Matter, 92 N. W. 523.

If the notice enables the sheriff to procure indemnity, it is sufficient. Ledley v. Hays, 1 Cal. 160; Boulware v. Craddock, 30 Cal. 190; Wellman v. English, 38 Cal. 583; Kellogg v. Burr. 58 Pac. 306.

Intent of the grantor to divest himself of title is the test of delivery. 9 Am. & Eng. Enc. Law (2d Ed.) 154.

A properly executed instrument in possession of grantee is proof of delivery. 9 Enc. Law (2d Ed.) 1591.

Intent of parties to a sale and delivery is determined by their acts and surrounding circumstances. Gibbons v. Robinson, 29 N. W. 533; Ramsey & Gore Mfg. Co. v. Kelsea, 22 L. R. A. 415; Welch v. Spies, 72 N. W. 548; Chezum v. Parker, 54 Pac. 22.

MORGAN, C. J. The defendant, as sheriff, levied writs of attachment upon property claimed by the plaintiff as owner. The writs were levied in actions brought by the Bristol & Sweet Company and the Dowaigac Manufacturing Company against plaintiff's husband on an indebtedness due from him to said parties. This action is brought to recover damages by reason of the taking of what is claimed to be her property. A jury was impaneled, and at the close of the testimony, the trial court directed a verdict for the plaintiff on all questions, except as to the value of the property taken by each of such creditors. The defendant has appealed from the judgment entered in plaintiff's favor on the verdict.

The facts developed at the trial are substantially the following: The plaintiff claims to be the owner of the attached property by virtue of a bill of sale from her husband. He had been engaged in the harness and saddlery business in Fargo for several years prior to making said bill of sale to the plaintiff. On about August 15 or 16, 1904, the husband disappeared from Fargo, and had not returned when the trial was had. Just immediately prior to his disappearance he executed a bill of sale of his stock of goods to the plaintiff, and said bill of sale was delivered to her on the morning of August 16th by one Pearson, who had been an employe in the store. Neither Aber nor Pearson was a witness at the trial. The plaintiff had no knowledge of the execution of the bill of sale un-

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til it was delivered to her. The husband was indebted to the plaintiff in the sum of about $1,500, money loaned by her to him to be used in the business. No fixed time was agreed on between them when it was to be paid back. She says it was to be repaid when the business would warrant or justify it. The consideration named in the bill of sale is $1,500. No understanding existed between her and Aber that she was to have a bill of sale executed to her, nor had she and her husband had any conversation on that subject. On the morning following Aber's disappearance, Pearson called at his home and informed Mrs. Aber that her husband had left town, and asked her to come to the store. She immediately went to the store, and, upon her arrival, Pearson handed her a sealed envelope, addressed to her, and in this envelope was the bill of sale. The envelope was in the safe just before Pearson handed it to the plaintiff. There is no direct evidence when the bill of sale was placed in the safe nor by whom, nor whether Pearson had ever seen or had it in his hands or custody before. The bill of sale was dated on August 15th. There is no direct evidence as to how the bill of sale came into Pearson's hands.

The defendant claims that the judgment should be reversed upon the following grounds: (1) That no delivery of the bill of sale to this plaintiff by the grantor therein is shown. (2) That the notice prescribed by section 6951, Rev. Codes 1905, was not served. (3) That it was prejudicially erroneous to admit in evidence the indemnity bond given by the attachment creditors to the sheriff.

Upon the first question, it seems evident that Pearson knew that the bill of sale was in the safe before plaintiff came to the store. From the circumstances under which he took it from the safe, it is a fair inference that he went to the safe for the purpose of handing the envelope to her, and that the finding of it in the safe at that time was not accidental. Appellant also claims that there is no proof that the bill of sale was delivered to Pearson for the purpose of delivery to this plaintiff. We think the circumstances warrant the conclusion that Aber delivered the bill of sale to Pearson, to be by him delivered to her. The evidence is undisputed that Aber was indebted to his wife, and that he executed the bill of sale just before his disappearance. Pearson knew that he had disappeared, and deemed it necessary that she should come to the store. Pearson had been the only person employed by Aber during

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the preceding months. He was the only person, so far as the record shows, who was aware of Aber's disappearance. From these admitted facts, we think the inference a reasonable one that Aber delivered the bill of sale to Pearson with instructions to deliver it to his wife. Delivery of an instrument may be inferred from acts and circumstances. If there was an intention to deliver and a delivery followed by taking possession under the instrument, the title passes. 9 Am. & Eng. Enc. Law, p. 154, and cases cited. When the attachment writs were delivered, plaintiff was in actual possession of the store, and had been conducting the business personally for about two weeks.

It was claimed on the oral argument that the question whether there was a delivery of the bill of sale should have been submitted to the jury, and that it was error for the court to take that question from the jury. Both parties moved for a directed verdict, and both motions were before the court when the court granted plaintitff's motion. Under prior adjudications of this court in parallel cases, both parties waived the right to have any question submitted to the jury after the making of such motions, and are conclusively deemed to have consented that all questions should be decided by the court. Appellant attacks these prior decisions as not based on any sound principle of law or procedure. In this case the ruling is not assigned as error, and the matter was in no way called to the attention of the trial court. For this reason we shall not review these prior decisions in this case.

It is further contended that the plaintiff cannot in any event recover in this case, for the reason of failure to comply with the provisions of section 6951, Rev. Codes 1905, which reads as follows: "If any property levied upon by the sheriff by virtue of a warrant of attachment is claimed by any other person than the defendant and such person, his agent or attorney, makes affidavit of his title thereto or right to the possession thereof, stating the value thereof and the ground of such title or right, the sheriff may release such levy, unless the plaintiff on demand indemnifies the sheriff against such claim by an undertaking executed by a sufficient surety; and no claim to such property by any other person than the defendant shall be valid against the sheriff, unless so made; and notwithstanding such claim, when so made he may retain such property under levy a reasonable time to demand such indemnity." The notice was not verified. It stated the basis of plaintiff's title

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to the property and right to its possession to be that she is the owner and had the legal title and possession thereof when attached by the sheriff. It was served on the sheriff. The complaint stated generally the giving of the notice to the sheriff that the property attached by him was owned by her and that the same "was wrongfully and unlawfully attached by him," and demanded a return thereof to her. The section of the Code given above is similar in all respects to the Minnesota statute on the same subject. From an early time in that state it has been held that the section has no application to cases of tortious taking, and that it does not apply to cases where the property is taken from the actual possession of a person other than the defendant in the attachment suit, and the property is owned by him. It is also held in that state that the section was enacted for the benefit of the sheriff, in order that in case of a claim by other parties he might demand from the attaching plaintiff indemnity in case the claim by a third person should be held valid. The decisions in that state are to the effect that, when a sheriff attaches property not in the possession of the judgment debtor named in the writ and owned by that person, he is a trespasser, and that no demand whatever is necessary. When the sheriff takes property from the possession of one not named in the writ, no notice is required, as the possession is sufficient notice to put him upon inquiry as to the rights to the property of the person in possession. Construing the section with a view to giving effect to the object intended to be gained by its enactment, we are satisfied that it was not intended to apply to cases where the property was taken from the possession of a person other than the one named in the writ and owned by him. In the Minnesota cases cited below this construction of a similar statute has been adhered to since the enactment of the statute. The following are a few of the cases giving a construction to Code provisions of like import and bearing upon the necessity of such notice and the waiver of giving it: Ledley v. Hays, 1 Cal. 160; Kellogg v. Burr, 126 Cal. 38, 58 Pac. 306; Padden v. Goldbaum (Cal.), 37 Pac. 759; Fuller Desk Co. v. McDade, 113 Cal. 360, 45 Pac. 694; Brenot v. Robinson, 108 Cal. 143, 41 Pac. 37; Moore v. Murdock, 26 Cal. 515; Richey v. Haley, 138 Cal. 441, 71 Pac. 499; Whitney v. Gammon, 103 Iowa, 363, 72 N. W. 551; Mitchell v. McLeod, 127 Iowa, 733, 104 N. W. 349; Barry v. McGrade, 14 Minn. 163 (Gil. 126); Butler v White, 25 Minn. 432; Lampson v. Brander, 28

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Minn. 526, 11 N. W. 94; Ohlson v. Manderfeld, 28 Minn. 390, 10 N. W. 418; Granning v. Swenson, 49 Minn. 381, 52 N. W. 30; Carpenter v. Bodkin, 36 Minn. 183, 30 N. W. 453; Hazeltine v. Swensen, 38 Minn. 424, 38 N. W. 110; Schneider v. Anderson, 77 Minn. 124, 79 N. W. 603; Heberling v. Jaggar, 47 Minn. 70, 49 N. W. 396, 28 Am. St. Rep. 331; Wood v. Matter, 88 Minn. 123, 92 N. W. 523.

Conceding, however, that the section is applicable in cases where the taking is tortious and from the possession of the owner who is not a party named in the writ, still the direction of a verdict was proper in this case. The sheriff made no objections to the defects in the notice, and acted upon the notice by demanding an indemnity undertaking from the attaching plaintiffs. He availed himself of the protection intended to be given him by the enactment of the law, and can claim no injury by reason of the defects in the notice. The cases cited fully sustain the principle that even substantial defects in the notice are waived when the sheriff receives indemnity pursuant to the notice. This principle is not seriously combated by the appellant. His contention in reference thereto is that the waiver was not pleaded in the complaint, and cites Murray v. Thiessen, 114 Iowa, 657, 87 N. W. 672, as sustaining his contention. In Mitchell v. McLeod, supra, a contrary doctrine seems to be upheld in Iowa. Whether that is necessary in this state we do not determine, as the appellant made no sufficient objection to the introduction in evidence of the indemnity bond or the notice based on or covering that ground. The objection that was made was a general objection only. The objection, therefore, cannot be raised for the first time in this court. There was no error in admitting the indemnity bond in evidence under the circumstances.

No other question of pleading is raised by either party in this court, nor is the constitutionality of the statute raised. We do not mention these questions which have been raised in some cases, as our decision in this case would not be affected, even if such contentions were sustained.

The judgment is affirmed. All concur.

(116 N. W. 95.)

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G. C. HEBDEN v. MATJ. BINA.

Opinion filed April 3, 1908.

Quieting Title — Adverse Claims — Plaintiff Must Establish Title as Alleged.

1. In an action to determine adverse claims to real property, it is incumbent upon plaintiff to establish his title to the property as alleged by him. This the plaintiff failed to do, and the action was therefore properly dismissed.

Mortgages — Foreclosure by Advertisement — Title of Person Foreclosing.

2. A foreclosure by advertisement of a mortgage on real property is of no validity where the person in whose name the same is foreclosed has not the legal title to the mortgage at the date of such foreclosure.

Same — Sufficient Description of Mortgage Assigned.

3. An assignment of a real estate mortgage, which merely describes the instrument as "the mortgage executed by Matj Bina and his wife to the Bank of Minot, and recorded in Book F of Mortgages on pages 556-558 in the office of the register of deeds of the county of Walsh," is too indefinite in description to vest in the assignee the legal title so as to authorize such assignee to foreclose by advertisement a mortgage executed by B. alone to such bank, and which was recorded in Book 15 of mortgages. Especially is this true when the proof shows that two mortgages were executed by B. to said bank on the same day and both were recorded in Book 15 of Mortgages, and the proof fails to show that there was no mortgage corresponding to the description contained in such assignment.

Quieting Title — Evidence — Possession a Proof of Title.

4. Evidence examined, and *held* insufficient to show possession of the real property in plaintiff prior to the commencement of the action, and hence the prima facie presumption of title resulting from possession does not apply in plaintiff's behalf.

Landlord and Tenant — Denial of Landlord's Title — Estoppel.

5. The doctrine of estoppel cannot be invoked to prevent defendant from questioning plaintiff's title, first, because the evidence fails to show that defendant was plaintiff's tenant of the land; and, second, even if such tenancy existed, defendant would not be thus estopped in an action like this, where plaintiff claims title in fee.

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

Action by G. C. Hebden against Matj. Bina. Judgment for defendant, and plaintiff appeals.

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Affirmed.

Scott Rex, for appellant.

An assignment is sufficient that charges persons with knowledge that the mortgage is assigned. Viele v. Judson, 82 N. Y. 32.

Government receiver's receipt vests beneficial interest. Bowne v. Walcott, 1 N. D. 415, 48 N. W. 336.

Law presumes legal title from possession. 28 Am. & Eng. Enc. Law, 233; Herrick v. Churchill, 29 N. W. 129; Dever v. Cornwell, 10 N. D. 123, 86 N. W. 227; Stuart v. Lowry, 51 N. W. 662; Hannah v. Chase. 4 N. D. 351, 61 N. W. 18.

Principal's interest in contract of agent may be shown by parol testimony. Jones Ev., section 457; Northern Bank v. Lewis, 47 N. W. 834; Gilmore v. Roberts, 48 N. W. 522; 21 Am. & Eng. Enc. Law, 1087; 1 Am. & Eng. Enc. Law, 1054; 4 Am. & Eng. Enc. Law, 197; Dickinson v. Burke, 8 N. D. 118, 77 N. W. 279.

Tenant cannot deny landlord's title. Rev. Codes 1905, section 7316, subdivision 4.

In statutory action to determine adverse claims a general denial raises no issue. Shattuck v. Smith, 6 N. D. 56, 69 N. W. 5; Donohue v. Ladd, 17 N. W. 381; Wall v. Magnes, 30 Pac. 56; Weston v. Estey, 45 Pac. 367.

Frich & Kelly, and *Bangs, Cooley & Hamilton,* for respondent.

A person to foreclose by advertisement must be owner and holder of the record title, and the notice must be signed by him. Morris v. McKnight, 1 N. D. 266, 47 N. W. 375; Backus v. Burke, 51 N. W. 284; Lowry v. Mayo, 43 N. W. 78; Burke v. Backus, 53 N. W. 458; Dunning v. McDonald, 55 N. W. 864; Clarke v. Mitchell, 84 N. W. 327; Thorpe v. Merrill, 21 Minn. 336; Ross v. Worthington, 11 Minn. 323; Johnson v. Sandhoff, 14 N. W. 889; Martin v. Bovey, 16 N. W. 449; Van Meter v. Knight, 20 N. W. 142; Benson v. Markoe, 42 N. W. 787; Hickey v. Richards, 20 N. W. 428; Langmaack v. Keith, 103 N. W. 210.

Addition of "agent" after signature is *descriptio personae.* Bingham v. Stewart, 13 Minn. 96; Pratt v. Beoupre, 13 Minn. 177; Deering v. Thom, 12 N. W. 350.

In actions to determine adverse claims, general denial puts in issue a fact necessary to plaintiff's recovery. Pennie v. Hildreth,

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22 Pac. 398; Adams v. Crawford, 48 Pac. 488; United Land Ass'n. v. Pacific Imp. Co., 69 Pac. 1064; Donohue v. Stearns, 17 N. W. 381; Wheeler v. Winnebago Paper Mills, 64 N. W. 920; Perkins v. Morse, 30 Minn. 11; Herick v. Churchill, 29 N. W. 129; Jellison v. Halloran, 42 N. W. 392.

Plaintiff must recover upon title pleaded. McClory v. Ricks, 11 N. D. 38, 88 N. W. 1043; Dever v. Conwell, 10 N. D. 123, 86 N. W. 227; Deering v. Merrill, 49 N. W. 693; Stuart v. Lowry, 51 N. W. 662; McArthur v. Clark, 90 N. W. 369.

Entryman on government land before issuance of patent has an equitable title only. Bowne v. Wolcott, 1 N. D. 415, 48 N. W. 336; Von Toneren v. Hefferman, 5 Dak. 180, 38 N. W. 52; Gould v. Tucker, 100 N. W. 427; Gould v. Tucker, 105 N. W. 624; Tegarden v. LaMarchel, 129 Fed. 487; Peyton v. Desmond, 129 Fed. 1; Healy v. Forman, 105 N. W. 233.

Fisk, J. This is the statutory action to determine adverse claims to real property. The complaint is in the usual form, alleging plaintiff's ownership in fee of the property in question, and that defendant claims a certain estate or interest therein adversely to plaintiff, and containing the usual prayer for relief. The defendant, Bina, answered, denying plaintiff's title, but admitting that he claims an estate or interest in the property as alleged, without setting out the nature or source of such adverse interest, and he prayed merely for a dismissal of the action with costs. For the purpose of proving title plaintiff introduced in evidence the record of a receiver's receipt, issued for the property by the United States to defendant, dated August 27, 1890; also the record of a mortgage from defendant, Bina, to the Bank of Minot, dated September 4, 1890; also the record of a mortgage from defendant, Bina, to the Bank of Minot, dated September 4, 1890, as recorded in Book 15 of Mortgagees, at page 556, together with the record of an assignment by the Bank of Minot to one Nelson of a mortgage claimed to be the mortgage aforesaid, but which describes the same as "the mortgage executed by Matj Bina and his wife to the said Bank of Minot, and recorded in Book F of Mortgages on pages 556-558 in the office of the register of deeds of the county of Walsh, state of North Dakota." Then followed record proof of foreclosure proceedings by advertisement of the mortgage aforesaid, culminating in the issuance to said Nelson of a sheriff's deed; also the

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record proof of a warranty deed of the pemises from Nelson to plaintiff. No question is raised as to the regularity of such foreclosure proceedings, provided the assignment of the mortgage to Nelson was sufficient to authorize him to foreclose such mortgage by advertisement; it being respondent's contention that such assignment was insufficient for this purpose, and hence that the foreclosure proceedings are void. It is appellant's contention that such proof was sufficient to show title in him as alleged, but, even if this is not true, that he sufficiently proved title by showing possession of the premises from which possession his title is presumed, and also that defendant is estopped to assert title as against him on account of the contract relations between them of landlord and tenant arising through certain written leases offered in evidence. Appellant also contends that defendant's answer is insufficient to raise any issue, because it fails to set forth defendant's adverse claim to the property, and contains merely a denial of plaintiff's title. The trial court held plaintiff's proof insufficient to show title as alleged, and entered judgment dismissing the action without prejudice, from which judgment this appeal is prosecuted.

These questions will be disposed of in the order presented in appellant's brief. Was plaintiff's proof of title, based upon the foreclosure proceedings, sufficient? In answering this question we shall assume (without deciding) that if the plaintiff, through the warranty deed from Nelson to him and the foreclosure proceedings under the mortgage, acquired all of defendant's interest in the property under the receiver's receipt, he is entitled to maintain this action. We are therefore required to determine, first, whether the assignment of the mortgage to Nelson conferred upon him the legal title to the mortgage, so as to authorize him to foreclose the same by advertisement; second, if this is answered in the negative, then whether there is any other sufficient proof of plaintiff's title; third, whether defendant is estopped by reason of the leases which were introduced in evidence from questioning plaintiff's title; and, lastly, whether the defendant's answer, which embraces merely a denial, is sufficient to raise an issue as to plaintiff's title. We are agreed that each of these questions must be answered in respondent's favor, and we will briefly give our reasons for so holding.

1. The assignment of the mortgage was insufficient to authorize Nelson, the assignee, to foreclose by advertisement, for the reason

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that such assignment did not operate to vest in such assignee the legal title to the mortgage. The assignment did not describe the mortgage with sufficient definiteness. It described it as a mortgage executed and delivered by Matj Bina and wife, and recorded in Book F of Mortgages, while the mortgage foreclosed was executed and delivered by Matj Bina, and was recorded in Book 15 of Mortgages. The proof shows that there were two mortgages executed and delivered by Bina to the Bank of Minot and recorded in Book 15. If we assume, as contended by appellant, that the intention was to assign the mortgage which was foreclosed, and which was a mortgage executed by Matj Bina alone, and which was recorded in Book 15, instead of Book F, we are confronted with the fact that the record of such assignment fails to impart such information to the public. From an inspection of the record of such assignment it is impossible to say with any degree of certainty that the mortgage assigned was intended to be the same mortgage which was foreclosed. Our statute (section 7457, Rev. Codes 1905) provides: "To entitle a party to make such foreclosure [by advertisement] it shall be requisite: * * * Subd. 3. That the mortgage containing such power of sale has been duly recorded, and if it shall have been assigned, that all the assignments thereof have been duly recorded." A similar statutory provision is in force in our sister states of Minnesota and South Dakota, and these statutes have been repeatedly construed, both in this state and in the state aforesaid, to mean that before a person can foreclose a mortgage by advertisement he must be the owner and holder of the record title of the mortgage. Morris v. McKnight, 1 N. D. 266, 47 N. W. 375; Brown v. Comonow (N. D.) 114 N. W. 728; Backus v. Burke, 48 Minn. 260, 51 N. W. 284; Lowry v. Mayo, 41 Minn. 388, 43 N. W. 78; Burke v. Backus, 51 Minn. 174, 53 N. W. 458; Dunning v. McDonald, 54 Minn. 1, 55 N. W. 864; Clarke v. Mitchell, 81 Minn. 438, 84 N. W. 327; Thorpe v. Merrill, 21 Minn. 336; Ross v. Worthington, 11 Minn. 438 (Gil. 323), 83 Am. Dec. 95; Johnson v. Sandhoff, 30 Minn. 197, 14 N. W. 889; Martin v. Baldwin, 30 Minn. 537, 16 N. W. 449; Van Meter v. Knight, 32 Minn. 205, 20 N. W. 142; Benson v. Markoe, 41 Minn. 112, 42 N. W. 787; Hickey v. Richards, 3 Dak. 345, 20 N. W. 428; Langmaack v. Keith, 19 S. D. 351, 103 N. W. 210. In Morris v. McKnight, supra, it was said: "From the adjudicated cases and the wording of the statute we conclude that, when a

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party seeks to foreclose his mortgage in this state by advertisement, claiming such right as assignee, the record must show complete legal title to such mortgage in such assignee. Otherwise such foreclosure will be a nullity." And quoting with approval from a Minnesota case the court further said: "The statute authorizing this method of foreclosure evidently designs that there shall be of record a legal mortgage, and that the record shall be so complete as to satisfactorily show the right of the mortgagee or his assignee to invoke its aid." In Morrison v. Mendenhall, 18 Minn. 232 (Gil. 212), it was held, construing a similar statute, that: "The manifest purpose of this requirement of the statute was to make the contents of the mortgage, and, as far as the statute goes, to make the title of the mortgage, a matter of record; and, as it was for such purposes, it follows that they must be in writing. A mere equitable or parol assignment would not answer." Appellant's counsel says in his brief that Morris v. McKnight, has been expressly departed from in McCardia v. Billings, 10 N. D. 373, 87 N. W. 1008, 88 Am. St. Rep. 729, in so far as it follows the doctrine of the early Minnesota decisions which lay down the rule of strict and literal compliance with the statute in mortgage foreclosures by advertisement. Counsel is in error in assuming that any such rule was announced or followed in the Morris-McKnight case, as an examination of the opinion in that case will disclose. Not having the legal title to the mortgage, Nelson could not foreclose the same by advertisement, and hence the sheriff's deed to him was a mere nullity, and plaintiff therefore acquired no title through the warranty deed from Nelson. This sufficiently disposes of appellant's first contention.

But appellant contends that respondent is estopped by his laches from questioning the validity of the foreclosure, and in support of his contention he confidently relies upon the decision of this court in Higbee v. Daeley, 15 N. D. 339, 109 N. W. 318. It was there held that a foreclosure by advertisement, made in the name of the mortgagee by the assignee, whose assignment was unrecorded, is voidable merely, and not a nullity. It was also held under the facts in that case that a party desiring to have such foreclosure adjudged void is guilty of laches if he neglects to assert his rights promptly upon discovering the facts, and for such reason is estopped from asserting title as against third persons, who, in good faith, have purchased what upon its face appeared to be a perfectly good title to

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the land, and who, in reliance thereon, have gone into possession and made valuable improvements thereon. The facts in the case at bar widely differ from those in the case last referred to. In the case at bar the record upon its face discloses an irregular or void foreclosure. In other words, it discloses a foreclosure in the name of one Nelson, and it fails to disclose any ownership in him of the mortgage foreclosed. The plaintiff is in a court of equity, asking affirmative relief, based upon an alleged title acquired through such foreclosure proceedings, and he cannot be considered a good faith purchaser, as he took his deed necessarily with full knowledge of such irregular foreclosure as disclosed by the public records. On the other hand, in Higbee v. Daeley, the defendant was the person asserting title under the foreclosure which, as before stated, was in all things regular upon its face. He had a right to invoke the doctrine of estoppel as a defense, while in the case at bar the plaintiff, who is required to establish a legal title, is seeking to do so by urging defendant's laches in failing to affirmatively attack such foreclosure proceedings. Defendant was not obliged to act in order to protect his rights, but could wait, as he in fact did, until his title was attacked by plaintiff.

It is next contended that plaintiff proved possession of the land prior to the commencement of the action, and that this was sufficient proof of title, for the reason that the law presumes title from possession, in the absence of other proof. The difficulty in the way of giving force to this contention is the fact that plaintiff wholly failed to show such possession. Plaintiff sought to show such possession by the introduction in evidence of certain written leases of the premises signed by the defendant, being three in number, covering the period from November 1, 1898, to September 1, 1903. The first two relate to the time prior to October 18, 1902. These were objected to upon the ground that no proper foundation for their introduction had been laid by proof of their execution. We think this objection was well taken, and hence they cannot be considered. The third lease upon its face recites that it was made by Bina as party of the first part and one "Thomas J. Baird, owner of the real estate" described, as party of the second part, and it was signed by said persons individually. Plaintiff offered certain testimony tending to show, however, that Baird was acting as plaintiff's agent in making these leases, but he failed in proving such fact by competent testimony. Plaintiff's only proof of such fact consists of

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the testimony of the witness Frazer, as follows: "Q. Mr. Frazer, I notice that in Exhibit B Mr. Baird, the lessor, is named as agent, and that he appears as lessor in Exhibits A and C. State whether or not, so far as you know, Mr. Baird was acting in this matter as representing Mr. Hebden, the plaintiff in this suit." This question was objected to as "immaterial, irrelevant, calling for a conclusion of the witness," and upon other grounds, after which the witness answered: "He was acting as representing Mr. Hebden." This testimony falls far short of proving such fact. There was no proof that the witness possessed any personal knowledge regarding the fact sought to be established, and the question did not call for an answer based upon any such knowledge. All this testimony amounted to, at the most, was to show that the witness had no knowledge that Baird was acting for any one other than Hebden in signing the leases. It did not amount to a statement that he was, as a matter of fact, acting for Hebden. We conclude, therefore, that plaintiff wholly failed in any respect to prove title to the property as alleged.

Appellant's third contention to the effect that defendant is estopped to question plaintiff's title is based upon the theory that the relation of landlord and tenant existed between the parties through the leases aforesaid. This contention is sufficiently answered by what we have just stated regarding plaintiff's failure to prove any such relation. The proof, at the most, discloses that Bina was the tenant of Baird, and not Hebden. But, conceding that appellant succeeded in establishing that defendant was holding merely as his tenant, it is well settled that a tenant is not estopped to deny his landlord's title in an action such as this, but he is thus estopped merely in actions arising out of the relation of landlord and tenant. 18 Am. & Eng. Enc. Law, 419-421; 24 Cyc. 942, and cases cited; Jochem v. Tibbells, 50 Mich. 33, 14 N. W. 690; Shaw v. Hill, 83 Mich. 322, 47 N. W. 247. 21 Am. St. Rep. 607; Kuefel v. Daly, 91 Ill. App. 321; Young v. Severy, 5 Okl. 630, 49 Pac. 1024; McKie v. Anderson, 78 Tex. 207, 14 S. W. 576; Van Winkle v. Hinckle, 21 Cal. 342; Franklin v. Merida, 35 Cal. 558, 95 Am. Dec. 129.

Lastly it is contended by appellant's counsel that defendant's answer, which in effect contains a bare denial of plaintiff's alleged title, is insufficient to raise an issue, and therefore the trial court erred in denying his motion to strike the same out. This contention

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is based upon the language of section 7526, Rev. Codes 1905, as follows: "In an action to determine adverse claims a defendant in his answer may deny that the plaintiff has the estate, interest, lien or incumbrance alleged in the complaint, coupled with allegations setting forth fully and particularly the origin, nature and extent of his own claim to the property; * * * or he may likewise set forth his right in the property as a counterclaim," etc. We are clear that this contention is erroneous. It is an unwarranted construction of this statute to say that the legislature intended thereby to resrict defendant's answer in such cases to such denials only as are coupled with allegations setting forth the origin, nature and extent of his own claim to the property. This court in Larson v. Christianson, 14 N. D. 476, 106 N. W. 51, in effect held contrary to such contention, and we think the clear weight of authority is in accordance with the rule there announced. See Pennie v. Hildreth, 81 Cal. 127, 22 Pac. 398; Adams v. Crawford, 116 Cal. 495, 48 Pac. 488; United Land Ass'n v. Improvement Co., 139 Cal. 374, 69 Pac. 1064, 72 Pac. 988; Reed v. Murry, 95 Cal. 48, 24 Pac. 841, 30 Pac. 132; Wheeler v. Paper Mills, 62 Minn. 429, 64 N. W. 920.

It follows from the views herein expressed that the judgment appealed from was correct, and must therefore be affirmed, and it is so ordered. All concur.

(116 N. W. 85.)

S. A. Pratt v. T. L. Beiseker.

Opinion filed March 21, 1908.

Mortgage Foreclosure — Validity.

1. A foreclosure of a mortgage by advertisement before there is any sum due thereon is void.

Same — Evidence — Amount Not Due.

2. Evidence considered and reviewed, and *held* to show that nothing was due on the note or mortgage securing the same when the foreclosure was made.

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

Action by S. A. Pratt against T. L. Beiseker, judgment for plaintiff, and defendant appeals. Affirmed.

Burke & Middaugh and Bessessen & Berry, for appellant.

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John O. Hanchett, for respondent.

MORGAN, C. J. This is an action to determine adverse claims to 160 acres of land situated in Pierce county. Both parties claim title to the land through one Van Gundy, who derived his title thereto from the United States under the homestead laws. The plaintiff claims his title under a deed from said Van Gundy, and defendant claims his title under a deed from one Mitchell, who bid in the land at a foreclosure sale by advertisement of a mortgage given by said Van Gundy to said Mitchell, who received a sheriff's deed of the land after the year for a redemption from the sale had expired. The mortgage was executed and delivered on August 31, 1900, and the sale under the foreclosure was made on April 14, 1903. Mitchell conveyed the land by quitclaim deed to the defendant Beiseker on June 10, 1904. The deed to plaintiff from Van Gundy was executed and delivered on December 28, 1901. The price paid by the plaintiff was the sum of $1,400, and the deed was given subject to the mortgages hereafter to be mentioned. The plaintiff has been in possession of the land since his purchase thereof from Van Gundy, and has farmed it each year. The ownership of the land depends upon the validity of the foreclosure of the Mitchell mortgage. That foreclosure is attacked by the plaintiff, who claims that it is void. The facts in relation to the giving and foreclosure of the mortgage are the following: In the summer of 1900 Van Gundy applied to the German State Bank of Harvey for a loan of $500 upon the land in question. The defendant Beiseker is the president of said bank. The application for the loan was accepted, and mortgages were thereafter executed to secure said sum and interest. Two mortgages were given—one to the defendant Beiseker and his partner Davidson for $500 and the other to the defendant Mitchell for $200, the former to become due in 10 years from date. The $500 mortgage and the notes secured by it drew interest at 8 per cent. per annum, and the $200 note and mortgage were given for the aggregate interest on the $500 loan for 10 years at 4 per cent. per annum. The mortgagor was therefore paying 12 per cent. interest on the $500 loan. It is clearly proven that no consideration whatever was paid by Mitchell to Van Gundy on the $200 notes and mortgage, and that they represented what was in reality the difference between 12 per cent and 8 per cent during the term of 10 years, and it was taken as a commission mortgage. The $200 mortgage secured three notes—one for $100, due November

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1, 1901; one for $50, due November 1, 1905; and one for $50, due November 1, 1906. These notes were to draw interest at 12 per cent. per annum after maturity. The foreclosure was made on the theory that there was a default in the payment of the $100 note. The notice of foreclosure stated the sum due on the mortgage to be $217.40, representing the principal sum named in the mortgage, and 12 per cent. interest on the $100 note after its maturity. The mortgage provided that in case of default in the payment of any one of these notes the mortgagor had the option to declare the whole sum due, which was done in this case. Whether the foreclosure had any validity, therefore, depends on a question of fact, and that question is, was there a default in the payment of the $100 note on November 1, 1901, when it fell due? The plaintiff claims that the note was paid by the mortgagor in December, 1901, when he settled with the mortgagees and agreed upon the sum to be paid him on the $500 mortgage. The mortgagees had made advancements to the mortgagor between the day when the mortgages were given and the day of settlement in December. The mortgagor testifies on behalf of the plaintiff that the mortgagees were unable or unwilling to pay him the amount due him, and agreed that the $100 commission note would be deemed paid by reason of not paying the amount due after allowing for all advancements. According to the mortgagor's testimony, he had great difficulty in getting any cash out of the loan, and was finally compelled to consent that $100 of the amount due him be applied in payment of the first commission or interest mortgage. The defendants strenuously deny that any such arrangement was made, and insist that the full amount due the mortgagor was paid to him after deducting all advance payments. The evidence is therefore conflicting on the issue whether there was anything due on the $200 mortgage when the foreclosure was begun. On that issue the trial court made the following finding: "That the $100 note secured by the said Mitchell mortgage which fell due November 1, 1901, was paid by the said David E. Van Gundy in the month of December, 1901, at the time he procured a settlement of the proceeds of his $500 loan."

We think this finding amply sustained by the evidence. The direct evidence of Van Gundy, considered in connection with his conduct and the conduct of the plaintiff, convinces us that the mortgagees never turned over to Van Gundy all that was coming to him under the $500 mortgage. No demand was ever made by Mitchell

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or Beiseker for the payment of the $100. The plaintiff continued to pay the interest on the $500 mortgage on demand therefor from the Beisekers or the bank, and was paying off other indebtedness against the land that had been made a lien thereon by Van Gundy before he conveyed to the plaintiff. This is a weighty circumstance in favor of plaintiff's contention. It does not seem reasonable that he would permit the $100 note to remain unpaid, and thereby assume the risk of losing his land entirely by defaulting on the payment of $100. It is true that the $100 note was never surrendered to Van Gundy, but this was not his fault. He asked for it, and was constantly informed that it would be sent for and surrendered. It is true also that the $200 mortgage was described in the deed to the plaintiff as a lien against the land. Why this was done is satisfactorily explained by Pratt and Van Gundy. It was perfectly understood, however, between the plaintiff and Van Gundy that the latter considered the $100 note paid. The two Beisekers, or their bank, attended to the making of collections of interest on the Van Gundy loan. Mitchell, the mortgagee in the $200 mortgage, was a nominal mortgagee only, and the mortgage was taken in his name for the convenience of the mortgagees in the $500 mortgage. The plaintiff paid interest on the $500 mortgage while foreclosure proceedings were pending on the $200 mortgage, and had other negotiations with the Beisekers concerning the $500 mortgage during this time. They knew that the plaintiff during that time believed that the $100 note had been paid, but they did not inform him of the foreclosure proceedings, of which he was ignorant until after the time for a redemption had expired.

Under these facts, and others which we deem unnecessary to mention or discuss, we are fully convinced that nothing was due on the $200 mortgage when it was foreclosed, and that it was void. The appeal from the judgment in this case is made under section 7229, Revised Codes 1905, and a trial de novo is demanded. The proceedings on the motion for a new trial are therefore not properly before this court, nor was that motion properly before the district court. Bank v. Town of Norton, 12 N. D. 497, 97 N. W. 860.

The judgment is affirmed. All concur.

(115 N. W. 835.)

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E. M. LARSON v. MYRON O. WALKER.

Opinion filed March 18, 1908.

Appeal — Dismissal — Non Appealable Order.

An order denying an application to set aside a previous order, made without notice, striking a cause from the trial calendar and dismissing the same, is not an appealable order.

Appeal from District Court, Barnes County; *E. T. Burke, J.*

Action by E. M. Larson against Myron O. Walker. From an order denying motion to set aside an order dismissing the cause, plaintiff appeals.

Dismissed.

Parks & Olsberg, for appellant.
Herman Winterer, for respondent.

MORGAN, C. J. This is an appeal from an order denying a motion to set aside an order striking the cause from the calendar and dismissing the same. The order is not appealable. The appellant contends that it is appealable, in view of the fact that the order is one denying a motion to set aside a previous order made without notice. Conceding that the original order was made without notice, notwithstanding the fact that the order recites that it was made on notice, we are satisfied that the order is nevertheless non-appealable.

Appellant contends that the order is appealable under subdivision 5, chapter 7225, Revised Codes 1905, which is as follows: "Orders made by the district court or judge thereof without notice are not appealable; but orders made by the district court after a hearing is had upon notice which vacate or refuse to set aside orders previously made without notice may be appealed to the supreme court when by the provisions of this chapter an appeal might have been taken from such order so made without notice had the same been made upon notice." If the original order striking the cause from the calendar was appealable and made without notice, then it is clear that an appeal would lie from the order attempted to be appealed from in this case. An order refusing to set aside a nonappealable order made without notice is not made appealable by this section, unless the original order made without notice would have been appealable if made on notice. If what would be an

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appealable order is made without notice, and an application is made on notice to set aside such order, and such application is denied, this section renders the latter order appealable. The first of these orders is nothing more than an order for judgment, which can only be reviewed on appeal from the judgment. Hanberg v. Bank, 8 N. D. 328, 79 N. W. 336; In re Weber, 4 N. D. 119, 59 N. W. 523, 28 L. R. A. 621; Field v. Elevator Co., 5 N. D. 400, 67 N. W. 147.

The appeal is dismissed. All concur.

(115 N. W. 838.)

Note.—See note to Olson v. Mattison, 16 N. D. 233.

W. D. Russell v. Waterloo Threshing Machine Company.

Opinion filed March 6, 1908.

Rehearing denied June 2, 1908.

Principal and Agent — Ratification — Failure to Repudiate.

1. Unless a principal repudiates the unauthorized act of his agent within a reasonable time after knowledge of the unauthorized act, he will be deemed to have ratified the same.

Same — Ratification by Silence.

2. There may be an implied ratification by silence in reference to the unauthorized acts of an agent done with the principal's knowledge, where the party dealing with such agent is thereby led to believe to his prejudice that the act of the agent is acquiesced in.

Same — Acceptance of Benefits.

3. Retaining possession of property purchased by an agent not authorized to do so, after knowledge of the unauthorized act, and acquiescing in the sale of such property to another, is an implied ratification of the unauthorized purchase of such property.

Same — Knowledge of Facts.

4. If a principal intentionally ratifies an unauthorized act of an agent without full knowledge of all the facts, when such facts are ascertainable, he cannot thereafter repudiate the unauthorized act to the prejudice of the other party.

Same.

5. The facts are set forth in the opinion, and are *held* to show a ratification of the act of an agent acting beyond his authority.

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Same — Evidence of Ratification.

6. Notes taken by an agent in the name of his principal for the purchase price of a machine sold without authority, of which fact the principal was afterwards informed, are competent evidence bearing on the question whether there was a ratification of the act with knowledge of all the material facts.

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

Action by W. D. Russell against the Waterloo Threshing Machine Company. Judgment for plaintiff, and defendant appeals.

Affirmed.

W. J. Mayer, for appellant.

An agent to take orders for sale of machinery of a certain make, cannot bind his principal for the purchase of second hand machinery. Revised Codes 1899, sections 4320, 4321, 4322; Schull v. New Birdsall Co., 86 N. W. 654; J. I. Case T. Machine Co. v. Eichinger, 91 N. W. 82; Fletcher v. Nelson, 6 N. D. 94, 69 N. W. 53; Enc Law, volume 1, pages 990, 1023, 987; Haseltine v. Miller, 43 Maine 177; Beebe v. Equitable Mutual Assn. 40 N. W. 122; Wheeler v. McGuire, 2 L. R. A. 808; Stewart v. Woodward, 50 Vt. 75.

To show ratification of an unauthorized act, there must appear 1. Notice to principal of material particulars. 2. Possession of this information while retaining the benefits. 3. Retention of benefits after full knowledge of material facts without disaffirmance. Revised Codes 1899, section 4315.

Ratification is made only by accepting or retaining benefits with notice. Revised Codes 1899, section 4315; Jewell Nursery Co. v. State, 59 N. W. 1025; 1 Am. & Eng. Enc. Law, 1189, 1190; Owings v. Hull, 9 Pet. 607, 9 L. Ed. 246.

Geo. A. Bangs, for respondent.

Agent's authority is implied by principal's acts. Aldrich, et al, v. Wilmarth, 54 N. W. 811; Griggs v. Seldon, 5 Atl. 504; Bank of Betavia v. Western R. R. Co., 12 N. E. 433.

If principal ratifies without full knowledge, he cannot complain if misled. Nemier Lbr. Co. v. Moore, 55 Ark. 244; Kelley v. Newberryport & Horse R. R. Co., 141 Mass. 496; Schultz v. Gordan, 32 Fed. 55; Wheeler v. N. W. Sleigh Co., 39 Fed. 354. Clark & Skyles on Agency, volume 1, page 266; Tilleny v. Wolverton, 55 N. W. 822.

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If the principal, knowing all the facts, so acts as to indicate his approval of the agent's unauthorized conduct, and leads a third party to rely on it, he cannot deny such conduct to the latter's prejudice. Ward v. Williams, 26 Ill. 447; Truesdale v. Ward, 24 Mich. 117; Heyn v. O'Hagan, 60 Mich. 150; Lynn v. Wright, 18 Texas 317; Bergus v. Harris, 47 Vt. 322.

Whether agency is created by conduct is for the jury. Block v. Delucia, 66 Atl. 769; Boyington v. Von Eten, 35 S. W. 622; Saginaw T. & H. R. Co. v. Chappell, 22 N. W. 278; Ferneau v. Whitford, 39 Mo. App. 311; Hughbanks v. Boston Inv. Co., 60 N. W. 640; Franklin Blank Note Co. v. Mackey, 83 Hun. 511; Patterson v. Bond, 50 Iowa 508; Schlesinger v. Tax M. R. R. C. 87 Mo. 146; McLung Ex'rs. v. Spootwood, 19 Ala. 165.

Where the principal assents to his agent's acts, to the injury of a third party acting upon them, he cannot afterwards deny them. Caffer v. Walters, 9 Kan. App. 291; Matthews v. Fuller, 123 Mass. 446; Hurley v. Watson, 68 Mich. 532; Hanks v. Drake, 49 Barb. 186; Reese v. Medlock, 27 Texas 120; Roundy v. Erspamer, 87 N. W. 1087.

Use of property acquired by the unauthorized acts of agent, ratifies such acts. Pike v. Douglass, 28 Ark. 59; Duncan v. Keanly, 72 Conn. 585; Campbell v. Miller, 84 Ill. App. 208; Hastings v. Bangor House Props., 18 Maine 436; Sartell v. Frost, 122 Mass. 184; Wright v. M. E. Church, 74 N. W. 1015; Scott v. Middleton R. Co., 86 N. Y. 200.

If principal ratifies a part, he ratifies all. Smith v. Smith, 21 Pac. 4; King v. Franklin Lbr. Co., 83 N. W. 170; Strasser v. Conklin, 11 N. W. 254; Hutchings v. Ladd, 16 Mich. 493; Garner v. Mangan, 93 N. Y. 642; Hall v. Hopper, 64 Neb. 633.

Principal must repudiate promptly. Robbins v. Blanding, 91 N. W. 844; Cram v. Sickel, 51 Neb. 828; Hamlin v. Sears, 82 N. Y. 327; Parris v. Reeve, 23 N. W. 568.

MORGAN, C. J. The plaintiff brings this action to recover the purchase price of a gasoline engine and one separator, with attachments, alleged to have been sold by the plaintiff to the defendant company. The answer to the complaint is a general denial. Plaintiff recovered a verdict for $1,660.68. A motion for a new trial was made and denied. Defendant appeals from the judgment entered on the verdict.

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The facts shown by the record are substantially as follows: One Armstrong was the agent of the defendant, and in charge and had the management of its office and business at Grand Forks. His authority was, as a matter of fact, restricted to taking orders for the purchase of machinery manufactured by the defendant and submitting such orders to the defendant company for approval. He had no authority to make sales, nor to purchase machinery, for the company. During the summer of 1905 he was endeavoring to secure an order for one of the machines manufactured by the defendant from one Hofto, and was in correspondence with the officers of the company at the main office in reference to such order. While such correspondence was going on, Armstrong, it is claimed by the plaintiff, bought a second hand threshing outfit from the plaintiff for the defendant for the sum of $1,600. Later this same outfit was sold by one Osland, a salesman in the employ of the defendant, to the aforesaid Hofto, and said sale was reported to the defendant at the home office. Hofto executed notes for the purchase price of this outfit in the sum of $1,800, and agreed to pay in cash on the purchase $75, or paid it; the agreed price being $1,875. The machine was delivered to Hofto by Osland, and the notes were left with one Ryan, who was told to hold them, at Hofto's request, with Osland's consent, until Hofto was satisfied that the machine would work satisfactorily. The notes were drawn in favor of the defendant company, but are still in Ryan's possession, as there seems to be some question as to whether Hofto was satisfied with the machine.

The question in issue in this case is whether Armstrong, the agent who dealt with the plaintiff when purchasing the second-hand separator and engine, was acting on behalf of his company, or independently for himself, or for the plaintiff. It seems to be undisputed that Armstrong did not have actual authority to purchase secondhand machinery; nor did Osland, the other salesman, have actual authority to dispose of secondhand machinery, as agent for the defendant company. Armstrong, however, was in charge and had full control of defendant's office in Grand Forks, and there was no one there who had authority superior to his. Whether he had ostensible authority, and whether Russell was not justified in believing that he had actual authority, presents a very different question; and there is much to be said in favor of applying the doctrine of estoppel as preventing the defendant from now claim-

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ing that the agent was without actual authority. However, it is not necessary to rest the case on that question, nor to decide that question. The defendant is estopped on other grounds from now saying that Armstrong was not its agent, with full power to purchase the machine from plaintiff. It had notice of facts that the machine had been purchased from plaintiff, and remained silent for so long a time without repudiating Armstrong's acts that it is presumed that it intended to and did ratify his acts.

On June 26, 1905, Osland made a daily report to the defendant at its home office as follows: "Travelers' Daily Report. Waterloo Threshing Machine Co., Manufacturers of Winneshiek Threshing Machinery, Waterloo, Iowa, June 26, 1905. Canvassed with K. O. Hofto. Lives six miles from Grand Forks. Canvassed for threshing machine Nos. 28-48, and self-feeder and Sattley weigher, Flour City engine. Price quoted $1,875. Terms: $75 cash, $900 October 1, 1905, $900 October 1, 1906. Sold to him (or them) Russell & Doll secondhand complete outfit. What is his financial standing? About $25,000. [Signed] Lars Osland, Traveler." This report was received at the home office at Waterloo, Iowa, on June 29th, as shown by indorsement thereon.

On receipt of this report the company wrote Osland in reference thereto in part as follows: "We note that you have sold to Mr. Hofto the Russell & Doll secondhand complete outfit for $1,875. We, of course, are at a loss to know why you have sold somebody's else goods to this customer. We supposed you were working for the Waterloo Threshing Machine Company. Of course, there may be something about this deal that we don't understand; but you should have mentioned that fact in your report. If these people are to take a new machine in the place of that, of course, that is a different proposition; but with no explanation it is rather a hard problem for us to solve. In the future please make mention of these things, so that we will know where we are at all the time, and do not fail to make a complete report of every transaction. * * * We certainly hope, however, that you have not sold somebody's else machine to accommodate them." From previous letters from Armstrong to the company, and answers thereto, it appears that the company was urging Armstrong to procure an order from Hofto for a new outfit manufactured by the company, and Armstrong was strongly asserting in his letters that he would procure such an order. The report of Osland gave the company unequivocal notice that a second-

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hand rig formerly belonging to Russell & Doll had been sold to Hofto on behalf of the company in place of a new one as promised.

In the above letter to Osland the company did not disaffirm the sale, but gave instructions for more explicit reports in the future. They did not even request more definite facts as to the sale, but seemed to consider the sale as final. From Osland's report, the company was notified that $75 was to be or had been paid to it on this sale. It did not order a return of that money or forbid its receipt, and is to be considered as having acquiesced in having the agent retain it, although there is no evidence that the money was ever actually turned over to the company. However, it had notice that its agent had contracted to accept it. The facts in regard to the $75 as a cash payment under the terms of the contract are so meager as not to be of much assistance in determining whether the sale was ratified or not. It does not appear affirmatively whether Hofto ever paid this money or not. The terms of the sale were otherwise completed by delivery of the machine and of the notes to Ryan as before stated. It is not unreasonable to presume that it was paid under the circumstances. However, as it unequivocally appears that the machine was sold to Hofto after having been purchased from the plaintiff, it does not materially affect our conclusion that there was a ratification, whether the $75 had been paid by Hofto or not. Later on, and in September, the plaintiff demanded of one Vaughn, the secretary and a director of the company, payment of the purchase price of the machine. On November 16th the attorney for the plaintiff by letter to the company demanded payment of the purchase price and informed the company that suit would be commenced on November 20th unless the demand was complied with. This action was commenced on December 4th. During the fall of 1905 one Gaunt, an agent of the defendant company, had the Hofto matter in his hands for investigation, and employed an attorney to accompany him to the Hofto place to investigate the deal and ascertain whether the machine sold to him by Osland was working satisfactorily.

After a careful review of the evidence, we fail to find that the company has ever done one single act towards repudiating the purchase of the machine from plaintiff, although it had positive proof in June, 1905, that the agent, Osland, had sold the Russell rig to Hofto. Having knowledge that the Russell machine was sold and

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delivered to Hofto on behalf of the company, and that its agent was to accept or had accepted $75 in cash on the sale, it necessarily had knowledge that its agents had purchased the machine from Russell. It was informed that its agents had purchased the second-hand rig, and it does not relieve the company from its duty to disaffirm the purchase to say that it did not have express knowledge of the fact that the company was to be held for the purchase price. Its agent had made a sale, and the company was informed of this fact. It cannot retain that machine with knowledge of the sale, and five months thereafter claim that its agents had exceeded their authority in buying and in selling the Russell machine. Considering together the traveler's report, Russell's demand for the purchase price, the agent Gaunt's investigation as to the satisfactory working of the machine in Hofto's hands, and that $75 cash was to be or had been paid to the agent, we have no hesitation in holding that the verdict was amply justified. The evidence shows ratification of the agent's acts after full notice of all the material facts. It must be borne in mind that the interests of Russell required a prompt disaffirmance of the acts of these agents upon ascertaining that they had exceeded their authority. He had parted with his machine, and the same was being used by Hofto, which necessarily means that it was deteriorating in value. By the silence of the company, he was justified in believing that the company acquiesced in Armstrong's purchase from him, even had he known that Armstrong was acting in excess of his authority, which is not the fact. Where the rights of third parties are involved, the principal is required to act with more promptness than when those of the agent alone are concerned.

As stated in Mechem on Agency, section 155: "But, where the rights and obligations of third persons may depend on his election, it is obvious that he is bound to act or suffer the necessary consequences of inaction, and that if, after knowledge, he remains entirely passive in regard to the transaction, it is but just, when the protection of third persons may require it, to presume that what, upon knowledge, he has failed to repudiate, he has at least tacitly confirmed." The company had no right to defer for an unreasonable time a repudiation of Armstrong's act in buying the machine from Russell until it had satisfactorily adjusted the troubles growing out of the Hofto sale. The purchase from Russell was unconditional and completed, and in no way connected with or dependent

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upon a sale to Hofto. The company should have repudiated the sale within a reasonable time after notice of the purchase from Russell and that he was claiming that the company was bound to pay the purchase price. Computing the time from June 29th until the commencement of this action, there was no disaffirmance within a reasonable time. Even from September, when a demand was made for payment by Russell, the same conclusion is reached. Upon receiving notice of the sale to Hofto, the company should have repudiated it. It cannot repudiate the Russell sale and affirm the Hofto sale. If the Russell sale had been repudiated, Russell would have been entitled at once to a return of the machine. This right to the return thereof cannot be complied with, and at the same time ratify the Hofto sale. By affirming the Hofto sale, by a failure to disaffirm it within a reasonable time, the purchase from Russell was also ratified. The defendant necessarily knew that title to the machine was in the company, as it had sold it through its agent to Hofto. By remaining silent beyond a reasonable time, and thereby ratifying Armstrong's act, it cannot now repudiate his act on the ground that it was not informed of all the facts.

It is claimed that the company was not bound to repudiate Armstrong's acts, for the reason that he informed the defendant on July 3d that he had sold the rig to Hofto for Russell & Doll in order to sell them a new machine. If this was the fact, it left the company in possession of contradictory reports from two different agents. Osland was assuredly acting for the company, as the notes from Hofto were taken in the company's name on the company's blanks. The company had the right to ratify or disaffirm this contract when these contradictory reports were made to it. By remaining silent it cannot now repudiate the purchase by saying that it acted on a false report, when it had the means accessible to ascertain the truth, and thus prejudice the interests of an innocent third party. As stated in Clark & Skyles on the Law of Agency, page 339; "Knowledge by the principal will not be presumed from the fact that he had a reasonable opportunity to acquire it; but, when there has once been a ratification, he cannot afterwards avoid the effect thereof by showing that he was not acquainted with all the facts of the transactions ratified, where he was in possession of the means of learning them. Although, as a general rule, a principal must have full knowledge of all the facts,

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as we have seen before, yet the principal cannot purposely remain ignorant, where the means of information is within his control, so as to escape the effect of his acts that would otherwise amount to a ratification." In Ehrmanntraut v. Robinson, 52 Minn. 333, 54 N. W. 188, the court said: "It is sometimes said that, to constitute a ratification of an unauthorized act of an agent, the principal must have had knowledge of all the material facts. As to a past and completed transaction, this would be generally true; but there are many cases where the conduct of the principal may amount to a ratification, although he may not know all the facts as to the unauthorized act of the agent in his behalf. He may ratify by voluntarily assuming the risk without inquiry, or he may deliberately ratify upon such facts as he possesses, without caring for more."

There is nothing in Armstrong's statement to the company on July 3d that negatives the fact shown by Osland's report that he had sold the machine to Hofto for the company. By selling it for Russell & Doll, as stated by Armstrong, the sale is not necessarily to be understood as having been made as their property, nor as their sale. The real question involved, however, is: Did Armstrong buy the machine from Russell for the defendant? And on that question there is no conflict.

Our conclusion is that the purchase from plaintiff and the sale to Hofto were ratified for the reasons: (1) Not ordering a return of the machine to Russell upon learning that it had been sold to Hofto. It is well established that, if an agent exceeds his authority in the purchase of property for his principal, the purchase is impliedly ratified if the property is retained after knowledge that the purchase was without or in excess of authority. Clark & Skyles on Agency, page 325, and cases cited; Wright v. M. E. Church, 72 Minn. 78, 74 N. W. 1015; Scott v. Middleton R. Co., 86 N. Y. 200; Campbell v. Millar, 84 Ill. App. 208; Sartwell v. Frost, 122 Mass. 184. (2) The defendant was silent, and permitted the acts of his agents to go unchallenged, for so long a time after knowledge that they had acted without authority, that their acts were impliedly ratified; and the defendant cannot now deny such authority, where the plaintiff had reason to believe from such silence that the agent's acts were authorized. That silence is presumed to be a ratification under such circumstances is also well settled. Clark & Skyles on Agency, page 335, and cases cited.

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It is claimed, also, that a reversible error was committed in receiving in evidence the notes executed by Hofto for a part of the purchase price of the machine. These notes were material evidence to show that Osland was acting on behalf of the defendant in making the Hofto sale. The company was also notified by the report of June 26th that notes were to be taken for the purchase price. We think they were competent evidence to show what the agent had done and what facts the defendants had notice of as bearing on the question of ratification.

The judgment appealed from is affirmed. All concur.

FISK, J., disqualified. Hon. W. J. KNEESHAW, judge of the Seventh judicial district, sitting by request.

(116 N. W. 611.)

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

Opinion filed March 19, 1908.

Public Warehousemen — Pledge — Warehouse Receipt.

1. A public warehouseman licensed to do business in this state under the provisions of chapter 141, page 180, Laws 1901, being sections 2262-2272, Rev. Codes, may, as security for his indebtedness, issue and deliver to his creditor a warehouse receipt upon property actually contained in such warehouse and owned by him.

Same.

2. The execution and delivery of such receipt operates as a valid pledge of the property without the necessity of an actual change of possession; a symbolical or constructive delivery through the issuance and delivery of such warehouse receipt being sufficient.

Same.

3. Such a transaction operates in law to create the holder of such receipt a bailor and the warehouseman a bailee of the property under said warehouse statute during the time such property remains in such warehouse, and renders the surety on the warehouseman's bond liable for its safe-keeping.

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Foreign Corporation — Compliance With State Law.

4. Following the rule announced by this court in the recent case of Sucker State Drill Co. v. Wirtz Bros., 115 N. W. 844, it is *held* that plaintiff, a foreign corporation, did not violate the statute of this state (sections 4695-4697, Rev. Codes 1905) prescribing the conditions upon which such corporations may do business within our borders.

Appeal — Review — Error Without Prejudice.

5. Certain alleged errors of law occurring at the trial in the rejection of testimony and in instructions to the jury examined, and *held* not prejudicial for reasons stated in the opinion.

New Trial — Specification of Error.

6. *Held,* further, that such rulings and the giving of the instructions complained of, if error, cannot avail appellant, as the same were not properly specified in the notice of intention to move for a new trial; the motion for new trial being based upon the minutes of the court.

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

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

Affirmed.

Pierce & Tenneson and *A. W. Cupler,* for appellant.

A warehouseman cannot pledge his own property by the issuance of a warehouse receipt. Sexton v. Graham, 4 N. W. 1090; Yennie v. McNamee, 45 N. Y. 614; Franklin Natl. Bank v. Whitehead, 39 L. R. A. 725; Bank v. Nelson, 95 Am. Dec. 400; Adams v. Merchants Natl. Bank, 2 Fed. 174; Greenleaf v. Dows, 8 Fed. 550.

There must be a delivery of possession. Section 6195, Revised Codes, 1905; Willard v. Elevator Co., 10 N. D. 400, 87 N. W. 996.

State cannot impose restrictions upon a foreign corporation where its business is interstate or foreign, or it is a federal agent. Pembina Con. S. M. & M. Co. v. Pennsylvania, 125 U. S. 181, 31 L. Ed. 650; Clark & Marshall, Priv. Corp. volume 3, page 2706.

A foreign corporation may be doing business within the state, in the sense of the statute although it has no office or place of busi-

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ness therein. Clark & Marshall, Priv. Corp., supra; Lamb & Lamb, 6 Biss. 420, Fed. Cas. No. 8018; Farriar v. New England, etc., 7 So. 200; People v. Horn Silver M. Co., 105 N. Y. 76; People v. Wemple, 27 Am. St. 542; Com. & Gloucester Ferry Co., 98 Pa. St. 105.

Receiving proceeds of converted property waives the wrongfulness of the act. 28 Am. & Eng. Enc. of Law, 739.

V. R. Lovell, for respondent.

A pledge is created by actual or constructive delivery; in the latter case, as by warehouse receipt, possession of actual property pledged must be retained by warehouseman. Merchants v. Hibbard, 48 Mich. 118; National, etc. v. Wilder, 24 N. W. 699; Egger v. Hayes, 40 Minn. 182; Milliorn v. Clow, 42 Ore. 169; Alabama, etc. v. Barnes, 82 Ala. 607; Broadwell v. Howard, 79 Ill. 303; Horr v. Barker, 8 Cal. 614; National v. Wallbridge, 19 Ohio St. 424.

A consignment of goods by a nonresident manufacturing corporation to a resident commission merchant within this state is not in violation of the law regulating doing business by foreign corporation therein. DeWitt v. Berger, 81 S. W. 334; Bell City v. Frizzell, 81 Pac. 58; Coit v. Sutton, 25 L. R. A. 819; Penn. etc. v. McKeever, 87 N. Y. Supp. 819; Oakland v. Fred, etc., 118 Fed. 243; Milan v. Gorton, 27 S. W. 971; Wolf v. Bigler, 43 Atl. 1092; Miller v. Goodman, 40 S. W. 719; Kilgore v. Smith, 15 At. 698; Cummer, etc. v. Associated, etc., 73 N. Y. 668; Huppman, etc. v. Western, etc., 36 S. W. 306.

FISK, J. Plaintiff recovered judgment in the court below, and defendant the Northern Trust Company alone appealed from the judgment. The facts, briefly stated, are as follows: The Hart-Parr Company, for whose use this action is prosecuted, is a foreign corporation engaged in the business of manufacturing engines at Charles City, Iowa, and in selling the same throughout the country. The defendant Robb-Lawrence Company was organized as a corporation under the laws of this state, and duly authorized to do business as a public warehouseman under the provisions of chapter 141, page 180, Laws 1901, being sections 2262-2272, Revised Codes 1905; the appellant being a surety upon the bond of the Robb-Lawrence Company, as such warehouseman, given pursuant

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to such statute. In addition to its business as a public warehouseman, the Robb-Lawrence Company was a dealer in farm implements and machinery, and in 1903 and 1904 it handled plaintiff's goods under commission contracts at Fargo, and in certatn specified territory adjacent thereto. On May 26th, 1904, the Robb-Lawrence Company, being indebted to the plaintiff in a large sum, and for the purpose of securing such indebtedness by a lien upon certain property then contained in its public warehouse, and owned by it, executed and delivered to plaintiff the following warehouse receipt: "Robb-Lawrence Company. Office and Warehouse. Northern Pacific Ave. and Eighth Street. Phone 516. Warehouse receipt No. 7. Fargo, N. D., May 26th, 1904. Received in store from the Hart-Parr Company on account of themselves P. O. Address Chas. City, Iowa, the goods named below, subject to the conditions printed on the back of this receipt. Storage, $——paid for first month and $—— per month for each subsequent month or part thereof. Handling charges $ Paid. Advance charges $——. Insurance: Yes. Carried by R——L——Co. I 30-horse Power Oil Cooled Gasoline Engine, No. 1211. 1 7-horse Power Oil Cooled Portable Gasoline Engine, Style No. 5, enclosed. 1 No. 12 Farquhar separator. 1 Wood Bros. self-feeder. 1 Farquahar wagon loader and weigher. 5 Noyes & Surreys, No. 220-221, 390-391. Value of above estimated at $2,970.00. Robb-Lawrence Company, By Wilbur Lawrence, Sec'y. Original." At the time of the issuance and delivery of such receipt there was no actual change of possession of the personal property covered by the receipt. Thereafter, the indebtedness aforesaid being past due, plaintiff tendered to the Robb-Lawrence Company the receipt aforesaid, and demanded the possession of said property, which demand plaintiff contends was refused for the reason that such property had theretofore been sold and disposed of by said defendant, and thereby converted to its own use. This action was brought against said Robb-Lawrence Company as principal, and the appellant, as surety, upon the bond aforesaid, pursuant to the provisions of section 2264, Revised Codes 1905, which is as follows: "When any one licensed to do business as a public storage company or as a public warehouseman fails to perform his duty, or violates any of the provisions of this article, any person, persons or corporations injured by such failure or violation may, with the consent of the attorney general, bring an action in the name of the state, but to his or their own use,

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in any court of competent jurisdiction, on the bond of such company or warehouseman. In such action the person, persons or corporation in whose behalf the action is brought shall file with the court a satisfactory bond for costs, and the state shall not be liable for any costs." The appellant, at the close of plaintiff's testimony, and also at the close of all the testimony, moved for a directed verdict, and thereafter moved for judgment notwithstanding the verdict and also for a new trial, each of which motions was denied, and these rulings constitute the basis of appellant's assignment of error.

Appellant's first contention is that a warehouseman cannot make a valid pledge of his own property by the issuance of a warehouse receipt, and hence that the holder of such receipt acquires no lien upon the property. Our attention is directed to section 6195, Rev. Codes 1905, which provides: "The lien of a pledge is dependent on possession and no pledge is valid until the property pledged is delivered to the pledgee or to a pledge holder as hereinafter prescribed." Also to section 2248, Revised Codes 1905, which prohibits the owners of grain elevators and warehouses from issuing warehouse receipts for grain not actually delivered into such warehouse. The latter section has no application to the case at bar, as it refers merely to the issuance of warehouse receipts for grain delivered in the elevator or warehouse. This section was enacted as a part of chapter 126, page 321, Laws 1891, which deals solely with grain warehouses. For the statute law applicable to this case, we must look to chapter 141, page 180, Laws 1901, being sections 2262-2272, Revised Codes 1905, which relates generally to warehouses for the storage of goods, wares and merchandise; grain in bulk being expressly excepted from the provisions of the act. It is a noticeable fact that this statute contains no provision corresponding with section 2248, Revised Codes 1905, above referred to. This distinction in the two statutes is an important one. See opinion of Brown, J., in Re St. P. & K. C. Grain Co., 89 Minn. 98, 94 N. W. 218, 99 Am. St. Rep. 549. We are therefore squarely confronted with the proposition whether under the provisions of chapter 141, page 180, Laws 1901, a warehouseman can by the issuance and delivery of a warehouse receipt for property owned by him and contained in his warehouse create a valid pledge of such property to his creditor as security for his indebtedness, and thereby, without an actual change of possession of the property, become a lawful

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bailee thereof, under such statute. In order to hold the trust company liable as surety on the bond, it is, of course, necessary that the transaction should have operated to create the Robb-Lawrence Company a bailee of the property under the warehouse statute aforesaid; the bond being conditioned, in the language of the statute, "for the faithful discharge of the duties by the Robb-Lawrence Co. of a public warehouseman." It is entirely clear that such would have been the result if the Robb-Lawrence Company had pledged the property to plaintiff by an actual delivery thereof to it, and the latter had then immediately deposited the same in such warehouse for storage or safe-keeping under the statute. Was such a formal transfer and retransfer of the actual possession necessary to create a valid pledge and deposit or bailment of the property, so as to render the appellant as such surety liable on the bond aforesaid? The statute is plain, it is true, that the lien of a pledge is dependent on possession, and that no pledge is valid until the property pledged is delivered to the pledgee or to a pledge holder; but is a literal compliance with this statute necessary? Does the law require a mere formal and apparently useless ceremony to be performed by the turning of the property over and turning it back again? We think not. "The law neither does nor requires idle acts." Section 6679, Revised Codes 1905. We do not think our statute relating to pledges was intended as a departure from the common-law and well-established rule that a delivery of the actual or constructive possession of the property is all that is required to constitute a valid pledge. In 30 Am. & Eng. Enc. of Law, 74, the rule is tersely and correctly stated as follows: "By the weight of authority a warehouseman having property of his own stored in his warehouse may, in the absence of statute, issue receipts therefor, and pledge them as collateral security for his own debt by delivery of the receipts." To the same effect, see Colebrooke on Collateral Securities, section 420, also the following authorities: In Re St. P. & K. C. Grain Co., 89 Minn. 98, 94 N. W. 218; 99 Am. St. Rep 549; Millhiser Mfg. Co. v. Gallego Mills Co., 101 Va. 579, 44 S. E. 760; Bank v. Hibbard, 48 Mich. 118, 11 N. W. 834, 42 Am. Rep. 465; Cochran v. Ripy, 13 Bush. (Ky.) 495; Parshall v. Eggert, 54 N. Y. 18; Smith v. Capitol Elevator Co., 9 Kan. App. 144, 58 Pac. 483; Norwegian Co. v. Hawthorn, 71 Wis. 529, 37 N. W. 825; Broadwell v. Howard, 77 Ill. 305; Bank v. Wilder, 34 Minn. 149, 24 N. W. 699; Millhorn v. Clow,

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42 Or. 169, 70 Pac. 398; Alabama, etc., v. Barnes, 82 Ala. 607, 2 South. 349; Eggers v. Nat. Bank, 40 Minn. 182, 41 N. W. 791; 2 Current Law, 2030. The Supreme Court of Minnesota in the recent case of In re St. P. & K. C. Grain Co., supra, said: "It is elementary that a valid pledge of personal peroperty can be created only by a delivery to the pledgee of either an actual or constructive possession of the pledged property. The delivery of a recognized symbol of title, such as a warehouse receipt, issued by a warehouseman as owner, is sufficient as constructive delivery. * * * This is the common-law rule, and is presumed to be the same in all states."

We fail to find anything in our statute requiring us to depart from this almost universal doctrine. Certain cases are cited by appellant's counsel apparently holding to the contrary; but, upon examination, they will be found to have been decided upon local statutes changing the common-law rule or to rest upon facts not parallel to those in the case at bar. Section 2266, Revised Codes 1905, is in harmony with the general rule above stated. It provides: "The title of goods and chattels stored with a public storage company or in a public warehouse shall pass to a purchaser or pledgee, by the indorsement and delivery to him of the storage company's or warehouseman's negotiable receipt therefor, signed by the party to whom such receipt was originally given, or by an indorsee of such receipt, subject to all liens and charges thereon for warehousing, advanced charges and insurance." Our conclusion upon this point is, in brief, that the pledge of this property by the Robb-Lawrence Company to the plaintiff was valid, and that by the issuance of such warehouse receipt to plaintiff, and the retention of the property in such warehouse, the relation of the Robb-Lawrence Company to said property thereafter was that of a public warehouseman under the law, and hence that appellant, the Northern Trust Company, as such surety became liable under the bond for its safekeeping.

Appellant's second contention is that plaintiff, being a foreign corporation, and not having complied with our statute (sections 4695, 4697, Revised Codes 1905,) prescribing the conditions upon which such corporations may do business in this state, cannot maintain this action, and that such contract is void under section 4699, Revised Codes 1905. In answer to this contention it is sufficient to say that the facts in the case at bar, as we understand them, are

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very similar to the facts in Sucker State Drill Co. v. Wirtz Bros. (just decided by this court) 17 N. D. 313, 115 N. W. 844, and the rule there announced is in all things controlling on this point against appellant's contention; and we deem it unnecessary, therefore, to notice this defense further.

It is next contended by appellant that the conversion of the property by the warehouseman was subsequently waived by plaintiff by receiving and retaining a portion of the proceeds of certain of said pledged goods, knowing that the same had been wrongfully sold and converted by the warehouseman. Conceding this to be true does not aid appellant, for the obvious reason that such waiver of the conversion of a portion of the property merely went to a diminution of plaintiff's recovery, and hence was not a ground for the direction of a verdict or for judgment non obstante. Kerr v. Anderson, 16 N. D. 36, 111 N. W. 614. It was not ground for a new trial, as no proper specification thereof was contained in the notice of intention to move for a new trial. It was not prejudicial, as the trial court in charging the jury told them, in effect, that in determining the plaintiff's damages, in the event they found for plaintiff, to omit the value of any property converted, the proceeds of which were paid to and knowingly received by plaintiff. It also appears that at about the time such proceeds were turned over to plaintiff the Robb-Lawrence Company took a receipt therefor from plaintiff's attorneys, which receipt expressly set forth an agreement that such payment should not operate as a ratification of such sale, or as a relinquishment of any of plaintiff's rights under the warehouse receipt aforesaid. For these reasons, we must overrule appellant's contention on this point.

The fourth contention relates to the ruling of the district court in refusing to permit the witness Lawrence to answer the following question: "At the time of the execution of the warehouse receipt was there any amount stated that should be secured by such warehouse receipt?" This ruling was clearly erroneous, as respondent's counsel, in effect, concede; but it does not appear that the same was in any manner prejudicial. No offer of proof was made, and the undisputed testimony is that the warehouse receipt was issued to secure the entire indebtedness of the Robb-Lawrence Company to plaintiff, and that such indebtedness was in excess of the value of the property as found by the jury.

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Appellant next complains of the court's refusal to give a certain cautionary instruction to the jury relative to their consideration of the testimony given by one of the plaintiff's attorneys. The requested instruction was no doubt correct as an abstract proposition; but its refusal in this case was not prejudicial. The testimony of this witness relates solely to a written demand for this property claimed to have been served on the Robb-Lawrence Company by said witness in plaintiff's behalf. Such demand was not seriously controverted. In fact, Lawrence, the secretary of the Robb-Lawrence Company, testified that the written demand (Exhibit N) was delivered to the Robb-Lawrence Company. Furthermore, this alleged error, as well as the two preceding ones, is not properly before us, and cannot be considered for the reason that they are not properly specified in the notice of intention to move for a new trial. Section 7065, subd. 3, provides: "When the motion is to be made upon the minutes of the court and the ground * * * * of the motion is error in law occurring at the trial, and excepted to by the moving party, the notice of intention must specify the particular errors upon which the party will rely. If the notice does not contain the specifications herein stated, and the motion is made on the minutes of the court, the motion must be denied."

The only specification of errors in law occurring at the trial contained in the notice of intention to move for a new trial, other than the specifications relating to the rulings in refusing to direct a verdict, is as follows, and not otherwise: "(a) Errors of the court in the admission and exclusion of evidence. (b) Errors of the court in instructions to the jury and in refusing to give to the jury certain instructions asked by the defendant the Northern Trust Company." Such specifications of error are manifestly insufficient under the statute aforesaid; and hence the motion for a new trial, in so far as such alleged errors are concerned, was under the statute properly denied.

The remaining points urged in appellant's brief relate to alleged errors in the instructions to the jury, and need not be noticed for the reason last stated.

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

(115 N. W. 846.)

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PETER W. SKEFFINGTON v. JAMES R. PRANTE.

Opinion filed March 20, 1908.

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

Action by Peter W. Skeffington against James R. Prante and others. From an order sustaining a demurrer to the complaint, plaintiff appeals.

Affirmed.

T. A. Curtis, for appellant.
Rourke, Kvello & Adams, for respondent.

PER CURIAM. This case comes here in all material respects on the same questions involved in Ross et al v. Prante et al. (argued and decided at this term), 17 N. D. 226, 115 N. W. 833, the opinion in which has this day been filed. The decision in that case is controlling in all respects in the case at bar.

The order of the district court, sustaining respondents' demurrer to appellant's complaint, is affirmed.

(115 N. W. 834.)

JOHANNA ROSS, ET AL., v. JAMES R. PRANTE, ET AL.

Opinion filed March 20, 1908.

Drains — Constitutional Law.

1. Following Tyler v. Shea, 4 N. D. 278, 61 N. W. 468, 50 Am. St. Rep. 660, *held*, that there is no violation of any constitutional provision, in having damages to real estate, resulting from the construction of a drain, assessed by a jury, and the benefits to the same property assessed by the drain commissioners.

Same — Assessment of Benefits — Jury.

2. Chapter 23, Rev. Codes 1905, known as the "Drainage Law," does not contemplate the assessment of benefits from the construction of a drain by a jury.

Same — Judgment — Res Judicata.

3. A judgment for damages, and condemning a right of way for a drain under chapter 23, Rev. Codes 1905, in an action in which no benefits were considered, does not preclude the drain commissioners from assessing benefits.

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

Action by Johanna Ross and others against James R. Prante and others. Judgment for defendants, and plaintiffs appeal.

Affirmed.

T. A. Curtis and *O. S. Sem*, for appellants.
Rourke, Kvello & Adams, for respondent.

SPALDING, J. This is an appeal from an order of the district court sustaining a general demurrer to the appellants' complaint. The complaint is for an injunction restraining the respondents, as the board of drain commissioners of Ransom county, from levying or assessing any benefits to the premises described, by reason of the construction of a certain drain or ditch, against said premises, and the county auditor from extending a tax therefor upon the tax books of Ransom county. As far as the allegations of the complaint are material to a consideration of the demurrer, it alleges ownership of the real estate described, and that on the 19th day of July, 1906, the said board of drain commissioners commenced an action to condemn a right of way across the premises described and other lands, to which complaint the defendants therein answered, alleging damages by reason of said drain or ditch and the construction thereof over, across, and upon said premises; that on the 30th day of August, 1906, all the issues involved in said action were tried and submitted to the court and the jury, and the jury returned a verdict in favor of the plaintiffs therein for $25 for the value of the land taken for said ditch, but assessed no damages or benefits by reason of the construction of said drain or ditch over, across, and upon said premises; that judgment was thereafter entered upon said verdict; that, notwithstanding such verdict and judgment, the said board of drain commissioners threaten to levy an assessment against the premises described for benefits by reason of the construction of said drain, and that the defendant Ferguson as auditor threatens to extend such assessments for benefits levied by said drain commissioners upon the tax books of Ransom county, against said premises, unless restrained by the court; and that the same will become a cloud on their title, and that they will suffer irreparable injury, etc. To this complaint the defendants interposed a general demurrer, which on argument was sustained by the district court.

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It is contended by appellants that the judgment in the former case precludes the board of drain commissioners from assessing any benefits which it may determine accrue to the land belonging to appellants by reason of the construction of the drain. The respondents insist that such is not the law, and that the board can still assess the benefits, and the auditor extend the tax, against the premises for its share of the burden of its construction. This court held in Tyler v. Martin, 4 N. D. 278, 300, 60 N. W. 392, 400, that "there is no violation of any constitutional provision, and no possibility of injustice to the property owner, in cases of this character, in having the total damages assessed by the jury, and having benefits assessed and the balance struck by the other tribunal, the drain commissioners." So the constitutional right of the parties under such holding, in this case, are not infringed if the benefits were not submitted to the jury. The question seems to be whether, from the complaint, it will be conclusively presumed that all the questions as to damages and benefits were in issue and submitted to the jury, and the judgment entered upon the verdict covered the same. From an inspection of the drainage law, contained in chapter 23, Revised Codes 1905, we are led to conclude that the method of acquiring the right of way by condemnation proceedings for any proposed drain is the same as for acquiring the right of way for other purposes, except in so far as the drainage law contemplates a different method of procedure. From an inspection of that law we find nothing except the reference contained in section 1826, and the provisions of section 1823, which in any manner appears to indicate that in condemnation proceedings for this purpose a submission of the question of benefits should be made to the jury. Section 1826 provides: "Upon acquiring the right of way, if the assessments of the benefits has not already been made under the provisions of section 1824, the board of drain commissioners shall assess the per cent of the cost of constructing," etc. Section 1824 contains nothing referring benefits to the jury or the court, but provides that, upon assessment by the jury, court, or referee of the amount of damages to which the respective owners of the right of way are entitled, warrants may be issued, etc., and that from the proceeds shall be paid into court, for the benefit of the owners of the right of way, the amount to which each is entitled according to the assessment of damages, and how, in case the money necessary to pay said damages cannot be raised by sale

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of the warrants, it shall be raised by special tax. It will be seen that this makes no reference to or provision for the jury assessing benefits. Section 1823 authorizes the acquiring of the right of way for drains in such manner as may now or hereafter be prescribed by law. Must the courts infer that the legislature intended to read into section 1824 the general law regarding the right of eminent domain and the method of procedure thereunder? In view of another complete method applicable to drains having been provided subsequent to the enactment of the law relating to acquiring right of way for other purposes, we think no such inference can properly be drawn from this reference. The later law provides a separate method for assessing the benefits, which is inconsistent with the provisions of the general law regarding eminent domain, and in our judgment is much more practical, and a much more effective and adequate method than the one contained in the other law would furnish for this purpose. It provides in sections 1826 and 1827 for the assessment of benefits by the drain commissioners, and their apportionment to the lands benefited, and the return of such assessments to the county auditor. Other sections provide for a review of the benefits assessed and of the apportionment of the cost of the drain.

The appellants argue that, because section 7595, Revised Codes 1905, provides that all the issues involved in an action must be submitted to and determined by the jury, we must assume that the question of benefits was in issue in the former case, and submitted to the jury, and especially so in view of the fact that the complaint in this case alleges that all the issues involved in said action were tried and submitted by the court to the jury. No issues were formed as to benefits, and the complaint expressly states that the jury assessed no damages or benefits by reason of the construction of the drain over, across, and upon appellants' premises. This eliminates entirely from any possible consideration by the court any question of fact as to the benefits having been submitted to the jury. We are of the opinion that a fair consideration of the drainage law warrants the conclusion that it was not contemplated that the question of benefits should be submitted to the jury and that the supreme court would not be justified in holding this question res adjudicata, but that, on the contrary, it could not properly have been in issue in the former case. We are fortified in the opinion by consideration of some reasons which appear clearly applicable.

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The benefits of a drain usually extend to land for several miles, and apply to different parties. If the jury were to consider the benefits applicable to the property of one owner alone, as would be necessary in a case like the one in question, it would have to know the requirements necessary to carry off the water from the particular tract, and ascertain the size of the drain, its slope, and its length, the requirements of all the other tracts affected, and many other facts which it is utterly impracticable to present to a jury, but which the board of drain commissioners, and their legal assistants, some of whom must be experts, can much more readily ascertain. It must be disclosed whether the capacity of the drain is sufficient to carry off all the water, or only a part, from the given tract, and how a lack of drainage affects the health of the community and of all the beneficiaries. Of these things no jury can arrive at an intelligent and practical idea in the short time necessary to the trial of the action in court. Each parcel of land would have to be treated independently of the other tracts affected; whereas we construe the law as attempting to provide for a general scheme of benefits in which the whole territory affected and all the other elements mentioned must be taken into consideration. When the damage to the land is first ascertained and paid, then all the parties affected stand on an equality. The law regarding eminent domain also supports this theory. Section 7595, Revised Codes 1905, provides what is to be done in case damages are equal to or greater than the benefits, but makes no provision where the benefits are greater than the damages. This latter is a self-evident possibility, and can be taken into consideration by the drain commissioners under the drainage law.

We are of the opinion that the trial court did not err in sustaining respondents' demurrer, and the order is affirmed. All concur.

(115 N. W. 833.)

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BRISTOL & SWEET CO., A CORPORATION, v. LOUIS SKAPPLE, E. I. MONTGOMERY AND JOHN MONTGOMERY, CO-PARTNERS, DOING BUSINESS AS SKAPPLE & MONTGOMERY.

Opinion filed March 19, 1908.

Partnership — Evidence — Burden of Proof.

1. Action to recover the purchase price of goods sold and delivered to the copartnership of S. & M., at Wales, N. D., of which it is alleged the respondent was a member. By the separate answer and stipulation of respondent, all questions were eliminated, except the single one whether he was a member of such copartnership. Defendant, both by his answer and the stipulation, contended that there were two distinct firms at Wales doing business under said copartnership name, and that he was not a member of the firm with which plaintiff had its dealings. *Held* that, by thus narrowing the issues, the burden of proof as to the only remainining issue was not shifted from plaintiff to said defendant; hence the trial court's charge as to the burden of proof was correct.

Appeal and Error — Harmless Error — Burden to Show Prejudice.

2. Appellant has the burden of showing that errors committed in rulings sustaining objections to the admissions of testimony were prejudicial. Certain rulings of this character considered, and *held* not prejudicial.

Witnesses — Questions Involving Conclusions.

3. A witness was asked in substance if defendant did not at a certain interview with plaintiff's collector treat the claim made by such collector as a claim against the firm of which he was a member. Such question did not call for an answer as to a fact, but merely a conclusion; and hence the objection on such ground was properly sustained.

Appeal — Verdict — Abuse of Discretion.

4. Evidence examined, and *held* sufficient to support the verdict. Where the trial court has been asked and has refused to disturb the verdict upon the alleged ground that the same is not supported by the evidence, this court will not reverse such decision, except in a clear case of abuse of discretion.

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

Action by the Bristol & Sweet Company against Louis Skapple and John Montgomery. Verdict for Montgomery; and, from an order denying a new trial, plaintiff appeals.

Affirmed.

W. A. McIntyre (*Turner & Wright,* of counsel), for appellant.

Dickson & Johnson, for respondent Montgomery.

FISK, J. Action to recover the purchase price of certain harness sold to the copartnership of Skapple & Montgomery, located at Wales, N. D. The sale is admitted, and also the price; and the

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sole question on the trial was whether defendant John Montgomery was a member of said firm, and hence liable as a partner. It was the contention of the defense that there were two distinct firms at Wales doing business under the name of Skapple & Montgomery, one of which was engaged in the harness business and the other in the farm machinery business, respondent being a member only of the latter, while Skapple and the respondent's son, E. I. Montgomery, composed the members of the former concern. This issue was submitted to a jury, and, a verdict having been returned in respondent's favor, a motion for a new trial was made and denied, and from the order denying the same this appeal was taken. Appellant has set forth seven assignments of error, which will be disposed of in the order presented in the brief.

1. It is contended that the trial court committed error in sustaining defendant's objection to the following question asked the witness Skapple: "Tell the jury what consideration and all considerations you gave John Montgomery for the return of that note." The objection was that the question called for the conclusion of the witness, and also that it was incompetent, irrelevant, and immaterial. Whether such ruling was proper or not is immaterial. If error, the same is not available to appellant, as there was no offer of proof, and this court cannot assume that the answer would have been favorable to the plaintiff; hence prejudice is not shown. Madson v. Rutten, 16 N. D. 281, 113 N. W. 872. Furthermore, the record discloses that almost immediately after such ruling was made the witness, in fact, fully answered such question without objection, and on cross-examination of this witness the fact was developed that the entire negotiations respecting this note were had with Eli Montgomery, instead of the respondent, and the effect of such cross-examination was that the witness gave respondent John Montgomery no consideration whatever for the return of said note. This furnishes another reason why such ruling, if error, was not prejudicial.

Assignments 2 and 3 will be considered together. These relate to the rulings in sustaining defendant's objection to the question: "Did John Montgomery, at this time, treat the claim made by the harness man [plaintiff's collector] as a claim against the firm of Skapple & Montgomery?" and in striking out the witness' answer, "Yes," to said question. Also in sustaining defendant's objection to the following question: "Did John Montgomery in any manner make any denial that he was liable on the bill?" These assignments are wholly without merit. The question clearly called for con-

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clusions of the witness, and the objections thereto were therefore properly sustained. Fields v. Copeland, 121 Ala. 644, 26 South. 491.

The fourth assignment is sufficiently answered by what we said relative to the first assignment; and hence need not be further noticed.

Assignment 5 relates to the ruling of the lower court in sustaining defendant's objection to the following question, and in striking out the answer thereto: "Q. Were these [meaning the book accounts, notes, and bills receivable] turned over to Eli Montgomery, or were they turned over to Eli and John Montgomery? A. Turned over to Eli and John Montgomery." Just prior to this the witness swore that they were turned over to Eli; but in answer to such leading question he changed his testimony as above stated. The apparent object of this testimony was to show John Montgomery's connection with the harness business, as tending to show that he was as claimed by plaintiff, a partner in such business. The same witness in his previous cross-examination testified as follows: "I testified on direct examination that John Montgomery got the harness for that $600 note. The harness goods were delivered when we took stock. John Montgomery wasn't there. Q. You stated on direct examination that the harness goods were delivered for that $600 note, did you not? A. No, sir; not the fall when I got back the $600 note again. Q. These harness goods were delivered to him? A. Or do you mean in the spring when I got the note that the harness goods were put up in security? Q. Didn't you testify that John Montgomery got the harness goods for that $600 note? A. Yes. Q. When did you deliver these harness goods to him? A. Why, the harness goods were delivered when we took stock. Q. Delivered to whom? A. It was in the same building that is was before, when I run it independent. Q. And John Montgomery wasn't there? A. No, sir. Q. And that is what you mean by the harness goods having been delivered to John Montgomery, is it? A. Yes." It is apparent that this witness was either badly confused regarding the fact, or else that he willfully and deliberately falsified in giving his testimony. Having positively testified to turning said accounts and notes over to Eli, we think the court was justified, especially in view of the apparently reckless manner in which this witness had given his prior testimony, in sustaining the objection of defendant's counsel to the foregoing question upon the ground stated in the objection thereto, which was that the subject-

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matter embraced in this question had already been testified to by the witness.

Assignment No. 6 relates to the instruction to the jury as to the burden of proof; the court charging, in effect, that the burden was on plaintiff to establish its alleged cause of action. It is contended by appellant's counsel that inasmuch as the sale and delivery of the goods by plaintiff to the firm of Skapple & Montgomery was admitted and also the price thereof, and that there were two firms by that name at Wales, N. D., and that respondent admitted in his answer that he was a member of one of such firms, that the burden shifted to him to prove that he was not a member of the firm which purchased such goods. In this we think counsel are clearly in error. There is nothing either in the answer or stipulation to sustain such contention. By the stipulation the issues were narrowed down to the single question as to whether defendant John Montgomery was a partner in the firm which purchased the goods. Both by the answer and stipulation this was the sole issue to be tried. The burden of proving this issue was in no manner changed by the elimination through the stipulation of the other issues in the case. The admission in respondent's answer that he was a member of a firm of Skapple & Montgomery at Wales does not aid appellant's contention, for the very obvious reason that such admission is coupled with an allegation that there were two firms by that name doing business at said place, and denying that said defendant was a member of the firm which dealt with plaintiff. The facts alleged in the answer merely amounted to a general denial of the allegations of the complaint, and not new matter by way of confession and avoidance of such allegations, as appellant's counsel seem to think. The instruction complained of was clearly correct.

The seventh and last assignment of error challenges the sufficiency of the evidence to support the verdict. We have examined the evidence with much care, and are agreed that it was amply sufficient to sustain the verdict. It would serve no useful purpose to review such evidence at length in this opinion. The trial judge refused to disturb the verdict on such ground, and it is well settled that, in the absence of a clear abuse of discretion, his decision will not be reversed on appeal. Gull River Lumber Co. v. Elevator Co., 6 N. D. 276, 69 N. W. 691.

Finding no prejudicial error in the record, the order appealed from is affirmed. All concur.

(115 N. W. 841.)

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ANNA MARIE ANDERSON v. ANTON ANDERSON, CHARLEY ANDERSON, ESTER ANDERSON, IDA ANDERSON, AND ANTON ANDERSON, AS ADMINISTRATOR, WITH THE WILL ANNEXED OF THE ESTATE OF VICTOR K. ANDERSON, DECEASED.

Opinion filed March 21, 1908.

Deeds — Duress — Evidence.

1. Before a conveyance of real property will be set aside as having been given under duress or menace, the proof must be clear, specific and satisfactory.

Same — Validity — Evidence.

2. Before a deed of real property will be set aside as having been executed through the influence of threats of violence or arrest, the proof must show that the deed was executed under the influence of such threats, and while the will was overcome by reason of such threats or duress or menace.

Same — Question of Fact.

3. Whether a deed was executed under the influence of threats is a question of fact in all cases depending upon the circumstances of each particular case.

Same — Sufficiency of Evidence.

4. Facts recited in the opinion *held* to show that a deed was not executed under the influence of threats.

Appeal from District Court, Griggs County; *Burke*, J.

Action by Anna Marie Anderson against Anton Anderson and others. Judgment for defendants, and plaintiff appeals.

Affirmed.

Pierce & Tenneson and *A. W. Cupler*, for appellant.

To constitute duress the means adopted need only be such as to overcome the will of the injured party, without reference to his mental weakness or strength. Neb. Mut. Bond Assn. v. Klee, 97 N. W. 476; Galusha v. Sherman, 81 N. W. 495; Ice v. Ice, 83 S. W. 135; Benn v. Pritchett, 63 S. W. 1103; Mack v. Prang, 79 N. W. 770; State Bank v. Hutchinson, 61 Pac. 443; Bentley v. Robson, 76 N. W. 146; Giddings v. Bank, 74 N. W. 21; First National Bank v. Sargent, 91 N. W. 595; Parmentier v. Pater, 9 Pac. 59; Hackley v. Headley, 8 N. W. 511.

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Parks & Olsberg, for respondents.

One is estopped to assert his own fraud. Williams v. Klink, 51 N. W. 453; Judge v. Vogel, 38 Mich. 369; Dyer v. Homer, 22 Pick. 253; Wearse v. Pierce, 24 Pick. 141.

To constitute duress, the threat must be an adequate cause controlling the will, and the injured party must have acted under it. Wolf v. Bluhm, 70 N. W. 73; Bennett v. Luby, 88 N. W. 37; Rochester Machine Tools Works v. Weis, 84 N. W. 866; Mack v. Prang, 79 N. W. 770; Galusha v. Sherman, 81 N. W. 495.

If no objection is made to testimony, none can be made to an amendment to conform to it. Sections 6883, 6886, Revised Codes 1905; Halloran v. Holmes, 13 N. D. 411, 101 N. W. 310; Hogan v. Klabo, 13 N. D. 319, 100 N. W. 847; Mannin v. Winters, 7 Hun. 482; Tyler v. Bowen, 100 N. W. 505; Maul v. Steele, 104 N. W. 4; Adams v. Castle, 67 N. W. 637.

MORGAN, C. J. This is an action brought to set aside and cancel a deed of 480 acres of land situated in Griggs county, N. D., and another deed to certain lots situated in the village of Hannaford, Griggs county, N. D. These deeds were given to the plaintiff by Victor K. Anderson on August 17, 1906. The allegation of the complaint on which the court is asked to set aside said deeds is as follows: "That said deed * * * was procured from this plaintiff by the said Victor K. Anderson representing to her that the conveyance theretofore made could be by legal proceedings set aside and was of no value whatever, and that, unless she consented to such reconveyance, he would immediately cause such legal proceedings to be commenced, and would further cause this plaintiff to be arrested for having fraudently obtained said conveyances, and by an arrest of her person compel her to make such reconveyance; that the said Victor K. Anderson further informed this plaintiff that unless she would consent to such reconveyance he would cause her bodily harm in that he would cause the premises which the plaintiff then occupied to be set on fire while she was asleep therein, and threatened generally by diverse means to take the life of this plaintiff and her minor child; and further called this plaintiff vile and obscene names, and then and there by threats attempted to commit violence upon the person of this plaintiff, all of which kept this plaintiff in fear of bodily harm and great mental anguish, and this plaintiff, by reason of the facts aforesaid, and not otherwise,

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signed her name to said conveyances." The answer admits the execution of the deeds to the plaintiff, but alleges that the same were without consideration. It further alleges that these deeds were given under the express understanding that plaintiff was to reconvey the lands thereby conveyed to Victor K. Anderson whenever he should request the same to be done. It further alleges that the deeds which this action is brought to set aside were voluntarily executed and delivered to said Victor K. Anderson, and there is also a denial in the answer that any force or undue influence was used before said deeds were executed. The trial court made findings of fact and conclusions of law for the defendants to the effect that the deeds from the plaintiff to said Victor K. Anderson were freely and voluntarily executed and delivered, and that they were executed without undue influence.

The plaintiff appeals from the judgment entered on the said findings of fact, and demands a trial de novo, under the provisions of section 7229, Revised Codes 1905. The facts brought out in the evidence are substantially as follows: In the year 1904 Victor K. Anderson's wife died and his children left him. In that year he went to Sweden, and there met the plaintiff, his niece. They entered into a contract there, under which she and her child were to come to North Dakota with him, where she was to keep house for him, and was to be paid therefor by him. She accompanied him to North Dakota and kept house for him, pursuant to the contract. In July, 1905, Victor K. Anderson deeded all his land to her, and also conveyed to her all his personal property. She paid no consideration whatever for these conveyances of property to her. It is well established by the evidence that the property was transferred to her for the purpose of avoiding a levy thereon by a creditor of said Anderson. The plaintiff admits in her testimony that there was no consideration for the transfer of this property to her, and admits that Anderson was the real owner thereof during all this time. He managed the farm and took care of the property the same as though it was his own. He received all the proceeds of the same also. In 1905 the land was rented to a third party, who farmed it. The lease was signed by the plaintiff, but all the terms thereof were arranged by said Anderson. During the summer of 1906 the said Victor K. Anderson was guilty of violence towards the plaintiff, and assaulted her upon one occasion, and she procured his arrest for assault and battery upon her, and he was fined $20 after

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a trial. The said Victor K. Anderson, during the summer of 1906, brought an action against the plaintiff in this case to compel her to reconvey to him the land and property which he had previously transferred to her. The plaintiff employed counsel to defend said suit, and while the suit was pending the parties met and agreed that the said Victor K. Anderson should convey all of his land to the plaintiff for the sum of $5,000, and that the plaintiff should execute to the said Victor K. Anderson a mortgage upon said land and nine promissory notes. No cash was paid upon this transaction, and the notes were never delivered to Anderson, but were placed in the hands of a third party to be held until the title to the lands was shown to be free and clear of all incumbrances and a certain lis pendens released of record. The date of these deeds and mortgage was the 17th day of August, 1906. As matters now stood, the plaintiff had the record title of all these lands by two separate deeds. The plaintiff went into possession of the land after these last deeds were delivered, and Victor K. Anderson requested to be allowed to remain in the house for a few days until he had settled his affairs. The plaintiff claims that during these three or four days Victor K. Anderson demanded a reconveyance to her of all of his property and threatened to have her arrested, called her vile and abusive names, and tried to assault her, and placed her in fear of violence, and that, while acting under such fear and the fear of the repetition of such acts, she reconveyed the property to him. On the day after these threats had been made the plaintiff, without further threats, accompanied the said Victor K. Anderson in a buggy to Hannaford, where the conveyances were executed and delivered to the said Victor K. Anderson on the 17th day of August, 1906. While at Hannaford she and Anderson seemed to be friendly towards each other. While there she had ample opportunity to avoid him and refuse without danger of injury to sign the deed. The notes and mortgage have not been paid nor any part thereof. No attempt has ever been made to collect them. The parties seemed to have considered them of no binding force. Defendants offered to secure a delivery of them in court for cancellation if the court should find that they were ever delivered. The said Victor K. Anderson died on the 24th day of January, 1907. During the time intervening between the giving of the deeds and the death of the said Anderson the plaintiff made no effort to have the deeds set aside, and did not state to any one that she had reconveyed the land

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to said Anderson under fear or undue influence. She stated to one or more persons that she had reconveyed to Anderson because she took pity on him. When the deeds of August 13, 1906, were executed and delivered the plaintiff was represented by counsel at the negotiations, and it is claimed that Anderson was induced to make these conveyances through threats and undue influence brought to bear upon him during these negotiations, and the trial court found that Anderson executed these conveyances on account of such undue influences. Whether that finding is based on the evidence or not is not material in this action. Hence it will not be considered. The real estate involved is conceded to be worth $14,000.

We think that the evidence clearly shows that the plaintiff is not entitled to recover in this action. The burden is upon her to show that the deed was not her free and voluntary act. The presumption is that the deed is valid and binding, and this presumption will not be overcome by barely preponderating circumstances. On the contrary, duress, menace, or undue influence must be shown by evidence of the clearest and most satisfactory character before the deed will be set aside. In Jasper v. Hazen, 4 N. D. 1, 58 N. W. 454, 23 L. R. A. 58, the court said: "Hence courts have, with great uniformity, in this class of cases, required the proof that should destroy the recitals in a solemn instrument to be clear, satisfactory and specific, and of such a character as to leave in the mind of the chancellor no hesitation or substantial doubt." McGuin v. Lee et al., 10 N. D. 160, 86 N. W. 714. It must appear that the deed would not have been given if the threats or undue influence had not been used. Unless it is clearly shown that the deed was given under the influence of fear, it will be deemed to have been given freely and voluntarily. The apparent consent will be deemed real, unless affirmatively shown to have been overcome by duress, menace, or fear, or undue influence. These general principles are statutory in this state. Sections 5288, 5289-5291, Revised Codes 1905.

Upon consideration of all the evidence we conclude that the deed was given freed from any undue influence, with consent uninfluenced by the former influence of Anderson, and in recognition of her moral duty to reconvey such property. Lockren v. Rustan, 9 N. D. 43, 81 N. W. 60. It is conceded that Victor K. Anderson had been guilty of violence and abuse toward the plaintiff. When under the influence of liquor he was abusive towards the plaintiff.

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At other times he was not guilty of such conduct towards her. Reprehensible as his conduct was towards her at times, that fact does not necessarily determine the real issue in this case. The controlling question is, what was her state of mind when she reconveyed the property to him on August 17th? She herself says that she had no fear of him at that time. What transpired during the execution and acknowledgment of the deeds, as shown by the witnesses, amply corroborates this fact. From previous experience she knew that her lawyer could be reached for communication. She had no equitable claims to the land, as she had not paid anything for the deeds outside of her services for about two years, during which time she had been supported by Anderson, who also paid her expenses in coming from Sweden. She stated after giving the deed of August 17th that all she asked for was compensation for her services. She never made any claim to any one prior to Anderson's death that the land belonged to her. From August 17th to January 24th and some days thereafter she made no claim to any one that she was forced through fear to reconvey. Her statements relative to the reconveyance negatived any claim that undue advantage had been taken of her to secure the deeds. She is a woman twenty-five years of age, of fair intelligence and education, strong physically, and seems to be a woman of ordinary firmness of character. At all events no grounds for fear of violence existed when she signed the deed. She was then among her friends, and could have communicated with her lawyer. The threats of arrest made the day previous cannot alone constitute such duress or menace as will avoid the deed. No warrant had been issued, and no grounds existed for issuing one which were known to her. The evidence impresses us that she was not in any fear of physical violence or of imprisonment or of being burned through his act. Her acquiesence in the conveyance and utter failure to reveal to any of her friends that she was forced to reconvey for five months, and until Anderson's death, are very strong circumstances against her contention that the deed was signed under duress or menace or coercion. We are satisfied that she reconveyed the property freely, and without any influence upon her mind that can be said to make her act wanting in consent. Her will was not overcome. That being the case, the deed is valid. In such cases as this no general rule can be laid down as to whether contracts are freely entered into or not. Each case must depend upon its own facts. The

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controlling question always is, was the consent freely and really given, or was the will overpowered by threats or force or fear? Considering all the evidence as to the character and intelligence of the parties and what was done, we are satisfied that the threats were not the moving cause for giving the deed. Rendleman v. Rendleman, 156 Ill. 568, 41 N. E. 223; Galusha v. Sherman, 105 Wis. 263, 81 N. W. 495, 47 L. R. A. 417; Dunham v. Griswold, 100 N. Y. 224, 3 N. E. 76.

The judgment is affirmed. All concur.

(115 N. W. 836.)

J. L. GORDER, AS ADMINISTRATOR OF THE ESTATE OF MARTIN J. FORDE, DECEASED, v. P. S. HILLIBOE, AS ADMINISTRATOR OF THE ESTATE OF E. ERTRESVAAG, DECEASED.

Opinion filed March 18, 1908.

Chattel Mortgage — Misdescription of Property.

1. Where a mortgage on its face shows that it must have been intended to be given on a crop to be sown during the season following its date, the intention of the parties will be given effect, notwithstanding the fact that the mortgage expresses another year by mistake.

Trover and Conversion — Defenses.

2. In an action for damages for the conversion of grain, it is competent to plead and show as an equitable defense that the grain was mortgaged to the defendant and that the mortgage was drawn by mistake to cover the crop of another year, without first reforming the mortgage through an equitable action.

Appeal from District Court, Bottineau County; *Goss, J.*

Action by J. L. Gorder, administrator of Martin J. Forde, against P. S. Hilliboe, administrator of E. Ertresvaag. Judgment for plaintiff, and defendant appeals.

Reversed and remanded.

Noble, Blood & Adamson (*Ball, Watson, Young & Hardy,* of counsel), for appellant.

Testimony on cross examination is the evidence of the party eliciting it. Wilson v. Wagner, 26 Mich. 518; Campeau v. Dewey, 9 Mich. 381; Shartz v. Shartz, 35 Mich. 485.

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Where a statute excludes testimony as to transactions with the decedent is silent as to the right of the opposite party, the latter can examine. Dudley v. Steele, 71 Ala. 423; Chase v. Enroy, 51 Cal., 618; Roberts v. Brisloe, 44 Ohio St., 596; Young v. Montgomery, 161 Ind. 68.

A voluntary transfer of property under an instrument containing a misdescription cures that defect. Frost, Assignee, etc., v. Citizens National Bank, 32 N. W. 110; Kelley v. Andrews, 71 N. W. 251; Dolan v. Van Demark, 10 Pac. 848; Trice v. Myton, 59 Pac. 1090; Falk v. Decow, 61 Pac. 760.

Plaintiff cannot sue for conversion of property lawfully in defendant's possession. Omlie v. Farmers State Bank, 8 N. D. 570, 80 N. W. 689; Irving v. Hubbard, 80 N. W. 156; section 21 Enc. Pl. & Pr. 1063, 1065.

A. G. Burr, J. H. Bosard, and *N. C. Wegner,* for respondent.

A contract must be *first* reformed, and then enforced. Revised Codes 1905, section 6622; Insurance Co. v. Mowry, 6 Otto, 546, 8 Myers Fed. Dec. 325; Miller v. Kolb, 47 Ind. 220; Conyers v. Mericles, 75 Ind. 443; McCasland v. Aetna Life Insurance Co., 9 N. E. 119; Linton v. Fireworks Co., 28 N. E. 580; Parker v. Schaller Sav. Bank, 67 N. W. 245; Wood v. Hubbell, 5 Barb. 603.

Evidence elicited on cross examination is deemed evidence in chief of the party bringing it out. Wilson v. Wagner, 26 Mich. 518; Campeau v. Dewey, 9 Mich. 318; Shartz v. Shartz, 35 Mich. 485.

Defendant, having no lien, cannot recoup from plaintiff's recovery in conversion. Lovejoy v. Merchants Bank, 5 N. D. 623, 67 N. W. 956.

MORGAN, C. J. This is an action for damages based on the alleged conversion of grain. The plaintiff is the administrator of the estate of one M. J. Forde, deceased. The defendant is the administrator of the estate of one E. Ertresvaag, deceased. Forde executed and delivered to Ertresvaag a chattel mortgage on the following described property, viz: "All the crops that shall be sown, planted, grown, raised or harvested during the year 1903 on the N. E. quarter of section 7, township 162, range 78, now in my possession in the county of Bottineau and state aforesaid." The mortgage was given and dated on December 14, 1903, and was to

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secure a note of the same date to become due October 1, 1904. The defendant, as mortgagee, took possession of the crop of 1904 and sold it. The plaintiff brings this action to recover the value of the crop, and alleges an unlawful conversion thereof by the defendant. The answer is a general denial, with a further allegation that the mortgage described the crop intended to be mortgaged through mistake to be the crop of 1903, when it should have described it, according to the intention of the parties, as the crop of 1904. A trial by jury was waived by the parties, and a trial to the court was had. The trial court found in favor of the plaintiff for $244, the value of the crop found to have been wrongfully converted with interest.

This finding was made on the theory that the defendant did not have a mortgage on the crop grown on the land in the year 1904. We are satisfied that the evidence shows the mortgage given was intended to cover and did cover the crop to be raised in the year 1904. In the first place the indebtedness secured by the mortgage was evidenced by a note of the same date as the mortgage which was to become due in October, 1904, and these facts are recited in the mortgage. Further, the mortgage recites that it was given on "all crops that shall be sown, planted, grown, raised, or harvested during the year 1903." It is plain that a crop in this latitude cannot be planted in December, and that a mortgage given in that month cannot possibly become a lien on a crop to be grown during that year. Hence it is too clear for doubt that the parties could not have intended the giving or taking of a mortgage on the crop of 1903. It is equally clear that a mortgage on the crop of 1904 must have been intended by the parties. Section 6131, Revised Codes 1905, provides that "a lien by contract upon crops shall attach only to the crop next maturing after the delivery of such contract except in the case of liens by contract to secure the purchase price or rental of the land upon which such crops are to be grown." The crop of 1904 was the only one that could next mature upon the land when the mortgage was given, and from the language of the mortgage, considered in connection with the provisions of this statute, it cannot be presumed that a mortgage was intended to be given on a crop which was to mature after the year 1904. It cannot be presumed that the parties intended to give a mortgage which would be ineffectual. In view of the language of the mortgage and the provisions of the statute, we think that the parties intended to give

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and did give a mortgage on the 1904 crop. The writing of the year 1903 in the mortgage must have been a clerical error. Giving effect to what we deem to be the expressed intention of the parties, notwithstanding the writing of the wrong year, we hold that the mortgage was given for the crop of 1904.

The respondent's contention is that the mortgage cannot avail the defendant as a defense to the alleged cause of action for conversion of the grain until the mortgage is reformed in a court of equity so as to express the intention of the parties. This cannot be upheld, inasmuch as the mortgage on its face shows that a mortgage for 1904 was intended. That contention, however, would not be sustainable as a matter of law if the mortgage had by mistake shown that it was given upon the crop of 1904. The defendant would not be guilty of converting the grain, if he had a legal or equitable right to the possession thereof. Any fact that will negative a wrongful taking will defeat a stated cause of action for conversion. If the parties intended that a mortgage was to be executed for the crop of 1904, and it is shown that such intention was not expressed on account of a mutual mistake, this fact could be shown as an equitable defense, without a previous reformation of the mortgage. In Pomeroy on Code Remedies, section 92, it is said: "There does not seem to be any limit to the use of such defenses, other than is found in the very nature of equity jurisprudence itself. Whenever equity confers a right, and the right avails to defeat a legal cause of action—that is, shows that the plaintiff ought not to recover in his legal action—then the facts from which such right arises may be set up as an equitable defense in bar."

In Plano Mfg. Co. v. Daley, 6 N. D. 331, 70 N. W. 277, it was held as follows in a claim and delivery action: "Where, in such an action, plaintiff bases his claim to the property upon a chattel mortgage executed by defendant, and defendant in his answer admits the execution of the mortgage and denies all the other allegations of the complaint, and also pleads certain facts upon which he predicates fraud in procuring the mortgage, if the evidence fails to establish fraud, but does show that defendant never intended to give, and plaintiff never intended to take, a mortgage upon the property in controversy, and that the mistake was not the result of defendant's negligence, then defendant will be entitled to a verdict in his favor, notwithstanding his failure to prove fraud." In that case the defendant was claiming that certain property had been

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inserted in the mortgage which was not intended to be mortgaged, and the court held that a mistake in inserting a description of it in the mortgage could be shown by the defendant to defeat the claim of plaintiff to the right to its possession. On principle, that case is like the present one. In that case the property was wrongfully inserted in the mortgage. In this case the property was wrongfully described, if the year expressed in the mortgage only is looked at. It is therefore permissible to show that a mistake was made to defeat the claim of conversion made by the plaintiff. In other words, the same facts may be shown as an equitable defense in this case that would have to be shown to give the mortgagee a right to reform the mortgage to show the real intention of the parties, if he was asking for affirmative relief based on his mortgage. Goldberg v. Kidd, 5 S. D. 169, 58 N. W. 574.

The other assignments of error become immaterial, in view of the fact shown that the defendant had a mortgage on the crop of 1904 under the evidence.

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

(115 N. W. 843.)

STATE OF NORTH DAKOTA, EX REL E. F. LADD, v. THE DISTRICT COURT IN AND FOR CASS COUNTY, THIRD JUDICIAL DISTRICT OF THE STATE OF NORTH DAKOTA, AND HON. CHAS. A. POLLOCK, JUDGE OF SAID COURT.

Opinion filed March 20, 1908.

Pure Food Commissioner — Injunction — Acts Beyond Authority.

1. The legality of the acts of the pure food commissioner, and the question whether he is exceeding the powers conferred upon him by the law under which he is authorized to act, may be tested in an action to enjoin him from the commission of acts alleged to be without authority.

Same — Jurisdiction — Multiplicity of Suits.

2. A district court may properly entertain jurisdiction of an action brought by parties whose property is about to be destroyed by the pure food commissioner, and who will, from the nature of their business and other facts, be thereby subjected to a multiplicity of suits to enjoin him from unlawfully proceeding.

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Same — Irreparable Injury.

3. The pure food commissioner may be enjoined from distributing circulars or bulletins condemning the property of manufacturers as harmful and deceptive to the public, when the acts of the commissioner are in excess of the power or authority conferred upon him by law, and would cause irreparable injury.

Prohibition — Illegal Acts of Officer — When Writ Will Issue.

4. The writ of prohibition will not issue against a district court to restrain it from further proceedings in an action to enjoin the pure food commissioner, when the issue in that court is the legality or the illegality of the acts threatened by the commissioner, and the record leaves this question in doubt.

Application by the state, on the relation of E. F. Ladd, for a writ of prohibition to the district court of Cass county and Charles A. Pollock, Judge.

Temporary writ vacated, and application denied.

Barnett & Richardson, Engerud, Holt & Frame, and *T. F. McCue,* Attorney General, for the relator.

Food commissioner's error in deciding upon a prohibited product, or in his conclusions and published statements; or that his prosecution may fail, and a party be without remedy. does not warrant an injunction. Arbuckle v. Blackburn, 113 Fed. 617; Pleasants v. Smith, 43 So. 467; Davis v. Society, etc., 75 N. Y. 362.

If his statements are incorrect, the publication is libel. Arbuckle v. Blackburn, supra; Francis v. Flinn, 118 U. S. 385, 30 L. Ed. 165; Ferrell v. Warren, 3 Wend. 253; Burns v. Erben, 40 N. Y. 463; Butolph v. Blush, 5 Lans. 84.

The guilt or innocence of the maker of a prohibited article cannot be tried out in equity. Pleasants v. Smith, supra; Stephens v. McAid, 98 N. Y. S. 553; Gramer v. Truett, 79 S. W. 4; Davis v. Society Prevention Cruelty, 75 N. Y. 363; Delaney v. Flood, 183 N. Y. 323; Power v. Village of Desplaines, 13 N. E. 819; Moses v. Mayor, 5 Ala. 209; Suess v. Noble, 31 Fed. 855; Hemsley v. Myers, 45 Fed. 283; Brown v. Mayor, 37 So. 173.

Upon application for an injunction constitutionality of law not determined; such determination is for the main action. Wallock v. Society, etc., 67 N. Y. 23; Paulk v. Mayor, 30 S. E. 417; Paul v. City, 47 S. E. 793; Levy v. City, 27 La. Ann. 620; West v. N. Y. 10 Paige, 539, 27 Cent. Dig. Injunction, section 132.

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Prosecution criminally for same matter will not be enjoined. Suess v. Noble, supra. Moses v. Taylor, 52 Ala. 198; Stuart v. Supervisors, 83 Ill. 341; Joseph v. Burk, 46 Ind. 59; Gault v. Walles, 53 Ga. 675.

Writ of prohibition issues to an inferior court that has exceeded its jurisdiction, or has assumed to proceed in a case of which it has no cognizance. High on Ex Rem, section 765, 767, 769, 772; Ex Parte Smith, 23 Ala. 94; Quimbo Appo. v. People, 20 N. Y. 531; Havemeyer v. Superior Court, 24 Pac. 121.

Legislature may prohibit manufacture and sale of foods although not injurious to health. Palmer v. State, 48 Am. Rep. 429; Shivers v. Newton, 45 N. J. L. 469; State v. Smyth, 51 Am. Rep. 344; Cook v. State, 20 So. 360; Com. v. Tobias, 6 N. E. 217; Weller v. State, 40 N. E. 1001; State v. Dreher, 44 N. E. 510. People v. Girard, 39 N. E. 823; People v. Cipperly, 4 N. E. 107.

May establish a standard of purity of foods, although they are harmless. State v. Crescent Cre. Co. 86 N. W. 107; Butler v. Chambers, 30 N. W. 308; State v. Smyth, 51 Am. Rep. 344; State v. Campbell, 13 Atl. 585; People v. Arensberg, 11 N. E. 277; People v. Marx, 2 N. E. 29; Powell v. Penn. 127 U. S. 618; State v. Tetu, 107 N. W. 953.

Ball, Watson, Young & Hardy, for defendant.

The writ of prohibition issues only in cases affecting the state's sovereignty, its franchises, or prerogatives and the liberties of the people. State v. Nelson Co., 1 N. D. 88, 45 N. W. 33.

It is not a writ of right, its issuance is discretionary; lack or excess of jurisdiction in the lower court, is not alone sufficient, but it must appear that applicant has no adequate remedy in the ordinary course of law by appeal or certiorari. Murphy v. Supreme Court, 24 Pac. 310; People v. Dist. Court, 19 Pac. 541; State v. District Court, 2 N. W. 698; Stoddard v. Supreme Court, 40 Pac. 491; Mustin v. Sloan, 11 S. W. 558; State v. Jones, 27 Pac. 452; Powelson v. Lockwood, 23 Pac. 143; Strouse v. Police Court, 24 Pac. 747; Levy v. Wilson, 10 Pac. 272; State v. Rightor, 5 So. 102; In re Fassett, 142 U. S. 479; State v. Whitaker, 19 S. E. 376.

Without an application to the trial court and an adverse ruling upon the jurisdiction, or excess of jurisdiction, writ of prohibition will not issue. State v. Attorney General, 39 S. W. 276; Southern

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Pacific Railroad Co. v. Court, 59 Cal. 471; Baughman v. Supreme Court, 72 Cal. 572; People v. Judge, 3 N. W. 851, 913.

Equity will enjoin public officers, proceeding under a claim of right, and about to impair property rights or cause multiplicity of suits. Smith v. Bung, 15 Ill. 400; M. & H. Ry. Co. v. Archer, 6 Paige, 262; Belknap v. Belknap, 2 Johns C. R. 463; Schuster v. Board of Health, 49 Barb. 450; Jewett Bros. v. Small, 105 N. W. 738; Sweet v. Holbert, 51 Barb. 312; Rogers v. Board of Health, 31 Barb. 447; School of Magnetic Healing v. McAnnulty, 187 U. S. 94; Mutual Life Ins. Co. v. Boyd, 82 Fed. 705; Glover v. Board of Flour Inspection, 48 Fed. 348; McChord v. Lanville, 183 U. S. 483; Smyth v. Ames, 169 U. S. 466; Touchman v. Welch, 42 Fed. 548; Western Union Tel. Co. v. Wyatt, 98 Fed. 335; Felts v. McGehue, 172 U. S. 516; Pratt Food Co. v. Bird, 112 N. W. 701; Ex Parte Dietrich, 84 Pac. 770.

Equity may, in a proper case, restrain criminal proceedings. Manhattan I. W. Co. v. French, 12 Abb. N. C. 446; Schandler B. Co. v. Welch Co. 42 Fed. 561; Platte & D. & G. v. Lee, 29 Pac. 1036; Hall v. Schultz, 31 How. Pr. 331; Glover v. Board, 48 Fed. 348; Spink v. Francis, 19 Fed. 670; Wadley v. Bount, 65 Fed. 667; Tuchman v. Welch, 42 Fed. 548.

The state cannot prohibit, but may regulate the sale of wholesome food to prevent fraud. Schallenberger v. Pa. St. 171 U. S. 1; Collins v. New Hampshire, 171 U. S. 30; Dorsey v. Texas, 40 L. R. A. 201; Helena v. Dayer, 39 L. R. A. 266; Chicago v. Netcher, 48 L. R. A. 261; Frost v. Chicago, 49 L. R. A. 657; In re Jacobs, 98 N. Y. 98.

SPALDING, J. On the 3d day of October, 1907, certain manufacturers of flour whose mills are located within this state commenced an action against Pure Food Commissioner E. F. Ladd in the district court of Cass county for the purpose of enjoining him from issuing or causing to be issued further circulars or bulletins condemning the flours manufactured by the plaintiffs in that action in the manner described in their complaint, and particularly the flour in the manufacture of which the process known as the "Alsop process" was employed, and from certifying to the county auditors the flours so manufactured by them as adulterated, and from seizing or causing to be seized such flours, and from in-

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stituting or causing to be instituted prosecutions against the plaintiffs therein under chapter 195, p. 315, Laws 1907. The complaint in that action among other things alleged that the plaintiffs therein were the owners of and engaged in operating flouring mills in various parts of the state, having a total capacity of 5,050 barrels of flour per day, and that they had for a long time prior to the commencement of such action been engaged in such business; that for the purpose of conducting such business, they had installed expensive plants aggregating in value many hundreds of thousands of dollars, and that they manufactured each year more than 50 per cent. of all the flour manufactured and used in the state; that complaint further alleged that the growing of wheat was the principal agricultural industry, and the milling of the same the principal manufacturing industry, of the state, and that the state produced more wheat and more flour than could be consumed by its people. That the wheat producers and millers must and do depend upon foreign markets for the sale of their product; that by reason of this fact they were forced into competition with the large mills of other states, and, unless able to manufacture flour under the same conditions as the mills of other states, they would be rendered unable to sell in competition with them; that within the past few years there had been adopted by the millers of the United States, Europe and elsewhere a process for aging and conditioning flour at the time of its manufacture known as the "Alsop Process;" that such process had received general recognition and approval in all of the several states of the Union and in foreign countries, and was in general use by commercial mills throughout the United States, and by said plaintiffs in their respective mills, as well as by other millers of the state; that said process was used in the manufacture of about 80 per cent of the flour manufactured within the state, and had been adopted by plaintiffs after thorough investigation, from which it was found that it did not render the flour so manufactured harmful, but, on the contrary, that it improved it; and that as a result of such investigation and the information thereby obtained the plaintiffs had installed said process within their mills at a very great expense. The complaint contained a description of the process and an allegation that nothing was used therein other than a flaming discharge of electricity and air, which matured and conditioned and slightly whitened in color and rendered more marketable the flour so manufactured, and made it more acceptable to the consumer, improved its

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bread-making qualities, and that no harmful ingredients were added, and no necessary constitutent in whole or in part extracted, and that the flour so manufactured under said process did not deceive or tend to deceive the purchasing public. Such complaint also shows plaintiff's claims as to the benefits derived by them and the public from the use of such process, particularly by reason of the saving made in storage and the ability of the millers to immediately market their product, saving to them and to the public the expense of storage during the period otherwise required for aging and conditioning the flour manufactured by them. The act of the legislature commonly designated as the "Pure Food Law," being chapter 195, p. 315, Laws 1907, is set out at length in such complaint, and it is alleged that Prof. E. F. Ladd was appointed commissioner and chemist thereunder, and that since about the 8th day of March, 1907, he had been exercising the authority enjoined upon him as such commissioner and chemist by said act, and that, pretending and assuming to act under the authority of the act of the legislature referred to, he had issued and caused to be circulated through the mails a circular or bulletin directed against the flour manufactured by said plaintiffs. and had caused the same to be published in the newspapers in the state, such bulletins being entitled "Bleached Flour Warning," and bearing date September 10, 1907; that in said bulletin he warned the manufacturers and the dealers that after October 1, 1907, the sale of flour described therein would be in violation of the pure food law of the state, and condemned the flours manufactured by said plaintiffs in the manner described. It also alleged that, assuming to act under authority of the act of the legislature referred to, he was then threatening to institute criminal prosecutions against said plaintiffs and others, and to cause plaintiff's property manufactured under said process to be seized and destroyed, and that he was threatening to, and would, under the assumed authority contained in section 9 of said act (page 318), certify to each of the county auditors of the state, and cause to be published in the several counties, a statement that their flours were adulterated, when, in fact, such flours manufactured under said process were not adulterated, and were not within the condemnation of said act. The nature of their business, and the great value of this process to them through enabling them to successfully compete with other mills, was shown. It was further alleged that, if prevented from continuing the use of such process, they would sustain irreparable injury, and that from the acts

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threatened to be performed by said Ladd, as aforesaid, great damage and loss would be sustained by said plaintiffs, and that by reason thereof, and of the seizures threatened, they would be involved in a multiplicity of suits, and that they were possessed of no adequate remedy at law. It was then alleged that the flours manufactured by them under such process were not within the condemnation of said act of the legislature, and not within the description contained within the bulletins and circulars issued and threatened to be issued by said Ladd, and that the provisions in said chapter were obnoxious to certain articles of the constitution of the United States and the state constitution. The district court of Cass county issued a temporary restraining order, and an order to show cause against said Ladd why such restraining order should not be continued pendente lite. Ladd answered, denying generally the material allegations of the complaint, and also detailed his investigations of the subject of flour treated by the process described and his conclusions therefrom, and averred that such process transmitted to the flour deleterious ingredients which were poisonous substances, and made the flour detrimental to the health of the consumers, and reduced and injuriously affected its quality and strength. He also set forth facts tending to show that it enabled the millers to produce a flour by mixing low grade with higher grade flour, in appearance the same as if the latter had only been used, and other facts tending to show the inferiority of the flour manufactured under such process. The order to show cause was heard by the district court November 16, 1907, when the defendant in that action submitted a motion to the court for the dissolution of the temporary restraining order, and the dismissal of the action on the ground that the complaint did not state a cause of action, and did not state facts sufficient to entitle plaintiffs to any equitable relief. On the hearing of said order to show cause the affidavit of Professor Ladd was used on the one side, and the affidavits of the millers and a number of experts and others upon the other side, and the court denied the motion to dissolve said restraining order and dismiss the action, and continued such order in force and effect, pending the final determination of the action, save and except so much thereof as enjoined or prohibited said Ladd in his capacity as a private citizen from making criminal complaints, upon his own information, against persons guilty of violating the pure food law of the state. Thereupon said Ladd applied to this court for the issuance of a writ of prohibition directed to the district

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court in and for Cass county and the judge thereof, commanding and directing said court and judge to desist from further proceeding in the cause mentioned, and to dismiss said action, and quash the injunctional orders therein made and entered. Upon such application this court issued its temporary writ, and we are now called upon to determine whether it shall be made permanent.

We deem it altogether unnecessary to set out the affidavit of Prof. Ladd in support of his application, and of his contention that the process used by the millers referred to is harmful and deceptive, or the numerous and lengthy affidavits of the experts named, submitted on behalf of the defendant in this proceeding to the contrary. Many points were raised by both the relator and the defendant and argued in this court, which we shall not determine, because, from the view we take of the law and the rights of the parties, their determination is unnecessary, and would be improper. The ground which underlies the relator's demurrer interposed in the district court, and his application for the writ in this court, is that the courts of this state have no authority to entertain an action having for its purpose the enjoining of a public official while executing or claiming to execute a public statute for the public benefit. He construes paragraph 4, § 6631, Rev. Codes 1905, as a prohibition upon courts from entertaining suits of this kind. That statute is as follows: "An injunction cannot be granted * * * (4) to prevent the execution of a public statute by officers of the law for the public benefit. * * *" We do not so construe this provision of the code. Rather we construe it to mean that when a suit is tried wherein it is sought to enjoin an officer from executing a statute he shall not be enjoined when found to be regularly and lawfully executing the statute for the public benefit. If acting in excess of, or without, authority, he is not executing a public statute. There must be some method to protect people and property against the unlawful execution of statutes by public officials, and we think the provision referred to was not intended to preclude an inquiry on the part of courts in a suit to enjoin as to the legality of official acts. The contention in this case is that the food commissioner has misinterpreted the law, and that the products of the millers interested do not come within the condemnation of the pure food law, and that, instead of the district court exceeding its jurisdiction, Prof. Ladd is the party who is acting in excess of the authority conferred upon him by the statute. It is the property interests of the millers and others that are at stake

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in that proceeding. Their investments in plants and machinery are very great. Their investment in installing the process referred to amounts to many thousands of dollars, and it is clear that, if prevented from making use of this process, the latter investment will be lost, and it is alleged that in that case they will be unable to sell their products in competition with the millers of this state or other countries, either in this state or elsewhere, and it is clearly evident that if this be true no computation can be made of the damages which their property will sustain. Great reliance is placed by the relator upon Arbuckle v. Blackburn, 113 Fed. 616, 51 C. C. A. 122, 65 L. R. A. 864, but we do not consider it in point. It holds that the federal court cannot enjoin a food commissioner from instituting criminal prosecutions under a state statute, and the opinion seems to us to contain nothing indicating that the courts should not entertain such an action where the contentions of the parties are like those in the case at bar. That court says: "We are cited to cases holding that equity has jurisdiction to enjoin acts likely to be destructive of property rights, although the acts complained of constitute infractions of the criminal law. This is quite a different proposition from enjoining a criminal proceeding alleged to be indirectly destructive of property rights." We are unable to conclude that that case is an authority under the facts alleged in the case at bar. State v. Fisk, 15 N. D. 219, 107 N. W. 191, is relied upon as holding that an injunction will not lie, but it does not establish any such comprehensive principle. This court found in that case, from the record, that the drainage board was proceeding in all things in accordance with statutory requirements, and acting regularly and within its exclusive jurisdiction. There was no claim that the commissioners did not have jurisdiction to establish a drain and do all things necessary for its construction, and it was held, therefore, that the district court exceeded its jurisdiction in enjoining the commission. That is not this case as far as it had gone when brought here. There had been no trial and no findings on the part of the district court as to the acts of the food commissioner, and no final determination whether he was proceeding in accordance with law and the powers it conferred upon him, or whether he was exceeding his lawful powers and proceeding contrary to law, and we cannot presume that the district court will permanently enjoin him from executing the statute if it finds him acting in accordance with its provisions, and that the products of the millers are within its terms. If the plaintiffs in

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that case have asked for greater relief than they are entitled to, that does not deprive the district court of jurisdiction of that proceeding. It may find them entitled to some of the relief asked for, and to an injunction against some of the acts complained of, and not against others. Section 6631 is identical with a section of the California code. Courts of that state seem not to have been called upon to pass upon this frequently, but we find in Payne v. English, 79 Cal. 540, 21 Pac. 952, it was sought to enjoin the State Harbor Commissioners from taking land which they had no right to take, and the judgment of the lower court in favor of the commissioners was reversed notwithstanding their contention that this section of the code inhibited an injunction. Nelson v. State Board of Health, 108 Ky. 769, 57 S. W. 501, 50 L. R. A. 383, is directly in point. A graduate of a school of osteopathy sought to enjoin the board of health from molesting him in his profession as an osteopath. The trial court dismissed the action, and the Court of Appeals reversed its judgment and directed a perpetual injunction restraining the board from interfering with or prosecuting him for the practice of osteopathy, basing its decision on the ground that the practice of osteopathy was not included within the terms of the statute making it unlawful for any person to practice medicine without a certificate from the Board of Health. In Pratt Food Company v. Bird, 148 Mich. 631, 112 N. W. 701, it is held that equity will restrain an officer from unlawfully placing in the hands of every stock food dealer in the state a bulletin, in effect threatening them with prosecution, if they should use manufacturer's products sold in lawful form. The Supreme Court of the United States in American School of Magnetic Healing v. McAnnulty, 187 U. S. 93, 23 Sup. Ct. 33, 47 L. Ed. 90, passed upon a similar question. The federal statute authorizes the Postmaster General, upon evidence satisfactory to him that any person is engaged in conducting any of certain fraudulent schemes through the mails by means of false or fraudulent pretenses, etc., to instruct the postmasters at offices at which registered letters arrived directed to any such person to return them, stamped with the word "fraudulent." The government demurred to the complaint of the party whose mail had been so returned, on the ground that it did not state a ground for equitable relief, or show any reason why an injunction should be granted. The trial court sustained the demurrer, but its judgment was reversed by the supreme court notwithstanding the con-

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tention of the government that the Postmaster General could not be supervised or controlled by the court in the exercise of his discretion, and that the finding of the Postmaster General was an act involving the exercise of judgment or discretion on his part. The court held that the fact that the post office is a part of the administrative department does not necessarily and always oust courts of jurisdiction to grant relief to the party aggrieved by any action by the head or the subordinate officials of that department, which is unauthorized by the statute under which he assumes to act, and that "the acts of all officers must be justified by some law, and in case an official violates the law to the injury of an individual the courts generally have jurisdiction to grant relief." The supreme court instructed the circuit court to grant a temporary injunction, and to permit the government, if it could, to show that the business of the complainants as in fact conducted amounted to a violation of the statutes. See, also, Smith v. Bangs et al., 15 Ill. 400; Belknap et al. v. Belknap, 2 Johns. Ch. 463, 7 Am. Dec. 548; Mohawk & Hudson R. Co. v. Archer, 6 Paige, Ch. (N. Y.) 83; Rogers v. Barker et al, 31 Barb. (N. Y.) 447; Schuster v. Met. Board of Health, 49 Barb. (N. Y.) 450; Sweet v. Hulbert, 51 Barb. (N. Y.) 312; 22 Cyc. 881. These cases establish the principle that a court of chancery has undoubted jurisdiction to interfere by injunction in a case where public officials are proceeding illegally and improperly under claim of right, or where the exercise of such jurisdiction is necessary to prevent a multiplicity of suits, or irreparable injury to property. 5 Pomeroy on Equity Jurisprudence, section 321, states the rule to be that a public official may be restrained in a case coming under the recognized head of equity jurisprudence from acting illegally to the injury of individuals, but that the mere fact that he is acting illegally is not sufficient to warrant equitable interference. There must be, in addition, an injury to the property rights of the party applying for relief. See, also, section 322. The case of the People v. Canal Board, 55 N. Y. 390, is also directly in point. Most of the authorities to which our attention has been called denying the right to an injunction go to the ultimate question as to whether the injunction should be granted, and not to the right or the power of the court to hear or determine an action to enjoin an officer. Minneapolis Brewing Company v. McGillivray (C. C.) 104 Fed. 258, holds that an injunction will lie to prevent the destruction of property and the ruin of

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business by an officer. We are of the opinion that an action instituted in the district court for an injunction is a proper action by which to determine whether the acts of the food commissioner are in accordance with or in violation of law, and that that court has power and jurisdiction to entertain such an action, and if it found that that official is, under color of law, proceeding in an unlawful manner, and is illegally condemning the products of the millers of the state, it may permanently enjoin him from so doing.

It follows that the temporary writ issued by this court must be vacated, and the relator's application denied. All concur.

(115 N. W. 675.)

D. T. YOUKER v. FLORA A. HOBART.

Opinion filed March 18, 1908.

Adverse Claims — Plaintiff Must Show Title — Evidence.

1. In the statutory action to determine adverse claims to real property, it is incumbent upon plaintiff to prove a title sufficient to authorize him to maintain the action, and, until he furnishes such proof, the defendant is not required to prove his adverse title or claim.

Taxation — Validity of Tax Deed.

2. Plaintiff's sole proof of title consisted of a tax deed based upon an alleged tax sale made on December 3, 1901, for the taxes for the year 1900. This deed is held void upon its face, for the reason that it discloses that the sale was conducted contrary to the provisions of chapter 154, page 198, Laws 1901, which requires that "each tract shall * * * be struck off to the bidder * * * who will agree to accept the lowest rate of interest," etc.

Same — Collusion at Tax Sale — Void Bid.

3. The tax sale upon which plaintiff's title is based was void because by an unlawful arrangement between the bidders at the sale all competitive bidding was eliminated; the proof of such unlawful combination and agreement being clearly disclosed by the evidence.

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

Action by D. T. Youker against Flora A. Hobart and others. Judgment for defendants, and plaintiff appeals.

Affirmed.

E. E. Cassells and *Youker & Perry,* for appellant.

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A tax sale on 19th day after first publication of notice is sufficient. Coe et al. v. Buell, 6 N. W. 621; Taylor v. Brown, 5 Dak. 335, 40 N. W. 525; Williams v. Turner Twp. 87 N. W. 968; C. M. & St. P. Ry. Co. v. Nield, 92 N. W. 1069.

Robinson & Lemke, for respondent.

A tax title depends upon strict compliance with requirements of law. Farrington v. N. E. Investment Co., 1 N. D. 102, 45 N. W. 191; Powers v. Larrabee, 2 N. D. 141, 49 N. W. 724; Power v. Bowdle, 3 N. D. 107, 54 N. W. 404; O'Neil v. Tyler, 3 N. D. 47, 53 N. W. 434; Swenson v. Greenland, 4 N. D. 532, 62 N. W. 603; Roberts v. Bank, 8 N. D. 504, 79 N. W. 1049; Lee v. Crawford, 10 N. D. 482, 88 N. W. 97; Security Imp. Co. v. Cass County, 9 N. D. 553, 84 N. W. 477.

A tax deed void on its face is not competent evidence. O'Neill v. Tyler, supra; Black on Tax Titles, section 545; Cooper v. Shepardson, 51 Cal. 299; Williams v. Kirkland, 13 Wall. 306, 20 L. Ed. 683; Blackwell on Tax Titles, 83 Note D; 2 Desty on Taxation 961; Johnson v. Elwood, 53 N. Y. 431; Dever v. Cornwell, 10 N. D. 123, 86 N. W. 227; Lee v. Crawford, 10 N. D. 482, 88 N. W. 97; Sweigle v. Gates, 9 N. D. 538, 84 N. W. 481; Silsby v. Stockle, 7 N. W. 160; Bailey v. Haywood, 38 N. W. 209.

Where a tax sale lacks competition and purchasers by agreement take turns at bidding, the sale is void. Blackwell on Tax Titles, section 559, Cooley on Taxation, (3d Ed.) 943; State v. Maxwell, 6 Wall. 268; Singer Mfg. Co. v. Yerger, 12 Fed. 487; Johns v. Thomas, 47 Iowa 441; Frank v. Arnold, 35 N. W. 453.

Beggs v. Paine, 15 N. D. 436, 109 N. W. 322, contra. is governed by Laws 1890, section 72, and Laws 1897, section 78.

A sale for a tax in whole or in part is illegal, is void. Wilson v. Supervisors, 47 Cal. 91; Dever v. Cornwell, supra; Lee v. Crawford, supra; Sweigle v. Gates, supra; Sibly v. Stockle, supra; Milage v. Coleman, 47 Wis. 180; Harper v. Rowe, 53 Cal. 233; Wills v. Austin, 53 Cal. 152; Treadwell v. Patterson, 51 Cal. 637; Case v. Dean, 16 Mich. 12; Riverside v. Howell, 113 Ill. 259; Kempt v. Cleland's lessee, 19 Ohio 308; Gage v. Plumpelly, 115 U. S. 462.

Fisk, J. This action, which was brought to determine adverse claims to certain real property, was tried in the district court of Dickey county, and resulted in a judgment in defendant's favor. By this appeal we are asked to review the entire case.

The complaint is in statutory form, alleging ownership of the property in plaintiff, and that defendants claim certain estates or

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liens therein adversely to plaintiff, and praying that defendants be required to set forth all their adverse claims, and that the title be quieted in plaintiff as against the same. The respondent Flora A. Hobart is the only answering defendant. She denies all the allegations of the complaint, except the single one that she claims ownership of the property, and by way of counterclaim she alleges ownership in her, and prays that her title may be quieted as against plaintiff's claim. She further alleges, in effect, that plaintiff's alleged title thereto is based upon a tax deed issued pursuant to an alleged sale of said land to one Sefton, plaintiff's grantor, for the taxes thereon for the year 1900, which tax sale took place on December 3, 1901, and subsequent payments of taxes for the years 1901, 1902 and 1903. She further alleges that the land in controversey was not assessed for taxation during said years, nor was any levy made therefor, and, further, that "the county taxes were not based upon the estimate of the expenses for the ensuing year, nor on a statement of the outstanding indebtedness of the county, and that a part of the said county tax levies were illegal and unauthorized." She further alleges that in the years 1900 and 1901 the county taxes charged against said land were not levied by uniform rule on all the taxable real and personal property in said county, and that in each of said years there was levied against all the taxable real property of said county, two mills on the dollar for gopher bounties, which levy on personal property. She further alleges that at the tax sale levies were made under a void statute, which did not authorize a levy on personal property. She further allges that at the tax sale in December, 1901, the land was not fairly and in good faith offered for sale, and sold at public vendue, for the reason that at said sale the persons present as purchasers were professional tax sale purchasers, and they refrained from bidding against one another under an understanding that they should take turns in bidding, thereby eliminating all competition, the result of which was that no bid was made at less than the rate of 24 per cent a year, with five per cent penalty. She further alleges that no notice of the time for redemption was given as required by law before the issuance of such tax deed, and, further, that she is ready and willing and offers to redeem by paying to plaintiff the amount paid by the purchaser at the time of sale with the statutory penalty of five per cent, together with the amount of the subsequent taxes paid by him, with interest on all taxes at the rate of two per cent a month for three years from the date of payment, and praying for judgment that said tax deed

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be cancelled, and that defendant's title be quieted as against the plaintiff's claim.

It was, and is, conceded that defendant is the owner in fee of the property in controversy, unless her title was divested by the tax proceedings above mentioned. The trial court held that such attempted tax sale and the deed issued pursuant thereto were void, and adjudged that such deed be canceled of record. This holding was based upon the facts as found, that the notice of sale was not published for the requisite length of time prior to the date of sale, and that such sale was not conducted as required by law, for the reason that the bidders thereat entered into and carried out an unlawful agreement, whereby all competitive bidding was eliminated, and the property was sold for the highest rate of interest and penalty permitted by law. Defendant deposited with the clerk of court and offered to pay the plaintiff the full amount of such alleged taxes, with interest and penalty, which offer was refused.

The plaintiff's title, and hence his right to maintain this action, concededly rests entirely upon the validity of the tax sale made on December 3, 1901. To prove such sale, plaintiff relied wholly upon such tax deed and the legal presumptions arising from its recitals. Respondent contends that such deed is void upon its face, and therefore has no probative force as evidence, and he urges several grounds against the validity of such sale, only one of which we deem it necessary to notice. The so-called tax deed recites upon its face that the sale was made for "the smallest or least quantity of land that would sell for the amount of the tax," and not a sale made to the person offering to accept the lowest rate of interest from the date of the sale on the amount of the tax. In other words, it discloses upon its face that the sale was conducted pursuant to the provisions of section 76, chapter 126, page 285, Laws 1897, instead of chapter 154, page 198, Laws 1901, then in force. It is therefore clear, we think, that said deed was void upon its face, and furnished no proof of title. As directly in point, see King v. Lane (S. D.) 110 N. W. 38. It was there held that a tax deed was void upon its face which recited, in effect, that the sale was made under a prior statute which had been repealed. The prior statute, as in this state, required that the least quantity of the tract that would sell for the amount of the taxes, etc., should be sold, while the law in force at the date of the sale provided that the land should be sold to the bidder who bid the full amount due and states in his bid the lowest rate of interest per annum which he is willing to receive. Plaintiff therefore

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wholly failed to prove title as alleged. This he was, of course, bound to do; it being well settled that defendant cannot be required to show title until plaintiff has first furnished proof of his title and right to maintain the action. Dever v. Cornwall, 10 N. D. 123, 86 N. W. 227, and cases cited. After quoting from numerous Minnesota authorities, the court says: "Under these authorities, the plaintiff was not in a position to call upon the defendant to show at the trial that their title to the land was a good title, and all evidence introduced at the trial to vindicate the defendant's title was therefore superfluous. As against the plaintiff, the defendants were entitled to have their title quieted at least to the extent of an adjudication that the plaintiff had no title to or interest in the land as against the defendants."

The decision of the trial court was manifestly correct for the further reason that the defendant's proof clearly shows that such tax sale was void because of the fact, which we think is clearly proven, that the purchaser at said sale had previously entered into an unlawful agreement with other prospective bidders whereby all competitive bidding was stifled and eliminated. The defendant introduced in evidence the tax sale record, from which it appears that 187 tracts of land were sold at said sale to about a dozen different persons, 15 of such tracts having been sold to the person, Sefton, who purchased the land in question. An inspection of this record discloses that the purchasers at said sale did not in a single instance bid against one another, and it is very apparent that said bidders took turns at bidding, and this must have been done pursuant to a previous express or tacit understanding between them. This was nothing more than a mere mock auction sale. That such a sale is void is well settled. Blackwell on Tax Titles. sections 559, 560; Cooley on Taxation (3d Ed.) 943, 944; Slater v. Maxwell, 6 Wall. (U. S.) 268, 276, 18 L. Ed. 796; Singer Mfg. Co. v. Yarger, (C. C.) 12 Fed. 487; Johns v. Thomas, 47 Iowa, 441; Frank v. Arnold, 73 Iowa, 370, 35 N. W. 456. In Johns v. Thomas, supra, the supreme court of Iowa, in speaking of a similarly conducted tax sale, said: "A list of the sales with the names of the purchasers is given. Green purchased several tracts, and no two in succession. His purchases, to be sure, do not appear to have taken place at entirely regular intervals. No one, however, can look at the list of sales without being impressed that they were to some extent governed by the idea of making an equal distribution." This language is strikingly applicable to the facts of the case at bar. Out of

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the entire number of sales made each person among the twelve bidders appears to have gotten his pro rata share of the bargains, and it is a significant fact that out of the entire number of 187 sales no bid was made at less than the maximum rate of interest and penalty, namely, 24 per cent interest and 5 per cent penalty. This circumstantial evidence is of the most convincing character, and fully justified the trial court's finding that "the said tax sale was not made at public auction." In addition to the foregoing authorities, see, also, 27 Am. & Eng. Enc. Law, 838-840, and cases cited. Under the statute (section 1576, Revised Codes 1905) a tax sale must be made at public auction, and each tract must be struck off to the bidder "who will agree to accept the lowest rate of interest from the date of sale on the amount of such taxes, penalties and costs, so paid by him, which said rate shall in no case exceed 24 per cent per annum." It needs no argument to show that this statute was most flagrantly violated at the sale in question. This being true, the alleged sale was void and plaintiff's alleged title, based thereon, is likewise void.

Having reached this conclusion, it is unnecessary to notice the other points raised by appellant's counsel.

The judgment appealed from is affirmed. All concur.

(115 N. W. 839.)

STATE EX REL. McCUE, ATTY. GEN., v. MINNEAPOLIS, ST. P. & S. S. M. RY. CO.

Opinion filed April 22, 1908.

Action by the state, on the relation of T. F. McCue, Attorney General, for writ of mandamus against the Minneapoiis, St. Paul & Sault Ste. Marie Railway Company.

Writ denied.

T. F. McCue, Attorney General, in pro per.

Alfred H. Bright and *Ball, Watson, Young & Hardy,* for defendant.

PER CURIAM. Following the decision in State ex rel. McCue, Attorney General, v. Great Northern Ry. Co. (N. D.) 116 N. W. 89, just announced, the application for a writ of mandamus is denied.

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ADAMS & FREESE CO. v. SAMUEL F. KENOYER, AND SARAH E. KENOYER, HIS WIFE.

Opinion filed April 2, 1908.

Limitation of Action — Change of Law — Effect on Existing Causes of Action.

1. The legislature may by amendment shorten the statutory period for the commencement of actions, and make such amendment applicable to existing causes of action, provided a reasonable time is fixed for the commencement of suits on such existing causes of action.

Same — Statute Presumed Prospective, not Retrospective.

2. Statutes are presumed to be prospective, and not retrospective, in their operation, in the absence of a clear legislative intent to the contrary.

Same — Foreclosure of Mortgages.

3. Chapter 5, page 9, Laws 1905, which excepts from the operation of the former statute, providing that absence or nonresidence from the state shall suspend the running of the statute, all actions and proceedings for the foreclosure of mortgages on real property, is construed, and *held* not to apply to existing causes of action for the foreclosure of mortgages which accrued prior to the passage of such amendatory statute, for the reasons, first, that no time was fixed by the legislature for the commencement of such foreclosure proceedings after the taking effect of such statute; and second, that if the time between the passage and approval of the act (March 10th) and its taking effect (July 1st) was intended to be the time fixed for such purpose, the same is manifestly unreasonable.

Same.

4. The defense that plaintiff's cause of action is barred by the statute of limitations is accordingly overruled.

Appeal from District Court, Sargent County, *Allen*, J.

Mortgage foreclosure by Adams & Freese Company against Samuel F. Kenoyer and others. Judgment for defendants, and plaintiff appeals.

Reversed, and judgment directed for plaintiff.

Rourke, Kvello & Adams, for appellant.

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Legislature may shorten the period within which actions may be brought, provided reasonable time is fixed within which actions about to be barred might be commenced. Osborn v. Lindstrom, 9 N. D. 1, 81 N. W. 72, 46 L. R. A. 715; Merchants National Bank of Bismarck, N. D. v. Braithwaite, 7 N. D. 358, 75 N. W. 244.

Statutes have no retrospective operation except where the legislative intent to make it so is clear. Wood on Limitation of Actions, page 30, section 12; State v. Switzler, 65 A. S. R. 653; Lawrence v. Louisville, 49 A. S. R. 309; Link's Appeal from Probate, 14 A. S. R. 94; Walker v. Bergess, 67 A. S. R. 775.

This includes statutes of limitations. Bruce v. Schuyler, 46 A. D. 447; Vaughan v. E. Tenn. Coal Co., Fed. Cases, 16, 898; Sohn v. Waterson, 84 U. S. 596, 21 L. Ed. 737.

Chas. S. Ego and *T. A. Curtis,* for respondent.

Statute of limitations apply to past and future causes of action, provided a reasonable time is allowed to bring action, the causes of which already exist. Osborn v. Lindstrom, 9 N. D. 1, 81 N. W. 72, 46 L. R. A. 715, 81 Am. St. Rep. 516; Merchants National Bank of Bismarck, N. D., v. Braithwaite, 7 N. D. 358, 75 N. W. 244, 66 Am. St. Rep. 653.

FISK, J. This action is here for trial de novo. The facts are stipulated, and in substance are as follows: On September 22, 1887, respondents executed and delivered to one Rush S. Adams their promissory note for the sum of $600, due November 1, 1892, with interest at eight per cent until maturity, and twelve per cent thereafter, the interest to accrue thereon being represented by five coupon notes of $48 each, maturing on November 1st of each year thereafter until paid. On the same day, and to secure said notes, they executed and delivered a mortgage with the usual covenants upon the northwest quarter, section 10, township 129, range 57, in Sargent county, this state, which notes and mortgage were thereafter assigned to appellant, the present owner thereof. That respondents now are, and ever since the execution of said mortgage, have been the owners of the real property aforesaid. That no part of such indebtedness has been paid, except the two coupon notes,

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which matured on November 1, 1888, and 1889, respectively. That at the date of the execution of said notes and mortgage respondents resided in Sargent county aforesaid, but that on or prior to November 1, 1894, they removed from this state to the state of Missouri, where they have ever since resided, and have been absent from this state during all times since leaving as aforesaid. That no proceedings at law or otherwise have been had to recover said sum, and that plaintiff's attorneys are duly authorized by a written power of attorney to foreclose such mortgage. The sole defense interposed is that plaintiff's cause of action was and is barred by the statute of limitations. The trial court rendered judgment in defendant's favor dismissing the action, and adjudging plaintiff's mortgage void, and also quieting defendants' title as against such incumbrance, to reverse which this appeal was taken.

It was the theory of the trial court, and it is respondent's contention in this court, that by operation of chapter 5, page 9, Laws 1905, plaintiff's cause of action became barred on July 1, 1905, being several months prior to the date the action was commenced. Chapter 5, page 9, aforesaid, was passed March 10, 1905, and not containing an emergency clause, it took effect on July 1st of that year. If this statute is held to apply to plaintiff's cause of action and is constitutional, then the judgment below was correct, otherwise not. Prior to the amendment embraced in such statute plaintiff's cause of action would not have become barred during the defendant's absence from the state. Mortgage Co. v. Thresher Co., 14 N. D. 147, 103 N. W. 915, Mortgage Co. v. Flemington, 14 N. D. 181, 103 N. W. 929, and Paine v. Dodds, 14 N. D. 181, 103, N. W. 929; and Paine v. Dodds, 14 N. D. 189, 103 N. W. 931, 116 Am. St. Rep. 674. But by this amendment proceedings to foreclose real estate mortgages by action or otherwise were excepted from the provisions of the statute (Rev. Codes 1905, section 6796), which, in effect, provides for a suspension of the running of the statute during the debtor's absence from the state. It is plain, therefore, that at no time prior to July 1, 1905, was plaintiff's cause of action barred under the law, but on that day it became, and at all times since has been, barred by force of this amendment, provided, as before stated, that such amendment is held to apply to such cause of action, and provided, further, that the said statute is constitutional when thus construed. The case of Osborne v. Lindstrom, 9 N. D. 1, 81 N. W. 72, 46 L. R. A. 715, 81

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Am. St. Rep. 516, is relied upon in support of the decision below. It was there held, after disapproving a contrary rule announced in the earlier case of Bank v. Braithwaite, 7 N. D. 358, 75 N. W. 244, 66 Am. St. Rep. 653, that in order that the amendatory statute may apply to existing causes of action the legislature must fix a reasonable time in which actions may be brought thereon after such new statute is passed. The court, in speaking of the Braithwaite decision, said: "We used language in that case, however, which, while not necessary to the decision of the case, needs qualification, and some that needs disapproval. We said: 'While it is usual for the new limitation law, which cuts down the period within which certain actions may be brought, to provide, in terms, that all suitors whose causes of action have accrued before the change was made should have, in any event, a specified time in which to sue, yet we do not think that this provision is essential to the validity of such a statutory change, when applied to existing causes of action, provided the time actually left in which to sue is not unreasonable.' We shall hold in this case that the legislature need not fix an exact time, provided the time they do fix must, in any event, be a reasonable time; but, so far as the language used in the Braithwaite case imports that the legislature need not fix any time, we thing it misstates the law, and we do not wish to remain committed to it. Again, it is stated in the syllabi of that case * * * that, in the absence of a legislative provision fixing a time within which actions may be brought on existing causes of action, 'the court will determine in each case whether, after the new law took effect, the suitor still had a reasonable time, under such new law, in which to commence his action.' That language was wholly unnecessary in the case, and does not meet our approval. When the legislature, in fixing such time, makes it so short that the right to sue is practically denied, courts will declare such time unreasonable, and refuse to enforce the law. But courts cannot go further and fix the time different from that fixed by the legislature within which suit may be brought. And if the legislature has failed to fix any time, the courts cannot, in a given case, supply this legislative lapse. The fixing of the time within which to bring suit, under such circumstances, is purely a legislative function. It is not within the power of the judiciary. We take this earliest opportunity to correct the errors that inadvertently found their way into the Braithwaite case." In so far as the Osborne case holds that the legislature and not the

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courts must fix the reasonable time in which suits upon existing causes of action may be brought in order to make the amendatory statute applicable to such causes of action, it undoubtedly is sound, and the contrary doctrine laid down in Bank v. Braithwaite, supra, was correctly repudiated.

The authorities are practically unanimous to the effect that, while the legislature may shorten the statutory period in which suits, including those on existing causes of action, may be commenced, it must as to such existing causes of action fix a reasonable time for the bringing of such suits thereon before the bar of such statute becomes effective, for otherwise the creditor would be deprived of his property rights in such causes of action without due process of law. As said by the Court of Appeals of New York in Gilbert v. Ackerman, 159 N. Y. 118, 53 N. E. 753, 45 L. R. A. 118: "There is no question as to the power of the legislature to pass or to shorten statutes of limitation. * * * The only restriction upon the legislature in the enactment of statutes of limitation is that a reasonable time be allowed for suits upon causes of action theretofore existing. Rexford v. Knight, 11 N. Y. 308; People v. Turner, 117 N. Y. 227, 22 N. E. 1022, 15 Am. St. Rep. 498. The question of reasonableness naturally and primarily is with the legislature, and when the question is brought before the court the surrounding circumstances are regarded in determining whether the legislature, in prescribing a period of limitation, has erred to the prejudice of substantial rights. The right possessed by a person of enforcing his claim against another is property; and if a statute of limitations, acting upon that right, deprives the claimant of a reasonable time within which suit may be brought, it violates the constitutional provision that no person shall be deprived of property without due process of law." See Clark v. Beck, 14 N. D. 287, 103 N. W. 755; also the recent case of Hathaway v. Merchants' Trust Co., 218 Ill. 580, 75 N. E. 1060; 19 Am. & Eng. Enc. Law, 174, and cases cited; 6 Current Law, 466. Such is the almost universally recognized doctrine, the principle being so firmly settled that we deem further citation of authorities unnecessary.

This court in the Osborne case held that, while the legislature which passed the amendatory act there in question did not fix a reasonable time or any time in which suits might be brought upon existing causes of action, the act nevertheless applied thereto, for the reason, as stated by the court, that the preceding legislature in

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enacting the law providing for a general revision of the code fixed such reasonable time by the necessary operation of such law. This court in that case also squarely held that the time between the passage of such amendatory statute and the time of its taking effect will be considered in determining whether a reasonable time is given for the bringing of suits on such existing causes of action, and they expressly refer to and repudiate the doctrine announced by the Court of Appeals of New York to the contrary. The writer of this opinion is firmly convinced both of the palpable fallacy and injustice of the rule thus announced in the Osborne case and of the eminently correct and just doctrine enunciated by the New York court. The practical effect of holding that the creditor must take notice of the amendment and bring his suit before the statute takes effect as a law is to deprive him of his property rights altogether; for it is a matter of general knowledge of which we must take judicial notice that during the greater portion of the time, if not the entire time, between the passage of a law in this state and July 1st thereafter, at which date the law takes effect, in the absence of an emergency clause or the designation of another date, there is no method by which the citizen can acquaint himself with the official contents of such statute except by an examination of the original in the office of the secretary of state, as there is no law requiring the publication of new statutes except in bound volumes, which usually takes until after July 1st following their enactment in which to publish them. Regardless of what courts may have held on this point in other states, the writer firmly believes that no such harsh rules should be longer sanctioned in this jurisdiction.

We are not required in this case, however, to either affirm or reverse the Osborne Case on this point, as we do not consider said point at all decisive of this appeal, or necessarily involved, and therefore the majority of the members of the court express no opinion thereon either way. We are agreed that the amendatory statute cannot be held to apply to existing causes of action for two reasons: First, in the enactment of said statute the legislature fixed no time for the bringing of suits on such causes of action; and, second, conceding that it intended to and did fix such time, that the time thus fixed, was, as a matter of law, unreasonable.

The statute in question amended and re-enacted section 5210, Revised Codes 1899, which in substance prescribed that the running of the statute against bringing suits on all causes of action should

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be suspended during the absence or nonresidence of the defendant from the state. The amendment added a proviso as follows: "Provided, however, that the provisions of this section shall not apply to the foreclosure of real estate mortgages by action or otherwise."

No mention is made of existing causes of action, and there is nothing in the law indicating a legislative intent to make such exception applicable thereto. It is perfectly apparent that no time for bringing suits on existing causes of action was fixed by such amendment. That this was necessary in order that it should apply to such causes of action is correctly settled in Osborne v. Lindstrom and Clark v. Beck, supra, as well as by the overwhelming weight of authority elsewhere. It is also equally well settled that such an amendment in the absence of a clear legislative intent to the contrary is presumed to be prospective, and not retrospective, in its operation. In Hathaway v. Merchants' Trust Co., supra, the supreme court of Illinois very recently said: "While it is undoubtedly within the power of the legislature to pass a statute of limitations, or to change the period of limitations previously fixed, and to make such statute or changes applicable to existing causes of action, yet such a statute is not to be readily construed as having a retroactive effect, but is generally deemed to apply merely to causes of action arising subsequent to its enactment, and the presumption is against any intent on the part of the legislature to make the statute retroactive. 19 Am. & Eng. Enc. Law, 174; Robertson v. Wheeler, 162 Ill. 566, 44 N. E. 870; Spaulding v. White, 173 Ill. 127, 50 N. E. 224. The statute will only be given a retroactive effect, when it was clearly the intention of the legislature that it should so operate. Fisher v. Green, 142 Ill. 80, 31 N. E. 172. And even where this intention clearly appears, it will not be given effect, if to do so would render it unreasonable or unjust. * * * The presumption is that the legislature did not intend this law to be retroactive unless the contrary clearly appears. There is nothing in the amendment to indicate such an intention on the part of the legislature. Therefore the presumption must prevail that it was not to be retroactive. The plaintiffs in error contend that there was about eight months after the act was approved and six months and thirteen days after it took effect, within which the defendant in error could have filed its claim, this was a reasonable time, and that the new limitation should prevail. The act must be applied generally to all claims and to all estates. A single claim or a single

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estate cannot be pointed out in which the act applies, and then say it does not apply to any other claim or to any other estate."

But conceding that the legislature in enacting the statute intended to make it retroactive as well as prospective in its operation, and also intended to and did fix the time between its enactment and the date of its taking effect, July 1st, for the institution of proceedings on existing mortgages, still the time thus fixed was, as a matter of law, unreasonable, and hence the statute cannot be held to apply to foreclosure proceedings under mortgages which had matured prior to the enactment thereof. The time between these dates was but three months and twenty-one days. In that short space of time it would be almost an utter impossibility, even if they, in fact, acquired knowledge of such law on the day it was enacted, for all persons, including residents and nonresidents, owning real estate mortgages on property in this state under which causes of action had accrued, to cause foreclosure proceedings to be instituted on all such mortgages. In considering the validity of such statute when applied to existing causes of action, it is both just and reasonable to assume, what we all know to be true as a matter of common knowledge, that a large per cent of such persons, especially nonresidents of the state, would not, in that short period of time, acquire knowledge that such a vitally important statute to them had been enacted. One of the objects of the constitutional provision providing that no law shall take effect before July 1st, except in case of an emergency, no doubt was to give the people an opportunity during the intervening time between the date of the passage of the statute and July 1st thereafter to become acquainted with the provisions of such law; yet under the rule contended for the citizen as well as the nonresident is bound at his peril, not only to acquire knowledge of the statute, but to act in contemplation of the same before the taking effect thereof. These considerations have induced us to hold as above indicated. Having reached this conclusion, it becomes unnecessary to notice the other questions discussed in the briefs.

The judgment is reversed, and the district court directed to enter judgment in plaintiff's favor for the relief to which it is entitled under the facts stipulated and the views above expressed. All concur.

(116 N. W. 98.)

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Landis Machine Company, a Corporation, v. Konantz Saddlery Company, a Corporation.

Opinion filed April 22, 1908.

Appeal — Review — Directed Verdict.

1. On an appeal from a judgment, the failure to renew a motion for a directed verdict at the close of the testimony, or to make a new motion for a directed verdict, precludes a review of the correctness of a ruling on a motion for a directed verdict made at the close of plaintiff's case.

Same — Sufficiency of Evidence.

2. Where no motion for a new trial is made, the sufficiency of the evidence to sustain a verdict cannot be reviewed.

Judgment Notwithstanding the Verdict.

3. A motion for judgment notwithstanding a verdict is not proper where no motion for a directed verdict was made at the close of plaintiff's case.

Trial — Objection to Evidence.

4. An objection to the offer of notes or documents in evidence, as incompetent, irrevelant and immaterial, is too general, and does not raise an objection thereto that the execution of the notes has not been proven.

Appeal — Harmless Error.

5. The admission of hearsay evidence is not prejudicial error, when the objecting party thereafter establishes by his own evidence the facts testified to, based on hearsay.

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

Action by the Landis Machine Company against the Konantz Saddlery Company. Judgment for plaintiff, and defendant appeals.

Affirmed.

Le Sueur & Bradford, for appellant.
Geo. H. Gjertsen, for respondent.

Morgan, C. J. This is an action for damages for the conversion of a harness stitching machine alleged to have been owned by the plaintiff under a conditional sale contract. The plaintiff sold the machine to the firm of Birch & Fladagar, to be paid for in install-

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ments, and each note representing an installment to be paid, provided that the title to the machine should remain in the seller until it was fully paid for. Before final payment, the purchasers sold the machine to the defendants, who took the same into its possession and refused to turn it over to plaintiff after due demand. Damages are claimed in the sum of $150. The defendant answered by denying that it wrongfully converted the machine. There was a verdict for the plaintiff for the sum of $150 and interest. Defendant made a motion for a judgment notwithstanding the verdict, which was denied. Judgment was entered on the verdict, and defendant has appealed.

There are numerous assignments of error, but some of them cannot be considered, as the record does not properly present them. At the close of plaintiff's case, the defendant moved for a directed verdict in its favor, and the motion was denied. Thereafter the defendant introduced its testimony and rested. No motion was made by it for a directed verdict after it had rested or after the taking of testimony closed, nor was the former motion renewed. The fact that no motion was made for a directed verdict after the testimony closed, or the former motion renewed, precludes the defendant from claiming error in denying the motion that was made at the close of plaintiff's case. Introducing testimony after such a motion is denied, without a renewal of the former motion, is a waiver of the right to have the motion reviewed.

Defendant also made a motion for judgment notwithstanding the verdict after the verdict was returned, and that motion was denied. No error can be predicated on that ruling for the reason that no motion for a directed verdict was made at the close of the taking of the testimony. The statutory prerequisites to the making of that motion must all be complied with before it can properly be made. The statute expressly provides that the motion is to be made where a motion for a directed verdict has been made at the close of the testimony in the case tried, and has been denied. This precludes the right to make that motion unless preceded by a motion for a directed verdict at the close of the testimony. See chapter 63, page 74, Laws 1901.

The appellant claims that the verdict for the plaintiff is not sustained by the evidence. No motion for a new trial was made. Without such a motion the evidence cannot be reviewed to determine whether the verdict is sustained or not. The language of section

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7226, Revised Codes 1905, is explicit on this point, wherein it provides: "But questions of fact shall not be reviewed in the supreme court in cases tried before a jury unless a motion for a new trial is first made in the court below." See, also, McNab v. N. P. Ry., 12 N. D. 568, 98 N. W. 353; Ness v. Jones, 10 N. D. 587, 88 N. W. 706, 88 Am. St. Rep. 755; Henry v. Maher, 6 N. D. 413, 71 N. W. 127; Myers v. Longstaff, 14 S. D. 98, 84 N. W. 233.

Certain rulings in the admission of evidence are assigned in the brief as errors. The introduction of the notes in evidence is claimed to have been erroneous for the alleged reason that their execution was not proven. No objection was made to their introduction on that ground. The trial court was not apprised by the objection made of its precise ground and could not possibly infer from the objection made that it was based on the ground that no foundation had been laid for their introduction. The objection made is that they are incompetent, irrelevant, and immaterial.

Objections were also made to evidence received on behalf of the plaintiff showing what was said by defendant's representative as to whom he was acting for when the machine was taken from the possession of Birch & Fladagar. If it should be conceded that it was error to receive this evidence, it would clearly be without prejudice. The defendant thereafter admitted the taking of the machine, and it claimed the right to take it as a purchaser without notice. Whether the evidence justifies the verdict on this point, we cannot determine, for the reason that the verdict must be deemed conclusive, in the absence of a motion for a new trial.

The abstract contains no specifications of the errors relied on for a reversal of the judgment. The briefs of both parties are not folioed. The absence of these requirements have all been overlooked by us in view of the fact that the record and briefs are not long ones. The necessity of specifications of the errors relied on will not ordinarily be overlooked, nor will the record be explored to determine whether the statement of the case as settled contains the required specification of errors.

Finding no error on the trial or upon the judgment roll, and it appearing that the judgment roll sustains the verdict, the judgment is affirmed. All concur.

(116 N. W. 333.)

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SUCKER STATE DRILL CO., A FOREIGN CORPORATION, v. A. J. WIRTZ AND CHAS. H. WIRTZ, PARTNERS AS WIRTZ BROS.

Opinion filed March 18, 1908.

Commerce — Subjects of Regulation — Storage of Goods to be Sold on Commission.

1. Plaintiff, a foreign corporation, brought this action to recover the purchase price of certain drills sold and delivered by it to defendants. The defense interposed is that plaintiff has not complied with the law of this state, being sections 4695-4699, Rev. Codes 1905, prescribing the conditions upon which such corporations may do business within our borders; it being admitted by plaintiff that it has not complied with such law.

Same.

2. Evidence examined, and it is *held* that plaintiff did not violate such statute, as in its dealings with defendant out of which its cause of action accrued it was engaged in transacting or doing an interstate, as contradistinguished from an intrastate, business.

Foreign Corporations — Compliance with Requirements — Interstate Commerce.

3. The statute aforesaid cannot apply, nor was it intended that it should apply, to foreign corporations while engaged solely in transacting an interstate business. It will be presumed that in the enactment of such statute the legislature did not intend in any manner to interfere with the exclusive power vested in the congress of the United States to regulate or restrict the business of interstate commerce.

Same.

4. A portion of the drills sold to defendants were in store at Grand Forks, and were shipped directly to defendants from that place, but it is *held,* for reasons stated in the opinion, that this shipment did not constitute the transacting or doing business within the state in violation of said statute.

Contracts — Evidence.

5. Certain evidence as to prior, but wholly independent contracts and transactions of plaintiff with other citizens of the state claimed to have been violations of such statute, is held irrelevant.

Appeal from District Court, Benson County; *Burke,* J.

Action by the Sucker State Drill Company against Wirtz Bros. Judgment for plaintiff, and defendants appeal.

Affirmed.

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Scott Rex, for appellants.

A contract by a foreign corporation doing business in this state in violation of law is void. United States Rubber Co. v. Butler Bros. Shoe Co., 132 Fed. 398; MacNaughton Co. v. McGirl, 49 Pac. 651; Sherman Nursery Co. v. Aughenbaugh, 100 N. W. 1101; Oakland Sugar Mill Co. v. Fred W. Wolf Co., 118 Fed. 239; Heilman Brg. Co. v. Peimeisl, 88 N. W. 441; Commonwealth v. Parlin & Orendorff Co., 80 S. W. 791; Fay Fruit Co. v. McKinney, 77 S. W. 160; People v. Wemple, 29 N. E. 1002; New York v. Roberts, 171 U. S. 664; 43 L. Ed. 323; Seamans v. Temple Co., 63 N. W. 408; Kent & Stanley Co. v. Tuttle, 50 Pac. 559; Diamond Glue Co. v. U. S. Glue Co., 187 U. S. 611, 47 L. Ed. 328; Ashland Lbr. Co. v. Detroit Salt Co., 89 N. W. 904.

C. W. Buttz, (*H. L. Halvorson* and *O. D. Comstock,* of counsel) attorney for respondent.

Where a travelling salesman takes an order for goods, submits it for approval to his principals, in another state, who ship pursuant thereto, it is interstate commerce. Mershon v. Pottsville Lumber Co., 40 Atl. 1019; Cooper Mfg. Co. v. Ferguson, 113 U. S. 727, 28 L. Ed. 1137, 5 Sup. Ct. 739; Robbins v. Taxing Dist. Selby Co., 120 U. S. 489, 30 L. Ed. 694, 7 Sup. Ct. 592; Brennan v. City of Titusville, 153 U. S. 289, 14 Sup. Ct. 829; Milan Milling Co. v. Gorton, 27 S. W. 971, 26 L. R. A. 135; Keating Imp. Co. v. Carriage Co., 35 S. W. 417; Allen v. Tyson-Jones Buggy Co., 40 S. W. 393.

It is lawful to make contracts to carry on commerce between states. Cooper Mfg. Co. v. Ferguson, supra; Coit v. Sutton, 60 N. W. 690; 25 L. R. A. 819; Belle City Mfg. Co. v. Frizzell, 81 Pac. 58; Gun v. White Sewing Machine Co., 20 S. W. 591, 18 L. R. A. 206; Re A. Spain, 47 Fed. 208, 14 L. R. A. 97; Diamond Glue Co. v. U. S. Glue Co., 187 U. S. 611; Hart v. Machine Co., 17 So. 769; United States v. Telephone Co., 29 Fed. 17; Cordage Co. v. Mosher, 72 N. W. 117; Rubber Co. v. Butler Bros., 132 Fed. 398; Oakland Sugar Mill Co. v. Wolf Co., 118 Fed. 229; Fay Fruit Co. v. McKinney, 77 S. W. 106; Commonwealth v. Parlin & Ordendorf Co., 80 S. W. 791; Com. v. Hogan, 74 S. W. 737.

An agent of a corporation cannot deny its right to do business in the state, in a suit against him for goods sold. U. S. Express

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Co. v. Lucas, 36 Ind. 361; In Hovey's Estate, 48 Atl. 311; Penn. Mutual Life Ins. Co. v. Bradley, 37 N. E. 569; Prudential Co. v. Cushman, 106 N. W. 934; De La Vergne, etc., v. Kolischer, 63 Atl. 971; Spinney v. Miller, 86 N. W. 317; Washburn Mill Co. v. Bartlett, 54 N. W. 544, 3 N. D. 138; Wright v. Lee, 51 N. W. 706.

A foreign corporation may sell in the domestic state by commission merchants or by factors and agents. People v. Roberts, 40 N. Y. Sup. 417; People ex rel. Soda Fount. Co. v. Roberts, 51 N. Y. Sup. 487; Bertha Zinc and Mineral Co. v. Clute, et al., 27 N. Y. Sup. 342.

FISK, J. The plaintiff, a foreign corporation, with its place of business and only office at Belleville, in the state of Illinois, brought this action in the district court of Benson county to recover a balance due as the purchase price of certain drills theretofore sold and delivered by it to defendants. Plaintiff recovered in the court below, and the sole question raised on this appeal involves the validity of the contract under which the drills were sold; it being appellants' contention that such contract is void because plaintiff had not complied with the laws of this state prescribing the conditions upon which foreign corporations may do business within its borders. This contention is based upon sections 4695 to 4699 of our Civil Code of 1905. Section 4695 provides: "No foreign corporation * * * shall transact any business within this state or acquire, hold, or dispose of any property, real or personal within this state until such corporation shall have filed in the office of the secretary of state a duly authenticated copy of its charter or articles of incorporation, and shall have complied with the provisions of this chapter. * * * *" Section 4697 requires such foreign corporation before doing business in this state to file a power of attorney in the office of the secretary of state, constituting such officer its attorney, upon whom process may be served with the same force and effect as if served personally upon the corporation in this state. Section 4699 declares that "every contract made by or on behalf of any corporation * * * doing business in this state without first having complied with the provisions * * * of sections 4695 and 4697 * * * shall be wholly void on behalf of such corporation. * *" It is an admitted fact in the case that plaintiff was an Illinois corporation, and that it never complied with section 4697, above referred to.

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The vital inquiry, therefore, is whether plaintiff was legally bound to comply with said statute before entering into or complying with the contract, pursuant to the terms of which the drills were sold and delivered. In other words, did the nature of plaintiff's dealings with defendant constitute the "transacting" or "doing" business in this state within the meaning of sections 4695 and 4699 aforesaid? Appellants' counsel contend that in answering this question we should take into consideration other contracts entered into and transactions had between respondent and appellants, as well as third persons, in previous years. Testimony as to such other contracts and dealings was received in evidence over appellants' objection, but these rulings were thereafter completely nullified by the trial court by an instruction to the jury at the close of the testimony to wholly disregard the defense of the illegality of the contract. We think this testimony should have been excluded. It related wholly to independent contracts and transactions in no manner connected with the contract or transaction alleged in the complaint, and for this reason it had no relevancy to the defense relied upon; and whether plaintiff violated such statute upon such prior occasions is therefore wholly immaterial to the present inquiry. Conceding all that appellants' counsel claims as to the nature of these prior transactions (which we are inclined to think is an unwarranted concession under the facts), how can it be legitimately asserted that the statute aforesaid may be invoked to nullify an entirely separate and independent contract entered into by the foreign corporation at a later date? If such latter contract, because it relates only to interstate transactions and is therefore within the protection of the federal constitution, or if for any other reason it does not fall within the inhibition of the state statute above cited, is it not valid and enforceable, regardless of prior relations of such statute by plaintiff? Clearly yes. If this were not so, then the mere fact that plaintiff at some time in the past has violated this statute would forever thereafter preclude it from enforcing perfectly valid contracts made by it with citizens of this state, even though the same relate to transactions involving interstate commerce. If such is to be the construction of the sections above quoted, then they are clearly unconstitutional and void as an unlawful interference with, and a restriction upon, interstate commerce. We think such construction is not permissible. The recent case of Butler Bros. Shoe Co. v. U. S. Rubber Co., 156 Fed. 1, decided by the Circuit Court

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of Appeals, Eighth Circuit, is directly in point, and fully answers appellants' contention in the case at bar. The opinion by Sanborn, Circuit Judge, is very exhaustive of the subjects treated, and a great many state and federal authorities are there cited and quoted from. We fully agree with the reasoning and conclusions arrived at in that case upon the question here under consideration. A statute of Colorado very similar to the above statute of this state was there held to apply only to foreign corporations when doing an intrastate, as distinguished from an interstate, business. That it will be presumed that such merely was the legislative intent in the enactment of the statute; for otherwise the law would constitute an unlawful attempt to interfere with the exclusive power of congress to regulate the business of interstate commerce. See, also, Hart-Parr Co. v. Robb-Lawrence Co., 15 N. D. 55, 106 N. W. 406, and cases cited; Cooper Mfg. Co. v. Ferguson, 113 U. S. 727, 5 Sup. Ct. 739, 28 L. Ed. 1137; Coit v. Sutton, 102 Mich. 324, 60 N. W. 690, 25 L. R. A. 819; Rock Island Plow Co. v. Peterson, 73 Minn. 356, 101 N. W. 616; Belle City Mfg. Co. v. Frizzell, 11 Idaho 1, 81 Pac. 58; Hart v. Machine Co., 72 Miss. 809, 17 So. 769; U. S. v. Telephone Co. (C. C.) 29 Fed. 17; Cordage Co. v. Mosher, 114 Mich. 64, 72 N. W. 117.

We come, now, to a consideration of the transaction in suit. Did respondent violate the state statute above cited by "transacting" or "doing" business within the state within the meaning of such statute, or was such business merely interstate commerce? This is the crucial test. Appellant's assumption that, even if the transaction in question constituted interstate commerce, the statute would bar plaintiff's recovery, is clearly untenable, as the above authorities clearly demonstrate. Plaintiff's cause of action arose out of a written contract, the substance of which is that plaintiff for a stipulated consideration sold to defendants the drills in question, together with certain repairs, one carload to be delivered f. o. b. Grand Forks, N. D., and one car f. o. b. Minneapolis, Minn. The goods were subsequently delivered pursuant to the contract. With the exception of the carload shipment from Grand Forks, it is not seriously contended, and, indeed, could not be, that the transaction in question was other than interstate commerce. The contract constituted a sale, and not a bailment of the goods, but this fact is immaterial. Butler Shoe Co. v. U. S. Rubber Co., supra, and cases cited. Did this single shipment from Grand Forks, or, in other

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words, the delivery of this carload of drills f. o. b. Grand Forks, constitute "doing business in this state," within the meaning of said statute? We think not. This car load of machinery was in store at Grand Forks pursuant to a commission contract previously entered into by plaintiff with one Collins at said place, and the same was the lawful subject of interstate commerce while in store at said place, and plaintiff had the undoubted right to transfer its situs to any other place, either for storage or sale, or to sell and deliver the same at Grand Forks, as it did. It would be unreasonable to hold that it must first be shipped out of the state before making a sale thereof to appellants, yet this is the logical effect of appellants' argument. The case of Hart-Parr Co. v. Robb-Lawrence Co., 15 N. D. 55, 106 N. W. 406, is an express authority to the effect that, by the storage of these drills at Grand Forks, plaintiff in no manner violated the law against "transacting," or "doing," business without a compliance with the statute aforesaid. See, also, Keating Imp. & Machine Co. v. Carriage Co., 12 Texas Civ. App. 666, 35 S. W. 417; Mearshon v. Lumber Co., 187 Pa. 12, 40 Atl. 1019, 67 Am. St. Rep. 560; Allen v. Tyson-Jones Buggy Co., 91 Texas, 22, 40 S. W. 393; Caldwell v. North Carolina, 187 U. S. 622, 23 Sup. Ct. 229, 47 L. Ed. 336. In Keating Imp. & Mach. Co. v. Carriage Co., supra, the plaintiff, an Ohio corporation, sold to a Texas firm a lot of wheeled vehicles on credit. Subsequently the Texas firm became insolvent, and the vehicles were returned to plaintiff at Ft. Worth, Tex. Plaintiff, having accepted the return of such vehicles, subsequently placed them in the hands of such insolvent firm for sale on commission, and they were attached by appellant as the property of such insolvent firm. The sole defense was the same as that in the case at bar, and in holding that plaintiff corporation was engaged in an interstate commerce business, and therefore not bound to comply with the Texas statute relative to the doing of business by a foreign corporation in that state, the court said: "It is clear that it was engaged in that business (interstate commerce business), and that the single transaction in question was but an incident thereof. It seems to be conceded that it had the right to take the vehicles back in self-protection, but it is insisted they should have been reshipped to Ohio, and not sold here. Such requirement would seem to be unreasonable. In many instances the character of the goods, the freight rates, and the difference in the markets would practically forbid such reshipment. It would tend to

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interfere with the freedom of interstate traffic, which can only be regulated by Congress." The above authorities fully support the rule that the shipment of goods into this state by a foreign corporation for storage and sale on commission is an interstate transaction; and hence such foreign corporation in so doing is not amenable to the laws of this state above referred to.

We have no hesitancy in holding, as we do, that the contract in this case was valid and is enforceable, and that under the facts disclosed in the record the trial court properly denied defendants' motion for a directed verdict. The judgment appealed from is accordingly affirmed. All concur.

(115 N. W. 844.)

THE STATE OF NORTH DAKOTA, ON THE RELATION OF KETTLE RIVER QUARRIES COMPANY, A CORPORATION v. GEORGE E. DUIS, AS MAYOR, AND WILLIAM V. O'CONNOR, AS AUDITOR, OF THE CITY OF GRAND FORKS, NORTH DAKOTA.

Opinion filed May 15, 1908.

Municipal Corporations — Resolutions — Veto Power.

1. Under section 2658, Rev. Codes 1905, which provides that the mayor "shall have power to sign or veto any ordinance or resolution passed by the council," it is *held,* that a resolution passed by the city council prescribing that certain streets and avenues shall be repaved in a certain designated manner is of a legislative character and subject to veto by the mayor.

Statutory Construction.

2. A construction, which completely nullifies a plain statutory provision, cannot be adopted when the law is susceptible of another construction, which is reasonably in harmony with the apparent object sought to be accomplished by the legislature.

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

Application by the state, on the relation of the Kettle River Quarries Company, for a peremptory writ of mandamus against George E. Duis, mayor, and William V. O'Connor, auditor, of the city of Grand Forks. From a judgment denying the writ, plaintiff appeals.

Affirmed.

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Bangs, Cooley & Hamilton and *Guy C. H. Corliss,* for appellant.

Veto power exists only where expressly conferred and then is strictly construed. People v. Board, 20 N. Y. S. 51; 4 Abbot's Pr. 35; 4 Thomp. & Cook, 357; Jacobs v. Board, 34 Pac. 630; Hall v. Racine, 50 N. W. 1094; State v. Langdon, 37 Atl. 383; McDermott v. Miller, 45 N. J. L. 251; Haight v. Love, 39 N. J. L. 14; Pensacola v. Telephone Co., 37 So. 824.

An ordinance is a local law prescribing a general and permanent rule. Citizens Nat'l Gas & Min. Co. v. Town of Elwood, 16 N. E. 624; City of Alma v. Guaranty S. Bk. 60 Fed. 206.

A power to veto with none to review is absolute; such legislative intent cannot be implied. People v. Councilmen of Buffalo, 20 N. Y. S. 51; Erwin v. Mayor, 60 N. J. L. 141, 64 Am. St. Rep. 584.

Entire statute will be explored to give meaning to a word. City of San Diego v. Granniss, 19 Pac. 875.

Scott Rex, for respondent.

An ordinance relates to legislative power, a resolution to business, executive or administrative power. McQuillan Mun. Ord. section 2; Abbot Mun. Corp., sections 514-6.

Resolutions should be approved by mayor. Stutsman v. McVicar, 82 N. W. 460; Altman v. City of Dubuque, 82 N. W. 461; Heins v. Lincoln, 71 N. W. 189; Moore v. City Council, 93 N. W. 510; State v. City of Englewood, 52 Atl. 239; State v. Council of Dover, 39 Atl. 675; Dey v. Mayor, 19 N. J. Eq. 412; Schuman v. Seymour, 24 N. J. Eq. 143; Whitney v. Port Huron, 50 N. W. 316; State v. District Court, 43 N. W. 389; People v. Schroeder, 76 N. Y. 160; Kittinger v. Traction Co., 54 N. E. 1081; Jones v. Light Co., 51 Atl. 762; Wilson v. Inhabitants, 56 N. J. L. 469, 29 Atl. 183; Cordilla v. City of Pueblo, 82 Pac. 594; Morton v. Broderick, 50 Pac. 644; Sacremento v. Anderson, 82 Pac. 1069; N. Y., etc. Ry. Co. v. Waterbury, 10 Atl. 162.

Legislative intent controls in construing statutes. 26 Am. & Eng. Enc. Law 602, 605; Lewis' Sutherland Stat. Consn., section 369; Cortesy v. Territory, 32 Pac. 504; Hugo v. Miller, 52 N. W. 381; Westfield Assn. v. Danielson, 26 Atl. 345; Grier v. State, 30 S. E. 255; Cummings v. Everett, 19 Atl. 456.

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FISK, J. By stipulation of counsel the sole question presented on this appeal involves the power of the mayor of the city of Grand Forks to veto two certain resolutions passed by the city council of said city on June 11, 1907, one of which declared that certain streets and avenues therein should be repaved with creosoted wood block pavement, and the other accepting the bid of and awarding the contract to the relator for the construction of such improvements and directing the respondents, as mayor and auditor, to enter into a contract with the relator accordingly. Each of such resolutions was vetoed by the mayor, and respondents refuse to enter into such contract, basing their refusal so to do upon the ground that said resolutions never became operative because of the vetoes aforesaid. The relator prays for a peremptory writ of mandamus to compel respondents to enter into such contract, and this appeal is from an order of the district court of Grand Forks county denying such writ.

It is conceded by appellant's counsel that, if the mayor had the right to veto either of said resolutions, the order appealed from should be affirmed. Section 2658, Revised Codes 1905, expressly confers the veto power upon the mayor. It reads: "He shall have the power to sign or veto any ordinances or resolutions passed by the council." Appellant's counsel concede that if the word "resolutions," as above used, means something distinct from an ordinance and is not intended as thus employed to be synonymous with that word, then there is much force in respondent's contention that the veto power existed as to the resolutions aforesaid; but they argue that such a construction of the statute ought not to be adopted and is not permissible on account of the serious consequences which they assume would follow such construction, it being their contention that such veto power, if any exists as to resolutions as contradistinguished from ordinances, would necessarily be absolute because of the absence of any provision prescribing how the city council may pass a resolution over the mayor's veto. Section 2675, Revised Codes 1905, relating to the method of exercising the veto power as to ordinances, is silent as to resolutions, and we find no provision in the code expressly covering the method of the exercise of the veto power as to resolutions. Hence there is much force to the contention of appellant's counsel that, if the mayor has the veto power as to resolutions, the same is absolute; but such a result, even if true, is not necessarily controlling, although it is entitled

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to much weight in construing the statute. It is, of course, within the undoubted power of the legislature to grant such unconditional veto power to the mayor. It is very apparent from an inspection of the statute that the same is strikingly deficient in revealing the legislative intent. The section granting the veto power as to resolutions as well as ordinances is explicit; but, as above stated, no method is prescribed as to the manner of the exercise thereof so far as resolutions are concerned.

In the face of this vague and ambiguous condition of our law upon the subject, we are required, if possible, to determine the legislative will, and to give effect thereto. It would certainly be doing violence to the legislative intent to hold, as contended by appellant's counsel, that such veto power does not extend to resolutions of any kind in the face of the express statute aforesaid. It is contrary to all rules of statutory construction to say that the word "resolutions," as used in the statute, means simply "ordinances." The language of the statute is too plain to permit of such construction, and it would manifestly be doing violence to the legislative will to so construe the same. The history of this statute as first found in the special charter granted to the city of Grand Forks in 1881 by the legislature of the late territory, and as incorporated into the general incorporation act of 1887 (Acts 1887, page 190, chapter 73), and now contained in the Revised Codes of the state (Rev. Codes 1905, chapter 2658), is repugnant to any such construction. Furthermore, the judicial construction of similar legislation of other states lends force to our views. City of Galveston v. Morton, 58 Texas 409; El Paso Gas, etc., Co. v. City of El Paso, 22 Texas Civ. App. 309, 54 S. W. 798; Gleason v. Peerless Mfg. Co., 1 App. Div. 257, 37 N. Y. Supp. 267; Creighton v. Manson, 27 Cal. 629; Twiss v. Port Huron, 63 Mich. 528, 30 N. W. 177; Stutsman v. McVicar, 111 Iowa 40, 82 N. W. 460; Altman v. City of Dubuque, 111 Iowa 105, 82 N. W. 461; Heins v. Lincoln, 102 Iowa 69, 71 N. W. 189; Moore v. Perry, 119 Iowa 423, 93 N. W. 510; State v. City of Englewood, 68 N. J. Law, 231, 52 Atl. 239; Pierson v. Dover, 61 N. J. Law, 404, 39 Atl. 675; Dey v. Mayor 19 N. J. Eq. 412; Whitney v. Port Huron, 88 Mich. 268, 50 N. W. 316, 26 Am. St. Rep. 291; State v. Dist. Ct., 41 Minn. 518, 43 N. W. 389; People v. Schroeder, 76 N. Y. 160; Jones v. Light Co., 202 Pa. 164, 51 Atl. 762; Cordilla v. City of Pueblo, 34 Colo. 293, 82 Pac. 594; Morton v. Broderick, 118 Cal. 474, 50 Pac. 644. See,

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McQuillan, Munic. Ordinances, sections 535-549. That there is a fundamental and well-recognized distinction between an ordinance and a resolution, see McQuillan, Munic. Ordinances, section 2; Abbott, Munic. Corps., sections 514-516.

A construction which completely nullifies a plain statutory provision, and thereby does violence to the legislative will, cannot be adopted, when the law is susceptible of another construction, which is reasonably in harmony with the apparent object sought to be accomplished by the legislature. The construction contended for by appellant would require us to hold that the chief executive of the city has no power of veto, except as to ordinances in the strict sense of the term, and this, in the teeth of the explicit language of the statute to the contrary. We cannot thus hold. On the other hand, we cannot agree with appellant's counsel that, in holding that the veto power exists as to the resolutions in question, we are required to go to the length of holding that such veto power extends to all resolutions and motions passed or adopted by the city council, and that such veto power is absolute. Such a holding would, in our opinion, do equal violence to the legislative intent. While we admit that the question is not entirely free from doubt, we hold that the veto power extends at least to all resolutions of a legislative, as distinguished from a mere administrative, character, and that the statutory method of exercising such veto power as to ordinances must be held to apply, so far as applicable, to such resolutions. Resolutions of such a character, while not required, on account of their temporary purpose, to be passed with all the formalities of an ordinance, are nevertheless often of more importance than almost any ordinance, as is the case with the resolutions in question, and we think it was the legislative intent that such resolutions, in so far as the exercise of the veto power is concerned, were intended to be treated the same as ordinances. In other words, the term "ordinance or resolution," as used in the statute granting the veto power, was intended to include not only ordinances as such, but also resolutions of a legislative character and which therefore are similar to ordinances in this respect. By this rule of construction we are enabled to give effect to the evident intent of the legislature without any of the dire consequences which appellant's counsel contend would result from a holding that the veto power is absolute and extends to all resolutions of every character. As will be seen by an examination of the foregoing authorities, some courts, under stat-

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utes similar to the one here involved, have gone to the extent of holding that the veto power extends to all resolutions, whether of a legislative character or not; but we are not called upon to go that far in the case at bar.

Applying the above rule of construction to the facts before us, we have no hesitancy in holding that the mayor had the right to veto at least the first resolution. This resolution is purely legislative in character, prescribing, as it does, the kinds of pavement to be laid in paving district No. 8 of said city. As said by us in Morton v. Holes, 115 N. W. 258: "It is, of course, well settled that the function of deciding all matters relative to public improvements such as are contemplated by the act in question are legislative in their character." See, also, Ton v. City of Chicago, 216 Ill. 331, 74 N. E. 1044; Jones v. Light Co., 202 Pa. 164, 51 Atl. 762; State v. Stewart, 74 Wis. 620, 43 N. W. 947, 6 L. R. A. 394; Turner v. Detroit, 104 Mich. 326, 62 N. W. 405. In Jones v. Light Company, supra, is was said: "The single question raised by this appeal is whether a resolution of a borough council, accepting the bid of an electric company to light the streets for five years, and directing the proper officials to execute a contract with the company, must be submitted to the chief burgess for his approval. The third section of the act of May 23, 1893, provides that, 'every ordinance and resolution which shall be passed by council shall be presented to the chief burgess of such borough. If he approves he shall sign it, and if he shall not approve it he shall return it with his objections to said council. * * *' The construction placed on this section of the act and on sections providing for advertisement and recording is that they apply to all acts of the council by ordinance or resolution which are of a legislative character, but not to those that are merely ministerial or executive. Generally, under the first, are permanent regulations for the government of the borough, the granting of privileges to occupy streets, and the creation of liability by contract; under the second, the transaction of current business, the ordinary administration of municipal affairs, and the awarding of contracts which have been previously authorized. Howard v. Olyphant Borough, 181 Pa. 191, 37 Atl. 258; Com. v. Diamond National Bank, 9 Pa. Super. Ct. 118. Seitzinger v. Illuminating Co., 187 Pa. 539, 41 Atl. 454, does not establish a different rule. In that case a resolution awarding a contract was presented by a resolution duly approved by the chief burgess authorizing the making of the con-

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tract. What is said in the opinion as to a resolution awarding a contract being a ministerial act has reference to a contract which a council has by resolution, approved by the chief burgess, previously authorized. The distinction above noted between ministerial and legislative acts was observed by the court, and it is, in effect, conceded that the making of a contract to light the streets for five years is a legislative subject."

In Creighton v. Manson, supra, the Supreme Court of California held that a declaration of intention to grade a street is a legislative act, and as such must be passed in the mode prescribed by law and be approved by the president of the board. The court says, among other things: "We shall notice but one of the objections made by the appellant to the proceedings, and that is that the resolution of intention of the board of supervisors to grade the street in question was not presented to the president of the board for approval according to the requirements of section 68 of the consolidation act. It is a general rule that the legislative department of a city government can act only through the medium of an ordinance, unless the organic law specially provides another mode. The instrument containing the expression of the legislative will need not necessarily be in the usual form of a municipal ordinance and be preceded by the words 'Be it ordained,' etc.; but it may properly be, as in this case, in the form of a resolution; but whatever its form it amounts in substance to an ordinance, and must be passed in the mode prescribed for the passage of ordinances. It is provided in section 40 of the consolidation act that the board may order a street to be graded after notice of their intention has been published in a daily newspaper for a period of ten days, unless the owners of a specified proportion of the lands or lots bounded by the street shall make a written objection thereto. The declaration of intention is the fundamental act of the whole proceeding to grade the street, and in the absence of the declaration of intention manifested by an ordinance, or some act that is its equivalent in substance and effect, though differing from it in form, the whole proceedings must fail of compulsory effect. * * * The declaration of intention, whatever may be its form, is a legislative act, and as such must be passed in the mode prescribed by law. * * *"

In Gleason v. Peerless Mfg. Co., supra, the New York Supreme Court says: "Nor should the legislative power of the common council be construed as confined to laws prescribing general rules

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of conduct for individuals of for the regulation of the city departments. A large part of all legislation is necessarily administrative in a certain sense. This is particularly true of the legislatures of municipal corporations, whose power to prescribe by-laws or rules of conduct is very limited. The main work of all such bodies is to act on the administration of local affairs, provide what improvements shall be made, what streets opened, how water shall be furnished to the inhabitants, and matters of this nature. The action of the common council on all these subjects we consider legislative." The Court of Appeals by unanimous vote affirmed the decision in said case. See 163 N. Y. 574, 57 N. E. 1110.

Having reached the conclusion that the mayor had the power to veto the first resolution aforesaid, we hold that the trial court did not err in denying the writ prayed for.

The order appealed from is, accordingly, affirmed. All concur.

(116 N. W. 751.)

FIRST NATIONAL BANK OF POMEROY, IOWA, A PRIVATE CORPORATION v. J. K. BUTTERY.

Opinion filed February 11, 1908.

Rehearing denied May 12, 1908.

Negotiable Instruments — "On or Before" — Agreement for Extension —Waiver of Protest.

The negotiable quality of a promissory note is not destroyed by a provision therein that the makers and indorsers thereof severally waive presentment of payment and notice of protest, and consent that the time of payment may be extended without notice, when by its terms it is made payable on or before a day named.

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

Action by the First National Bank of Pomeroy against J. K. Buttery. Judgment for defendant, and plaintiff appeals.

Reversed.

Skulason & Skulason, for appellant.

A note payable on a date certain or before upon a contingency is negotiable. Phelps v. Sargent, 71 N. W. 927; Coda v. Buck, 7 Metc. 588; Walker v. Woolen, 54 Ind. 164; Charlton v. Reed, 16

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N. W. 64; Eaton & Gilbreath, Com. Paper, 220; 4 Am. & Eng. Enc. Law, 93; 7 Cyc. 599; Stevens v. Blunt, 7 Mass. 240; Goodloe v. Taylor, 10 N. C. 458; Ernst v. Steckman, 15 Am. St. Rep. 542.

Date of maturity is certain, and the rights of a transferee are unaffected. National Bank of Commerce v. Kenney, 83 S. W. 326; Capron v. Capron, 44 Vt. 410; Protection Ins. Co. v. Bill, 31 Conn. 534; Farmer v. Bank, 107 N. W. 170.

J. H. Bosard, for respondent on appeal.
Scott Rex, for respondent on application for rehearing.

A provision in a note that payee or holder may extend time of payment renders the note non-negotiable. Rosenthal v. Rambo, 62 N. E. 637; Matchett v. Anderson Machine Works, 64 N. E. 229; Woodbury v. Roberts, 13 N. W. 312; Glidden v. Henry, 1 N. E. 369; McClellan v. Norfolk Southern Co., 18 N. E. 237; Coffin v. Spencer, 39 Fed. 262; Second Nat. Bank v. Wheeler, 42 N. W. 963; Mer. & Mech. Sav. Bank v. Fraze, 53 Am. St. Rep. 341.

SPALDING, J. This is an action on a promissory note. The note was sued on by the indorsee for value before maturity, and the court found that there was a failure of consideration, and that the contract was not a negotiable note, and entered judgment for the dismissal of the action. Only one question requires consideration. If the instrument in question is a negotiable promissory note, the judgment should be reversed; otherwise, it should be affirmed.

The note was made in this state, and is payable at Sioux City, Iowa, and the clause which the trial court held rendered it non-negotiable reads: "The makers and indorsers herein, severally waive presentment of payment and notice of protest, and consent that the time of payment may be extended without notice." There is an apparent conflict of authorities as to whether this or similar agreements render a note nonnegotiable. The note is, by its terms, made payable on or before the 1st of October, 1903. Without the paragraph complained of, it would unquestionably be a negotiable instrument, and the indorsers would be released by any extension of time of payment without their assent. We are of the opinion that this provision does not extend the time of payment indefinitely or render it uncertain. The time of payment is already fixed.

It is strenuously argued that the use of the word "makers" in the waiver admits of an extension being made at any time on the part of the holder, by a mere secret mental process, unknown to any

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other party. This may be true as a psychological fact, but we do not deem it so as a matter of practice in commerce and banking. To us it is clear that it has the same effect as though the note read "on the 1st day of October, 1903, or thereafter on demand," in which case there would be no question of its negotiability. Holders of notes do not by a secret mental process make an extension of the time of payment, but such extension, if made at all, is made by an agreement between the principal debtor and the holder of the paper, either with or without the consent of the indorsers. This provision seems to us to have been inserted to protect the holder against any release of indorsers or others, by an extension without their assent, and the word "makers" is evidently included to prevent any misunderstanding or misconstruction of the contract or failure to distinguish between makers, indorsers, sureties, and any other parties who might be or become liable theron under certain contingencies as makers. 7 Cyc. 614. This phrase does not express an agreement to extend time, but leaves the matter of extension optional with the holder, and not obligatory upon him, and the note on its face fixes the time when it becomes due. In this respect it must be distinguished from a provision to the effect that the time of payment shall be extended indefinitely, in which case the uncertainty of the time renders the instrument nonnegotiable.

We feel that the reasoning in the National Bank of Commerce v. Kenney (Tex. Sup.) 83 S. W. 368, is not only satisfactory, but conclusive of this point. The note involved in that case contained this provision: "The makers and indorsers hereof hereby severally waive protest, demand, and notice of protest and nonpayment in case this note is not paid at maturity, and agree to all extensions and partial payments before or after maturity, without prejudice to the holder." In holding that this provision did not render the note nonnegotiable, the Texas court says: "If, as is argued, the effect of the stipulation is to give the right to the maker, without the consent of the holder, or to the holder without the consent of the maker to appoint another date of payment, and thereby extend the time, it may be that it would render the instrument nonnegotiable. But we do not think it capable of that construction. It does not say that either the holder or the maker may extend the note. It simply makes a provision in case the time of payment may be extended. How extended? It seems to us that the extention meant is that which takes place when the debtor and creditor make an

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agreement upon a valuable consideration for the payment of the debt on some day subsequent to that previously stipulated. The obvious purpose of the stipulation taken as a whole was merely to relieve the holder of the paper from the burdens made necessary by the rigid requirements of the mercantile law in order to secure the continued liability of the indorsers and sureties on the paper. Therefore what was meant by the stipulation as to extension of time was simply that in case the holder and maker should agree upon an extension the sureties and indorsers should not be discharged. The holder and maker of a note may at any time agree upon an extension; therefore, the fact that they have that right does not affect the negotiability of the paper. It is usually said that, in order to make an instrument negotiable under the law merchant, the time of payment must be certain. But a note payable on or before a certain date is negotiable. The maker of such a note has the right to pay before the date named, but the holder cannot demand payment before that date. So, in this case, the time at which the maker may elect to pay is uncertain, but the time at which the holder may demand payment is certain. It follows that if the holder has the absolute right to demand payment at a certain date, the note is negotiable. This is but an illustration of what we understand to be the general rule. There being nothing in the stipulation under consideration, which gave any one the right to demand of the holder of the note an extension of the time of payment, we think the time at which he could demand payment was fixed, and that, therefore, it was a negotiable note."

In Capron v. Capron, 44 Vt. 410, a note which contained the provision that "if there is not enough realized by good management in one year to have more time to pay" was held negotiable. See, also, Protection Insurance Company v. Bill, 31 Conn. 534; Farmer et al. v. Bank, 107 N. W. 170.

In Jacobs v. Gibson, 77 Mo. App. 244, the court held that an agreement that the time of payment might be extended without notice did not destroy its negotiability, and said: "The time of payment which is 182 days after date is certain, and if the holder exercises his option under the extension clause, and fixes another time, that time will be none the less certain. In legal effect we cannot discover that the agreement contained in the extension clause is different from that in a bill of exchange or promissory note which is payable at sight or on demand, or on or before maturity."

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In Bank v. Commission Company, 93 Mo. App. 123, the court says: "The makers and indorsers agree to any extensions or partial payments before or after maturity without prejudice to the holder," and that the note according to its terms amounts to no more than an agreement that in the event of an extension of time, the holder should not be prejudiced thereby. Under this agreement the holder was given the option to extend the time of payment without thereby creating the right to defend on that ground. In the exercise of this option, the holder would still retain the right to fix the time when the note should become due. There is a plain distinction between the clause in this note, and those in most of the cases cited as authority for the contention of the respondent, and this distinction has been made by the recent Iowa case cited above. The court of that state in Farmer et al. v. Bank, supra, says: "In one branch of his argument, counsel bases a contention upon the assumption that the notes held by plaintiffs were nonnegotiable, and this, because of the provision therein respecting sureties. The assumption is not warranted. As we think, the notes met all the requirements for negotiable instruments. There was no uncertainty as to the payee, the amount, or the time of payment. We may concede that in the case of an instrument providing in terms for the extension of time of payment indefinitely, there is such uncertainty as to make the same nonnegotiable. And such are the cases of Miller v. Poage, 56 Iowa, 96, 8 N. W. 799, 41 Am. St. Rep. 82, and Woodbury v. Roberts, 59 Iowa 348, 13 N. W. 312, 44 Am. St. Rep. 685, cited and relied upon by counsel. But in the notes before us, we have a distinct and unqualified agreement on the part of the makers to pay on a certain date. And we perceive no good reason for holding that the negotiable character thereof is destroyed because of a clause embodied therein providing that a surety, if such there shall be, will not claim a release from his collateral liability on the instrument, if, forsooth, an extension of time shall be granted the makers without notice to him. Our attention has been called to no case so holding. As well say that where sureties, guarantors, and indorsers entitled to notice of payment, waive the requirement for such notice, the waiver must be given operation to destroy the negotiable character of the instrument. The doctrine of the courts seems to be that when the maker's promise will at some time be absolutely enforceable, and where the event on which the time and duty of payment depends is one over which the holder will have

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entire control, there is no such uncertainty regarding it as renders the note nonnegotiable." See Protection Insurance Co. v. Bill, 31 Conn. 534, and cases cited therein. So much for authorities sustaining its negotiability.

We are, however, of the opinion that, under the plain terms of the negotiable instruments act of this state, this note is negotiable, without reference to other authority.

Section 6486, Revised Codes 1905, defines a negotiable promissory note as follows: "A negotiable promissory note within the meaning of this chapter is an unconditional promise in writing, made by one person to another, signed by the maker, engaging to pay on demand, or at a fixed or a determinable future time, a certain sum of money, to order or to bearer." Section 6309 provides that an instrument is "payable on demand. * * * 2. In which no time for payment is expressed." Section 6422 provides how such an instrument is "discharged against a person secondarily liable thereon." Paragraph 6 thereof provides that it is discharged by any agreement binding upon the holder to extend time of payment, or to postpone the holder's right to enforce the instrument, unless made with the assent of the party secondarily liable, or unless the right to recourse against such party is expressly reserved.

If, as is contended by the respondent in the case at bar, this instrument, taken as a whole, expresses no time for payment, then, under section 6309, it is an instrument payable on demand, and according to section 6486 the negotiability of a promissory note is not destroyed by its being made payable on demand. On the other hand, if it does express a time for payment, the 1st day of October, 1903, is a fixed and determinable future time as required by section 6486, supra. This note was executed and dated within this state, and we are satisfied that the paragraph complained of as rendering it nonnegotiable was drawn for the express purpose of protecting it within the terms of paragraph 6, section 6422, above quoted, and in accordance with other statutory provisions providing for waiver of presentment, notice of dishonor, and protest. Notes containing clauses similar to the one in question have been in almost universal use in this state for years, and the identical waiver complained of has been in common use, and the instruments containing them have been regarded and treated by the trade and bankers as negotiable.

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For the reason stated, the judgment of the district court is reversed.

POLLOCK, District Judge, concurs.

FISK, J., disqualified; HON. CHAS. A. POLLOCK, judge of the Third judicial district, sitting by request.

MORGAN, C. J. (dissenting). I am unable to concur in the conclusion reached by my associates in this case. My reason for reaching an opposite conclusion may be briefly stated.

The statute in express terms requires that the time of payment must be definitely stated in the note or that it can be definitely determined therefrom when it becomes payable, or it will be rendered non-negotiable. From the face of the note, it seems to me conclusive that it does not show when the note may become due and payable in view of the fact also stated therein that an extension may become operative and binding. It does not seem to me to be a sound conclusion to say that the note states a fixed day of payment when it also states that the day stated may not represent the date of payment if the stipulation as to an extension that follows is put into effect. The note cannot be said to be a demand note, as by its very terms it is not such. It fixes day of payment, subject to extensions. So far as having no fixed day of payment is concerned, the time is rendered as uncertain by reason of possible extensions as it would be if it provided for extensions indefinitely, and is therefore fairly within the principles of the Iowa cases cited in the opinion. In Bank v. Gunter, 67 Kan. 227, 72 Pac. 842, the note contained this stipulation: "The makers and endorsers hereby severally * * * agree to all extensions * * * before or after maturity without prejudice to the holder," and in reference to the effect thereof upon the negotiability of the note, the court said: "In the note in question, payment is first fixed at 182 days after the date, but as will be observed, a later provision makes the time indefinite by stipulating that it may be changed and extended either before or after maturity. If the time is to remain fixed until maturity, when another time is to be fixed by the parties, or if payment is made to depend upon events which necessarily must occur, and the time of payment is ultimately certain, other considerations would arise; but here payment is not ultimately certain, for the time stated in the paper is subject to change at any time at the volition of some of the parties to the action."

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In Coffin v. Spencer (C. C.) 39 Fed. 262, the court said in reference to a similar stipulation: "Every successive taker of the paper is, of course, bound to take notice of the stipulation, and, instead of looking only to the face of the instrument for the time of its maturity, as in case of commercial paper he must, is put upon inquiry whether or not any agreement for a renewal or extension of time has been made by his proposed assignor or by any previous holder."

In Oyler v. McMurray, 7 Ind. App. 645, 34 N. E. 1004, the court said in speaking of a like stipulation: "The holder was not bound by the stipulation in either case to extend the time of payment. The material and controlling fact is that the holder had the option, at any time before as well as after the time of payment stated in the note, to extend to the drawers and indorsers, or either of them, the time of payment."

The following authorities specifically hold that stipulations like the one contained in the note in suit render the note non-negotiable: 7 Cyc. 600, and cases cited; Daniel on Neg. Inst. (5th Ed.) p. 49; Eaton & Gilbert on Commercial Paper, p. 220; Smith v. Van Blarcom, 45 Mich. 371, 8 N. W. 90; Woodbury v. Roberts, 59 Iowa, 348, 13 N. W. 312, 44 Am. St. Rep. 685; Hodge v. Farmers' Bank of Frankfort, 7 Ind. App. 94, 34 N. E. 123; Oyler v. McMurray, 7 Ind. App. 645, 34 N. E. 1004; Glidden v. Henry, 104 Ind. 278, 1 N. E. 369, 54 Am. St. Rep. 316; Rosenthal v. Rambo, 28 Ind. App. 265, 62 N. E. 637; Id., 165 Ind. 584, 76 N. E. 404, 3 L. R. A. (N. S.) 678; Evans v. Odem, 30 Ind. App. 207, 65 N. E. 755; Second National Bank v. Wheeler, 75 Mich. 546, 42 N. W. 963; Lamb v. Storey, 45 Mich. 488, 8 N. W. 87; Citizens' Nat. Bank v. Piollet, 126 Pa. St. 194, 17 Atl. 603, 4 L. R. A. 190, 12 Am. St. Rep. 860.

On principal and authority, the note should be held non-negotiable.

ON REHEARING.

SPALDING, J. This case was argued at the March, 1907, term of this court by counsel for respondent, and was submitted by appellant on its brief.

The findings of the trial court wholly failed to show on what ground or grounds it held the note in question nonnegotiable. The brief of respondent discussed only the ground mentioned in our opinion, and the writer has a distinct recollection that respondent's

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counsel stated in his argument that, although on the trial in the district court he had contended and believed the note to be non-negotiable for each of several reasons, on examining authorities in the preparation of his brief on appeal, he had concluded that the note was nonnegotiable only on the ground referred to in our opinion. Whether such statement was made or not is, however, entirely immaterial. Respondent argued but one question either orally, or in his brief, and relied only on that as a ground for affirmance. It therefore expressly or impliedly waived all other reasons which might have been advanced to sustain the judgment of the trial court, and thereby conceded the correctness of the contention of the appellant on all except the one ground. The learned counsel who argued the case and prepared the brief for respondent has since deceased, and a petition for rehearing is presented by new counsel, who, doubtless, was unaware of what transpired on the argument, and who, in his petition for rehearing discusses questions thus waived. Under such or any ordinary circumstances, it would be highly injudicious and unjust to now open the case for the purpose of permitting respondent to present points which were waived on the original argument. It, in effect, would be permitting the respondent to speculate on the outcome of the case, and, when defeated, to reopen it to present matters which he might have presented, but waived on the first argument.

This court has repeatedly held that the appellant waives all errors not discussed on his argument or in his brief, and we see no reason for making any distinction between appellant and respondent in such case. This view of the matter is supported by ample authority.

In this case no decisive question submitted by counsel for respondent has been overlooked by the court, and it never considered any of the reasons now alleged for holding the note nonnegotiable. It was not asked to do so. It relied, as it had a right to do, upon the contention of the respondent. We are not saying that a case might not be presented where counsel had overlooked points in his favor which, on being presented in a petition for rehearing, might entitle him to a reargument, but we are saying that under the circumstances of this case, it would be out of harmony with all rules intended to protect parties, and preserve their rights to permit it. See 18 Enc. Pl. & Pr. 37, and cases cited; also Id. p. 43 (d); also 3 Cyc. 214 (i).

For these reasons, the petition is denied.

(116 N. W. 341.)

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F. C. Fulton and J. L. Fulton v. Edward Cretian.

Opinion filed July 8, 1908.

Brokers — Commissions — Pleading.

1. Action by real estate brokers to recover commissions under an express contract for finding a purchaser for defendant's property. The complaint, in effect, alleges an express contract that plaintiffs should receive the excess over $20 per acre at which a sale should be effected by defendant to prospective purchasers introduced by them, but it fails to allege that they introduced a prospective purchaser who was willing to pay any sum in excess of $20 per acre, and it also fails to allege that defendant in fact sold or had any opportunity to sell said property for an amount in excess of such price. *Held,* that the complaint fails to state facts sufficient to constitute a cause of action.

Same — Evidence.

2. Evidence examined, and *held* insufficient to establish that anything is due the plaintiffs for commissions under the contract, for the reasons that the proof is wholly lacking to show that plaintiffs introduced a purchaser to the defendant who was willing to purchase the property, or that defendant, in fact, sold or had an opportunity to sell for a price in excess of $20 per acre.

Same.

3. For the same reasons, the conclusions of law of the trial court are wholly unwarranted by the findings of fact.

New Trial — Verdict Against Evidence.

4. The complaint failing to allege and the proof failing to establish a cause of action in plaintiffs' favor, the judgment in their favor and the order denying defendant's motion for a new trial are erroneous.

Appeal from District Court, Bottineau County; *Burke,* J.

Action by F. C. Fulton and J. L. Fulton against Edward Cretian. Judgment for plaintiffs, and defendant appeals.

Reversed and remanded.

Noble, Blood & Adamson (*Ball, Watson, Young & Hardy,* of counsel), for appellant.

A. G. Burr (*Le Sueur, Bradford & Hurley,* of counsel), for respondents.

Fisk, J. Plaintiffs, who were real estate brokers, recovered judgment in the lower court for certain commissions alleged to be

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due them under an express contract with defendant for finding a purchaser for his property. The appeal is from the judgment and also from an order denying defendant's motion for a new trial. Numerous assignments of error are set forth in appellant's brief, but they relate principally to the sufficiency of the complaint, the proof, and the findings of fact of the trial court, and may be considered together.

That the judgment and order appealed from are erroneous and must be reversed is too clear for serious debate. The complaint wholly fails to allege, and the proof wholly fails to establish, any cause of action, and the findings of fact do not warrant the conclusions of law. Our reasons for the above assertions will be briefly stated. Plaintiffs' cause of action as set forth in their amended complaint is in substance as follows: (1) That at all times mentioned plaintiffs were engaged in the business of selling real estate. (2) That on or about September 25, 1902, defendant listed with plaintiffs for sale 720 acres of land in Bottineau county, under an agreement that plaintiffs should advertise the same for sale and introduce prospective purchasers to defendant, the latter to quote and maintain the price at $21.50 per acre as to all such prospective purchasers thus introduced by plaintiffs, and that, if plaintiffs secured a purchaser for said land, defendant would pay them the sum of $1,080. (3) That, pursuant to such agreement, plaintiffs advertised said land for sale, and on or about October 11, 1902, secured a prospective purchaser in the person of one McNett, whom they introduced as such to defendant. (4) That under such agreement plaintiffs were to receive for their services all sums over $20 per acre. (5) That a sale was made to McNett at a less sum than $21.50 per acre (but without stating any price), and that such sale was made without notice to plaintiffs and with intent to defraud them out of any compensation, to their damage in the sum of $1,080. At the trial plaintiffs asked for, and were granted, leave to amend paragraph 4 of the complaint, so as to read: "That the defendant has made a sale of the aforesaid land through the aforesaid W. E. McNett to one whom the plaintiffs are informed and believe is named Johnson, and has refused and still refuses to pay the plaintiffs." Conceding that such amendment was thereafter made, of which there is no proof, and also conceding that the same was intended to and did amend paragraph 5 of the amended complaint, instead of paragraph 4 of the original complaint, as no doubt was the inten-

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tion, in no manner aids respondents. The amended complaint comes far short of stating a cause of action. Its defect consists in its total failure to allege facts showing that anything ever became due the plaintiffs under the terms of the agreement. It is nowhere alleged that plaintiffs ever secured or introduced any one willing to purchase the property at any sum in excess of $20 per acre, nor is it anywhere alleged that defendant sold or was ever able to sell at any price in excess of such sum. Surely no cause of action can be alleged without an allegation that plaintiffs procured such prospective purchaser, for such is the express agreement between the parties. The contention of respondents' counsel that the complaint alleges two causes of action, one of which is based upon the theory of a contract that plaintiffs should receive a flat commission of $1,080 in the event they furnished a purchaser upon terms acceptable to defendant, cannot be sustained. The complaint is not susceptible of such construction. If it was, there might be some merit to his contention, and the authorities cited by him might be in point. But, as we construe the complaint as a whole, it sets forth in effect merely an agreement that, if plaintiffs should secure or introduce a person willing to purchase at the price of $21.50 per acre, then they should be entitled to receive $1,080 or, in other words, the excess over $20 per acre. The latter portion of the second paragraph of the amended complaint must be construed together with paragraph 4, and, when thus construed, the intention of the pleader is apparent. The whole tenor of the complaint clearly discloses that the commission to be received by plaintiffs was not a fixed sum, but merely the excess of the selling price over $20 per acre. Failing, therefore, to allege that plaintiffs secured a purchaser willing to purchase at a price in excess of $20 per acre, or even that defendant, in fact, effected a sale or had an opportunity to effect a sale at a price in excess of such sum, the amended complaint does not state a cause of action. The allegation of an intent to defraud is of no force, in the absence of an allegation that plaintiffs introduced a purchaser willing to purchase at a price in excess of $20 per acre.

Coming to the evidence, we find our construction of the complaint relative to the terms of the contract fully corroborated by the plaintiff's own testimony, and nowhere is it contended that plaintiffs produced a purchaser willing to purchase, or that defendant, in fact, sold the property or that he had any opportunity to sell it

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for a price in excess of $20 per acre. The undisputed testimony discloses, and the trial court found, that, by the terms of the agreement, plaintiffs were to receive only such sum as the property sold for in excess of $20 per acre, and that it was, in fact, sold through McNett to one Johnson for only $14,000 or $19.44 per acre; yet in the light of these facts a judgment was ordered in plaintiff's favor for the sum of $1,080 and interest. The trial court no doubt labored under the mistaken theory that because defendant did not adhere to the price of $21.50 per acre as he promised to do, but sold for a less price, the plaintiffs were damaged in the sum of $1.50 per acre. If plaintiffs had been able to produce and, in fact, had produced, a purchaser at such figure, and the defendant had, notwithstanding such fact, sold at $20 or less per acre, a different question would be presented. No such proof was offered. How, then, were plaintiffs damaged in the sum of $1,080 or in any other amount? Respondent's counsel in effect concedes that the judgment cannot be sustained except upon his theory of the contract, as his whole argument is based upon such theory. But, as we have above stated, the complaint does not allege, nor the proof show, that plaintiffs were to receive any commission except in the event a purchaser should be found by them who would be willing to purchase at a price in excess of $20 per acre. The principles of law involved in this case are elementary, but we cite the following authorities in support of our views as above expressed; Ames v. Lamont, 107 Wis. 531, 83 N. W. 780; McArthur v. Slauson, 53 Wis. 41, 9 N. W. 784; Ball v. Dolan, 18 S. D. 558, 101 N. W. 719; Anderson & Jorgenson v. Johnson, 16 N. D. 174, 112 N. W. 139; Milligan v. Owens, 123 Iowa, 285, 98 N. W. 792.

It follows as a necessary conclusion from what we have above held that the judgment and order appealed from must be reversed, and the cause remanded for further proceedings according to law, and it is so ordered. All concur.

(117 N. W. 344.)

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PETER BERTELSON v. PETER EHR.

Opinion filed April 22, 1908.

Appeal — Statement of the Case — Specification of Error.

1. Under section 7058, Rev. Codes 1905, it is essential to a review of errors of law occurring at the trial of a law action that they shall be specified in the statement of case.

Same.

2. Counsel, in the preparation of the so-called statement of case, not only violated the provisions of the above section, but they failed to comply with rule 7 of the Supreme Court (91 N. W. vi), which requires the evidence to be set forth in narrative form. For these reasons the statement of case must be disregarded on appeal.

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

Action by Peter Bertelson against Peter Ehr. Judgment for plaintiff, and defendant appeals.

Affirmed.

Le Sueur & Bradford, for appellant.
Joseph Denoyer and *Noyes & Sutton*, for respondent.

FISK, J. Plaintiff recovered judgment in the court below for the sum of $500 and costs, said sum being the amount of damages awarded by the jury for the alleged breach of a contract for the sale and delivery of a stock of merchandise, to reverse which judgment this appeal is prosecuted.

Appellant's counsel have set forth in their printed brief 31 alleged specifications of errors of law upon which they intend to rely in this court for such reversal. These so-called specifications of error all relate to rulings upon the trial in the admission and rejection of testimony, and in refusing to strike out certain testimony; also, in denying defendant's motions for a dismissal of the action, and for a directed verdict; also, rulings in giving certain instructions, and in refusing to give certain requested instructions, asked by defendant. None of the matters embraced in these so-called specifications of error can be considered by us, as such specifications are not incorporated in the settled statement of the case as required by law. Section 7058, Revised Codes 1905, expressly provides: "There shall be incorporated in every such statement a specification of the particulars in which the evidence is alleged to be insufficient to justify the verdict or other decision, and of the errors of law upon which the party settling the same intends to rely. If no such specification is made the statement shall be disregarded on motion for new trial and on appeal. * * *" As said by this court in

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Jackson v. Ellerson, 15 N. D. 533, 108 N. W. 241: "The requirement that errors shall be assigned in the appellant's brief rests upon the rules of court, but the requirement that they shall be specified in the statement of case is statutory; and this is true as to the requirement that, when the verdict or decision is challenged because of the insufficiency of the evidence, the particulars in which it is claimed to be insufficient must be pointed out. The failure of the appellant to comply with these plain provisions of the statute is fatal to the review which he seeks." This court has, in many cases, too numerous to mention, had occasion to call attention to this statutory rule, and its inability to review alleged errors in the absence of a compliance with said statute. We have searched the printed record in vain for such specifications. Appellant's counsel have not only ignored said statute in the preparation of the statement of case but they have flagrantly violated rule 7 of this court (91 N. W. vi), which requires the evidence to be reduced to a narrative form.

For the foregoing reasons we are obliged to entirely disregard the so-called statement of case, and, finding no error upon the face of the judgment roll as contained in the printed abstract, it necessarily follows that the judgment appealed from must be affirmed, and it is so ordered. All concur.

(116 N. W. 335.)

A. D. Clarke & Co., v. Michael B. Doyle, Theresa E. Doyle, L. N. Cary.

Opinion filed April 22, 1908.

Foreclosure of Mortgages — Limitations of Actions.

1. Following the decision of this court in Adams & Freese Company v. Kenoyer et al., 17 N. D. 302, 116 N. W. 98, it is held that Chapter 5, page 9, Laws 1905, which provides that a mortgagor's absence or nonresidence from the state shall not suspend the running of the statute of limitations as to actions and proceedings for the foreclosure of mortgages on real property, does not apply to causes of action which accrued prior to the passage of said statute, for the reasons, first, that no time was fixed by the legislature for the commencement of actions upon such existing causes of action after the taking effect of such statute; and, second, that, if the time between the passage and approval of the act (March 10th) and its taking effect (July 1st) was intended to be the time fixed for such purpose, the same is unreasonable.

Judgment — Res Judicata.

2. The note and mortgage in suit were assigned to plaintiff by one Alexander McKenzie, the payee and mortgagee. Prior to such

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assignment, it was adjudged in a former action brought against said McKenzie and others that they had no right, title or interest in and to the property covered by such mortgage, but this so-called judgment was a nullity in so far as the said McKenzie is concerned, for the reason that he was never legally served with a summons in such action, nor did he make any appearance therein. *Held,* that the rights of McKenzie under said mortgage were in no manner affected by said former judgment; and hence the plaintiff acquired a good title to the note and mortgage through said assignment.

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

Action by A. D. Clarke & Co., against Michael B. Doyle and others. Judgment for plaintiff, and defendants appeal.

Affirmed.

W. H. Stutsman, for appellants.
S. L. Nuchols, for respondent.

FISK, J. This is an appeal from a judgment of the district court of Morton county, and is here for trial de novo.

After the case was argued and submitted in this court, respondent made a motion to dismiss the appeal in so far as appellant Michael B. Doyle is concerned, upon the ground that said Doyle never authorized such appeal, which motion has been argued and submitted. We deem a decision of this motion unnecessary in view of the conclusion which we have arrived at upon the merits of the appeal, and will therefore refrain from expressing any opinion upon the motion.

Upon the merits we are clearly convinced that the judgment appealed from should be affirmed. The suit was brought to foreclose a certain mortgage upon real property executed and delivered by appellants, Michael B. Doyle and Theresa E. Doyle, to Alexander McKenzie on April 14, 1888, to secure a promissory note for the sum of $89.26 and interest at the rate of 12 per cent per annum, payable November 1, 1888. Respondent is the assignee of the note and mortgage. The complaint is in the usual form. The principal defense interposed is that of the statute of limitations; the action not having been commenced until the month of August, 1905. Another defense pleaded in the answer is that in a former action brought by respondent against said Doyle, McKenzie, and others it was adjudged that the defendants in said suit had no interest in the real property covered by the mortgage, which judgment, in

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so far as the said McKenzie is concerned, is alleged to be in full force and effect, and hence plaintiff, as the assignee of McKenzie, acquired no interest in the note and mortgage aforesaid. The facts were stipulated, and merely questions of law are presented for our determination. In brief, the questions presented are: (1) Is this action barred by the statute of limitations? (2) If not so barred, did the assignment of the note and mortgage by McKenzie to plaintiff vest in the latter such title as authorizes it to maintain this action?

The agreed facts disclose that some time in 1894 the mortgagors, M. B. and Theresa Doyle, removed from this state and have ever since resided in Washington, D. C., so that under the law of this state in force prior to July 1, 1905, the cause of action for the foreclosure of such mortgage was not barred. On March 10, 1905, chapter 5, page 9, Laws 1905, was approved, and the same containing no emergency clause went into effect on the following 1st day of July. This statute provides: "If, when the cause of action shall accrue against any person, he shall be out of the state, such action may be commenced within the terms herein repsectively limited after the return of such person into the state; and if after such cause of action shall have accrued such person shall depart from and reside out of this state and remain continuously absent therefrom for the space of one year or more, the time of his absence shall not be deemed or taken as any part of the time limited for the commencement of such action; provided, however, that the provisions of this section shall not apply to the foreclosure of real estate mortgages by action or otherwise. * * *" In the recent case of Adams & Freese Company v. Kenoyer, 17 N. D. 302, 116 N. W. 98, this same statute was construed, and we held that the same does not apply to causes of action for the foreclosure of mortgages existing at the date of its enactment, for the reason that no time was therein fixed for the bringing of suits upon such causes of action, and that, if the time from March 10th to July 1st can be said to have been fixed as the time in which suits upon existing causes of action may be commenced, the same is unreasonable. Following the decision in that case, we hold that the cause of action for the foreclosure of the mortgage in suit is not barred.

Upon the second proposition of law presented very little need be said. The stipulated facts disclose that the judgment in the former action is a nullity in so far as McKenzie is concerned, for the reason

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that he was never legally served with a summons in said action, nor did he make any appearance therein. While the summons was published for six successive weeks, no affidavit for publication of such summons was ever filed as to McKenzie, and hence the court acquired no jurisdiction over him. It follows that his rights under the note and mortgage were unimpaired, and were in full force and effect at the time he assigned said note and mortgage to plaintiff. This being true, it needs no argument in support of plaintiff's title to the note and mortgage derived through the assignment and its consequent right to maintain this action.

Having reached the foregoing conclusions, it becomes unnecessary to notice the other questions presented.

The judgment appealed from was correct, and is therefore affirmed. All concur.

(116 N. W. 348.)

John Buchanan, Sr., v. The Minneapolis Threshing Machine Company.

Opinion filed April 22, 1908.

Warranty — Waiver of Notice — Defect in Machinery.

1. The mere fact that a notice of the failure of a machine to work as warranted is not given in the manner prescribed by the written warranty or is not given at all is of no avail as a defense, where the company to whom such notice is to be given acts under some notice given under the warranty, and sends an expert to examine the machine, and does everything that it could have done had such notice been properly sent.

Trial — Evidence — Form of Objection.

2. An objection that certain evidence called for by a question is incompetent, irrelevant and immaterial is too general ordinarily, and is for that reason no objection at all, so far as the objecting party is concerned.

Instruction — Comments of Judge.

3. The trial court gave as part of an instruction the following language: "The contract will be sent to the jury box with you, gentlemen, and you can wrestle with it at your pleasure. I cannot read it in the present light." *Held*, not an unfavorable comment on the contract as having been printed in small type.

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Same.

4. The charge of the trial court should be considered in its entirety, and error cannot be predicated on parts thereof, where the charge as a whole is not subject to the objection made to a part thereof.

Appeal — Objections to Evidence.

5. An objection to evidence based on the lack of a pleading to support it cannot be made for the first time in the Supreme Court.

Appeal from District Court, Foster County; *Burke*, J.

Action by John Buchanan against the Minneapolis Threshing Machine Company. Judgment for plaintiff, and defendant appeals.

Affirmed.

Turner & Wright, for appellant.

Failure to give notice of breach of warranty, according to contract, precludes recovery for such breach. Minn. Thresher Co. v. Lincoln, 4 N. D. 410, 61 N. W. 145; Minn. Thresher Co. v. Hanson, 3 N. D. 81, 54 N. W. 311; James v. Bekkedahl, 10 N. D. 120, 86 N. W. 226; Fahey v. Esterly Machine Co., 3 N. D. 220, 55 N. W. 580, 44 Am. St. Rep. 554; J. I. Case T. M. Co. v. Ebbighausen, 11 N. D. 466, 92 N. W. 826; J. I. Case T. M. Co. v. Balke, 15 N. D. 206, 107 N. W. 57.

Notice must advise of all breaches. Trapp v. New Birdsall Co., 75 N. W. 77, 85 N. W. 478.

Disparaging remarks of court upon evidence is error. Chicago v. Spoor, 60 N. E. 540.

The court in stating testimony to a jury must deal fairly with evidence of both parties. Harriott v. Holmes, 79 N. W. 1003; Goodhue Framers' Warehouse Co., v. Davis, 83 N. W. 531; Argbright v. State, 69 N. W. 102; Chapman v. State, 86 N. W. 907; Bush v. Wilcox, 46 N. W. 940; Dawson v. Boat Club, 84 N. W. 618.

T. F. McCue and *S. E. Ellsworth*, for respondent.

Where a party acts upon a notice, he admits and waives its service. Davis & Sons v. Robinson, 67 Iowa, 355; Thresher Co. v. Kennedy, 34 N. E. 856; Davis & Sons v. Butrick, 68 Iowa, 94; Dean v. Nichols Shepard Co., 95 Iowa, 94.

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The general objection "incompetent, irrelevant and immaterial" is sufficient to point out the ruling desired. Kolka v. Jones, 6 N. D. 461, 71 N. W. 558.

MORGAN, C. J. This is an action for damages based upon the following facts as set forth in the complaint: That on the 15th day of July, 1899, plaintiff purchased from the defendant one Minneapolis threshing separator with attachments, and agreed to pay therefor the sum of $850, and that, pursuant to the sale of said separator and the terms of the contract, the plaintiff executed and delivered to the defendant his promissory note dated August 24, 1899, for $850, due November 1, 1899, with 7 per cent interest from date; that said separator was sold under an express warranty, whereby the defendant agreed and warranted that the separator was well made of good material, and that when said machinery was properly operated by competent persons it would do the work for which the same was intended as well as any machinery of the same size manufactured in the United States, and that, if the same did not do the work for which it was intended as well as any other machinery, the defendant would make the same fill such warranty, and that upon failure to do so the plaintiff might return said machine to the defendant; that the separator did not work in accordance with said warranty, for the reason that the same was not made of new materials, and that the separator was old and badly damaged machinery painted and fixed up and repaired to represent new machinery; that upon the failure of said separator to do the work as warranted the plaintiff immediately gave notice of that fact to the defendant as provided for in said warranty, and that in pursuance of such notice the defendant sent an expert to fix said machine, and that the said expert failed to make said machine work, and that in consequence of such failure the plaintiff rescinded the contract and returned the machine to the defendant at the place specified in the warranty, and afterwards gave the defendant notices in writing of the return of said machine and demanded from the defendant the return of the purchase price; that the defendant failed to return the plaintiff's note, but on the contrary sold and transferred the same in due course of business to one Lane, and that said Lane brought an action against the plaintiff upon said note and recovered judgment against the plaintiff for damages and costs amounting to the sum of $1,022.12, which said sum the defendant paid on the 23d

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day of November, 1901. The plaintiff demands judgment against the defendant for the said sum of $1,022.12, with interest thereon at the rate of 7 per cent per annum from the 23d day of November, 1901. The answer is a general denial, and in addition thereto it alleges that the plaintiff failed to comply with the terms of the written warranty, and in consequence thereof is not entitled to any damages on account of the alleged breach of the warranty of said machinery. The jury found in favor of the plaintiff for the sum of $850, with interest at 7 per cent thereon from the 24th day of August, 1899. A motion for a new trial was made by the defendant and denied, and judgment was thereafter entered on said verdict, from which the defendant has appealed.

It is claimed that no sufficient foundation was laid for the introduction of secondary evidence of the contents of a notice claimed to have been sent by the plaintiff to the defendant that the machine had failed to work according to the warranty contract. The plaintiff demanded the production of the notice from the defendant at the trial, and defendant's counsel then stated that no such notice was in defendant's possession or had been received by it. Thereupon the court permitted plaintiff to show by oral evidence what the contents of the notice were. The objection to such evidence was that no sufficient effort had been shown to find the copy that had been retained by plaintiff. The precise objection was that no inquiry had been made of the person with whom the notice had been left about five years previous to the trial. Said person had been dead about three years prior to the trial. If there was a waiver of the giving of this notice by the acts of the company itself through its authorized agents, then the question of the giving of the notice became immaterial, and the admission of such evidence, if erroneous, would be without prejudice. We are of the opinion that the authorized representatives of the company responded to some one of the notices claimed to have been given by mail or delivered personally under the contract, and the fact whether sufficient foundation was laid for secondary evidence of the contents of the notice that was claimed to have been mailed could not be urged by the company in view of its response to some notice. The general agent of the defendant company was a witness at the trial, and was interrogated at considerable length in reference to the circumstances under which the expert Foster appeared and tried to make the machine work as warranted. It appears as undisputed that Foster

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was a regular expert in the employ of the defendant. We think it has been shown, and that it is the only proper inference from the general agent's entire evidence, that the expert was instructed from the general office to attend to this machine pursuant to notice of some kind from the plaintiff. He says that he knew of an expert coming to Carrington to look after this machine, and that he came with instructions from the home office. He was asked: "Do you know of an expert coming here to Carrington to look after this machine? A. I did. * * * No; I was not acquainted with him. I do not believe I ever saw him but once at the factory. He came with instructions from the home office. Q. You said he came with some instructions from the home office? A. I can't say he came with any particular instructions from the home office. I presume he did; but do not know from my own knowledge." He was further asked: "Do you know if Mr. Foster came here to look after this machine as a result of information which the home office had received at that time or thereabouts?" He answered: "All I know is what I presume about that. That was taken up direct with him. He had no instructions from me. Q. Did you learn from your conversation with the manager or general agent at the home office in any way that this expert had been sent at that time from the home office? A. I learned that he was here. I learned this through the home office and through him both." On cross-examination he stated: "I mean that Mr. Foster was one of the men who was through this territory experting on threshing machines, and I afterwards learned that while he was here he had called on this machine and had experted on it." While this evidence is in some respects unsatisfactory and evasive, there is no doubt about the expert having come to Carrington with instructions from the home office, and the witness first testifies that he came there to look after this machine. Although this statement was subsequently modified, we think that this testimony, read in connection with the following testimony of the plaintiff, show that the expert came there with instructions from the main office in respect to this machine. The plaintiff says: "He came on the 18th day of September. He was the first expert that was sent there. I know where he went after he came to Carrington. Mr. Faxon [the company's local agent] and I met him at the depot, and I took him to the store and we got in a rig and went right to the machine. Q. He was one of the experts sent by the company? A. Yes, sir; he showed us a letter to that effect." This

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testimony fully negatives the contention that the expert was a mere volunteer without authority from the company, and is ample to sustain a verdict that the expert acted under direct authority from the company. Whether the proof shows that plaintiff made diligent effort to find the notice left with Judge Rose therefore becomes immaterial, as there was a clear waiver of the notice. The object in giving the notice was attained, and, having done everything that it could have done had the notice been given, the company was not prejudiced, and cannot now be heard to claim that no notice was given. That a company may waive the giving of notices provided for in similar contracts is conceded, and the rule is fully recognized by this court. Fahey v. Machine Co., 3 N. D. 220, 55 N. W. 580, 44 Am. St. Rep. 554; Manufacturing Co. v. Lincoln, 4 N. D. 410, 61 N. W. 145; J. I. Case Co. v. Ebbighausen, 11 N. D. 466, 92 N. W. 826. See, also, Briggs et al. v. Rumely Co., 96 Iowa, 202, 64 N. W. 784.

The defendant insists that the plaintiff cannot be heard to assert that there has been a waiver of the conditions of the warranty as to notice for the reason that no such fact was alleged in the complaint. Whether a waiver in such cases must be alleged before a party is entitled to prove that fact we are not called upon to decide in this case, and we express no opinion on that point. It is sufficient for the purposes of this case to say that no sufficient objection to this evidence was made or suggested at the trial. It is raised for the first time in this court, and it comes too late. We have recently held that before a want of a pleading in such cases can be urged against the admissibility of evidence in this court the record must show that the evidence was objected to at the trial by an objection sufficiently specific to call the trial court's attention to the absence of appropriate pleading. Aber v. Twichell, 17 N. D. 229, 116 N. W. 97.

The separator was warranted to "do the work for which it was intended as well as any machinery of the same size manufactured in the United States" when operated by competent persons in accordance with the printed rules and directions of the manufacturer. This separator was equipped with a 40-62 inch cylinder, and was operated by the plaintiff with an 18 horsepower Buffalo Pitts engine bought in 1885. Expert witnesses were permitted to state their opinions after having seen the separator at work as to whether it did the work for which it was intended as well as other separators which the witnesses were familiar with the working of, without

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any showing as to the size and capacity of the engines that furnished the power in those other instances. It is also claimed in this court that these opinions should not have been admitted, because in some instances the separators were not equipped with self-feeders and swinging stackers and were smaller machines. The theory of these contentions is that the failure of the separator to work may have been due to lack of power, and that expert opinions are inadmissible unless based on facts similar as to the size of the separator and capacity for power in the engine with the working of which the one in suit is compared. We do not think that the appellant has presented to us a record which entitles it to raise that question in this court for the first time. These questions were all objected to, but the objections cannot be held to properly suggest the objection that is insisted on now. To the following question: "Now state in reply to your observation of this machine as well as with your experience in operating both, did this Minneapolis separator do its work as well as that machine?"—the objection interposed was: "Objected to as incompetent, irrelevant, and immaterial, calling for a conclusion of the witness and not a statement of a fact, and the witness has not shown himself competent to answer." Nowhere does the record show that the precise point now urged as making the question objectionable was suggested or raised by an objection. Since the decision of Kolka v. Jones, 6 N. D. 461, 71 N. W. 558, 66 Am. St. Rep. 615, this court has followed the rule there adopted that an objection to a question as incompetent, irrelevant, and immaterial is too general and does not advise the court or opposing counsel of the ground relied on, and that the ground must be specified, except in cases where the objection cannot possibly be obviated at the trial. In effect, such an objection is therefore, in cases like the present one, no objection at all. To one question asked of the witness Holcomb in reference to the sufficiency of the power generated by this engine to operate a Buffalo Pitts separator a proper objection was interposed, but after the ruling on the objection the witness testified to facts showing the conditions to have been substantially similar.

It is objected that the court erred in admitting Exhibit E in evidence. This exhibit is an entry made in plaintiff's daybook kept as a record of daily transactions in plaintiff's store. The objection to the evidence as now urged is that the memorandum was independent evidence of the contents of the notice claimed to have been sent to

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the defendant of the failure of the machine to work, concerning which plaintiff had fully testified previously, and that it could at least be resorted to only to refresh the witness' recollection, and that it was simply a private memorandum not made in due course of business in a book kept for a particular business. Without deciding whether the admission of the memorandum to prove the fact of mailing the contents of the notices was erroneous or prejudicial, we need only say that the objection made to the question at the trial was the general one that it was incompetent, irrelevant, and immaterial and was properly overruled. The respondent now contends that the sole purpose of offering the memorandum in evidence was to establish the date of the notice. Had the objection apprised respondent of the precise ground intended to be urged, the error, if any, could have been avoided. Not having done this, we think that the particular objections now urged were waived.

The court charged the jury as follows: "The contract will be sent to the jury box with you, gentlemen, and you can wrestle with it at your pleasure"—and defendant has excepted to it, and urges that it was such a disparaging comment on the manner of printing the contract as necessarily would create in the minds of the jury an impression that the contract was of no importance, and that the court entertained an unfavorable opinion of it. Immediately following the portion of the charge excepted to, the court added: "I am unable to read it in the present light." We think the contention that the remark was prejudicial is entirely unfounded. There was not necessarily any reflection in these words against the contract, and it is entirely an erroneous conclusion to say that the contract was condemned by the court because printed in small type. If true that this charge was inferentially a censure upon the manner of printing it, we could not say that it was prejudicial in view of the fact that the court had previously stated to the jury that the contract was a legal one, which the parties had a right to make and each party must comply with the terms thereof.

The appellant claims that the giving of the following instruction was erroneous and prejudicial: "In this case the testimony offered by the plaintiff is that the notice was sent within one week. If you believe that it was sent, as stated by the plaintiff, it will be compliance with that portion so far as time is concerned." The objection urged against it is that it singles out the plaintiff's contentions on this point and is silent as to defendant's contention that

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no such notice was ever sent. Undue prominence should never be given to what is claimed to have been done by one party without stating the contentions of the opposite party as to the same question. But we do not think that there was an entire deviation from that rule in this instance when the whole charge is read together. The stipulations or terms of the contract were fully stated to the jury, and they were told that each party was bound and required to live up to it. They were further instructed that, if plaintiff had done all of the things required by the contract and the machine failed to comply with the warranty, they should find for the plaintiff, and were thereafter instructed that, if they found from the evidence that plaintiff had not performed what was required of him by the contract, they should find for the defendant.

We think this sufficiently covers what is objected to in the quoted instruction and the one following objected to on the same ground. We think that it would be an unreasonable conclusion to say, in view of this language, that the jury was not instructed that, if the plaintiff failed to send the notice required by the contract within one week, he could not recover. Taking the charge on this subject in its entirety, there is no room for the contention that the court singled out plaintiff's evidence and omitted what was claimed by the defendant. The defendant requested no instructions to be given on its behalf to cover this phase of the case, and, in the absence of such request, there is no foundation to claim error. If the charge was too general in this respect, a request for a more specific statement of the defendant's claims as shown by the evidence would undoubtedly have been given.

No reversible error being shown, the judgment is affirmed. All concur.

(116 N. W. 335.)

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LEHMAN M. GROVE AND J. FULTZ v. THE GREAT NORTHERN LOAN COMPANY, A CORPORATION.

Opinion filed April 22, 1908.

Usury — Effect on Mortgage.

1. A mortgage given for interest partly in excess of 12 per cent. per annum is not void in this state.

Same — Purchase Subject to Usurious Mortgage — Defenses.

2. A purchaser of real estate subject to a mortgage thereon for interest partly in excess of 12 per cent per annum is entitled to defend against the foreclosure of such mortgage so far as the entire interest is concerned, unless the amount of the usurious mortgage was deducted from the purchase price.

Same.

3. The purchaser in such cases is permitted to defend as against usury, on the ground that he stands in privity of contract and estate with the mortgagor.

Same — Foreclosure of Usurious Mortgages — Rights of Purchaser.

4. The mere fact that the purchaser of real estate did not have actual notice of a mortgage on the land does not entitle him to set aside the sheriff's deed under a foreclosure regular in all respects where the mortgage was duly recorded, and the only ground on which relief is asked is that the mortgage was usurious.

Mortgages — Foreclosure by Advertisement — Effect.

5. A foreclosure by advertisement has the same binding force as foreclosures by action in which the parties are personally served with process.

Same — Notice to Mortgagor.

6. No personal notice to the mortgagor or his grantees is required to render a foreclosure by advertisement effectual.

Same — Inadequacy of Price.

7. Mere inadequacy of the price at a foreclosure sale is not ground to set aside the foreclosure in the absence of fraud, undue advantage, or prejudice.

Certificate of Sale — Filing Not Mandatory.

8. The statutory provision that a certificate of sale shall be filed thirty days after the sale is not mandatory.

Same — Mortgage Not Dated.

9. The absence of a date in the mortgage as recorded will not vitiate a foreclosure thereof.

Same — Setting Aside Mortgage Foreclosure Notice.

10. A purchaser of real estate on which there is a mortgage given for interest, partly usurious, is not entitled to have a sheriff's deed given on the forclosure of the mortgage, regular in all particulars,

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set aside on account of such usury and on the ground that he had no actual notice of the mortgage or of the foreclosure, when the mortgage was duly recorded and the notice of foreclosure duly published, where the application is not made until about three months after the redemption period has expired.

Appeal from District Court, McHenry County; *Goss,* J.

Action by Lehman M. Grove and J. Fultz against the Great Northern Loan Company. Judgment for defendant, and plaintiffs appeal.

Affirmed.

Butler Lamb, for appellants.

An instrument representing entirely a usurious consideration is void. Section 5513, Revised Codes 1905; Ward v. Sugg, 24 L. R. A. 280; Brown v. Marion National Bank, 169 U. S. 416; McGee v. First Nat'l Bank of Tobias, 40 Neb. 92; Webb on Usury, 327, 357; Guthrie v. Reed, 107 Pa. St. 251; German Bank v. De Shon, 41 Ark. 331; Union Bank v. Gilbert, 83 Hun. 417; Gore v. Lewis, 13 S. E. 909; Exeter Nat'l Bank v. Orchard, 58 N. W. 144; Cochran v. Powers, 6 Ohio St. 19; Lucas v. Govt. Nat'l Bank, 28 P. F. Smith, 231; Tyler on Usury, page 382, 391.

Privies of parties agreeing to give usury may plead it. Webb on Usury, page 401, 435; Union Dime Savings Institution v. Clark, 59 N. Y. Rep. 342; Morgan v. Tipton, 3 McLean 339, C. C. U. S.; Maloney v. Eahart, 18 S. W. 1030; Jones on Mortgages, Vol. 1, page 541; Hutchinson v. Abbot, 33 N. J. E. 379; Lloyd v. Scott, 4 Peters, 205; Lasater v. First Nat'l Bank, 72 S. W. 1054; Valentine v. Fish, 45 Ill. 468; Ryan v. Am. etc., Land Mtg. Co., 23 S. E. 411.

Foreclosure of usurious mortgage may be set aside. McGee v. First Nat'l Bank of Tobias, supra; Green v. Tyler, 39 Pa. St. 361; Russell, Receiver v. Nelson, 1 N. E. 314; Jackson v. Skinner, 6 Wend. 415; Webb on Usury, 388; Tyler on Usury, 382; Hyland v. Stafford, 10 Barb. 558; Jackson v. Dominick, 14 Johnson's Rep. 435; Cole v. Savage, 10 Paige, 583; Schrappel v. Corming, 5 Denio 236; Jordan v. Humphrey, 18 N. W. 450; Wetherall v. Stewart, 29 N. W. 196; Webb on Usury, 228.

Usury Statutes are liberally construed. Hommand v. Hopping, 13 Wend. 55; Morgan v. Tipton, 3 McLean, 399; Gray v. Bennett, 44 Mass. 522.

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Christianson & Weber, for respondent.

A sheriff's deed upon foreclosure cannot be set aside for usury. Bell v. Fergus, 18 S. W. 931; section 5856 Revised Codes N. D. 1899; Reilly v. Phillips, 57 N. W. 780.

The plea of usury is personal to the grantor and cannot be set up by his grantee. Gray v. Loud & Sons, 53 L. R. A. 731; Moses v. Home Bldg. Asso., 14 So. 412; Barney v. Tontine Surety Co., 91 N. W. 140; Eslava v. Bldg. & Loan Assn. 25 So. 1013; Johnson v. Bldg. & Loan Assn., 26 So. 201; Anderson v. Oregon Mtg. Co., 69 Pac. 130; Mathews v. Ormerd, 74 Pac. 136; De Wolf v. Johnson, 10 Wheat. 367; Cheney v. Dunlap, 5 L. R. A. 465; McKnight v. Phelps, 56 N. W. 722; Gray v. Loud, 87 N. W. 376; Ladd v. Wiggin, 35 N. H. 421; Ready v. Koebke, 1 N. W. 344; Hill v. Alliance Bldg. Co., 60 N. W. 752; Hiner v. Whitlow, 49 S. W. 353; Smith v. McMillan, 46 W. Va. 577; Zeigler v. Maner, 30 S. E. 829; Bell v. Fergus, 18 S. W. 931; Hiner v. Whitlow, 49 S. W. 353; Robinson v. McKinney, 4 Dak. 291, 29 N. W. 658; N. W. Mortg. Co. v. Bradley, 70 N. W. 648.

A mortgage is complete without a date. Goodlaid's Case, 2 Coke 4; Thompson v. Thompson, 9 Ind. 323; Savory v. Browning, 18 Iowa, 249; Lyon v. McIlvaine, 24 Iowa, 15; Banning v. Edes, 6 Minn. 402; Mitchell v. Bartlett, 51 N. Y. 453.

Misstatement of amount due, in the absence of fraud or injury, does not affect the foreclosure. Savings, etc., Assn. v. Burnett, 39 Pac. 922; Butterfield v. Farnham, 19 Minn. 85; Hamilton v. Lulukee, 51 Ill. 415; Klock v. Cronkhite, 1 Hill, 107; White v. McClellan, 62 Md. 347; Ramsey v. Merriam, 6 Minn. 168; Cook v. Foster, 55 N. W. 1019.

A foreclosure is not affected by the fact that proof of publication was made after the sale. McCammon v. Detroit L. & N. R. Co., 61 N. W. 273.

MORGAN, C. J. This is an action to set aside a sheriff's deed issued pursuant to a foreclosure of a real estate mortgage by advertisement under a power of sale.

The complaint states the following facts: The plaintiff Grove was the owner of the land involved in said mortgage from September, 1903, until May, 1904, and in the latter month conveyed the same by a warranty deed to Fultz, his co-plaintiff in this case. In September, 1903, and while said land was owned by Grove, he en-

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tered into negotiations with the defendant, under which it was agreed between them that the defendant would furnish said Grove with $500, and said Grove was to mortgage said real estate to the defendant or to any one to whom the defendant should direct said mortgage to be given. Pursuant to this contract, a mortgage was executed and delivered by Grove to one Laton to secure $500 at 7 per cent annual interest from its date, September 3, 1903, which mortgage was to become due in December, 1908. Two other mortgages were given at the same time pursuant to that contract, one to E. P. Gates for $82.50, of which $41.25 was due December 1, 1903, and $41.25, December 1, 1904, and the other to the defendant for $60, of which $10 was to be paid annually on November 1st until fully paid. All of these mortgages were duly recorded in the proper office. This $60 mortgage was foreclosed by the defendant by advertisement on February 25, 1905, and the land was bid in by it for the sum of $129.06, and on February 27, 1906, the sheriff issued a deed of the premises to the defendant. The complaint also alleges that this mortgage was wholly and entirely usurious and void, and that the foreclosure proceedings were for that reason void. It is further alleged that the plaintiff Fultz did not have any actual knowledge of the existence of the $60 mortgage, and had no actual notice of the foreclosure proceedings until in May, 1906, which was after the sheriff's deed had been delivered. It is claimed that this foreclosure was invalid for the following additional reasons: (1) That the mortgage was not dated as shown by the records of McHenry county, where the same is recorded. (2) That the affidavit of publication is dated March 11, 1905, and the sheriff's certificate is dated on February 25, 1905. (3) That the amount due on the mortgage is incorrectly stated in the notice of foreclosure; that the amount due is stated to be $81.96, whereas the amount due is only $67.50, conceding that the mortgage was not usurious. That in June, 1904, the plaintiff Grove conveyed the premises involved in this suit to said Fultz by a warranty deed for a valuable consideration. That said land was conveyed free of all incumbrances except the mortgage for $500, and said Grove expressly warranted that said mortgage did not draw interest in excess of 12 per cent per annum. That the defendant was informed of the conveyance of said premises to said Fultz and knew his post-office address and did not notify said Fultz of said foreclosure nor of the default in the payment of the 1904 installment. That he has tendered

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to the defendant the full amount for which the defendant did purchase said premises at said sale and subsequent costs, but defendant refused to accept said tender. The relief demanded is that said $60 mortgage be declared canceled as well as the deed issued on the foreclosure thereof, and, if such relief be denied, that said defendant Fultz be permitted to redeem from said foreclosure sale. The defendant demurred to the complaint on the ground that it fails to state a cause of action, and the trial court sustained the demurrer, and plaintiffs have appealed to this court.

The appellant's contention is that the foreclosure sale, as well as the deed issued pursuant thereto, was absolutely void for the reason that it was wholly usurious. Conceding that the transaction was usurious, it nevertheless appears that the foreclosed mortgage did not represent interest wholly in excess of 12 per cent per annum on $500 for five years. It was usurious, however, and, being a mortgage for interest only, the interest would be subject to forfeiture in a proper case. The question is therefore presented whether a foreclosure of a mortgage representing in part a usurious transaction is void, and, if void, whether the plaintiffs are permitted to set up that fact as a ground for affirmative relief against a foreclosure sale after the redemption period has expired. Conceding that the $60 mortgage represented some interest in excess of 12 per cent, the highest legal rate allowed, we are agreed that the plaintiff Grove is clearly not entitled to the relief demanded. There is no allegation or claim that he did not have actual notice of the foreclosure and permitted it to go on until the deed was issued without asserting his defense. If he has a right to be heard now in defense of his covenant of warranty, he had the same right while the foreclosure was pending. Conceding that he had a legal right to prevent the foreclosure jointly with Fultz, he did not invoke that right, and now demands equitable relief without attempting to excuse this default. He has lost all right to equitable relief. He should have made his defense seasonably.

The plaintiff Fultz seeks equitable relief upon different grounds. He alleges that he had no knowledge of the $60 mortgage, and no actual notice of the foreclosure thereof. The regular notice prescribed by statute for a foreclosure of mortgages by advertisement was given by publication. This notice was conclusively binding on Fultz, and had the same legal effect on him as if a personal notice had been served on him. He cannot now be heard to assert

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that he did not know of the foreclosure. He is presumed to have had notice thereof, and will not be heard to assert that he did not know what the law imputes to him as notice. Barney v. Little, 15 Iowa, 527; Ensign v. Batterson, 68 Conn. 298, 36 Atl. 51; Smith v. Boyd, 162 Mo. 146, 62 S. W. 439; Beach v. Osborne, 74 Conn. 405, 50 Atl. 1019, 1118; Curtis v. Moore, 152 N. Y. 159, 46 N. E. 168, 57 Am. St. Rep. 506; Chadwick v. Russell, 117 Ala. 290, 23 South. 524. Whether Fultz is entitled under any conditions to raise the question of usury is a question of serious contest between the parties. The defendant claims that a purchaser of land, subject to an existing mortgage, can never raise the question of usury in such mortgage. Under many circumstances the contention is true, as that right is generally personal to the borrower. Under the allegations of the complaint, however, we do not think that the general rule applies. In the first place, the borrower brings this action jointly with Fultz, the purchaser, and consents thereby that Fultz may raise the question of usury, and shows that he does not intend to waive the usury. The general rule is that the borrower and those in privity of estate may attack the mortgage or mortgage sale when void for usury. Jones on Mortgages, section 644 (6th Ed.), says: "But the doctrine more generally adopted is that not only the mortgagor, but any person who is seized of his estate and vested with his rights, unless he has assumed payment of the mortgage, may interpose this defense, although a mere stranger cannot. * * * Any one in legal privity with the mortgagor, unless he has debarred himself of the right to dispute the mortgage, may set up this defense; otherwise, the property would be practically inalienable in the hands of the mortgagor, unless he should be willing to affirm the usurious mortgage by selling the property subject to it. But the owner of the property has, of course, the right to sell the property as though such void mortgage did not exist; and the purchaser necessarily acquires all the rights of his vendor to question the validity of the usurious incumbrance." The respondent also contends that Fultz cannot raise the invalidity of the mortgage on the ground of usury, for the reason that he purchased subject to the mortgage and is presumed to have retained a sufficient sum out of the purchase price to fully pay the mortgage. The complaint, we think, clearly refutes that presumption, and negatives the idea that any sum was so retained out of the purchase price to pay anything above 12 per cent interest on the

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$500 loan. The general rule applicable in cases where the purchaser deducts from the purchase price enough to pay the mortgage, including the usurious interest, cannot be invoked in this case, as the complaint shows that the $60 mortgage was not known to have been in existence by Fultz, and the amount thereof, therefore, could not have been reserved out of the purchase price.

The case, therefore, comes within the principle that the borrower and those in privity of estate with him are permitted to defend as against usury in proper cases. Webb on Usury, section 350; Union National Bank et al. v. International Bank et al., 123 Ill. 510, 14 N. E. 859; Merchants' Exch. Nat. Bank v. Commercial Warehouse Co., 49 N. Y. 635; National Mutual Bldg. & Loan Ass'n v. Retzman, 69 Neb. 667, 96 N. W. 204. If the borrower waives the usury and pays it, or makes a deduction of the purchase price to that extent on a sale of the premises subject to the mortgage, the purchaser cannot raise the question of usury, even in an action on the usurious note or mortgage. The right to raise the question of usury is personal to the borrower, and, if he ratifies the usurious transactions, others cannot assume a contrary attitude. If these plaintiffs had appeared and resisted the foreclosure by advertisement, as they might have done under section 7454, Revised Codes 1905, no legal objection could have been interposed to allowing them to raise the question of usury.

It is further claimed that the defendant did not notify plaintiffs that the mortgage was to be foreclosed. No such notice is provided for by the statute. Hence the defendant was not required to give such notice, and the foreclosure cannot be invalidated on that ground. Reilly v. Phillips, 4 S. D. 604, 57 N. W. 783.

It is claimed that the foreclosure was void by reason of the usurious character thereof. Whether this is so or not depends upon the statute in force when the mortgage was given. Unless the statute declares that usury vitiates and renders void the notes and mortgages given therefor, then the proceedings are not void. There are no penalties or forfeitures for usurious transactions, except such as are prescribed by statute. The statute in force when the loan was made was the same as the usury law now is, and it is as follows: "The taking, receiving, reserving, or charging a rate of interest greater than is allowed by section 5510 (5511), when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill or other evidence of debt carries with it or which has

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been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back in an action for that purpose twice the amount of interest thus paid from the person taking or receiving the same; provided, that such action is commenced within two years from the time the usurious transaction occurred." In addition to this forfeiture of interest in a civil action, the taking of usury is declared to be a misdemeanor by the Penal Code. Under section 5511 a rate of interest not exceeding 12 per cent is lawful. It will be observed that section 5513 is silent as to the effect upon the contract or upon the securities or notes if usury is stipulated for or charged therein. The contract is not declared to be void by this section, nor is the effect of usury upon the contract mentioned therein. It prescribes only as to the penalty in case usury is charged or paid, and no mention is made nor can be read into the statute so far as affecting the contract is concerned. The penalties laid down by the statute, therefore, are the only ones that can be considered, as the rule is that the terms of the statute govern as to that question. The following authorities and many others sustain these principles: Bank v. Pick, 13 N. D. 74, 99 N. W. 63; N. W. Mortgage Trust Co. v. Bradley, 9 S. D. 495, 70 N. W. 648; Oates v. Bank, 100 U. S. 239, 25 L. Ed. 584; Robinson v. McKinney, 4 Dak. 291, 29 N. W. 658; Haseltine v. Bank, 22 Sup. Ct. 50, 183 U. S. 132, 46 L. Ed. 118; Fletcher & Sons v. Circuit Judge, 136 Mich. 511, 99 N. W. 748; N. W. Mortgage Co. v. Bradley, 9 S. D. 445, 70 N. W. 648. It follows that the remedy sought in this action by both plaintiffs is not available to them. They seek to have the mortgage and sheriff's deed declared void when they are not void as a matter of law or fact. On the main question, whether the foreclosure was void, the plaintiff cites many authorities. After carefully reading them, it is clear to us that they are not in point. They refer mostly to foreclosure sales under statutes declaring the usurious contracts void. Other cases are cited which are not applicable. They are cases where defenses of usury were interposed in actions to foreclose mortgages.

The foreclosure by advertisement, followed by the issuing of a deed, is not subject to attack on these grounds any more than if the deed were based on a decree of foreclosure in court. A sale under decree is no more efficacious as a basis of title than a sale by advertisement when all statutory requirements have been complied with.

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This is the express effect given to deeds under foreclosures by advertisement by section 5856, Revised Codes 1899, in force when the foreclosure was made. Fultz relies on the fact that he had no actual notice of the $60 mortgage, and no actual notice of its foreclosure until after the redemption period had expired. Under the circumstances of this case, we do not think those facts entitle him to the equitable relief demanded. The mortgage was recorded, which gave him constructive notice of its existence. The notice of foreclosure was regularly published, which as a matter of law is as binding upon him as though he had been personally served with notice of the foreclosure. He purchased the land from Grove, and relied on his covenant that the $500 mortgage was the only mortgage, without any examination of the record.

There is no allegation of fraud or undue influence on the part of the defendant in foreclosing the mortgage. Under such circumstances, we are satisfied that the foreclosure sale is not subject to an attack by an equitable action, based solely on the ground that the mortgage was usurious. If the statute rendered the mortgage void, a different question would be presented. To allow him or parties similarly situated in other cases to come in merely on the ground of want of actual notice would render this method of foreclosure subject to grave abuse, though the foreclosure was attended by strict compliance with the statute. Relief under such circumstances should not be granted in the absence of some distinct ground for equitable relief.

The fact that the publisher's affidavit of the notice of sale was dated as of a later day than the sheriff's certificate does not invalidate the sale. The statute providing for such filing within 30 days from the day of sale does not provide that the failure to do so shall invalidate the sale. The jurisdictional requirement is that the notice shall be published. In the absence of some statutory provision invalidating the sale for failure to file the proof within the prescribed time, we think that the reasonable construction to be given to the provision is that it was intended to be merely directory. Johnson v. Day, 2 N. D. 295, 50 N. W. 701. The notice of sale stated the amount due on the mortgage to be $81.96, when it should have been only $67.50 according to the terms of the notes. There is no allegation of fraud or bad faith in inserting a wrong amount, and there is no allegation that any one was mislead thereby, and there could not well be ground for such allegation of actual prejudice. Jones

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on Mortgages, chapter 1855; Cook v. Foster, 96 Mich. 610, 55 N. W. 1021. The absence of a date from the mortgage does not invalidate the mortgage. The fact that the record of the mortgage shows no date is therefore immaterial, as the validity of the mortgage does not depend upon its being dated, but it becomes effective by delivery.

The judgment is affirmed. All concur.

(116 N. W. 345.)

L. E. Mariner v. H. A. Wasser.

Opinion filed June 19, 1908.

Personal Property — Possession as Evidence of Ownership.

1. A person in actual possession of and having actual control over personal property is prima facie the owner thereof.

Sheriffs — Unlawful Levy — Conversion — Demand.

2. A sheriff is not guilty of conversion of property when taken and sold under an execution when he finds the property in the actual possession and under the control of the execution debtor, until a demand for the return of the property is made or notice given of the ownership of the property, or the sheriff has knowledge of the actual ownership of the same.

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

Action by L. E. Mariner against H. A. Wasser. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Geo. W. Thorpe and *S. E. Ellsworth*, for appellant.

Where a levy is made on personal property in judgment debtor's possession, demand and refusal to deliver are indispensable to render officer liable, unless he knows the true ownership of other claimant. Killey v. Seannell, 12 Cal. 73; Daumiel v. Gorham, 6 Cal. 43; Taylor v. Seymour, 6 Cal. 512; Bond v. Ward, 7 Mass. 123; Shumway v. Rutter, 8 Pick. 443; Vose v. Stickney, 8 Minn. 75; Barry v. McGrade, 14 Minn. 163; Lewis v. Whittemore, 22 Am. Dec. 466; Master v. Webb, 60 How. Pr. 302; Walter v. Jacobson, 7 N. D. 32, 73 N. W. 65.

Carr & Kneeland, for respondent.

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Sheriff can always protect himself by demanding indemnity. Waples on Attachment, 148; Shriver v. Harbaugh, 37 Pa. 399.

Trover can be maintained without demand, where situation of property fairly warrants that it is the judgment debtor's. Woodbury v. Long, 8 Pick. 543; Blanchard v. Cooley, 22 Pick. 151; Stickney v. Davis, 16 Pick. 19.

Whoever deals with chattels does so at his peril. 2 Cooley on Torts, 778, 779; 2 Jaggard on Torts, 734; 2 Hillard on Torts, 188; 2 Addison on Torts, section 907.

Where a sheriff sells personal property of another than the judgment debtor, he is liable without notice unless real owner's conduct has misled him. 26 Am. & Eng. Enc. Law. 720, 790; Lothrop v. Arnold, 25 Me. 136; Whitney v. Preston, 45 N. W. 619; Taylor v. Plunkett, 56 Atl. 384; Meadow v. Wise, 41 Ark. 285; Ilg v. Burbank, 59 Ill. App. 291; Duperon v. Van Wickle, 4 Rob. 39, 39 Am. Dec. 509; Fort v. Wells, 56 Am. St. Rep. 316; Reynolds v. Shuler, 5 Cow. 323; State v. McBride, 81 Mo. 353; Meade v. Smith, 16 Conn. 346; Riley v. Martin, 35 Ga. 136; Cobb v. Dows, 9 Barb. 230; Jamison v. Hendricks, 2 Black, 94; Roche v. Link, 15 Ky. L. Rep. 702; Terrial v. Kinney, 20 La. Ann. 444.

Morgan, C. J. This is an action for damages for the conversion of personal property by the defendant sheriff, who sold it under an execution in an action to whicih the plaintiff was not a party. A jury trial was duly waived, and a trial was had to the court who made findings of fact and conclusions of law in plaintiff's favor, and rendered judgment in his favor for $66 and costs. The plaintiff was the owner of the property beyond dispute, as shown by the evidence. No demand was made upon the sheriff for the return of the property or for damages for its wrongful taking prior to the commencement of this action. The answer was a general denial but the evidence, unobjected to, showed that the sheriff was acting under an execution, regularly issued in an action in which the plaintiff's brother was the judgment debtor. The property, when levied on, was in the actual possession of the execution debtor, and, when levied on, the sheriff was in no way notified or informed that the plaintiff was the owner thereof. The sole question presented for consideration is whether a sheriff is liable for damages in levying on and selling the property of a third person under execution when he finds the property in the actual possession of the execution debtor,

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and he is in no way advised and has no knowledge that the property does not belong to the execution debtor. In this state there is no statutory provision applicable to the question, although section 6954, Rev. Codes 1905, provides that, when property of a third person is taken under a writ of attachment, the sheriff is not liable for damages for so doing, unless such third person notifies the sheriff by a verified claim of such ownership. We have recently held that said section is not applicable to cases where the property is taken from the actual possession of such third person. Aber v. Twichell, 17 N. D. 229, 116 N. W. 95. A determination of the question depends upon the force and effect of the actual possession by the execution debtor of the property when levied on.

It is a general principle of law that the person in actual possession of personal property is prima facie the owner thereof. Does the fact of such possession except the sheriff from his general liability for selling the property of a stranger to the execution writ, when there is an entire want of notice or knowledge, and he is acting in entire good faith? The plaintiff placed the property in the execution debtor's hands, and is to that extent the cause of the sheriff's mistake. Had a demand been made before suit, and the sheriff had refused to comply therewith, the sheriff would be liable. In such a case his liability would be the result of his own act as he had an opportunity to remedy the mistake. In the case at bar the sheriff has had no opportunity to return the property, and he had sold it before a suit was brought against him for damages. We think it would be an unjust and harsh rule to force him to respond in damages unless a demand be first made. The requirement of a previous demand by the owner of the property before suit can be maintained does not inflict upon the owner a burdensome task, and the enforcement of the opposite rule would often inflct upon the officer serious consequences without any fault whatever on his part. We think that the general rule as to demand should be applied, and that is that a demand is necessary where the possession is not wrongful. The prima facie ownership by virtue of the possession was sufficient to authorize a levy on the property by the sheriff, and, until notice or a demand for the possession, his possession cannot be said to have been wrongful. The precise question involved here has been before the California courts. In Killey v. Scannell, 12 Cal. 73, the absence of demand was declared fatal to a recovery by the owner on the sole ground that the possession of the judgment debtor authoriz-

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ed a levy on the property so found. This case, however, was expressly disaffirmed in Boulware v. Craddock, 30 Cal. 190, and in Wellman v. English, 38 Cal. 583. But both of these last-mentioned cases were expressly disapproved in Fuller Desk Co. v. McDade, 113 Cal. 360, 45 Pac. 694, and the rule in Killey v. Scannell, supra, returned to. In Vose v. Stickney, 8 Minn. 75 (Gil. 51), the same rule was followed, and in the syllabus is stated as follows: "Where a person is in possession of and exercising acts of possession over personal property of another, the owner cannot, until demand or notice to the sheriff, maintain an action against him for levying upon and taking it under process against the person in possession." For an instructive discussion of the question, see Masten v. Webb, 60 How. Prac. (N. Y.) 302, where the California rule is followed. In Freeman on Executions, § 254, the same rule is laid down, and in commenting on the doctrine of the California cases, above cited, where it is held that the sheriff is liable for wrongful levies, although the property is in the possession of the judgment debtor, it is said: "This statement requires some modification. If the property is in possession of the defendant in execution, it is prima facie his. The officer may, therefore, levy upon it, if he knows nothing to rebut this presumption, and cannot be charged as guilty of a conversion, unless, after notice that it belongs to another, he insists upon retaining possession of it and refuses to deliver it to the owner."

It follows that the action cannot be maintained without notice or proof of a demand for possession and that the defendant is not shown to have wrongfully levied on the property, and the findings of the court that the defendant wrongfully levied upon it are not sustained by the evidence. The judgment is reversed, a new trial granted, and the cause remanded for further proceedings.

All concur.

(117 N. W. 343.)

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Henry Rieck v. J. B. Daigle.

Opinion filed June 19, 1908.

Negotiable Instruments — Defense.

1. A promissory note, which contains the following stipulation: "This note subject to conditions of hotel purchase contract of even date herewith"—is nonnegotiable, and hence an indorsee thereof takes the same subject to all legal defenses or set-offs existing in favor of the maker of such note, at the date of the commencement of an action thereon.

Evidence — Parol Evidence to Vary Writing.

2. A written contract supersedes all prior or contemporaneous oral agreements or negotiations relating to the subject-matter embraced therein.

Bills and Notes — Counterclaim — Payment.

3. Defendant pleaded payment in full prior to the commencement of the action, but such defense is not supported by any evidence He also attempted to prove a set-off for damages, based upon a breach of the contract, subject to the conditions of which the note was given, but it is *held,* for reasons stated in the opinion, that such defense was not established.

Judgment Notwithstanding Verdict — New Trial.

4. Following the rule announced in Welch v. N. P. R. R. Co., 14 N. D. 19, 103 N. W. 396, *held,* that it is not a proper case for ordering judgment, notwithstanding the verdict, but a new trial is ordered.

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

Action by Henry Rieck against J. B. Daigle. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

Christianson & Weber, for appellant.

A statement in a note that merely refers to the consideration or transaction does not affect its negotiability. Rev. Codes 1899, Ch. 100, Sec. 5; Buford v. Ward, 19 So. 357; New Zealand Ins. Co. v. Maas, 59 Pac. 213; Biegler v. Merchants' Loan & Trust Co., 45 N. E. 512; Dobbins v. Oberman, 22 N. W. 356; Bank of Carroll v. Taylor, 25 N. W. 810; Kimball Co. v. Millon, 48 N. W. 1100; Hudson v. Emmons, 65 N. W. 542; Markey v. Corey, 66 N. W. 493, Choate v. Stevens, 74 N. W. 289.

Parol evidence cannot vary terms of a written contract. Rev. Codes 1899, Sec. 3888; Jones on Evidence, Sec. 505; Thompson v. McKee, 5 Dak. 172, 37 N. W. 367; Ely v. Kilborn, 5 Denio 514; Barnstable Sav. Bank v. Ballou, 119 Mass. 487; Clanin v. Easterly Harvesting Machine Co., 3 L. R. A. 863; Brewton v. Class, 22 So.

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Rep. 916; First Nat. Bank v. Bows, 51 Pac. 777; Milich v. Armour Packing Co., 56 Pac. 1; Adams v. Watkins, 61 N. W. 774; Harrison v. Howe, 67 N. W. 527.

No brief by respondent.

FISK, J. This is an appeal from an order of the district court of Pierce county denying plaintiff's motion for judgment notwithstanding the verdict, or for a new trial. The action was brought to recover upon a promissory note, executed and delivered by defendant to one Hulda Rieck, which note, it is alleged, was, before maturity and for value, sold and indorsed to plaintiff, the stepson of the payee of said note. The complaint is in the usual form, and the answer, after admitting the execution and delivery of the note as alleged in the complaint, pleads payment in full prior to the commencement of the action. The answer also denies that plaintiff purchased said note in due course of business, and alleges that he had full knowledge of all the facts concerning the consideration thereof at the time of his purchase. The answer then proceeds to set out the consideration for the giving of such note, and alleges that defendant purchased a hotel property from Hulda Rieck for the sum of $900, agreeing to pay her $600, and to assume the payment of $300, which she then owed to one Hyde from whom she had heretofore purchased the property. It also alleges that Hulda Rieck represented to him that the sum of $300 was the total amount owing by her to Hyde on her contract for the purchase of said property, and that such representations were falsely and fraudulently made, with knowledge thereof at the time they were made, and defendant alleges that there was at said time the sum of $400 due said Hyde from her on such contract, and that defendant had to pay, and did pay, said sum, with interest, to Hyde before he could get a deed for said property from her. It is also alleged that the note in suit is one of four notes, for $100 each, which defendant executed and delivered to Hulda Rieck as part purchase price for said property, and further that defendant has paid Hulda Rieck $500 and interest, and Hyde $400 and interest, being payment in full of the purchase price of said property.

At the trial the note in suit, after being properly identified, was introduced in evidence, and is as follows: "$100.00. Devils Lake, N. Dak., Mar. 24, 1898. On or before the first day of December, 1902, for value received I promise to pay to Hulda Rieck or order one hundred ($100.00) dollars at the office of Albert M. Powell, In-

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vestment Banker, Devils Lake, N. Dak.; with interest at the rate of seven per cent per annum, payable annually, from date. This note subject to conditions of hotel purchase contract of even date herewith. J. B. Daigle." Said note bears an indorsement in blank by the payee. It was proven that, at the time this note was executed and delivered, there was a contract in writing, entered into between the parties, for the sale and purchase of this hotel property. This contract was offered in evidence, and, among other stipulations, contains the following: "Said Hulda A. Rieck and John Rieck, her husband, hereby agree to protect J. B. Daigle in quiet and peaceable possession of this hotel property, which has been sold to him, as against any possible harm or attempt at possession by Fannie M. Hyde, by reason of a disputed claim of $100.00, between said Fannie M. Hyde and Hulda Rieck." It is therefore apparent that the note is nonnegotiable and consequently is subject, in plaintiff's hands, to such defenses, when properly pleaded, as may exist. Plaintiff's contention that the same is negotiable is without merit, and the authorities cited by him are, we think, clearly distinguishable from the case at bar on the facts. Without attempting an analysis of the numerous authorities cited, which would serve no good purpose, we will proceed to a consideration of the other questions involved.

There are 24 alleged errors assigned in appellant's brief, but we are not required to notice them, except in a general way. The plea of payment was not supported by the proof, but the defense sought to be established was that, in the purchase of the hotel property, Hulda Rieck falsely represented that but $300 was at that time due Hyde from her, on the contract for deed to said property from Hyde to her, and that in fact there was a balance thus due of $400. Testimony was also introduced, over plaintiff's objection, tending to show an oral agreement, to the effect that if defendant was required to pay the $100 in dispute between Hyde and Hulda Rieck, the note in suit should be canceled and surrendered to him. We think this testimony was improperly received. Such oral agreement is clearly at variance with the written contract relating to the same subject-matter, entered into a day or two after such oral negotiations took place, and hence the written contract must be held to have superseded such oral negotiations. Proof of such oral agreement was therefore clearly incompetent. Under the clause of the written contract above quoted Hulda and John Rieck, her husband, agree to protect defendant in the quiet and peaceable possession of the property sold, as against any claims asserted by Hyde by reason of

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the disputed item of $100. If defendant can show a breach of such contract, then, no doubt, the damage resulting to him therefrom would constitute a proper set-off in his favor, as against the note in suit, but he wholly failed to establish such defense by any competent evidence. There is not a scintilla of evidence in the record tending to show that Hyde had any legal right to recover this disputed item of $100; and, in the absence of such proof, no right of set-off was shown, nor, for the same reason, was any defense shown under the oral agreement aforesaid, even conceding that such agreement was not merged in the subsequent written contract. The ruling of the trial court, as well as the instructions complained of, were therefore erroneous, and necessitate a new trial. Judgment non obstante is asked for, but this would not be proper, as upon a new trial defendant may be able to supply the defect in his proof. Welch v. N. P. R. R. Co., 14 N. D. 19, 103 N. W. 396.

The order appealed from, in so far as it denied plaintiff's motion for a new trial, is reversed, and the cause remanded for another trial. All concur.

(117 N. W. 346.)

J. L. OWENS COMPANY v. THOMAS DOUGHTY.

Opinion filed April 22, 1908.

Set-off and Counterclaim — Subsisting Right of Action.

Action on a promissory note. The answer admits the execution and delivery of the note and the amount due thereon, but alleges two counterclaims based upon a contract under which plaintiff agreed to reimburse defendant for the expenses incurred by the latter in effecting sales of certain fanning mills theretofore sold by plaintiff to defendant and for the purchase price of which the note in suit was given. The first counterclaim is for expenses theretofore incurred by defendant in making sales of seventeen of such mills. The second asks for the sum of $560 as the probable or estimated expense of effecting sales of twenty-eight mills which are still unsold and in defendant's possession. Plaintiff admitted the first counterclaim. The other one was stricken from the answer on plaintiff's motion, and judgment ordered on the pleadings in plaintiff's favor. *Held* not error, as no cause of action for the recovery of the expense of making sales in the future of the mills on hand had accrued under the terms of the contract.

Appeal from District Court, Foster County, *Burke,* J.

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Action by the J. L. Owens Company against Thomas Doughty. Judgment for plaintiff, and defendant appeals. Affirmed.

T. F. McCue, for appellant.
Turner & Wright, for respondent.

FISK, J. This is an appeal from a judgment of the district court of Foster county. The suit is upon a promissory note for the sum of $1,010.50 executed and delivered by appellant to respondent on December 18, 1902, and upon which the sum of $424 was paid on November 1, 1903. The answer admits the execution and delivery of the note and the payment aforesaid, and by way of counter-claim alleges that said note was given as the purchase price of 60 fanning mills sold and delivered by plaintiff to defendant pursuant to the terms of a written contract by which plaintiff agreed to furnish a canvasser to sell said mills, and guaranteed that such mills would be sold in four months, and that any mills remaining unsold at the expiration of such time were to be sold by defendant at plaintiff's expense. A violation of said contract by plaintiff is alleged in the answer, in that but 10 of such mills were sold during said time. The answer also alleges that since the expiration of said four months the defendant sold 17 of such fanning mills, and that the reasonable value of services and expenses in making such sales is $10 per mill; and in paragraph 9 of said answer he alleges that he has on hand 28 of the mills, and that the expense of canvassing for purchasers thereof and in making sales of the same will be the sum of $20 per mill. When the case was called for trial in the district court, plaintiff moved to strike paragraph 9 aforesaid from the answer, which motion was granted. Thereupon plaintiff's counsel admitted in open court that it was reasonably worth, and that defendant expended in the sale of the 17 mills, the sum of $170, and moved for judgment upon the pleadings for the amount prayed for in the complaint, less said sum of $170, which motion was also granted, and judgment was thereafter duly entered in respondent's favor.

Appellant's assignments of error are predicated upon the court's rulings in striking out said paragraph, and in ordering judgment aforesaid. These assignments are wholly without merit. It is too plain for discussion that no cause of action existed in defendant's favor for the recovery of the expense of selling said mills, and none can accrue until such expense has been incurred. The expense to

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which defendant will be put in order to effect a sale of said mills is, of course, entirely problematical. The defendant, through his counterclaim, seeks to recover in advance the estimated cost and expense to him of effecting sales of the mills still on hand. Plaintiff did not agree to reimburse defendant except for the actual expenses incurred by him in making said sales. See opinion of this court on former appeal (Owens Co. v. Doughty, 16 N. D. 10, 110 N. W. 78). It is therefore entirely obvious that before defendant may recover for such expense the same must have been incurred. Not having sold the mills, no cause of action for the recovery of the expense has yet accrued. We cannot speculate upon what the probable expense will be of making such sales. The actual, not the probable, expense, is what plaintiff contracted to pay.

The plaintiff, having admitted defendant's first counterclaim, was clearly entitled to judgment on the pleadings as ordered.

Judgment affirmed. All concur.

(116 N. W. 340.)

STATE OF NORTH DAKOTA, EX REL T. F. MCCUE, ATTORNEY GENERAL, V. GREAT NORTHERN RAILWAY COMPANY.

Opinion filed April 22, 1908.

Constitutional Law — Due Process of Law — Regulation of Carriers — Establishment of Passenger Rates.

1. The provision of chapter 199, page 327, Laws of 1907, requiring railway corporations to sell 1,000 mile tickets to purchasers, to be used by themselves, their wives and children, at a rate lower than the maximum rate under which others may purchase such tickets, is a violation of the federal constitution, which entitles the railroad company to due process of law and the equal protection of the laws.

Supreme Court of United States — Its Decisions Conclusive on Federal Question.

2. A decision of the Supreme Court of the United States, holding a law similar to this provision of chapter 199, page 327, laws of 1907, unconstitutional under the federal constitution, is conclusive upon this court and all state courts in determining the validity of said provision.

Application by the state, on the relation of T. F. McCue, Attorney General, for writ of mandamus against the Great Northern Railway Company.

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Writ denied.

T. F. McCue, Attorney General, in pro. per.
W. R. Begg and Murphy & Duggan, for defendant.

Morgan, C. J. This is an application for a peremptory writ of mandamus. On the 7th day of August, 1907, the Attorney General presented his application for said writ, and in his petition alleged the following facts: That the defendant corporation is a common carrier, and as such corporation operates and owns a main line of railway across the entire state, and also numerous branch lines extending from said main line to various places within the state, and is engaged in the transportation of freight and passengers within said state. That chapter 199, p. 327, of the Laws of 1907, provides that every common carrier within the state shall issue, upon request of any person, mileage books in denomination of 1,000 miles, and that the said defendant, upon demand for the issue of mileage tickets pursuant to said law, has refused to issue the same, and has refused to comply with the terms of said law. An order was issued against said defendant, citing it to appear in the city of Grand Forks on the 16th day of September, 1907, and show cause why the Attorney General should not have leave to file his petition, and why a writ should not issue against said defendant, compelling it to comply with said law.

On September 20th the defendant appeared, and for a return to said order to show cause, and as reasons why a writ of mandamus should not be issued as prayed for by the relator, filed a return, which, after certain admissions, set forth the following facts as reasons why the said writ should not issue: "That the said law requiring the issuance and sale of mileage books at the rate of 2 cents per mile amounts to an unjust and unlawful discrimination in favor of those persons who shall be able or desire to buy transportation at wholesale or in the form of such mileage books, and against those who are unable or do not desire to buy transportation at wholesale nor in the form of such mileage books, and amounts to an unjust discrimination in favor of persons the members of whose families are adults, and against those persons the members of whose families are minors, all in violation of the constitution of the state of North Dakota and the constitution of the United States, and par-of North Dakota and the constitution of the United States and particularly article 14 of the amendments of the constitution of the United

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States, in that said provision requiring the issue and sale of mileage books as hereinbefore set forth will deprive defendant of its property without due process of law, and will deny to those persons who are unable or unwilling to purchase transportation at wholesale or in the form of mileage books aforesaid, and to those persons the members of whose families are not adults, the equal protection of the laws." There are other allegations in the return which it is not necessary to set forth, in view of the fact that the decision of the case is based upon the allegations just set forth.

After the filing of the application and the return, an oral argument was presented to the court at Grand Forks, and leave was granted to the respective parties to file additional authorities and arguments. No further authorities were submitted, and the case was finally submitted for decision by a stipulation of the parties on the 15th day of April, 1908. The statute on which the application for the writ is applied for is chapter 199, page 327, of the Laws of 1907, and is entitled as follows: "An act providing for a maximum rate of fare to be charged and collected by railroads, railroad corporations, and common carriers for the transportation of passengers and baggage and providing a penalty for the violation thereof." After providing that the compensation for carrying passengers shall not exceed 2½ cents per mile, that law has an additional provision, which is as follows: "Provided, that every railroad, railroad corporation and common carrier doing business in this state, shall issue, upon request of any person, mileage books in denomination of 1,000 miles, limited to not less than one year from the date of issue and redeemable within one year after the expiration of such limitation, with baggage and other facilities similar to those accompanying regular trip tickets, at a price of $20.00 each; that such mileage books shall be good for travel by the purchaser and such adult members of his family as he may designate, and whose names are then and there written thereon, but the fare shall always be that multiple of five nearest reached by multiplying the rate by the distance."

The defendant makes no point against the constitutionality of the law as a whole, but expressly alleges that it is complying with the provisions of this law, except as to the mileage book provision. As to this provision it claims that it is unconstitutional, as violating the fourteenth amendment to the federal constitution, as well as the provision of the state constitution which provides that prop-

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erty shall not be taken without due process of law, and, further, that the act discriminates in favor of certain persons and is not general in its application, and that the law thereby deprives certain persons of the equal protection of the laws guaranteed by the constitution, the return therefore presents a question of the construction of the provision of this law in view of the fourteenth amendment of the Constitution of the United States. This is purely a federal question, which has been expressly passed upon by the supreme court of the United States in a case similar in every respect to this case. In that case the constitutionality of a mileage book enactment of the legislature of the state of Michigan was under consideration. That enactment provided that railroad companies must keep for sale 1,000-mile tickets, and when required by purchasers they should be issued in the name of the purchaser, his wife, and children, designating the name of each on each ticket, and that these tickets should be valid for two years after date of purchase. The supreme court of Michigan held this law a valid enactment, and on appeal to the supreme court of the United States the law was declared unconstitutional.

In speaking for the court, Peckman, J., said in his opinion: "The legislature having fixed a maximum rate, and what must be presumed, prima facie, to be also a reasonable rate, we think the company, then, has a right to insist that all persons shall be compelled to pay alike; that no discrimination against or in favor of certain classes of married men, or families, excursionists, or others, shall be made by the legislature. If otherwise, then the company is compelled, at the caprice or whim of the legislature, to make such exceptions as it may think proper, and to carry the excepted persons at less than the usual and legal rates, and thus would part in their favor with its property without that compensation to which it is entitled from all others, and therefore would part with its property without due process of law. The affairs of the company are in this way taken out of its own management, not by any general law applicable to all, but by discrimination made by law to which the company is made subject. Whether an act of this nature shall be passed or not is not a matter of policy to be decided by the legislature. It is a matter of the right of the company to carry on and manage its concerns, subject to the general law applicable to all, which the legislature may enact in the legal exercise of its power to legislate in regard to persons and things within its

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jurisdiction." Lake Shore & Mich. So. Ry. Co. v. Smith, 173 U. S. 684, 19 Sup. Ct. 565, 43 L. Ed. 858. The principles of this case were again commented on in distinguishing it from the case of Wis., Minn. & Pac. R. R. Co. v. Jacobson, 179 U. S. 288, 21 Sup. Ct. 115, 45 L. Ed. 194, then under consideration, when it was said: "There we held that the statute in question was not a reasonable regulation of the business of the company; that it was the exercise of a pure, bald, and unmixed power of discrimination in favor of a few of the persons having occasion to travel on the road, permitting them to do so at a less expense than others, provided they could buy a certain number of tickets at one time. It was not legislation for the safety, health, or proper convenience of the public, but an arbitrary enactment in favor of the persons spoken of, who, in the legislative judgment, should be carried at a less expense than the other members of the community, and there was no reasonable ground upon which the legislation should be rested, unless the simple decision of the legislature should be held to constitute such reason."

This is an authoritative decision of the precise question at issue here, by the highest court of the land, and is binding upon all state courts, being a decision of a federal question. No useful purpose would be gained by a more extended statement of the grounds on which that eminent court based its decision. Since that decision it has been followed as a binding adjudication by state courts. Beardsley v. N. Y., Lake Erie & Western R. R. Co. et al., 162 N. Y. 230, 56 N. E. 488. In that case the court said: "The supreme court of the United States, in Railway Company v. Smith, 173 U. S. 684, 19 Sup. Ct. 565, 43 L. Ed. 858, has practically foreclosed all discussion on the question of the constitutionality of statutes of the character of the one before us." See, also, Commonwealth ex rel. Atty. Gen. v. Atlantic Coast Line R. Co., 106 Va. 61, 55 S. E. 572, 7 L. R. A. (N. S.) 1086, 117 Am. St. Rep. 983.

As the federal decision is controlling, it follows that the application for the writ of mandamus must be denied. All concur.

(116 N. W. 89.)

Note.—As to validity of statutes requiring issuance of mileage books at reduced rates see note to Com. ex rel Anderson v. Atlantic Coast Line R. Co. (Va.) 7 L. R. A. (N. S.) 1086.

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AMERICAN SODA FOUNTAIN COMPANY, A CORPORATION, v. GEORGE M. HOGUE.

Opinion filed April 22, 1908.

Actions — Bills and Notes — Party in Interest.

1. The holder of a promissory note, payable to another or order, and unindorsed, is the real party in interest within the meaning of section 6807, Rev. Codes 1905, and may sue thereon where the consideration for the note passed solely between the holder and the maker, and the note was given to another person solely for the benefit of the present holder.

Evidence — Conclusion of Witness.

2. Permitting a witness to answer the following question under objection, viz.: "Did you ever get a soda fountain from the American Soda Fountain Company?" was erroneous, as calling for the conclusion of the witness on a matter within the province of the court or jury.

Appeal — Review — Question Not Raised Below.

3. Whether a formal verdict in writing should be required where a verdict is directed not decided, as the question was not raised at the trial.

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

Action by the American Soda Fountain Company against George M. Hogue. Judgment for defendant and plaintiff appeals.

Reversed and remanded.

Newton & Dullam, for appellant.

One entitled to the avails of a suit is the real party in interest. Cassidy v. First National Bank, 14 N. W. 363; Pease v. Rush, 2 Minn. 107; Foster v. Berky, 8 Minn. 351; White v. Phelps, 14 Minn. 27; Hoagland v. Van Etten, 35 N. W. 869; Kinsella v. Sharp, 66 N. W. 634; Hogan v. Klabo, 13 N. D. 319, 100 N. W. 847.

That plaintiff is not party in interest must be taken by answer. Spooner v. Delaware, 21 N. E. 696; Smith v. Hall, 67 N. Y. 48.

It must also show a good defense against the real party. Price v. Dunlap, 5 Cal. 483; Gushee v. Leavitt, 5 Cal. 160; Hutchinson v. Crane, 100 Ill. 269; Farewell v. Tyler, 5 Iowa, 535; Burnett v. Costello, 87 N. W. 575.

Such defense only calls for real party to be brought in. McCane v. William, 37 Ill. App. 591; Van Buskirk v. Levy, 3 Metc. 133.

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Possession of notes is prima facie evidence of ownership. Brynjolfson v. Osthus, 12 N. W. 42, 96 N. W. 261; 3 Elliott on Evidence, section 1824; Pomeroy Code Remedies, page 154, section 128.

Conclusions of witnesses are excluded as evidence. Bradner on Evidence, page 359; 1 Elliott on Evidence, section 672; Smith v. N. P. Ry. Co., 3 N. D. 555, 58 N. W. 345; Davis v. Hamilton, 92 N. W. 512.

Mockler & Johnson, for respondent.

Complaint must state ownership of note and how, when and where acquired. Topping v. Clay, 63 N. W. 1038; Mechanics' Bank v. Donnell, 35 Mo. 373; Montague v. Reineger, 11 Iowa, 503; Eikenbary v. Clifford, 52 N. W. 377; Parke v. Kleeber, 37 Pa. St. 257; Andrew v. Bond, 16 Barb. 633; Gallup v. Lichter, 35 Pac. 985; Altman v. Fowler, 37 N. W. 708; 4 Cyc. 104.

Assignment of contract must be alleged and proven. Cilley v. Patten, 25 N. W. 326; Haveron v. Anderson, 58 N. W. 340.

MORGAN, C. J. This is an action in claim and delivery under which the possession of a soda fountain and attachments is claimed. The plaintiff claims in its complaint to be the owner thereof. The fountain and fixtures were sold to the defendant by one Putnam, who was the agent of the plaintiff. The written contract or order for the property was in the name of one Tufts, and each of the 33 notes was given to said Tufts as payee, and the name of the plaintiff is not given or mentioned in any of the papers as originally executed. The defendant gave said Tufts 33 promissory notes on the sale, and they and the contract provided that the title to all the property should remain in Tufts until full payment of the purchase price, and these notes and the contract gave him the right to take possession of the property on default in the payment of any of the notes. The answer was a general denial. A jury was impaneled, and at the close of plaintiff's testimony the court directed a verdict for the defendant. A motion for a new trial was made, based on a notice of intention to move for a new trial and a settled statement of the case, and denied. From the order denying a new trial, the plaintiff has appealed.

The error principally relied on for a reversal of the order is the direction of a verdict for the defendant. The ground urged before

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the trial court on the motion for a directed verdict was that the action was not prosecuted in the name of the real party in interest. It was, and now is, the contention of the defendant that Tufts, to whom the order and notes are given according to their terms, is the real party in interest, and the only party entitled to bring the action until properly assigned or the contract reformed. The complaint alleges unqualifiedly that the plaintiff is the owner of the property. The evidence shows that the contract with the defendant was entered into by one Putnam as agent for the plaintiff; that the plaintiff is now the owner of the notes, and entitled to the possession of the soda fountain and fixtures; that the contract and notes were made with the name of said Tufts as payee with the consent of Tufts, and for plaintiff's benefit and use; that the plaintiff was authorized by Tufts to do business in his name, and that the property involved in this suit was sold as plaintiff's property, but in Tuft's name, as plaintiff was authorized to do; that the original order was taken for the plaintiff, and mailed to it at its principal office, and there accepted by it; that said Tufts formerly was in business in his own name, and became one of the incorporators of the plaintiff company when it was organized; and that the plaintiff succeeded to his business when it was incorporated. This evidence clearly shows that the plaintiff was the owner of the notes, and had been such owner ever since their execution and delivery. It also shows that the contract was made exclusively for its benefit, and that it is entitled to the property under the conditions expressed in the same. The statute provides that all actions shall be brought in the name of the real parties in interest, except as therein provided. Section 6807, Revised Codes 1905. The plaintiff was clearly entitled to bring this action under said section. It was the owner of the notes and contract which are the basis of defendant's forfeiture of the right to the possession of the property if payment is not made when due. Under this evidence, the plaintiff was unqualifiedly the real and only party in interest. The mere fact that the notes were made to Tufts imports nothing under this evidence, as the actual owner may bring an action thereon. They were brought into court by the plaintiff, and have always been rightfully in its possession. The contract was made for the plaintiff's sole benefit, and it was the owner of the notes, and was as much entitled to the benefit of the contract as though expressly drawn and written in its name. The object of the statute is to give the

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beneficial owners the right to sue in their own right without regard to the technical title as shown by the contract. The case relied upon by respondent—Montague v. Reineger, 11 Iowa, 503—is not in point, as the complaint in that case did not show ownership or title in the plaintiff; the question having been raised on demurrer. In this case the evidence fully explains why notes were drawn to another, and, if this evidence had been objected to, it would have been admissible as showing plaintiff's right to sue thereon. We have examined the other cases cited by the respondent, but they do not controvert the principle that a person may maintain an action for possession of personal property owned by him, although the notes on which the recovery is based show the legal title to be held by another, where the ownership is shown to be in the plaintiff as a matter of fact. In Pomeroy's Remedies and Remedial Rights, section 128, the general principle is stated as follows: "On the one side it has been urged that the language of the section in all the state codes is most general and comprehensive, containing no exceptions in terms or by implication, and that it is in the highest degree imperative that the action must be prosecuted in the name of the real party in interest, except in the single case of a trustee of an express trust, and that the real party in interest is the person for whose immediate benefit the action is prosecuted, who controls the recovery, and not the person in whom the mere naked apparent legal title is vested." See, also, Pomeroy on Code Remedies, section 140; 15 En. Pl. & Pr. p. 710, and cases cited; Stewart v. Price, 64 Kan. 191, 67 Pac. 553, 64 L. R. A. 581, and note; Bliss on Code Pleading (3d Ed.) section 45; Cassidy v. First Nat. Bank, 30 Minn. 86, 14 N. W. 363; Kinsella v. Sharp, 47 Neb. 664, 66 N. W. 634.

It is unnecessary to pass upon the question argued by the appellant that the objection cannot be raised on a motion for a directed verdict, but should have been raised by special demurrer by answer. This question was objected to as calling for a conclusion of the witness: "Did you ever get a soda fountain from the American Soda Fountain Company?" The objection was overruled. We think the objection should have been sustained. The answer called for the witness' conclusion as to whether the agent Putnam was plaintiff's agent or Tuft's agent, which is a question of law if the facts are undisputed, and a question for the jury under proper instructions if the facts are in dispute. The fact that Tufts

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has never made any demand for the property was shown under objection. That fact was utterly immaterial under the issues in the case. Whether its admission would constitute prejudicial error we need not determine, in view of the fact that a new trial becomes necessary on another ground.

It is claimed that no verdict was rendered by the jury, and that that omission is ground for a new trial. The trial court granted the motion to direct a verdict and to dismiss the action, but the record is silent as to whether a verdict was called for or returned by the jury. The record does not affirmatively show that no verdict was returned, and no objection was made at the time based on the fact that the jury should be required to return a formal verdict at the direction of the court. The omission was first called to the court's attention on a motion for a new trial. We think the objection comes too late. Conceding, without deciding, that the statutory requirement that verdict shall be returned in writing is mandatory, no possible prejudice could result to the plaintiff by the omission, and we are not inclined to consider an objection so technical until it is properly raised. No cases are cited by the appellant, but it has been decided that the better practice is to have formal verdicts in writing returned in such cases, but that the omission is not fatal to the proceedings, nor prejudicially erroneous. Moore et al. v. Petty et al., 135 Fed. 668, 68 C. C. A. 306; Cahill v. Ry. Co., 74 Fed. 285, 20 C. C. A. 184.

For the error in directing a verdict for the defendant, the order is reversed, a new trial granted, and the cause remanded for further proceedings. All concur.

(116 N. W. 339.)

Note.—As to who is real party in interest within meaning of statutes defining parties by whom action must be brought, see note to Stewart v. Price, (Kan.) 64 L. R. A. 581.

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MARY KEPHART v. CONTINENTAL CASUALTY COMPANY, A CORPORATION.

Opinion filed April 23, 1908.

Insurance — Accident Policy — Contract of Another State — Pleading — Proof.

1. In an action upon an accident insurance policy, which contains a stipulation that satisfactory proof of claim must be furnished the company by the claimant within thirty days after the date of the injury, and also the further stipulation that no suit shall be brought under said policy unless brought within nine months from the date of the accidental injury, defendant denies any liability thereunder on account of a failure to comply with such stipulations. Defendant contends that the policy of insurance is an Illinois contract, and that under the statute of Illinois the limitations aforesaid are valid. Such defense is unavailing to defendant, as there is no allegation in the answer and no proof in the record as to the existence of such a statute in said state, and, in the absence of such allegation and proof, the law of the forum controls.

Same — Proof of Loss — Time to Sue.

2. Under the law of this state (Rev. Codes 1905, sections 5978, 5371) the proof of loss under the policy was furnished and the action brought in ample time.

Same — Line of Duty — Brakeman.

3. Defendant seeks to escape liability under such policy upon the ground that the insured at the time he met with the accident was not engaged in the line of his duty as brakeman, but this contention is overruled.

Same — Contributory Negligence of Assured.

4. Defendant's contention that the insured was guilty of negligence which contributed to his injuries, and hence that the beneficiary cannot recover under such accident insurance policy, has no support in the evidence, and is therefore untenable.

Same — Presumptions and Burden of Proof — Cause of Injury.

5. The policy provides for the payment of benefits only in case of personal bodily injury, "through external, violent and purely accidental causes." It also provides that, "where the accidental injury results from unnecessary exposure to danger or to obvious risks of injury," the amount payable shall be but one-tenth of the face of the policy. The policy contains no provision exempting the company from liability for negligence of the insured contributing to his injuries, and it will be presumed in the absence of proof to the contrary that the injuries were received through accidental causes.

Trial — Questions for Jury.

6. At the conclusion of plaintiff's testimony defendant moved for a directed verdict in its favor, which motion was denied. Thereafter

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plaintiff moved for a directed verdict in her favor, which motion was granted. No request was made by defendant's counsel to submit any question of fact to the jury; hence defendant waived its right, if such right existed, to have submitted to the jury the question as to whether the injury was accidental, or whether it resulted from unnecessary exposure to danger or to obvious risks of injury within the meaning of the terms of the policy.

Appeal — Assignment of Error — Exceptions — Directing Verdict.

7. An assignment of error based upon the rulings of the trial court in directing a verdict, where no exception to such ruling was taken, cannot be considered.

Insurance — Deduction of Premium — Matters Not Presented Below.

8. It is contended that a certain portion of the unpaid premium on said policy should have been deducted from plaintiff's recovery. *Held*, that such contention is without merit., as there is no foundation in the pleadings for any such allowance or deduction, and no such question was presented to or passed upon by the trial court.

Same.

9. So-called specifications of error not embraced in the settled statement of the case will not be noticed, and an assignment of error based thereon cannot be considered.

Appeal from District Court, Wells County; *Burke*, J.

Action by Mary Kephart against the Continental Casualty Company. From a judgment for plaintiff and an order denying a new trial, defendant appeals.

Affirmed.

George K. Shaw, for appellant.

In the absence of a statute a policy may limit the time for suit thereon. Kiisel v. Mutual Reserve Life Ins. Co., 107 N. W. 1027; 28 Cent. Digest, see Insurance 1545.

Contract is completed at the place and when the proposals of one party are accepted by the other. 1 May on Ins. (4th Ed.) section 43, 66; Marden v. Hotel Owners Ins. Co., 52 N. W. 509.

Where a policy is not binding until countersigned, it takes effect where countersigned. Pomery v. Manhattan Life Ins. Co., 40 Ill. 398; Hyde v. Goodnow, 3 N. Y. 266; Lamb v. Bowser, 7 Bissel, 315; Tuttle v. Iowa Ins. Co., 104 N. W. 1131; Stephens v. Capitol Insurance Co., 54 N. W. 139; Commonwealth Fire Ins. Co. v. Knabe & Co., 50 N. E. 516.

J. J. Youngblood, for respondent.

Unless the laws of a foreign jurisdiction are alleged and proved, the law of the forum prevails. National German American Bank

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v. Lang, 2 N. D. 66, 49 N. W. 414; Sandmeyer v. Dakota Fire & Marine Ins. Co., 50 N. W. 353; Morris v. Hubbard, 72 N. W. 894.

FISK, J. This is an action upon an accident insurance policy issued by the defendant to one Earl C. Kephart; the plaintiff, Mary Kephart, being his mother and the benficiary named in such policy. The face of the policy is $1,000, but it contains a stipulation that in case of accidental injury or loss resulting from unnecessary exposure of the insured to danger or to obvious risk of injury the amount payable shall be only one-tenth of the face of the policy, or, in this case, $100. The policy also contains a provision that satisfactory proof of claim must be furnished the company at its office at Chicago, Ill., by the claimant within 30 days after the date of the death of the assured. It also provides that no suit shall be brought against the company under said policy unless brought within 9 months from the date of the accidental injury. The insured was injured on August 14, 1903, and died the following day, and this action was commenced June 2, 1905. At the close of the testimony the trial court directed a verdict in plaintiff's favor for the full amount prayed for in the complaint, and judgment was entered accordingly. Thereafter a motion for new trial was made and denied, and this appeal is from such order and from the judgment.

Appellant assigns error as follows: (1) The court erred in overruling the defendant's motion made at the close of the plaintiff's case to direct the jury to find a verdict in its favor and against the plaintiff; (2) the court erred in overruling the defendant's motion made at the close of all the testimony to direct a verdict in favor of the defendant; (3) the court erred in directing a verdict for the plaintiff; (4) the evidence is insufficient to justify the verdict; and (5) the court erred in overruling the defendant's motion for a new trial.

Regarding the first assignment of error it is appellant's contention that no recovery can be had under said policy because proof of claim was not made to the company within 30 days from the date of the accident, and also because suit was not commenced within nine months after the death of the insured. It is in effect conceded that, if the statute of this state (sections 5978, 5371, Revised Codes 1905) has any application, such contention is not sound; but it is argued that the policy was delivered in the state of Illinois,

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and hence is governed by the laws of that state. Conceding that the policy is an Illinois contract does not aid appellant, as it wholly failed to allege or prove the law of that state. This was necessary Bank v. Lang, 2 N. D. 66, 49 N. W. 414; Sandmeyer v. Insurance Co., 2 S. D. 346, 50 N. W. 353; Morris v. Hubbard, 10 S. D. 259, 72 N. W. 694. In Bank v. Lang it was said: "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." Such, in effect, are the holdings in the other cases above cited; and we do not understand that appellant's counsel challenges the correctness of these decisions, but, on the contrary, expressly recognizes their binding force. In the face of this admission we are at a loss to know how appellant's counsel hopes to maintain his contention. There is no attempt in the answer to allege the existence in Illinois of a statute different from that in this state. Furthermore, the proof thereof is wholly insufficient. At the conclusion of plaitiff's testimony appellant's counsel moved for a directed verdict, and at the same time called to the court's attention the case of Insurance Co. v. Whitehill, 25 Ill. 388, which decided that a limitation clause in a policy requiring suit to be brought upon the same within one year after the loss or damage occurs was valid. This decision was made in 1861, and it is contended that this was sufficient proof of the statute law of Illinois in 1903 at the time the policy in suit was issued. The trial judge was not asked to take judicial notice of the laws of Illinois as disclosed by this decision; but, even if he had been expressly so requested, we should be required to hold such proof wholly insufficient. Nearly 42 years elapsed between the decision in that case and the issuance of the policy in suit. Furthermore there was no foundation laid for such proof by any allegation in the answer, and, as before stated, this was essential. We conclude, therefore, that the rights of the parties are governed by the laws of this state, and that under such laws the proof of claim was presented and the action commenced in ample time.

It is next urged as a ground why defendant's motion for a directed verdict should have been granted that the evidence discloses that the insured was not injured in the line of his duty. The proof shows that he was employed as a brakeman on a freight train known as "Extra East." It also appears that his train was backed

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in on a side track at Balfour to permit train No. 108, which was due there soon, to pass, and that it was his duty to close the switch after his train had backed upon the side track. The witness Gable, who was engineer on the train upon which the deceased was employed, testified that it was young Kephart's duty to remain on the engine when not at work; but it cannot be said, nor was it seriously contended, that he disobeyed any instructions or rules in remaining at the switch until the arrival of such other train, a period of 30 or 40 minutes, and we think it clear from the evidence that he met with the injury which resulted in his death while engaged in the line of his duties as such brakeman. The true cause of the injury is not disclosed; but it does quite clearly appear that train No. 108 passed over both of the feet and ankles of the deceased, necessitating amputation thereof, from which injuries he died.

It is urged that he was guilty of negligence which contributed to his injuries, and hence the beneficiaries cannot recover. It is said, in effect, that this young man was chargeable with the same degree of care as if this action was against the railway company to recover for the injuries. If this be sound, there would be little or no incentive or object in purchasing accident insurance by a railway employe. An examination of the policy convinces us of the fallacy of such contention. It provides for payment of benefits in case of personal bodily injury "through external, violent, and purely accidental causes." It also provides that, "where the accidental injury results from unnecessary exposure to danger, or to obvious risks of injury, * * *" the amount payable shall be but one-tenth of the amount which would otherwise be payable under the terms of the policy. The policy contains no provision exempting the company from all liability in case of the negligence of the insured contributing to his injuries. In the absence of proof to the contrary, and there is none in the record, we must presume that the injuries were received through accidental causes. See Stevens v. Continental Casualty Company, 12 N. D. 463, 97 N. W. 862, and cases cited; Cameron v. G. N. Ry. Co., 8 N. D. 124, 77 N. W. 1016.

This brings us to appellant's contention that no recovery can be sustained in excess of one-tenth of the face of the policy, or $100. This contention is predicated upon the theory that under the facts in the case it conclusively appears that the injury resulted from the necessary exposure of the insured to danger or to obvious risk of injury, and hence that within the terms of the policy the recovery

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cannot exceed said sum of $100. This contention cannot be upheld. The most that could have been claimed was that there was sufficient evidence to require the submission of the question to the jury as to whether the injury resulted from such "unnecessary exposure of the insured to danger or to obvious risk of injury." No request was made by defendant's counsel to this effect; but at the close of the testimony such counsel moved for a directed verdict, which motion was overruled, and thereafter plaintiff's counsel moved for a directed verdict in plaintiff's favor, which was granted, no exception being taken to the latter ruling. This ruling is assigned as error, but the assignment cannot be noticed for the above reason.

The argument advanced in support of the fourth assignment of error relates to the same questions heretofore disposed of, with the exception of the latter portion thereof, and need not be further noticed. In the latter portion of such argument it is claimed that the verdict is excessive because the evidence presumptively shows that certain portions of the premium installments have not been paid, and that they should therefore be deducted from plaintiff's recovery. It is idle to talk about this, for the obvious reason that there is no foundation in the pleadings for any such allowance or deduction, and furthermore no such question was presented to or passed upon by the trial court.

The fifth and last assignment of error challenges the correctness of the trial court's ruling in denying the defendant's motion for a new trial. This assignment, as stated therein, is based "upon all the grounds stated in the specifications of error" as set forth in the printed abstract at page 64. No argument is advanced in support of such assignment, but we are referred in a general way to all the preceding discussion contained in the brief. The alleged specifications to which we are referred are no part of the settled case as contained in the abstract, and are in no manner authenticated; hence we have no method of determining whether these alleged errors were urged or relied upon in the court below as grounds for a new trial, and hence they cannot be noticed.

Having disposed of each assignment of error adversely to appellant's contention, it follows that the judgment and order appealed from must be affirmed, and it is so ordered.

Fisk, J. concurs.

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SPALDING, J. (concurring specially.) I concur in the result, but express no opinion as to the necessity of alleging and proving the law of Illinois. In view of the conclusion that the law of this state governs, I see no necessity for passing on the effect of failure to allege or prove the law of that state.

(116 N. W. 349.)

PLANO MANUFACTURING COMPANY v. S. J. DOYLE.

Opinion filed April 30, 1908.

Principal and Agent — Payment — Assumption of Debt by Creditor's Agent.

1. The assumption by an agent of a debt due from a third party to the agent's principal, without authority from, or ratification by the latter, does not constitute payment.

Judgment — Power of Court to Correct — Pending Action.

2. While an action in which a jury trial was waived is still pending in the district court, that court has jurisdiction and power to correct its own errors, and may in the exercise of its discretion on notice and motion vacate its findings and judgment, and make new findings, and enter a new and different judgment.

Appeal from District Court, Foster County; *Burke*, J.

Action by the Plano Manufacturing Company against S. J. Doyle. Judgment for plaintiff. Defendant appeals.

Affirmed.

T. F. McCue, for appellant.

Where a general agent, with authority to collect for his principal, pays money to himself for the latter's debts, the debtor's obligation is extinguished. Gray v. Herman, 6 L. R. A. 691; 40 Am. Rep. 66; Stebbins v. Lardner, 48 N. W. 847.

Payment may be made by one other than the debtor, but in his behalf. 22 Am. & Eng. Enc. Law, 235.

Turner & Wright, for respondent.

Payment may be made in other than money, if parties so agree, Scott v. Gilkey, 49 Ill. App. 116; Cleveland v. Rothschild, 94 N. W. 184; Lokken v. Miller, 9 N. D. 512, 84 N. W. 368.

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But an agent can accept only money for his principal's debt, unless otherwise instructed. Scott v. Gilkey, 39 N. E. 265; Gray v. Herman, 44 N. W. 248, 6 L. R. A. 691.

Courts of general jurisdiction can vacate, amend or modify their judgments during the term at which rendered. 17 Am. & Eng. Enc. Law, 813; 23 Cyc. 860; 1 Black on Judgments, section 305; Coughron v. Gutcheus, 18 Ill. 390; Layman v. Graybill, 14 Ind. 166; Taylor v. Lusk, 9 Iowa, 444; Wolmerstadt v. Jacobs, 16 N. W. 217; State v. Sowders, 42 Kan. 312; Comm. v. Weymouth, 2 Allen 144; Taylor v. Gribble, 33 S. W. 765.

And as long as the case is pending. Martinson v. Marzolf, 14 N. D. 301, 103 N. W. 937; Dedrick v. Charrier, 15 N. D. 515, 108 N. W. 38.

SPALDING, J. Action for a balance due plaintiff from defendant on account. Defense, full payment alleged to have been made to one Otis as general agent of the plaintiff. Two questions are raised in this case. The first depends upon the facts, which are as follows: The defendant was indebted to the plaintiff. One Otis was the general agent of the plaintiff with authority to make collections. He personally purchased of the defendant his interest in a tract of Manitoba land for a sum sufficient to pay the debt of the defendant to plaintiff. It is not contended that he took the land for the plaintiff, but it is conceded that it was a personal purchase on his part, and that the defendant knew this. Otis gave the defendant a receipt in full for the plaintiff's claim as agent, and agreed to protect the defendant against any further demands on the part of the plaintiff for payment of the debt. No cash or equivalent changed hands or was produced. Otis testified that he kept in his bank account sufficient money to pay the claim to the plaintiff, but that he had a contingent claim against it which he intended to offset against this account, and therefore did not remit his own money to plaintiff in payment of defendant's debt, and that he bought the land for himself, and not for the company, and did not expect or intend to turn the land over to the company. It is contended that Otis received the money from himself individually to himself as general agent of the respondent, and that this had the same force and effect as though the respondent had received the same. No claim is made that the respondent ever ratified the transaction or accepted Otis individually in place of the appellant as

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its debtor. A jury was waived on the trial, and error is assigned in ordering and rendering judgment in favor of the respondent and against appellant. No authorities are cited by the appellant which appear directly in point.

Otis testified that he showed the money to the appellant at the time the transaction occurred, but that he did not pay it to him and then he pay it back; that appellant never paid him any part of the money, but subsequently on cross-examination stated that he did not know whether he showed Mr. Doyle the money or not. The only question on this point is whether the facts sustain the appellant's plea of payment. It appears to us to be elementary that this transaction did not constitute payment of respondent's claim against appellant. The deal was never ratified. It is not shown that Otis had any authority to substitute his obligation in place of that of a third party to the respondent, and respondent repudiated the transaction and has continued to do so. It was a mere agreement on the part of the agent to assume and pay the debt of the appellant. See Scott v. Gilkey, 153 Ill. 168, 39 N. E. 265; Lokken v. Miller, 9 N. D. 512, 84 N. W. 368; Bostick v. Hardy, 30 Ga. 836; Lochenmeyer et al. v. Fogarty et al., 112 Ill. 572.

Error is also assigned because the trial court vacated its first findings and judgment on motion, which were in favor of the appellant, and made new findings and entered a new judgment in favor of respondent. This is not the usual practice, but that courts have the power to correct their own errors before they lose jurisdiction of a case is well established, and we cannot say that the court abused its discretion in its action in this case. Under the provisions of the code, the action was still pending. The court, therefore, had full power and authority over the judgment. Martinson v. Marzolf, 14 N. D. 301, 103 N. W. 937; Dedrick v. Charrier, 15 N. D. 515, 108 N. W. 38; Clopton v. Clopton, 10 N. D. 569, 88 N. W. 562, 88 Am. St. Rep. 749, and cases cited; Sim et al. v. Rosholt, 16 N. D. 77, 112 N. W. 50, 11 L. R. A. (N. S.) 372; 23 Cyc. 860; 17 Am. & Eng. Enc. Law, 813.

No error affirmatively appearing, the judgment of the district court is affirmed. All concur.

(116 N. W. 529.)

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HENRY ERICKSON v. J. B. ELLIOTT.

Opinion filed June 19, 1908.

Justice of the Peace — Amendment of Answer After Appeal.

1. An amendment of an answer in district court filed on an appeal from a default judgment in justice's court is permissible, except as to matters wholly beyond the jurisdiction of the justice of the peace to determine.

Same — Amendment to Plead Bankruptcy.

2. An answer is amendable, subject to the discretion of the court, alleging a release of the debt sued on by virtue of bankruptcy proceedings begun after the action was commenced.

Same — Reply.

3. It is not necessary to reply to an answer alleging a release of the debt sued on by virtue of bankruptcy proceedings after the action was commenced, as an affirmative defense only is stated, and not a counterclaim.

Judgment on Pleadings.

4. It is error to grant a motion for judgment on the pleadings, where the answer states matters of affirmative defense, as proof of the affirmative defense must be made before the allegations of the answer can have any effect, except to settle the issues.

Appeal from District Court, McHenry County; *Goss*, J.

Action by Henry Erickson against J. B. Elliott. Judgment for plaintiff was reversed in the district court, and he appeals.

Reversed and remanded.

Christianson & Weber, for appellant.

On appeal from justice court, issue is same as below. O'Maley v. Garriott, 49 S. W. 108; Clements v. Carpenter, 78 S. W. 369; Cedar Hill Orchard & Nursery Co. v. Henney, 80 S. W. 278; Lamping v. Keenan, 12 Pac. 434; Union Pac. Ry. Co. v. Sternberg, 21 Pac. 1021; Currie v. Southern Pac. Ry. Co. 28 Pac. 884; Hollen v. Davis, 13 N. W. 413; Carlson v. Stocking, 65 N. W. 58; Frohlich v. Graulich, 71 N. W. 477.

Plea of bankruptcy not entertained after appeal from judgment below. Cornell v. Dakin, 38 N. Y. 253; Ward v. Tunstall, 2 Baxt. 319; Riggs v. White, 4 Heisk. 503; Dormire v. Cogly, 8 Black. 177.

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D. J. O'Connell and *Chas. D. Donnelly,* for respondent.

Under the codes supplemental complaint, answer or reply setting up facts occurring since last pleading, is allowed. Revised Codes 1905, section 6887; Current Law, Vol. 6, 1046; Vol. 4, 1030; Allen v. City of Davenport, 87 N. W. 743; Swedish-American Bank v. Dickinson Co., 6 N. D. 222, 69 N. W. 455; Schouweiler v. Hough, 63 N. W. 776; Kirby v. Muench, 62 N. W. 93.

MORGAN, C. J. This action was commenced in justice court on the 21st day of January, 1905. The complaint alleged a cause of action on an indebtedness represented by a check drawn by the defendant in favor of the plaintiff upon the Towner Merchants' Bank for the sum of $150. On presentation of the check at the bank, payment was refused, and this action was commenced. The defendant did not appear in justice court on the return day fixed by the summons, and judgment by default was entered against him for the full amount claimed. The defendant in due time appealed from the default judgment entered in justice court and filed an answer containing a general denial and a counterclaim for damages growing out of the alleged failure of the plaintiff to furnish extras and certain attachments to the machine sold by him to the defendant, and out of which purchase the indebtedness represented by the check is alleged to have accrued. The appeal was regularly on the trial calendar at a jury term held at Towner in March, 1905. At that term the case was continued over the term on application of the defendant, without any showing made in favor of such continuance, and was continued over the objection of the plaintiff. On March 29, 1906, the defendant made an application, unsupported by affidavits or any showing, for leave to file a supplemental answer setting up defendant's discharge from all his indebtedness, including the debt set forth in the plaintiff's complaint, by an order made in the district court of the United States under the bankruptcy laws. The order of discharge was dated on August 21, 1905. The trial court granted the defendant leave to file said supplemental answer, over plaintiff's objection. On November 19, 1906, plaintiff moved to strike the supplemental answer from the files, and this motion was denied on December 14, 1906. On the last-named day the defendant moved for judgment of dismissal of the action on the pleadings, and the motion was granted, over plaintiff's objection, and judgment of dismissal of

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the action was thereafter entered. From this judgment of dismissal, the plaintiff has appealed to this court.

The errors complained of and specified on the appeal are: (1) In granting leave to file the supplemental answer; and (2) in granting the motion for judgment on the pleadings. Two grounds are urged against the correctness of the order granting leave to file the supplemental answer, and they are as follows: (1) That the district court had no authority or power to permit the trial of any issues on the appeal which were not embodied in the pleadings filed in justice court when the appeal was taken; and (2) that it was an abuse of discretion to permit the filing of such supplemental answer, for the reason that the defendant was estopped from filing such answer by his conduct in asking for a continuance while the bankruptcy proceedings were pending, and that leave to file such answer was error, for the reason that defendant had been guilty of laches in making his application to file such answer.

The appellant contends that the district court erred in permitting the defendant to file a supplemental answer, for the reason that the issues were thereby changed, which he claims is not permissible after an appeal. Section 8509, Revised Codes 1905, provides that: "The action shall be tried anew in the district court in the same manner as actions originally commenced therein." This section has been construed by this court as not a bar to an amendment of the pleading after the appeal, if the amendment does not pertain to a subject-matter that would not be within the jurisdiction of the justice court. Vidger v. Nolin, 10 N. D. 353, 87 N. W. 593.

It is also urged that it was error to permit the supplemental answer to be filed for the alleged reason that the defendant was guilty of unreasonable delay before making his application for leave to file the same, and for the further reason that the answer presented an unconscionable defense which should not be permitted to be filed as a matter of favor and without terms. It is true that the supplemental answer was filed about eight months after the discharge in bankruptcy was given. In view of the record, we cannot say that this was an abuse of discretion. The district court was in a better position to determine this question, in view of what transpired before it when postponements were granted, and whether a trial court could have been had at the terms of court held during the time between the commencement of

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bankruptcy proceedings and the filing of the supplemental answer. There is no merit in the contention that a release in bankruptcy presents an unconscionable defense or plea that should not be permitted to be pleaded as a matter of law. There might arise cases in which the circumstances would warrant a refusal to permit an answer to be filed setting up such release, but such refusal could not be justified as a matter of law solely, but would be a matter of discretion depending upon unreasonable or prejudicial delays in asking for leave to file an answer or plea setting forth the release or other facts, whereby the plaintiff was prejudiced through defendant's fault. In our opinion there is no legal principle upon which a plea of discharge in bankruptcy can be denied as a matter of law when the discharge is obtained after the issues had been made up. 5 Cyc. 406, and cases cited.

It was error, however, to grant defendant's motion upon the pleadings on the record as made when the motion was granted. The supplemental answer alleged a discharge from the debt on which the suit was based after the commencement of the action. This answer was no evidence of the fact of such release. Before the court could rightfully give effect to the allegation of a release, the release must be established by evidence or admitted. It is contended by the respondent that the defendant did not file a reply to the supplemental answer, and that the allegations thereof were consequently admitted. No reply was necessary. The answer stated an affirmative defense which, if proven, would entitle the defendant to a dismissal of the action. If a release in bankruptcy was granted, and it covered the claim in suit, and those facts were proven, then a dismissal of the action would follow. The appellant contends that the debt was contracted in fraud, and that the release in bankruptcy did not therefore include it. If this contention be true, it shows a further reason why the order for judgment of dismissal of the action on the pleadings should not have been granted.

For the error in granting the motion for judgment on the pleadings, the judgment is reversed, a new trial granted, and the cause remanded for further proceedings. All concur.

(117 N. W. 361.)

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HENRY ERICKSON v. J. B. ELLIOTT.

Opinion filed June 19, 1908.

Appeal from District Court, McHenry county; *E. B. Goss*, J.

Action by Henry Erickson against J. B. Elliott. Judgment for plaintiff was reversed in the district court, and he appeals.

Reversed.

Christiansen & Weber, for appellant.
D. J. O'Connell and Chas. D. Donnelly, for respondent.

PER CURIAM. Following the case of Erickson v. Elliott, 17 N. D. 389, 117 N. W. 361, decided at this term, the judgment appealed from is reversed, a new trial granted, and the cause remanded for further proceedings.

M. E. SOLIAH, ET AL., v. A. G. CORMACK, C. L. GORDON AND J. F. JOHNSON. CONSTITUTING THE BOARD OF DRAIN COMMISSIONERS OF TRAILL COUNTY, NORTH DAKOTA.

Opinion filed May 28, 1908.

Constitutional Law — Delegation of Legislative Power — Drainage Act.

1. The drainage act, being sections 1818 to 1850, Rev. Codes 1905, does not conflict with section 25 of the state constitution, which vests the legislative power of the people of the state in the legislative assembly. Appellants' contention that such drainage law is an unwarranted delegation of legislative power to the board of drain commissioners is not sustained.

Same — Due Process of Law.

2. Such law does not violate the fourteenth amendment to the Constitution of the United States, nor section 13 of the constitution of this state, prohibiting the taking of property without due process of law.

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

Action by M. E. Soliah and others against A. G. Cormack and others. Judgment for defendants, and plaintiffs appeal.

Affirmed.

P. G. Swenson and Engerud, Holt & Frame, for appellants.

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The drainage act is an unwarranted delegation of legislative power. Vallely v. Park Commissioners, 16 N. D. 25, 111 N. W. 615.

Legislative power can be delegated only to officers elected by people to be affected by their legislative acts. State v. Budge, 14 N. D. 532, 105 N. W. 724; Marr v. Enloe, 1 Yerg. 452; Hope v. Deaderick, 8 Humph. 1; People v. Parks, 58 Cal. 624; 1 Cooley on Taxation, 95; Shumway v. Bennett, 29 Mich. 45; Cooley on Taxation, (3rd Ed.) 81.

The levy of special assessments is taxation. Burroughs on Taxation, 461; 3 Cooley on Taxation, 1181; Hamilton on Special Assessments, 38; Desty on Taxation, 1117, 1237, 1265, 1266; 2 Dillon on Mun. Corp. 752; Cooley on Const. Lim. 213, 216; 25 Am. & Eng. Enc. Law. 458, 468; Burroughs on Taxation, 458, 463.

Due process requires that the tribunal intrusted with legislative authority be one to which such power may be lawfully delegated. Paulson v. Portland, 149 U. S. 30; Voight v. City of Detroit, 184 U. S. 115; French v. Barber Asphalt Co. 181 U. S. 324; Walston v. Nevins, 128 U. S. 578; Eel Riv. Dr. Co. v. Topp, 16 Ind. 242; McKinney v. Bowman, 58 Ind. 88; Columbus v. Kyle, 67 Ind. 206; Bryant v. Robbins, 35 N. W. 545.

Theo. Kaldor, State's Attorney for Traill County, for respondents.

A special assessment differs from a tax. 25 Am. & Eng. Enc. Law 1174; Arnold v. Mayor, 3 L. R. A. (N. S.) 837.

Special assessments are not governed by constitutional provisions regulating taxation. Vallelly v. Park Commissioners, 16 N. D. 25, 111 N. W. 615; Elliott on Roads and Streets (2nd Ed.) Sec. 543; Gray on Limitations of Taxing Power, Sec. 1839; 25 Am. Eng. Enc. Law (2nd Ed.) 915; In re Hagne-Hendrum Ditch, 82 N. W. 1094; 14 Cyc 1024; Town of Muskego v. Drainage Comm'rs, 47 N. W. 11; Griffith v. Pence, 59 Pac. 677; Zigler v. Manges, 121 Ind. 99; 16 Am. St. Rep. 357; Gray on Limitations of Taxing Power, Sec. 249; O'Reilly v. Kankakee Drainage Co. 32 Ind. 169; Coster v. Tide Water Co. 18 N. J. E. 54; Sessions v. Crunkelton, 20 Ohio St. 349; Atty. General v. McClear, 109 N. W. 27; Wurtz v. Hoaglund, 114 U. S. 606; State v. Blake, 36 N. J. L. 442; Kinnie v. Bare, 36 N. W. 672; Arnold v. Mayor, 3 L. R. A. (N. S.) 837; 10 Am. Eng. Enc. Law. 223; Donnelly v. Decker, 17 N. W. 389; Hager v. Board of

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Supervisors, 47 Cal. 222; Cooley Const. Law, (4th Ed.) 741; Kelgour v. Drainage Comr's. 111 Ill. 342; Horbach v. City of Omaha, 74 N. W. 434.

Legislative power may be delegated to non-elective tribunals. Martin v. Tyler, 4 N. D. 378; 60 N. W. 393; Bryant v. Robbins, 35 N. W. 454; Erickson v. Cass County, 11 N. D. 494, 92 N. W. 841; State v. Fisk, 15 N. D. 219, 107 N. W. 191; Cook v. Nearing, 27 N. Y. 306, Egyptian Levee Co. v. Hardin, 27 Mo. 495; Territory v. Scott, 20 N. W. 401; Mound City v. Miller, 70 S. W. 721; Turner v. City of Detroit, 62 N. W. 405; State v. Crosby, 99 N. W. 636; Wurtz v. Hoaglund, 114 U. S. 606, 29 L. Ed. 229; In re Kingman, 12 L. R. A. 417; Hagar v. Reclamation Dist. 111 U. S. 701; Town of Muskego v. Drainage Com'rs, 47 N. W. 11.

Drainage law does not violate fourteenth amendment to the constitution, nor section 13 of the constitution of North Dakota. Erickson v. Cass Co., supra, State v. Fisk, supra; Turnquist v. Cass County, 11 N. D. 514, 92 N. W. 852.

Fisk, J. Plaintiffs, who are property owners and residents of Mayville and Morgan townships in Traill county, brought this action in the district court of said county for the purpose of perpetually enjoining the defendants as drain commissioners from taking any further proceedings towards the construction of a certain drain through such townships, and from levying any assessments upon their property for the construction thereof. The district court sustained a demurrer to the complaint and this appeal is from such order. The regularity of all the proceedings of the board of drain commissioners is expressly conceded by appellants, their sole contention being that the drainage law of this state is unconstitutional and void: First, because it is claimed to be in conflict with section 25 of the state constitution, which vests the legislative power of the people of the state in the legislative assembly; and, second, that such law violates section 13 of the state constitution and the fourteenth amendment to the federal constitution, forbidding the taking of property without due process of law.

Appellant's first and chief contention is that the drainage law is an unwarranted delegation of legislative power to the board of drain commissioners, the members of which are not elected by and answerable to the people, but are merely appointed by the board of county commissioners. Counsel for appellants have pre-

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sented a very able and plausible argument in support of their contention, basing the same, to a large extent, upon the holding of this court in the recent case of Vallelly v. Park Comr's, 16 N. D. 25, 111 N. W. 615, and the authorities therein cited. It is vigorously asserted by them that that case is absolutely decisive in their favor of the case at bar. It was there held in effect that the taxing power which is vested by the constitution of the state in the legislative assembly cannot be delegated to a person or body not elected by and responsible to the people. In other words, that the legislature in enacting the park commissioner law exceeded its constitutional powers by delegating to the park commissioners, who were to be appointed by the city council without any voice on the part of the people, the legislative power of levying general taxes upon the property within the city. It is, of course, clear that if the power to make special assessment is governed by the same principles which govern the assessment and levy of general taxes, the logic of appellant's argument is unanswerable, but if the contrary is true, their argument is entitled to no weight. The questions presented are of the gravest importance to the people of the state, and, after giving to them the consideration which their importance demands, we are entirely convinced that the act is not vulnerable to the attacks made upon it by appellants' counsel in this case.

We think appellants' counsel are clearly in error in their construction of the Vallelly opinion as well as the opinion in the cases cited therein. None of these cases deal with the question of the constitutional power of the legislature to delegate to an appointive body the right to make special assessments for local improvements, but they merely hold that the power to levy general taxes is a legislative power, and that the same cannot be conferred upon such a nonrepresentative body. The evident fallacy in appellants' entire argument in support of their first contention, as it appears to us, lies in their unwarranted assumption that, because the power to levy special assessments for local improvements according to benefits is derived from the taxing power, it necessarily follows that the power to make such special assessments cannot be delegated to other than representative bodies. While it must, we think, be conceded that under the great weight of authority the levying of special assessments is the exercise of the taxing power—(Hamilton on the Law of Special Assessments, chapters 48-50, and cases cited)—still it is equally well settled and will not be denied that

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the right to order local improvements is derived from the police power, and that the levying of special assessments is a mere incident to the making of such local improvements. Although referable to the taxing power, local assessments are not, strictly speaking, taxes. As said by the supreme court of Missouri in speaking of the power to levy special assessments: "The power to make such assessments has been the prolific source of much forensic discussion, and difficulty seems to have existed in tracing this power to its true source and basing it upon a sound principle, but it is settled in Missouri and generally elsewhere that it is referable to the taxing power, though such assessments are not taxes in the sense that word is usually employed." City of Independence v. Gates, 110 Mo. 374, 19 S. W. 728. In Martin v. Tyler, 4 N. D. 303, 60 N. W. 401, 25 L. R. A. 838, it is said: "We understand counsel to admit—granting the existence of the power to levy special assessments—that such assessments differ radically in their nature and purpose from ordinary taxation, and that the rule which requires uniformity in taxation has no application whatever to special assessments. This has now become so elementary that citations are unnecessary."

Is the contention of counsel for appellants sound that the power to levy such special assessments can only be delegated to elective or representative bodies? A brief review of the authorities, will, we think, completely demonstrate the utter fallacy of such contention. In Martin v. Tyler, supra, this court sustained the power of the legislature to delegate to an appointive board of drain commissioners the functions of constructing drains and levying assessments to pay for the same. After quoting from the opinion of the court in Bryant v. Robbins, 70 Wis. 258, 35 N. W. 545, in affirmance of such power, this court said: "Surely this language is applicable to this case. It will not be contended for a moment that, under their general powers, the county commissioners could engage in the work of constructing drains; that they could for that purpose exercise the power of eminent domain, assess benefits, and institute proceedings to ascertain damages. This was a special purpose, and its accomplishment required special legislative authority; which might be placed where the legislature saw proper. See, also, Sheboygan Co. v. Parker, 3 Wall. (U. S.) 93, (18 L. Ed. 33)." It is true, as counsel for appellants contend, that the precise point here urged was not raised in that case, but the court had

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the question squarely presented (but on another ground) as to the constitutional right of the legislature to vest in such appointive boards the powers conferred by the drainage act, similar to those conferred by the act in question.

In Erickson v. Cass County, 11 N. D. 494, 92 N. W. 841, this court again said: "The legislature had the undoubted power to commit to the drainage board the ascertainment of the lands to be assessed, as well as the apportionment of benefits." The constitutionality of the drainage law was also sustained in Turnquist v. Drain Commissioners, 11 N. D. 514, 92 N. W. 852. In the recent case of State v. Fisk, 15 N. D. 219, 107 N. W. 191, the court said: "The board was acting under regular appointment pursuant to statutory authority. It had sole and exclusive authority to carry out the provisions of the drainage law. (Revised Codes 1905, section 1818-1850.) * * * 'The matter to be dealt with was a mere legislative privilege granted upon any condition the legislature saw fit to impose.'" It is true the precise point now under consideration was neither raised nor discussed in these cases. The supreme court of the United States in Bauman v. Ross, 167 U. S. 548, 17 Sup. Ct. 966, 42 L. Ed. 270, held that "in the matter of assessing benefits, under the right of taxation, it is within the discretion of the legislature * * * to commit the ascertainment of the land to be assessed, as well as the apportionment of the assessment among the different parcels, to the determination of commissioners appointed as the legislature may prescribe." In People v. Drainage Commissioners, 143 Ill. 417, 32 N. E. 688, it was held that drainage commissioners may tax for drainage purposes land in another township where the owner thereof has connected his ditches with those of the district; and that in laying such taxes they act as officers of their district not of the township.

In Cooley on Constitutional Limitations (3 Ed.) p. 1237, it is said: "Where an improvement concerns a municipality, or some portion thereof, to be determined on an investigation of facts, it is most usual for the legislature to confer upon the municipal authorities full authority in the premises; to delegate to them the power to determine whether the improvement shall be made, and, if so, through what subordinate agencies, but under such restraints as are deemed important for public and individual protection, and, not uncommonly, the determination of the rule of apportionment is left to the same authorities. This is not only competent, but in

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general is deemed the proper course. In many cases, however, a special district may be requisite, and this may embrace two or more municipalities, or parts of two or more. For this or other reasons any single municipality may be incompetent to deal with the case, and it may be necessary to create a special authority for the purpose. This is particularly the case with drains, with long highways and with levees, and when needful, a commissioner or board of commissioners will perhaps be provided for. It is not doubted that the legislature has authority to do this, when not hindered by any constitutional restriction. The choice of commissioners is sometimes made by the legislature itself, sometimes referred to a court and sometimes, where the course is practicable, given to the people concerned. Other methods of choice according to circumstances are not inadmissible." And at page 1241, it is further said: "The rule that the legislative authority cannot delegate its powers is also as imperative here as elsewhere, and therefore the question what rule of appointment shall be applied, though it might be referred for decision to municipal authority, cannot be left to mere administrative or ministerial officers. But the execution of the rule and the determination of the district, when it is to depend upon facts, is commonly, not only with propriety, but of necessity, left to such officers."

In the case of Foster v. Rowe, 128 Wis. 326, 107 N. W. 635, it was held: "The power to equalize taxes is not legislative, in the sense that it cannot be delegated by the legislature to a board. On the contrary, the authority of the legislature to create such boards and authorize courts to appoint them is well established." Hamilton on Special Assessments, chapter 553, lays down the following rule: "It has been said that the assessment is a ministerial act, and may be made by the city engineer where required by statute.That the power of the legislature over the entire scheme of assessment extends to the designation of the person or persons who are to make the assessment is unquestioned. Yet if the latter be made on the principle of benefits, it is certain the person so designated acts judicially, and his acts are valid only when within the bounds of his discretion judicially exercised."

In 25 Am. & Eng. Enc. of Law, pages 1219-1220, in speaking of special or local assessments, it is said: "The amount of the assessment, should, of course, be determined, and the assessment levied by the officers, board, or tribunal specified by the statute. * * * The legislature may itself designate the officers or tri-

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bunal to determine the extent of the benefits and assess the persons benefited, or the appointment of assessors or commissioners of assessment may be delegated to the city council or to a court of justice"—citing authorities. In O'Brian & Co. v. County Commissioners, 51 Md. 15, the court held a statute constitutional which provided for a board of examiners and assessors for the purpose of laying out a certain avenue, defining its limits and making assessments for its completion. The court said: "The exercise by the legislature of this power of appointment has been held to be constitutional"—citing, Mayor, etc., v. Howard, 15 Md. 376. In Crawford v. People, 82 Ill. 557, it was held that the General Assembly of that state had the undoubted power to say who should ascertain and determine the extent of the special benefits and who should assess them. In the case of People v. Nearing, 27 N. Y. 306, the constitutionality of the drainage law of that state, which provided for the construction of drains and defraying the expenses thereof by assessing the land benefited, was involved, and the court said: "The legislature might lawfully direct the mode and manner of assessing or apportioning such damages upon the persons or property benefited thereby, and designate or appoint the persons to make such assessment or apportionment."

In addition to the foregoing authorities we call attention to the following: Egyptian Nav. Co. v. Hardin, 27 Mo. 495, 72 Am. Dec. 276; Territory v. Scott, 3 Dak. 357, 20 N. W. 401; Mound City v. Miller, 170 Mo. 240, 70 S. W. 721, 60 L. R. A. 190, 94 Am. St. Rep. 727; Turner v. City of Detroit, 104 Mich. 326, 62 N. W. 405; State v. Crosby, 92 Minn. 176, 99 N. W. 636; Wurts v. Hoaglund, 114 U. S. 606, 5 Sup. Ct. 1086, 29 L. Ed. 229; Hagar v. Reclamation District, 111 U. S. 701, 4 Sup. Ct. 663, 28 L. Ed. 569.

It is stated by appellants' counsel that most of the authorities cited and relied upon in Vallelly v. Park Board, supra, were special assessment cases. In this, counsel are also mistaken, as a brief examination of those cases will disclose. State v. Mayor of Des Moines, 103 Iowa, 76, 72 N. W. 639, 39 L. R. A. 285, 64 Am. St. Rep. 157, held an act void which authorized a library board appointed by the city council to levy a general tax against the city for library purposes. Parks v. Board of Commissioners (C. C.) 61 Fed. 436, had under consideration the validity of an act which attempted to confer upon road commissioners, appointed by the

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county commissioners, the power to levy a tax against all the property in the county. Harwood v. Drain Co., 51 Ill. 130, involved the validity of an act which conferred upon a private corporation the power to levy an annual tax upon a specified district for the purpose of constructing and maintaining a levee. Board of Commissioners v. Abbott, 52 Kan. 148, 34 Pac. 416, held an act void which authorized road commissioners appointed by the board of county commissioners to assess and levy by a general tax one-third of the cost of the roads against the county generally.

People v. Park Commissioners, 28 Mich. 228, 15 Am. Rep. 202, involved a statute providing for the appointment of a board of park commissioners, and empowered such board to contract general debts against the city for park purposes. Hinze v. People, 92 Ill. 406, held void an act of the legislature giving appointive police commissioners the power to levy a general tax and create a general indebtedness against the city. The recent case of Arnold v. Mayor, etc., of Knoxville, 115 Tenn. 195, 90 S. W. 469, 3 L. R. A. (N. S.) 837, contains a valuable discussion of the nature of special assessments, and the principles underlying them, together with a reference to most of the text-books and many adjudicated cases relating thereto, where the distinction between such assessments and general taxes is clearly and fully explained.

We have been unable to find any authority, and none has been called to our attention, sustaining appellants' first contention, and we conclude that there are none. All the cases, without exception, apparently recognize the constitutional right of the legislature to confer upon local boards or officers, whether elective or appointive, the functions of assessing and apportioning the benefits for local improvements.

It is contended by appellants' counsel that because the drainage board is authorized to apportion a part of the cost of a drain to a city, town, or township to be raised by general taxation therein, that this is equivalent to the vesting in such board, to this extent, of the power to levy general taxes, and hence is forbidden by the principles enunciated in the Vallelly case. We cannot yield our assent to this contention. The distinction between the principles involved in the Vallelly case and those involved in the case at bar has, we think, been sufficiently pointed out in this opinion. In the one case the delegation of legislative power to levy general taxes was involved, while in the other the power of the legislature to

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authorize local improvements to be made and to designate the board or officers who shall apportion the benefits and levy special assessments accordingly, was involved. Under the act involved in the Vallelly case it was attempted to confer upon the board of park commissioners the authority to create general indebtedness for park purposes and to levy general taxes against all property within the city to pay the same, while under the drainage law the drainage board is given authority to levy special assessments only against lands specially benefited. And where by the construction of a drain an entire city, town, or township receives a special benefit therefrom we see no valid reason why such corporation cannot be required as such to contribute its share toward the cost of such local improvements.

In Bryant v. Robbins, supra, the supreme court of Wisconsin, in speaking upon a similar question, said: "As we have said, the law plainly makes the land which is benefited by the drainage the principal source from which the means to do the work are derived; and wherever a city or town, as a corporation, is likewise benefited, there is no injustice in charging it to the extent of the benefits received." See, also, Town of Muskego v. Drainage Commissioners, 78 Wis. 40, 47 N. W. 11; In re Kingman, 153 Mass. 566, 27 N. E. 778, 12 L. R. A. 417. The authority to require such public improvements to be made is derived from the police power although the authority to levy special assessments to pay for the same comes from the taxing power.

It is next contended that the act in question violates the fourteenth amendment to the constituion of the United States and section 13 of the state constitution, prohibiting the taking of property without due process of law. This contention is based principally upon the first contention. Counsel say in their brief: "In dealing with the objection we make we are not at all concerned with how the power is exercised by those who assert the power, but with the right to exercise it at all. * * * If the drainage board could be given any legislative powers of a discretionary nature, then there could be no question that the procedure prescribing the manner of exercising it as found in this act would fully comply with the requirements of due process." What we have already said upon appellants' first contention is therefore a sufficient answer to this last contention. Furthermore, this court fully disposed of this question adversely to appellants' contention

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in the following cases: Erickson v. Cass County, State v. Fisk, and Turnquist v. Cass County, supra. In State v. Fisk it was said: "The statute imposes upon the board the duty to assess benefits. A review is provided for, and a hearing granted, where evidence may be produced. The board acts judicially in assessing benefits. The board is acting under a delegation of power from the legislature in respect to local affairs, but in the exercise of that power is exercising functions in their nature judicial. Stone v. Little Yellow Drainage District, 118 Wis. 388, 95 N. W. 405; Dodge County v. Acom et al., 72 Neb. 71, 100 N. W. 136; Erickson v. Cass County, supra. * * * In Erickson v. Cass County the drainage law was construed, and its constitutionality upheld as against the contention that it authorized the taking of property without due process of law. It was competent for the legislature to invest the drainage board with power in good faith, and after notice and an opportunity to be heard, to finally determine the benefits accruing to each tract of land in the drainage district. * * *" We see no reason to depart from the rule thus so well established in this state. See, also, Gray's Limitations on Taxing Power, section 1161.

Our conclusion is that the act in question is not vulnerable to any of the objections urged against it, and the order appealed from is accordingly affirmed. All concur.

(117 N. W. 125.)

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WILLIAM O'KEEFE, JR. v. O. M. OMLIE, DEFENDANT, AND DAVID H. BEECHER, DEFENDANT AND APPELLANT.

Opinion filed April 30, 1908.

Rehearing denied July 25, 1908.

Appeal and Error — Notice of Appeal — Service.

1. Failure to serve notice of appeal by one defendant upon his codefendant, against whom the action was dismissed by the trial court, is not ground for dismissing the appeal on motion of plaintiff, when the appellant does not rely upon the dismissal as error, and the respondent has not appealed from the order or judgment of dismissal.

Same — Statement of Case.

2. Rule 7 of the Supreme Court (10 N. D. 41, 91 N. W. 6) is intended to facilitate the work of that court, and to aid litigants in pointing out and making clear the errors relied upon, and to relieve the court of the necessity of exploring the whole record.

Same — Defective Statement.

3. In the statement of the case no attempt is made to comply with the requirements of the rule above cited by reducing the testimony to narrative form, or to eliminate those parts having no bearing upon the decision of the case, and the specifications of error do not comply with the requirements of the rule, but are scattered throughout the proceedings wherever an exception was taken. For these reasons this court will disregard everything except the judgment roll.

Same — Abstracts and Briefs.

4. Rule 19 of this court (10 N. D. 52, 91 N. W. 11), prescribing the size of the page and method of binding typewritten abstracts and briefs, should be followed.

Appeal from District Court, Walsh County; *Goss,* Special Judge.

Action by William O'Keefe, Jr., against David H. Beecher. Judgment for plaintiff, and defendant appeals.

Affirmed.

Phelps & Phelps and *John W. Ogren,* for appellant.
DePuy & DePuy, for respondent.

SPALDING, J. Defendant appeals from a judgmnet of the district court awarding plaintiff damages in the sum of $207.23, and costs. The action was brought by plaintiff against one Omlie and the appellant jointly for the recovery of damages for an alleged breach of contract. After all parties had rested, a motion

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to dismiss the action as to defendant Omlie was granted, after which a verdict was rendered, and judgment entered against the appellant.

We first meet with a motion to dismiss the appeal. We see no merit in this motion. It is based on the ground that notice of appeal was not served upon Omlie. This was a matter which rested entirely with the appellant, Beecher. If he desired to protect his rights as against Omlie, and throw the burden upon him, he should have served notice of appeal on him; but the respondent cannot complain that he did not do so without himself appealing. Although he objected and excepted to the order, he has taken no appeal.

Rule 7 of the Supreme Court (10 N. D. 41, 91 N. W. 6), relating to the contents of the statement of the case, provides that: "If the evidence, or any part thereof, is embraced in the statement, it must be epitomized by excluding all superfluous matter and verbiage. The evidence shall be reduced to a narrative form except in those particulars in which a transcript of part of the stenographer's minutes becomes necessary to preserve the sense, or present the particular points of error. All superfluous matter, including all evidence not bearing upon the specifications, is required to be rigorously excluded. The stenographer's minutes of the trial, as settled and allowed, do not constitute a statement of the case, in this class of cases, within the meaning of the law, and will not be so regarded by this court." In this case, the abstract and briefs are typewritten, and the appellant makes no attempt to comply in good faith with the requirements which we have quoted. While there are portions of his abstract in which the evidence is given in narrative form, yet an examination shows that it is only a pretense, and that in effect there has been no reasonable attempt to comply with the rule. The respondent claims that material portions of the record have been omitted from appellant's abstract, and he supplies them in additional abstract, wherein no attempt is made to reduce testimony to narrative form. Appellant's abstract contains 48 closely typewritten pages, and respondent's 67. Appellant's specifications of error number 26, and are extended throughout the entire evidence contained in the abstract, instead of being placed together following the title as required by the rule. His brief contains 15 assignments of error, all by reference to pages

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and lines of the abstract. The rules of the court are intended for the guidance of litigants, and to facilitate the work of the court, and to aid litigants in pointing out and making clear the errors relied upon, without making it necessary for the court to explore and consider the whole record. The violations of the rule to which we have referred in the case at bar are so flagrant that to overlook them would be to wholly abrogate the rule mentioned. Indeed, it would be far easier and more satisfactory to do so than to examine the abstract of the appellant, and compare it with that of the respondent and determine where the omitted portions should have been inserted, if at all. The work of this court is too burdensome to admit of taking the time made necessary by the procedure adopted in this case, and to overlook this failure to comply with the rules would furnish a precedent which would result in a great amount of unnecessary labor for the court, which could not fail to seriously retard its work, to the great detriment of litigants and the public.

Appellant's abstract and brief are made in no manner to conform to the requirements of rule 19 (10 N. W. 52, 91 N. W. 11). The requirements of this rule should be obeyed, but for violations of these alone we should not at this time decline to consider the abstract.

After due deliberation, we have decided to disregard everything except the judgment roll. Bertleson v. Ehr, 17 N. D. 338, 116 N. W. 335.

That discloses no reversible error, and we therefore affirm the judgment of the district court. All concur.

(117 N. W. 353.)

E. I. Donovan v. Ezra Block.

Opinion filed June 19, 1908.

Rehearing denied September 11, 1908.

Chattel Mortgages — Replevin by Mortgagee — Time.

1. On the uncontroverted facts of this case, it is *held*, that, as to the principal of the notes secured by the mortgages sought to be foreclosed, this action was prematurely brought.

Judgment — Res Judicata.

2. Plaintiff contends that he was entitled to the possession of certain chattel security for the purpose of foreclosing mortgages on the

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same to recover two items of indebtedness from the defendant to him, aggregating $149. *Held,* that for this purpose the action cannot be maintained, for the reason that the liablity of the defendant to plaintiff for said items was litigated and determined adversely to the plaintiff herein in the case of Block v. Donovan, 13 N. D. 1, 99 N. W. 72.

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

Action by E. I. Donovan against Ezra Block. Judgment for defendant, and plaintiff appeals.

Affirmed.

W. A. McIntyre, for appellant.

Dickson & Johnson, for respondent.

SPALDING, J. This is a claim and delivery action. The complaint is in the usual form, describing certain notes and chattel mortgages given by the defendant to a bank in Cavalier county, and by it transferred to the plaintiff herein. Plaintiff seeks possession of the security described in the mortgages for the purpose of foreclosure. He contends that default has been made in the payment of the debt originally secured by the mortgages, and that by an agreement with the defendant he was to hold them as security for additional sums of $97.95 and $51.05. The facts in the case are the same as those considered in Block v. Donovan, 13 N. D. 1, 99 N. W. 72, and no further reference thereto is necessary, except to say that Donovan purchased a farm of Block, against which there were apparent incumbrances amounting to $1,597.95. The value of the farm was assumed to be $1,500, and Donovan was to take care of the incumbrances up to that amount. He contends and contended in the case above referred to, that he was to take up none of the indebtedness until Block paid him the sum of $97.95, and that, in addition to the amount stated in the notes, he is entitled to foreclose the mortgages, and from the proceeds be repaid the sum of $149, evidenced by the two items referred to. The case was tried to a jury. The defendant submitted no evidence. Both parties moved for directed verdicts, but the court submitted the issues of fact to the jury which found for Block.

In a former opinion in this case we held that the court should have directed a verdict for the plaintiff, but our attention had not been called to certain portions of the issues and decision in Block v. Donovan, supra. We were, however, pointed to that part of the decis-

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ion in that case wherein it was held, in effect, that Donovan had the right to enforce collection of the notes which he had paid, under his contract with Block, for the purchase of the farm. On further examination of the record in the Block-Donovan case, we have reached an opposite conclusion from that arrived at on the first hearing of the case at bar. It is possible that, as the evidence in the case at bar stood when it was submitted to the jury, without reference to the other action, a verdict should have been directed for the plaintiff, giving him possession of the security for the purpose of collecting the two items amounting to $149, but this case was not tried until after the trial of the other action, wherein the trial court on the same facts found Donovan not entitled to recover that item, and its judgment was affirmed on a trial de novo in this court. This eliminates that item from our consideration.

As to the notes secured, this action was prematurely brought. At the time it was commenced Donovan was holding title to the land in question, and, as it appears, was attempting to enforce collection, in this proceeding, of the very notes which he had agreed to take up and deliver to Block as a part of the consideration for the land. He could not do both, and could not maintain this action while holding title to the land.

The conclusion we have arrived at in no way conflicts with what was said in Block v. Donovan of Donovan's right to payment of the notes taken over by him while holding title to the land. The items aggregating $149 having been adjudicated in the other suit, and this action having been prematurely brought, we find nothing to litigate, and the judgment of the trial court must be affirmed. All concur.

117 N. W. 527.

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PERCY M. COLE, PETER P. PETERSON, J. A. ENGLUND, ANTON KLEMMENS, C. W. JONES, W. H. MAKEE, A. G. KINSLOW, G. A. ROBERTSON, R. M. WOODS, PAUL C. PAULSON, NEILS NELSON, AND W. H. CAMPBELL FOR THEMSELVES AND FOR THE BENEFIT OF ALL OTHER RESIDENTS AND TAXPAYERS OF THE VILLAGE OF KENMARE, IN SAID COUNTY AND STATE v. THE MINNESOTA LOAN & TRUST COMPANY, A CORPORATION, D. W. CASSEDAY, ELI C. TOLLEY, W. T. SMITH, MARY H. SMITH, WINFRED W. SMITH, AND KENMARE SECURITY BANK, A CORPORATION.

Opinion filed June 19, 1908.

Dedication — Public Parks — Easements — Estoppel.

1. The statutes of this state, prescribing the method of dedicating real property to public uses, as well as easements therein for such purposes, are not and were not intended to be exclusive of the common-law method of dedication nor do they abrogate the well-settled rule of implied dedication by estoppel in pais.

Same — Statutory and Common Law Method.

2. Section 3016, Rev. Codes 1905, which authorizes and empowers cities and villages to receive, by gift or devise, real estate for purposes of parks or public grounds, is not exclusive in its operation, and lands or easements therein may be acquired for such purposes by a common-law dedication thereof. The owners and proprietors of the townsite of K. left a square in the center thereof, undivided into lots, and designated simply by the numeral "2." The other blocks were divided into lots, and those blocks surrounding block 2 were platted into lots, facing toward said square. One of the proprietors of the townsite had active charge of the sale of lots therein, and he represented to prospective purchasers that such square was and would remain a public square or park. Plaintiffs, in reliance thereon, and also upon like representations made by one C, who was also a partner in such townsite enterprise, purchased lots fronting on said square, and made valuable improvements thereon. *Held,* that said acts and representations constituted a common-law dedication of such block as a public square or park. *Held,* further, that defendants are estopped, by reason of such acts and representations, to deny that said block 2 has been dedicated to the public for the uses aforesaid.

Same — Evidence.

3. An intention to dedicate property to a public use must be clearly established, but such an intention may be shown by deed, by words, or by acts. Construing the testimony in the light of such rule, it is held that the intention of the proprietors of the townsite to dedicate said block to the public is clearly established.

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Same — Public Squares.

4. The rule regarding dedication by estoppel with reference to streets applies equally to public squares and parks.

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

Action by Percy M. Cole and others against the Minnesota Loan & Trust Company and others. Judgment for plaintiffs, and defendants appeal.

Affirmed.

Barnett & Richardson, Burke & Middaugh, and *Francis J. Murphy,* for appellants.

Acts of dedication must be unequivocal. Harris' Case, 20 Grat. 837; Holdaone v. Gold Spring, 21 N. Y. 474; Washburn on Easements, 180; 13 Cyc. 451; Milliken v. Denny, 53 S. E. 867.

An agent, unless authorized, cannot dedicate to public use. 10 Cyc. 927; Stow v. Wise, 18 Am. Dec. 99; Town v. Bland, 56 S. E. 804; Klug v. Jeffers, 85 N. Y. S. 423; Stacy v. Springs Co., 79 N. E. 133.

Intention to dedicate by owner and acceptance by proper authorities, are essential to a common law dedication. Grube v. Nichols, 36 Ill. 92; Town v. Grundman, 45 N. E. 164; Morrison v. Marquardt, 92 Am. Dec. 444; Lee v. Lake, 90 Am. Dec. 220; Culmer v. City, 75 Pac. 620; Atty. Gen. v. Whitney, 137 Mass. 450; Sanders v. Village, 118 Fed. 720; Farlin v. Hill, 69 Pac. 237; Niles v. City, 58 Pac. 190; County v. Dayton, 17 Minn. 260; Westfall v. Hunt, 8 Ind. 174; Scantlin v. Garvin, 46 Ind. 262; Allen v. Duluth Co., 48 N. W. 1128; DeArmas v. City, 5 La. 132.

In absence of use, formal acceptance of dedicated land is necessary. Steinaur v. City, 45 N. E. 1056; Baker v. Johnston, 21 Mich. 319; Wilson v. Land Co., 39 So. 303; Town v. Trust Co., 70 Pac. 757; City v. Drexel, 30 N. E. 774; Kidd v. McGinnis, 1 N. Dak. 331, 48 N. W. 221; City v. Madison Co., 75 N. E. 105; Baker v. Johnson, 21 Mich. 319; Pitcairn v. Town, 135 Fed. 587; Town of West Point v. Bland, 56 S. E. 804.

David H. Pierce and *L. W. Gammons,* for respondent.

Lands represented by spaces on recorded plats not a part of platted lots, are presumed to be dedicated to public use. Elliott

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Roads & Streets, (2d Ed.) section 130; Hitchcock v. Oberlin, 26 Pac. 466; Arnold v. Weiker, 55 Kan. 510; Maywood Co. v. Maywood, 118 Ill. 61; M. E. Church v. Hoboken, 33 N. J. L. 25; Mier v. Portland Ry. Co., 1 L. R. A. 85.

Common law dedication is by estoppel in pais. Abbots Mun-Corporations, Vol. 2, 1724, 1749; Herman on Estoppel and Res Judicata, 1788; Dillon on Municipal Corporation, Par. 627, 653; Elliott Roads, etc., section 123.

The vital principle of common law dedication is intention. Harding v. Jasper, 14 Cal. 643; Campbell v. City of Kansas, 10 L. R. A. 551; Church v. City of Portland, 6 L. R. A. 259.

Same rules apply to public squares as to highways. Church v. City of Portland, supra; New Orleans v. United States, 10 Pet. 714; Mankato v. Willard, 13 Minn. 23; Price v. Thompson, 48 Mo. 363; Hunter v. Sandy Hill, 6 Hill. 407; Mowry v. Providence, 10 R. I. 152; San Leandro v. Le Breton, 13 Pac. 405; Huber v. Gazley, 18th Ohio, 18; Carter v. Portland, 4 Or. 339; M. E. Church v. Hoboken, 33 N. J. L. 25.

Intention to dedicate must be manifested by acts. Pittsburg v. Town of Crown Point, 50 N. E. 741; Kile v. Town of Logan, 87 Ill. 67; Moffett v. South Park Commissioner, 28 N. E. 975; City of Indianapolis v. Kingsbury, 101 Ind. 200; Miller v. City of Indianapolis, 24 N. E. 228; Pittsburg Ry. v. Noftsger, 47 N. E. 332; Elliott Roads and Bridges, section 126.

Actual fraud in representations not necessary; it is enough that they tend to mislead. Stevens v. Ludlum, 13 L. R. A. 270; Bigelow on Estoppel, 486; Edwards v. Dickson, 66 Texas, 613; Jackson v. Allen, 120 Mass. 64; White v. Ashton, 51 N. Y. 280; White v. Walker, 31 Ill. 422; Babcock v. People's Savings Bank, 118 Ind. 212; Anderson v. Hubbel, 93 Ind. 570.

Equity will enjoin erections in violation of easement. Wheeler v. Gilsey, 53 How. Pr. 147; Corning v. Lowerre, 6 Johns. Ch. 439; Tallmadge v. East River Bank, 26 N. Y. 105; Lawrence v. New York, 2 Barb. 580; Oakly v. Williamsburgh, 6 Paige, 262.

FISK, J. This litigation arose in the district court of Ward county, and the case is here for trial de novo. The appeal is from a judgment in plaintiff's favor, adjudging that block 2 of the original town site of the village of Kenmare in said county is and shall ever remain a public square, park and common, and forever en-

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joining defendants and their heirs and assigns from in any manner interfering with or preventing the full, free, and unobstructed use by the public of said property as a public square or common, and also adjudging that plaintiffs recover their costs and disbursements of the action. Plaintiffs are residents and taxpayers of said village, and the owners of lots fronting upon said block, and they instituted the action in their own behalf, for the benefit of themselves and all other residents and property owners of said village, for the purpose of obtaining the relief awarded to them by the trial court. The respondents contend in brief that they are entitled to the relief aforesaid, upon the grounds, first, that said block was, long prior to the commencement of this action, dedicated to the public by a common-law dedication; and, second, that defendants by their conduct are estopped to deny that said block is a public square, park, or common. If either of these contentions is sound, the judgment must be affirmed, otherwise it should be reversed.

We deem it advisable to call attention, first to the issues as framed by the pleadings. The complaint, in substance, alleges the following facts:

(1) That the defendant Minnesota Loan & Trust Company is a corporation, organized under the laws of the state of Minnesota, and the defendant the Kenmare Security Bank is a corporation organized under the laws of this state.

(2) Plaintiffs are residents and taxpayers of said village of Kenmare, and the owners of real estate fronting upon the square or block in question, and this action is brought for the benefit of each of the said plaintiffs, and of all residents and taxpayers of said village.

(3) That on November 26, 1900, one Crane received from the United States a patent conveying to him the N. E. quarter of the N. E. quarter, and lot 5, in section 19, township 160, range 88, and that, on or about March 19, 1897, said Crane and wife conveyed said property by warranty deed to the defendant the Minnesota Loan & Trust Company, which deed was recorded in the office of the register of deeds of said county, on March 25, 1897.

(4) On January 12, 1901, said Crane and wife by quitclaim deed conveyed to the Minnesota Loan & Trust Company all their right, title, and interest in and to said real estate, which deed was recorded on January 21, 1901, in the office of the register of deeds of said county.

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(5) That on or about May 8, 1897, said Minnesota Loan & Trust Company, being the owner and proprietor of said real estate, caused to be surveyed and platted into squares, blocks, lots, streets, and alleys a portion of said real estate; that said land was so platted under the title of "Kenmare," and said plat was duly filed in the office of the register of deeds of said county on May 15, 1897, and duly recorded in Book A of Plats at page 14; that in said plat a portion of said land 300 feet square, was designated by the numeral "2," and said square was not subdivided into lots. The blocks on the different sides of said square were subdivided into lots, so arranged that the front of said lots faced said square.

(6) That said plat was in all things executed in accordance with the laws of this state. Plaintiffs allege that said square marked "2" on said plat was intended by said proprietors as a public square and common, for the use and benefit of the plaintiffs and all the residents of Kenmare, and that said proprietors did by their acts, as aforesaid, dedicate to the public said square, and all the streets and alleys appearing on said plat.

(7) That on January 15, 1901, said trust company by deed of warranty conveyed, or attempted to convey, to defendant Casseday the above-described real estate, including the said townsite of Kenmare, which deed was duly recorded.

(8) That on August 18, 1902, Casseday conveyed, or attempted to convey, by special warranty deed, to the defendants Tolley and Smith, the W. half of said square, marked on said plat with numeral "2," which deed was duly recorded in the office of the register of deeds of said county, and on September 13, 1902, Casseday by a similar instrument conveyed, or attempted to convey, to defendant bank the E. half of said square, which instrument was duly recorded in the office of the register of deeds.

(9) That on August 28, 1902, Smith and his wife conveyed, or attempted to convey, to defendant Winfred W. Smith by warranty deed an undivided half of said interest of said W. half of said square, marked "2," as aforesaid, which deed was duly recorded.

(10) That the W. half of the N. W. quarter of section 20, township 160, range 88, adjoins said town site of Kenmare on the east side thereof, and a patent from the United States was duly issued therefor, on April 1, 1899, conveying said land to one Stanley, and on January 16, 1899, Stanley conveyed said land to one Clark D. Smith by quitclaim deed.

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(11) On April 21, 1899, said Clark D. Smith caused said last-described real estate to be surveyed and platted into blocks, lots, streets, and alleys under the name of "Tolley's Plat of Kenmare," which plat was duly executed and certified, and duly recorded; that said Clark D. Smith and wife, on October 18, 1900, conveyed by warranty deed a large portion of said real estate so platted to one Milburn Sandefur.

(12) That on or about July 12, 1901, defendant Casseday caused to be surveyed and platted the balance of the tract of land hereinbefore first described, as blocks 11 to 17, inclusive, of the town of Kenmare; that thereafter said Casseday conveyed a large portion of said land included in said last-described plat to said Milburn Sandefur by deed of warranty.

(13) During the times herein mentioned, defendant Tolley caused to be surveyed and platted 80 acres, embracing 28 blocks, lying immediately north of the plats hereinbefore described, and known as "Tolley's First Addition to Kenmare," which plat was duly recorded.

(14) That the lands embraced in the several plats herein described are now within the limits of the village of Kenmare.

(15) That ever since the making of the first plat above described, defendants Tolley, D. W. Casseday and W. T. Smith have each been authorized to sell lots within the townsite of said Kenmare, and each had a proprietary interest in said townsite during said time, including said square marked "2," and that all the lots in the vicinity of said square have been sold by said defendants, and purchased by the plaintiffs and others with reference to said public square, and with express representations by the owners thereof that said square was and should at all times remain and be maintained as a public square and common, for the use and benefit of these plaintiffs, and other residents of Kenmare, and said square has at all times been considered and understood to be a public square and common by the residents of said Kenmare, and has been thus treated, at all times, with the full knowledge and consent of the owners thereof; that moneys have been raised by subscription from these plaintiffs, and other residents of said Kenmare, for improving and beautifying said square, which moneys have been paid defendant proprietors of said townsite for such purpose, and have been expended by said proprietors of said townsite in improving said square, and in making it into a park and pleasure

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ground for the common benefit of the residents of Kenmare; that said moneys were thus paid and received upon the express stipulation and agreement, between the people paying the same and the said townsite proprietors, that said square should at all times remain and be maintained as a public square and common, and plaintiffs allege that the defendants herein have at all times represented to them, and to other residents of Kenmare, that said square is a public square, and said defendants have at all times intended the same to be a public square, and the same was left undivided into lots for the sole purpose of preserving it as a public square for the use and benefit of the residents of Kenmare; that said square has been used and occupied by the plaintiffs and the public generally as a public square and park for the past six years, with the full knowledge and consent of the original owners thereof, and has been universally recognized, accepted, and used by the public as such.

(16) Plaintiffs further allege that if the defendants or any of them have, or have had, an unqualified fee-simple title in said square since the filing of the first plat aforesaid, the said holders of the record title have, by their acts, representations, and conduct lost all right and power to sell and dispose of said property to private individuals, to be used for private purposes, and that the holders of said record title, since the filing of said plat as aforesaid, have held the record title to said square, as trustees, for the use and benefit of the public.

(17) That notwithstanding the facts aforesaid, the defendants have, in direct violation of the rights of the public, and in the face of the long-continued use by dedication and acceptance of said public square, proceeded to have the said square surveyed and platted into lots and have attempted to sell, and are now attempting to sell, a fee-simple title to said public square, and to the several lots that they have wrongfully and unlawfully caused to be platted thereon, to private individuals for private purposes.

(18) That if the defendants are not restrained, they will proceed to sell said square, and the whole thereof, to private individuals for private use, thereby inflicting upon these plaintiffs and all other residents of said Kenmare great and irreparable injury.

(19) That it would be extremely difficult to ascertain the amount of compensation which would afford adequate relief for said injur-

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ies, and pecuniary compensation would not afford adequate relief therefor.

The prayer for relief is that the defendants be perpetually enjoined from in any manner alienating, incumbering, or in any way disposing of said square, or in any manner interfering with the use thereof by the public as such, and that the same be adjudged to be a public square and common; also that the conveyances which have been made by said defendants since May 15, 1897, whereby it has been sought to vest in any one a fee-simple title in and to said square for private use, be set aside and declared null and void, and that defendants be adjudged to hold the title to said property in trust, for the use and benefit of the public, also for general relief.

The defendants, answering said complaint, expressly admit paragraphs 1 to 5, inclusive, and 7 to 14, inclusive, and the allegations in paragraph 6 are admitted, except the portions thereof referring to said square, and in reference to the same defendants allege that said square is designated on said plat as block 2 in the same manner that other blocks are designated thereon, and the allegation that said square was intended by said proprietors as a public square and common, for the use and benefit of these plaintiffs and other residents of Kenmare, and that said proprietors did by their acts dedicate to the public said square, and all streets and alleys appearing on said plat, is denied, and defendants allege that said block 2 was not intended for public use as aforesaid. Further answering, defendants admit that E. C. Tolley, D. W. Casseday, and W. T. Smith had authority to sell lots within the townsite of Kenmare after the conveyance by the Minnesota Loan & Trust Company to said Casseday, but that said Tolley and Smith had no authority to sell any lots within said town site, except upon the submission of such sale to the said Casseday for his approval, and that neither the said Tolley nor Smith had any authority to donate or dedicate any part of said townsite, or any part of block 2 therein, to any person or persons whomsoever; and they deny each and every other allegation not specifically admitted.

It will be seen, therefore, that the chief contentions between these parties is as to whether the block in question has been dedicated by the proprietors to the public as and for a public park or common, or whether by their representations and conduct defendants are estopped, as against the plaintiffs and other residents of Kenmare, from asserting title thereto. At the conclusion of the

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testimony the learned trial court made findings of fact in substantial conformity to the allegations of the complaint, and after a careful consideration of the testimony, we are of the opinion that such findings are amply supported by the great weight of the evidence, and by clear and satisfactory proof, of a character such as to leave in the minds of the chancellor no hesitation or substantial doubt as to its truthfulness. The testimony is very voluminous, embracing, as it does, about 350 pages of the printed abstract. We shall not attempt a detailed analysis of the same in this opinion, as it would serve no useful purpose so to do, and would swell the opinion to an unwarranted length. While the evidence regarding the main facts in issue was contradicted by the defendants, we are of the opinion that the clear preponderance of the evidence is in plaintiff's favor, and that the learned trial court correctly so found.

In the light of the facts as thus found to exist we will direct our attention to the questions of law advanced in appellants' brief. Appellants' counsel advance the following propositions in support of their contention that the judgment appealed from should be reversed: First. The statutes of this state provide for the acquisition of lands, within the corporate limits of cities and villages, for the purpose of parks and public grounds, and the procedure mentioned in the statute is exclusive. Second. The statute provides for the establishment of easements, enumerates them, and does not provide for easements in lands for park purposes, and, further, that the provisions of the statute are intended to be exclusive. Third. The statutes of this state provide for the dedication of lands to the public by plat, and such provisions, and the procedure therefor, are mandatory and exclusive with respect to the dedication of land. Fourth. That a common-law dedication or a common-law easement over land for park purposes does not exist, and cannot be acquired lawfully within this state. Fifth. That the evidence in the record, as to alleged acts in pais on the part of the defendants, or with the alleged knowledge and consent of defendants, is not sufficient to estop defendants from maintaining and asserting their exclusive rights with reference to the disposal of block 2.

We will consider the first four propositions together, as they involve questions closely related to each other and analogous principles of law. As we understand appellants' counsel, they contend that because the statutes of this state prescribe the method of acquiring

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lands, within the corporate limits of cities and villages, for parks and public grounds, and for the establishment of easements in real property, and fail to provide for easements in lands for park purposes, such statutes are exclusive in their nature and effect, and hence cities and villages are powerless to receive lands for parks or public grounds otherwise than pursuant to such express statutes, and that there is no method, under the laws of this state, for acquiring an easement in land for park purposes. In the third and fourth points they contend that land cannot be dedicated to the public otherwise than by the statutory method, and that a common-law dedication or a common-law easement over land for park purposes is an unknown thing in this state. Their contention, in brief, is that it was the intent of the legislature, in the enactment of the statutes, to which they refer in their printed brief, authorizing cities and villages to acquire property for park purposes, and relating to dedication of land by plat or map, and statutes providing for the establishment of easements in real property, that such statutory method or methods should be exclusive. They say: "Section 3016, Revised Codes 1905, is the only statute authorizing and empowering cities and villages to receive, by gift or devise, real estate within their corporate limits, or within five miles thereof, for purposes of parks or public grounds. It is plain from this section, therefore, since it is the only statute on the subject, that it is the source of the power of cities and villages to receive land for park or public grounds." They also state: "In this state easements are creations of statute, and section 4787 expressly and specifically sets forth the definition of an easement in this state, and then enumerates such easements as may be lawfully acquired. It is significant that an easement to the public for park purposes, or for use as public grounds, is wholly omitted from the provisions of section 4787. It is plain, from the detailed and specific enumerations of the statute, that the enumerated easements in the statute are intended to be exclusive." Again they say: "The statutes of this state provide but one way for the dedication of land, and this procedure is found in section 2930, Revised Codes 1905. * * * This is the method which has been prescribed by the legislature with respect to the dedication of land. * * * It is the contention of appellants that this fact conclusively shows that the provisions of sections 3016 and 2930 are intended by the legislature to set forth the only and exclusive way by which a municipality or its inhabitants can secure land for park purposes."

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It is a significant fact that counsel have cited no authorities in support of their above contentions, and we believe none exist. On the contrary, the rule is firmly established that statutes of the character aforesaid are not exclusive of the common-law method of dedication of lands and easements therein to the public for parks and other purposes. It would be announcing an unwarranted doctrine to hold that the statutes aforesaid were intended to abrogate the well-settled rule of equitable estoppel, and the common-law method of dedication is analogous to and rests upon the principles of such estoppel. A statutory dedication is distinguishable from a common-law dedication in this: That the former is in the nature of a grant, while the latter rests upon the principles of estoppel in pais, and we are entirely clear that the statutory regulations aforesaid were not intended to preclude or abridge in any manner the rights of the public based upon the principles of estoppel or implied dedication. The correct rule is stated in 13 Cyc. 440, as follows: "It is well settled that statutes providing means whereby lands may be dedicated to public uses do not prevent such uses being created by dedication as at common law. They merely provide a new mode by which a dedicator's intention to grant or convey his land may be carried into effect, and there may be a statutory dedication by some of the owners, and a common-law dedication by others. Nevertheless the statutes in no way enlarge, either expressly or by implication, the class of cases where an easement may be created in favor of the public by common-law dedication"—citing many authorities. To the same effect see, also, 9 Am. & Eng. Enc. of Law, 36, and many cases cited. See, also, 2 Dillon on Municipal Corporations, chapter 493. The supreme court of Illinois, in speaking upon this subject in Lake Erie, etc., R. Co. v. Whitham, 155 Ill. 514, 40 N. E. 1014, 28 L. R. A. 612, 46 Am. St. Rep. 355, used the following language: "Except in what are known as 'common-law dedications,' parol gifts of land or of easements therein are not effectual; it being elementary law that the title to lands cannot be transmitted inter vivos except by deed, or its equivalent, and that easements or other incorporeal heriditaments cannot be created by parol, but only by grant, or by prescription, whereby a conclusive presumption of a previous grant is raised. The provisions of chapter 109 of Hurd's Revised Statutes of 1893, entitled 'Plats,' furnish no exception to this rule. They merely

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create a new mode of conveyance. By force of those provisions the owner of the land, by platting it, and marking or noting on the plat that portions of the land are donated or granted to the public, * * * in legal effect conveys the portion of the land so marked or noted to the designated donee or grantee, for the uses or purposes therein indicated. By this statute the purposes for which an owner of land may dedicate or grant it away to others are not enlarged, restricted, or modified, but a new mode is provided, by which his intention to grant or convey his land may be carried into effect. But, by the rules applicable to what are known as 'common-law dedications,' lands or easements therein may be dedicated to the public, so as to become effectually vested without the aid of any conveyance. It may be done in writing, by parol, by acts in pais, or even by acquiescence in the use of the easement by the public. All that is necessary is that the intention to dedicate be properly and clearly manifested, and that there be an acceptance by or on behalf of the public. When that is done, the right or easement becomes instantly vested in the public. * * * At the common law they were confined to the purpose of highways; but in this country the doctrine has a wider application, and its limits have been judicially defined as extending to public squares, common lots, burying grounds, school lots, * * *" etc. Many more authorities might be cited, but the above will suffice to show that the first four propositions advanced by appellants' counsel are without merit.

This brings us to appellants' fifth and last proposition, which is: That the evidence is insufficient to show that defendants should be estopped from asserting title or right of possession to said block. They assert that, even under the rule of the common law, the facts in the record will not warrant the court in finding that the plaintiffs and the public are entitled to a perpetual easement in said block for park purposes for the reasons: First. That no representations that block 2 was intended for a public park were made by the defendants. Second. That the representations which respondents allege were made, were, by the testimony of respondents themselves, not relied on by them, and such alleged representations did not in any wise influence or affect respondents. Third. The defendant, whom respondents allege made representations as to block 2, had absolutely no authority, express or implied, to

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make such representations, and this fact was known, or should have been known, to the plaintiffs. Fourth. That the defendants at all times maintained an exclusive ownership and supervision over said block. Fifth. That there was no user of said block by the public, except with the express consent of the defendant, upon the understanding that the same was private property. Sixth. That there was no intention, on the part of appellants, to dedicate said block 2, or an easement therein, to the public. Seventh. That under respondents' own testimony there was no acceptance whatever of the alleged dedication of block 2 by the public. Eighth That the testimony on the whole is not sufficiently clear, unequivocal, and well established to warrant the court, even under the common-law rule, in deciding, as a matter of law, that the burden of proof resting upon the respondents has been sustained.

The foregoing reasons, urged by appellants' counsel, involve mixed questions of both law and fact, and in respect to the facts, as we have heretofore stated, we think the findings of the trial court are amply supported by the evidence; and, without attempting a review of the testimony, we hold that the proof clearly shows that the defendants Casseday, Tolley, and W. T. Smith had a partnership arrangement between them for the acquisition, platting, and sale of the townsite in question, and that they, in fact, were the owners and proprietors of said townsite, and in causing the same to be platted, or at least in subsequently selling lots adjacent to and facing said block 2, it was their expressed intention that said block should remain a public square, park, or common, for the use and benefit of the inhabitants of such municipality. The fact that said block was not platted into lots, and the further fact that all the blocks surrounding the same were laid out into lots 25 feet in width, and facing such block 2, is of itself quite convincing proof of such intention. Besides, the clear preponderance of the testimony is that these surrounding lots, or many of them, were sold with such understanding, and many of the purchasers thereof, in reliance upon representations made by Tolley to that effect, purchased such lots, paying therefor more than they otherwise would have paid, and have placed valuable improvements thereon. In the light of these facts certain language in the opinion in Attorney General v. Abbott, 154 Mass. 323, 28 N. E. 346, 13 L. R. A. 251, is strikingly applicable. We quote: "The testimony makes it very plain that the establishment of open spaces or

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parks was deemed an important feature of the scheme for selling lots. At the outset it was a matter of discussion among the parties interested. Lots fronting upon the parks, or having an unobstructed view of them, were deemed more attractive. Assurances were freely given, by those having charge of the sale of the lots, that these spaces or parks should always be kept open. Four of the original owners testified, in distinct terms, that it was the intention of those interested in the enterprise to make them open parks, free to the public forever. This is so extremely natural and probable, and any other course would be so unlikely that evidence of a contrary intention on the part of any one of them would be received with some distrust. If the corporation had announced, at the time of making the sales, that it reserved the right to cut up the open spaces into building lots, to sell them after the village should be established, it would, no doubt, have diminished the sales. If the corporation had an intention to reserve this right, the course pursued of inviting purchasers was inconsistent with common honesty. * * * Without dwelling upon various other particulars of the evidence, which tends in the same direction, we cannot doubt that it was a part of the scheme of the enterprise or speculation that the public should understand that these spaces should be left open for public use, and that no right was reserved to sell them for building lots, and that the corporation held out to the public this assurance, and at the time fully and fairly intended to give up this right, and that the two persons upon whose supposed dissent the defendant relies did not, in fact, dissent at the time. If they had done so, their dissent would be overborne by the action of the other four; but it seems to us more reasonable and probable to suppose that at the time they acquiesced, if they did not fully concur, in the views of the majority." To the same effect is Carter v. City of Portland, 4 Or. 340, and Abbott v. Mills, 3 Vt. 521, 23 Am. Dec. 222. In the latter case it was stated: "It is customary, in laying out towns, * * * to lay out a square or common, and to locate building lots bordering thereon. And these lots acquired an increased value in consequence of their location. If a village is built up, and individuals buy these lots, erect buildings, and commence the establishing of a village, and make it a common center for the business of the town, the other lands in town rise in value, of which the proprietors have all the advantage. It would then be the height of injustice, and contrary

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to every principle of good faith, to permit these proprietors to derive this advantage, and then frustrate the expectations held out, by resuming the lands thus set apart, and at a value greatly enhanced in consequence of their having been thus set out. * * * Whenever a public square or common is marked out and set apart as such by the owners or proprietors, and individuals are induced to purchase lots or lands bordering thereon, in the expectation held out by the proprietors or owners that it should so remain, or, even if there are no such marks placed on the ground, but a map or plan is made, and village lots marked thereon, and sold as such, it is not competent for the proprietors or owners to disappoint the expectations of the purchasers by resuming the lands thus set apart, and appropriating them to any other use."

We fully agree with appellants' counsel that "ownership of land once had is not to be presumed to have been parted with; but the acts and declarations relied on to show a dedication should be unequivocal and decisive, manifesting a positive and unmistakable intention, on the part of the owner, to permanently abandon his property to the specific public use. If they are equivocal, or do not clearly and plainly indicate his intention to permanently abandon the property to the public, they are not sufficient to establish a dedication. The intention to dedicate must clearly appear, though such intention may be shown by deed, by words, or acts. If by words, the words must be unequivocal, and without ambiguity. If by acts, they must be such acts as are inconsistent with any construction, except the assent to such dedication." Whether an intention to dedicate block 2 is sufficiently shown, or may be inferred from the face of the plat alone, it is unnecessary for us to determine. Upon this question, see Birge v. City of Centralia, 218 Ill. 503, 75 N. E. 1035, and cases cited, where it was held that leaving a blank space on a plat, without designating such space as a street, alley, or other public ground, does not constitute a dedication of the tract of land represented by such space, nor show a common-law dedication, in the absence of evidence of an intention by the grantor to make such dedication and an acceptance thereof by the public. We are entirely clear, however, that when the plat is considered in connection with the clear preponderance of the oral testimony as to representations made by the defendants, it unquestionably appears that it was the intention of the proprietors of this townsite to dedicate said block to the public as a public square, park, or

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common, and their subsequent conduct, with reference to said square, lends force to this view. The evidence discloses that, under the supervision of defendant Tolley, this square was inclosed by a fence, and gates or stiles were placed at each corner, and at the center of each side line walks or paths were left from each of these openings to the center of the square; that the triangular pieces between the paths were broken, leveled, and seeded to grass, and trees set out along the boundaries of these various walks and the outside boundaries of the square; that a band stand was erected in the center of the square; and that at least two wells were dug in the square in an attempt to secure water for the use of the public. Some of these improvements were made by individual citizens of Kenmare and money was raised, by subscription among the citizens, for defraying a portion of the expenses of such improvements, and this square has at all times been used by the public as a park and place for holding celebrations, picnics, public speaking, band concerts, etc. These facts, taken in connection with the method of platting the adjacent blocks so that the lots each faced towards said square, is of a most convincing character to show the intention of the town-site proprietors in platting said town site. The fact that trees were planted in the manner aforesaid is wholly inconsistent with an intention on the part of such proprietors to cut up said block into lots for building purposes. While it is true, as we have stated, that an intention to dedicate is essential to a common law or implied dedication, such intention is not merely existing in the mind of a person, but it is the intention manifested by his words and acts to which the courts must give effect. If such intention to dedicate can be fairly inferred from his words or acts, it is sufficient. As said by Judge Elliott, in his work on Roads and Streets (page 92): "The intent which the law means is not a secret one, but is that which is expressed in the visible conduct and open acts of the owner. The public, as well as individuals, have the right to rely on the conduct of the owner as an indication of his intent. If the acts are such as would fairly and reasonably lead an ordinary prudent man to infer an intent to dedicate, and they are so received and acted upon by the public, the owner cannot, after acceptance by the public, recall the appropriation. Regard is to be had to the character and effect of the open and known acts, and not to any latent or hidden purpose. If the open and known acts are of such a character as to induce the belief that the

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owner intended to dedicate it away to the public use, and the public and individuals, acting upon such conduct, proceed as if there had been, in fact, a dedication, and acquire rights which would have been lost if the owners were allowed to reclaim the land, then the law will not permit him to assert that there was no intent to dedicate, no matter what may have been his secret intent." The foregoing is quoted with approval in Pittsburg, etc., Ry. Co. v. Town of Crown Point, 150 Ind. 536, 50 N. E. 745. It is stated, in the opinion in said case, that a common-law dedication, or the presumption in favor of said dedication, operates by way of estoppel in pais. Many authorities might be cited to the same effect, but we deem it unnecessary to cite them, as the rule is well established.

We hold that the facts are sufficient upon which to base a finding of a common-law dedication of block 2 to the public, and we are also convinced that the judgment of the trial court must be affirmed, upon the ground that defendants are estopped, as against the plaintiffs and other citizens of Kenmare who purchased property facing said square, from asserting that the same is not a public square or park. In other words, as to these plaintiffs and the other purchasers of such lots, who purchased the same in reliance upon representations of Tolley that block 2 should remain a public square or park, it must be held that said square was dedicated as aforesaid. Upon the plainest principles of natural justice the appellants should be estopped to now claim that the square in question has not been dedicated to the public. Dedications arising by estoppel are of frequent occurrence, and are treated as implied dedications. "In such cases the party is estopped or precluded from going into the question as to whether or not there has been a valid dedication of the public use in question. It, therefore, makes no difference whether the essentials of a valid dedication do exist. Inquiry is precluded by estoppel; and whether or not it is precluded depends upon the principles of estoppel, and not upon the doctrine of dedication." 12 Cyc. p. 454, note 75. On page 455 of the same work the rule of implied dedication by estoppel is stated thus: "Where the owner of real property lays out a town upon it, and divides the land into lots and blocks, intersected by streets and alleys, and sells any of the lots with reference to such plan, or where he sells with reference to a map of the town or city, in which his land is so laid off, he thereby dedicates the streets and alleys to the use of the public. * * * On the same principle the owner will be held

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to have dedicated to the public use such pieces of land as are marked on the plat or map as squares, courts, or parks. The reason is that the grantor by making such a conveyance is estopped, as well as in reference to the public as to his grantees, from denying the existence of the easement"—citing a great many authorities. To the same effect see Elliott on Roads and Streets (2d Ed.) chapter 118, and cases cited. Also Russell v. Lincoln, 200 Ill. 511, 65 N. E. 1088, and authorities therein cited. In Clark v. City of Elizabeth, 40 N. J. Law, 172, the court in commenting upon the above rule said: "Of the propriety of the rule there can be no question. It is based on the most obvious principles of fair dealing—the principles which require the vendor to deliver to his vendee that which the latter has bought and paid for—the principles which hold men to their lawful bargains."

The case at bar is quite similar to the case of Village of Princeville v. Auten, 77 Ill. 325. In that case, as in this, a block was left in the center of the town, not divided into lots, as were the other blocks, but merely left blank. It was proven that the proprietors of the townsite recognized the blank square as public grounds and sold lots fronting thereon for an enhanced price. It was held that the legal effect of what they did was an incomplete statutory dedication of the block to the public, but that it constituted a dedication thereof at common law. Weger v. Delran Tp., 61 N. J. Law, 224, 39 Atl. 730, is another case where a vacant square was left, but the same was not designated on the plat or map as a "square" or "park." The proof shows that all the other blocks were divided into numbered lots; that the block in question was distinguished from the other blocks by a different coloring, by the delineation of trees and of paths, and by rough representation of a fountain in the center; that a map showing these things was shown to prospective purchasers, and that he declared to many persons his intent that this square should be and remain for public use as a place for recreation and pleasure to the public. The court, after referring to the evidence, said: "Although the map did not designate this block in words as 'square' or 'park,' yet it contained persuasive evidence that it was intended for a different use than that to which the other blocks were designed to be put, and from Bechtold's acts and declarations, which were admissible evidence, there was the plain inference capable of being drawn that he intended to dedicate the block to public use." In most of the re-

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ported cases of dedications arising by estoppel the plat or map of the town designated the square or block as a park, or other similar designation, and it has been uniformly held that the proprietor who had sold lots with reference to such plat was estopped to deny that he had dedicated such square to the public. These decisions rest upon the theory of implied representations, to purchasers of lots, that such squares or parks have been dedicated to the public. The following are some of the many authorities so holding: Poudler v. City of Minneapolis (Minn.) 115 N. W. 274; Watertown v. Cowen, 4 Paige (N. Y.) 510, 27 Am. Dec. 80; Fessler v. Town of Union, 67 N. J. Eq. 14, 56 Atl. 272; Attorney General v. Abbott, 154 Mass. 323, 28 N. E. 346, 13 L. R. A. 251; Sanborn v. City of Amarillo (Tex. Civ. App.) 93 S. W. 473; Archer v. Salinas City, 93 Cal. 43, 28 Pac. 839, 16 L. R. A. 145; Florida, etc., Ry. Co. v. Worley, 49 Fla. 297, 38 South. 618; Carter v. City of Portland, 4 Or. 340; City of Pella v. Scholte, 24 Iowa, 283, 95 Am. Dec. 729; Russell v. City of Lincoln, 200 Ill. 511, 65 N. E. 1088. The rule regarding dedication by estoppel with reference to streets applies equally to public squares and parks. Poudler v. City of Minneapolis, supra; Abbott v. Cottage City, 143 Mass. 521, 10 N. E. 325, 58 Am. Rep. 143, and cases cited. Florida, etc., Ry. Co. v. Worley, supra.

That oral representations, made by the proprietors of the town site to prospective purchasers of lots with reference to the character of such squares or parks, are sufficient upon which to base a dedication by estoppel there is no doubt. Such representations may be express or implied, and may be written or oral. This is firmly established by the authorities. Counsel for the appellants contend that Tolley was not authorized to make the representations which he made. There is no merit to such contention. The proof shows that Casseday, Tolley, and Smith were partners in this townsite enterprise, and that Tolley represented such partnership in the sale of lots; he having particular charge thereof. While Casseday denies such authority, his testimony is entitled to but little weight, in view of the other testimony in the case, and the admissions and representations made by him to some of the plaintiffs.

It is also contended by appellants' counsel that there was no acceptance of the dedication of said block, and no user thereof by the public, and that the defendants at all times continued to exercise exclusive ownership and supervision over said block. We do

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not think these contentions are borne out by the proof. No express acceptance by the public was necessary, as the foregoing authorities will show. When the plaintiffs purchased their lots in reliance upon the representations of Tolley, as most of them did, defendants became estopped to question a complete dedication of such square. While it is true, as the testimony discloses, that Tolley exercised certain supervision over said block, and made certain improvements thereon, in the way of planting trees, building a fence, etc.,such acts were not necessarily inconsistent with a prior dedication thereof. In speaking upon this identical question the supreme court of Massachusetts, in Attorney General v. Abbott, supra, took occasion to say: "The fact that not much was done to adorn these spaces, and that the corporation itself did whatever was done in this respect, and to some extent it seemed to exercise a certain control over the land, is not of much weight in opposition to the conclusion to which we have come. The chief element of a public park, in such a place, at least till the village is well settled, is to have the land kept open. The adornment would naturally come later, if at all. The corporation did a little toward improving and caring for these open spaces. It had some interest in doing so. Ordinarily, when parks are established for public use, the municipal authorities exercised control over them. It was not so here. Whatever was done was done by the corporation, which, to some extent, did what municipal authorities usually do. Washb. Easem. 146, 147, 156. The corporation was interested in pushing its speculation; and, as long as it had many lots left for sale, it did something for the parks. * * *"

In conclusion we are entirely convinced that, by the clear preponderance of the evidence, and under the well-established rules of law applicable thereto, it must be held that the block in controversy was dedicated to the public by the townsite proprietors, as and for a public square or park, and further that the defendants are and should be estopped by their conduct and representations from denying such dedication. The defendants, other than Casseday, Tolley, and W. T. Smith, have acquired no rights in said property which interfere with the granting to the plaintiffs of the relief for which they pray. It is therefore ordered that the judgment appealed from be, and the same is hereby, affirmed. All concur.

(117 N. W. 354.)

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THE STATE OF NORTH DAKOTA v. M. B. CHASE AND JOHN DWYER.

Opinion filed September 10, 1908.

Criminal Law — Time for Preparation.

1. The right to one day's time for preparation for trial after the plea is entered is absolute if requested in time.

Same — Time to Make Request.

2. Under a statute providing for one day's time to prepare for trial, but not prescribing when the request shall be made, a reasonable construction thereof is that the request should ordinarily be made immediately after plea, and before any other step preliminary to the trial is taken.

Same — Waiver of Right.

3. Unless the request for time to prepare for trial, pursuant to a statute giving that right, is made in time, the right thereto is waived.

Same.

4. After the plea had been entered and the trial called and four jurors called into the box, the defendants asked for one day's time to prepare for trial, and the court denied the request. *Held,* not error.

Same — Appeal — Review — Abuse of Discretion.

5. Whether the request for time to prepare for trial is made in time may depend in some cases upon special circumstances, and in such cases the action of the trial court will be entitled to great weight, and will not be disturbed, except in case of manifest abuse of discretion.

Evidence.

6. Admissibility of certain evidence considered, and its admission *held* immaterial.

Gaming — Verdict — Evidence.

7. Verdict *held* sustained by the evidence on a review thereof.

Appeal from District Court, Williams County; *Goss,* J.

M. B. Chase and John Dwyer were convicted of keeping a gambling resort, and they appeal.

Affirmed.

Palda & Burke (*Engerud, Holt & Frame,* of counsel), for appellants.

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Defendant is entitled to a day after plea to prepare for trial. Section 9935, Revised Codes 1905.

It is his right without statute. Miller v. U. S. 57 Pac. 836; Goodson v. U. S. 54 Pac. 423; Johnson v. State, 49 S. W. 618; State v. Pool, 23 So. 503.

Trial is not begun until jurors are sworn. State v. Hazledahl, 2 N. D. 521, 52 N. W. 315; State v. Kent, 5 N. D. 516, 67 N. W. 1052.

Abuse of discretion to refuse time for preparation. Colean Mfg. Co. v. Feckler, 16 N. D. 227, 112 N. W. 993; State v. Pool, supra.

Statement of a witness not in defendant's presence not binding on latter. 2 Wigmore on Evidence, section 1071.

T. F. McCue, Attorney General, *R. N. Stevens,* Asst. Atty. Gen'l, and *Van R. Brown,* State's Attorney, for respondent.

Refusal of trial court to set aside a verdict is not reviewable, where there is any evidence to sustain it. Palmer v. People, 4 Neb. 73; Hurley v. State, 6 Ohio, 400; State v. Crews, 16 Mo. 391; Wolf v. State, 11 Ind. 231; Guiles v. State, 6 Ga. 272; State v. Elliott, 15 Iowa, 72; State v. Howell, 100 Mo. 659.

MORGAN, C. J. The state's attorney of Williams county filed an information against the defendants, charging them with jointly keeping a place as a gambling resort in violation of section 8974, Revised Codes 1905, and a conviction followed, after a joint trial before a jury, and they were sentenced to imprisonment in the county jail for 90 days, and to pay the costs of trial, taxed at the sum of $150. The defendants have appealed from the judgment, and, pending the appeal, were admitted to bail by the district court.

There are three grounds urged by them for a reversal of the judgment.

(1) The refusal of the district court to grant to them one day in which to prepare for trial after pleading to the information, as provided by section 9935, Revised Codes 1905, which reads as follows: "After his plea, the defendant, if he requests it, is entitled to at least one day to prepare for trial." The record shows that, after arraignment of the defendants on June 17, 1907, they were given one day in which to plead. At the opening of the court

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on the following day, the defendants' plea of "not guilty" was received and entered on the record. After the case had been called for trial, and the clerk had called the names of four jurors, who had taken their places in the jury box, the defendants moved for a separate trial, and asked for one day's time in which to prepare for trial. The court denied both requests. No exception is urged as to the ruling denying a separate trial, as the granting of separate trials in misdemeanor cases is discretionary with the trial court under the express terms of the statute. Section 9996, Revised Codes 1905.

The ruling upon the request for one day's time to prepare for trial presents a different question. If the request is made in time, it must be granted as a matter of right, and the granting or refusing of it involves no question of discretion. The statute does not fix any time or stage of the proceedings during which the request must be made. A reasonable construction of the provision is that the request must ordinarily be made immediately after the plea, and before any other step preliminary or preparatory to the trial is taken. Under this construction it should ordinarily be made before the calling of a jury is ordered. Although the right to at least one day for preparation for the trial is absolute if made in time, still by not making the request at all, or by not making it in time, the right thereto is waived. Unless a seasonable request is made for a delay of one day or more for preparation, the right thereto will be deemed to have been abandoned. As to whether the request is made in time, or should be granted although not made in time, may be controlled by particular circumstances, and in determining such matters, the action of the trial court will not be disturbed, unless there has been an abuse of discretion. In this case nothing appears in the record to show that any prejudice could have followed the action of the court in not granting the additional time. No fact was urged at the trail to show any reason for the postponement for one day. The request seems to have been based upon the fact that defendants' chief counsel was not present when the request was made. The defendants were represented by counsel during the arraignment and during the impaneling of a jury. After the jury was impaneled, the court on its own motion postponed the trial until the chief counsel arrived, and he thereafter conducted the defense. We think the trial court did not err in denying the request under the circumstances, as the request was not made in

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time, and no circumstance appears showing that the request should have been granted although not made within time. That the right given by the statute is waived unless made in time is amply sustained by authority. State v. Counts, 49 Tex. Cr. R. 329, 94 S. W. 221; State v. Harris, 100 Iowa, 188, 69 N. W. 413; State v. King, 97 Iowa, 440, 66 N. W. 735; State v. Jordan, 87 Iowa, 86, 57 N. W. 63; State v. Fletcher (Tex. Cr. R.) 39 S. W. 116; People v. Winthrop, 118 Cal. 85, 50 Pac. 390.

(2) The defendants were arrested while card games were going on at the place where both defendants were at the time. One of the players had a conversation with one of the persons who accompanied the officer making the arrest, as follows: "I had a conversation in there at that second table. I asked the fellows for their cards, and one fellow said I could not have them. The defendants at that time were over by the round table. The room is, I should judge, 10 or 12 by 14 or 16. Both defendants were in this room. * * * I asked the fellows for their cards, and they said I could, not have them, and I says, 'Yes, I want them,' and one fellow said, 'Well, you can't have them, we are playing for 25 cents,' and I said, 'I can't help it. I want all the stuff,' and he said 'All right. You are an officer. We were just playing for fun,' and gave me the cards. I heard other conversation in there." It is claimed that it was error to receive this testimony without a showing that the defendants heard the conversation. Standing alone, this testimony would not sustain a conviction, but there is other evidence in the record showing that gambling games were going on in that room when the arrests were made and at other times. The defendants offered no testimony, and the uncontradicted testimony of the state clearly showed that gambling was going on, and had been for a long time going on, in the room where this conversation took place. On this point there can be no question but that the verdict was amply sustained on this point by the evidence, and the evidence objected to had no bearing on the case, except as to whether gambling was permitted to be carried on in this room. The objection to the evidence is that it was hearsay so far as the defendants are concerned, as there is no showing that the defendants heard the conversation, and could not therefore be charged by their silence in having acquiesced in the statement that gambling was going on there. If the players had unequivocally stated that the game was being played for money, it may be doubted whether the admission

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of the evidence was prejudicial, in view of the size of the room and the circumstances under which the statements were made. But we need not dispose of the objection on that ground. The statement of the player, as narrated by the witness, cannot be said to show that the game was being played for money. Considered altogether, it required no statement from the defendants, and their silence became immaterial.

(3) It is also assigned as error that the motion to advise the jury to return a verdict of acquittal should have been granted. As stated before, the evidence amply sustains the verdict as to both defendants. This motion is especially urged as to the defendant Chase. The claim is that the evidence fails to connect him with the running or management of the place. There is no basis for the claim. His codefendant, Dwyer, left him in charge on the night of the arrests, and it is shown that he had keys to the card and chip racks, paid out money, and acted as proprietor. This is sufficient to sustain the verdict as to his connection with the place as keeper, in the absence of any denial from him or any contrary evidence.

The judgment is affirmed. All concur.

(117 N. W. 537.)

L. B. PENDROY v. GREAT NORTHERN RAILWAY COMPANY.

Opinion filed April 22, 1908.

Rehearing denied September 12, 1908.

Railroads — Accident at Crossing — Injury to Automobile — Contributory Negligence — Question for Jury.

1. Action to recover damages for injury done to plaintiff's automobile by a collision with defendant's train at a public crossing. Plaintiff's daughter was driving the automobile, and the plaintiff and others were riding therein at the time of the accident. The proof shows that at the time of the accident and for some time prior thereto defendant's train crew was engaged in switching in its yards at the city of Towner where the accident occurred, but that plaintiff and his daughter, although they had been pleasure riding about the city for some time, did not know that such switching was being done. In approaching such crossing the view of the occupants of the car was obstructed by buildings and other structures. Plaintiff and his daughter testified that in approaching such crossing they looked and listened for trains, but heard none. Just prior to reaching the crossing the gear of the automobile was changed from high to low

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speed, and the noise which it made was about the same as that of an ordinary lumber wagon going at the same speed, which was about five miles per hour. The train which collided with the automobile was being backed over this crossing in a westerly direction, the first car and the one which came in contact with the automobile being a flat car loaded with iron. *Held*, that the question of the contributory negligence of plaintiff and his daughter was properly submitted to the jury.

Same — Instructions — Meaning of "Proximate Cause" and "Contributory Negligence."

2. A person in passing over a public railway crossing is bound to use care commensurate with the known and reasonably apprehended danger; but it is only in exceptional cases that a trial court is justified in taking from the jury the question of the exercise of such care. Under the evidence, it cannot be said as a matter of law that plaintiff and his daughter were guilty of contributory negligence in not stopping the automobile before making such crossing. Certain instructions as to the meaning of the terms "proximate cause" and "contributory negligence" examined, and *held* correct.

Appeal and Error — Instruction — Prejudice.

3. The trial court charged the jury that "the act or omission must contribute, in order to be contributory negligence, to the happening of the act or event causing the injury, * * * and, if the act or omission merely increases or adds to the extent of the loss or the injury, it will not have that effect." This instruction had no application to the facts in the case, but its giving is *held* not prejudicial error.

Railroad Crossing — Accident — Instructions.

4. Certain requests for instructions by defendant were denied, and properly so, as their giving in effect would have amounted to a directed verdict.

Appeal and Error — Assignment of Error — Rules of Court.

5. Certain assignments of error predicated upon rulings of the trial court in the admission and rejection of testimony are deemed abandoned for the reason that they are not discussed or treated in the brief in accordance with rule 14 (91 N. W. 8) of this court.

Witness Fees.

6. In its order retaxing the costs, the trial court allowed certain witnesses the sum of $10 per day for attendance. This was erroneous, and the judgment is modified accordingly by reducing such allowance to the sum of $2 per day.

Appeal from District Court, McHenry County; *Goss*, J.

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Action by L. B. Pendroy against the Great Northern Railway Company. Judgment for plaintiff, and defendant appeals.

Affirmed.

Arthur Le Sueur and *Murphy & Duggan,* for appellant.

Where the view of one about to cross a railroad track is obstructed, he must stop and listen. West v. N. P. Ry. Co., 13 N. D. 221, 100 N. W. 254; Kniter v. Railway Co. 54 Atl. 276; Chicago, etc. Ry. Co. v. Crisman, 34 Pac. 286.

Plaintiff was guilty of contributory negligence. Houghton v. Ry., 58 N. W. 314; Brady v. Ry., 45 N. W. 1110; Shatto v. Ry., 121 Fed. 678; Seefeld v. Ry., 35 N. W. 278; Barnhall v. Ry. 33 So. 63; Ry. v. Holdem, 49 Atl. 625; Day v. Ry., 52 Atl. 771; Allen v. Ry. Co., 19 Atl. 105; Bond v. Railway Co., 76 N. W. 102; Shufelt v. Ry., 55 N. W. 1013; Haas v. Ry., 11 N. W. 216; Rogers v. Ry., 72 N. E. 945; Proper v. Ry., 99 N. W. 283; Cleveland Co. v. Heine, 62 N. E. 455; Fletcher v. Ry., 21 N. E. 302; Donnelly v. Ry., 24 N. E. 38; Debbins v. Ry., 28 N. E. 274; Marty v. Ry., 35 N. W. 670.

Court's definition of "proximate cause" and "contributory negligence" were erroneous. Reitveld v. Wabash R. Co., 105 N. W. 515; Banning v. Ry. Co., 56 N. W. 277; Kerr v. Topping, 80 N. W. 321.

O'Connell & Donnely, Palda & Burke and *Bossard & Ryerson,* for respondent.

Failure to stop and listen is not alone negligence. N. Y., S. & W. R. Co. v. Moore, 45 C. C. A. 21; Dougherty v. Chicago, etc. Ry., 104 N. W. 672; Guggenheim v. Lakeshore & M. S. Ry. Co., 33 N. W. 161; Union Pac. R. R. Co. v. Ruzicka, 91 N. W. 543; Shearman & Redfield on Negligence, section 477; Massoth v. Deleware Canal Co., 64 N. Y. 524.

Obstruction of view may impose on a railway company increased care and watchfullness, call for more signalling than law requires, and excuse a traveler who might otherwise be deemed negligent. Siegel v. Milwaukee R. Co., 48 N. W. 488; Oldenburg v. N. Y. Central R. Co., 26 N. E. 1021; Parsons v. N. Y. Central Ry. Co., 113 N. Y. 355, 21 N. E. 145; McDuffie v. Lake Shore R. Co., 57

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N. W. 248; Petrie v. N. Y. Cent. R. Co., 66 Hun. 282; Fisher v. M. R. Co., 18 Atl. 1016; Baltimore R. Co. v. Walborn, 26 N. E. 207; N. P. R. Co. v. Austin, 12 C. C. A. 97; Kenny v. H. R. Co., 16 S. W. 837.

Injury presumed caused by omission of signals. Huckshold v. St. Louis R. Co, 19 Mo. 548; Doyle v. Boston R. Co., 145 Mass. 385; Beisiegel v. N. Y. Cent. R. Co., 34 N. Y. 622.

Backing a train is not negligence, but a watchman should be on rear car to warn travelers. Duame v. Chicago R. Co., 40 N. W. 394; Whalen v. Chicago R. Co., 44 N. W. 849; Bergman v. St. Louis R. Co., 1 S. W. 384; Hamilton v. Morgan's R. Co., 8 So. 586; Robinson v. Western Pac. R. Co., 48 Cal. 409; Chicago R. Co. v. Walsh, 41 N. E. 900; Ry. Co. v. Schuster, 7 S. W. 874; Chicago R. I. & P. Ry. Co. v. Sharp, 11 C. C. A. 337.

The court's definition of "proximate cause" was correct. Shearman & Redfield, on Negligence, section 26; Oil Creek Oil Co. v. Keighron, 74 Pa. St. 320; Insurance Co. v. Tweed, 7 Wal. 52.

Also of "contributory negligence." Shearman & Redfield on Negligence, section 94; Scheffer v. Ry. Co., 105 U. S. 249, 26 L. Ed. 1070.

Contributory negligence must be a proximate, not a remote cause. 2 Thompson on Neg. 1151; Wharton on Neg., section 323; Kline v. C. P. R. Co., 37 Cal. 400; Meeks v. Southern P. R. Co., 56 Cal. 513; Isbell v. N. Y. R. Co., 27 Conn. 393; Weymire v. Wolfe, 52 Iowa, 533; State v. M. R. Co., 52 N. H. 528; Dudley v. Ferry Co., 45 N. J. L. 368; Mark v. H. B. Co., 56 How. Pr. 108; Smithwick v. Hall & Upson Co., 12 L. R. A. 280, and note.

Fisk, J. This is an appeal from an order of the district court of McHenry county denying a motion made in the alternative for judgment notwithstanding the verdict, or for a new trial, and also from the judgment entered pursuant to the verdict of a jury.

Plaintiff's cause of action is based upon the alleged negligence of the defendant railway company in backing one of its trains of cars against plaintiff's automobile at a public crossing in the city of Towner. The question of defendant's negligence and of plaintiff's contributory negligence and the extent of plaintiff's damages were submitted to a jury, and a verdict returned in plaintiff's favor for the sum of $350. In addition to a general verdict, the jury returned answers to 12 interrogatories, as follows:

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"(1) Was the automobile in question fully stopped momentarily before the same was run upon the passing track where the collision occurred? A. No.

"(2) Was the engine whistle blown a short time before the collision, and while the engine was approaching on the same track upon which the collision occurred? A. No.

"(3) Was the engine bell rung before the collision, while the engine was approaching on the track upon which the collision occurred? A. No.

"(4) Was the brakeman or any employe of the defendant company on the box car or on the flat car in question at the time or immediately before the collision between the train and automobile? A. No.

"(5) At how many miles per hour was the train approaching the crossing in question when the flat car collided with the automobile? A. About 10 miles per hour.

"(6) Were the air brakes applied before or after the collision with the automobile? A. After.

"(7) Was the engine reversed before or after the collision? A. After.

"(8) Would an ordinary reasonable, prudent man, familiar with the operation of an automobile, have attempted to cross the said railway track with obstructions to the view as were present at that time at the time plaintiff and Mattie Pendroy crossed them in said automobile without stopping the automobile to examine for any impending danger from passing trains? A. Yes.

"(9) Was the plaintiff or Mattie Pendroy, either or both, guilty of any negligence whatever in the operating of the automobile or negligent in any degree in operating the automobile upon the Great Northern Railway passing track, just before or at the time of the collision of the train and automobile? A. No.

"(10) Were the defendant's employes guilty of any negligence in the operation of the train in question at the time of this collision or immediately before the collision between the train and automobile? A. Yes.

"(11) Did the engineer or other employes of the defendant company do anything to cause injury to others which an ordinary prudent and reasonable man would not have done doing the same work, or omit to do anything to prevent injury to others in operating the said train at the time of the collision in question, or shortly before

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and while approaching the place of collision with the automobile on the passing track, that ordinary prudent and reasonable men, doing the same work, would have done? A. Yes.

"(12) If you answer question No 11 in the affirmative, state fully of what such acts or omissions referred to in the said question consisted. A. Because they did not blow the whistle; because they did not ring the bell; because the air brakes were not applied at the proper time; because the reverse lever was not applied at the proper time; the brakeman was not on the flat car."

Thereafter defendant made a motion, as before stated, for judgment notwithstanding the verdict or for a new trial, which motion was denied, and judgment entered pursuant to the verdict.

Appellant has set forth 38 assignments of error relating to rulings in the admission and rejection of testimony, alleged errors in instructions to the jury and refusals to instruct, also to the ruling of the court in denying motions for nonsuit and for judgment notwithstanding the verdict, or for a new trial; also, the order of the court in retaxing and allowing certain costs. Such assignments as have been argued in appellant's brief will be noticed in the order presented. The assignments not argued will be deemed abandoned. Before noticing these assignments, a brief statement of the facts may be useful. On July 7, 1906, the plaintiff, with two of his daughters and other persons, was riding about the city of Towner in plaintiff's automobile, and while in the act of attempting to cross defendant's railroad tracks at the intersection of said tracks with Main street, in said city, said vehicle was struck by defendant's train, consisting of two cars and an engine, which were backing over such crossing from the east. Plaintiff's daughter, aged about 18 years, was driving the automobile, and plaintiff was ridng on the rear seat. The accident happened about 8 o'clock in the evening. The testimony tended to show that in approaching the crossing from the south the automobile was being driven at a speed of five or six miles per hour, and, when it reached a point within a few feet from the south track, the speed was changed to what is known as "low gear," which is a speed of less than five miles per hour. It was shown that the noise from the automobile as it approached the railroad tracks was about equal in volume to the noise made by an ordinary lumber wagon under the same conditions, and that by changing from the high to the low gear the noise was increased. On account of the grade crossing, it was necessary to change the engine to low

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gear. At the east of Main street, and on the south side of defendant's right of way, and along its south track, there were numerous obstructions to the view, consisting of elevators, elevator sheds, engine house, stockyards, etc. These structures and objects were upon the railroad station grounds. There were also other structures just south of said right of way and east of Main street, consisting of lumber yards and buildings, all of which structures and objects to a large extent obstructed the view to the persons in said automobile as they approached said crossing just prior to the accident. There were four tracks crossing Main street, designated as the "industry" track, a "side" track, "passing" track, and "main" track. The collision occurred on the passing track, being the third track from the south. It is 13½ feet from the center of the most southerly track to the center of the next track to the north, and from the latter point to the center of the track where the accident occurred is 14 feet. Certain freight cars were standing on the southerly track and on the easterly portion of Main street, and extending continuously at a distance of about 500 feet to the east. The car which stood on the easterly side of Main street in no manner obstructed traffic over the crossing. Flat cars approaching such crossing from the east were entirely hidden from view. Upon the evening in question, and for about an hour just prior to the accident, one of defendant's train crews was engaged in switching cars in the yards, and at the time of the accident defendant's engine was engaged in backing a couple of cars westerly over the crossing, the most westerly car being a flat car loaded with iron, and the other a box car. Numerous persons in the vicinity of the crossing heard the noise caused by the switching of the cars aforesaid. The testimony was conflicting as to the speed the train was being backed at the time of the accident, but 12 miles per hour was the probable speed. Both the plaintiff and his two daughters testified that, as they approached the railroad, they looked and listened for trains, but neither saw nor heard any. Plaintiff testified that it was impossible to see the approaching train until they had passed over the south track. As the automobile was passing down Main street, towards the tracks just prior to the accident, certain spectators who heard the approaching train endeavored to attract the attention of those in the car, but were unsuccessful. Plaintiff and the other occupants of the automobile had been riding around town for some time prior to the accident, and had crossed the defendant's tracks

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at said place, but the plaintiff's daughter Mattie testified that she did not know that defendant's train crew was switching cars in defendant's yard prior to the accident.

As stated by appellant's counsel, "the important question involved upon this appeal is whether or not plaintiff is barred from recovery because of contributory negligence." The question of the defendant's negligence as settled by the verdict of the jury is not controverted.

It is strenously insisted by appellant's counsel that, under the evidence, the driver of the automobile, as well as the plaintiff himself, was a matter of law guilty of negligence which bars his recovery. They contend that, on account of the obstructions to the view of the occupants of the automobile, it was incumbent upon plaintiff and his daughter to stop and listen for trains before attempting to make the crossing, and counsel cite and rely upon, as controlling in their favor, the case of West v. N. P. Ry. Co., 13 N. D. 221. 100 N. W. 254. The facts in that case are clearly differentiated from the facts in the case at bar. In that case it was held as a matter of law that plaintiff's servant, who was the driver of the team which was killed, was guilty of contributory negligence in attempting to cross defendant's tracks ahead of the train which he knew was coming, and must necessarily have been very close to the crossing at the time of the accident. In narrating the facts it was there said: "Frank Hayes, the driver of the team, * * * was familiar with the crossing on Lamborn avenue and the conditions above described. * * * He saw a train approaching on the main track about 1½ miles north. He went into the house, stopped there not over a minute, came out to the street where the team was standing, turned it around, and started it east towards the track. He drove the team on a trot clear down to and onto the track. When he crossed the west side of Chicago avenue, he looked north but did not see the train. He knew when he could not see it that it was very close to the crossing; knew it had not yet crossed; knew it was approaching, but thought from where he had first seen the train he had time to get over the crossing, and so did not slacken the horses' speed at all until they struck the track. As he was driving he looked and listened for the train. The wagon he was driving was an ordinary lumber wagon. * * * It is plain that Hayes was guilty of gross negligence, and that his negligence was the direct cause of the accident, and that the negligence of the appellant's trainmen

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in the particulars mentioned could furnish no excuse or justification for the reckless act of Hayes in attempting to cross in front of the approaching train. From the time Hayes crossed Chicago avenue until he reached the track, he knew all view of the train would be obstructed, and that he could not gauge its exact distance from the sense of sight, but must rely upon the sense of hearing alone. When 127 feet from the crossing, with his mind and attention fixed upon the fact that the train was approaching; with ocular proof that it had traveled from a point 1½ miles north to a point less than 1,380 feet from the crossing since he had first seen it less than three minutes before, and if the rate of speed was maintained it would be on the street in less than one minute; with knowledge that he could not see the train again until it emerged from behind the buildings and appeared at the crossing towards which both the train and his team were hurrying, that a stop of a minute at most would let it pass; with full knowledge of the danger of attempting to drive across in front of a train approaching at such a rapid speed and dangerously near—he took no precaution for his safety, but hastened on as if in a race to see which could first pass the point of intersection. The trains were not used to stopping at the crossing. He knew this because he relied upon the bell or whistle to warn him when the train would get to the crossing. The erections which obstructed his view of the train also prevented the train crew from seeing him. It was impossible, and he knew it would be impossible, for the train crew to see him on the crossing in time to stop the train and avoid a collision. * * * Hayes voluntarily and unnecessarily put himself and team in a place of known danger on the track in front of the train, and by so doing took the risk of accident. * * *" It was there held as a matter of law, under the facts aforesaid, that the failure to ring the bell or sound the whistle was not the cause of the accident, as the driver of the team had actual knowledge of the train's approach in ample time to have avoided the accident, and he knew without sound of bell or whistle all that he could have known had the alarm been sounded, and that under the circumstances it was his duty to stop and listen before venturing on the tracks, and that his failure so to do was negligence as a matter of law. The facts in the case at bar are widely different from those in the case relied upon. In the case at bar, testimony was introduced tending to show that plaintiff and his party had been riding around Towner during the evening, and had

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not seen any train or engine in the yards; that as they came down Main street to a point where they could view the track between the two elevators they looked, and saw no train coming; that as they approached the track, and when about ten feet south of the southerly track, the gear of the automobile was changed from high speed to low speed, and at this time they were listening for any sound of a train. The driver of the automobile testified that she neither saw nor heard any signs of the train and proceeded to cross the track.

Under these facts, was it contributory negligence as a matter of law not to have stopped the automobile before making the crossing in order to look and listen for approaching trains? Can it be said as a matter of law that a prudent person, under the like circumstances, would have stopped the automobile for the purpose of looking or listening for the approach of trains? We think these questions must be answered in the negative. While it doubtless is true that on account of the obstructions to their view the occupants of this automobile were in duty bound to exercise a higher degree of care for their safety than otherwise would have been required had such obstructions not existed, still we believe that, under the weight of authority and the better-considered cases, they cannot be held guilty of contributory negligence as a matter of law merely because they did not stop and listen before crossing the defendant's track. A person is bound to use care commensurate with the known or reasonably apprehended danger; but it is only in exceptional cases that a trial court is justified in taking from the jury the question of the exercise of such care. The fact that, if the automobile had been stopped, the occupants might have heard the approaching train, and thus have avoided the accident, is not decisive of their negligence. Fair-minded men might honestly differ, under all the facts as disclosed by the evidence, whether the exercise of such precaution was exacted of them. In the case of Coulter v. G. N. Ry. Co., 5 N. D., 568. 67 N. W. 1046, this court held that the question of plaintiff's contributory negligence was for the jury, and not for the court, to decide. This was a crossing case, and the facts disclosed that plaintiff at about dusk in the evening drove a team and wagon over a public crossing, and was struck and injured by a passenger train. The proof showed that a heavy snowstorm was raging at the time, which probably obstructed plaintiff's view of the approaching train. Plaintiff testified that he looked and listened

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but did not stop. The headlight on the engine was lighted, and there was no obstruction to plaintiff's view aside from the snow-storm. If he had stopped his wagon, it is apparent that he could have heard the approaching train, yet the court, as before stated, refused to hold as a matter of law that plaintiff was guilty of contributory negligence. In the recent case of Schwanenfeldt v. C., B. & Q. Ry. Co. (Neb.) 115 N. W. 285, the plaintiff, who was driving across a railroad track on a public street in a city, was run into by a backing train, and, in disposing of the question of plainriff's contributory negligence, it was said: "It appears from the evidence that the city ordinances restricted the speed of trains on this track to four miles an hour, and required warning to be given of the approach of trains by the ringing of the engine bell and the blowing of its whistle; that the train in that case was being backed up at the rate of of five or six miles per hour; that the engine was so far away from the car that became the front of the moving train as to make the signal of its approach therefrom of little advantage; that no such signal was heard by the plaintiff or his companion; and that nothing else was done to warn travelers of the approach of the train. The plaintiff was approaching on an upgrade at a jog trot, and at a speed estimated by the witness Drake of four miles an hour. It was not possible for him to see an approaching train until he passed the lot line and was within 17 feet of the track, so that his horse's head would be very nearly at the point of contact with the passing car at the earliest instant at which the train became visible to him. To say that this evidence establishes the contributory negligence of the plaintiff as a matter of law, we must hold, first, that the plaintiff should in the exercise of ordinary prudence, after the moving train came into view, have stopped his horse or jumped from his wagon in time to avoid the collision; or, second, that it was incumbent upon him to stop and look for an approaching train before he drove into the street. It seems to us that the question whether he might have stopped his horse in time or jumped from the wagon, or otherwise avoided the collision, after coming in view of the same, was one about which different minds might honestly disagree, and therefore proper to be submitted to the jury. * * * We think that different minds might honestly draw different conclusions as to whether plaintiff was guilty of any negligence after arriving at a place where he could see the approaching train. We are not prepared to hold as a matter

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of law that it was incumbent upon the plaintiff to stop and look before entering upon the street. The rule that a driver must stop and listen and look before crossing, when approaching a railroad, at an ordinary crossing, has not been adopted in this state. * * * We think the plaintiff was justified in relying upon the lack of warning of an approaching train, and that a jury might well hold that ordinary diligence, as well as a due regard for human life and limb, requires a railroad company, while using the public streets of a city, to give adequate notice of the approach of its trains, and that it would not be unreasonable to say that, in a case where it was backing trains so that the signal from the engine would be ineffective, such trains should be preceded by a flagman, or other means taken to warn the passers-by of their approach." In another place in the opinion it is said: "The question of negligence and contributory negligence is frequently a complex and difficult one, which can only be established by inferences drawn from primary facts. The proneness of human minds to differ in the observation of primary facts increases in geometrical ratio when it becomes necessary to draw inferences therefrom; and whether certain conduct constitutes negligence is usually held to be a question peculiarly suitable to be submitted to a jury. * * * That the degree of caution to be exercised by the plaintiff should have been proportioned to the degree of danger he should have anticipated will be generally admitted. In approaching this track, the plaintiff was charged with taking account of the extent and character of the danger; but we think he was not required to anticipate that the defendant would operate a train upon this track in a negligent manner, considering all the surrounding conditions, nor fail to give such warning of its approach as ordinary prudence demanded."

It would serve no useful purpose to review or cite the great number of authorities upon this question, and we shall content ourselves by a mere reference to a few of such cases. N. Y. S. & W. R. Co. v. Moore, 105 Fed. 725, 45 C. C. A. 21; Dougherty v. C., M. & St. P. Ry. Co., 20 S. D. 46, 104 N. W. 672; Guggenheim v. Railway Co., 66 Mich. 150, 33 N. W. 161; Union Pac. R. R. Co. v. Ruzicka, 65 Neb. 621, 91 N. W. 543. 7 Am. & Eng. Enc. Law, pages 427-436, contains an accurate and clear statement of the rule of law here involved, with copious citations of authority. We quote therefrom in part as follows: "At highway crossings a railway company is bound to exercise ordinary care to avoid in-

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juring persons upon the crossing; and the duty of persons using the crossing is to exercise the same kind of care. Those who attempt to cross a railroad track at a public highway crossing must exercise ordinary care, in view of all the surrounding circumstances, to avoid receiving an injury by collision with trains, but, in the very nature of things, the standard of such care cannot be absolutely fixed. In some jurisdictions, however, it is held that a failure to stop, look and listen before entering upon a railway track is not merely evidence of negligence, but is negligence per se, and, as such, will bar a recovery, unless it affirmatively appears that it did not proximately contribute to the injury. And so stringent is the rule in Pennsylvania that, when a driver cannot otherwise determine whether a train is coming, it seems he must get out and go forward to the track before attempting to cross with his vehicle, or take the risk of being held guilty of contributory negligence. But in other jurisdictions such a precaution is not necessary to constitute ordinary care; and the general rule is that a person about to cross a track must bear in mind the dangers attendant upon crossing, and vigilantly use his senses of sight and hearing in the endeavor to avoid injury. And if the traveler looked and listened, or did all that a prudent man would have done under the circumstances, it will not be said as a matter of law that he should have stopped; nor will a failure to stop, look, and listen be held negligence when the circumstances were such that an observance of these precautions would have been unavailing as a guard against injury. Hence a failure to stop, look, and listen is not contributory negligence per se. The traveler, however, is rigidly required to do all that care and prudence would dictate to avoid injury, and, the greater the danger, the greater the care that must be exercised to avoid it. And where because of physical infirmities, darkness, snow, fog, the inclemency of the weather, buildings, or other obstructions and hindrances, it is more than usually difficult to see or hear, greater precaution must be taken to avoid injury than would otherwise be necessary; and, under such circumstances, there can be no excuse for a failure to adopt such reasonable precautions as would probably have prevented the injury."

Our conclusion upon this phase of the case is, in brief, that under all the circumstances surrounding the plaintiff and the other occupants of the car, and in view of the testimony that they did not know of the switching that was going on in the defendant's yards

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at said place on the evening in question, and that they looked and listened just before attempting to make the crossing for the approach of trains and neither saw nor heard any, the trial court did not err in holding that it was within the province of the jury to say whether plaintiff and his daughter at and just prior to the accident were in the exercise of such care as an ordinarily prudent person would be expected to exercise under the like circumstances. In other words, it cannot be said as a matter of law that they, or either of them, were guilty of contributory negligence.

Appellant next complains of the trial court's definition of "proximate cause," and also of the meaning of "contributory negligence." The jury was charged "that contributory negligence meant the want of the exercise of ordinary care which proximately causes the injury complained of." They were also charged that "proximate cause, within the meaning of the definition of the instruction of the court, is such a cause as operates to produce particular consequences without the interference of any independent, unforseen cause, without which the injury would not have occurred; or, in other words, proximate cause is the true, probable and natural cause." Appellant contends that there was prejudicial error in these instructions. They argue that the jury was told, in effect, that unless plaintiff was guilty of negligence that proximately caused the injury he was entitled to recover. They say, "If plaintiff's negligence and acts, combined with the negligence and acts of defendant, were responsible for the collision, still, under this charge, the jury must find for plaintiff." In other words, they contend that the instructions in effect informed the jury that, in order to bar plaintiff's recovery, the contributory negligence must have been the immediate and sole cause of the accident, and they cite and rely on Reitveld v. Wabash R. Co., 129 Iowa, 229, 105 N. W. 515, where, in speaking of a similar instruction, it was said: "This was erroneous in the form in which it was given, in that it virtually announced the rule of comparative negligence which does not prevail in this state. Of course, the plaintiff's negligence must be such as contributes proximately to the injury; but, if it does so in whole or in part, in any manner or in any degree, there can be no recovery on his behalf." The case just quoted from no doubt states the correct rule regarding contributory negligence and the effect thereof upon plaintiff's right of recovery, but the court was there dealing with the question of proximate cause as applied to contri-

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butory negligence, while in the case at bar the trial court gave the above definition of the term "proximate cause" in connection with the instructions regarding defendant's negligence. We have examined the entire instructions with much care, and are agreed that the same, when taken as a whole, contain a correct definition of proximate cause and of contributory negligence and of the rules of law applicable thereto. When the instructions are considered as a whole, we do not think it can be said that the jury was misled regarding the rule of contributory negligence. It is true that in one part of the instructions the court erroneously charged the jury "that contributory negligence is a want of the exercise of ordinary care which proximately causes the injury complained of." But later in the charge the jury was correctly instructed as follows: "I charge you that the act or omission must contribute, in order to be contributory negligence to the happening of the act or event causing the injury." And earlier in the instructions the jury was properly instructed that, if the plaintiff or his daughter was actually guilty of negligence which contributed to the accident then they must find for the defendant. And still in another place in the instructions the jury was told, in effect, that plaintiff and his daughter, in order not to have been guilty of negligence, must have operated the automobile in the manner that a reasonable and ordinarily prudent person would have operated it under the like circumstances, and that they should have taken the same precaution in crossing the track that an ordinarily prudent and reasonable man would have taken under the same circumstances, and, if the plaintiff and his daughter did observe such caution and did so act, they were not guilty of negligence. If they did not so act, they were guilty of negligence, and, if the plaintiff himself or his daughter, or either of them, were actually guilty of negligence in the operation of the machine at the time of the collision, or immediately prior thereto, or in crossing at the time shown by the evidence in this case, then the plaintiff cannot recover, and the verdict should be for the defendant. In view of these explicit instructions, it is difficult to see how the jury could have been misled by the giving of that portion of the instruction complained of.

Appellant excepted to that portion of the charge to the jury as follows: "I charge you that the act or omission must contribute, in order to be contributory negligence, to the happening of the act or event causing the injury, and, if the act or omission merely in-

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creases or adds to the extent of the loss or the injury, it will not have that effect." It is said that the foregoing had no application to this case, and tended simply to mislead and confuse the jury. We think counsel are clearly correct in their contention that said instruction was inapplicable to the case, but we fail to see how it could have misled or confused the jury. The first portion thereof was a correct statement of the law, but the latter clause was wholly inapplicable to the facts as disclosed by the evidence. There was no claim nor suggestion that the entire damage done to the automobile was not caused solely by the collision; in other words, it was not contended that plaintiff, by any fault of his own, aggravated the consequences of the injury, but the contention was that he contributed directly to such injury by his own or his daughter's negligent act, and hence there was no basis for the instruction as given. Its giving, however, was not prejudicial error.

Appellant predicates error upon the refusal to give certain instructions requested by it. Without setting out such requests in this opinion, it is sufficient to say that they were properly denied. The first request had no support in the evidence, and each of them amounted, in effect, to a directed verdict upon the ground of contributory negligence, and, as before stated, this question was properly one for the jury to determine.

Numerous alleged errors are complained of in the admission and rejection of testimony, but the manner in which they are presented in appellant's brief does not require us to notice them. Rule 14 (91 N. W. 8) of this court provides that the brief shall contain "an assignment of errors, which need follow no stated form, but must in a way as specific as the case will allow, point out the errors objected to, and only such as he expects to rely on and ask this court to examine. * * * In the body of his brief appellant shall present his reasons in support of each error assigned, with a concise statement of the principles of law applicable thereto with authorities supporting the same, treating each assignment relied upon separately, and such errors as are merely assigned and not supported in the body of the brief by reasons or authorities will be deemed to have been abandoned." In the preparation of their brief counsel for appellant has failed to comply with the foregoing rule, and hence we refrain from noticing the assignments upon which these alleged errors are predicated.

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This brings us to appellant's last assignment of error, which challenges the correctness of the order retaxing the costs in the court below. It is contended in brief that certain witness fees were improperly taxed as follows: Anton Strand, $8.10; T. H. Smith, $46.50; Frank Swickard, $24.50. As to the fees taxed for the witness Strand, we think the order complained of was correct, but, as to the fees of Smith and Swickard, the order was clearly erroneous, as $10 per day was taxed for these witnesses. We know of no law permitting the taxation of these witness fees in excess of $2 per day, and the judgment should therefore be modified by deducting therefrom the sum of $40, and, as thus modified, the judgment appealed from will be affirmed. All concur.

(117 N. W. 531.)

LOUIS KASLOW v. E. J. CHAMBERLAIN.

Opinion filed December 2, 1907.

On rehearing, September 12, 1908.

New Trial — Motion — Absence of Judge on Return Day.

1. A motion for a new trial was duly noticed for hearing on a day and hour named at chambers of the judge of the district court of the proper district. On the day set for the motion the judge was not present, and no proceedings were had. *Held,* that, in the absence of an order continuing the hearing or a written stipulation to that effect, the motion went down, and could not again be taken up without new notice or formal consent of the party on whom it was served.

Same — Verbal Stipulation.

2. Courts cannot take jurisdiction to hear a motion for a new trial on a verbal agreement that it may do so, claimed by one party, and denied by the other.

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

Action by Louis Kaslow against E. J. Chamberlain. From an order setting aside a judgment and granting defendant a new trial Plaintiff appeals.

Reversed.

Anderson & Traynor, for appellant.

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It must appear of record that motion was made on the date set in the notice. 15 Am. & Eng. Enc. Law (1st Ed.) 914, note.

Stipulation must be in writing. Section 502, Revised Codes 1905; Rule 21, Dist. Court Rules; Chamberlain v. Hedger, 73 N. W. 75; McLaughlin v. Claussen, 48 Pac. 497; Sapp v. Aiken, 28 N. W. 24; State v. Stewart, 37 N. W. 400.

Burke & Middaugh, for respondent.

The court will not permit a party to be misled, deceived or defrauded by means of an oral stipulation. 20 Enc. Pl. & Pr. 654; Mutual L. Ins. Co. v. O'Donnell, 40 N. E. 787; Henderson v. Merritt, 38 Ga. 232; Montgomery v. Ellis, 6 How. Pr. 328; Stinnard v. New York F. Ins. Co., 1 How. Pr. 169; Harris v. Ensign, 1 How. Pr. 103; Shadwick v. Phillips, Col. & C. Gas. 471; Griswold v. Lawrence, 1 Johns. 507; Phillips v. Wicks, 38 N. Y. Supr. Ct. 75; Capt. v. Stubbs, 68 Texas, 225; Williams v. Huling, 43 Texas, 120; Burnham v. Smith, 11 Wis. 258.

Spalding, J. On the 23d day of June, 1905, judgment was entered on a verdict in favor of the plaintiff and appellant and against the defendant and respondent in the district court of Ramsey county. Notice of the entry of this judgment was served June 24, 1905. June 26, 1905, the defendant served notice of intention to move for a new trial. Statement of the case was settled by the judge on stipulation of attorneys on the 23d day of October, 1905, and on the 11th day of October, 1905, the defendant served notice on plaintiff's attorneys that on the 19th day of October, 1905, he would move the court for an order granting a new trial. The hour set in the notice for the making of the application to the court was 10 o'clock in the forenoon of said day, and the notice did not contain the usual phrase, "or as soon thereafter as counsel can be heard." On the day set for the making of the motion for a new trial, the judge of the court was not present at the time and place set, so the motion was not made or presented to the court. No further proceedings were had in the matter until June 28, 1906, when execution was issued on the judgment, and returned on the 26th of August, 1906, unsatisfied. October 29, 1906, the plaintiff filed written objections to the hearing of a motion for a new trial, and, in support of and in opposition to said objections, affidavits were filed by the respective parties. On the 20th of November,

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1906, the court made an order granting a new trial, which was subsequently modified and amended on the 22d of December, 1906. Such order vacated, annulled, and set aside the judgment. From this order the plaintiff appeals. A discussion of two questions is all that is necessary to determine this appeal. They are: What was the effect of the failure to bring on the motion at the time set? Was a verbal stipulation, if made as contended by defendant, sufficient on which to base a motion for a new trial, the plaintiff denying such stipulation?

1. It appears that the original motion for a new trial was returnable on a day and hour named. The day was not a day of a regular term of court, nor a day designated by the rules of the court for hearing motions, but was at chambers outside any term of court. We are of the opinion that the motion in the form in which it was noticed was abortive, and went down when not heard on the day for which it was noticed. The statute requires eight days' notice of motion for a new trial, and that the notice shall specify the time and place of hearing. It also requires it to be heard at the earliest practicable period after the service of notice of intention. Revised Codes 1905, section 7067. The authorities are few on this question, but we find none on a notice in form like the one under consideration, which hold that the motion stands over to a later day in the absence of an order by the court or stipulation of counsel. Ireland v. Spalding, 11 Mich. 455; Cheetham v. Howell, 6 Yerg. (Tenn.) 311; Gwin v. Vanzant, 7 Yerg. (Tenn.) 143; Vernovy v. Tanney, 3 How. Prac. (N. Y.) 359; Rogers v. Toole, 11 Paige (N. Y.) 212. There are cases holding that when an order is returnable at a fixed time or "as soon thereafter as counsel can be heard," or on a motion day or on the first day of a term of court, and is not heard on the day named, it goes over until the next day or the next motion day or for a reasonable time. Platt v. Robinson, 10 Wis. 128; Stephens v. Kaga, 142 Ind. 523, 41 N. E. 930; Allen v. Beekman, 42 Wis. 185. But it has also been held that, when a motion is not heard on the day named in the notice and goes over, it is error to act upon it, in the absence of the adverse party without further notice. Fischer v. Hanna, 8 Colo. App. 471, 47 Pac. 303. The object of requiring notice is to inform the opposite party of the time and place of the hearing, and enable him to prepare and be in attendance and present his reasons why it should not be granted. The motion

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is not in court until either filed or presented orally to the judge. It can hardly be expected that the opposite party should remain in attendance on the court constantly after the day set in the notice for the hearing, and until the moving party sees fit to present it. To require this would be to do away with the purpose and object of the notice, and would not be in harmony with the purpose of the practice act. If, however, it is contended that the motion might be heard without further notice within a reasonable time, it can scarcely be held that one year is a reasonable time.

2. Affidavits were used on the part of the respondent to show a verbal stipulation that no advantage would be taken by the appellant of the absence of the judge on the day set for the hearing of the notice, and that it might be presented to the judge by respondent in the absence of the appellant and his counsel, and considered without briefs or argument. Appellant admits that he agreed not to take advantage of the absence of the judge if it was brought on for hearing within a reasonable time, but denies that he agreed that it might be submitted without briefs or argument. It appears that there was a misunderstanding between counsel. This court cannot undertake to settle misunderstandings of a verbal agreement. The statute and the rules of the court contain provisions intended to protect parties against just such misunderstandings. Revised Codes 1905, section 502, provides that an attorney and counselor has power "(2) to bind his clients to any agreement in respect to any proceeding within the scope of his proper duties and powers; but no evidence of any such agreement is receivable, except the statement of the attorney himself, his written agreement signed and filed with the clerk, or an entry thereof upon the records of the court." Rule 21 of the district court provides that "no private agreement or consent between parties or their attorneys in respect to the proceedings in a cause shall be binding unless the same shall have been reduced to the form of an order of consent and entered, or unless the evidence thereof shall be in writing, subscribed by the party against whom the same shall be alleged or by his attorney or counsel, where one shall have appeared for him in the action." That the statute and rule quoted are intended to apply to just such cases cannot be doubted. In construing section 467, Comp. Laws (Revised Codes Civ. Proc. 1903, section 507), the supreme court of South Dakota in Chamberlain v. Hedger, 10 S. D. 290, 73 N. W. 75, said, in speaking of verbal stipulations

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shown by affidavit: "But as they were not reduced to writing, nor entered upon the records of the court, they are not binding on respondents, and cannot be considered by this court." In McLaughlin v. Clausen, 116 Cal. 487, 48 Pac. 487, the supreme court of that state says: "If a party against whom a verbal stipulation is invoked denies that such a stipulation was made, the court will not hear the parties for the purpose of settling the dispute." The points in dispute in the case at bar are vital, and appellant denies that the verbal stipulation covered them. The court had no power to order a new trial of its own motion one year after verdict and entry of judgment. This is established in Flugel v. Henschel, 6 N. D. 205, 69 N. W. 195. It is possible that the judgment in the case at bar is excessive, but we are precluded by the record from examining this question. Much as we might be disposed to relieve respondent from it, as we view the law, we cannot do so.

Respondent claims that the court should not permit a party to be misled, deceived, or defrauded by means of an oral stipulation and submits authorities in support of this contention. We think his authorities are not in point. In the case at bar it is not conceded that the stipulation covered the points in issue, and the record discloses no fraud on either side. It is clear that the district judge exceeded his legal powers when he considered and determined the motion for a new trial on the strength of a verbal stipulation claimed by respondent and denied by appellant.

Other points are discussed in the briefs, but they become immaterial on our view of the case.

The order granting a new trial is reversed. All concur.

ON REARGUMENT.

A rehearing was granted in this case, and additional briefs were filed and argued. After careful consideration of all the points urged, we see no reason for any but verbal changes in the opinion on file.

The respondent contends that it was verbally stipulated that no advantage of the absence of the judge would be taken, and that the motion might be submitted without briefs or argument. The appellant insists that it was to be presented to the court within a reasonable time, and that no agreement or understanding was had as to briefs or argument. It therefore appears that the contentions of the parties are in conflict as to the time and manner of the

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proposed renewal of the motion. We see no way to relieve the respondent from this misunderstanding. If respondent's contention is correct, appellant was entitled to no further notice whatever. If appellant is not mistaken, even if the motion was presented within a reasonable time, he was entitled to some kind of notice so he might appear and present his objections.

Respondent insists that appellant fails to deny making the stipulation as understood by him, because in one of his affidavits his attorney alleges that no agreement was ever entered into in the presence of the court. We understand this to be an allegation intended to be independent of and in addition to the others, and used to foreclose any question as to a verbal stipulation being valid, as it might be if made in the presence of the court. This does not present a question as to the enforcement of a verbal stipulation, the terms of which are agreed upon by the parties, but one of determining or refusing to determine what was agreed upon verbally, when the parties disagree as to this.

We unanimously conclude that the former opinion must be adhered to. All concur.

(117 N. W. 529.)

State of North Dakota v. Moses Minor.

Opinion filed September 10, 1908.

Criminal Law — Malicious Mischief — "Maliciously."

1. The word "maliciously," as used in section 9315, Rev. Codes 1905, relating to the crime of "malicious mischief," is to be given a restricted meaning, and imports that the act to which it relates must have resulted from actual ill-will or revenge. It implies an intent to vex and annoy the owner of the property injured.

Same — Malice Essential to the Offense.

2. Malice is an essential ingredient of the crime of malicious mischief, and a conviction cannot be sustained in the absence of any evidence disclosing such malice.

Same — Evidence.

3. Evidence examined, and *held* not sufficient to warrant the conviction of appellant.

Appeal from District Court, Williams County; *Goss, J.*

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Moses Minor was convicted of malicious mischief, and he appeals.

Reversed.

Palda & Burke (Engerud, Holt & Frame, of counsel), for appellant.

Acts done in good faith are not malicious in a legal sense. State v. Flynn, 28 Iowa, 26; Sattler v. People, 59 Ill. 68; State v. Newkirk, 49 Mo. 84; State v. Hause, 71 N. C. 518; Goforth v. State, 8 Humph., 37; Palmer v. State, 45 Ind. 388; The King v. Langford, 1st C. & M., 602.

T. F. McCue, Attorney General; *R. N. Stevens,* Assistant Attorney General, and *Van R. Brown,* State's Attorney, for respondent.

An unlawful act intentionally done, without cause, is malice. State v. Grassler, 74 Mo. App. 313; Commonwealth v. York, 50 Mass. 93; State v. Foote, 71 Conn. 737.

Fisk, J. The defendant was convicted in the district court of Williams county of the crime of malicious mischief, and from the judgment imposing a fine against him of $25, and costs taxed at $50, he prosecutes this appeal.

The information, omitting the formal parts, is as follows: "On the 7th day of September, 1905, at the county of Williams, in the state of North Dakota, one Moses Minor, late of the county of Williams and state aforesaid, did commit the crime of malicious mischief, committed in the manner following, to-wit: That at the said time and place the above-named defendant, willfully, wrongfully, unlawfully, and maliciously did injure, deface, destroy, and remove a certain building then and there situate upon lot 16 of block 1 of the plat of Wheelock, N. D., and did then and there willfully and wrongfully, unlawfully and maliciously, by removing from shelter in said building, and otherwise, and then and there injure, deface, and destroy certain furniture, fixtures, and machinery, all of said property then and there injured, defaced, destroyed, and removed as aforesaid being then and there the personal property of one A. E. Hughes, and part of the printing plant owned by A. E. Hughes, at Wheelock, N. D., said injury to said personal property being then and there done with malicious intent had in him, said Moses Minor, to deprive said A. E. Hughes of the benefit thereof." The evidence disclosed that defendant is and was the owner of the lot upon which

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said building was situate; he having purchased the same in December, 1904. Some time prior to such purchase the complaining witness Hughes moved the building thereon, under a verbal license of the then owner. It was and is defendant's contention that when he purchased said lot he had no notice that Hughes claimed to be the owner of the building, and he believed that by his purchase he acquired title to the building, as well as to the lot upon which it rested. A dispute naturally arose between these parties regarding the ownership of the building. Defendant caused notice to be served upon Hughes to vacate the premises, and, the latter not complying with such notice, defendant proceeded to and did enter said building, and removed certain personal property therein contained and belonging to Hughes from the building, leaving the same upon the public street, and he then proceeded to and did remove said building to another lot owned by him.

Appellant's assignments of error are grouped together, and discussed in his brief under the general proposition that the evidence does not sustain the charge embraced in the information, his chief contention being that the evidence fails to show any malice on the part of the defendant. We are entirely clear that such contention is sound. The defendant's conduct, in so far as the evidence discloses, was entirely consistent with the utmost good faith on his part. He did nothing from which it can even be inferred that he intended to do wrong, or to do anything except what he believed he had a legal right to do. He acted openly and not secretly, and there is not a scintilla of evidence showing or tending to show that his purpose was to vex or annoy the prosecuting witness, or to injure him in his property rights. Section 9315, Rev. Codes 1905, defining the offense of malicious mischief, provides: "Every person who maliciously injures, defaces or destroys any real or personal property not his own * * * is guilty of a misdemeanor. * * *" Under this statute malice is an essential ingredient of the offense, and we think that the word "maliciously" has a restricted meaning from that given to it generally in criminal statutes, and imports a wish or desire to vex, annoy, and injure the owner or possessor of the property. The authorities are somewhat divided upon the proper construction of such statutes, but the prevailing rule, and the one which meets with our approval, is set forth in 25 Cyc. 1676, as follows: "Malice is an essential ingredient of an offense of malicious mischief both at common law and under almost all of the statutes de-

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fining the offense. As distinguished from the meaning attributed to 'maliciously,' as ordinarily employed in criminal statutes, as equivalent to wrongfully, intentionally, and without just cause or excuse, the word has been held in many statutes, directed against the unlawful destruction of property, to have a restricted meaning peculiar to such statutes, implying that the act to which it relates must have resulted from actual ill-will or revenge. This distinction first arose under the English statutes, but the statutes of the United States have been regarded as sufficiently like those of England to have been given the same construction in many cases." To the same effect see 19 Am. & Eng. Enc. of Law, 641, and cases cited. Also 2 Bish. Cr. Law, section 996, note 10; Nutt v. State, 19 Tex. 340; State v. Boies, 68 Kan. 167, 74 Pac. 630; Com. v. Williams, 110 Mass. 401; State v. Johnson, 7 Wyo. 512, 54 Pac. 502; Rose v. State, 19 Tex. App. 470; State v. Flynn, 28 Iowa, 26; Barlow v. State, 120 Ind. 56, 22 N. E. 88.

Applying the above rule of construction to the evidence in this case, we are required to hold that the state wholly failed to establish the charge contained in the information, and we therefore conclude that the judgment appealed from must be reversed, and a new trial ordered. All concur.

(117 N. W. 528.)

William Strehlow v. Donald McLeod.

Opinion filed July 8, 1908.

On rehearing September 11, 1908.

Chattel Mortgages — Conversion by Mortgagee Extinguishes Lien — Foreclosure.

1. In an action brought to foreclose a chattel mortgage upon certain grain, a warrant was issued under the provisions of section 7513, Rev. Codes 1905, pursuant to which all the grain grown on the land described in the mortgage was seized by the plaintiff, and subsequently, and before trial, the same was wrongfully converted by a sale thereof. Such grain was the sole property covered by the mortgage, and its wrongful conversion by plaintiff extinguished the lien of the mortgage, and thereby the cause of action for such foreclosure ceased to exist.

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Set-off and Counterclaim — Confusion of Goods — Accrual of Cause of Action.

2. At the time of such seizure, other grain of the same kind, which had been intermingled by defendant with that covered by the mortgage, was also seized and converted in like manner. In his answer defendant pleaded a counterclaim for damages, based upon such conversion, and was allowed to recover in the lower court. *Held* error, as the cause of action contained in this so-called counterclaim had not accrued at the time the action was commenced.

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

Action by Wiliam Strehlow against Donald McLeod. Judgment for defendant, and plaintiff appeals.

Reversed and dismissed.

Engerud, Holt & Frame, for appellant.

In the foreclosure of a mortgage on property in defendant's possession, mortgagor cannot gainsay his act in giving the mortgage. Redman v. Bellamy, 4 Cal. 247; Land Association v. Viera, 48 Cal. 572; Tartar v. Hall, 3 Cal. 263; Carson v. Cochran, 53 N. W. 1130; Barber v. Harris, 15 Wend. 615; Strong v. Waddell, 56 Ala. 471; Wyckoff v. Gardner, 20 N. J. L. 556; Cobbey on Chattel Mortgages, section 785; Harvey v. Harvey, 13 R. I. 598; Adams v. Wildes, 107 Mass. 123; Willard v. Rice, 52 Mass. 493.

Reservations of titles to crop to secure performance of contract may be waived. Tanner v. Engine Co., 7 So. 187; Gorham v. Holden, 9 Atl. 894; Hinchman v. Railway Co., 44 Pac. 867; Thomas v. Lewis, 15 So. 830; Holt Mfg. Co. v. Ewing, 42 Pac. 435; Kearney Milling & Elevator Co. v. Railroad Co., 66 N. W. 1059; Van Winkle v. Crowell, 146 U. S. 42.

Comingling mortgaged goods with those not mortgaged, without mortgagee's consent, warrants the latter in holding the entire mass. Adams v. Wildes, 107 Mass. 123; Willard v. Rice, 52 Mass. 493; Merchants' National Bank v. McLaughlin, 2 Fed. 128; Burns v. Campbell, 71 Ala. 271; Samson v. Rose, 65 N. Y. 411; Dunning v. Sterus, 9 Barb. 630; Krith v. Rogers, 101 N. C. 263; Jones on Chattel Mortgages, Par. 481; Cobbey on Chattel Mortgages, Par. 765.

For wrong done under a warrant of attachment, a separate action is necessary. Jewett Bros. v. Huffman, 14 N. D. 110, 103

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N. W. 408; Sackett & Co. v. Partridge, 4 Iowa, 416; Churchill v. Fullam, 8 Iowa, 45; Elliott v. Mitchell, 3 Green 237; Vieths v. Hogge, 8 Iowa, 163; Abbott v. Whipple, 4 Green, 320; Burrows v. Lehndorff, 8 Iowa, 96.

V. R. Lovell, for respondent.

Until division of crop, where lessor reserves title, chattel mortgage will not attach. Hawk v. Konouzski, 10 N. D. 37, 64 N. W. 563.

Bailee may maintain trover for the conversion of bailed property. 28 Am & Eng. Enc. Law (2d Ed.) 676.

In an action prematurely brought, a supplemental complaint cannot base a new cause on facts occurring pending the action. 21 Enc. Pl. & Pr. 18.

FISK, J. The record in this case presents an anomalous condition. The action was brought in the district court of Cass county for the foreclosure of a chattel mortgage, executed and delivered by the defendant to the plaintiff, upon an undivided one-half interest in certain barley raised during the year 1905, on land described in the complaint. There is no dispute as to the giving of the mortgage, or as to the existence of the indebtedness secured thereby. The complaint is in the usual form, and the answer, after admitting the execution of the notes and chattel mortgage, alleges in effect that the grain grown on the land described in the mortgage is the property of one E. L. Young, the owner of said land, and that defendant farmed said land during said year under the ordinary farm contract, by the terms of which all title to the crops produced thereon during said year should be and remain the property of the said Young, as security for the payment by the defendant to the said Young of all advances made by Young to him, and all indebtedness due from him to the said Young, the title to all such crops to remain in said Young until a settlement was had between them on account of all matters arising out of the farming operations for that year, and that such contract contained a stipulation that, until such settlement and the payment of all such advances, the title should remain in said Young. It further alleges that no such settlement had ever taken place. By the terms of this contract Young was to pay the defendant, by way of compensation for his services, the one-half of the crop raised on said

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tract during said season, but such payment was not to be made until defendant had fully performed the terms of the contract on his part to be kept and performed. The answer further alleges that, at or about the time of the commencement of the action, the plaintiff seized and took into his possession a large amount of barley, some of which was grown on land other than that described in the mortgage, but owned by the said Young, and which grain was raised under the terms of said contract; the title thereto being in the said Young. It also alleges that at the time and place of such seizure barley was worth the sum of about 35 cents per bushel, and that by reason of the facts aforesaid the defendant was damaged in the sum of $350. The plaintiff served a reply to the new matter contained in said answer, and later a supplemental reply was served pleading an estoppel as against the defendant from asserting that anyone, other than the defendant, was the owner of such grain, and further alleging that since the service of the previous reply, and on or about April 19, 1906, the said Young demanded one-half of the barley seized by the sheriff in this action, and that such demand was complied with by delivering same to him. The trial court denied plaintiff any relief, and gave defendant judgment on his counterclaim for the sum of $101.80 and interest, and the case is here for trial de novo.

The proof shows that there were about 936 bushels of barley seized and taken into the possession of the sheriff under a warrant issued pursuant to section 7513, Revised Codes 1905. About five-elevenths thereof was grown on the land described in the chattel mortgage, and the remainder upon other land owned by Young and farmed by defendant under said farm contract. At the time the grain was threshed the defendant intermingled the same by placing it in one bin or granary on the farm. The undisputed proof shows that some time after its seizure Young demanded from the plaintiff one-half of said grain, and the same was delivered pursuant to the demand. The proof also shows that some time prior to the trial the plaintiff sold the remaining portion to an elevator company. We therefore have the strange anomaly of the plaintiff seeking to obtain a judgment in foreclosure under this chattel mortgage after the property has been sold and converted by him; and defendant asserts that the chattel mortgage never attached to the grain, for the reason that he, as mortgagor, never acquired any title therein, and that the title thereto is in said Young. At the same time he

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asked for and was given a judgment upon his so-called counterclaim for a portion of the grain, upon the theory that he was the owner of said grain, and that the same was, since the commencement of the action, wrongfully seized and converted by the plaintiff. As we view it, but two propositions are necessarily involved in this controversy. First, plaintiff's right to maintain his action; and, second, defendant's right to maintain his counterclaim. Other interesting questions are presented by the record involving the rule of estoppel, also the ownership of the grain, and the relative rights of the parties to the portion thereof grown on land other than that described in the mortgage, and which was by defendant intermingled with the grain covered by the mortgage, etc.; but our conclusions upon the propositions first stated render it unnecessary to notice these questions at this time. They may arise later in other proceedings between the parties, and any expression of our views at this time would merely amount to dicta. We are convinced that, by the sale and conversion of the grain during the pendency of the action, plaintiff's cause of action for the foreclosure of the mortgage, conceding that he had a cause in the beginning, was thereby destroyed. There was nothing thereafter left upon which to foreclose, and a judgment of foreclosure would have been fruitless and meaningless. It would be similar to a foreclosure under a mortgage covering property which had been totally burned or otherwise put out of existence. By the sale and consequent conversion of the barley the lien of the mortgage, if it had ever attached, ceased to exist. This is self-evident. The relief prayed for by plaintiff was therefore properly denied.

This brings us to a consideration of defendant's counterclaim, upon which he was allowed to recover an affirmative judgment against the plaintiff. Having, in effect, alleged ownership and right of possession in Young of the grain in controversy, it would seem that his only cause of action, if any, would be one for damages, to his contingent or conditional interest or estate in the property. Both he and Young might maintain an action against the plaintiff for damages but their recovery would necessarily be limited to the value of their respective interests in the grain. Of course both could not recover its full value. Whether such actions would at common law be designated as trover, or some other form of trespass on the case, is immaterial. But however this may be, we are entirely

clear that the defendant's cause of action for damages for the conversion could not be pleaded as a counterclaim in this action, for it was not in existence at the time the action was commenced. The grain was seized under a warrant issued in the action, and this was necessarily subsequent to the commencement of the action. The argument of respondent's counsel that the provisions of section 7515, Revised Codes 1905, relating to the conditions of the undertaking required to be given by the plaintiff before a warrant may issue for the seizure of the property, contemplate that a counterclaim of this character is permissible does not meet with favor by this court. Said statute provides that the conditions of such undertaking shall be to the effect "that if the defendant recovers judgment, the plaintiff will pay all costs that may be awarded to the defendant, and all damages which he may sustain by reason of any seizure under the warrant." This does not contemplate that damages, by reason of seizure under the warrant, may be adjudicated in the action in which such undertaking is given, and it in no manner changes the universal rule that a counterclaim must be restricted to a cause of action in existence and owned by dedefendant at the time of the commencement of the action in which such counterclaim is pleaded. Said section 7515 in all essential particulars is identical with section 6944, providing for undertakings in attachment proceedings. While it was held in the early case of Reed v. Chubb Bros. et al., 9 Iowa, 178, that, "When the affidavit for attachment and the bond are filed, and the writ sued out at the commencement of the action, if the suit is wrongfully sued out, any damages sustained by the defendant therefrom constitute a claim held by him at the commencement of the suit, in such a sense that the same may be set off against the plaintiff's demand in the same action," this case seems to have been overruled in the late case of Youngerman v. Long, 95 Iowa, 185, 63 N. W. 674, and the rule announced in the latter case is uniformly recognized and enforced. 1 Bates, Pleadings, Practice, Parties and Forms, page 379, and cases cited. 19 Enc. Pl. & Pr. 760, and cases cited.

It is stated in respondent's brief that no objection was made to this counterclaim in the court below. It is true plaintiff's counsel did not ask to strike it out, and they served a reply thereto, but the record discloses that at the trial they objected to all evidence in any way tending to prove the same. We think this sufficient.

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Our conclusions are, therefore, that the judgment upon the so-called counterclaim was erroneous and must be reversed and the action dismissed, and it is so ordered. All concur.

ON PETITION FOR REHEARING.

Since the foregoing opinion was filed, counsel for appellant have presented a petition for rehearing, in which they contend that there is no proper evidence to support the conclusion that, since the action was commenced, and prior to the trial, appellant had converted the grain covered by his mortgage by a sale thereof. In such petition counsel direct our attention to the testimony drawn out on cross-examination of plaintiff over proper objections, and they contend that this is the only evidence that the barley seized under the warrant had been disposed of. If counsel were correct in this contention, we think their argument would be unanswerable. But they have evidently overlooked the fact that later in the trial plaintiff was called as a witness for defendant, and without any objection whatever they proved by his testimony that he had sold the grain to Walker & Huyck, elevatormen. This testimony, coming in as it did without objection, is, we think, fatal to plaintiff's recovery. The petition is therefore denied. All concur.

(117 N. W. 525.)

G. B. NYSTROM *v.* CHARLES F. TEMPLETON, JUDGE OF THE FIRST JUDICIAL DISTRICT.

Opinion filed July 17, 1908.

Writ of Prohibition — Vacating Judgment.

1. On the facts disclosed by the record, application for a writ of prohibition is denied.

Appeal and Error — Remittitur — Loss of Jurisdiction.

2. Where a remittitur has been regularly issued and transmitted to the district court, the appellate court has lost jurisdiction; but, when irregularly, inadvertently, or erroneously issued, such court does not lose jurisdiction, but may recall for the purpose of correcting any error or mistake.

Application by G. B. Nystrom for writ of prohibition to Charles F. Templeton, Judge of the First Judicial District.

Writ denied.

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B. G. Skulason, for appellant.
Scott Rex, for defendant.

SPALDING, J. This is an application for an alternative writ of prohibition, having for its purpose the restraining of the judge of the First judicial district from vacating or setting aside a certain judgment of the district court in and for Nelson county in an action pending therein in which one G. B. Nystrom is the plaintiff and John Lee the defendant. The facts necessary to an understanding of the application are as follows:

On an appeal from a judgment of the district court in the case of Nystrom v. Lee, 16 N. D. 561, 114 N. W. 478, this court reversed the judgment and granted a new trial for the purpose of assessing the damages, but granted no new trial on the main contention of the parties. The clerk of this court inadvertently notified counsel for the defendant that a new trial of the case was ordered. This notice was erroneous, in not stating that a new trial was only granted as to one issue, and that a minor one. Counsel for the defendant was thereby misled, and, supposing a new trial was granted on all issues, made no application for a rehearing, and only learned of the mistake after the remittitur had been received from this court by the clerk of the district court. Judgment was immediately entered in the district court in conformity with the order of this court, without giving defendant's counsel notice or time to apply for a recall of the remittitur to enable him to submit an application for a rehearing. Counsel for the respondent made application to the district court to have the judgment so entered vacated, for the purpose of enabling him to apply to this court for a recall of the remittitur and a rehearing. That court has not taken final action upon such application; but, doubtless upon an intimation from this court that it would be glad to entertain an application for a rehearing, it indicated to the parties that it would vacate the judgment, but, as plaintiff contended that that court had no power to do so, he was allowed an opportunity to apply to this court for this writ.

It is well established that, where a remittitur has been regularly issued and transmitted to the district court, the appellate court has lost jurisdiction; but the cases are uniform, so far as we are able to examine them, to the effect that a remittitur irregularly, inadvertently, or erroneously issued does not deprive the appellate court of jurisdiction, and it may recall the remittitur, after it has been

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sent down and filed, for the purpose of correcting any error or mistake, and that where the mistake is on the part of the clerk, and not discovered until after the remittitur was issued and filed, this court does not lose jurisdiction. It is held in Rowland v. Kreyenhagen et al., 24 Cal. 52, that the jurisdiction of the appellate court cannot be divested by an irregular or improvident order; that in contemplation of law an order obtained upon a false suggestion is not the order of the court, and may be treated as a nullity; and if, under color of such an order, the proceedings have in part found their way back to the court below, yet in law they are considered as still pending in the appellate court, and that court may take such steps as may be necessary to make the fact and law agree. See, also, Vance et al. v. Pena et al., 36 Cal. 328, and note to Legg. v. Overbagh (N. Y.) 21 Am. Dec. 121. It was the error of this court in the notice given counsel that prevented him from making application for a rehearing. The proceedings to remedy it may not in all respects have been exactly regular; but the party prejudiced by the inadvertence of an officer of this court should not suffer thereby, and we feel that we are justified in denying this application and permitting the district court to use its discretion in the premises.

We are not making any intimation as to the merits which may be disclosed by any application for rehearing which may be made; but it seems just and proper that the party who was misled by the notice should have the opportunity to fairly present his points and convince the court that a rehearing should be granted, if he is able to do so, and to make application for the recall of the remittitur. See Franklin Bank Note Co. v. Mackey, 158 N. Y. 683, 51 N. E. 178. All concur.

FISK, J., disqualified. HON. CHAS. A. POLLOCK, Judge of the Third judicial district, sitting by request.

(117 N. W. 473.)

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The North Dakota Horse & Cattle Company v. Siver Serumgard.

Opinion filed July 17, 1908.

Mortgages — Foreclosure — "Redemption."

1. A "redemption" from the purchaser at a foreclosure sale by one not the mortgagor is a compulsory sale of the interest acquired by the purchaser at the foreclosure sale, and such redemption can only be enforced by one given that right by statute, and then only by pursuing the method prescribed by the statute conferring the right.

Same — Redemption by Superior Mortgagee — Tender.

2. The holder of a mortgage superior to the one foreclosed, assuming to be a redemptioner when not made so by statute, who tenders the amount necessary to redeem, becomes by the issuance to him of a certificate of redemption and the acceptance and retention by the holder of the certificate of sale of the money tendered, as between himself and the party who parts with such certificate, a "redemptioner."

Same — Redemption from Superior Redemptioner.

3. One who is not made by statute a redemptioner, but thus acquires the rights of a redemptioner, also assumes the obligations and liabilities of a redemptioner, and it follows that he must permit the lawful redemptioner to redeem from him within the period given by statute to a subsequent lienholder by judgment or mortgage for such purpose.

Same — Payment by Check — Failure to Object — Legal Tender.

4. The tender, by a lawful redemptioner, of a bank check issued by a solvent and reputable bank for the sum necessary to be paid to effect a redemption, to a prior redemptioner or his agent, for the purpose of receiving redemption money, effects a redemption, unless refused because it is a check, instead of legal tender, and the subsequent lienholder given an opportunity to procure and tender the necessary currency to comply with the legal requirements of the holder of the certificate.

Same — Sheriff Agent of Purchaser in Proceedings to Redeem — His Authority.

5. The sheriff or other person who conducts the sale on foreclosure by advertisement is the agent of the purchaser or holder of the certificate to receive redemption money, but is not such an agent as can bind his principal to accept a check, instead of money, from one qualified to redeem, or to retain the money received by such agent from one not a lawful redemptioner, if the principal makes seasonable objection to the form of payment, or refuses forthwith

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to recognize the party making the tender as entitled to redeem as a redemptioner, when he is not made so by statute.

Same — Redemption from Previous Redemptioner.

6. Under section 7465, Rev. Codes 1905, the property sold may be redeemed within one year from the day of sale in like manner and to the same effect as provided in chapter 12 for redemption of real property sold upon execution, so far as the same may be applicable, by—

(1) The mortgagor or his successor in interest in the whole or any part of the property.

(2) By a creditor having a lien by judgment or mortgage upon the property sold, or on some share or part thereof, subsequent to that on which the property was sold.

Only those mentioned in subdivison 2 of the above section are redemptioners, and as such entitled to sixty days in which to redeem from a previous redemptioner.

Same — Mortgage by Owner After Foreclosure.

7. Real estate is subject to mortgage by the holder of the legal title between the act of sale on foreclosure under a power contained in a prior mortgage and the expiration of the period allowed by statute for redemption.

Same — Redemption — Remedial Statute — Construction.

8. The redemption statute is remedial in its nature, and is intended, not only for the benefit of creditors holding liens subsequent to a lien in process of foreclosure, but more particularly for the purpose of making the property of the debtor pay as many of his debts as it can be made to pay, and to prevent its sacrifice, and should be liberally construed.

Same — Who May Redeem.

9. Every person having an interest in property subject to a lien has a right to redeem it from the lien at any time after the claim is due, and before his right of redemption is foreclosed. Rev Codes 1905, section 6141.

Same — Certificate of Sale — Effect of.

10. The provision of section 7464, Rev. Codes 1905, that the certificate given on the execution of a power of sale contained in a mortgage shall have the same validity and effect as the certificate of sale in like manner furnished upon the sale of real property upon execution, provided for by section 7137, Rev. Codes 1905, does not relate to the effect of the act of sale, but to the validity and effect of the certificate.

Same.

11. The certificate of sale in such case is only evidence of what transpired for the purpose of record, notice to protect purchasers

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against intervening claims, and to show who may become entitled to a deed, and it conveys no title.

Same — "Foreclosure Sale" — Effect — Embraces What.

12. A "foreclosure sale" under a power contained in the mortgage, which conveys the title of the mortgagor, is in a legal sense the complete foreclosure proceedings, beginning with the act of sale and terminating with the execution of the deed after the expiration of the period allowed for redemption. It includes all the proceedings for the foreclosure of the right of redemption by sale and deed.

Same — Title Conveyed.

13. The title conveyed by such completed foreclosure sale is all the right, title and interest in and to the mortgaged premises which the mortgagor possessed at the time the mortgage was executed or which was subsequently acquired by him.

Same — Who is Redemptioner — "On the Property Sold."

14. The phrase "on the property sold," in the statutory definition of a redemptioner as being one holding "a lien by judgment or mortgage on the property sold," applies to the land or premises, as those words are commonly used.

Same.

15. The holder of a mortgage given after the act of sale under a prior mortgage, and before the expiration of the period allowed for redemption from such sale, is a redemptioner.

Same — Sale Under Power.

16. The sale in the exercise of a power contained in a mortgage which conveys the title of the mortgagor is the sale as completed by the execution of a deed at the expiration of the period allowed for redemption.

Same — Mortgage During Period of Redemption — Record of Mortgage.

17. The fact that a mortgage given after the act of sale occurred on a prior mortgage, and before the expiration of the period allowed for redmption, is not recorded until after the expiration of one year from the sale, but is recorded within the sixty days additional allowed where there has been a redemption, does not deprive the holder of the last mortgage given of the right to redeem on complying with the other statutory requirements.

Appeal from District Court, Pierce County; *Fisk,* J.

Action by the North Dakota Horse & Cattle Company against Siver Serumgard. Judgment for plaintiff, and defendant appeals.

Reversed and remanded.

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Guy L. Whittemore (*Scott Rex* and *Engerud, Holt & Frame,* of counsel), for appellant.

Right to redeem depends upon an actual, not apparent lien. Section 7139, Revised Codes 1905; Scheibel v. Anderson, 79 N. W. 594; Scobey v. Kinningham, 31 N. E. 355; Todd v. Johnson, 57 N. W. 320.

Receipt and retention of money by certificate holder from one not entitled to redeem, works a redemption. McDonald v. Beatty, 10 N. D. 511, 88 N. W. 281; Roose v. Gove, 77 Pac. 246; Hare v. Hall, 41 Ark. 372.

Sannan is estopped to deny his character as redemptioner. Horn v. Cole, 12 Am. St. Rep. 111; Pom. Eq. Jur. sections 803, 809, 811, 895, 810; Fargo Gas. Co. v. Fargo Electric Co., 4 N. D. 219, 59 N. W. 1066; Olson v. Orton, 28 Minn. 36; Porter v. Fletcher, 25 Minn. 493; Summer v. Seaton, 47 N. J. Eq. 103, 19 Atl. 884; Hill v. Blackwelder, 113 Ill. 283; Power v. Larrabee, 3 N. D. 502, 57 N. W. 789.

Sannan is bound by the recitals in his redemption papers. 16 Cyc. 699; Blood v. Light, 38 Cal. 649; Daniels v. Tierney, 102 U. S. 421, 26 L. Ed. 187; Taylor v. Riggs, 57 Pac. 44; Libby v. Ralston, 43 Pac. 294.

Unauthorized payment to sheriff extinguishes the mortgage foreclosure. Meyer v. Mintoyne, 106 Ill. 414; McMillan v. Bagley, 83 S. W. 610; San Jose Bank v. Bank, 54 Pac. 83; Phyfe v. Riley, 15 Wend. 248.

Tender of check on redemption is good. Section 5260, Revised Codes 1905; 28 Am. & Eng. Enc. Law, 26. So of bank notes and silver certificates. Lathrop v. O'Brien, 58 N. W. 987; Koehler v. Buhl, 54 N. W. 157; Mitchell v. Copper Co., 67 N. Y. 280; Duffy v. O'Donovan, 46 N. Y. 223.

Redemption laws are liberally construed, to make property pay as far as possible. Lysinger v. Hayer, 54 N. W. 145; Hervey v. Krost, 19 N. E. 125; Todd v. Johnson, supra; Sprague v. Martin, 13 N. W. 34; Schenck v. Gerlach, 101 Ill. 388; Oldfield v. Eulert, 36 N. E. 615.

A. E. Coger and *Guy C. H. Corliss,* for respondent.

Sannan was not a lawful redemptioner. Lysinger v. Hayer, 54 N. W. 145; Todd v. Johnson, 52 N. W. 864.

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Statutory right of redeption must be strictly construed. Frem. Ex. (3rd. Ed.) Sec. 314; Wooters v. Pinkell, 25 N. E. 791; Boyle v. Dalton, 44 Cal. 332; Gilfillan v. Ryder, 22 Minn. 87; Morss v. Purvis, 68 N. Y. 225; Gilchrist v. Comfort, 34 N. Y. 235; 17 Am. & Eng. Enc. 1035; Tharp v. Forrest, 40 N. W. 718; Waller v. Harris, 20 Wend. 555; Lynch v. Burt, 132 Fed. 417; Robertson v. Van Cleave, 26 N. E. 899.

After the purchaser has accepted a pretended redemptioner's money, he cannot question the latter's rights. Freeman on Executions, Sec. 317; Carver v. Howard, 92 Ind. 173; In re Eleventh St. 81 N. Y. 436; McDonald v. Beatty, 10 N. D. 511, 88 N. W. 281; Bagley v. Ward, 37 Cal. 121; Sexton v. Rhames, 13 Wis. 99; Hervey v. Krosh, 19 N. E. 125; Todd v. Johnson, supra; Roose v. Gove, 77 Pac. 246; Bozarth v. Largent, 21 N. E. 218; Rush v. Mitchell, 32 N. W. 367 Clark v. Butts, 76 N. W. 199; San Jose Bank v. Bank of Medera, 54 Pac. 83; White v. Costigan, 63 Pac. 1075; 66 Pac. 78; Byer v. Healy, 50 N. W. 70; Gilbert v. Husman, 41 N. W. 3; Abadie v. Lobero, 36 Cal. 390; Eldridge v. Wright, 55 Cal. 531.

Such receipt of money does not make the payer a lawful redemptioner. Bank v. Bank, supra; Hughes v. Helms, 52 S. W. 460; Jarrell v. Brubaker, 49 N. E. 1050; Scobey v. Kinningham, 31 N. E. 355; People v. Rathbun, 15 N. Y. 528; Thomas v. Bowman, 29 Ill. 426; Byer v. Healy, 50 N. W. 70.

After foreclosure sale, mortgagor or judgment debtor has no interest mortgagable or subject to lien. Dickinson v. Kinney, 5 Minn. 409; Curriden v. Railway Co., 52 N. W. 966; Pollard v. Harlow, 71 Pac. 454; Robinson v. Thornton, 34 Pac. 120; Boynton v. Pierce, 37 N. E. 1024; Duff v. Randall, 48 Pac. 66; Wood v. Conrad, 50 N. W. 903.

An unlawful redemptioner's redemption need not be heeded. Hare v. Hall, 41 Ark. 381; People v. Ransom, 4 Denio. 145; Pamperin v. Scanlon, 28 Minn. 345; Parke v. Hush, 13 N. W. 668; Buchanan v. Reid, 45 N. W. 11; Hardin v. Kelly, 144 Fed. 353; Keller v. Coman, 44 N. E. 434; Jack v. Cold, 86 N. W. 374.

Payment to effect redemption, must be in money. Sec. 5546, Rev. Codes, 1905; Thorn v. City of San Francisco, 4 Cal. 127; Lytle v. Etherly, 18 Tenn. 389; People v. Baker, 20 Wend. 602; Bank v. Warren, 7 Hill. 91.

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Sheriff is not the agent of a foreclosure purchaser, so as to bind the latter in an unlawful redemption. Bennett v. Wilson 55 Pac. 390; Waller v. Harris, 7 Paige, 167; Waller v. Harris, 20 Wend. 555; Byer v. Healy, 50 N. W. 70.

He is bound only by a legal redemption. Hardin v. Kelly, 144 Fed. 353; Waller v. Harris, supra; Hare v. Wall, 41 Ark. 380; Hughes v. Olson, 77 N. W. 42; Bovey DeLaittre Lbr. Co. v. Tucker, 50 N. W. 1038; Bennett v. Wilson, 55 Pac. 390; Byers v. McEniry, 91 N. W. 797; Nichols v. Tingstad, 10 N. D. 172, 86 N. W. 694; McDonald v. Beatty, 10 N. D. 511, 88 N. W. 281.

SPALDING, J. This is an action brought by the respondent for the determination of adverse claims to certain real property situated in Pierce county, N. D. The complaint is in the statutory form. The defendant answers, setting forth a series of transactions, involving mortgages, redemptions, and an attempted redemption, and prays for judgment that the plaintiff has no right, title, interest, or estate in the premises described, or any part thereof, but holds the pretended title thereto in trust for the defendant, and demands judgment that the plaintiff be denied the relief asked in its complaint and that the defendant be awarded affirmative relief: First, that the defendant is the sole owner in fee of said premises, and of the whole thereof; second, that the plaintiff holds said premises in trust for the defendant herein; third, that the plaintiff be required to reconvey said premises to the defendant herein; fourth, that the plaintiff be forever enjoined from asserting any claim, right, title, interest, or estate in or to said premises, or any part thereof, adverse to the defendant herein; fifth, for such other and further relief as to the court may seem just in the premises; sixth, for his costs and disbursements. The court made its findings, and judgment was entered for the plaintiff, adjudging and decreeing that the plaintiff is the owner in fee of the real estate involved, and that defendant has no title, legal or equitable, in any part thereof, and has no interest or lien thereon, and quieting the title of the plaintiff in and to the property described, as against the defendant, Siver Serumgard, and for its costs and disbursements. The defendant appeals from the judgment, contending that on the facts found judgment should be entered in his favor.

As found by the court, one Russell was the owner of the premises involved and gave five mortgages thereon for various sums and on

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different dates between the 8th day of October, 1898, and the 21st day of March, 1902. All such mortgages became the property, by assignment or otherwise, prior to the 28th day of June, 1904, of one Lillian M. Plummer. All these mortgages, and the assignments of those assigned, were duly recorded at about the date of their execution or assignment. On the 2d day of June, 1904, Russell gave a sixth mortgage on the same premises to one Coger to secure the sum of $600, and this mortgage was assigned to one Williams on the 25th day of March, 1905, and the assignment thereof duly recorded on the same day. This mortgage was recorded on the 2d day of June, 1904. Mrs. Plummer foreclosed her fifth mortgage by advertisement, and the sale occurred March 26, 1904. She became the purchaser and received the certificate, bearing date March 26, 1904, and it was duly recorded on that day. No question is made as to the regularity and validity of this foreclosure, or of the assignments. March 25, 1905, Williams, holding the sixth or Coger mortgage by assignment, redeemed from the foreclosure sale of the fifth mortgage as a redemptioner and received a certificate of redemption, which was recorded on the 25th of March, 1905. The validity of this redemption is not questioned. April 12, 1905, one Sannan acquired by purchase and assignment the first four mortgages on said premises held by Mrs. Plummer, and his assignments were duly recorded on the 14th day of April, 1905. On the 25th day of April, 1905, Sannan filed his affidavit and notice of redemption as required by law for a redemptioner, which were recorded on the same day, and the sheriff executed and deliverd to said Sannan his crtificate of redemption, dated that day, and recorded April 26, 1905. On the 3d day of March, 1905, Russell executed and delivered to Theo. P. Scotland & Co., incorporated, a seventh mortgage on said premises, which was not recorded till the 22d day of June, 1905. On the 17th day of June, 1905, Scotland & Co. assigned this mortgage to the defendant, Serumgard, and this assignment was recorded on the 22d day of June, 1905. On the 22d day of June, 1905, the defendant, Serumgard, as assignee of the Scotland mortgage, attempted to redeem the land in controversy from the foreclosure sale made on the fifth mortgage by serving and filing his affidavit and notice of redemption, which were recorded on that date, and tendering to the sheriff of Pierce county a banker's check for $3,187.50 as and for the total amount due on account of said foreclosure, together with interest and costs, and thereupon

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such sheriff, without the knowledge or consent of Sannan, the holder of the certificate of sale, issued to Serumgard his certificate of redemption, bearing date and recorded on that day. After Sannan was informed of the delivery of such check by Serumgard to the sheriff for the purpose stated, and of the issuance of a certificate of redemption by the sheriff to Serumgard, he refused to acknowledge the right of Serumgard to redeem the property, and repudiated the act of the sheriff, and refused to acknowledge his right to issue said certificate of redemption, and when the sheriff delivered the banker's check, hereinbefore referred to, to Sannan, Sannan forthwith returned it to the sheriff, with instructions to return the same to Serumgard. In returning said check to the sheriff, Sannan did not object to the manner in which Serumgard had attempted to make redemption; that is, he did not object to it by reason of its having been tendered in form of a check, instead of legal tender money. After the check was returned to the sheriff, he on the same day, by mail returned it to Serumgard, who subsequently returned it to the sheriff, and some time after the 24th of June, 1905, the check was paid by the bank which issued it, it being a reputable and solvent bank, and the sheriff deposited the proceeds of the check to his own credit in the First National Bank of Rugby, N. D., and since such deposit the money derived from such check has been held by the sheriff for and subject to the control of Serumgard on deposit in that bank. The court found that Sannan had at no time in any manner recognized the right of Serumgard, as assignee of the mortgage given to Scotland & Co., to redeem said land from foreclosure sale, and that on the 26th day of June, 1905, the sheriff of Pierce county, refusing to recognize the validity of the redemption of Serumgard, or of the certificate of redemption issued to said Serumgard, executed to said Sannan, under the certificate of redemption theretofore issued to him, and on the theory that there had been no lawful redemption of the property since his redemption, a sheriff's deed in due form, in and by which he conveyed, as such sheriff, title to said premises in fee simple to Sannan. After the execution of said sheriff's deed, Sannan, on the 26th day of June, 1905, executed and delivered to the plaintiff a deed of conveyance of said premises. The seven mortgages referred to constituted and were the only liens affecting the premises, or any part thereof, at any time during the period covered by the events described.

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The court found, as conclusions of law, that the mortgage executed and delivered by Russell to Scotland & Co., under which Serumgard attempted to redeem, was not a mortgage of the property sold under the foreclosure, but only of such interest as Russell retained after the foreclosure sale to Plummer, and that at the time of the attempted redemption by Serumgard, as assignee of the Scotland mortgage, Serumgard was not a redemptioner, and was not entitled to redeem the land from such foreclosure sale, and that the certificate of redemption issued to him by the sheriff was void and should be canceled of record. It also found that the sheriff's deed executed by the sheriff to Sannan, as well as the certificate of redemption issued to him, were lawful instruments, and conveyed title to the land involved in this action in fee simple, and that the plaintiff, as the assignee of Sannan, is the owner in fee of said real estate, and that defendant had no title, either legal or equitable, and no interest therein or lien thereon, and that the plaintiff is entitled to the possession of said real estate. Judgment was entered on these findings as hereinbefore recited. The appellant raises many points in his brief, and we shall consider them nearly in the order in which they are submitted.

1. He contends that Sannan, as assignee of the four mortgages, which were all prior liens to the mortgage foreclosed, was not a redemptioner, strictly and technically, within the statute, but maintains that nevertheless in fact he was a redemptioner, and cites section 7465 of the Revised Codes of 1905, which provides that property sold may be redeemed within one year from the day of sale in like manner and to the same effect as provided in chapter 12 of this code for redemption of real property sold upon execution, so far as the same may be applicable, by (1) the mortgagor or his successor in interest in the whole or any part of the property, or (2) a creditor having a lien by judgment or mortgage on the property sold, or some share or part thereof, subsequent to that on which the property was sold, and such creditor is termed a "redemptioner," and has all the rights of a redemptioner under that chapter, and the mortgagor and his successor in interest has all the rights of a judgment debtor and his successor in interest, as provided therein, and that in law he is a redemptioner by reason of having asserted himself as such, and having exercised the right of redemption, and because the money paid by him for redemption on the issuance of the sheriff's certificate of redemption was ac-

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cepted and retained. If Sannan is not to be considered and treated as a redemptioner, Serumgard was not entitled to 60 days after Sannan's attempt to redeem in which to redeem from him, and therefore his attempt at redemption came too late. Respondent contends that Sannan is not a redemptioner, because he does not come within the definition of a redemptioner under the section of the statute quoted. Redemption from the purchaser at a foreclosure sale by the holder of a subsequent lien by judgment or mortgage is a compulsory sale of the interest acquired by the purchaser on foreclosure, and such redemption can only be enforced by one given this right by statute and then only by pursuing the method prescribed by the statute conferring the right. The title acquired by redemption on the part of a redemptioner is the same which he would acquire by a voluntary sale and purchase of the sheriff's certificate of sale, except that the statutes recognize the equity of requiring one given this right by law to permit those similarly situated to purchase from him within a specified time; in other words, it gives the subsequent lienholder the same right given him. A redemptioner is a statutory purchaser, and his right under the statute to redeem is the right to buy the purchaser's interest at the price paid by him, with interest. Tinkcom v. Lewis et al., 21 Minn. 132.

Sannan, not being a subsequent lienholder, could not compel Williams to accept his money and issue to him a certificate of redemption; but having asserted himself as a redemptioner, and having paid to Williams the money which would have entitled him to his certificate of redemption, had he been a statutory redemptioner, and Williams having accepted and retained the money, and issued a certificate of redemption to Sannan, Sannan at least became, as between himself and Williams, a redemptioner, and entitled to all the rights of a redemptioner. It has been so held by several courts. See Hare v. Hall, 41 Ark. 372; Roose v. Gove, 32 Col. 522, 77 Pac. 246; Smith v. Jackson, 153 Ill. 399, 39 N. E. 130; MacGregor v. Pierce et al., 17 S. Dak. 51, 95 N. W. 281; McDonald v. Beatty et al., 10 N. D. 511, 88 N. W. 281; Hervey v. Krost et al. 116 Ind. 268, 19 N. E. 125; Carver et al. v. Howard, 92 Ind. 173. In McDonald v. Beatty this court said: "Concededly that plaintiff paid to the holder and owner of the sheriff's certificate the amount required to make redemption and such payments were made for such purposes, it might be conceded that

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the owners of the sheriff's certificate could have successfully challenged plaintiff's right to redeem on the ground now urged; but they did not see fit to do so. On the contrary, they accepted and retained the redemption money, and by doing so they waived any question as to the right to redeem which may have existed, and thereby validated the redemption, and clothed plaintiff with their statutory right under plaintiff's certificate. That such effect follows the retention of redemption money is well settled, and in cases where the persons redeeming did not possess the strict statutory right of redemption. * * * It is also well settled that the holder of the sheriff's certificate and the person redeeming it are the only persons concerned in the regularity of the redemption. The owner of the certificate may deal with it as he sees fit. He may sell and assign it, or he may retain it, and insist that any one who wishes to secure his right thereunder by redemption shall do so only by strictly complying with the statute, or he may waive his right to require exact and formal observance of the statutory mode, and his acceptance of the redemption money will be such a waiver. Carver v. Howard, supra. In this case it makes no difference to the defendant whether the rights evidenced by the sheriff's certificates were owned by the original purchasers or the plaintiff, McDonald. He could redeem from the plaintiff, as well as from the original purchasers, and it did not add anything to the amount required to free his premises from the lien, and by failing to redeem, his rights in the real estate were lost." In 3 Freeman on Executions (3d Ed.) 317, Mr. Freeman says: "If a redemption made by a disqualified person is acquiesced in * * * by the purchaser or other person from whom redemption is made, it will estop such person, after he has received such redemption money, from denying the validity of the redemption." Numerous other authorities, which it is not necessary to cite, hold that the party who receives and retains the money from one not entitled to redeem is estopped from questioning the validity of the redemption.

These cases, it will be observed, take into consideration only the rights of the two parties dealing together; that is, the party who holds the certificate of sale and the unqualified redemptioner whose money is accepted. More than that question, however, is involved in this case, because it may be assumed that, whatever the relations of the two parties themselves or their status as to each other may

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be, the unqualified redemptioner is not a redemptioner, and not to be treated as one by, and does not assume any of the obligations of a redemptioner to, subsequent lienholders who might otherwise be entitled to redeem. The respondent contends that this redemption by Sannan gave him and his assigns the rights of a successor in interest to the mortgagor, freed from the obligations of a redemptioner, and that the statute allowing 60 days in which a redemptioner may redeem from a prior redemptioner does not apply; but we are of the opinion that it does apply, and that as Sannan voluntarily placed himself in a position where he became a redemptioner, as between himself and Williams, as is held in McDonald v. Beatty et al., supra, then he must be considered a redemptioner for all purposes. This is implied in the decision above quoted, and we hold that a holder of a mortgage superior to the one foreclosed, assuming to be a redemptioner, and who, in the method prescribed by statute, tenders the amount necessary to redeem, becomes by the issuance to him of a certificate of redemption, and the acceptance and retention by the holder of the certificate of sale of the money tendered, as between himself and the party who parts with such certificate, a redemptioner, and that, thus acquiring the rights of a redemptioner, he in equity assumes the obligations and liabilities of a redemptioner. Hence he must permit a lawful redemptioner to redeem from him within the 60 days which the statute gives a subsequent lienholder by judgment or mortgage for such purpose. It necessarily follows that Sannan became a redemptioner under the circumstances and facts of this case, and that a qualified redemptioner holding a lien subsequent to his could redeem from him within 60 days after his redemption. We are satisfied that this is in accordance with sound principles of equity.

Respondent's counsel quotes at some length from White v. Costigan, 134 Cal. 33, 66 Pac. 78, where it was held that one unqualified to redeem, but whose money was accepted and retained, became an equitable assignee of the interest of the party from whom he redeemed and entitled to have his equitable right perfected. We see nothing in that case in conflict with our theory on this point. A certificate of redemption is only an assignment of the rights of a prior holder under the sale. It is a statutory assignment, and we simply go a step further than it was necessary for the court to go in the California case, by holding that, having assumed the attitude of and obtained the benefits accruing to a redemptioner,

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which he was not entitled to, Sannan must also assume the obligations of a redemptioner, precisely the same as though he had been entitled to enforce a redemption, and that he cannot now change his attitude to the prejudice of other redemptioners. Railway Co. v. McCarthy, 96 U. S. 258, 24 L. Ed. 693; Daniels et al. v. Tearney et al., 102 U. S. 415, 26 L. Ed. 187; Power v. Larabee, 3 N. D. 510, 57 N. W. 789, 44 Am. St. Rep. 577; Davis v. Wakelee, 156 U. S. 680, 15 Sup. Ct. 555, 39 L. Ed. 578.

2. The next point in logical order is made by the respondent. It is to the effect that Serumgard has no rights in the premises, because the payment made to the sheriff in his effort to redeem from Sannan was not in money, but in the form of a bank check issued by a solvent and reputable bank. Objection was made on other grounds, but no objection was made as to the form of payment We find some very early cases to support this doctrine, but the decisions in such cases were made when a very small part of the business of the country was conducted by means of checks and drafts. In these days, when the commercial transactions of the country are almost universally carried on by means of bank checks and drafts, we feel that a business custom so universal should be recognized, and that payment by check issued by a reputable and solvent bank should constitute payment, unless seasonable objection is made to its receipt, and the reason specifically given, so as to give the person tendering the check an opportunity to procure and tender legal tender currency if available. This is in accordance with the weight of modern authority. Jessup et al v. Carey, 61 Ind. 584; Boyd v. Olvey, 82 Ind. 294; Koehler v. Buhl, 94 Mich. 496, 54 N. W. 157; Lathrop v. O'Brien, 57 Minn. 175, 58 N. W. 987; McGrath v. Gegner, 77 Md. 331, 26 Atl. 502, 39 Am. St. Rep. 415; Moynahan v. Moore, 9 Mich. 9, 77 Am. Dec. 468; Ball v. Stanley, 13 Tenn. 199, 26 Am. Dec. 263, 28 Am. & Eng. Enc. Law, 26.

3. The sheriff having at first accepted the check and issued his certificate of redemption to Serumgard, the question arises whether he could, by so doing, bind Sannan, and make the certificate of redemption valid as against the protest and objection of the person entitled to receive the money. In this class of proceedings the person making the sale may be the sheriff or any other person properly designated for that purpose, and under our statute the person making the sale may issue the certificate of sale, as well as

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the certificate of redemption, and such sheriff or other person who conducts the sale on foreclosure by advertisement is the agent of the purchaser or holder of the certificate to receive the redemption money; but this does not make him an agent for all purposes, or for the purpose of binding the principal on an illegal redemption, if his principal promptly repudiates the action of the sheriff or other person. In the very nature of things it should not make him an agent for such purpose. He is a statutory agent, and possesses only a limited authority on behalf of his principal. The distance between them may be so great as to preclude speedy communication, and necessitate delay between the time of the attempted redemption and the receipt of information concerning the same by the holder of the certificate. For this and many other reasons, to hold the sheriff's acts binding on his principal in this respect might often work great injustice. We are of the opinion that he is not such an agent as to bind his principal to accept a check, instead of money, from one qualified to redeem, or to retain the money received by such agent from one not a lawful redemptioner, if the principal makes a seasonable objection to the form of payment or refuses forthwith to recognize the party making the tender as entitled to redeem, when he is not made a redemptioner by statute. Bennett v. Wilson, 122 Cal. 509, 55 Pac. 390, 68 Am. St. Rep. 61.

4. Having concluded that a qualified redemptioner, whose lien was subsequent to that of Sannan, had 60 days after his redemption in which to redeem from him, and that the payment by bank check was good, because not objected to for the reason that it was a check, instead of legal tender currency, it becomes necessary to consider whether, under the statute, the defendant, Serumgard, himself was entitled to redeem. He had become the owner and holder of the seventh mortgage. The foreclosure sale which we are considering occurred on the 26th day of March, 1904. The owner, or his successor in interest, had until the 26th day of March, 1905, to redeem. Sannan redeemed from this sale as a redemptioner on the 25th day of April, 1905, and the holder of any lien by judgment or mortgage on the property sold, subsequent to the mortgage on which the sale occurred, therefore, had until June 24, 1905, in which to redeem. Serumgard contends that he is a redemptioner, because he says he holds a lien by mortgage upon the property sold subsequent to the one foreclosed. In considering

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this question, it is necessary to determine what right or property in real estate may be the subject of mortgage, whether appellant's mortgage is upon property which may be mortgaged, and, if so, whether he is given by the statute the right of a redemptioner. In this state a mortgage is not a conveyance of title, but is simply evidence of a lien. It is defined by section 6149, Revised Codes 1905, as a contract by which specified property is hypothecated for the performance of an act, without the necessity of a change of possession. Section 6154 provides that any interest in property which is capable of being transferred may be mortgaged, and section 6162 that a mortgage is a lien upon everything that would pass by a grant of the property, and upon nothing more. Section 4945, Revised Codes 1905, defines a transfer as an act of the parties, or of the law, by which the title to property is conveyed from one living person to another, and section 4947 permits property of any kind to be transferred, except as otherwise provided by the two following sections, which sections are in no way material to this case. Section 4965 provides that a transfer vests in the transferee all the actual title to the things transferred which the transferror then has, unless a different intention is expressed or is necessarily implied. A transfer, as applied to real estate, is termed a "grant."

According to the authorities, the power to mortgage and the right to sell are governed by the same principles, as likewise are the rights to redeem from execution sale and from the foreclosure of a mortgage. While there are few statutes on these subjects identical with ours, yet these questions are largely governed by certain general principles of substantially uniform application in those states where a mortgage is held only to be a lien; and authorities supporting this construction of the provisions of the statutes cited above are not lacking. In Fish v. Fowlie, 58 Cal. 373, it is held that the holder of the legal title to real estate can mortgage it. Such is the express provision of our code. Revised Codes 1905, section 6154. In Curtis v. Millard, 14 Iowa, 128, 81 Am. Dec. 460, it is held that, prior to the sheriff's deed, land is subject to sale under execution or to conveyance by deed, and that a judgment rendered after execution sale, and before the expiration of the time for redemption, attaches as a lien on the debtor's interest. In Bridgeport v. Blinn, 43 Conn. 274, the supreme court of that state held that the mortgagor during the period allowed for redemption

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had a right which he could alienate, and one which his creditor could attach. In Atwater v. Manchester Savings Bank, 45 Minn. 345, 48 N. W. 187, 12 L. R. A. 741, it is held that an attachment levied on the last day for redemption constitutes a lien, and the attaching creditor a redemptioner. Freeman, in his work on Executions, at section 182, states the rule to be that pending the expiration of the time for redemption, while the debtor has possession of the property, he has a beneficial as well as a legal estate therein, which is subject to his voluntary disposition, and that a preponderance of authorities now affirm that such an estate is susceptible of levy and sale under execution against him, and at section 173 says the legal title may always be bound to the extent of the beneficial interest covered by it. In Kaston v. Story, 46 Or. 308, 80 Pac. 209, 114 Am. St. Rep. 871, the question was whether a judgment obtained during the period of redemption could form a basis for a sale as against the successor in interest of the mortgagee under a prior sale, and the court says: "The legal title remains in the mortgagor or his successor in interest until a sale under a foreclosure decree has ripened into a title by the execution and delivery of a sheriff's deed. * * *Therefore, at the time of the second judgment, * * * the legal title to the property was in Lundin, subject to the inchoate right of the purchaser at the foreclosure sale, and the judgment became a lien on such property, subject to be defeated only by the consummation of such sale by the execution and delivery of a sheriff's deed." Robinson v. Thornton et al., 102 Cal. 675, 34 Pac. 120, relied upon as an anthority in favor of the respondent in this case, recognizes throughout that a creditor attaching land during the period of redemption obtains a valid lien upon it. It is plain that during the time allowed by law for redemption the debtor possesses such an interest in the real property sold as will support a mortgage thereon.

We feel that we might rest the right to redeem on the right to mortgage, as after a very careful consideration of all the authorities to which our attention has been called, and many others, we are satisfied that the right to redeem is coincident with the right or power to mortgage, when by the terms of the statute subsequent mortgagees are included among redemptioners, and that no technical or strained construction should be given the terms of the statute which may prevent the exercise of the right. This is evidenced by the object and policy of the law in providing for re-

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demption by holders of liens by mortgage or judgment. The redemption statute is remedial in its nature and purpose, and is intended not only for the benefit of creditors holding liens, but more particularly for the purpose of making the property of the debtor pay as many of his debts as it can be made to pay, and to prevent its sacrifice, and it should be liberally construed. In the case at bar the mortgage of the appellant is $1,500, the amount necessary to redeem when he attempted to make redemption was $3,187.50, and the property is alleged to be worth $10,000. Concerning facts similar to these, and the policy of the law in such cases, the remarks of Judge Pardee in Bridgeport v. Blinn, supra, are quite appropriate. He says: "The law intends to apply the property of debtors to the payment of their debts. Burns owes Blinn about $400, and has secured payment of the debt by the mortgage of land worth $1,500. He owes the petitioner about $250. This land, upon every equitable principle, should be disposed of so as to pay both debts; and this can be done without violence to Blinn's right. He allowed Burns to become his debtor. He took a mortgage by way of security for his claim. All that he is entitled to is payment. The decree passed in his favor reserved to Burns the right ot pay and redeem. If the mortgage performs its office, first in securing, and lastly in paying, the debt, Blinn can ask for no more. After payment the land should go back to the mortgagor, or his representative, or to his creditors. The tender by the petitioner prevented the title from becoming absolute in Blinn, preventing him from obtaining the inequitable right to retain as against other creditors of Burns' land worth $1,500 for a debt amounting to less than $250." See, also, Williams v. Lash, 8 Minn. 496 (Gil. 441), Van Rensselaer v. Sheriff, 1 Cow. (N. Y.) 501, and Atwater v. Bank, supra.

But in view of the fact that this case has been twice exhaustively argued, and that on this feature we have arrived at a conclusion opposed to that entertained after the first argument, as well as the great importance of the rule to be established as effecting titles, we deem it advisable to give our reasons somewhat more at length. Every person having an interest in property subject to a lien has a right to redeem it from the lien at any time after the claim is due, and before his right of redemption is foreclosed. Revised Codes 1905, section 6141. Section 7464 provides that, upon a sale of real property by virtue of a power of sale contained in a

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mortgage, the officer making it shall give the purchaser a certificate containing a description of the real property, the price bid, the price paid, the costs and fees, and that it shall have the same validity and effect as the certificate of sale in like manner furnished upon sale of real property upon execution. Section 7137, being the corresponding section under executions, provides that such certificates shall be taken and deemed evidence of the facts therein recited and contained, and also that upon a sale of real property the purchaser is substituted to and acquires all the right, title, and claim of the judgment debtor thereto, and that in cases like the one at bar the real property is subject to redemption. It is strenuously argued by the respondent that this last-mentioned provision applies in the case of foreclosure by advertisement. If this is correct, it can only be so by reason of the reference made in section 7464 to the validity and effect of the certificate; but we are of the opinion that that reference is limited to the validity and effect of the certificate only, and does not refer to the effect of the sale. The provision mentioned in section 7137 relates to the effect of the sale, and not to the effect of the certificate of sale. The certificate of sale is only evidence of what transpired for the purposes of record, notice, and to protect purchasers against intervening claims, and as showing who is entitled to a deed, and it, of itself, conveys no title. It is said in Smith v. Colvin, 17 Barb. (N. Y.) 157, "that it only operates by way of notice to protect the purchaser against intervening claims, except the right of redemption. * * * This mode of transferring title to real estate is in derogation of law, which requires the owner's consent, and the statute should, therefore, be construed strictly, or, in other words, title should not be regarded as devised or transferred by the sale alone, unless such is the plain import of the statute." See, also, Foorman v. Wallace, 75 Cal. 552, 17 Pac. 680; Lightcap v. Bradley, 186 Ill. 510, 58 N. E. 227.

First the question arises as to what is meant by the sale—whether the word "sale" is used in this connection to refer simply to the act of knocking down the property to the highest bidder at auction, or whether it means the proceeding which commences at that time and terminates on the execution of the deed at the expiration of the period allowed by law for redemption. Some provisions in the statute regarding executions and foreclosures unquestionably, in referring to the sale, mean simply the act of receiving and ac-

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cepting a bid; but in the connection in which it is used in relation to the title conveyed by foreclosure by advertisement we have concluded that it must be taken in the broader sense, and as applying to the whole proceeding from the auction to the deed—that the sale referred to means the foreclosure of the right of redemption by sale and deed. This is made clear by section 7467, wherein the officer, or other person making the sale, is required, if the premises are not redeemed, to complete such sale by executing a deed of the premises so sold, and it is provided that such deed shall have the same force and effect as if it had been executed pursuant to a sale under foreclosure of the mortgage by action. Section 7483 makes the deed on foreclosure by action vest in the grantee all the right, title, and interest of the mortgagor in and to the property sold at the time the mortgage was executed, or which was subsequently acquired by him, etc. The provision that the deed shall vest all the right, title, and interest of the mortgagor in and to the property sold is an idle and meaningless provision, if, as contended by the respondent, all such title vested at the time the purchase occurred. In Daniels v. Smith, 4 Minn. 172 (Gil. 117), it is said: "It is perhaps not strictly correct to say that the purchaser takes the title, inasmuch as the sale is not complete until the expiration of the time allowed for redemption and a deed has been executed as provided by statute. * * * Strictly speaking, no title passes by the sale itself. The sale, payment of the amount bid, and giving of the certificate provided for by statute has about the same effect as an escrow, which is a deed executed and delivered to some third person to keep until some act is done or condition performed, and then it is to be delivered to the grantee and to become of full effect. * * * But until this second delivery the title to the premises remains in the grantor." And in Donnelly v. Simonton, 7 Minn. 167 (Gil. 110), the court of that state says further on this subject: "I think it is true, as claimed by respondent, that upon the sale of mortgaged premises by advertisement the legal title vests in the purchaser, and he becomes the owner of the land. The principal difficulty in the matter is to determine what constitutes a sale, or when the sale becomes an act fully completed. Is it when the sheriff or other proper person offers the premises at public auction and knocks them down to the highest bidder? Or not until the time for redemption expires and the purchaser obtains a deed in pursuance of the provisions of the statute? It

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is somewhat difficult to determine from the language of the statute what the intention of the legislature was in this regard, since sometimes the one and sometimes the other are spoken of as the sale. From a careful examination of the whole chapter, however, and subsequent enactments, it becomes, I think, apparent that the intention was not to vest the title (certainly not the absolute title) in the purchaser until the expiration of the time for redemption. Section 12, chapter 75, Comp. St., above cited, provides for the completion of the sale by the execution of a deed after the expiration of the time of redemption. * * * By our statute a mortgage of real property is not to be deemed a conveyance, so as to enable the owner of the mortgage to recover possession of the real property without a foreclosure." And in Standish v. Vosberg, 27 Minn. 175, 6 N. W. 489, it is held that a foreclosure is not complete, so as to operate as a sale, until the time allowed by statute for redemption has expired; that till then the title does not pass. See, also, Horton v. Maffitt, 14 Minn. 289 (Gil. 216) 100 Am. Dec. 222. In Smith v. Colvin, supra, the New York court says: "The sale is not consummated until conveyance by the sheriff, and in Curtis v. Millard & Co., 14 Iowa, 128, 81 Am. Dec. 460, it is held that there is no sale in a legal sense under a judgment or decree until the title passes, and till that time the purchaser has a mere inchoate and indefeasible right to conveyance of the legal title." And in Bank v. Union Insurance Co., 88 Cal. 497, 26 Pac. 509, 22 Am. St. Rep. 324, the supreme court of California holds that the foreclosure of a mortgage embraces the sale of the property and the execution of the sheriff's deed, as well as the decree of the court ordering sale, and that a mortgage cannot be said to be foreclosed, even in the sense of the California code, until the mortgagor's right of redemption is cut off, and that where the time for redemption had not elapsed,and no deed had been made to the purchaser, there has been no foreclosure of the mortgage, and that, unless the right of redemption has been extinguished, there is no payment pro tanto by the mortgagor in the sale; that, where no deed is passed, the foreclosure is incomplete, and no payment has been made. To the same effect, by the same court, see Goldtree v. McAlister, 86 Cal. 93, 23 Pac. 207, 24 Pac. 801. See, also, Puffer v. Clark, 7 Allen (Mass.) 80.

In this connection it is strenuously argued by the respondent that all the title of the mortgagor passed at the time of the auction,

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except the bare, naked, legal title, and it relies upon the case of Pollard v. Harlow, 138 Cal. 390, 71 Pac. 454, as an authority sustaining such position, and that therefore the mortgage held by appellant did not constitute a lien upon the property sold under the proceedings through which respondent claims. But the Pollard case cannot be construed as an authority on that point, when carefully analyzed. The facts are entirely different. Foreclosure proceedings had taken place on two mortgages by action, and the holder of the certificate under the second mortgage sought to redeem from the holder of the certificate under the prior mortgage. The code of California, like that of this state, provides that from such foreclosure redemption may be made by the mortgagor, or his successor in interest, or by a creditor having a lien by judgment or by mortgage on the property sold, etc. It was contended that the holder of the second certificate was not entitled to redeem, either as a redemptioner or as a successor in interest. The court held that she was not entitled to redeem as a redemptioner, because her judgment foreclosing the second mortgage was satisfied by the sale to her under that mortgage, and that the lien of the judgment had ceased to exist, and that this fact left her with neither a lien by judgment nor mortgage, and therefore placed her outside the statutory definition of a redemptioner. The opinion was a commissioner's opinion, and discusses the subject of the interest sold at the sale under the judgment foreclosing the first mortgage. The argument of the commissioners at first appears to sustain the theory of the respondent in this case, yet they expressly disclaim passing definitely on the question as to what title passed by the act of sale—i. e., whether it was legal or equitable—and held that, whatever it might be, the holder of the second certificate was a successor in interest and entitled to redeem as such. The decision hinges upon the extinction of the judgment lien by the act of sale. No such principle is involved in the case at bar. The Serumgard mortgage had not been foreclosed. It was a mortgage by description on the same land on which foreclosure proceedings on the prior mortgage had been instituted, and, if that mortgage constituted a lien upon the premises, its lien had not been extinguished, as in the California case, by any act of sale. If Serumgard comes within the definition of a redemptioner by holding a lien by mortgage upon the property sold, then he is entitled to redeem. The supreme court of California considered the Pollard

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case on petition for rehearing, reported in 138 Cal. 390, 71 Pac. 648, and repudiated the argument of the commissioners in the first opinion, but concurred in the conclusion by saying: "It is enough for the purposes of the decision of the case to say that such purchaser acquires a qualified title, which is sufficient to, and does, carry with it the right to redeem from another sale." Robinson v. Thornton, supra, is also cited; but, while there are sentences contained in the opinion which tend to support respondent's theory, when read in the light of the facts before the court and of the many other decisions of the supreme court of California, we think it cannot properly be given much weight as an authority in the case at bar. The most relevant authority cited by respondent is Dickinson v. Kinney, 5 Minn. 409 (Gil. 332), where the supreme court of that state held, through Judge Flandrau, that an execution sale carried all the estate that the debtor had in the land, subject only to the right of redemptioners to purchase it, and that, therefore, the purchaser could assign his interest by deed or quitclaim deed. The latter case, taken by itself, appears to sustain respondent's contentions; but unfortunately the supreme court of that state has in the decisions of other cases, from some of which we have quoted, at least modified the view it there expressed.

There are, however, other reasons for disaffirming the views of respondent. It relies upon some of the later California cases, as above noted, to support its theory. In those cases the reasoning of that court was based upon the provisions of section 700 of the Code of Civil Procedure of that state, which is identical with section 7137, supra. In that state foreclosures are made by action only, and the sales are made upon execution, and hence the provision that upon the sale of real property the purchaser is substituted to and acquires all the right, title, interest, and claim of the judgment debtor thereto is clearly as applicable on foreclosures as it is to sales under other judgments and executions; but, as we have seen, section 7464 of our code omits all reference to title conveyed. Without considering or determining what the effect of section 7137, supra, is on those sales to which it applies, or the distinction, if any, which it effects under our code between sales under execution, and those under a power of sale contained in a mortgage, it certainly has no controlling force in determining what title is conveyed by the bare act of sale under a power. Many of the California cases wherein that section has been in question may

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readily be construed as extending its meaning to the sale when completed by the deed. Most of the cases from that state which we shall cite were decided on facts which arose before the enactment of that section into the law of that state, and when the statute, like ours on foreclosure by advertisement, was silent as to what title passed before the time for redemption expired. It is unnecessary to analyze all the California cases, or trace the reasons for the apparent changes of construction by the courts of that state relating to the title retained by the mortgagor, and that passing to the purchaser at the time the sale occurs, because, as we have shown, the paragraph relating to the purchaser acquiring all the right, title, and interest of the debtor does not apply to sales under a power contained in a mortgage. We, however, in view of the argument, call attention to the doctrine of the earlier California cases, which, as we have shown, are the only cases in point. Those decisions have often been misinterpreted, both by counsel and courts.

One early leading case on the subject is McMillan v. Richards, 9 Cal. 365, 70 Am. Dec. 655, wherein Judge Field, speaking on behalf of the court, and upon an exhaustive discussion of the subject of mortgages under the modern theory, and the rights of the different disinterested parties, says: "The settled doctrine of equity is that a mortgage is a mere security for a debt, and passes only a chattel interest; that the debt is the principal, and the land the incident; that the mortgage constitutes simply a lien or incumbrance; and that the equity of redemption is the real and beneficial estate in the land, which may be sold and conveyed by the mortgagor, in any of the ordinary modes of assurance, subject only to the lien of the mortgagee. * * * Proceedings for the foreclosure of mortgages in the sense in which the terms are used in England and in several of the states, by which the mortgagor, after default, is called upon to repay the loan by a specified day, or to be forever barred of his equity of redemption, are unknown to our law. The owner of the mortgage in this state can in no case become the owner of the mortgaged premises, except by purchase upon sale under judicial decree consummated by conveyance. A foreclosure suit by our law results only in the legal ascertainment of the amount due and a decree directing the sale of the premises in its satisfaction. * * * The estate of the mortgagor and of the judgment debtor after the sale stand upon the

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same footing. * * * The decisions as to the estate of the judgment debtor after sale become, therefore, authorities for determining the estate of the mortgagor after sale under decree, and from them it will be found that the estate must remain in the mortgagor until a consummation of the sale by conveyance, as it does in the judgment debtor, and that the conveyance, when executed, will take effect in the one case from the date of the mortgage, as it does in the other from the time the lien of the judgment attached. * * * There is no difference, so far as the liens of judgments are concerned, between out statutes and that of New York. Here the statute requires the lien by judgment of the creditor to be subsequent to that on which the property is sold. There the statute requires the judgment which creates the lien to be recovered before the expiration of the time for redemption. The period within which the judgment creating the lien must be recovered is not limited in either case by the sale. In Kent v. Laffan, 2 Cal. 595, the judgment under which a redemption was claimed was recovered after the sale of the premises under the decree of foreclosure. * * * It follows, from the views above expressed, that the legal title of the premises remained in Randall after the sale under the decree of foreclosure, and that the plaintiff acquired a lien by his judgments. * * * The title remained in the debtor until conveyance executed. * * * Until then the purchaser had no legal estate in the premises, but only a right to an estate which might be perfected by conveyance." And this is followed by People v. Mayhew, 26 Cal. 656, in which the court says: "When a judgment debtor pays to the purchaser, at a sale under an execution or an order of sale, a sum of money for the purpose of affecting redemption of the land, what can that which he pays be properly denominated? Suppose, first, that the judgment creditor is the purchaser, that the sum bid equals the amount of his judgment, and that thereupon the execution is credited by the sheriff with the amount bid. The purchaser does not thereby acquire the defendant's title to the land, for that passes to him by the execution and delivery of the sheriff's deed. This is manifest by the provisions of section 232 of the practice act (St. 1851, page 88, chapter 5), which declares in effect, that upon a redemption being made by the debtor the sale becomes null and void, which could not be the case if the title had passed, and by the fact that the purchaser can neither take nor recover the posses-

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sion of the land previous to the sheriff's deed. His judgment is not satisfied by the sale; for, if the sale should for any reason be set aside, the judgment remains in full force, and such could not be the case if it had been satisfied. The purchaser, prior to the execution of the sheriff's deed, holds merely a lien upon the land, differing from the lien of the judgment in this: that it is more specific and may continue after that of the judgment has expired, and that the lien is much nearer a complete enforcement than that of the judgment; the single act of the execution and delivery of the sheriff's deed being required."

This was likewise followed by Page v. Rogers, 31 Cal. 294, which has been cited many times by the California courts and the courts of both Dakotas. In some cases it has been cited to show that during the period allowed for redemption the debtor, or his successor in interest, retains only the mere dry, naked, legal title; but a careful perusal of the opinion discloses that this was not what that court held, and that the definition so used in the opinion in that case applies to the title of the debtor, or his successor in interest, between the date of the expiration of the time allowed for redemption and the execution and delivery of the sheriff's deed, and does not apply to the period between the sale and the expiration of the time for redemption. The court says: "To call the interest of the purchaser at a sale or execution before making of the sheriff's deed a lien merely is not very exact. In a general sense it may be a lien; but it is more. The purchaser obtains an inchoate right, which may be perfected into a perfect title without any further action than the subsequent execution of a deed in pursuance of a sale already made. * * * The sale is simply a conditional one, which may be defeated by the payment of a certain sum by certain designated parties within a certain limited time. If not paid within the time, the right to a conveyance becomes absolute, without any further sale or other act to be performed by anybody. The purchaser acquires an equitable estate in the lands, conditional, it is true, but which may become absolute by simply lapse of time without performance of the only condition which can defeat the purchase. The legal title remains in the judgment debtor, with a further right in him and his creditors having subsequent liens to defeat the operation of a sale already made during the period of six months, after which the equitable estate acquired by the purchaser becomes absolute and indefeasable, and the mere

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dry, naked, legal title remains in the judgment debtor, with authority in the sheriff to divest it by excuting a deed to the purchaser." And this construction is followed in Bennett v. Wilson, 122 Cal. 509, 55 Pac. 390, 68 Am. St. Rep. 61, after the enactment of section 700 of the Code of Civil Procedure of that state. See, also, Freeman on Executions, sections 193, 323; Horton v. Maffitt, supra; Reynolds v. Harris, 14 Cal. 667, 76 Am. Dec. 459; Swain v. Stockton Savings & Loan Society, 78 Cal. 600, 21 Pac. 365, 12 Am. St. Rep. 118; Donnelly v. Simonton, supra; 8 Current Law, 576; Smith v. Colvin, supra; Foorman v. Wallace, supra.

The statute of Oregon is in effect like that of this state, and in the well-considered case of Flanders v. Aumach, 32 Or. 19, 51 Pac. 447, 67 Am. St. Rep. 504, the court of that state says: "During the interim between the sale and the deed the rights of the parties interested are measured by the statute. The sale is inchoate, and does not transfer title until consummated by the execution and the delivery of the deed in due course of law. If subsequent lienors redeem, the course of the sale is not thereby impeded or precluded, but finally culminates in a deed as if no redemption had been made by any one, and the deed puts an end to the lien of the judgment or decree under which the sale was made, and all other liens subsequently acquired; but a redemption by the judgment debtor terminates the sale and restores the estate. The effect is the same on a redemption by a successor in interest. The lien of the judgment is only partially satisfied by the sale, is not arrested or eradicated, but is simply suspended, as are the liens of all creditors having subsequent judgments, decrees, or mortgages pending the sale. If the sale is perfected, all these are swept away." See also, Kaston v. Story, supra; Baber v. McClellan et al., 30 Cal. 136; Curtis v. Millard & Co., supra; Phillips v. Hagart, 113 Cal. 552, 45 Pac. 843, 54 Am. St. Rep. 369.

In construing redemption statutes, to determine whether one is included in their terms, the principle is stated to be that if one is in privity in title with the mortgagor, and has such an interest that he would be a loser by the foreclosure, he may redeem, and that any person who may have acquired any interest in the premises, legal or equitable, by operation of law or otherwise, in privity with the mortgagor, may redeem and protect such interest in the land, provided it be an interest in the land derived in some way, mediate or immediate, from or through or in the right of the mort-

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gagor, so as in effect to constitute a part of the mortgagor's original equity of redemption, and is a lien at the time when he comes to redeem, and that it need not be a lien at the time of the sale. See Mr. Freeman's note, 21 Am. St. Rep. 245, and cases cited; Story's Equity Jurisprudence, section 1023; Pomeroy's Equity Jurisprudence, section 1220; supplement to Wiltsie on Mortgage Foreclosures, sections 959, 960; Van Rensselaer v. Sheriff, supra; Perkins v. Center, 35 Cal. 713. To construe the phrase "upon the property sold" as applying only to the fraction of the title to the land, rather than to the land itself, would be extremely technical, and we are unable to find any authorities to bear out any such construction. On the contrary, the terms "property sold," "real estate," "premises," and "land" are applied in such cases indiscriminately and interchangeably by the authorities, and we are satisfied that the legislature, in enacting the law relating to redemptions, intended it to apply to the "land" or the "premises," as those words are used commonly, and not in any technical sense. In Phillips v. Hagart, supra, the California court expressly held that a deed executed by the mortgagor after foreclosure sale constituted the grantee in the deed a successor in interest and entitled him to redeem. If the grantor had a right to convey the land, and thereby constitute his grantee a successor in interest, the same grantor, under section 6154, supra, had a right to execute a mortgage upon the land and make the mortgagee a subsequent mortgagee, or a lienholder, and therefore a redemptioner.

Still farther, as we have seen, under the statutes of this state, the deed executed by the sheriff relates back to and covers the whole title of the mortgagor at the time the mortgage was given. From this fact, and from the construction which is given the words "sale" and "foreclosure," in this connection, it necessarilly follows that the property sold is the whole title and interest of the mortgagor in the mortgaged premises at the time the foreclosed mortgage was given, and that, if the contention of the respondent be correct, no other conclusion can be drawn than that the holder of no mortgage given after the one on which the foreclosure proceedings occurred can be a redemptioner, or have the right to redeem, and therefore the inevitable effect of respondent's construction of the law would be to completely thwart the intention and the purpose of the legislature in providing for redemption by holders of subsequent mortgages. We conclude that the sale

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in the exercise of the power contained in a mortgage, which conveys the title of the mortgagor, is the sale as completed by the execution of deed at the expiration of the period allowed for redemption.

5. It is contended in respondent's original brief that, Sannan having, as a redemptioner, redeemed from the holder of the prior certificate of sale when the records disclosed no subsequent incumbrance on the property, he is entitled to the protection of the recording act as against any attempted redemption by the holder of a mortgage given during the period allowed for redemption, and not recorded until just before the expiration of the 60 days allowed for a redemption from a redemptioner. On the first argument we were impressed with the soundness of this contention, and that it followed the conclusion there reached on the preceding point; but on reargument respondent did not insist upon it. We have, however, made a careful examination of authorities. The decision of the preceding point would seem to dispose of this question, because the mortgage held by Serumgard could not possibly have been recorded until after the sale under the prior mortgage, for the reason it had not been given at the time of such sale. It therefore becomes plain that, when we hold that Serumgard was a redemptioner under the redemption statute, the recording law cannot be held to deprive him of that right. If there is any conflict between the redemption law and the recording law, in view of the object of the former, it, rather than the latter, must control. The general recording law has no application. That applies only where it is sought under an instrument executed prior, but not recorded to assert rights superior to those claimed under an instrument subsequently executed, but first recorded. In the case at bar Serumgard is not attempting to assert rights superior to the plaintiff, but inferior thereto. He is asserting rights as a redemptioner, and necessarily thereby he concedes they are inferior, and not superior, to those of the prior lien-holder. Pollard v. Taylor, 13 Ala. 604, squarely sustains this proposition. Nothing in Foorman v. Wallace conflicts with it, and we construe Phillips v. Hagart, supra, as authority on this point, as well as the preceding one. This holding does not deprive the plaintiff of any legal right. He still obtans payment of his lien against the land, and repayment of all he has invested in making his redemption, with interest on both sums.

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A purchaser at a foreclosure sale and those redeeming from him are bound to know the law; i. e., they are bound to know that the mortgagor may, at any time before the year for redemption expires, give a mortgage upon the property sold, and that the mortgagee in such mortgage is a redemptioner. Hence there is no possibility of the purchaser or thé first redemptioner being prejudiced because the mortgage of the last redemptioner is not recorded. The purchaser and the prior redemptioner act with knowledge that there may be a subsequent redemptioner.

Indiana cases are not authority, because the statute of that state permits the party seeking to redeem to do so if his mortgage was recorded within the year for redemption. In Condit v. Wilson, 36 N. J. Eq. 360, there is practically no discussion of the question, and, even if it may be construed as in point, we are not justified in following it, in view of the plain purpose of the redemption law and the finding that defendant is a redemptioner. Several authorities establish the rule that a party seeking to redeem by virtue of holding a subsequent lien need only hold a lien at the time he seeks to redeem. It cannot be contended that an unrecorded mortgage is not a lien. Sannan suffers no loss by permitting a redemption. While he may suffer the loss of an opportunity to speculate on the land, or obtain it for less than its value, yet this is not such a loss as the redemption statute is intended to protect against. Respondent cites several cases holding that assignment of a mortgage is a conveyance within the meaning of the recording act, as being analogous to a certificate of redemption; but they are so held to protect debtors who make payment to the original mortgagee without notice of the assignment required by law.

We therefore conclude that the appellant must prevail. The judgment of the district court is reversed, and the case is remanded, with directions to that court to enter judgment in conformity with this opinion. All concur.

Fisk, J., disqualified; Hon. Chas. F. Templeton, Judge of the First judicial district, sitting by request.

(117 N. W. 453.)

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JOHN McBRIDE v. ROBERT WALLACE.

Opinion filed August 28, 1908.

Rehearing denied October 8, 1908.

Trial — Denial of Directed Verdict — Renewal of Motion at Close of Testimony.

1. When the plaintiff rested on the trial of this action, defendant moved for a directed verdict on the ground that plaintiff had failed to establish the allegations of his complaint. *Held,* that the defendant, not having renewed this motion after all the evidence was submitted, thereby waived any error in denying his motion.

Negligence — Agistment of Animals — Question for Jury.

2. Defendant took a mare belonging to plaintiff to pasture for the season, and in the month of October, two or three days after having built a barbed-wire fence around a corral about eight rods in length connected with the pasture by a lane and a gate, permitted plaintiff's mare to be driven into such corral with other horses, and either closed or permitted the gate to be closed. While the horses were restrained in such corral, the mare of the plaintiff got entangled in a barbd wire and injured so it became necessary to kill her. *Held,* that in an action to recover her value, and charging her loss to the negligence of the defendant, the question of negligence was one of fact for the jury to determine.

Same — Evidence — Defendant's Reputation for Care.

3. In such a case it is not reversible error to exclude a question as to defendant's reputation as a man of care in handling stock, as, while his reputation may have been of the best, he may have failed to exercise ordinary care in this instance.

Appeal and Error — Exclusion of Question Already Answered.

4. It does not constitute reversible error to exclude a question which has already been asked and answered by the same witness.

Instruction — Degree of Care.

5. In the light of all the instructions to the jury in this case, *held,* that it did not constitute reversible error to inform them as to the different degrees of care and negligence, but served to more clearly define the degrees of care imposed upon the defendant.

Same — Charge Considered as a Whole — Harmless Error.

6. Instructions to the jury must be considered as a whole, and an isolated sentence containing an erroneous statement of the law, but which, when taken with the rest of the charge, cannot have misled the jury, is harmless error, and does not warrant reversal.

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

Action by John McBride against Robert Wallace. Judgment for plaintiff, and defendant appeals.

Affirmed.

Anderson & Traynor, for appellant.

An agister of cattle undertakes only such care as a man of ordinary prudence uses towards his own property under like circumstances. 1 Am. & Eng. Enc. Law, 589; 3 Cur. Law, 162, note 68; Revised Codes 1905, section 5472; Wood v. Remick, 9 N. E. 831.

When defendant advises plaintiff of the accident to animal, burden is on the latter to show negligence. Calland v. Nichols, 46 N. W. 631; 2 Enc. of Ev. 193; Wood v. Remick, supra; Elliott on Ev. Vol. 3, sections 1783 and 1785; Willett v. Rich, 7 N. E. 776; Foster v. Pacific Clipper Line, 71 Pac. 48; Stewart v. Stone, 14 L. R. A. 215; 2 Cyc. 323.

Negligence must be shown to be proximate cause of injury. 2 Enc. Ev. 196; 2 Elliott on Ev., section 1787; Revised Codes 1905, section 9522.

Plaintiff must show agister's negligence. 2 Cyc. 323; Wood v. Remick, supra; 2 Enc. of Ev. 193, 196.

It is competent to show agister's reputation for care. Revised Codes 1905, sections 5472, 6694; 3 Cur. Law, 162, note 68; 1 Am. & Eng. Enc. Law 589; 2 Cyc. 323; 5 Cyc. 217; 2 Enc. Ev. 201.

Evidence as to custom of neighborhood in handling stock is competent. Revised Codes 1905, section 5553; 5 Cyc. 219; Maynard v. Buck, 100 Mass. 40; 2 Enc. of Ev. 202; 3 Elliott on Ev. 1768, 1796.

The charge must correctly state the rule, viz: "Bailor must prove the contract of bailment, delivery and failure to return, or return in a damaged condition; it is then for bailee to show the manner of loss or injury, and if successfully done, bailor must show it due to bailee's negligence." 3 Elliott on Evidence, 1785, 1796; Revised Codes 1905, sections 5465, 5553; 5 Cyc. 219; 2 Enc. of Ev. 202.

Burke & Middaugh, for respondent.

Where property is bailed in good condition, and returned in bad, or not at all, bailee's negligence is presumed. 5 Cyc. 217; Can-

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field v. B. & O. R. R. Co., 93 N. Y. 553; Burnell v. N. Y. C. R. Co., 45 N. Y. 185; 6 Am. St. Rep. 61; Magnis v. Dinsmore, 56 N. Y. 168; Steers v. Liverpool, etc., Steamship Co., 57 N. Y. 6; 15 Am. St. Rep. 453; Fairfax v. N. Y. C. & Hud. R. R. Co. 67 N. Y. 11; Claflin v. Meyer, 75 N. Y. 260; 31 Am. St. Rep. 467; Schmidt v. Blood, 9 Wend. 524; Russell v. N. H. Steamboat Co., 50 N. Y. 121.

Motion for directed verdict must be made at close of all testimony. Illstad v. Anderson, 2 N. D. 167, 49 N. W. 659; Bowman v. Eppinger, 1 N. D. 21, 44 N. W. 1000; Conrad v. Smith, 2 N. D. 408, 51 N. W. 720; Colby v. McDermott, 6 N. D. 495, 71 N. W. 772; Tetrault v. O'Connor, 8 N. D. 15, 76 N. W. 225; First Nat. Bank v. Red River Valley Nat'l Bank, 9 N. D. 319; 83 N. W. 221; Haggerty v. Strong, 74 N. W. 1037.

Whether defendant used ordinary care was for the jury. Bullard v. Mulligan, 29 N. W. 404; Loveland v. Gardner, 4 L. R. A. 395; Welch v. Mohr, 28 Pac. 1060.

SPALDING, J. The complaint in this case alleges that a certain mare, the property of the plaintiff, was intrusted to the defendant to pasture for hire during the season of 1906, and that while she was in the defendant's possession, and under his control, and being so pastured for plaintiff, the defendant carelessly and negligently permitted her to run into a wire fence in his corral, whereby she was injured, and made valueless, and prays damages therefor. The answer admits the pasturing, but denies any injury through the fault or negligence of the defendant, and pleads a counterclaim for the sum of $3, the agreed price for pasturing. The case was tried to a jury, and plaintiff, being called as a witness, testified as to the value of the mare, her soundness, that he saw her in July, and did not see her again until October; that when he saw her on the latter date her leg was badly injured by a cut received from a barbed wire. He offered no evidence showing how she was injured, but showed that she was killed by the defendant as a result of the injury, and testified as to some other unimportant details about the contract of pasturage. On this evidence plaintiff rested his case, and the defendant submitted a motion to direct a verdict in his favor on the ground that plaintiff had failed to establish the allegations of his complaint by showing that the mare was cut, permanently injured, and made valueless by reason of carelessness and negligence on

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the part of the defendant. The court overruled this motion, to which ruling defendant excepted, and assigns the court's action as error.

It is unnecessary to consider this further than to say that the motion was not renewed after all the evidence of both parties was submitted, and, if the denial of the defendant's motion for a directed verdict was error, the defendant cannot avail himself of that fact without having renewed his motion after all the evidence was in. This court has so held in so many cases that it is unnecessary to again cite them. The evidence shows that the defendant took some horses belonging to the plaintiff to pasture for the season, and that some three or four days before the accident to the mare described occurred the defendant built a barb-wire fence around a corral near his buildings. The corral was about eight rods long, and between it and the pasture was a lane. Between the lane and the corral a gate was hung. On the day referred to, another patron of the defendant came for some horses which he had in the pasture, and drove some of the horses through the lane to the corral. The defendant with other persons went into the corral to look at the horses. It is not shown whether the defendant or some other person closed the gate between the corral and the lane, but it is shown that it was closed and left closed after the horses entered the corral with the knowledge of the defendant. The defendant and others were about the middle of the corral with the horses in one end when the latter made a sudden start, and ran around the corral. It was soon discovered that one of the legs of the mare in question was entangled in a barbed wire, but no one was able to testify whether it was a wire which had been left loose in constructing the fence, or whether she had been pushed into the fence by the other horses, or how the accident was caused. Immediately upon discovering her condition, defendant notified plaintiff, who inspected and left her with the defendant. There is some disagreement as to their conversation on this occasion, but we do not deem either version material. As we view the evidence, it resolves itself into the question as to whether it was negligence on the part of the defendant to permit a number of horses, some of which, including the mare in question, were unbroken, to be driven into a corral newly fenced with barbed wire and the gate leading therefrom closed. The question of negligence in such a case is one of fact, and, unless the evidence is so clear that

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the minds of reasonable and fairminded men would agree on the subject, it must be submitted to the jury for determination. We think this is such a case. We cannot say as a matter of law that it either was or was not negligence for the defendant to permit a number of horses to be shut into a small corral newly fenced with barbed wire to which the horses had not been accustomed, and the evidence showing some of the horses unbroken. Carr et al. v. Minneapolis, St. Paul & Sault Ste. Marie Ry. Co., 16 N. D. 217, 112 N. W. 972; 2 Cyc. 323. The jury found for the plaintiff, and, unless error was committed in the exclusion or admission of evidence, or in the charge of the court, we cannot meddle with the verdict.

Error is assigned because the court did not allow a question as to defendant's reputation as a man of care in handling stock. It is conceded that the degree of care required by a depository for hire is ordinary care, and that ordinary care is such care or diligence as persons of ordinary prudence usually exercise about their own affairs of ordinary importance. Revised Codes 1905, sections 5472, 6694; 3 Current Law, 162, note 68. We see no error in excluding evidence as to his reputation in this respect. The facts relating to this accident were all before the jury, and in such a manner that their verdict must be based upon the facts of this case, and, while the defendant's reputation may have been, and doubtless was, excellent in the matters referred to, yet, if he did not exercise ordinary care in this instance, his reputation for care could have no proper influence upon the deliberations of the jury. Lucia v. Meech, 68 Vt. 175, 34 Atl. 695.

Error is also assigned because the court excluded evidence as to custom regarding driving stock into this corral. It is unnecessary to determine whether this was properly excluded, because the question next preceding this had been answered, and it was in substance the same, and to have allowed the question to which the objection was sustained would, in effect, have been allowing a repetition of the question just asked and answered.

The court in its charge to the jury stated that there were three degrees of care and three degrees of negligence, and proceeded to define each degree; and error is assigned to such charge upon the ground and for the reason that it directly and and inferentially misstated the law applicable, and had a tendency to confuse and mislead the jury as to what ordinary care was, and also that the evidence showed no negligence whatsoever

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on the part of the defendant, but conclusively disapproved any negligence on his part. We see no merit in this assignment. The fact that the court undertook to clearly define the different degrees of care and negligence could not have prejudiced the rights of the defendant before the jury. The court was endeavoring by contrast to make the subject clear, and we think that the charge in this respect has that effect by bringing out more plainly to the jury the degree of care which the law imposed upon the defendant than would have been done had the court mentioned none but those applicable to this case.

The trial judge among other things, charged the jury as follows: "Now, then, gentlemen of the jury, in this case the burden of proof is upon McBride to establish that he placed his mare in Wallace's care as a depository for hire, that Wallace was a depository for hire, and, further, that, when he placed the mare there, that she was sound and healthy and all right. And the burden of proof is also upon him to show that she has not been returned to him, but that she was injured by the negligence of defendant so that on account of such injury she had to be killed as valueless. Now, then, if McBride has shown these things by the fair preponderance of the evidence, then under the law Wallace should pay McBride for the damage thus done him. The burden of proof is upon McBride to establish by a fair preponderance of the evidence that the loss of this mare happened notwithstanding the exercise of ordinary care on Wallace's part; and, unless the evidence in this case so makes it appear to you, gentlemen of the jury, then Wallace would not be liable." Error is assigned in that it misstates the law applicable, and because the latter part of this instruction is confusing and unintelligible, and had a tendency to mislead and confuse the jury as to the burden of proof and tended to hold defendant as an absolute insurer, and for other reasons upon which we have already passed. The authorities regarding the burden of proof in this class of cases cannot be harmonized. The English doctrine is that the burden is upon the plaintiff throughout. Later authorities in this country seem to hold that, when the plaintiff has shown the delivery of the article, its sound condition, and that it has not been returned, the burden shifts to the defendant to show the facts occasioning the loss, or that he used ordinary care in the protection of the property. Still other courts hold that much depends upon the circumstances, and whether conditions are such that the

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facts regarding the loss are peculiarly within the knowledge of the defendant rather than of the plaintiff.

It is urged by the appellant that the burden is upon the plaintiff throughout. We are not called upon to determine in this case where the burden rests. The charge was delivered by the court orally. Had it been reduced to writing, the apparent conflict or ambiguity hereinafter referred to could not well have occurred. The defendant submitted no requests, and failed to call the court's attention to any point omitted by it in the charge. The first paragraph above referred to certainly states the rule as favorably to the defendant as he contends for, and follows those cases in harmony with the English doctrine. If it constitutes error, it was error in defendant's favor, and furnishes him with no cause for complaint. On these points, see 2 Encyc. of Evidence, pages 189-294, inclusive, and cases cited; 3 Elliott on Evidence, sections 1784-1787, and cases cited; 3 Am. & Eng. Enc. of Law, 750; Manson et al. v. Pullman Palace Car Porters' Railway Employes Association (N. J. Sup.) 60 Atl. 1120.

The error assigned relating to the last portion of that part of the charge above quoted furnishes a more difficult question. Error is not assigned by reason of the latter sentence being contradictory to any other part of the instructions. We have carefully considered the charge, taken as a whole; and, while the last sentence quoted may be somewhat ambiguous and confusing, yet we have concluded that it cannot have misled the jury. The court had clearly and emphatically told the jury that the burden was upon McBride throughout, and all other portions of the charge were in harmony with that theory. Taking the last sentence as it reads, it may have well been understood by the jury to have indicated that the burden was upon McBride to show that Wallace used more than ordinary care. This construction would make this sentence far more favorable to the defendant than he was entitled to have the law stated on any theory of the law of negligence, and we think that when read in connection with the whole charge, and in the light of the true spirit and tenor of the instructions as a whole, that the jury could not have understood the court to indicate that Wallace was liable if he used ordinary care. If we were not bound by the record before us, we should seriously question its correctness as to this sentence. Under this construction, the contradiction would be so slight and so in favor of the defendant that we do

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not deem it reversible error. The appellant has submitted affidavits to show that this was not the language used in fact, but this is not the proper method to correct the record, and we repeat that it is clear to us that, taken as a whole, the charge could not have misled the jury. Instructions must be considered as a whole, and an isolated sentence containing an erroneous statement of the law, but which when taken with the rest of the charge would not mislead the jury, is harmless error, and does not warrant a reversal. Bank v. Lemke, 3 N. D. 154, 54 N. W. 919; State v. Brennan, 2 S. D. 384, 50 N. W. 625; Bank v. Elevator Co., 11 N. D. 280, 91 N. W. 436; McCormack v. Phillips, 4 Dak. 506, 34 N. W. 39; Fassett v. Town of Roxbury, 55 Vt. 552; Melandy v. Town of Bradford, 56 Vt. 148. The court in the last two cases cited gives very clear statements of this doctrine.

Other errors in the charge are assigned, some of which are not argued. Others are covered by what we have already said, and still others are without merit. Some questions of practice are raised by respondent, but it is unnecessary to pass upon them in view of the conclusion at which we have arrived.

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

(117 N. W. 857.)

Alice Stiles v. Seymour Granger, et al.

Opinion filed September 4, 1908.

Adverse Possession — Color of Title — Invalid Tax Deed.

1. Appellant purchased a quitclaim deed for the land in controversy from one Bowdle in August, 1890. The only title possessed by Bowdle was derived from a deed under sale for taxes for the year 1886. It is contended that such tax deed is invalid. Without determining this question, but conceding for the purposes of this case that it is invalid, and following Power v. Kitching, 10 N. D. 254, 86 N. W. 737, 88 Am. St. Rep. 691, it is *held* that the title so obtained by appellant is adequate as foundation for title in the appellant under section 4928, Rev. Codes 1905, which reads: "All titles to real property vested in any person or persons who have been or hereafter may be in actual, open, adverse and undisputed possession of the land under such title for a period of ten years, and shall have paid all taxes and assessments legally levied thereon, shall be and the same are declared good and valid in law, any law to the contrary notwithstanding."

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Same — Evidence — Action to Quiet Title.

2. Appellant took possession of the premises described in the deed above referred to and placed the same under cultivation in 1891, and his possession and cultivation thereof have been continuous since 1891, and he paid all taxes and assessments levied thereon between the years 1890 and 1905, and while so in possession of said land. *Held,* that these facts are a complete defense to an action to quiet title, brought by one holding the record title from the Northern Pacific Railroad company, under a deed from that company executed, delivered and recorded in 1879; none of the parties through whom plaintiff's title came having ever been in actual possession of the premises.

Same — "Payment" of Taxes — Owner's Purchase at Tax Sale.

3. The appellant, during a long absence when traveling for his health, directed an agent to pay the taxes on the land in question, and other land owned by him assessed against it in the year 1897. By a mistake or oversight of the agent, and contrary to his instructions, instead of paying them in the usual manner, he purchased the land at tax sale in the name of the appellant. Appellant paid all subsequent taxes assessed prior to the bringing of this suit, and did not procure a tax deed under the certificate so obtained by such sale. *Held,* in the absence of any question of good faith on the part of appellant, that such purchase was void, and operated as a "payment" within the requirements of section 4928, Rev. Codes 1905.

Same — Recognition of Title — Negotiations to Quiet Title — Effect.

4. The title to the land in controversy ripened in appellant after the payment of ten years' taxes and possession during the same period, and such title is not affected by any subsequent negotiations which he may have had with the respondent for the purpose of quieting his title.

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

Action by Alice Stiles against Seymour Granger and others to determine title to land. Judgment for plaintiff, and defendant Granger appeals.

Reversed, and judgment for defendant.

Page & Englert, for appellant.

Failure of true owner to assert title within the statutory period, makes the adverse occupant owner against all others. Mayberry v. Willoughby, 5 Neb. 368; 1 Cyc. 1084; 1 Enc. Ev. 669; Probst v. Trustees, 129 U. S. 182, 9 Supt. Ct. Rep. 263; Murray v. Romine,

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82 N. W. 318; Moore v. Brownfield, 34 Pac. 199; Wood v. Railway Co., 11 Kan. 324; Gildehaus v. Whiting, 18 Pac. 916; Anderson v. Burnham, 34 Pac. 1056; Ward v. Nestell, 71 N. W. 593; Falloon v. Simshouser, 22 N. E. 835; Sheriff v. Frecking, 11 N. Y. Supr. Ct. 452; Elder v. McClusky, 70 Fed. 529; Roots v. Beck, 9 N. E. 698; Hapgood v. Burt, 4 Vt. 155; Carpenter v. Coles 77 N. W. 424; Seymour, Sabin & Co. v. Carli, 16 N. W. 495; Maas v. Burdetzke, 101 N. W. 182; Nash v. N. W. Land Co., 15 N. D. 566, 108 N. W. 792; Revised Codes N. D. 1905, section 6781.

Actual possession is the exercise of dominion over the land as if owned by the person so exercising. Village of Glencoe v. Woodsworth, 51 N. W. 377; Cook v. Clinton, 31 N. W. 317, 8 Am. St. Rep. 816; Copeland v. Murphy, 72 Tenn. 64; Wright v. Phipps, 90 Fed. 556; Batz v. Woertel, 89 N. W. 516; Lotta v. Clifford, 47 Fed. 614; Webber v. Clark, 15 Pac. 431; Crawford v. Galloway, 45 N. W. 628; Collette v. Vanderburgh, 4 L. R. A. 321.

Where a possessor of land buys at a tax sale, such purchase is a payment of the tax. Smith v. Lewis, 20 Wis. 350; Petty v. Mays, 19 Fla. 652; Lewis v. Ward, 99 Ill. 525; Christie v. Fisher, 58 Cal. 256; Swan v. Rainey, 27 S. W. 240; Murphy v. Redeker, 94 N. W. 697; Wambole v. Foote, 2 Dak. 1, 2 N. W. 239; Desty on Taxation, volume 2, page 929.

Occupant's knowledge of defective title does not prevent acquisition by adverse possession. Carpenter v. Coles, 77 N. W. 424; Searl v. School Dist. No. 2, 133 U. S. 553; Lampman v. Van Alstyne, 69 N. W. 171; Keppel v. Dreier, 58 N. E. 386; Warren v. Bowdran, 31 N. E. 300; 1 Enc. Ev. 691.

May buy out standing interest to confirm his title by adverse possession. Myer v. Hope, 77 N. W. 720; Elder v. McLusky, 70 Fed. 529; Barnes v. Barnes, 85 N. W. 629; Wiese v. Union Pac. Ry. Co., 108 N. W. 175; Sinder Manf. Co. v. Tillman, 21 Pac. 818; Mather v. Walsh, 17 S. W. 755; Owens v. Myers, 57 Am. Dec. 693; Burhous v. Van Zandt, 7 Bush. 91.

Title acquired by adverse possession is not forfeited by subsequent interruption or act. Hoffman v. White, 7 So. 816; Carter v. Chevalier, 19 So. 798; LeRoy v. Rogers, 30 Cal. 229, 89 Am. Dec. 88; Gage v. Hampden, 127 Ill. 87, 20 N. E. 12; Bank v. Fife, 8 S. W. 241.

Theodore S. Lindland, for respondent.

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While United States holds title, there can be no adverse possession. N. P. R. R. Co. v. Traill Co., 115 U. S. 600, 29 L. Ed. 477; Krueger v. Schulz, 6 N. D. 310, 70 N. W. 269; 1 Am. & Eng. Enc. Law, (2d Ed.) 875-6.

Where the instrument of title is procured with knowledge of its invalidity, the grantee does not occupy under color of title. 1 Am. & Eng. Enc. Law, (2d Ed.) 868, 88 Am. St. Rep. 713.

Permitting land to be sold for taxes and buying at the tax sale is not paying taxes. 1 Cyc. 1109; McDonald v. McCoy, 53 Pac. 421; Irving v. Brownell, 11 Ill. 402; Wetting v. Bowman, 47 Ill. 17.

SPALDING, J. Action to determine adverse claims to the SW¼ of the SW¼ of section 25, in township 142 N., of range 58 W., in Barnes county. The complaint is in the statutory form. The defendant Seymour Granger alone answers. He denies generally the allegations of the complaint, and that plaintiff has ever been the owner of the land described, or any part thereof, and sets up various forms of defense under the statute of limitations. The only one material to be considered is that he claims title by reason of having occupied, possessed, and paid the taxes on the land continuously for more than ten years prior to the commencement of this suit under color of title by virtue of a tax deed based upon a sale for taxes of 1886; such deed having been issued on the 3d day of October, 1887, to one Bowdle, who quitclaimed to Granger on the 2d day of August, 1890, all his estate, right, title, interest, claim, property, and demand in and to said premises. This action was brought about May 12, 1905, and tried on the 17th day of February, 1906. Judgment was entered for the plaintiff, quieting the title in her, on the 10th day of March, 1906. The defendant appeals, and demands a review of the entire case by this court.

The findings do not materially assist us in determining what the trial court found to be the facts. They are in the main conclusions of law. More or less evidence was submitted on all of the defenses raised by the answer, but it is unnecessary to consider any except the one above set out. It is shown that this 40-acre tract of land was included in the grant of the United States to the Northern Pacific Railroad Company to aid in the construction of its line of road. Patent was issued to the railroad company August 22, 1884. November 10, 1879, the railroad company conveyed the premises to George Stiles and George C. Getchell. May 28, 1884, Stiles

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conveyed an undivided half interest to Alice Stiles, his wife, the plaintiff and respondent in the present action. July 25, 1884, the interest of Getchell was sold on execution to Chas. V. Guy and Mary Ann Guy, his wife, and a sheriff's certificate issued and recorded on said date. January 17, 1905, the sheriff's certificate aforesaid was assigned to George Stiles, and February 14, 1905, a sheriff's deed was issued to him thereon. May 9, 1905, Stiles quitclaimed to the plaintiff and respondent, his wife, and on the same day Mary Ann Guy executed a quitclaim deed to her. This is in substance the chain of title through which respondent claims. Neither she nor any of her ancestors, predecessors, or grantors were ever in actual possession of the premises, or any part thereof, and never enjoyed any of the rents or profits therefrom, and never demanded the possession, or in any manner attempted to take possession of, or assume control over, such premises. October 12, 1889, a tax deed was executed to A. M. Bowdle, purporting to convey said premises pursuant to a sale thereof for taxes for the year 1886. August 2, 1890, Bowdle and wife conveyed by quitclaim deed all the interest acquired under such tax sale to the appellant. The appellant owns the land adjoining the tract in question on the east and west. His occupancy of a few acres of the tract in controversy dates back to 1883, and in 1891 he broke it all, except about five acres, which was unfit for cultivation, and has had thirty-five acres under plow continuously since then; some years cropping it himself, and other years renting it and receiving compensation for its use. The plaintiff Stiles, lived near the land with her husband. They passed by it frequently, and never objected to its use by the appellant. George Stiles in matters relating to it acted as agent for his wife, and he testified that he knew of its occupancy by appellant, but that it was vacant and unoccupied until and during the year 1889. Neither he nor his wife ever paid any taxes on the land until after title had ripened in Granger.

Section 4928, Rev. Codes 1905, reads: "All titles to real property vested in any person or persons who have been or hereafter may be in actual, open, adverse and undisputed possession of the land under such title for a period of ten years, and shall have paid all taxes and assessments legally levied thereon, shall be and the same are declared good and valid in law, any law to the contrary notwithstanding." This is the statute under which appellant makes his pricipal claim to title. It is shown by competent evidence that

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appellant paid the taxes each year upon the premises from 1889 to 1896, both inclusive; the taxes for the latter year having been paid by him September 22, 1897. The next year appellant was away from home traveling for his health, and left the payment of his taxes in charge of an agent, with instructions to pay those on this land. By an oversight or mistake of the agent they were not paid when due on this and some of the other lands to which he held title, but it was purchased in appellant's name in his absense by his agent, December 6, 1898, at tax sale. He regularly paid the taxes each year thereafter to and including the year 1905. No contention is made by respondent that appellant was not in possession and occupancy of the land during all these years, and her agent testified that no effort was ever made to get possession thereof, and there is nothing to show that Granger's right to possession or ownership was ever challenged by any one until about the time this suit was commenced. Appellant had made a loan upon this and other land. The mortgagee requested him to strengthen the title to this property, whereupon he telephoned to the husband of the respondent, and asked him for the address of Mrs. Guy, and informed him that he wished to see if he could get a quitclaim deed from her. He wrote to Mrs. Guy, but received no reply, and it appears that she deeded to Stiles immediately after this, and suit followed.

The first question for determination is whether the purchase at tax sale December 6, 1898, for the taxes of the year 1897, by the appellant, constitutes a payment within the meaning of the statute above quoted. Respondent urges that it is not a payment, and that the deed from Bowdle to appellant does not constitute such color of title as to bring appellant within the terms of the statute referred to. The appellant contends that it does constitute payment, and that the deed held by him is adequate title to sustain his defense. When the oversight occurred, and the land was accidentally sold to the appellant, he was in possession, claiming ownership, under his deed from Bowdle. It was his duty to pay the taxes. He had for many years recognized this duty, and had paid them each year, and continued to pay them subsequent to the sale. No question of good faith is involved. He held his certificate nine years after the sale without making application for a deed. The sale of land to the person claiming ownership and in possession, whose duty it is to pay the taxes, is void, and operates as a pay-

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ment. The purchaser under such circumstances acquires no title by his purchase, and it is deemed to be only one method of paying the taxes. Good faith is presumed, in the absence of evidence showing the contrary. Christy v. Fisher, 58 Cal. 256, and cases cited; Smith v. Lewis et al., 20 Wis. 350; Bassett v. Welch, 22 Wis. 175; Whitney v. Gunderson, 31 Wis. 359 and 379; Murphy v. Redeker et al., 16 S. D. 615, 94 N. W. 697, 102 Am. St. Rep. 722; Swan et al. v. Rainey, 59 Ark. 364, 27 S. W. 240; Douglas v. Dangerfield, 10 Ohio, 152; Morrison v. Norman, 47 Ill. 477; Davis v. Hall, 92 Ill. 85. Respondent cites some early Illinois cases to the effect that a purchase at tax sale may not be a payment of the taxes, when made by the party in possession; but the court of that state fails to discuss the question, or the facts show that the good faith of the payment was involved, and that the purchase was made with the intention of acquiring a deed thereunder and with a hostile purpose. In Lewis v. Ward, 99 Ill. 525, the supreme court of that state says: "The law is well settled that certain persons, on account of their relations to the property or their obligation to pay the taxes thereon, are forbidden by the policy of the law to become purchasers of the lands at a tax sale. The rule admits of no exception that a purchase by one whose duty it is to pay the tax operates as a payment and nothing more." Had appellant intentionally omitted the payment of the 1897 tax, and purchased at the tax sale with the purpose of acquiring title under his purchase, a different case would be presented, and his good faith might well be questioned. Under the facts and circumstances of this case, we conclude that the purchase by the appellant was a payment of the taxes for the year 1897, within the requirement of section 4928, supra.

It is equally clear to us that the deed from Bowdle to Granger constitutes color of title, and brings Granger within the terms of section 4928, supra. The facts are almost identical in this respect with those in Power v. Kitching, 10 N. D. 254, 86 N. W. 737, 88 Am. St. Rep. 691. There is no suggestion in the record of any lack of good faith on the part of Granger in his assumption that his deed gave him title at the time he purchased it. While it may be conceded that the tax deed to Bowdle conveyed no title, yet the deed was delivered, as was also the deed from Bowdle to Granger, before the decision in Power v. Larabee, 2 N. D. 141, 49 N. W. 724, was rendered by this court, and the fact that both

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parties may have misinterpreted the law prior to the decision of that case does not impeach their good faith. Respondent argues that, because the deed to Granger contains a clause limiting it to conveyance of the interest acquired by Bowdle under the tax deed mentioned, it appears that appellant did not rely on the deed, and that this is made more apparent because he took assignments at the same time of tax certificates for other years held by Bowdle, and still holds them. We are unable to construe these facts as supporting respondent's contention. The tax deed gave Bowdle color of title. His deed to Granger was an assignment of whatever right or title he acquired by the tax deed. If the deed gave Bowdle color of title, his grantee or assignee took the same title that Bowdle had held. Instead of being evidence that Granger did not rely on the tax deed to Bowdle, it appears, from the fact that he took no deed on the certificates, that he did rely upon the title acquired by the deed from Bowdle. Had he not relied upon such title, he would surely have taken deeds on the certificates.

The only remaining question which we deem necessary to notice is whether certain conversations or negotiations, if they may be called that, between Granger and Stiles, constitute a recognition of title in Stiles in such a sense as to defeat the claim of Granger under the statute. The authorities on this question are numerous, and it may be admitted that they are not in harmony; but the fact that these negotiations, the evidence regarding the nature of which is conflicting, were not had until after the title had ripened under the statute in Granger, eliminates this question. Cannon v. Stockton, 36 Cal. 535, 95 Am. Dec. 205.

The judgment of the district court is reversed, and the title is quieted in the appellant, Granger, as against all claims of the respondent and persons claiming under her. All concur.

(117 N. W. 777.)

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B. W. SCHOUWEILER, K. CURRIE AND W. H. COX v. HON. FRANK P. ALLEN, DISTRICT JUDGE OF THE FOURTH JUDICIAL DISTRICT, NORTH DAKOTA, THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT IN AND FOR RICHLAND COUNTY, N. D., J. M. KRAMER, CLERK OF THE DISTRICT COURT OF RICHLAND COUNTY, N. D., FAIRMOUNT SCHOOL DISTRICT IN RICHLAND COUNTY, N. D., A SCHOOL CORPORATION, M. L. BRANSON, H. O. HUBBARD AND K. CURRIE, DIRECTORS OF SAID SCHOOL DISTRICT, AND T. P. WILLIAMS.

Opinion filed October 8, 1908.

Attorney and Client — Discharge of Attorney.

1. A suitor has the right to discharge his attorney, either with or without reason, at any time during the progress of the litigation he was employed to conduct, on paying or securing payment for his services.

Intervention — Voters and Taxpayers.

2. On the facts of this case, an application made by voters and taxpayers of a school district to be allowed to defend a pending action, brought to enjoin the issuance of the bonds of the district, did not constitute a petition to intervene.

Schools and School Districts — Bond Issue — Elections — Duty of School Officers.

3. The officers of a school district are in effect agents of the voters and taxpayers, and when the district, at a regularly called and conducted election, votes to issue the bonds of the district and from the proceeds to build a schoolhouse, such vote is an instruction by the principal, and such officers have no discretion as to obeying their instructions.

Same — Stipulation for Judgment — Fraud.

4. After a majority of the voters of a school district had instructed the school board to issue bonds for building purposes, a taxpayer and voter of the district brought suit to enjoin the issuance of the bonds voted, alleging that enough illegal votes were cast in favor of the bonds to change the result.

The school board answered, denying all allegations of the complaint, relating to illegal votes; but subsequently a majority of the board stipulated personally with the plaintiff in such action that judgment should be rendered and entered in favor of the plaintiff permanently enjoining the defendants from issuing the bonds so voted. On such stipulation, without the submission of evidence, and without making any findings, the court ordered judgment as stipulated.

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Held, that such stipulation constitutes collusion between the plaintiff and the officers, and a legal fraud upon the district and the court, and furnished no basis for the judgment entered, and that it was error to order judgment upon such collusive, illegal and void stipulation.

Bonds — Duty of Board of Election Authorizing Issue.

5. Section 911, Rev. Codes 1905, which provides that, if a majority of all the votes cast at a school district election at which the issue of bonds is submitted should be in favor of issuing bonds, the school board through its proper officers shall forthwith issue bonds in accordance with such vote, is mandatory.

Supreme Court — Prerogative Writ — Certiorari.

6. On application of voters and taxpayers in such case for a writ of certiorari or other appropriate writ under the supervisory control of this court over inferior courts:

Held, that such power should not be lightly exercised, and that inasmuch as the applicants have the right to apply to the district court for an order vacating the judgment so entered, and by such application become parties to the record, and, if such application is denied, may have the action complained of reviewed, no such exigency exists as warrants this court in granting the writ applied for.

Original application for writ of certiorari by B. W. Schouweiler and others to be directed to Frank P. Allen and others.

Writ denied.

W. S. Lauder, for plaintiff.

Persons not parties below, having an interest in the proceeding to be reviewed may apply for certiorari. Champion v. Com'rs, 5 Dak. 416, 41 N. W. 739; State v. Rose, 4 N. D. 319, 58 N. W. 514; 6 Cyc. 767, 768, 769.

Intervention must be before entry of judgment. Revised Codes 1905, section 6825; Carey v. Brown, 58 Cal. 180; Hocker v. Kelley, 14 Cal. 165; Owens v. Colgan, 32 Pac. 519; Foerny v. Ball, 6 La. Ann. 685.

Courts will not dispose of a case at the will of the parties thereto, where the rights of others, or the public will be prejudiced. School Dist. v. Clifcorn, 112 N. W. 1099; State v. Ludvig, 82 N. W. 158; Van Gordon v. Goldamer, 16 N. D. 323, 113 N. W. 609; McDuffie v. Greenway, 24 Texas, 625; Penobscot R. Co. v. Mayo, 60 Maine, 306; Major v. Collins, 11 Ill. App. 658; McAdam v. Jenkins, 64 N. C. 795.

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Purcell & Divet, Dan. R. Jones and *Chas. E. Wolfe,* for respondents.

Where intervention is denied the applicant can obtain full relief by an appeal from the order denying. Coburn v. Smart, 53 Cal. 742; Stich v. Dickinson, 38 Cal. 608; Amundson v. Wheelock, 8 Pickering, 470; Harman v. Barhydt, 31 N. W. 488; Henry v. Insurance Co., 26 Pac. 176; Trenton v. Highland, 10 So. 442; Hall v. Jack, 32 Md. 253; Keefe v. Branch, 84 N. C. 202; Rollins v. Rollins, 76 N. C. 264; Bass v. Fountelroy, 11 Texas, 698.

SPALDING, J. This is an application for a writ of certiorari or other proper writ to be directed to the judge of the district court of the Fourth judicial district, the clerk of that court for Richland county, the officers of the Fairmount school district, and T. P. Williams. All the records in the action sought to be reviewed are before us, and the application may be considered on its merits.

April 30, 1907, a special election was held in the Fairmount school district on the proposition of issuing the bonds of that district in the amount of $18,000, for the purpose of building a new schoolhouse with the proceeds. Neither the regularity nor validity of the preliminary steps leading up to the election or the conduct of the election is questioned. At such election 271 votes were cast, 140 of which were in favor of issuing bonds and 131 against it. The result was duly certified to the county auditor, and a tax spread on his records against the property of the district to create a sinking fund to pay the bonds as they might mature, in accordance with the statute. It is alleged that this tax became a valid charge against the property of the district for the year 1907. The board of directors of the district, when the election was held, consisted of three members, of whom two were in favor of the issuance of the bonds and one was opposed thereto. After the election the board proceeded to carry out the instructions of the voters, plans and specifications for the proposed building were procured, arrangements were perfected for the sale of the bonds to the state, and advertisements for bids for the construction of the schoolhouse were published. The board was about to sell the bonds and enter into contracts for the building of the schoolhouse when the annual school election occurred on the 4th of June, 1907. At that election a new director opposed to the issuance of bonds was elected in place of one who had favored them, making the new board

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stand one in favor of their issuance and two opposed thereto. Immediately after this election and such change in the complexion of the school board, an action was commenced by one T. P. Williams, for himself and others similarly situated, for the purpose of enjoining the officers from issuing the bonds and from proceeding further to carry out the instructions of the voters given at the special election referred to. It is unnecessary to specify at length the allegations of the complaint. The material point is that it charged that at the special election referred to 15 of the persons who voted in favor of bonds "were not legal voters of the district, or within the county of Richland, and had no right or authority to vote at said election upon any question or subject whatever, and that the defendants and directors of such school district aforesaid, knowing that such persons were not legal voters and had no right or authority to vote at said election or meeting, and knowing that the ballots so cast by said voters were void (and the same were void), yet counted said votes as being legal votes in favor of the issuance of said bonds, when in truth and in fact the majority of the legal voters present and voting at said election or meeting cast written or printed ballots therein having thereon the words 'Against Bonds.'"

An order restraining the board from proceeding further in carrying out the instructions of the voters, together with an order to show cause why such injunction should not be continued during the pendency of such action, was obtained from the district court. Hearing of this order to show cause was had, at which affidavits were submitted on both sides, and the restraining order was continued in force. The answer of the defendants, among other things, denied that any illegal ballots were cast in favor of bonds. Hon. W. S. Lauder was employed by the board to prepare and serve an answer and to conduct the defense, and the action was placed on the calendar. A few days before the opening of the term the two members of the school board opposed to the issuance of bonds called upon Lauder and informed him that unless he would, as attorney for such board, stipulate that judgment might be entered without trial adjudging and decreeing that the allegations of the complaint were true and that the temporary injunction should be made permanent and perpetual, said school board would discharge him as its attorney and employ some other attorney who would conduct such litigation in accordance with the wishes of

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said directors. Said Lauder refused to enter into such stipulation, and was later notified by the school board, by letter, that he was discharged, whereupon he informed the board that he had been employed to appear in the action and test the validity of the election, and that he declined to recognize the authority of the board to discharge him, and that he refused to turn over to the clerk the papers and documents pertaining to the case, and that he expected to try it on its merits. December 10, 1907, the board adopted a resolution instructing the attorney for the board to appear in court and consent on the part of defendants that the temporary injunction be made permanent and to take all legal steps to procure the same to be done. The resolution further authorized and directed him to represent and show to the court that in the opinion of the board the material allegations of the complaint referred to were true and that the district ought not to be put to the enormous expense of defending the action. A resolution was also adopted by the board, authorizing its president to employ an attorney to represent it in such action who would consent on the written direction of the board to the temporary injunction being made permanent. December 11th Lauder was written by the board that he was discharged. A motion was submitted to the district court, and an order entered substituting Dan R. Jones as attorney for the board in said action. The motion was supported by the verified petition of two of the directors, which recited the controversy with Lauder, and further stated that they had investigated the facts stated in the complaint and had come to the conclusion that it would be for the best interest of the district that judgment be entered in favor of the plaintiff, Williams and that they believed the material facts in the complaint to be true, and that a trial of the action would put the district to large and unnecessary expense. Lauder submitted his own affidavit in opposition to the applicant for substitution, wherein he set forth the proceedings relating to the election and the steps taken in regard to the action and what had been done by the board regarding the issuance of bonds and the letting of contracts, etc., and, further, that it was the purpose of the majority of the directors to prevent, if possible, all judicial investigation into the validity of such election, and to obtain from the court, without any trial or investigation whatever of the facts, an adjudication to the effect that such election was illegal and void, and that it was the deliberate purpose of the majority of such board by collusion and fraud to

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nullify and set at naught, without any trial or investigation of the facts, the result of the election, and thereby thwart the will of the people as expressed by such election, and that the majority of the board was attempting to accomplish this by indirection, collusion, and fraud, without regard to the merits of the controversy; that he had made a very thorough investigation of all the facts embraced within the pleadings, and that he believed that the allegations of the complaint relating to illegal votes being cast were not true, and that a trial of the issue raised by the pleadings would convince the court that such election was fairly and honestly conducted, and that a clear majority of the legal votes cast thereat were in favor of the issuance of the bonds for the construction of the schoolhouse. This affidavit was corroborated by the affidavits of other taxpayers and voters of the district.

The order of substitution was served on the 10th day of February, 1908, and immediately thereafter Lauder presented to the court a petition of 70 of the electors and taxpayers of the school district, praying that said Lauder be permitted to appear in said action on behalf of the people and taxpayers of the district and take part in the trial thereof, and agreeing to become personally responsible for the fees and charges of said Lauder for his services; and they offered in open court to assume the financial burden of carrying on the litigation. This petition was at once denied by the court. Immediately afterward a stipulation was filed, which, omitting title and venue, reads as follows: "It is hereby stipulated and agreed between the parties to the before entitled action that judgment may be rendered and entered here in favor of the plaintiff and against the defendants, making permanent the temporary injunctional order hereinbefore issued, but without cost to either party." This was signed as follows: "T. P. Williams, Plaintiff in Person. H. O. Hubbard, M. L. Branson, the School Board of Said Defendant School District, Who are Authorized by Act of Said Board to Sign this Agreement." On filing the stipulation, an order for judgment was entered in favor of the plaintiff. It recites that it is made upon the stipulation signed by the plaintiff in person and by the defendant Fairmount school district in person. It directed the entry of judgment making the temporary injunctional order theretofore issued permanent. The court made no findings of fact or conclusions of law. Judgment was thereupon entered in favor of the plaintiff, pursuant to the terms of the stipulation and

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the order of the court. February 26th a motion was submitted to the court by the petitioners herein, as resident voters and taxpayers of Fairmount school district for an order vacating the judgment referred to, for the purpose of permitting petitioners to intervene in the action as parties defendant and defend the same on its merits. This application was denied, and the petitioners are in this court seeking relief, claiming that under the supervisory power over inferior courts, conferred by the constitution of this state upon this court, the proceedings of the district court in question should be annulled.

It was first contended that the district court had no right under the circumstances to order the substitution of attorneys, that the action of the majority of the board of directors, as appears from the papers before the court, discloses that they were seeking such substitution for an unlawful purpose, and particularly because Lauder had refused to comply with their directions and stipulate for a permanent injunction restraining the issuance of bonds, and that they desired to employ an attorney who would comply with their illegal and unwarranted instructions. We are of the opinion that this does not furnish ground for granting the writ. A suitor has the right to discharge his attorney, either with or without reason, at any time during the progress of the litigation which he was employed to conduct, provided his compensation is paid or secured. 9 Current Law, 303; 3 Am. & Eng. Enc. Law, 409; 4 Cyc. 954.

The last-named motion was treated solely as an application after judgment to intervene. It is now conceded that an application to intervene, made after judgment, comes too late, and it can hardly be contended that the petition asking permission to have Lauder retained in the case in behalf of the citizens and taxpayers, not accompanied by any proposed complaint in intervention, can be construed as a petition to intervene. The code provides for an election in school districts to vote upon the issuance of bonds in such cases, and section 911, Revised Codes 1905, contains the requirement that, if the majority of all votes cast "shall be in favor of issuing bonds, the school board, through its proper officers, shall forthwith issue bonds in accordance with such vote." The bonds cannot be issued except upon an affirmative vote. The wisdom of their issuance is a question solely for the voters of the district themselves, and not for the board, to determine. The mem-

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bers of the board are but the special agents of the people constituting the school district. The law has provided the method whereby the principal—in this case the voters—may instruct its agents, and when the instruction is in favor of issuing bonds the legislature has not seen fit to provide any method for revoking such instruction. After an affirmative vote at the election, the duties of the school board are ministerial, and consist in obeying implicitly the directions of the voters so given. No evidence was submitted, unless the affidavits submitted on the preliminary hearings could be called evidence, and they did not show the casting of enough illegal votes in favor of bonds to change the result. Of course, we cannot say what the testimony of the same persons might disclose if they were placed on the witness stand and subjected to rigid cross-examination; but as the record stands there was nothing on which the court could base its order for judgment, except the naked stipulation of the parties, and that stipulation was made in direct defiance of law. It was a legal fraud on the voters and taxpayers, the patrons of the school, and the court. It may have been made with the best of intentions, and the members of the board may have been misled by their desire to prevent the issuance of bonds; yet it constituted collusion, and was of no force or effect, and furnished no basis for a judgment. The court had acquired jurisdiction of the parties, and had jurisdiction of the subject-matter; but it was error for it to order judgment upon a collusive, illegal, and void stipulation. The fundamental error of the court lies in the position it seems to have taken that the matters involved related only to the plaintiff and to the directors of the school district, and that the voters, taxpayers, and patrons were in no way interested.

We cite but a few of the many authorities either directly in point or analogous. Kelley & Alexander v. Mayor and Aldermen of Milan, 127 U. S. 139, 8 Sup. Ct. 1101, 32 L. Ed. 77; Sturm v. School District No. 70 et al., 45 Minn. 88, 47 N. W. 462; School District Tp. v. Lombard, Fed. Cas. No. 12,478; Kane v. Independent School District of Rock Rapids et al., 82 Iowa, 5, 47 N. W. 1076; Nevil et al. v. Clifford, 55 Wis. 161, 12 N. W. 419; Independent School Dist. of Rock Rapids et al. v. Schreiner et al., 46 Iowa, 172; Babcock Hardware Co. v. Farmers' & Drovers' Bank, 54 Kan. 273, 38 Pac. 256; Balch v. Beach et al., 119 Wis. 77, 95 N. W. 132; Frederick Milling Co. v. Frederick Farmers' Alliance

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Co., 20 S. D. 335, 106 N. W. 298; Hemmer v. Bonson (Wis.) 117 N. W. 257. The principle is clearly stated in Kelly & Alexander v. Mayor, etc., supra. It was an action to recover on municipal bonds which had been adjudged valid and binding on the town. The defense was that the decree holding them valid had been procured by combination and fraud between the railroad company, for whose benefit they were issued, and agents and attorneys of the defendant. The court held the agreement made in this action by the mayor with the railroad that the bonds were valid could give them no validity. The court, through Mr. Justice Blatchford, said: "The act of the mayor in signing the agreement could give no validity to the bonds, if they had none at the time the agreement was made. * * * The decree of the court was based solely upon the declaration of the mayor, in the agreement, that the bonds were valid; and that declaration was of no more effect than the declaration of the mayor in the bill in chancery that the bonds were invalid. * * * This was not the case of a submission to the court of a question for its decision on the merits, but it was a consent in advance to a particular decision, by a person who had no right to bind the town by such consent, because it gave life to invalid bonds, and the authorities of the town had no more power to do so than they had to issue the bonds originally."

The question then arises, on this statement of the facts and the law, whether the writ asked for should be granted. It is contended that this court should grant it under its power to supervise and control the action of inferior courts; but this supervisory power must be governed by some reasonable rules and regulations, and it should not be lightly exercised. The authorities on the subject of its exercise are in conflict. We are of the opinion that it should not be made use of where it is not called for by some exigency. It is conceded by the respondents in this proceeding that the petitioners still have the right to apply to the district court to vacate its judgment, and we think this correct. While they are not parties by name to the action, they are interested as voters and taxpayers of the district and patrons of the school; and it is only such who are interested, as the directors themselves are in effect merely the agents of the district. We held, in Plano Mfg. Co. v. Doyle, 116 N. W. 529, that in cases tried by the court the power to correct errors in the findings or judgment is possessed by the district court while it retains jurisdiction of the action. The interested parties, seeking

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to have the will of the voters made effective, may by motion ask to have the judgment, entered contrary to law, vacated, and thus become parties to the record. This is supported by ample authority. Aetna Insurance Co. v. Aldrich et al., 38 Wis. 107; Lowber v. Mayor, etc., of N. Y., 26 Barb. (N. Y.) 262; Elliott v. Superior Court, 144 Cal. 501, 77 Pac. 1109, 103 Am. St. Rep. 102. In the latter case it is held that one not a party, but whose rights are injuriously affected by a judgment, cannot resort to certiorari, but may move to set aside the judgment, and on the denial of the motion may appeal, and thereby have the judgment of which he complains reviewed for error.

While the applicants possess this remedy, and perhaps others, we see no such extreme necessity for the writ asked as to justify its issuance, even assuming it might be granted in the exercise of the supervisory control possessed by this court.

The writ is denied. All concur.

(117 N. W. 866.)

The State of North Dakota v. William H. Denny.

Opinion filed October 10, 1908.

Criminal Law — Instruction — Felonious Intent.

1. An instruction defining the term "feloniously" as "an intent to commit a felony or an intent to commit a wrongful act which might result in the commission of a felony," etc., is erroneous. By the use of the word "might" the jury was told, in effect, that a person is by law presumed to intend all the possible, rather than the reasonably probable, consequences of his voluntarily wrongful act. Said definition was also erroneous as it in effect informed the jury that an intent to commit a wrongful act which might result in receiving stolen property, knowing the same to be stolen, constituted a felonious intent within the meaning of the law relating to the offense charged in the information, to wit, receiving stolen property knowing the same to have been stolen.

Same — Error Without Prejudice.

2. Said instruction, although erroneous, was not prejudicial in view of the subsequent explicit instructions given by the trial judge which are referred to at length in the opinion.

Same — Receiving Stolen Property — Evidence.

3. In a prosecution for receiving stolen property knowing the same to have been stolen, it is unnecessary to allege or prove who

the thief was. It is accordingly *held* that an instruction to the effect that it is immaterial who committed the larceny, was not prejudicial, in view of state of the proof, which in no manner tended to implicate the defendant in such larceny.

Same — Guilty Knowledge.

4. An instruction that "guilty knowledge is made out and sufficiently proven to warrant conviction in that respect by proof that the defendant received the property under such circumstances as would satisfy a man of ordinary intelligence and caution that they were stolen" is erroneous. Such instruction lays down an arbitrary rule for determining guilty knowledge using as a test facts which would satisfy a man of ordinary intelligence and caution. The standard by which to impute guilty knowledge is not that of a man of ordinary intelligence and caution, but the test is a personal test of the defendant. Under such instruction, no discretion was vested in the jury and hence the same constituted an invasion of the province of the jury. Spalding J., dissenting.

Same.

5. Among other things, the jury was instructed as follows: "This felonious intent, to warrant conviction, must have consisted of his intentional receipt of said stolen property, knowing the same to be stolen, with further intent in defendant in receiving the same to deprive the owner of said property, or to derive gain, profit or consideration himself from receiving or concealing said property or the disposal thereof." Said instruction was proper. as a person may be convicted, even though he received the stolen property for the purpose of returning it to the owner. if his purpose was also to receive a reward therefor.

Criminal Law — Witness — Impeachment — Cross-Examination.

6. On cross-examination of one of the state's witnesses, and for the purpose of impeachment, he was asked whether as a matter of fact he was running a certain saloon in violation of law and without a license. To this question counsel for the state objected, and the objection was sustained. *Held* error. Such question was admissible under the general rule that for the purpose of impeachment a witness may be asked questions as to collateral matters. the answers to which may tend to degrade or otherwise discredit him.

Evidence.

7. The state was permitted over defendant's objection to give secondary evidence as to the contents of a certain copy of letter claimed to have been written by one Miller to defendant, and tending to show defendant's guilty knowledge in receiving the stolen property. *Held,* for reasons stated in the opinion, that such ruling constituted prejudicial error, for the reason that no sufficient foundation for the introduction of such testimony had been shown.

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Witness — Expert Testimony.

8. The state's attorney, who was a witness for the state, was permitted to give his opinion or conclusion to the effect that the alleged copy of letter claimed to have been sent from Montana to defendant was on letter paper different from that in use by the Great Northern Hotel at Williston. He was a non-expert witness, and his testimony should have been restricted to facts, leaving it to the jury to draw their own inferences or conclusions therefrom.

Evidence.

9. Certain other rulings in the admission of testimony examined, and *held* not error.

Same — Motion to Advise Acquittal.

10. Evidence examined, and *held* that the rulings of the trial court in denying defendant's motions to advise an acquittal and for a new trial, in so far as the ground of insufficiency of the evidence is concerned, were correct.

Appeal from District Court, Wiliams county; *Goss,* J.

William H. Denny was convicted of receiving stolen property, knowing the same to have been stolen, and from the judgment of conviction and an order denying a new trial, he appeals.

Reversed and remanded.

Palda & Burke, (*Engerud, Holt & Frame,* of counsel), for appellant.

Charge must cover substantive elements of the crime. State v. Fordham, 13 N. D. 502, 101 N. W. 888.

Felonious or wrongful intent essence of the crime. O'Connel v. State, 55 Ga. 191; Rice v. State, 50 Tenn. 215; Revised Codes 1905, section 9199.

Use of the word "might" causes the meaning of possible instead of probable consequences of defendant's acts. People v. Munn, 3 Pac. 650; People v. Rockwell, 39 Mich. 503; People v. Sweeney, 22 N. W. 50.

The identity of the thief, other than the defendant, is immaterial. Wharton Criminal Law, (9th Ed.) volume 1, section 986.

The standard to determine guilty knowledge is not ordinary intelligence and caution, but the test is a personal test of the defendant. State v. Hazlett, 16 N. D. 426, 113 N. W. 374.

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Before the admission of the contents of a lost paper, all sources of information, and means of discovery which the nature of the case suggests, must be exhausted. McManus v. Commow, 10 N. D. 340, 87 N. W. 8; Bogen v. McCutcheon, 48 Ala. 493; Calhoun v. Thompson, 56 Ala. 166; Watson v. State, 63 Ala. 19; Bolden v. State, 15 So. 341; O'Neill v. McKinna, 49 So. 105; Norris v. Russell, 5 Cal. 249; Taylor v. Clark, 49 Cal. 671; Wells v. Adams, 1 Pac. 698; Billen v. Henkle, 13 Pac. 420; Lott v. Buck, 39 S. E. 70; Post v. School District, 26 N. W. 911; Smith v. Axtel, 1 N. J. Eq. 494.

A witness must state facts, not his inferences therefrom. Smith v. N. P. Ry. Co., 3 N. D. 555, 58 N. W. 345; Musick v. Latrobe, 39 Atl. 226; Perry v. Graham, 18 Ala. 822; Largen v. Central Ry. Co., 40 Cal. 272.

T. F. McCue and *Van R. Brown,* for respondent.

The definition of "feloniously" as "with intent to commit a felony," was correct. State v. Jesse, 17 N. C. 297; State v. Snell, 78 Mo. 240; State v. Rechnitz, 52 Pac. 264; State v. Smith, 71 Pac. 767; People v. Dumar, 5 N. Y. Cr. Rep. 55; State v. Dustraw, 137 Mo. 44; State v. Douglas, 53 Kan. 70, 37 Pac. 172; U. S. v. Greve, 65 Fed. 489.

In a prosecution for receiving stolen property, name of the person stealing need not be alleged or proven. Commonwealth v. Hogan, 121 Mass. 373; Commonwealth v. King, 9 Cush. 284; People v. Caswell, 21 Wend. 86.

The evidence was sufficient to justify the verdict. Williams v. State, 21 N. W. 56; Palmer v. People, 4 Neb. 73; Hurley v. State, 6 Ohio, 400; State v. Crewes, 16 Mo. 391; State v. Elliott, 15 Iowa, 72; Wolf v. State, 11 Ind. 231; Guiles v. State, 6 Ga. 272.

Fisk, J. The defendant, William H. Denny, was convicted in the district court of Williams county of the crime of receiving stolen property, knowing the same to have been stolen, and was sentenced to imprisonment in the penitentiary for the period of three years. He moved for a new trial upon the grounds, first, of misdirection of the jury, and errors of law occurring at the trial and excepted to by him; second, that the verdict is contrary to law and clearly against the evidence; and, third, that the information does not state facts sufficient to constitute a public offense, which motion was

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denied on July 29, 1907. From the judgment of conviction, and from the order denying the motion for a new trial, defendant appealed to this court, setting forth 17 assignments of error, which we will dispose of in the order presented in appellant's brief.

The first assignment is based upon the instruction of the court to the jury defining the word "feloniously." The instruction complained of is as follows: "The term 'feloniously' means, when applied to the intent with which an act was done, an intent to commit a felony, or an intent to commit a wrongful act, which might result in the commission of a felony; and under our statutes the crime of receiving stolen property, knowing the same to have been stolen, is a felony." We agree with appellant's counsel that the instruction is faulty. An essential ingredient of the crime is the felonious or wrongful intent in receiving the stolen property. By the use of the word "might" in defining the term "feloniously" the jury was told that a person is by law presumed to intend all the possible, rather than the reasonably probable, consequences of his voluntarily wrongful act. This we think was error. People v. Munn, 65 Cal. 211, 3 Pac. 650; People v. Rockwell, 39 Mich. 503. Said definition was also erroneous, as it in effect informed the jury that an intent to commit a wrongful act which might result in receiving stolen property, knowing the same to be stolen, constituted a felonious intent within the meaning of the law relating to the offense charged. As said by the Court of Appeals of New York in People v. Hartwell, 166 N. Y. 361, 59 N. E. 929: "A person may receive stolen property, knowing it to be stolen, for the purpose of returning it to the true owner, and not be guilty of any crime. It is only where the property is received, knowing it to have been stolen, with the criminal intent to deprive the owner of the property, that the receiver is punishable. * * * A person may receive property from another, and at the time of receiving it may intend to retain it and thus feloniously deprive the owner thereof, and still have no knowledge that the property had been stolen. By so retaining the property, he may become guilty of larceny, but he would not be guilty of the crime charged by the provisions of the code under consideration." Although the said instruction was erroneous for the reason above stated, still, when considered in connection with the entire charge to the jury, we are not prepared to hold that the same was prejudicial to the defendant. Later in the instructions the jury was distinctly told that, unless they

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found from the evidence beyond a reasonable doubt that every material allegation of the information was true, they should acquit; and they were instructed that among the material allegations thereof were the following:

"(5) That the defendant, William H. Denny, did willfully, unlawfully, and feloniously and knowingly and for a consideration receive said stolen personal property.

"(6) That at the time said William H. Denny received into his possession said personal property he did so willfully, unlawfully, and feloniously, and knowing that said personal property had been feloniously stolen and received the same, with intent to deprive the owner thereof."

Still later in the charge the jury was instructed as follows: "In this connection also comes the question of the intentional receiving of said property, if the same was received by defendant, knowing the same to have been stolen, as the defendant must have intentionally received said property with guilty knowledge—that is, with knowledge that the same was stolen property—to be guilty of the charge contained in the information, that of receivng stolen property, knowing the same to have been stolen. The knowledge of the stolen character of the property must have been in the mind of the defendant at the time of the receiving of the same, if he did receive it; and, if the defendant received said property without knowledge that the same was stolen property, and after the reception thereof learned that the same was stolen, the defendant cannot be found guilty. And, in addition to the reception of said property with knowledge that the same was stolen, before the defendant can be found guilty you must find that he took said horses, or received them, with the intent to deprive the owner thereof." In view of these explicit instructions, we are unable to see how the defendant could have been prejudiced by the above definition of the term "feloniously."

Assignment No. 2 challenges the correctness of that portion of the instructions wherein the jury was told "that the person committing said larceny from the owner thereof is immaterial." Counsel argue that it is necessary that the person who commits the larceny should be some one other than the defendant or person receiving it, because, if the defendant had himself committed the larceny, he could not have been found guilty of the crime charged, as they are distinct. Granting the soundness of this contention, we are

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unable to agree to the conclusions reached by counsel. It was unnecessary for the state to allege or prove who the thief was, and there was not even an intimation that defendant stole the property, and the presumption is that he did not. How then can it be claimed that the jury may have believed that defendant was an accomplice in the larceny? There was no foundation for such a belief; and hence there is no force in the contention that the jury might have understood from the instruction that they could convict defendant, even though they found that he committed the larceny or was an accomplice thereto.

The next assignment calls in question the following instruction: "Guilty knowledge is made out and sufficiently proven to warrant conviction in that respect by the proof that the defendant received the property under such circumstances as would satisfy a man of ordinary intelligence and caution that they were stolen." Immediately following the above is the further instruction: "The jury is further instructed that, if you find that all the facts and circumstances surrounding the receiving of the horses by the defendant were such as would reasonably satisfy and convince a man of defendant's age, intelligence, and business ability that the horses were stolen, then you may in your discretion find the defendant had knowledge that said property was stolen property."The criticism made on these instructions is that they are inconsistent, and the latter does not in any manner qualify the former. It will be seen that the first instruction lays down an arbitrary rule for determining guilty knowledge, using as a test facts which would satisfy a man of ordinary intelligence and caution, while the latter test is as to what would reasonably satisfy and convince a man of defendant's age, intelligence, and business ability that the horses were stolen. Under the latter instruction, the jury was told that they may in their discretion find guilty knowledge on the part of the defendant after applying the rule therein stated, while the former instruction leaves no such discretion, but they are told that guilty knowledge is made out and sufficiently proven to warrant conviction if the proof shows that defendant received the property under circumstances sufficient to satisfy a man of ordinary intelligence and caution that they were stolen. We think the first instruction was clearly erroneous and prejudicial. Appellant's counsel are correct in their contention that "the standard by which to impute guilty knowledge is not that of a man of ordinary intelligence and caution, but the test is a per-

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sonal test of the defendant." This is in harmony with the principle announced by this court in State v. Hazlett, 16 N. D. 426, 113 N. W. 374. See, also, Robinson v. State, 84 Ind. 452. We think said instruction was clearly erroneous for the further reason that it invaded the province of the jury. As stated by the Indiana court in the above case, "guilty knowledge was purely a question of fact for the determination of the jury; and the court could not, as a matter of law, tell them what would be sufficient evidence of such guilty knowledge. The court had no right thus to invade the province of the jury." Upon the latter point, see, also, Collins v. State, 33 Ala. 434, 73 Am. Dec. 426. In Commonwealth v. Finn, 108 Mass. 466, cited by respondent's counsel, the instruction which was sustained differed from the one here challenged in that it did not invade the province of the jury.

Assignment No. 4 is predicated upon the giving of the following instruction: "This felonious intent to warrant conviction must have consisted of his intentional receipt of said stolen property, knowing the same to be stolen, with further intent in defendant in receiving the same to deprive the owner of said property, or to derive gain, profit, or consideration himself from receiving or concealing said property or the disposal thereof." The last clause is the portion criticised, but we are of the opinion that the criticism is not well taken. A person may be convicted even though he received the stolen property for the purpose of returning it to the owner, provided his purpose was also to secure a reward therefor. 1 Wharton, Cr. Law, section 991; 2 Bish. Cr. Law, section 1138; 24 Am. & Eng. Enc. of Law 47, and cases cited.

We have examined the instruction complained of in appellant's fifth assignment of error, and are agreed that the giving of the same was in no manner prejudicial to defendant; and we pass the same without further comment.

The sixth assignment of error calls in question the correctness of the trial court's ruling in permitting an answer to the following question asked the witness Mills, who is the owner of the horses stolen: "Q. Did he ever recover the horses for you? A. No, sir." Just previous to the asking of this question, Mills testified to a conversation with defendant about these horses, in which defendant admitted having received the same, and promised to do what he could to recover the horses for the witness, but stating that it would

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take some time to do so. We think the ruling was error, but we are unable to see how the same was prejudicial.

The next assignment of error relates to the ruling of the trial court in excluding the answer to the following question asked the witness Miller on cross-examination: "Q. As a matter of fact, you were running that saloon in violation of law and without a license?" This question was asked for the purpose of impeaching the witness by proof of general bad character. We think the question was admissible under the general rule that, for the purpose of impeachment, a witness may be asked questions as to collateral matters, the answers to which may tend to degrade or otherwise discredit him. While such a cross-examination may be controlled within the limits of a sound discretion vested in the trial court, we think the ruling above complained of was an abuse of such discretion.

The next three assignments of error are discussed together in appellant's brief, and they relate to the rulings of the trial court in permitting the witness Miller to testify over defendant's objection as to the contents of a certain letter claimed to have been sent from Ashford, Mont., to defendant, and written by the witness at the dictation of one Tom Ryan. The grounds of these objections were that the testimony was incompetent, irrelevant, and immaterial, no foundation laid, and not the best evidence. The answer, which was permitted to be given, was very damaging to the defendant, as it tended directly to connect the defendant with the crime charged. Therefore the testimony was highly prejudicial, and, if these rulings were erroneous, they clearly constitute reversible error. The only evidence adduced by the state to show defendant's guilty knowledge in receiving these stolen horses is the testimony of the witness Miller that at the request of Ryan, the alleged thief, he dictated, addressed, and mailed to the defendant a certain letter dated July 29th, from the contents of which it might be presumed that the defendant knew that the horses which he received were stolen horses. Defendant denied the receipt of any such letter. Miller testified that, at the time he wrote the original, he made a copy which he afterwards exhibited to witnesses Mills and Hall, and which was offered in evidence at a certain preliminary examination on October 16, 1905, before one Leonhardy, a justice of the peace at Williston. The defense contended that the purported copy of letter introduced before said justice bore unmistakable evidence

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on its face that it was written on stationery of the Great Northern Hotel at Williston, and that the top of the letterhead had been severed to conceal such fact, but that certain marks appearing at the top and to the right of the alleged copy matched exactly with the bottom of the letters appearing on the stationery of such hotel; the matching being so perfect that the character of the paper and the ruling and water mark conclusively showed that, instead of being made as Miller testified on his own note paper at Ashford, Mont., this copy was made on the Great Northern Hotel stationery, and presumably at Williston, where said hotel is located. The state contended that this letter was lost, although conceding that it was in the possession of counsel for the state on Friday preceding the trial. The state, before offering secondary evidence of the contents of the copy and for the purpose of laying a foundation therefor, placed State's Attorney Brown upon the stand, who testified that he saw the letter on Friday, examined it carefully to see if it was the same letter or a copy of the letter, stating that he received it from Miller through Mr. Purcell. He was not positive that he had the letter last, but he and Mr. Purcell examined it together. On cross-examination he testified: "I will be frank with you. I don't believe the letter is mislaid. I feel confident of that. * * * I don't know when the paper was lost. The last time I used the letter was the night that we examined it carefully, and laid it to one side. * * * I don't think it was handed to Mr. Miller, but my best recollection is that it was between Mr. Purcell and me. I couldn't say who last had the letter, but it was between Mr. Purcell. I think the sheriff saw the letter there at the same time. The letter disappeared on Friday, and was not missed until Saturday. This was last Friday." Lampmann and George W. Hall were also examined with reference to the whereabouts of said copy, but there was no showing made that Purcell, who assisted the state's attorney in the prosecution of said case, did not have such copy in his possession. Miller testified as follows: "Q. What have you done with that copy? What has become of it? A. Mr. Purcell and Mr. Brown have got it, I guess. I gave it to them Friday morning." Purcell made the following statement not under oath: "I will say in this connection that I had the copy of the letter in the other trial. There was no preliminary examination had in this case, and I am the one that got the letter from the files, or rather picked it up here and took it and gave it to Mr. Miller last Decem-

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ber, and he handed it over to Mr. Brown and myself the other evening, and I gave it to Mr. Brown there, and he last had it, and we have been looking for it down in his office; and Mr. Brown is the last one who had it, and he mislaid it and I expected to have Mr. Brown take the stand and prove that fact. He has mislaid it in some way. That is the explanation we make of it, and in his endeavor to have it put away for safe-keeping Mr. Brown has mislaid it with some of his papers, and we have been looking for it for some time." Without laying any further foundation, the state was permitted to show by the witnesses Miller, Mills, and Hall what the contents of this copy of letter were. We think this was reversible error. There was no proper showing made that Purcell did not have the copy in his possession, and we think it was incumbent upon the state to make such showing before offering secondary evidence. The correct rule regarding the laying of a foundation in order to render admissible secondary evidence as to the contents of a lost instrument may be found in the following cases: McMannus v. Commow, 10 N. D. 340, 87 N. W. 8; Bogen v. McCutchen, 48 Ala. 493; Calhoun v. Thompson, 56 Ala. 166, 28 Am. St. Rep. 754; O'Neal v. McKinna, 116 Ala. 606, 22 South. 905; King v. Randlett, 33 Cal. 318; Taylor v. Clark, 49 Cal. 671; Lott v. Buck, 113 Ga. 640, 39 S. E. 70; Post v. School District, 19 Neb. 135, 26 N. W. 911; Smith v. Axtel, 1 N. J. Eq. 494.

Assignments numbered 11, 12, 13, and 14 relate to rulings upon objections interposed to questions propounded to the witness Brown, and they require but brief notice. This witness, who was the state's attorney in charge of the prosecution of defendant, was permitted, over objection, to testify as to his opinion or conclusion regarding the identity of the paper on which the alleged copy of Miller's letter to defendant was written and the letter paper of the Great Northern Hotel. We think these rulings were erroneous. The witness had not been shown to possess expert knowledge upon the subject regarding which he testified, and therefore his testimony should have been restricted to facts, leaving it to the jury to draw their own inferences or conclusions therefrom. Smith v. N. P. Ry. Co., 3 N. D. 555, 58 N. W. 345; Williams v. Clark, 47 Minn. 53, 49 N. W. 398; 5 Encyc. of Ev. 675.

The next assignment of error challenges the correctness of the court's ruling in permitting the witness Stewart to testify relative to existing differences in certain papers examined by him during

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the hearing before the justice; the particular objection being that the witness was not shown to have had any knowledge that the paper which he examined was the purported copy of letter which Miller wrote to defendant, and that there was no proof as a matter of fact that the paper which he examined was such purported copy. We think there is no merit to such contention in view of the testimony of the witness Brown to the effect that he called Stewart's attention to such purported copy.

The last two assignments of error are predicated upon the refusal of the trial court to advise a verdict of acquittal, and in denying defendant's motion for a new trial. In support of these assignments appellant's counsel contend: First, that the state has failed to show beyond a reasonable doubt that any property was stolen, and that it was stolen by some one other than the defendant. Second, there is no evidence which shows that the horses alleged to have been stolen are the identical horses alleged to have been in the possession of the defendant. Third, the state has failed to show by any evidence whatever that the defendant received the five head from the thief or the latter's agent. Fourth, the state has failed to show by any competent evidence that the defendant had any knowledge, actual or imputed, that the property received by him was stolen property. Fifth, the state has failed to show by any competent evidence that there was any larcenous intent in the defendant at the time of the reception and disposal of the horses in his possession. It is no doubt true, as contended for by appellant's counsel, that in order to establish defendant's guilt as charged in the information, it is incumbent upon the state to prove beyond a reasonable doubt the following essential facts: (1) That the property was stolen by some one other than the defendant. (2) That defendant thereafter received into his possession such stolen property or a portion thereof. (3) That he had guilty knowledge of the fact that said property had been stolen at the time he received it. (4) That in thus receiving said property he did so with a larcenous intent; that is, with the felonious intent to deprive the owner thereof. After considering the testimony and the argument of counsel in support of the contentions last made, we are convinced that these assignments are devoid of merit, and, without reviewing the testimony at length, suffice it to say that there was sufficient evidence to warrant the trial court denying said motions. At least, we are not prepared to hold that the record in this case dis-

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closes such a failure of proof as to justify us in reversing the judgment of the trial court in denying such motions. Of course, where a case is destitute of any evidence tending to establish the guilt of the defendant, it becomes a question for the court, but, as above stated, we do not think this is such a case. Certain language in the opinion in the case of Williams v. State, 61 Wis. 281, 21 N. W. 56, is pertinent here. We quote: "The weight of the evidence and its convincing effect was for the jury, and not for the court. In criminal cases the effect which the evidence shall have as tending to establish the guilt of the accused is for the jury. If they find it insufficient to establish guilt, there is no power in the court to set aside their verdict, though the trial judge might be convinced that the verdict was against, not only the weight of the evidence, but against all the evidence. On the other hand, if there be evidence which fairly tends to prove the guilt of the defendant, and the jury find the guilt, the court cannot properly set aside such verdict because he may entertain doubts as to its sufficiency to establish such guilt. Ordinarily the decision of the trial judge upon the question of granting a new trial on the ground that the evidence is insufficient to support the verdict is held conclusive upon this court; and this rule is adhered to in a criminal case where the record contains evidence from which guilt of the accused can be fairly deduced. * * * The effect of the evidence as to its convincing character is first addressed to the jury, and afterwards to the trial judge on the motion for a new trial; and, when both the jury and the trial judge have expressed themselves satisfied with the verdict, this court will not interfere except in a clear case of the want of proof of any fact upon which the guilt of the accused can be fairly predicated."

Because of the prejudicial errors above pointed out, we are required to reverse the judgment and order appealed from, and to remand the case for further proceedings according to law, and it is so ordered.

Morgan, C. J., concurs.

Spalding, J. (concurring specially). I adhere to my opinion in State v. Hazlett, 16 N. D. 426, 113 N. W. 374, as relating to the fourth point above, and for the same reason I there gave. In other respects I concur in the foregoing opinion.

(117 N. W. 869.)

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THE STATE OF NORTH DAKOTA, EX REL. H. H. STEEL, GEORGE WHITFORD, PETER CONNOLLE, P. S. FITZMAURICE AND WILLIAM CLIFFORD, *v.* J. W. FABRICK.

Opinion filed October 13, 1908.

Supreme Court — Jurisdiction — Original Writs.

1. The jurisdiction of the Supreme Court to issue original writs extends to questions affecting the sovereignty, franchises or prerogatives of the state, or the liberties of the people.

Same — Adequacy of Relief.

2. Where the right to be enforced pertains to matters of private or local concern alone, though publici juris, the jurisdiction belongs to the district court, and not to the Supreme Court, unless circumstances of such exceptional character are shown to exist that adequate relief cannot be obtained in the district court.

Same — Questions Involved — County Division.

3. The sovereignty or franchises of the state are not directly affected by proceedings for the division of a county.

Same — Rights of Electors.

4. Under section 2329, Rev. Codes 1905, as amended by chapter 60, page 85, laws of 1907, the electors of a county have a right to have submitted to them, and to vote upon, all petitions in reference to the division of a county that conform to the statute, although the petition last presented to the county commissioners may conflict, as to the territory to be embraced within the proposed counties, with the petitions first presented and acted upon.

Same — Successive Petitions — Order of County Commissioners — Auditor's Duty.

5. Where a petition is presented for a division of a county, and the county commissioners order the submission of the question of the division of the county, pursuant to the petition, to a vote at the next general election, the county auditor is without authority to refuse to give notice that the question of the division of the county, pursuant to the petition, will be voted on at the next general election, on the alleged ground that the county proposed to be organized, pursuant to the petition, is to contain in part the same territory as the territory to be embraced in another county proposed to be organized pursuant to another petition, which was on file and had been acted on by the commissioners when the petition in this case was presented to the commissioners and acted on.

Application by the state, on the relation of H. H. Steele and others, for a writ of mandamus to J. W. Fabrick.

Writ granted.

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George A. Bangs and *F. B. Andrews,* for petitioners.

Delays incident to appeal, occasioning a denial of justice, warrants the prerogative writ. Gaines v. Rugg, 148 U. S. 228, 13 Sup. Ct. Rep. 611; State v. Hart, 57 Pac. 415; State v. Dick, 79 N. W. 421; State v. Johnson, 79 N. W. 1080; Merced Mining Co. v. Fremont, 7 Cal. 130; Clark v. Crane, 57 Cal. 634; Cariaga v. Fernald, 5 Pac. 615.

Official refusal in advance to perform duty—justifies action before actual default. State v. Rotwitt, 37 Pac. 8445; State v. Metcalf, 100 N. W. 923; Brandt v. Murphy, 88 Miss. 84; State v. Wrightson, 56 N. J. L. 126; In re Whitney, 3 N. Y. Supp. 838.

George A. McGee and *Francis J. Murphy,* for respondent.

Conflicting petitions cannot be submitted at the same time. Pennell v. Armstrong, 46 N. W. 618; State v. Board of Co., Comrs. 338 N. W. 40.

Morgan, C. J. This is an application for a peremptory writ of mandamus. The application is based upon the refusal of the respondent to comply with an order of the board of county commissioners of Ward county, directing him to give notice that the question of the division of Ward county and the formation of Renville county would be submitted to the electors at the November, 1908, election, and to otherwise comply with the order of said board.

The application for the writ is based upon an affidavit which sets forth in detail the facts leading up to the application, and the territory out of which the county of Renville is to be composed is described in detail. Other facts are stated in the affidavit as follows: (1) That the relators are free holders, taxpayers, and electors of Ward county, and are residents, taxpayers and qualified electors in the territory sought to be detached from Ward county and organized as Renville county. (2) That on July 31, 1908, a petition was filed in the office of the county auditor of Ward county, and thereafter presented to the commissioners of said county. This petition is set forth in the affidavit, and it states the necessary facts to authorize the county commissioners to submit to a vote of the people the question whether the county of Ward should be divided, and the county of Renville organized and composed of the territory therein described. (3) That the petition was signed by a majority of all the voters residing in the territory to be de-

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tached from Ward county out of which the county of Renville is to be formed. (4) That upon the presentation of the petition to the county commissioners the same was granted by them, and an order was made by the commissioners directing that the question of the formation of Renville county be submitted to a vote of the people at the November, 1908, election, and the respondent, as county auditor, was directed to publish due notice that such question was to be submitted to the people as prescribed by law. (5) That the county auditor of Ward county has advised the respondent that the order of the county commissioners directing the submission of the question of the division of Ward county was without authority of law, and that the respondent has often stated that he would not comply with the order of the county commissioners, and would not submit the question to a vote of the people, unless compelled to do so by an order of court. (6) That a demand upon the state's attorney has been made by the relators to prosecute this proceeding, or to permit the use of his name in the proceeding, but the demand has been refused. (7) That the Attorney General of the state has refused to prosecute this proceeding, and has refused to permit his name to be used in the proceeding. (8) The affidavit further states as follows: "That an exigency exists, because of which your petitioners should not be required to make application to the district court for a writ of mandamus herein, in this: That through the exercise of the right of appeal, and the ordinary delays of litigation, a final decision herein cannot be rendered until after the next general election, and justice would be thereby denied; that the matters herein set forth are publici juris." The relators pray that the respondent be compelled by a writ of mandamus to comply with the order of the county commissioners, directing him to submit the question of the division of Ward county in accordance with said petition of the voters in said territory.

Upon the filing of the affidavit and application for a writ of mandamus, an order was issued by this court, directing the respondent to show cause at Bismarck on September 25, 1908, why the writ should not be issued and he compelled to comply with the order of the county commissioners. On the return day fixed by said order the parties appeared, and the respondent filed his written return to the order to show cause, and objected to the issuance of the writ. Such objections are the following in substance: That

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the action of the board of county commissioners in submitting the question of the formation of Renville county was null and void, for the reason that, prior to the filing of the petition for the formation of said Renville county, a petition had been filed for the formation of the county of Lake out of the territory now comprised within the county of Ward; that the said last-named petition was in all respects in compliance with the provisions of the statute regulating the division of counties; and that the prayer of the said petition was granted by the county commissioners, and the respondent was by them directed to comply therewith and submit the question of the formation of Lake county to the voters. In the return of the respondent it was further alleged that a large part of the territory to be comprised within the county of Renville as shown by the petition of the voters for the organization thereof, is included in the territory proposed to be organized as Lake county, as shown by the petition filed and acted upon before the petition for the formation of Renville county was presented to said board; and for the reasons alone that the petitions for the organization of the counties of Lake and Renville comprised in part the same territory the respondent did refuse to place the question of the organization of Renville county upon the ballot to be voted upon in 1908. No question is raised by the return, except that the petition in this case conflicts, so far as territory is concerned, with the petition for the creation of Lake county, and that in consequence of such conflict the result may not be decisive on the questions to be voted on.

The respondent raises no question as to the jurisdiction of this court to determine the issue raised by the return under the constitutional provisions granting to it jurisdiction to entertain applications for writs of mandamus. The respondent has expressly stipulated that no objection shall be raised by him to the jurisdiction of this court to determine the issues raised. The stipulation, however, does not and cannot of itself confer jurisdiction, and it is of no effect. In a similar proceeding affecting the location of the county seat in Rolette county, 17 N. D. 543, 117 N. W. 864, argued and submitted on the same day as this application, the jurisdiction of this court to issue the writ of mandamus was expressly challenged by a motion in writing to quash the order to show cause. The question of the jurisdiction of this court to entertain the application and to issue the writ will therefore be determined, without regard to the stipulation of the parties that they submit to the

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jurisdiction without objection. The relators in this case have been fully heard on the question of jurisdiction, as they appear in this court by the same counsel who appear for the relators on the application in the Rolette county case, in which objections to the jurisdiction have been filed, and such objection fully argued by the counsel for the relators in both cases.

In what cases and under what circumstances this court will issue original writs under our constitutional provisions has often been considered and discussed in the prior decisions of this court. It has been so fully and exhaustively considered and treated that no new principle need be invoked for the determination of this application. It is necessary only to apply the facts of this case to the principles so plainly established by the prior decisions, and from such application determine whether the relators are enttled to invoke the original jurisdiction of this court as defined in the Constitution, and fully explained by such prior decisions. In respect to the jurisdiction of this court on applications of this kind, the constitutional provisions are as follows:

"Sec. 86. The Supreme Court, except as otherwise provided in this Constitution, shall have appellate jurisdiction only, which shall be coextensive with the state, and shall have a general superintending control over all inferior courts under such regulations and limitations as may be prescribed by law.

"Sec. 87. It shall have power to issue writs of habeas corpus, mandamus, quo warranto, certiorari, injunctions, and such other original and remedial writs as may be necessary to the proper exercise of its jurisdiction, and shall have authority to hear and determne the same," etc.

These sections have been under consideration in many cases by this court. From these cases it is established without dissent that the jurisdiction is not to be exercised unless the interests of the state are directly affected. Merely private rights are not enough on which to base an application for the issuance of original writs by this court. The rights of the public must appear to be directly affected. The matters to be litigated must not only be publici juris, but the sovereignty of the state, or its franchises or prerogatives, or the liberties of its people, must be affected. Before the court will, in the exercise of its original jurisdiction, issue prerogative writs, there must be presented matters of such strictly public concern as involve the sovereign rights of the state, or its

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franchises or privileges. The often quoted statement of the rule as to the original jurisdiction of the Supreme Court to issue writs of a prerogative character, as given in Attorney General v. City of Eau Claire, 37 Wis. 400, is well expressed and clear: "To warrant the assertion of original jurisdiction here, the interest of the state should be primary and proximate, not indirect or remote; peculiar, perhaps, to some subdivision of the state, but affecting the state at large in some of its prerogatives; raising a contingency requiring the interposition of this court to preserve the prerogatives and franchises of the state in its sovereign character." This statement of the rule has been approved in many cases in this court, and notably in State v. Archibald, 5 N. D. 359, 66 N. W. 234; State v. Nelson, 1 N. D. 88, 45 N. W. 33, 8 L. R. A. 283, 26 Am. St. Rep. 609; Elevator Co. v. White, 11 N. D. 534, 90 N. W. 12; State v. Wilcox, 11 N. D. 329, 91 N. W. 955; State v. McLean Co., 11 N. D. 356, 92 N. W. 385; State v. Nohle, 16 N. D. 168, 112 N. W. 141; State v. Holmes, 16 N. D. 457, 114 N. W. 367; State v. Burr, 16 N. D. 581, 113 N. W. 705.

In this case the matter involved pertains to the division of a county. Counsel forcibly urge that these matters are of great public concern, and involve the sovereignty and franchises of the state, by reason of the fact that the electors of Ward county will be deprived of voting upon this matter of great concern to them unless the order be complied with to submit the proposition of the division of the county to them. We cannot agree with the contention of the relators that the state at large is proximately affected or concerned in the question of the division of Ward county, or whether that county be divided into two counties, or whether it is to be divided into four counties. It is a question of public concern to the residents of the proposed counties, but that it directly concerns the state at large we cannot see. It is no more a matter affecting the state at large than would be the question of the formation of particular school districts out of prescribed territory, or of the location of a school house therein. It pertains wholly to the private convenience of the local inhabitants.

It is strenuously urged that the rights of these petitioners and relators are parallel with and of the same character as the rights of the electors as declared in State v. Falley, 8 N. D. 90, 76 N. W. 996; State v. Falley, 9 N. D. 450, 83 N. W. 860; State v. Lavick, 9 N. D. 461, 83 N. W. 914; State v. Porter, 11 N. D. 309, 91 N. W.

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944; State v. Liudahl, 11 N. D. 320, 91 N. W. 955; State v. Larson, 13 N. D. 420, 101 N. W. 315. Those cases all refer directly to the exercise of the elective franchise in the election or nomination of candidates for office. In some of those cases the exercise of the rights of franchise, under the facts of those cases, was described by the court as a most sacred right, and involved much more than a contest between individuals as to which of them was entitled to hold a certain office. For that reason alone those cases establish the fact that the exercise of the elective franchise involved the sovereignty of the state. We think it apparent that a division of a county in no way affects the sovereignty of the state, and that the sovereignty of the state is directly affected in the selection of the officers of the state, or of its counties, by the electors. For these reasons it is clear that the facts do not present a question of such concern to the state at large as to call for the issuance of the writ. See Russell v. Jacoway, 33 Ark. 191.

It is the contention of the relators that the circumstances shown by the affidavit warrant this court in assuming jurisdiction to issue the writ, although the facts may not present a question publici juris that affects the sovereignty or franchises or prerogatives of the state, or the liberties of its people. In other words, it is their contention that this court should issue the writ, although the facts present matters of concern to only one locality within the state, and do not present any question where the sovereignty of the state is affected. That this court will sometimes issue the writ when there is an exigency or emergnecy, or exceptional circumstances arise, is well settled. In State v. Nohle, 16 N. D. 168, 112 N. W. 141, the court said: "It has repeatedly been held by this court that the writ here prayed for is strictly a prerogative writ, and that the same will be issued only in exceptional cases." This statement referred to an application by a private relator. In State v. McLean County, 11 N. D. 356, 92 N. W. 385, the court said: "Upon such a showing we discover no exigency calling for the interposition of this court at the instances of a private relator. From our standpoint, the case is one calling for unusual caution and the exercise of great deliberation on the part of the judicial department of the state. Certainly nothing in this case calls for the hasty action which would be involved if this court should initiate proceedings by putting forth its prerogative powers in opposition to the advice of the Attorney General." See, also, Wheeler v. County, 9 Colo. 248, 11 Pac. 103.

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We are of the opinion that exceptional circumstances are shown which entitle the relators to the issuance of the writ, and that a practical denial of justice will result to them unless the writ is issued. As before stated, there are three petitions for a division of the county before the county commissioners. The petition for the creation of the counties of Renville and Burke conflict with the petition for the creation of Lake county, so far as territory is concerned. If the relators are compelled to first apply to the district court for the writ, it is doubtful whether a final decision in district court can be had in time for the submission of the question to the voters at the November election, and in case of an appeal to this court it is certain that the matter could not be decided in time for submission at the coming election. The necessary consequence would therefore be that the petition of the relators would avail them nothing, and another petition must be presented to secure the right to vote on the question at the 1910 election. The statute which control the proceedings for division of counties is section 2329, Revised Codes 1905, as amended by chapter 60, page 85, Laws of 1907, which reads as follows: "Whenever it is desired to form a new county out of one or more of the then existing counties, and a petition praying for the formation of such new county, describing the territory proposed to be taken for such new county, together with the name of such proposed new county, signed by a majority of the legal voters residing in the territory to be stricken from such county or counties (as appears by the number of votes cast for governor at the last preceding general election), shall be presented to the board of county commissioners of each county to be affected by such division, and it appearing that such new county can be constitutionally formed, it shall be the duty of such boards of county commissioners to make an order providing for the submission of the question of the formation of such new county to a vote of the people of the counties to be affected, at the next succeeding general election, and notice thereof shall be given, the votes canvassed, and the returns made as in the case of the election of members of the legislative assembly; and the form of the ballot to be used in the determination of such question shall be 'For New County' and 'Against New County.'" Under this section the impossibility of securing a final decision before the election in 1908 would necessarily deprive the petitioners for the creation of Renville county of the right to express their choice on the important question of

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the division of Ward county until the election of 1910, as there is no provision for calling a special election to determine such matters.

Under said section the question to be voted on as to a division of a county must be voted on at the next general election after the presentation of the petitions to the county commissioners and the making of an order thereon by them. Another petition would therefore have to be presented before the question could be submitted to the voters at the election of 1910. Before that time changes in population may occur, and the county of Ward may be divided and the county of Lake may be created by the people at the 1908 election. By reason of these facts, the petitioners may be prevented from ever being permitted to vote upon the question pursuant to their wishes as contained in their petitions, which the auditor refuses to comply with. It is therefore apparent that unusual delay will occur before a determination of the question can be regularly had in district court. The matter of the division of a county is one of public importance to the people of the county. The statute gives the people a right to express a choice on that question. Inasmuch as the question must be voted on at the next succeeding election after the presentation of the petition to the commissioners, it is not improbable that delays or refusals by some official will cause the same situation in 1910 as now confronts the petitioners. We are fully convinced that only matters of the gravest importance should be considered sufficient to warrant this court in issuing prerogative writs at the request of private relators. Nevertheless we deem the circumstances and conditions surrounding this case to show such a state of facts as to bring it within the exception to the general rule. By refusing to entertain the writ now, it is inevitable that a delay of two years will be occasioned. A delay for so long a period on a matter of this importance is a potent consideration in favor of taking jurisdiction. In view of the fact that an appeal to the supreme court can follow any decision of the district court in the case, we think the interests of justice demand that this court should act and dispose of the controversy now, and prevent further delay on a matter of such great consequence to the people of Ward county.

It is contended by the respondent that his action was lawful, inasmuch as the petitions filed subsequent to the one for the formation of Lake county conflict, so far as the territory to be comprised within the counties, with the territory out of which Lake

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county is to be composed, is concerned; in other words, that Renville and Burke counties are to comprise a part of the same territory that is to comprise Lake county. It is therefore his contention that said section 2329 should not receive a strict and literal construction, but should be construed so as to further the legislative intent in its enactment; that is, to facilitate the division of counties. Respondent's argument in favor of that construction is based upon the contention that each voter is entitled to vote on each independent proposition, which may result in two propositions each receiving a majority of all the votes cast, and thereby giving two proposed counties, to be composed in part of the same territory, the required votes, which would defeat the proposed organization of each county.

Under the language of said section 2329 there is no prohibition against submitting any number of propositions for the division of a county. The language is general that on the filing of a petition for the division of a county, stating the necessary facts, the commissioners shall make an order for the submission of the question of the division of the county to the voters. The section does not prescribe any limitation as to the number of petitions, nor is there any prohibition against submitting petitions to a vote of the people if the petitions are conflicting as to territory. We find nothing in the language of that section warranting us in construing it to mean that the first petition filed can only be submitted to a vote if there be a conflict as to the territory to be comprised in the counties proposed to be created. We think it clear from the language of the section that all petitions are to be submitted to a vote when legal in form and contents. The auditor was without authority to refuse to give notice of the election upon the proposition of the creation of Renville county.

The question whether petitions for the division of a county that conflict as to territory can legally be submitted to a vote of the people has been before the supreme court of Nebraska and Minnesota, and these courts have reached opposite conclusions. In Nebraska it is held that the commissioners have a right to reject all petitions after the first one presented, where the subsequent ones include a part of the same territory proposed to be included in a county by the first petition. State v. Armstrong, 30 Neb. 493, 46 N. W. 618, 9 L. R. A. 382. In Minnesota it is held, under a statute practically the same as ours upon the question of the submission of such questions to a vote, that all petitions for a division of a county must be

submitted to a vote of the people, although the petitions show that there is a conflict so far as territory is concerned. On that question the supreme court of Minnesota says: "A majority of the members of the court, however, are of the opinion that this construction of the statute is not justified by the specific directions of the statute requiring the submission of all petitions where the petitions therefor are found to conform to the law, and that the statute must be construed as requiring the submission of all legal petitions, whether conflicting or otherwise." State v. Commissioners, 67 Minn. 352, 69 N. W. 1083. In State v. Larson et al., 89 Minn. 123, 94 N. W. 226, the supreme court limited the application of the language quoted, so that it applied only to petitions showing a conflict of territory, and not to a conflict as to minor matters. The modification of the decision in no way affects the principle in the case at bar. In State v. Falk, 89 Minn. 269, 94 N. W. 879, the rule in State v. Larson, supra, was adhered to. The construction given in the statute by the Minnesota court meets with our approval, as it gives effect to the legislative will more completely than does the Nebraska rule. It insures to the voters of a county an opportunity to fully express themselves upon the question of the division of the county. By curtailing or limiting the number of petitions that may be filed which include a part of the same territory, it necessarily follows that the choice of the people is not given the full expression contemplated by the statute.

For these reasons, the writ of mandamus is granted. All concur.

(117 N. W. 860.)

THE STATE OF NORTH DAKOTA, EX REL. R. B. COX, JERRY DONOVAN, A. B. BICKFORD AND E. C. KRUEGER, v. J. W. FABRICK.

Opinion filed October 13, 1908.

Application by the state, on the relation of R. B. Cox and others, for writ of mandamus to J. W. Fabrick.

Writ granted.

George A. Bangs and *F. B. Andrews*, for petitioners.

George A. McGee and *Francis J. Murphy*, for respondent.

PER CURIAM. Following the case of State ex rel. Steele v. Fabrick, 17 N. D. 532, 117 N. W. 860, the opinion in which was this day filed, the writ of mandamus herein applied for is granted.

(117 N. W. 864.)

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STATE OF NORTH DAKOTA, EX REL. J. H. MURPHY, v. WILLIAM GOTTBREHT, ET AL.

Opinion filed October 13, 1908.

Supreme Court — Original Writ — Jurisdiction.

1. The jurisdiction of the Supreme Court to issue writs under existing constitutional provisions ordinarily extends only to cases publici juris, wherein are directly involved the sovereignty of the state, its franchises or prerogatives, or the liberties of its people.

Same — Change of County Seat — Questions Publici Juris.

2. The matter of the change of the location of the county seat of a county is not a question publici juris, affecting the sovereignty or franchises of the state.

Same — Mandamus.

3. The mere fact that delays might occur if legal proceedings are instituted in the district court, and that an appeal might be taken to this court from the district court, does not present such exceptional circumstances as would constitute a reason for issuing a writ of mandamus by the Supreme Court to compel the county commissioners to act in matters solely pertaining to the removal of a county seat.

Application by the state, on the relation of J. H. Murphy, for writ of mandamus to William Gottbreht, and others.

Application denied.

George A. Bangs, Albert Nelson, and *D. J. McLennon,* for relators.

Burke, Middaugh & Cuthburt and *H. E. Plymat, f*or respondents.

MORGAN, C. J. This is an application by private relators for a writ of mandamus to compel the respondents, who are the county commissioners of Rolette county, to submit to the electors of said county, at the next general election, the question of the removal of the county seat of said county from Rolla to Rolette. The application is based upon an affidavit setting forth: (1) That the relator is a freeholder, taxpayer, and elector of Rolette county, and that he signed a petition for the removal of the county seat of said county. (2) That on April 20, 1908, a petition was presented to the board of county commissioners, praying for the removal of the county seat of said county from Rolla to Rolette. (3) That said petition was verified, as required by statute, and contained all

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the facts required to be set forth in the petition by the statute, and was signed by the requisite number of electors. (4) That on July 7, 1908, the respondents by an order refused to submit such question to the electors of said county. (5) That the attorney-general of the state and the state's attorney of Rolette county have been requested to prosecute these proceedings, and such requests have been denied. (6) That the relators have no other plain, speedy, or adequate remedy in the ordinary course of law. (7) That an emergency or exigency, exists, because of which the petitioner should not be required to make an application to the district court for the writ. Such exigency consists in the fact that, through an appeal, and the ordinary delays incident to litigation, a final decision upon the question cannot be rendered until after the next general election, and justice, would thereby be defeated.

Upon the presentation to the court of the affidavit, an order to show cause why the writ should not be granted as prayed for was issued, and such order was made returnable at Bismarck, on the 25th day of September, 1908. On said day the parties appeared, and the respondent filed a motion to quash the order to show cause, upon the expressed ground that the facts shown by the affidavit do not show facts that would authorize this court to issue the writ of mandamus, under sections 86 and 87 of the constitution, defining the jurisdiction of the supreme court to issue such writs. The question raised by the motion to quash the order to show cause presents the same question as to the jurisdiction of this court as that decided by the court in State ex rel Steele et al. v. J. W. Fabrick, 17 N. D. 532, 117 N. W. 860, in which our opinion has just been handed down. In that case the court held that the question of the division of a county upon application of qualified electors did not in any way involve any question affecting the sovereignty of the state, its franchises or prerogatives, or the liberties of the people; that it presented a question of public concern to the people of the county only, and did not in any way affect the people of the state generally, and was in no way publici juris so far as the state at large is concerned. The jurisdiction to issue the writ was, however, assumed, and the writ was issued in that case, for the reason that the facts showed the existence of such an emergency and exceptional circumstances that might be followed by a denial of justice unless the writ was issued. See Russell v. Jacoway, 33 Ark. 191. Neither in the case at bar nor in the Fabrick case were the franchises or prerogatives

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or sovereignty of the state at large affected. In both cases matters of local concern only were affected. The facts in that case showing the existence of exceptional circumstances are not present in this case. In that case the facts were that three petitions had been presented to the commissioners, each asking for the division of Ward county, and each praying for the creation and formation of a new county out of said Ward county, and the county auditor had refused to give notice that the question of the division of Ward county, pursuant to two separate and independent petitions, would be voted upon at the 1908 election, although the commissioners had made the order granting each petition. In this case the question of the change of the location of the county seat alone is affected.

We do not think that the two cases present parallel facts, so far as the existence of an emergency is concerned. In this case the only prejudice to the relator that can possibly follow, if they are compelled to resort to the district court, is a delay of two years before the question may be voted on. In the other case there was added another element of prejudice likely to follow—a change of circumstances by reason of the fact that the county lines might be changed by the formation of a new county, pursuant to a petition on which the commissioners had acted and which was ordered to be submitted to a vote at the November, 1908, election. We do not deem the consequences of our refusal to issue the writ in this case as likely to be serious, or to result in the ultimate defeat of the relator's rights. Delay alone will not deprive them of any permanent right. No serious complications are liable to follow if the question is not voted on at the coming election. No facts are urged or set forth to show the existence of an emergency, except delays caused by litigation and a possible appeal. We do not think that such facts show the existence of an extraordinary emergency. In State ex rel. Newell v. Purdy, 36 Wis. 213, 17 Am. St. Rep. 485, the court said: "The distinction between the election of public officers, to whom, for the time being, the exercise of the functions of sovereignty is intrusted, and the mere choice of a site for a public building, is quite apparent. The former involves, or may involve, the integrity of the government, and the preservation of the principles upon which it is founded, while the latter is only a matter of public convenience or pecuniary interest, involving no fundamental principle whatever." In State v. Juneau Co., 38 Wis. 554, the court said, in speaking of a similar question: "The right

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sought to be enforced in this proceeding is of a permanent character, and cannot be destroyed or greatly impaired by delay. Indeed, it is not apparent that any considerable delay will necessarily result, should this court refuse to take jurisdiction."

For these reasons we are satisfied that no exceptional circumstances have been shown, and that the writ should not be issued.

Application denied. All concur.

(117 N. W. 864.)

IN THE MATTER OF THE APPLICATION OF WILLIAM CONNOLLY AND VINCENT KOVASH FOR A WRIT OF HABEAS CORPUS.

Opinion filed October 15, 1908.

Constitutional Law — Special Legislation — County Seat Removal.

1. Chapter 77, page 159, Laws 1905, which provides in effect that in all organized counties not having more than 6,500 inhabitants and in which no courthouse had been constructed prior to the taking effect of the act, proceedings for county seat removals may be initiated by a petition signed by the inhabitants thereof equal in number to one-third of the votes cast therein for governor at the last election, and further providing for a removal of such county seat by a mere majority vote, is unconstitutional and void, as special legislation.

Same.

2. The act includes within its terms counties to be subsequently organized; but such attempted classification of the counties having no courthouse upon a certain date, and which perpetually precludes them from passing out of such class into the general class after they have erected such buildings, is purely arbitrary, having no reasonable basis to support it.

Application of William Connolly and Vincent Kovash for writ of habeas corpus.

Application granted.

Crawford & Burnett and *Ball, Watson, Young & Hardy,* for petitioners.

R. N. Stevens and *J. M. Hanly,* for defendants.

FISK, J. This is a joint application by William Connolly and Vincent Kovash for the issuance by this court of a writ of habeas corpus. The petitioners, who are county commissioners of Dunn

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county, were adjudged guilty of contempt of court and committed to jail for refusing, as such commissioners, to comply with a certain peremptory writ of mandamus issued by the judge of the district court commanding them to call a special election for the purpose of submitting to the voters of said county the question of relocating the county seat therein, pursuant to a petition of the inhabitants thereof, under the provisions of chapter 77, page 159, Laws 1905. Counsel have stipulated that the merits may be heard and determined on the application and stipulation of facts, without the formal issuance of a writ. They have also stipulated that the following are the sole questions involved: (1) The constitutionality of chapter 77 aforesaid; (2) whether said act applies to Dunn county; (3) whether said act was repealed or amended by chapter 61, page 86, Laws of 1907; and (4) whether, in case chapter 77 is valid, a majority or two-thirds vote is necessary to remove the county seat. It is agreed by counsel that, if chapter 77 aforesaid is valid and applies to Dunn county, the refusal to order the election was wrong, and petitioners were duly committed for contempt, and hence are not entitled to the writ prayed for. On the other hand, if said act is void or is not applicable to Dunn county, the petitioners are entitled to their liberty.

As we view the matter, the first two are the only questions requiring consideration. Following is the full text of said law:

"Section 1. In all organized counties in this state wherein prior to the taking effect of this act no courthouse has been constructed or is owned by such county, the county commissioners shall, upon the petition of the inhabitants of such county, equal in number to one-third of the votes cast therein for Governor at the last preceding election, submit to the electors of such county at a special election to be called in sixty days, or at the next general election. as may be required by said petition, the question of moving the county seat from the place where it is located by law or otherwise, to another place. Such petition must be verified by the affidavit of each of the signers thereof, stating that he is a resident of the county, and a qualified elector therein and that he personally signed such petition.

"Sec. 2. Notice of such election shall be given in the manner prescribed by section 1882 of the Revised Codes of North Dakota for the year A. D. 1899.

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"Sec. 3. In voting on the question each elector must vote for the place in the county which he prefers by placing opposite the name of the place the mark 'x.' When the returns have been received, compared, and the result ascertained by the board of county commissioners, if more than one-half of all the legal votes cast by those voting on the proposition are in favor of any particular place, the board must give notice of the result by publishing a notice thereof, in each newspaper in the county, at least once a week for four consecutive weeks, and the place so selected as the county seat shall be designated in such notice as the county seat, from a date specified therein not more than sixty days after the election.

"Sec. 4. The board of county commissioners shall cause a statement of the result of said election to be deposited and transmitted as provided by section 1885 of the Revised Codes of North Dakota for the year A. D. 1899.

"Sec. 5. All acts and parts of acts inconsistent with this act are hereby repealed; provided, however, that this act shall not apply in counties having more than six thousand five hundred inhabitants according to last census.

"Sec. 6. Whereas, there is now no law covering the subject matter named in this act, therefore an emergency exists, and this act shall take effect and be in force from and after its passage and approval."

It will be observed that the legislature, by said act, recognizes those counties wherein courthouses have not been erected as a class by themselves, and prescribes for such class a method to be pursued in the removal and relocation of county seats different and less difficult from that applying to the other counties of the state. It is conceded by counsel for petitioners that such a classification of the counties for the purposes aforesaid is permissible, if the act is general in its operation when applied to such class; but it is contended by them that the act in question is vicious for the reason that it is not general, but special, in its operation, as it does not embrace all counties without courthouses, but is expressly limited to counties having not more than 6,500 inhabitants, and also to those counties which were organized prior to the date of the passage of the act. It is argued that there is no valid reason why a county without county buildings having more than 6,500 inhabitants should not have the same right of removal of the county seat as a county having a less number of people, nor why a county organized after

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the passage of the act in question which has no county buildings should not be treated in the same class as a county without county buildings at the time the act took effect. We will take up the last proposition first.

Counsel's argument is based upon the premise that said act excludes from its operation counties organized after its passage and approval. If their premise is sound, we think their argument would be unanswerable, as such a classification would be clearly arbitrary and unreasonable, and therefore render the law special in its operation and clearly in violation of subdivision 3, chapter 69, of the constitution, which is as follows: "The legislature shall not pass local or special laws in any of the following enumerated cases; that is to say: * * * (3) Locating or changing county seats." We are entirely clear that counsel for petitioners wholly misconstrue the language employed in the act. As we read section 1, the clear legislative intent was that the same should apply to all counties, whether organized at the date of the passage of the act or thereafter organized, in which no courthouse has been constructed or is owned by such county, and which does not contain a population of more than 6,500 inhabitants. The clause, "prior to the taking effect of this act," relates to and qualifies the following clause, "has been constructed or is owned by such county." This clause was used to designate the dividing line between the two classes of counties. The legislative intent was to subject all organized counties having not to exceed 6,500 inhabitants and not having a courthouse at the date of the passage of the act to the operation of the law, even though they might thereafter, and before the institution of proceedings for the removal of their county seat, have constructed or purchased a courthouse. Without such clause the act would apply only to those counties which, at the date of the institution of county seat removal proceedings, have no courthouse. After the taking effect of said act the inhabitants of a county governed thereby are bound to take notice of the law, and hence are bound to know that proceedings for the removal of their county seat may be instituted under said act, even though they had previously thereto erected or purchased a courthouse. It is, therefore, plain that counties organized after the passage and approval of the act are included within the class of counties intended to be dealt with in said chapter.

The other objection urged to the validity of the law, that counties having more than 6,500 inhabitants according to the last cen-

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sus are excluded from the operation of the act, is more serious. Is there any reasonable basis for such a classification, or is it purely arbitrary? We are not without precedents in this state upon the rules so well settled elsewhere construing and applying the constitutional limitations against legislative action of the character now under consideration. The law is well settled that a classification of objects or places for the purpose of legislation must be natural, not artificial. It must, in view of the character of the legislation, have some reasonable basis. As aptly stated by Chief Justice Beasley of the New Jersey court: "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." State v. Hammer, 42 N. J. Law, 439. Among the decisions of this court to the same effect are Edmonds v. Herbrandson, 2 N. D. 270, 50 N. W. 970, 14 L. R. A. 725; Vermont Loan & Trust Co. v. Whithed, 2 N. D. 82. 49 N. W. 318; Angell v. Cass County, 11 N. D. 265, 91 N. W. 72; Beleal v. Railway Co., 15 N. D. 318, 108 N. W. 33; Plummer v. Borsheim, 8 N. D. 565, 80 N. W. 690. In the light of the rule thus firmly established, we can discover no justification for the attempted classification, or any classification, on the basis of population. Why should a different rule regarding the removal of county seats apply to counties having 6,600 inhabitants than applies to counties having but 6,500. We are unable to discover any plausible or rational reason, and we believe none exists.

A similar question was also before the New Jersey court in Anderson v. City of Trenton, 42 N. J. Law, 486. An act of that state declared it lawful for any city within the state, having a population of not less than 25,000 inhabitants, to borrow money to the amount of its floating or unbonded indebtedness and to issue bonds therefor. Such an act was held special legislation; the court, among other things, saying: "The question to be de-

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termined concerning the law now under review, therefore is whether, since it does not relate to all cities, it affects a class of cities constituted upon this principle—whether the basis of classification is some peculiar feature to which the provisions of the law are naturally related. The basis of classification is a minimum of population. The powers to be conferred by the statute concern the issue of bonds for the purpose of funding floating indebtedness. Now, I am unable to see any natural connection between the number of people in a city and its right to fund its floating debt. It is true that there may be some propriety in denying this authority to very small municipalities and granting it to larger ones; but the same may be said of almost every power usually possessed by cities, and it is manifest that if the classification made by a statute is to be justified, or not, by considering whether it is proper to apply the peculiar provisions of the law to the particular individual or individuals designed to be affected, then laws will be upheld or overthrown, not as the court shall decide them to be general or special, but as they shall deem them wise or unwise. No rule heretofore laid down in this state sanctions such a test of constitutionality, nor do I think that such a criterion should be adopted." In commenting upon a Pennsylvania decision upholding a statute which divided the cities of the state into three classes according to population, the court further says: "But that statute is distinguishable from the one now before us, inasmuch as that classification was made for all the purposes of municipal legislation, and could therefore be regarded as a general classification, while in the present law the grouping of cities is for a special purpose only—to confer on some a power of funding debts not granted to others; and hence, in this aspect, the law is special. If it be sustained, the classes into which towns may be divided, on this simple basis of population, will be as numerous and diversified as the purposes of the legislature, and all the evils sought to be averted by the abolition of the power to legislate for individuals will return under the form of class legislation. I see no view in which this law will appear to be general." The foregoing very clear and accurate statement of the law meets with our unqualified approval. Many authorities might be cited to the same effect, but we content ourselves by referring to the following, in addition to those above cited: Morrison v. Bachert, 112 Pa. St. 322, 5 Atl. 739; Sutton v. State, 96 Tenn. 696, 36 S. W. 697, 33 L. R. A. 589, and cases cited.

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We think the act in question is inhibited by the constitutional provisions aforesaid for the further reason that the counties within the class created by the act in question can never in the future pass from that class to the other class governed by the general law regarding removal of county seats. In other words, counties having no courthouses at the date of the passage of the act will be permitted to change the location of their county seat by a mere majority vote, even after they have constructed valuable courthouses, The necessary result would be that counties in all respects similarly situated, so far as courthouses and population are concerned, will be governed by different rules regarding the method of changing county seats. This is clearly contrary to the letter as well as the spirit of the constitutional provision against special legislation, and is directly opposed to the rule announced in Edmonds v. Herbrandson, supra, wherein Chief Justice Corliss, in speaking for the court, gave expression as follows: "We are inclined to the view that under the authorities, had the legislature not closed the door against accessories to the class of counties having a courthouse 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 courthouse 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 (Laws 1890. page 168, chapter 56). So far as the value of improvements is concerned, it excepts only those counties wherein the courthouse 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 courthouse 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

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to the date when the act took effect, i. e., July 1st, all counties in which the courthouse 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 for 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 nullify the constitution so far as it prohibited special legislation." The opinion cites and quotes from many authorities sustaining the rule therein announced.

A similar question was before the supreme court of Minnesota in the case of Nichols v. Walter, 37 Minn. 264, 33 N. W. 800, and it was there 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 other 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, 25 years or 6 months before the act passed, should require a vote of three-fifths of its electors

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to remove it, and the county which should so locate it 3 or 6 months after the act passed may again remove or locate it on 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."

While we are not unmindful of the rule that courts are reluctant to declare legislative enactments unconstitutional, and will only do so in a clear case requiring it, we are forced to the conclusion, for the reasons above stated, that chapter 77, page 159, of the Laws of 1905, is unconstitutional and void as special or class legislation.

It follows that the writ should issue. All concur.

(117 N. W. 946.)

STATE OF NORTH DAKOTA v. ELIAS JOHNSON.

Opinion filed November 18, 1908.

Criminal Law — Arrest of Judgment — Information.

1. The sufficiency of the allegations of an information, when raised by a motion in arrest of judgment, will be construed with less strictness than when raised by demurrer.

Sufficiency of Information — Motion in Arrest.

2. Where an information states facts constituting an offense in general words, and in the language of the statute defining the offense, the information is sufficient, as against a motion in arrest of judgment, although some of the necessary allegations are stated or appear by inference, and not by positive allegation.

Criminal Law — Evidence — Intent.

3. A person accused of a crime, in the commission of which a corrupt intent is a necessary ingredient thereof, may testify what his intent was in doing certain acts.

Objections to Evidence.

4. Objections to certain questions considered, and *held* error to sustain them.

Criminal Law — Evidence of Intent.

5. A person accused of crime should be allowed the fullest latitude to explain what his intent was in writing or making statements, apparently incriminating, and in explaining what he meant by certain equivocal statements.

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Appeal from District Court, Benson County; *Cowan,* J.

Elias Johnson was convicted of offering a bribe to a road overseer and appeals.

Reversed and remanded.

F. Baldwin, C. B. Craven, Craven & Maxfield, and *R. A. Stewart,* for appellant.
T. F. McCue, Atty. Gen., for the state.

MORGAN, C. J. The defendant was convicted of the crime of offering a bribe to a road overseer or supervisor, and sentenced to one year and six months in the penitentiary. The assignments of error on his appeal are: (1) That the information fails to state facts constituting an offense against the laws of the state of North Dakota; (2) that prejudicial errors were committed in sustaining objections to certain questions; (3) that the evidence is insufficient to sustain the verdict. The information is in the following words, omitting formal parts, concerning which no objection is made: "That at the said county of Benson, state of North Dakota, on the 27th day of July, A. D. 1905, the said Elias Johnson did willfully, unlawfully, and feloniously offer and give a bribe to one Edwin Olson, who was then and there duly appointed, qualified, and acting road supervisor and road overseer in and for the west half of township 155, range 68, in said county of Benson, by then and there offering and giving to the said Edwin Olson a bank check for the sum of $75, and of the value of $75, made, executed and delivered then and there by the said Elias Johnson to the said Edwin Olson, which bank check is in words and figures as follows, to wit: 'For taxes v. N. P. R. R. Co., 155-68, Benson county, 1905, No. 145, Carrington, N. Dak., July 28, 1905. Pay to the order of Edwin Olson $75.00 seventy-five and no-100ths dollars. Elias Johnson. To Commercial State Bank, Carrington, N. Dak.' Which said bank check was then and there offered, given, and delivered to the said Edwin Olson by the said Elias Johnson through the United States mail, with the intent then and there, on the part of the said Elias Johnson, to induce and influence the said Edwin Olson, as road supervisor and road overseer, as aforesaid, to sign as such road supervisor and road overseer, as aforesaid, a certain receipt in words and figures following: 'The state of North Dakota, county of Benson, township 155, 68, road district, 21-2,

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July 28, 1905. Received of Elias Johnson the sum of one hundred and thirteen and 75-100 ($113.75) in labor upon the highways in said district, in full for district road tax, for the year 1905 against the Northern Pacific Railway Company on personal property valuation of $——— in said district as follows: Labor of man 55½ days, labor of team and wagon or plow 35½ days. ——— Road Overseer.' The said Elias Johnson, then and there well knowing that the said Elias Johnson had not done, or caused to be done, any of the labor or paid said sum of $113.75 mentioned in said receipt, for which he (the said Elias Johnson) offered and gave the said Edwin Olson the bribe as aforesaid, to induce and influence the said Edwin Olson, as road supervisor and road overseer, to sign said receipt as aforesaid. * * *" The objections urged against the information are: (1) That it does not state that the defendant knew that Edwin Olson was a road overseer or supervisor; (2) that it does not state that the bribe was offered with corrupt intent. The information is drawn under section 8633, Rev. Code 1905, which reads as follows: "Every person who gives or offers any bribe to an executive officer of this state, with intent to influence him in respect to any act, decision, vote, opinion, or other proceedings of such officer, is punishable," etc. It will be seen that the information charges that the bribe was offered to the road overseer with intent "to induce and influence the said Olson, as road supervisor and road overseer, as aforesaid, to sign, as such road supervisor and road overseer, as aforesaid, a certain receipt, * * * knowing that the said Elias Johnson had not done, or caused to be done, any of the labor, or paid said sum of $113.75," etc. It is claimed that the fact that the defendant knew that Olson was a road overseer must be directly charged, and that it is not sufficient to charge this fact inferentially or indirectly. It is also claimed that a corrupt intent must be directly charged, and that it is not sufficient that the corrupt intent appears as a necessary conclusion from the facts stated. In reference to these objections it may be said that neither of them was made or raised by demurrer. There was a plea of not guilty entered without in any way attacking the sufficiency of the information and no objection was made to the introduction of evidence based on the insufficiency of the information.

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The objections are now presented under an exception to the denial of a motion in arrest of judgment, in which these objections were specifically set forth. It may also be stated that the information states all the facts required by said section 8633, Rev. Codes 1905, and states such facts substantially in the general language of that section. It cannot be said that there is a total absence of any allegation of fact that is made a constituent element of the crime of bribery. The most that can be said of the information is that its averments as to the intent, and as to knowledge that Olson was a road supervisor, are not made with the absolute directness and certainty that is required in informations before they will be sustained when attacked by demurrer. It is true that the failure of an information to state facts constituting an offense against the state may be raised for the first time by a motion in arrest of judgment. When so raised for the first time, however, we deem it well settled that the same strict rules will not be enforced in testing the sufficiency of the information as are applied or will be applied, when its sufficiency is challenged by demurrer If the information states an offense, though imperfectly, by reason of general statements, or it is defective as to some matter not of the substance of the offense, then a motion in arrest of judgment will not lie. It is only in case of an omission of allegations as to ingredients of the offense that pertain to the substance thereof that the insufficiency of the information can be attacked after trial by a motion in arrest of judgment. In State v. Knowles, 34 Kan. 393, 8 Pac. 861, the court said: "Where an averment, which is necessary to support a particular part of a complaint or information filed in a criminal case, is imperfectly stated, or stated in very general terms, a verdict or plea of guilty cures the defective averment, although such averment might have been bad on demurrer or motion to quash." The Kansas statute, under which this decision was based is similar to our own as to motions in arrest of judgment. In this case the information charges the defendant with unlawfully and feloniously having offered a bribe, and then states the facts constituting such offer, and in a general way that it was done with intent to influence the action of the road overseer. The word "bribe" is given a specific meaning by section 9526, Rev. Codes 1905, and whenever used in the Code signifies anything of value or advantage, or any promise or undertaking in reference thereto which is asked, given, or accepted with a corrupt intent to

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influence unlawfully the person to whom it is given in any public or official capacity. With this fixed meaning to the word "bribe," in connection with the charge that the bribe was offered unlawfully and feloniously, with intent to influence the action of the road overseer, we think it clear that the defendant was apprised fully of the charge against him, and that sufficient facts are stated to make it certain what offense he is charged with in case of an attempt to again file an information against him for the same offense. The information, therefore, states sufficient facts to charge the crime of bribery, as against an attack by motion in arrest of judgment. Some more liberality is permissible in construing allegations of informations when attacked by motion in arrest than when a demurrer is resorted to. Wharton, Crim. Pleading & Pr. (8th Ed.) § 760; 12 Cyc. p. 760, and cases cited; People v. Swenson, 49 Cal. 388; United States v. Dimmick (D. C.) 112 Fed. 352; Bishop on Crim. Proc. § 707.

Section 10157, Rev. Codes 1905, provides as follows: "After hearing the appeal the court must give judgment without regard to technical errors, or defects or exceptions which do not affect the substantial rights of the parties." The record presents facts warranting the application of this section. The information is not substantially defective as to any allegaton. Every requirement of the statute is set forth, although in general terms as to some essentials. Great reliance is placed by appellant on State v. Howard, 66 Minn. 309, 68 N. W. 1096, 34 L. R. A. 178, 61 Am. St. Rep. 403, and it is claimed that the informations are similar, and that that decision should govern this case. In that case the information was demurred to, which is sufficient ground to warrant a different decision in the case at bar.

The principal evidence against the defendant at the trial consisted of a letter written by him to Olson. In fact, so far as the offer of the alleged bribe is concerned, the letter constituted all the evidence bearing on the question until the defendant gave his own testimony. The letter referred to is as follows:

"Carrington, N. D., July 26, 1905. Mr. Edwin Olson, Leeds. N. D.—Dear Sir: Your letter to Mr. A. M. Burt, superintendent N. P. R. Co. was handed to me as contractor for the Co. In regard to the taxes, should have been attended to before, but got letter today. As I understand you are the overseer in your district, it will be an easy matter for you to take this. Nobody will ever

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know anything more about it. It is the way we are doing with all. Have only left in your township ———. I herewith inclose you a check for $75, and receipt to sign as road overseer. You might work out some, you know, and then you have until fall to work it in, hoping this will be satisfactory, I am your truly, Elias Johnson, Carrington, N. D., Box 305.

"Please put valuation in the space."

While the defendant was on the witness stand, his counsel asked him the following questions, which the state objected to, and the court sustained the objections: "Q. You may look at Exhibit 1, and tell the jury what you intended to do in writing that letter. (Objected to on the grounds that the letter speaks for iteslf. Sustained. Exception.) Q. Now, at the time you sent this receipt, did you expect that receipt back before the work was done?" "Q. In that statement in the letter where you say, 'This is the way we do it with all,' what did you mean by that statement?" Q. Did you mean by that statement that you let it out to people on that percentage or basis?" "Q. Was the amount you sent Olson in this letter an amount slightly lower than the contract you took it for?" "Q. In writing that letter to Olson, did you intend by that to make a contract with him to do the road work in the west half of this township?" "Q. Did you have any other intention in writing that letter than to make a contract to do this road work?" "Q. What was your object in writing that letter and sending that receipt and check to Olson?" "Q. Tell the jury in your dealings with Mr. Olson what kind of a deal you calculated to make with him?" Many other questions of similar import were asked, and the answers excluded under objections from the state. These other questions are not now set forth, for the reason that the exclusion of the answers was rendered without prejudice by reason of the fact that full answers to the questions were given by the defendant in his testimony later.

There are several statements in the letter which have no unequivocal meaning. That the defendant should be permitted to explain such statements and state what was the meaning intended to be conveyed is too patent to require further observation. Even in case of statements in the letter that may seem to impart but one meaning to a reader thereof, or to a juror, we think the fullest latitude should be allowed for statements or explanations by the accused as to what was intended by him. It is what the defendant

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actually meant that is the test of criminality, and not what the expressed words may seem to convey when read by others. We think the following expresses the correct rule as to the latitude to be allowed on the examination of those accused of crime while testifying: "He must be permitted, on his direct examination, to explain his conduct and declarations as he has testified to them, or as they have been described by other witnesses. He must be permitted fully to unfold and explain his actions, and to state the motives which he claims prompted them. It is within certain limits relevant for him to state what intention was present in his mind when he participated in a transaction which is in issue. And the jury are the sole judges to determine whether the defendant's statement is false. * * * They must consider it in connection with all the evidence. The inference which they draw from it may be strong enough to overcome any conclusion of guilty intention which they may draw from his other acts or declarations." Section 59, Underhill on Criminal Evidence; State v. Tough, 12 N. D. 425, 96 N. W. 1025; People v. Quick, 51 Mich. 547, 18 N. W. 375; State v. Montgomery, 65 Iowa, 483, 22 N. W. 639; People v. Farrell, 31 Cal. 576; Ross v. State, 116 Ind. 495, 19 N. E. 451; State v. King, 86 N. C. 603. That it was error to exclude the answers to these questions is not seriously denied by the state, but the contention is that the error was rendered harmless in view of the defendant's testimony that was admitted after the objections were sustained. A careful reading of that testimony discloses that the questions called for answers concerning matters not at all covered by the defendant's testimony. This is especially true of the questions that referred to the kind of deal that he intended to make, and what he meant by the expression, "this is the way we do it with all," and whether he intended making a contract with Olson to do the road work in the west half of the township.

The following is all of the testimony of the defendant as shown by the record: "I meant to hire anybody to work out the taxes for the railroad company, and pay them as much or as little as I could. My object has been to let out these contracts to parties who will take them for the least possible compensation. I wrote that letter because he was the only man I had, and I thought he would know the farmers or anybody there that probably would help me out with him to do the work; that is the only name I had. At the time I wrote that letter, it was my intention to employ him to do that work

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if I could. I did not afterwards hear from Olson in regard to that work. I had nothing further with Olson in regard to getting that work done, except that I wrote him a card. I intended, when I wrote that letter to Olson, that he should work out the company taxes. I did not intend at the time I wrote that letter, to have Olson give me receipt without doing any work on the road. My object in writing that letter was because I thought I would save expense by not going up there. I sent him the check in that letter as a guaranty of good faith. I didn't expect him to start doing the work without having some kind of guaranty that he was to have the money. I had never seen Olson. I didn't know him, and I sent this for the reason I didn't know him, and he didn't know me. In sending that check and letter and receipt to Olson, I did not intend to influence him in any way in the performance of his duty as road overseer." It seems clear that the defendant was restricted within a too narrow compass in explaining his purpose, and what he meant by the above equivocal expressions of the letter. The evidence called for was competent, relevant, and material, and its exclusion was prejudicial and reversible error without an independent offer of proof.

The judgment is reversed, a new trial granted, and the cause remanded for further proceedings. All concur.

(118 N. W. 230.)

NELS H. ELVICK v. HARRY GROVES.

Opinion filed October 29, 1908.

Elections — Polling Place — Unauthorized Removal.

1. Where a voting place at a primary election is duly established by the county commissioners at a certain place, an election held at another place over three miles distant, pursuant to a resolution of a majority of the voters of the precinct assembled at a political meeting, is unauthorized, and the returns of the election at such place should not be canvassed.

Same.

2. Evidence that no injury followed such change of the voting place is not admissible.

Same.

3. It is only in case of emergency or extraordinary circumstances that such a change of a voting place should be upheld.

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

Contest by Nels H. Elvick of the nomination of Harry Groves at a primary election for the office of county treasurer. Judgment for contestee, and contestant appeals.

Affirmed.

Frich & Kelly, for appellant.

Departure from strict letter of election law not fatal unless injurious to party complaining. Laws 1907, section 1 and 2; Perry v. Hackney, 11 N. D. 148, 90 N. W. 483; Miller v. Schallern, 8 N. D. 395, 79 N. W. 865.

To defeat an election by change of polling places, contestant must allege and prove loss of votes. Farrington v. Turner, 18 N. W. 544; Ex Parte Segars, 25 S. W. 26; Ex parte Williams, 31 S. W. 653; Stemper v. Higgins, 37 N. W. 95; Roper v. Scurlock, 69 S. W. 456; Simons v. Dunning, 9 N. E. 220; Bordwell v. State, 91 S. W. 555; Perry v. Hackney, supra, Miller v. Schallern, supra.

Delay in opening polls not fatal to election. Perry v. Hackney, supra; Miller v. Schallern, supra; Soper v. Sibley Co., 48 N. W. 1112; People v. Keeling, 4 Colo. 129; Clark v. Leathers, 5 S. W. 576; State v. Smith, 30 Pac. 1064; Graham v. Graham, 68 S. W. 1093; Patton v. Watkins, 31 So. 93; Bowers v. Smith, 20 S. W. 101; Hope v. Flentge, 47 L. R. A. 822; Packwood v. Brownell, 53 Pac. 1079; Pickett v. Russell, 28 So. 764.

Election laws liberally construed. Bingham v. Broadwell, 103 N. W. 323; Griffith v. Bonawitz, 103 N. W. 327.

Scott Rex and *Fred A. Kelley,* for respondent.

An election held at an improper place is void without proof of fraud or prejudice. 10 Am. & Eng. Enc. Law, 684.

Delay in opening polls vitiates election regardless of fraud or injury. 10 Am. & Eng. Enc. Law, 684, 692; People v. Hill, 57 Pac. 669; Tebbe v. Smith, 29 L. R. A. 673, 41 Pac. 454; Hayes v. Kirkwood, 69 Pac. 30; Kenworthy v. Mast., 74 Pac. 841; McCrary on Elections, section 126; Paine on Elections, section 498; Melvins case, 68 Penn. State 333; Hayfron v. Mahoney, 24 Pac. 93; Russell v. McDonald, 23 Pac. 183.

MORGAN, C. J. This is a statutory contest of a nomination for the office of county treasurer of Nelson county. Nels H. Elvick,

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the appellant, and Harry Groves, the contestee and defendant, were candidates for a nomination to said office at the primary election held in said county on the 24th day of June, 1908. The contestant received 729 votes and the defendant received 730 votes for said office, according to the election returns, and a certificate of nomination was issued to the defendant by the county auditor. The plaintiff served a notice of contest, and alleged various irregularities as grounds for contesting the right to the nomination certificate. It is unnecessary however, to notice or determine any of such alleged grounds of contest as set forth in plaintiff's notice of contest. The contestant concedes that, if no valid election was held in Adler township, he is not entitled to a certificate of nomination. The facts in regard to the validity of the vote at said precinct are alleged in the defendant's answer as follows: "Upon his information and belief that schoolhouse No. 4 was duly designated as the voting place in Adler township and precinct in said county for said election; that said election was not held in said schoolhouse No. 4, but was held in the manner hereinafter set forth in schoolhouse No. 3, which was distant about three miles from schoolhouse No. 4, and that no election was held in said schoolhouse No. 4; that a pretended election was held during a portion of the day of election in schoolhouse No. 3 in said township and precinct, and certain pretended returns of said election were forwarded to the county auditor by the precinct election board, and were canvassed by the county canvassing board; that said returns show that plaintiff and contestant received 27 votes for said nomination in said precinct, and that defendant received nine votes for said nomination in said precinct, and that said returns were so canvassed by the county canvassing board; that at said pretended election at said schoolhouse No. 3 the polls were not open until about 12 o'clock noon; that, by reason of the facts herein set forth, the said pretended election held in said township and precinct was null and void; and that the pretended vote thereof should be rejected." The trial court made findings of fact and conclusions of law in favor of the defendant, and dismissed the contest. From the judgment dismissing the contest proceedings, the contestant appealed to this court, and demands a review of all of the evidence.

In the findings of fact the trial court found that the election was held at schoolhouse No. 3 without authority of law, and

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that the returns from that election precinct should be rejected, and they were rejected. If the action of the trial court in rejecting all the votes from this precinct was proper, it is decisive of the appeal under the express admissions of the appellant. The appellant claims that schoolhouse No. 4 of Adler township was not proven to have been regularly established as a voting place by the board of county commissioners—the proper body to do so. The records of the county commissioners were produced in court showing the designation by them of the various voting precincts of the county, and the county auditor was asked as to what the designation was as to Adler township, as shown by the commissioners' proceedings, and the county auditor answered by reading from the record of the county commissioners, and such record showed that schoolhouse No. 4 had been established as the voting place for said township. This question was asked the auditor before he read from the record: "And what is the designation shown by the record you have in your hand?" This question was objected to as incompetent, irrelevant, and immaterial, and not the best evidence. The court stated after the objection was made: "Your objection does not go to the point that they do not offer the book itself, instead of the auditor's reading from the book." The attorney responded: "No; I don't care anything about that." We think that it was not error to admit the testimony, for the reason that no objection was made thereto upon the ground that it was not the best evidence. This evidence fully established the fact that precinct No. 4 was duly established by the commissioners. The evidence also shows that the notices published under the direction of the county auditor showed that the election in Adler township was to be held in schoolhouse No. 4.

The appellant strenuously contends that the vote of Adler township, as shown by the returns, should be counted notwithstanding the change of the voting place without authority of law from schoolhouse No. 4 to schoolhouse No. 3. He bases this contention upon the alleged fact that it is affirmatively shown that all the electors within said precinct voted at schoolhouse No. 3 on that day, and that, therefore, no injury followed the change of the voting place. He further contends that the change was made pursuant to a resolution of a majority of the electors of said precinct while assembled at a political gathering about a week prior to the primary election. It appears that the officers of election at

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Adler township took no official action in reference to the change of the voting place. They did not convene on election day at schoolhouse No. 4, but tacitly acquiesced in the change agreed upon by the electors at the political meeting, and convened at schoolhouse No. 3. There is no claim, nor room for a claim, that the change was made in bad faith. Schoolhouse No. 3 had previously been the one used for holding elections for several years. In regard to the vote for the change of place, it may be said that the record does not affirmatively show that all of the electors of said township participated in, or were present at, the meeting where the change was decided on, and the record does not show that all of the voters in said precinct voted on said election day. Whether an unauthorized change of a voting place is fatal to an election and renders it void is a question on which there is some divergence of authority. Under one line of authorities, the result of the election is rejected without regard to the fact as to whether any injury followed the change of the place of voting or not. Under the other line of authorities, the change is deemed immaterial, providing it is clearly shown that the change of the place was without injury to any one.

In 10 Am. & Eng. Enc. of Law (2d Ed.) page 684, the rule is laid down as follows: "As a rule, the place for holding an election must be fixed by the proper authorities before a valid election can be held. And, when the place has been so fixed, the election must be held there, and not at some other place. There is less latitude allowed in changing the place of holding an election than in varying the time of holding it, and it is a general rule, to which there are few exceptions, that an election held at an improper place is absolutely void without proof of any fraud or injury." In this case the established voting place was arbitrarily changed to a place between three and four miles distant. No excuse is shown, except that it was deemed by the electors at the meeting that resolved in favor of the change that schoolhouse No. 3 was a more convenient location for the electors generally. We do not think the question as to which is the most convenient place for a voting place should be left to the judgment of the voters independently of, or contrary to, the judgment of the county commissioners. On that question we think the action of the county commissioners should be deemed final, and not subject to change by the authorities, except under extraordinary circumstances.

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Circumstances may arise making a change absolutely necessary, but the question of convenience should not be considered an excuse or justification for the setting aside of the official action of the proper authorities on so important a question as the establishment of a place for voting in a precinct. On that question the supreme court of California, in Knowles v. Yates, 31 Cal. 83, said: "We are aware that courts have been very indulgent respecting the omissions, inadvertences, and mistakes of officers of election, lest by exacting of them a technical compliance with the requirements of the law the citizen might be deprived of a sacred right. We are not disposed to be less indulgent in respect to the observance of forms and methods than have been the courts to which counsel have referred; but we deem it of the highest importance to the protection of the elective franchise that the law should be complied with in substance, and that those intrusted with discharge of the duties pertaining to elections should be required so to perform them as to preserve the ballot box pure. * * * The election held at the Buckeye house was at a place not authorized by the board of supervisors. It was distant from the place designated, six miles, and though, for aught that appears, the officers there conducted the election in an orderly manner and fairly, they had no right to hold the election at a place other than that fixed by the supervisors. We do not say officers of election would not have authority to hold the election at any other house than the one designated by the supervisors in case of necessity, provided the same be held in the immediate vicinity of the place designated, but, in case of a deviation from the order of the board of supervisors, a reason and necessity therefor should be shown to exist. To allow any other practice to obtain would expose those under political excitement to temptations which, yielded to, might be subversive of the great objects and ends of free suffrage to be exercised at popular elections." See, also, McCreary on Elections (3d Ed.) section 126; Paine on Elections, section 498; Russel v. McDowell, 83 Cal. 70, 23 Pac. 183; Melvin's Case, 68 Pac. 333; Walker v. Sanford, 78 Ga. 165, 1 S. E. 424; Heyfron v. Mahoney, 9 Mont. 497, 24 Pac. 93, 18 Am. St. Rep. 757.

It is our conclusion that the change of the voting place to schoolhouse No. 3 was unauthorized, and that the district court was justified in wholly disregarding the returns from Adler township pre-

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cinct, and that evidence to show that the change of voting place was without injury was not admissible under the circumstances shown by the record. Our conclusion of this question renders it unnecessary to consider whether the alleged fact that the election officers failed to open the polls until 11 or 12 o'clock is true, and, if true, the effect upon the canvass of the returns.

The judgment is affirmed. All concur.

(118 N. W. 228.)

STATE OF NORTH DAKOTA v. JOSIE WESIE.

Opinion filed October 29, 1908.

Criminal Law — Adultery — Spouse May Prosecute Either or Both Guilty Parties.

Section 8903 of the Revised Codes of 1905 reads: "Adultery is the voluntary sexual intercourse of a married person with a person other than the offender's husband or wife; and when the intercourse is between a married woman and a man that is unmarried the man is also guilty of adultery. No prosecution shall be commenced except on the complaint of the husband or wife, and no prosecution shall be commenced after one year from the time of the committing of the offense."

Held that by the provisions of this section the spouse of either of the guilty parties is empowered to make complaint against either or both of them.

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

Josie Wesie was charged, on information with adultery, and from a judgment sustaining a demurrer to the information, the state appeals.

Reversed and remanded.

Wm. H. Barnett, State's Attorney, and *S. W. Richardson,* Assistant State's Attorney, for the state.

Adultery is a crime against the state as well as innocent party. State v. Clemenson, 99 N. W. 139.

Spouse of the married party to adultery may prosecute the unmarried participant. Parson v. People, 21 Mich. 509; Bayliss v. People, 9 N. W. 257; People v. Davis, 18 N. W. 362; Wilson v. Circuit Court, 62 N. W. 293; State v. Brecht, 42 N. W. 602.

V. R. Lovell, for respondent.

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Prosecution for adultery can only be by spouse of the person charged with offense. State v. Bennett, 31 Iowa, 34; State v. Mahan, 46 N. W. 855; People v. Dalrymple, 22 N. W. 20.

SPALDING, J. This is an appeal from a judgment of the district court for Cass county, sustaining a demurrer to an information charging the respondent, a married woman, with having committed the crime of adultery with one Pratt, a married man, and not the husband of said respondent. The information further alleges that the prosecution against the respondent was begun upon the complaint of the wife of said Pratt. The only question for determination is whether the wife of a man charged with adultery is, under the statute, competent to make complaint, as a basis for the institution of a criminal prosecution, against the other party to the crime, namely, the guilty woman. Section 8903 of the Revised Codes of 1905 provides, among other things, that "no prosecution for adultery shall be commenced, except on complaint of the husband or wife." The construction of this clause will determine this appeal. The same section defines adultery as "voluntary sexual intercourse of a married person, with a person other than the offender's husband or wife," and provides that when the intercourse is between a married woman and a man that is unmarried, the man is also guilty of adultery. The state contends that the prosecution can be instituted against either of the guilty parties, by the spouse of either one of them, while the respondent insists that the statute, correctly construed, admits only of a prosecution upon the complaint of the spouse of the party who is being proceeded against; hence that the prosecution cannot proceed or be maintained, or a conviction had, based upon the complaint of Mrs. Pratt against Mrs. Wesie. Laws of this character are evidently enacted for the purpose of protecting the sanctity of the home, and in recognition of the principle that the crime of adultery is a crime peculiarly infringing upon the rights of the innocent parties to the marriage relation, and that if such innocent parties see fit to condone the offense, and from a desire to avoid scandal and humiliation, and to preserve the integrity of the home, and prevent the disgrace of children and relatives, refuse to prosecute, the public is not sufficiently interested or injured to justify the institution of criminal proceedings, as in other cases, by any member of the community.

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It may be assumed at the outset that the meaning of this statute in respect to who is competent to make the complaint within the limits mentioned is not clear, and that in such case the court is justified in seeking aid from the apparent intention of the legislature, and the construction which other courts have placed upon similar or identical language in statutes of other states. When the crime of adultery is committed between parties who are married, it is an injury to two innocent parties. The act cannot be committed by one person alone, but requires the participation of two, and the husband and wife of the guilty parties are each injured, as the guilty party not only injures his own spouse, but in the same measure injures the spouse of the other party to the crime, and we are of the opinion that the intent of the legislature was to provide for the commencement of the prosecution for this crime by either of the injured parties against either or both of the guilty ones. We are supported in this conclusion by what we consider the better reason, by authority, and by certain facts of history connected with this legislation, as well as by consideration of the whole of section 8903, supra. This provision is found in the statutes of Michigan, Minnesota, and Iowa, and has been passed upon by the courts of each of these states. It is held in Bayliss v. People, 46 Mich. 221, 9 N. W. 257, that the complaint may be made by the spouse of the party who is not being prosecuted; and in People v. Davis, 52 Mich. 569, 18 N. W. 362, the court states that it sees no reason to doubt the correctness of the decision in Bayliss v. People. It has been referred to and passed upon in other Michigan cases, which it is unnecessary to refer to. In State v. Brecht, 41 Minn. 50, 42 N. W. 602, the supreme court of Minnesota, in passing upon this provision, uses the following language: "It must be entirely apparent, the policy of the statute as to this offense being that, if the parties injured choose to acquiesce in the matter, where there are two persons injured, either may complain; as, where the guilty parties are both married, the husband of the one or the wife of the other may make the complaint."

In Iowa the opposite conclusion has been reached, but the court of that state has held that an exception exists to the rule which they have established, when one of the guilty parties is unmarried. In such case it holds that the complaint may be made by the spouse of the guilty married party, against the guilty unmarried party.

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It is unnecessary to discuss at length the reasoning of the court, but we see no reason for excluding the guilty married party, and at the same time including the guilty unmarried party, in the construction of the language in question, when it is clearly as applicable to one as to the other. This detracts very largely in our estimation from the weight which should be given the Iowa authorities upon this question. One of the authorities cited from that state is State v. Roth, 17 Iowa, 336. The decision was by a divided court; and, while a strong argument is made in the majority opinion in support of its theory, we deem the reasoning of Chief Justice Wright, in his dissenting opinion, far more convincing than that of the majority. Some of his reasoning is worthy of quotation. Among other things, he says: "At best the clause of the statute under consideration may and does permit, in too many instances, a crime which shocks the moral sense of the community to go unpunished; but, under the construction given to it by the majority, it becomes even more obnoxious and objectionable. It is certainly a monstrous anomaly that the feelings of society should be outraged, and a whole community injured, by the undisputed commission of this offense continued for months and years, and that, under the law, there is no remedy so long as the husband or wife, either from fear of his own or her own degradation, declines or refuses to apply the remedy. But when we go one step further and say that the wife of a guilty husband cannot complain against the wife of another husband, but can only complain of her husband, and that such other wife must escape punishment if her husband does not complain against her, the outrage, to my mind, is still greater, and we ought to hesitate long, and be justified by the most cogent considerations, before giving to the statute a construction involving such consequences. * * * And so I say in this case, when the wife complained against Mary Slarrett, she could not do so without, in the language of the court below, 'making the same against the husband as well.' The law will not allow her to make a half complaint, to make a partial prosecution, to commence, and not to commence, to halve the adultery, to say to the grand jury, 'Do your duty, and have regard to the oaths you have sworn as to one party, but disregard all as to the other.' But I am told that the language 'the husband or wife' means the husband or wife of the party against whom the prosecution is commenced. And stress is laid upon the definite arti-

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cle 'the' as favoring the construction. I answer that the legislature, in expressing their intention, had to use the language, either definite or indefinite, and suppose they have 'a' husband or wife, instead of 'the' husband or wife. Then any one who was so fortunate as to have a husband or wife could set the wheels of law in motion, the unmarried portion of society only being insulted, and wronged without the power of redress. This, however, was not the purpose of the legislature, and hence they used the language more definite and limited in its scope and purpose. The meaning, I think, is that the husband or wife whose domestic peace and quiet have been disturbed, whose rights have been violated, who is willing to submit to the disgrace and ignominy, may commence the prosecution against either or both of the parties to the crime; and that, while they alone can commence the prosecution, when once they commence, it must go through, and the law take its course with all connected with the crime, or who are legitimately involved in the prosecution—not against them by name and in terms, but in the crime of which complaint is made." Again it is self-evident, in view of the provisions of the section quoted, that where an unmarried man is guilty of the crime of adultery, if the contention of the respondent in this case is to be sustained, the legislature has branded him as a criminal, but has provided no possible means whereby he can be prosecuted. Such an absurdity goes a long way toward sustaining the contention of the state.

There is, however, one additional reason supporting our construction of this language. When the code was revised and reenacted in 1895, as shown by the records, it included the words "of the accused," making the provision read, "No prosecution for adultery shall be commenced except on the complaint of the husband or wife of the accused." The added words were omitted from the code as printed and in 1897 the legislature amended the section in question by striking out the limitation. Undoubtedly the legislature had two objects in doing this, one of which was to make the law stand as printed in the code, and the other to open the door to prosecution being commenced by either innocent party against either guilty party. We are not justified in presuming that the only purpose of the legislature was to harmonize the law with the printed code, because, had this been its only intent, it could have re-enacted the provision, and included the words omitted in the printed law.

The judgment is reversed, and the cause remanded.

(118 N. W. 20.)

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LILLY E. PROBSTFIELD v. WILLIAM E. HUNT, AS SHERIFF OF CASS COUNTY, NORTH DAKOTA.

Opinion filed October 30, 1908.

Attachment — Levy — Claims of Third Persons — Demand.

1. No demand or verified claim of title and ownership of property by the owner is required under section 6951, Rev. Codes 1905, where the property of the wife levied upon under a warrant of attachment in an action against the husband is in the possession of a third person with whom it is stored in the name of the husband by the agent of the owner of a house which the husband had leased and lived in with his wife, and upon leaving the house unoccupied, and not paying the rent, the owner of the house had removed the property therefrom, and stored it with said third person.

Same.

2. Section 6951, Rev. Codes 1905, applies to cases where the property of a third person is levied on while in the possession of the defendant named in the writ under such circumstances as to raise a presumption that it is owned by him.

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

Action by Lilly E. Probstfeld against William E. Hunt, Sheriff. Judgment for plaintiff, and defendant appals.

Affirmed.

F. A. Ball and *Turner & Wright,* for appellant.

A third person, claiming property taken under attachment, is limited for remedy to the mode ordained by statute. Barry v. McGrade, 14 Minn. 153; King v. Oiser, 4 Duer, 431.

Must show notice. Dodge v. Chandler, 9 Minn. 97; Barry v. McGrade, supra.

M. A. Hildreth, for respondent.

Affidavit of claim and demand for property attached are necessary only where it is in possession of defendant in the writ. Taylor v. Hanson, 8 N. W. 825; Barry v. McGrade, 14 Minn. 163; Ohlsen v. Manderfield, 10 N. W. 418.

MORGAN, C. J. This is an action for damages on account of the alleged conversion of personal property consisting of household goods, furniture, cooking utensils, table and silverware, wearing

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apparel, books, and other personal property, which property is alleged in the complaint to be the property of the plaintiff. The value of the property is alleged to be the sum of $650. Plaintiff demands judgment for said sum and interest from October 1, 1906, togther with costs and disbursements. The answer is, in part, a general denial, and the defendant also alleged as a justification for the taking of the property the following facts: That a judgment was rendered on the first day of October, 1906, in favor of Wasem & Gaard, who were plaintiffs in a certain action brought by them against one W. G. Probstfeld. That said plaintiffs Wasem & Gaard, had caused a writ of attachment to be issued in said action, and delivered the same to the defendant, who was sheriff of Cass county. That the defendant duly took possession of such property under and by virtue of said writ of attachment. Later an execution was issued upon said judgment and placed in the hands of the defendant for service. That the defendant thereupon levied upon the property which was in his possession by virtue of the levy under the said writ of attachment, and, after due notice as provided by law, sold said goods under said execution. The answer further alleges that during the time said goods were in the possession of the defendant neither the plaintiff nor any one in her behalf made any claim upon or demand for said property, nor did she or any any one in her behalf make an affidavit of her title to said property, or any part thereof, or her right to the possession thereof. A jury was impanelled at the trial, and after the taking of testimony on behalf of the plaintiff and defendant, and after both parties had rested, the court directed a verdict in favor of the plaintiff upon all the issues raised by the pleadings, except as to the value of the property, and as to that question the court submitted it to the jury. The jury found in favor of the plaintiff for the sum of $473.40. Judgment was rendered upon the verdict for said sum, and the defendant has appealed from such judgment, and has procured the settlement of a statement of the case.

The errors specified in the statement of the case are numerous, but in the brief the counsel for the appellant assigns but one error, and that is that no demand or affidavit of the title and ownership of the property was made or presented to the defendant by the plaintiff or her agent. It is the contention of the counsel for the appellant that the failure to make a claim of ownership and

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title of the property is fatal to any recovery in this action, and he bases such contention upon section 6951, Revised Codes 1905, which reads as follows: "If any property levied upon by the sheriff by virtue of a warrant of attachment is claimed by any other person than the defendant, and such person, his agent or attorney, makes affidavit of his title thereto, or right to the possession thereof, stating the value thereof and the ground of such title or right, the sheriff may release such levy, unless the plaintiff on demand indemnifies the sheriff against such claim by an undertaking executed by a sufficient surety; and no claim to such property by any other person than the defendant shall be valid unless so made; and notwithstanding such claim, when so made he may retain such property under levy a reasonable time to demand such indemnity." This section has been construed by this court in Aber v. Twitchell, 17 N. D. 229, 116 N. W. 95. In that case the section was construed as follows: "When the sheriff takes property from the possession of one not named in the writ, no notice is required, as the possession is sufficient notice to put him upon inquiry as to the right to the property of the person in possession. Construing the section with a view to giving effect to the object intended to be gained by its enactment, we are satisfied that it was not intended to apply to cases where the property was taken from the possession of a person other than the one named in the writ and owned by him." In that case we followed the construction placed by the supreme court of Minnesota upon a statute substantially identical with this statute. The cases bearing upon the question decided by the California, Iowa, and Minnesota courts are collected in that opinion. The decisive question in this case, therefore, is: In whose possession was the property when levied upon by the sheriff under the writ of attachment on October 1, 1906? The evidence shows that the owner of the property was the plaintiff in this case, and that it had been used by her husband and herself in their home in a rented house; that they were not at the time of the levy, and for some time prior thereto had not been, occupying this house, and the house had been left closed and unoccupied since April, 1906; that the husband had not kept up the payment of the rent for the house; that the agent of the owner of the house, without the knowledge or consent of Probstfeld or this plaintiff, entered the house and caused the furniture and all the property described in the complaint to be removed therefrom and stored in

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the warehouse of Young & Co., at Fargo, in the name of W. G. Probstfield, the husband; that neither the plaintiff nor her husband was aware of the removal of the property from the house until about August 1, 1906. We are satisfied that the property was not in the possession of the defendant named in the writ of attachment after it had been stored in the warehouse of Young & Co., even if it be conceded that it was in his possession before that time. The mere fact that Lane took a receipt in the name of Probstfeld does not show the possession in him at the date of the levy. We think the statute should be construed as applying to such cases of possession by the defendant named in the writ, or his authorized agent, as shows the control of the property to be in either the defendant or such agent. In this case the husband, who was the defendant named in the writ, did not have control of the property and could not have taken possession of it without Young & Co.'s consent. He was therefore not in possession of the property when the levy was made under the attachment. The statute does not, therefore, apply to this case, and no verified claim to the property was required. The possession of Young & Co. would create no presumption of ownership by W. G. Probstfield. The property was not levied on while in the possession of the defendant in the attachment action, and the levy of the attachment writ was wrongful.

Following the principle laid down in Aber v. Twitchell, supra, the judgment is affirmed.

(118 N. W. 226.)

STATE, EX REL. FRANCIS COOPER ET AL V. ALFRED BLAISDELL, SECRETARY OF STATE.

Opinion filed November 18, 1908.

Elections — Certification of Nomination by Secretary of State — Nature of Duty.

1. In the performance of his duties as secretary of state, in certifying the names of candidates for state offices to the different county auditors for printing upon the ballot to be used at the general election, the secretary acts in a ministerial capacity; and, when certificates of nomination filed with him are legal in form, it

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is not any part of his duty to examine into the facts recited in such certificates to ascertain their truth or falsity.

Elections — Certificates of Nomination — Effect as Evidence.

2. Certificates of nomination filed with the secretary of state, legal in form, are prima facie evidence of the facts which they recite.

Elections — Certificates of Nomination — Verification — Necessity.

3. Certificates of nomination, provided for by section 501, Rev. Codes 1899, need not be verified.

Elections — Certificates of Nomination — Statement of Party or Principles Represented.

4. A certificate of nomination, to which are affixed the requisite number of signatures, nominating a person as a candidate of the Socialist party for a state office, in other respects conforming to law, is a valid certificate, and entitles the party nominated to have his name placed in the column provided for individual nominations on the Australian ballot for use at the general election.

Elections — Certificates of Nomination — Statement of Party or Principles Represented.

5. While authorities are not in harmony as to what principles constitute the principles of Socialism, their main tenets are sufficiently understood and agreed upon, so the word "Socialist" may be used to designate a political party.

Original application by the state, on relation of Francis Cooper and others, for a writ of mandamus against Alfred Blaisdell, as Secretary of State.

Writ granted.

Le Seuer, Bradford & Hurley, for relators.

R. N. Stevens, Assistant Attorney General, for defendant.

SPALDING, J. Application by the state, on the relation of Francis Cooper and others, for a writ of mandamus against Alfred Blaisdell, as secretary of state, directing him, as such official, to certify the relator's names to the several county auditors of the state for printing on the official ballot to be used at the general election in 1908, as candidates for offices, respectively, as follows: Francis Cooper and E. D. Herring, for representatives in Congress; L. F. Dow, for Governor; Valdomar Gram, for Lieutenant Governor; A. G. Brastrop, for Judge of the Supreme Court; Odin Stampro, for Secretary of State; M. Brumwell, for State Auditor; E. J. Moore, for State Treasurer; A. E. Bowen, for

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Superintendent of Public Instruction; Samuel Lane, for Commissioner of Insurance; Arthur Le Sueur, for Attorney General; M. Vlasek, for Commissioner of Agriculture and Labor; M. C. Wartenbe, F. W. Umbreit, and Herb Carruthers, for Commissioners of Railroads. The application was argued orally, and no briefs have been submitted. The relators waived objection to the writer participating in the decision of this case, on account of his disqualification by reason of the fact that one of the relators is a candidate for the same office held by the writer, and for which he is also a candidate at this time. The application sets forth the filing with the secretary of state of a petition in form and manner as provided by section 501, Revised Codes 1899, which petition, it is alleged, duly and legally nominated the relators for the respective offices mentioned, as candidates of the Socialist party, and that the secretary of state, without cause or excuse, has failed to certify the names of such nominees for printing upon the official ballot. It also alleges that the petition contains the names of over 500 duly qualified electors of this state who had taken no part in the nominations made at the primary election, and had signed no nomination papers for other candidates for the same offices. To this petition the secretary of state made a return, denying on information and belief all the material allegations, and attempting to put in issue specifically the allegation that the required number of qualified electors, who had not participated in any manner in the nomination of candidates for the same offices, had signed the certificate. The return also sets out the attitude of the secretary of state in the matter, and his reasons for refusing to certify to the county auditors the names of the relators. Other allegations of the petition were denied, but the issues so made were not pressed on argument.

The certificate filed by the relators, or, as they term it, "the petition," complies in form with the provisions of section 501, Revised Codes 1899. That section contains provisions whereby a candidate may be placed in nomination by individual voters, without the action of a party, through either the primary or the convention system prevalent when said section was enacted, the names of such candidates to be printed in the column for individual nominations on the Australian ballot. Section 34, page 164, chapter 109, Laws 1907, known as the "Primay Election Law," reads: "Nothing herein contained shall be construed as repealing or being

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in conflict with section 501 of the Revised Codes of 1905." On argument it was conceded that such reference should be to section 501 of the Revised Codes of 1899, and we shall assume that it relates to that section, and leaves it in full force and effect.

The official duties of the secretary of state, with reference to certificates of nomination made in the manner referred to, are purely ministerial. When a certificate in form complying with the law is presented to him within the proper time, it is his duty to place the same on file in his office, where it remains subject to the inspection of candidates and the public. The secretary is an impartial official, and in his capacity as such cannot take sides, and certify to the county auditors the names contained on one petition and refuse to certify those on another petition or certificate valid upon its face. If other candidates or any qualified portion of the public desire to question the genuineness of the signatures, or the qualifications of the signers, they have a right to do so, and the right to test the legality of nominations devolves on them, and not upon the Secretary of State. The certificate is prima facie evidence of the facts which it recites, and if the Secretary of State were permitted to assume judicial duties, which he must do if he can go behind the facts recited, it would be possible for him to work great injustice and hardhsip to candidates, and render it in most cases impracticable, if not wholly impossible, for candidates to prove the genuineness of all signatures, or that the requisite number of signers were duly qualified to make nominations. We refrain from any extended discussion upon this question because it has been passed upon in state ex rel. Plain v. Falley, 8 N. D. 90, 76 N. W. 996, and we think that the reasons given by this court in that case are conclusive. See, also, State v. Benton, 13 Mont. 306, 34 Pac. 301.

The Secretary further objects that the certificate of nomination is not verified. Reference to the law itself discloses that no verification is required.

It is also alleged that the certificate or petition does not state, in not more than five words, the party or principle represented by the candidates, and that the principles of Socialism have not been agreed upon with sufficient uniformity to give any definite meaning to the words "Socialist Party" when used to designate a political party. The certificate in question represents that the candidates named are nominated as candidates of the Socialist party. This

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certainly comes within the limits of the law in question, by defining in not more than five words the party represented by candidates. While authorities differ as to what constitute the governing principles of Socalism, we think their main tenets are sufficiently well known so the word "Socialist" may be used to designate a political party. In fact it has so been used for some years. The same objection may be entered to the use of the word "Republican" or "Democrat," as not all persons fully agree as to the controlling principles of either of those parties. It cannot be expected that any politically accepted definition will always be mathematically accurate or uniform. We are of the opinion that the certificate in this case is not open to the objection made. It is not sought to place the candidates in a column headed "Socialist," where they can be voted for by making a cross at the head of the column, and no contention is made that a sufficient number of votes was cast for candidates of that party at the last general election, to entitle it to have its candidates now appear in a party column where they can be voted for by making one mark. Hence we are not called upon to pass upon the party per cent. feature of the law.

We are of the opinion that the Secretary of State erred in failing to certify the names of the candidates to the county auditors for the offices named.

The writ will issue. All concur.

(118 N. W. 225.)

STATE OF NORTH DAKOTA v. WILLIAM CLAYTON RHOADES.

Opinion filed November 18, 1908.

Criminal Law — Indictment and Information — Waiver of Defects — Sufficiency of Information.

1. When attacked for the first time by motion in arrest of judgment, an information for the crime of rape in the first degree, drawn under subdivision 3 of section 8890, Rev. Codes 1905, will not be held fatally defective in not charging, in direct and positive language, that the female ravished resisted, and her resistance was overcome by force or violence.

Same.

2. An allegation that defendant did, "by force and violence, then and there overcome the resistence then and there made by ———,"

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will, when its sufficiency is challenged only after verdict, be held equivalent to an allegation that the female ravished resisted, and that her resistance was overcome by defendant by force and violence.

Same — Rape — Sufficiency of Evidence.

3. Evidence examined, and *held* insufficient to support the verdict finding appellant guilty of rape in the first degree.

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

William Clayton Rhoades was convicted of crime, and appeals.

Reversed.

J. W. Tilly and *Turner, Wright & Lewis*, for appellant.

W. H. Barnet, State's Attorney, *Seth W. Richardson*, Assistant State's Attorney, and *T. F. McCue*, Attorney General, for the state.

FISK, J. Appellant was convicted of the crime of rape in the first degree, and sentenced to imprisonment in the penitentiary for the period of ten years, from which judgment he appeals.

Error is assigned upon the ruling of the trial court in denying appellant's motion for a new trial, and also his motion in arrest of judgment. The grounds urged in the motion for a new trial were that the verdict is contrary to the evidence and against law, and the grounds urged in arrest of judgment are: "(1) The information does not state facts sufficient to constitute a public offense; (2) the information does not state facts constituting the offense of rape in the first degree; (3) If the information charges any public offense it is that of rape in the second degree." The charging part of the information is as follows: "That at said time and place the above-named defendant, William Clayton Rhoades, did unlawfully and feloniously, by means of force and violence, then and there overcome the resistance then and there made by ———, she, the said ———, being then and there a female, and not then and there the wife of this defendant, and then and there under the above circumstances, have sexual intercourse with the said ———; that at said time and place the above-named defendant, William Clayton Rhoades, did feloniously have sexual intercourse with one ———, a female person, not the wife of the defendant, by then and there preventing said ——— from resisting, by means of threats of immediate and great bodily harm, then and there accompanied by apparent power of execution." Appellant's counsel expressly concede that there

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is no merit in the first ground of the motion in arrest of judgment; their contention being that the information does not charge rape in the first, but merely in the second, degree.

The first pertinent inquiry, therefore, is whether the information sufficiently charges rape in the first degree as against an attack after verdict by motion in arrest of judgment. Section 8890, Revised Codes 1905, so far as applicable, defines rape as follows: "Rape is the act of sexual intercourse, accomplished with a female not the wife of the perpetrator, under either of the following circumstances: (3) When she resists, and her resistance is overcome by force or violence. (4) When she is prevented from resisting by threats of immediate and great bodily harm, accompanied by apparent power of execution." Under section 8893, Revised Codes 1905, rape, accomplished in the manner mentioned in the third subdivision aforesaid, and also in certain other cases not material here, is rape in the first degree, and, when accomplished in the manner stated in the fourth subdivision, is rape in the second degree. By reference to said statute it will be seen that the crime of rape may be committed in several distinct ways, and among the several ways are those mentioned in subdivisions 3 and 4, namely, when the female ravished resists and her resistance is overcome by force or violence; and, when she is prevented from resisting by means of threats of immediate and great bodily harm, accompanied by apparent power of execution. The particular acts constituting the alleged rape should be set forth in the information in a manner sufficient to apprise the accused in which one of these different ways it is claimed he committed the offense. State v. Vorey, 41 Minn. 134, 43 N. W. 324, and cases cited. Under the information in the case at bar an apparent effort was made by the pleader to charge the commission of the offense under both of the subdivisions 3 and 4, and this in one count. This was clearly improper, but no demurrer was interposed, nor did appellant ask that the state be required to elect upon which theory it would proceed. Hence he has waived his right to urge the objection. It follows that, if the information properly charges rape in the first degree, and the evidence of defendant's guilt thereof is sufficient, the verdict must stand, although the information also charges rape in the second degree. Does it sufficiently charge rape in the first degree? It is contended by appellant's counsel that there is no allegation that the female resisted. The language employed in the informa-

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tion is that the defendant did "overcome the resistance then and there made by ———." Is this a sufficient allegation that she then and there made resistance? It is said that the allegation that defendant overcame "the resistance then and there made," etc., must be regarded only as the conclusion of the pleader as to the legal effect of the specific act thereafter pleaded to-wit, that she was prevented from resisting by threats, etc. We think such construction not permissible. Without intimating what our decision would be if the sufficiency of the information had been challenged before verdict, we are constrained to hold that, after verdict, and on motion in arrest of judgment, the allegations of the information as to resistance by the female ravished must be held sufficient. While it is true that the general rule of criminal pleading, which has been embodied in our code (section 9849) requires the essential facts to be averred with directness and certainty, it is also true, as recently held by this court in State v. Johnson, 17 N. D. 552, 118, N. W. 230, that when challenged for the first time by motion in arrest of judgment, "the same strict rules will not be enforced in testing the sufficiency of the information as are applied, or will be applied, when its sufficiency is challenged by demurrer." That case is directly in point as sustaining the sufficiency of the information in the case at bar, as against an attack by motion in arrest of judgment.

This brings us to a consideration of the sufficiency of the evidence. Before reviewing the evidence, it is proper that we should briefly notice the established rules of law to be observed in considering such question. Under section 10,080, Revised Codes 1905, a new trial may be granted in criminal cases (subdivision 6) "When the verdict is * * * clearly against the evidence." An appellate court will not ordinarily disturb the decision of the trial judge in denying a motion for new trial, based upon alleged insufficiency of the evidence to support the verdict, and it will not do so in a criminal case, "where the record discloses evidence from which guilt of the accused can be fairly deduced," but it will interfere where it clearly appears that the verdict has no substantial support, or is clearly without support, in the evidence. State v. Denny, 17, N. D. 519, 117 N. W. 869; Williams v. State, 61 Wis. 281, 21 N. W. 56; Lam Yee v. State, 132 Wis. 527, 112 N. W. 425; 12 Cyc. 906-908, and cases cited. The verdict, finding appellant guilty of rape in the first degree, must be supported, if at

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all, by evidence fairly tending to show that the prosecutrix resisted, and that her resistance was overcome by force or violence. Section 8890, subd. 3, Revised Codes 1905. Unlike the statutes of most states defining the crime of rape, out statute divides the offense into degrees, and provides, in effect among other things, that to constitute rape in the first degree there must be resistance by the female, and such resistance must be overcome by force or violence. If prevented from resisting by threats, etc., it is rape merely in the second degree. The question to what extent must there be resistance on the part of the female ravished to constitute rape in the first degree therefore logically presents itself. This question has often arisen and been decided in other jurisdictions, as the following citations will show: 23 Am. & Eng. Enc. Law (2d Ed.) 860-862, and numerous cases therein collated; Mills v. U. S., 164 U. S. 644, 17 Sup. Ct. 210, 41 L. Ed. 584; People v. Dohring, 59 N. Y. 374, 17 Am. St. Rep. 349; People v. Connor, 126 N. Y. 278, 27 N. E. 252; Vaughn v. State, (Neb.) 110 N. W. 992; Devoy v. State, 122 Wis. 152, 99 N. W. 455; Brown v. State, 127 Wis. 193, 106 N. W. 536; State v. Cowing, 99 Minn. 123, 108 N. W. 851, 9 Am. & Eng. Ann. Cas. 566. See valuable note on page 572 of last publication. In the last case many authorities are reviewed, and the rule deduced therefrom is summed up by Jaggard, J., as follows: "From the authorities as a whole it fairly appears: (1) That resistance by a female is an issue in a trial for rape only as it is involved in the necessary proof of her want of consent; (2) that to show such unwillingness her resistance must be proportionate to the occasion, under the circumstances and at the time of the act complained of—that is to say, in ordinary cases there must be resistance to the utmost, or at least to the extent of her ability, and in peculiar cases a less degree may be sufficient—(3) and that in exceptional cases rape may be made out without proof of resistance."

The above statement of the rule, in so far as it is applicable to our statute defining rape, meets with our full approval; but, in view of our statute making resistance an essential element of rape in the first degree, it cannot properly be said, as was said by the Minnesota, and other courts, "that resistance by the female is an issue in a trial for rape only as it is involved in the necessary proof of her want of consent." Our statute, so far as rape in the first

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degree is concerned, requires more than a want of consent on the part of the female. It requires actual resistance on her part, and we think the resistance contemplated must be the utmost resistance within her ability under the circumstances. With these rules in view can it be correctly said that the verdict is clearly against the evidence? We have carefully considered the same, and with due deference to the views of the trial court we are forced to answer the above question in the affirmative. The testimony of the prosecutrix, it is but natural to assume, was as unfavorable to the accused as the facts warranted, and it, to our minds, comes far short of showing that degree of resistance essential to constitute rape in the first degreee. We will narrate the entire substance of the state's testimony, but prior to doing so, we desire to emphasize the importance of keeping in mind the fact that we are dealing with the sufficiency of the evidence to support the verdict for the statutory crime of rape in the first degree, and hence testimony as to threats made by the accused and the effect thereof, if any, in preventing the prosecutrix from resisting, serve to show rape in the second, rather than in the first, degree.

Prosecutrix testified as follows: "Twenty-one years old last fall; came to Fargo about the 8th day of May, 1907; went to work at Hub restaurant waiting on the table; roomed with Mrs. Dunn about three months before this trouble happened. Her house was a two-story house. Mrs. Dunn had the upstairs or second story. There were about three rooms on the second floor upstairs. There was a young married couple rooming upstairs besides Mrs. Dunn. They left, and Mr. Rhoades, this defendant, took their place. Defendant was rooming there about a week before this trouble happened. Prior to the time this trouble took place he took me to different places of amusement; to the Bijou and Ideal. He would take me to the Bijou, and when I went home to my room, he would go with me. This trouble happened on a Sunday; don't remember exactly the date, it was the 1st or 24th, 24th of November or the 1st of December, 1907. On that Sunday the first time that I saw Mr. Rhoades was at noon time, I waited on him. I met him that day about 2 o'clock at the Hub restaurant. He asked me if I was working that afternoon. I says no. He asked me if I would go out for a street car ride. I said yes, and we went. We got back about 4:30 in the afternoon. I next saw him about 8 o'clock that evening up in the place where I roomed. I seen him in the

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hall. He asked me if I wanted to go to church, and I says I would. He asked me to go to the Salvation Army, and I went. After we left the Salvation Army, we went home to my room. He went to his room, and I went to my room. I took my clothes, my coat off, and then sat down and practiced awhile on my telegraph instrument. Then the defendant came in, and he brought a revolver and put it down; don't know whether the revolver was loaded. He had a handful of bullets. He put the revolver on the stand. He talked like he usually did, in a friendly way. I was working on my instrument. He asked me if he should help me any, and I said yes. Then he helped me for a little while on the telegraph instrument, sent messages to me, then he left the room. I saw him again in about 20 minutes or so. After he went out of my room I undressed myself and threw myself over the bed, and laid there thinking. The light was burning. Q. What, if anything, did you do with respect to the door? A. I reached around, there is a lot of clothes hanging on my door, and I reached around and turned the key, it was just a little ways off, the door was closed when I turned the key. I meant to lock the door. Q. Then what did you do? A. Then I was lying there thinking, and I finally went to dosing, pretty near went to sleep. Then finally some one stepped in my room. I didn't know who it was at the time he stepped in. He then turned the key and locked the door; immediately went and blowed out the lamp and came right on to me. I found out who it was when he spoke to me. He didn't say much, just jumped onto me. I says, 'What do you want from me? What do want to do?' And he would not answer me. I told him to leave the room, and let me alone. Q. What did he do? A. He took hold of me and was going to force. He was in a night gown at the time. I was also undressed, and in my night gown Then he jumped onto me, and I asked him what he wanted from me, and he would not answer me. Then I says, 'Oh, Mr. Rhoades,' and I says, 'Please let me alone.' He says, 'I won't do it.' I says, 'I will report you,' and he says he don't give a damn, he says, and then I cried. I says, 'Have you got any parents to respect?' and he says no. Then I cried for help, and was crying all the while. I says, 'Oh, God, help me,' and he answered, 'He won't help you; I will help you now.' Then I tried to get out of my bed, and worked for about three hours, and then he says, 'God damn. Jesus Christ; if you don't shut up, I will kill you,' and it frightened

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me so I could not help myself. Then I says, 'What do you try to do to me, spoil my reputation?' He says, 'You ain't the first one; that makes forty-one girls I took advantage of that way,' and I cried, and he left the room, and he told me to shut up and don't say a word, if I would, I would feel sorry for it. Q. Before he left the room did he, or did he not, have sexual intercourse with you? A. Yes, he did. I had never had intercouse with any man before. After he left my room I did not go to sleep any more. I got up and lit my lamp again, and I sat there and was crying all the while. Next day I got up and went to work again. I told Mrs. Bertha Plunkett about it. She was a friend of mine. She was working at the Hub restaurant where I was. I told her right the next day. I told Mrs. Jones, the cashier, a couple of days later. I was crying around there in the restaurant, and she came and asked me what was the matter, and then I told her about it. After that I told my roommate. I got the letter, Exhibit A, after he was arrested." Exhibit A is as follows: "Adelia: Say, you have gone and made a nice mess of this thing now. Everybody in town will know about it, and what will they think of you then. You will only get your name down, and that's all there will be to it, for you have no charge against me at all, so all the good it will do is just to cause a talk around town. Now the best thing for you to do is to get ready and go home tonight., and then there will be nothing more to it, and I have intended right along to do as I said I would, only I thought you was a little sore at me, and that's why I have been letting you alone for the last few days. Now you better think this all over, and do as I say, or you will ruin your name here, and all for nothing. Please write a letter to me, and send it back with this man and tell me what you will do, and if you decide to do this, you want to be sure and go home tonight. I am going to Glyndon tomorrow to work for a few days. Then I will come down to Parkers Prairie and see you. As ever, Clayt."

On cross-examination: "Q. What kind of a house was this of Mrs. Dunn's? A. Upstairs and down stairs. Q. There was some families directly under yours, wasn't there, on the first floor? A. Yes. There was a stovepipe going up through my room, the room I slept in. I think there was a family rooming right under my room. I have heard children crying down stairs. Q. You knew on this 1st day of December that there was a family rooming directly under your room? A. I knew there was some one down-

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stairs, yes. Q. There was a family rooming across from your room wasn't there, just across from the hall? A. No, sir; not that I know of. Q. Just the other side of the hall from where you roomed in the same house? A. I don't know if there was a family, but I know there was people living in there. There was no door or anything between. They came into their room from the door downstairs. There was no door going from the hall into their room. This is a double house. There was just a wall between us and the width of the hall. I had known the defendant about a week before this occurrence. He was boarding at the Hub, and was working at the Western Union. He was rooming the same place I was at the time I first got acquainted with him. I don't remember how soon after the first time I met him that I went out with him. It was more than one day. I went out to the theater with him once between the time I first met him and the time of this trouble. I went out once with him to the Bijou, once to the Ideal, and once to the Grand. That is three times, and Sunday night I went out for a car ride with him, and then to the Salvation Army the same night. That all occurred within a week before this trouble, and I had only met him for the first time but just a week before the trouble occurred. I got pretty well acquainted with Rhoades within that week. Mr. Rhoades from the time I met him in the restaurant up to the time of the trouble was a perfect gentleman. The way I got acquainted with him he helped me along with my instrument. I didn't know anything about Mr. Rhoades up to the time I got acquainted with him in the Hub restaurant. He was a perfect stranger to me. I was perfectly willing to stop on my way home and go to the Bijou or the Grand or the Ideal with him. After the show was over he would take me home with him, then I would go to my room, and I learned that he was a telegraph operator. I was trying to learn that trade. He offered to come into my room and help me along all he could. I never asked him to come in. He offered to help me along, and he did; yes he did come into my room. After the shows were over, he would come into my room and show me how to operate the instrument. He would stay there probably a half hour or so; about eleven o'clock he would leave my room and go to his. Q. During that week you and he were very friendly, weren't you? A. He was very friendly to me. He treated me nice, and helped me along. Q. There was no one in your room with you and him?

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A. No; but I had my door wide open. Q. There was no one up there was there? A. Mrs. Dunn was home that week. Q. When Mrs. Dunn was away on her vacation, there was no one upstairs at all, was there? A. Not at that time. Q. And you would invite Mr. Rhoades to come in and show you? A. No, sir; I never did. I told him a good many times I didn't want anything to do with him. Q. You did? A. Yes I did. I told him he must not come into my room. Q. And he still kept coming right along? A. He would not ask me whether he could come or not, and when I told him that he could not come there, he simply did not ask anything. He just opened the door and walked right in during the week that Mrs. Dunn was away. He kept that up for pretty nearly a week. I didn't tell anybody that this Mr. Rhoades was coming into my room without my permission. After I told him he just kept coming. Q. Why didn't you? A. Because I didn't want to, I was afraid of him. Q. He had not made any threats to you at that time, had he? A. No; he had not. He had always been very polite, clever and pleasant to me. Q. Was Mr. Rhoades in your room after this Sunday that you say he assaulted you? A. Yes; he opened my door. I had my door locked, and took my key out, and I went and worked at the banquet one night, and when I came home about 12 o'clock, my door was open, and I thought, 'Where is my roommate,' and I had my key with me. I walked in, in the dark, and there he sat and was waiting for me, and then he caught me and took away my key, and locked the door and kept me in there. That was the next night after the trouble. Yes; he took the key away from me and locked the door. Q. Was the lamp lit? A. I lighted the lamp myself when I went in, and when I had lit it, I looked around and saw him. Yes; he caught me. Q. Where did he catch you? A. He took hold of me. Q. What did he do? A. I told him to let me alone. Q. Is that all you told him? To let you alone? A. I was fighting, and— Q. Did you holler real loud? A. Yes I did, 'Let me alone.' Q. Was that the night after the occurrence? There was nobody at home then? A. I don't know whether there was anybody down stairs. Mrs. Dunn had not got home then. The next day I went to work, and worked all day, and was crying about it. I think Mrs. Dunn came home the next day. Q. Did you tell Mrs. Dunn what occurred? A. No, sir; I didn't. I did not tell her that Mr. Rhoades had broken into my room, and had assaulted

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me Sunday night and had intercourse with me. Q. And you did not tell her that the next night, Monday night, he broke into your room, and that when you got home, he caught you and took the key away from you and locked the door, and stayed there until a late hour? You didn't tell her anything of that? A. No. Q. Why didn't you. A. Because I told Mrs. Plunkett, a lady friend of mine, first, and she advised me I should not, as long as I worked in public places, and I was ashamed to, and because I did not want to spoil my reputation as long as I had one, and was ashamed to say anything. That was why I didn't. Q. Never caressed you at all? A. Once he did, yes; but not that evening, before that. That was when he helped me that week when Mrs. Dnnn was home. The night of the trouble, the 1st of December, he and I were working away and visiting until about half past 10. I don't remember whether it was a little later or not. Q. And then he said he had got to go to his room? A. He got up and went to his room. He did not say anything, and I didn't say anything. I did not say good night to him; he did not say good night to me. He did not say a word. He just got up and left. When he left I was sitting there looking at my work, and after a little while I got up and undressed. I had my lamp burning, and I laid myself over the bed, and then I reached around and turned the key. Q. You did not turn the key in the door, or shut the door, until you had got into bed, did you? A. Not until I got into bed. The door was not open when I got into bed. I shut it myself. After I got into bed I turned the key. I am sure of it. Q. How did Rhoades get in there then? A. I thought the door was shut. There is a lot of clothes hanging on the door, and it must have got into the door, some clothes, I don't know. I turned the key, and I thought all the time it was locked. Q. Why didn't you turn the key before you got into bed? A. Because I didn't think of anything. I didn't have any idea. I didn't think of anything. I didn't have no bad thoughts in my mind at all. I always used to lock my door that way after I got into bed. Q. Still you knew this man was rooming next to you, and that you didn't want to have anything to do with him, and that you didn't want him to come into your room, and that you had forbidden him to come to your room, and still you did not lock your door before you got into bed, is that true? A. Yes; I told him I didn't want to have anything to do with him. Yes; I was

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afraid of him. Q. Still you didn't lock the door before you got into bed? A. I locked the door when I went to bed. I got into bed before I locked the door. Q. Why didn't you lock it before you got into bed? A. I didn't think anything about it. I didn't have any such idea that anything like that should happen to me. When I got into bed and turned the key, I left the light burning. I was lying there thinking like I usually do; did not realize that I was getting sleepy. I just simply dropped off to sleep all of a sudden, and left the light burning; had been in bed about 20 minutes when I heard Mr. Rhoades come back into room. Q. The first thing you knew, then, this night after he went out was that you was awakened out of a sleep, and you looked around and you saw a man there? A. Yes. My light was burning. When I woke up did not see anything much, I was scared. Q. What did this man first say? A. He did not say a word to me. He was in his nightgown. When I first saw him, he was up to my lamp, and blowed it out. His back was towards me. When I first noticed him, and the lamp went out, I jumped and got scared; didn't jump out of bed, I just jumped up. I didn't know my self what I was doing. Q. Didn't you ask who it was or anything of that kind? A. He jumped onto me right away. I didn't have no chance to. He got on the bed. Then took hold of me. He got right on top of me the first thing, and held me down. I says, 'What do you want,' and he did not answer. He did not say a word, but all he did he jumped onto me and held me. Q. As I understand you, he walked to the lamp. That woke you up, and he blew the lamp out, and then he turned right around and came onto the bed? A. He came right onto me. Q. Came right straight to the bed the first act he done, and jumped right onto you? A. The first act he done was right on the bed, right onto me. He jumped across me, and held me. I was lying lengthways of the bed. Q. Was his face up close to yours? A. I don't remember. I got so excited that I was frightened and I don't know how it happened. Q. You say that you hollered? A. Yes; I did. Q. Real loud? A. Yes; I did. I am sure of that; don't remember how many times I did holler. Q. Did you keep on hollering? A. I kept on hollering, and I kept on crying. Q. When you were hollering what did you say? A. I had been begging him to let me go. I says, 'Mr. Rhoades have you got any sisters or brothers or parents that you have any respect for?' I

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hollered just as loud as I could. Yes; I certainly did. Q. About how far could they hear you when you were hollering? A. If there was anybody around, they could hear the noise in my room. Q. If there was anybody in the house they could have heard you? A. Yes. Q. Anywhere in the house, you are sure you hollered that loud? A. I did make enough noise so anybody could hear it; yes, I did, I hollered for help. I says, 'God help me,' I says, I prayed. I says, 'Let me alone,' if I had any help here I says, and I asked him if he had any parents that he had any respect for, to let me go, I says, 'God help me, oh, God help me,' and I tried my best to get out of bed, and he pulled me back into bed. All he said, 'For God's sake don't get on the floor,' and I worked just as hard as I could till I was all played out, and I didn't give up, and he says 'God damn, Jesus Christ; if you don't shut up, I will kill you,' and the revolver was laying right in my room. Q. You were not so excited when he said that but what you could remember just what he said? A. Yes; that is the time I got so frightened. Q. You could not tell what he said to you? A. No; he did not speak to me. He did not speak anything to me. Q. You was so excited; you remember, though, that he said God damm it, and swore to you, and all that sort of thing? A. Yes; that frightened me. Q. Did he say anything to you when he came in there about wanting to get into bed with you? A. No; he didn't. Q. You were laying on top of the bed? A. Yes, in my night dress. I didn't get under the bed clothes at all. Q. When he got onto you, as you say, what did he first do then? A. He tried to take advantage of me. Q. What did he first do, what was the first act he done? A. He tried to pull up my night dress, and I would not let him. Q. You would not let him? A. No; I fought for it. Q. You kept it down all the time? A. Yes; I did all I could and he held my hand, and I held my knees together, and he just went onto me, and I worked as hard until all the clothes from the bed was all torn down. Then I finally gave up. I could not help myself; I had to. I could not assist myself at all any more, and he frightened me like that. After I had the trouble with Mr. Rhoades, he left my room and went to his room. I was scuffling and struggling with him for about three hours. When he left the room, I got up, but not right away. I laid there for a while. I didn't dress when I got up. I tried to go to sleep because I had to go to

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work the next day, but I could not sleep. I just got up and walked around my room, and threw myself back on the bed and I was crying. I went to work the next morning at 7 o'clock. Q. Was there anybody up around the house at 7 o'clock when you got up? A. Not that I know of. I didn't see anybody. I don't know who I first saw that morning when I got to the restaurant. I think I saw the cashier first, Mrs. Jones. Q. Did you talk with Mrs. Jones when you went in? A. I did not right away. I took off my wraps and put on my apron and went to work. Q. Did not tell Mrs. Jones that Rhoades had assaulted you that night? A. No sir. Q. Did you tell any of your co-workers or any of the waiters about it that morning? A. No, sir; I did not say a word to anybody. I was friendly with all the girls that were working there, still I did not tell any of them of the trouble. Q. Did you ever tell your roommate that Mr. Rhoades had assaulted you that Sunday night? A. No; I did not. I never told any one but Mrs. Plunkett is the first one. I told her Monday evening the 2d of December. Q. You swore to the complaint at the time it was made out, didn't you? A. Yes; I signed the paper down at the Police Station, about 20 days after this thing happened."

Redirect examination. "Q. You testified that this defendant some time prior to the night this trouble happened had caressed you, or put his hands on you. Tell the jury how that happened, what he did? A. He pulled me on his chair. I told him to let me go. He didn't let me go. In a few minutes he did. That is the only time he caressed me."

Recross-examination. "Q. You say he pulled you on his chair. Did he pull you on his lap? A. Yes; he pulled me on his knee. That was before he went out to put on his night gown, and before I laid down on the bed, before I undressed. Q. And you just simply said, 'Let me alone?' A. I told him to let me alone, let me go, and he did. Q. Then you got right up and left him? A. Yes; he went out of my room. He didn't stay there at all. He was just getting ready to go, and after I told him to let me go and let me alone; he got right up and went to his room, knowing that I would not have anything to do with him, and in a short while, about 20 minutes, he undressed, and came right back into my room. I told Mrs. Plunkett first about this trouble the day after it happened. I didn't tell anybody else, not for a long while after. She advised me not to say a word and I didn't."

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The foregoing is substantially all the state's evidence, and we submit that it signally fails to prove that degree of resistance by the prosecutrix essential to constitute rape in the first degree. Wherein does it tend in the least to show that the prosecutrix resisted defendant to the utmost of her ability? As stated in Vaugh v. State, supra, "Neither she nor the defendant seem to have suffered any bruises, scratches, or evidences of conflict of any kind, and her * * * clothing * * * bore no evidence of disturbance, * * * and there was no evidence * * * of such nervous disturbance as would be expected in an outraged woman." There was no evidence of a bruised condition of the parts, although she swore she had never had sexual intercourse with any one before. Numerous other people were in the house, and no one heard her alleged appeals for help. She did not communicate the fact of her ravishment to any one immediately thereafter, and did not make complaint against defendant until about three weeks after the occurrence. She admits that defendant was in her room the next night, which, if her story is true, is a very unlikely and unusual coincidence. Not only this but the committing magistrate testified to admissions made by the prosecutrix in his court to the effect that defendant visited her room once or twice after the occurrence, and that he got into bed with her, she claiming, however, that his said visits were against her will and without her consent. It is inconceivable that this could have happened, or would have happened, if she had resisted to the extent of her ability, and it is passing strange that no one in the house heard any disturbaance in her room on any of these occasions. The letter, Exhibit A, written by defendant to the prosecutrix, in no way tends in our opinion to strengthen the state's case. It rather has the opposite tendency. In the recent case of Brown v. State, supra, the supreme court of Wisconsin used language which is strikingly applicable to the case at bar. We quote: "Not only must there be an entire absence of mental consent or assent, but there must be the most vehement exercise of every physical means or faculty within the woman's power to resist the penetration of her person, and this must be shown to persist until the offense is consummated. * * * Further, it is settled in this state that no mere general statements of the prosecutrix, involving her conclusions, that she did her utmost, and the like, will suffice to establish this essential fact, but

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she must relate the very acts done, in order that the jury and the court may judge whether any were omitted. * * * It is hardly within the range of reason that a man should come out of so desperate an encounter as the determined normal woman would make necessary, without signs thereof upon his hands, face, or clothing. * * * This court does not hold with some that, as a matter of law, rape cannot be established by the uncorroborated testimony of the sufferer, but, in common with all courts, recognizes that, without such corroboration, her testimony must be most clear and convincing. Among the corroborating circumstances almost universally present in cases of actual rape are the signs and marks of the struggle upon the clothing and persons of the participants, and the complaint by the sufferer at the earliest opportunity. In the present case the former is absolutely wanting. * * * Not a bruise or scratch on either was proved, and none existed on the prosecutrix. * * * When one pauses to reflect upon the terrific resistance which the determined woman should make, such a situation is well-nigh incredible.

Without referring to the other evidence in the record tending to disprove the charge on which defendant was convicted, suffice it to say that we are clearly convinced that there was no evidence of such resistance as is essential to the crime of rape in the first degree, and hence it was error to deny the motion for a new trial.

Reversed and new trial ordered. All concur.

(118 N. W. 233.)

P. S. Hilleboe, as Administrator of the Estate of Elias Ertresvaag, Deceased, v. N. J. Warner, W. R. McIntosh, C. L. Newhouse, A. R. MacKay,, D. H. McArthur, Mark Hawker, H. C. Dana, R. A. Scholfield and C. B. Adams.

Opinion filed October 10, 1908.

Rehearing denied December 31, 1908.

Depositions — Objections — Admission in Part.

1. A general objection to a deposition, on the ground of the incompetency or irrelevancy of the evidence contained therein, is not tenable where the deposition contains evidence material to the issues not subject to such objection.

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Appeal and Error — Harmless Error — Admission of Evidence — Facts Otherwise Appearing.

2. The admission of incompetent or irrelevant evidence over objection on a trial to the court is not prejudicial error where there is in the record undisputed evidence not objected to bearing on the same issue as the testimony objected to.

Principal and Surety — Alteration of Instrument — Discharge of Surety.

3. The erasure by or on behalf of the obligee of a surety's name on a contractor's bond releases all sureties on said bond who signed after the surety whose name was erased and before the erasure, unless they consented to the erasure.

Same — Consent to Alter.

4. The possession of a bond by the obligee while an alteration is made therein, together with the fact that an action is commenced on the bond in its altered form, is sufficient evidence to sustain a finding that the alteration was made by or with the consent of the obligee.

Appeal from District Court, Bottineau County; *Burke*, J.

Action by P. S. Hilliboe, as administrator of the estate of Elias Ertresvaag, deceased, against N. J. Warner, W. R. McIntosh, and others. Judgment for McIntosh and such others, and Hilliboe appeals.

Affirmed.

Noble, Blood & Adamson, (*Ball, Watson, Young & Hardy*, of counsel), for appellant.

The execution of a bond to an obligee, since deceased, is as to the signers a transaction to which neither can testify. Regan v. Jones, 14 N. D. 591, 105 N. W. 613; Amchampauch v. Schmidt, 34 N. W. 460; Waters v. McCrevey, 82 N. W. 949; Bright v. Macron, 121 N. C. 86; Garretson v. Kinkhead, 92 N. W. 55; Bryant v. Stainbrook, 19 Pac. 917; In re Brown's Estate, 60 N. W. 659.

A. G. Burr, for respondents.

Alteration of a bond releases sureties, if it is done without their consent. Hagler v. State, 47 N. W. 692, 28 Am. St. Rep. 514; State v. Craig, 12 N. W. 301; State v. Churchill, 3 S. W. 352; Smith v. U. S., 3 Wall. 219; Pingrey on Suretyship, section 67,

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103, 138; Welch v. Hubschmitt, 61 N. J. Law 57; Greenville v. Ormans, 51 S. C. 58, 64 Am. St. Rep. 663; Simonson v. Thori, 31 N. W. 861; Brennan v. Clark, 45 N. W. 472; Pioneer Sav. & Loan Co. v. Freeburg, 61 N. W. 25; Backus v. Archer, 67 N. W. 913.

Parties are not excluded from testifying to transactions with which decedent had no connection. Giles v. Wright, 26 Ark. 476; Tarry v. Rodahan, 11 Am. St. Rep. 420; St. John v. Lofland, 5 N. D. 140, 64 N. W. 931; Hard v. Ashley, 23 N. E. 177; Wadsworth v. Heermans, 85 N. Y. 639; Thompson v. Onley, 1 S. E. 620.

MORGAN, C. J. The plaintiff, as administrator of the estate of E. Ertresvaag, deceased, brings this action against the defendants to recover damages for the alleged breach of a bond given by them for the faithful performance of a building contract between Ertresvaag in his lifetime as the owner of the building and the defendant N. J. Warner, the contractor. The other defendants are sureties upon said bond. The complaint alleges the execution of the bond and the purposes for which it was executed. It further alleges that said Ertresvaag paid said Warner the full amount due him upon the completion of the building pursuant to said contract. It further alleges that Warner had failed to pay for the labor and materials furnished for said building, and that in consequence of such failure the George Olson Lumber Company filed a lien against such building on account of having furnished materials in the construction thereof, and that said Ertresvaag was compelled to pay to the George Olson Lumber Company the sum of $1,616.55 to prevent the foreclosure of the valid mechanic's lien placed upon said building by said lumber company. The complaint further alleges that the said Ertresvaag was damaged in other respects by the failure of said Warner to carry out the provisions of said contract by reason of delays in the completion of said building, and that in consequence of such delays said Ertresvaag was damaged in the further sum of $900. The plaintiff demands judgment against the said Warner and against the sureties for the sum of $2,687, besides costs. The defendants, except Warner, answered. The sureties by their answer interpose nine defenses to the complaint. The principal defense relied upon is that the bond was materially altered after its execution by them, and that, by such alteration, the contract was changed and their liability increased by reason of such changes. The allegations of the answer in re-

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spect to such alteration are that one T. F. Woods signed such bond as surety when each of said defendants signed said bond, and that each signed said bond, relying upon the fact that said Wood's name was upon said bond, and that they would not have signed said bond had the name of said Woods not appeared thereon as surety. After all of the said defendants had signed said bond, the name of said Woods was erased therefrom without their knowledge or consent. It is not necessary, in view of our decision upon the issue raised upon the allegations of the answer in respect to the erasure of the name of said Woods from said bond, to determine or consider the questions raised by the other allegations of the answer. A jury was waived and the issues were submitted to the court for determination. After taking testimony, the trial court made findings of fact and conclusions of law in favor of defendants, and ordered the action dismissed as to the answering defendants. Judgment was entered pursuant to such findings, and the plaintiff has appealed from such judgment, and assigns numerous errors in respect to the sufficiency of the evidence to sustain the findings and in respect to errors in the admission of evidence.

At the trial each of the defendants was asked the following question: "You may state whether or not the signature of T. F. Woods was on this instrument at the time you signed it." This question was objected to as incompetent, irrelevant, and immaterial, being testimony of one of the defendants in regard to a personal transaction had with E. Ertresvaag, deceased. The trial court overruled the objection made to this and similar questions, and the plaintiff excepted thereto, and this ruling is assigned as prejudicial error by the appellant on this appeal. We do not deem it necessary, in view of the condition of the record, to determine whether the question was objectionable on the ground stated—that is, that it referred to a transaction with a deceased person, whose administrator is a party to the action—the witness being also a party to the action. The testimony of the contractor, Warner, was taken by deposition, and the deposition was introduced and read in evidence. He therein testifies fully in respect to the matters concerning which the objection above given referred to; that is, the signing and erasure of Woods' name. He testified that the name of Woods was upon the bond when the other sureties, except McIntosh, signed the same, and that the name of Woods was the second or third name upon said bond; his own being the first. McIntosh

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and Woods signed at the same time. The witness is not positive which of these sureties signed the bond first, but he states that one of them was the first signer and the other the second. The bond shows that the name of Woods was the first surety that signed the same. This evidence in respect to the fact that the name of Woods was upon the bond was not objected to at all in the deposition. All of this evidence was therein received without any objection, including that pertaining to the erasure of Wood's signature. The record shows that the name of Woods was upon the bond by evidence which is sufficient to sustain the findings of the trial court, and the finding in respect to the matter of the signature of T. F. Woods is as follows: "That said bond was first signed by N. J. Warner, the next by one T. F. Woods, and then by the other sureties, and that at the time the defendants other than the said N. J. Warner signed said bond the name of T. F. Woods was attached thereto as one of the sureties; that the name of said T. F. Woods was erased from said bond, and his liability as surety thereto canceled after the defendants, other than N. J. Warner, had signed said bond, and without the knowledge or consent of said sureties, and that said erasure was made by and on behalf of said E. Ertresvaag." If it should be conceded that the testimony of the sureties as to the matters objected to was inadmissible, and should not have been admitted, it is nevertheless a fact that the record on this appeal shows without contradiction that the name of said T. F. Woods was erased from said bond after the other sureties had signed, and that the said Woods' name was upon the bond when the other sureties signed the same. It is therefore clear that the admission of such evidence was without prejudice, even if it be conceded that it was erroneously admitted.

The appellant claims that this testimony was all objected to, and that the objection is sufficient, and that it should be considered by this court. After the deposition was filed, the plaintiff filed written objections thereto, and, upon the point under consideration, the objection to the deposition is as follows: "The plaintiff objects to the entire deposition on the further ground that it is incompetent, irrelevant, and immaterial, and testimony of a personal transaction had with one of the parties to this action and a personal transaction between the defendant, a party to this action, and E. Ertresvaag, now deceased." It will be noted that this is simply an objection to the deposition as a whole on account of the incom-

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petency, irrelevancy, and immateriality of the testimony. There is no objection to any specific question. If a reading of a deposition shows that it contains evidence as to other matters which are material to the issue, then it is plain that the objection should have been overruled. Upon reading the deposition, we find that it contains material evidence not involving any transaction with or statement made by the deceased. There is testimony therein as to when the building was completed, and as to the situation of the old store building while the new building was in process of erection. This evidence was material as bearing upon the allegation of the complaint as to damages for failure to complete the building within the time specified in the contract. It is therefore patent that the general objection to the deposition was not tenable, and was properly overruled. An objection to a deposition as a whole cannot be deemed an objection to any question contained therein. It follows that all the evidence in the deposition was received without objection.

It is not seriously disputed by the appellant on this appeal that the erasure of the name of Woods from the bond is a complete defense to the other sureties who signed the bond after said Woods had signed the same and before his name was erased. In this case there was no agreement as to the number of sureties that should sign the bond, nor as to who the sureties should be. It is claimed that the erasure of the name under such circumstances changed the implied contract of contribution among the sureties, and that the sureties who signed the bond after said Woods had signed the same as a matter of law signed it on the understanding that Woods would be liable to them in contribution should they be required to pay the bond. In other words, they signed it, relying upon Woods' responsibility, and that the erasure was therefore a material alteration of the bond. In these contentions we concur. In two cases the principle has been adopted by this court. Cass Co. v. American Exchange Bank, 9 N. D. 263, 83 N. W. 12; Id., 11 N. D. 238, 91 N. W. 51. It is claimed by the appellant that there is no evidence in the record that the erasure was made by Ertresvaag or by his authority or with his consent. There is no direct evidence bearing upon this question. It appears, however, that the bond was in the custody of Ertresvaag, and this fact, together with the fact that the action is not brought against Woods, is sufficient prima facie

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to sustain the finding that the erasure was made with the consent of Ertresvaag.

In view of these conclusions, it is unnecessary to consider the other defenses raised by the answer.

The judgment is affirmed. All concur.

(118 N. W. 1047.)

RICHARD GALVIN v. TIBBS, HUTCHINGS & COMPANY.

Opinion filed April 21, 1908.

Rehearing denied January 7, 1909.

New Trial — Appeal and Error — Discretion of Trial Court.

1. The granting of a new trial for insufficiency of the evidence to sustain the verdict is largely within the sound judicial discretion of the trial court, and its decision should not be disturbed except for an abuse of such discretion.

Wrongful Sale on Execution — Exemptions — Property Obtained by False Pretenses — Punitive Damages.

2. In an action for damages occasioned by a sale on execution of plaintiff's additional exemptions, when such sale is attempted to be justified by a claim that the debt forming the basis of the execution was contracted by reason of false pretenses, exemplary or punitive damages are not recoverable unless malice and a want of good faith are shown on the part of the party causing the sale.

Same — Evidence of Good Faith.

3. The good faith necessary to defeat a claim for exemplary damages may be shown in other ways than by showing a full statement of facts to counsel who advised the action complained of.

Evidence — Best and Secondary — Decision of Bankruptcy Court.

4. Parol evidence of the decision of a federal court of bankruptcy to show that on a hearing it had set aside certain property as exempt is inadmissible, when no reason is shown why the best evidence is not offered.

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

Action by Richard Galvin against Tibbs, Hutchings & Co. From a judgment for plaintiff and an order denying a new trial, defendant appeals.

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District court directed to permit plaintiff to remit a certain amount as to which the verdict was excessive, if he does so within thirty days; otherwise a new trial granted.

Murphy & Duggan, for appellant.

The charge of the court, that the assertion as a fact of that which it not true by one who has no reasonable ground for believing it true, constitutes deceit, is good law. Mooney v. Davis, 42 N. W. 802; Hudnut v. Gardner, 26 N. W. 502; Judd v. Weber, 11 Atl. 40; Claflin v. Com. Ins. Co., 110 U. S. 81; Wheeler v. Barr, 6 Ind. App. 530; Moyer v. Lederer, 50 Ill. App. 54; Flower v. Brumbach, 23 N. E. 335; Lobdell v. Baker, 35 Am. Dec. 358; Haight v. Hayt, 19 N. Y. 464; Caldwell v. Maxfield, 64 N. W. 166; Fuller v. Elevator Co., 2 N. D. 220, 50 N. W. 359; McMillan v. Aitcheson, 3 N. D. 183, 54 N. W. 1030; Mead v. Conro, 8 Atl. 374; Garrett v. Greenwall, 4 S. W. 441; Sandwich Mfg. Co. v. Feary, 33 N. W. 485; Jones v. McWattey, 11 S. E. 554; Miller v. Ry. Co., 30 N. W. 580; Dow v. Wells, 11 Fed. 132; Griffin v. Ry. Co., 60 Atl. 863; Phillips v. Laughlin, 50 Atl. 64.

Docket record and parol evidence of a judgment are not the best evidence. Amundson v. Wilson, 11 N. D. 193, 91 N. W. 37; Strecker v. Railson, 16 N. D. 68, 111 N. W. 612; Noyes v. Belding, 59 N. W. 1069; Miller v. Durst, 86 N. W. 631; Jones on Ev. section 199.

B. G. Skulason, for respondent.

Verdict will not be disturbed when evidence is conflicting. Gull River Lbr. Co. v. Osborne, McMillan El. Co., 6 N. D. 276, 69 N. W. 691; Becker v. Duncan, 8 N. D. 600, 80 N. W. 762; Magnusson v. Linwell, 9 N. D. 154, 82 N. W. 746; Flath v. Casselman, 10 N. D. 419, 87 N. W. 988; Ross v. Robertson, 12 N. D. 27, 94 N. W. 765; State v. Howser, 12 N. D. 495, 98 N. W. 352.

Burden is on defendant to show that debt was incurred for property obtained under false pretenses. Revised Codes 1905, section 7125; Wagner v. Olson, 3 N. D. 69, 54 N. W. 286; Murphy v. Sherman, 25 Minn. 196; German Bank v. Folds, 68 N. W. 747; Noyes v. Belding, 59 N. W. 1069; State v. Carson, 43 N. W. 361; Sears v. Hanks, 14 Ohio St. 298; State v. Stewart, 9 N. D. 409, 83 N. W. 869; Bracket v. Griswold, 112 N. Y. 454; Curtis v. Hoxie, 59 N. W. 581; Eaton Co. v. Avery, 83 N. Y. 31.

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To obtain punitive damages actual malice need not be shown; legal malice is sufficient. Kolka v. Jones, 6 N. D. 461, 71 N. W. 558; Castile v. Ford, 73 N. W. 945; Matteson v. Monroe, 83 N. W. 153; Murray v. Mace, 59 N. W. 387; Cronfeldt v. Arrol, 52 N. W. 857; Stonestreet v. Crandell, 62 Pac. 249; Holt v. Van Eps, 1 Dak. 198, 46 N. W. 689.

Whether defendant's agent communicated all facts to counsel in ordering attachment was for the jury. Merchant v. Pielke, 10 N. D. 48, 84 N. W. 574; Kolka v. Jones, supra; Struby v. Kyes, 48 Pac. 663; Jonasen v. Kennedy, 58 N. W. 122; Chicago v. Ross, 69 Ill. App. 123.

Evidence going to the matter of notice and malice in attachment proceedings is an exception to the best evidence rule. Wigmore on Ev. section 1252; Bulger v. Ross, 12 So. 803; Foxworth v. Brown, 24 So. 1; Davis v. Walker, 27 So. 313; East v. Pace, 57 Ala. 521; St. v. Scott, 31 Mo. 121; Helfrich v. Stein, 17 Pac. St. 143; Stewart v. Massengale, 1 Tenn. 379; Parker v. Chancellor, 15 S. W. 157; 2 Enc. of Ev. 285, 287.

SPALDING, J. This is an appeal from a judgment in favor of the plaintiff and an order of the district court of Grand Forks county denying defendant's motion for a new trial.

The action was brought to recover damages claimed by reason of the levy on and sale under execution of certain personal property belonging to the plaintiff, claimed by him to be exempt. The defendant justifies the sale under the claim that the firm of which the plaintiff was a member had secured the credit and goods for which the debt was owed from it under false pretenses, by reason of which the plaintiff was not entitled to those exemptions known as additional exemptions, included in which were the goods sold by the defendant. These false pretenses are charged to have been made through certain financial statements given by plaintiff's firm to several mercantile agencies, for the information of their subscribers, among whom was the defendant, and by means of one statement made to the defendant itself. It is claimed that these various statements grossly exaggerated the assets of plaintiff's firm, and gave its liabilities at a materially smaller sum than they in fact were and that by reason of relying upon the truthfulness of such representations the defendant was induced to extend the credit on which the judgment was recovered, and execution complained of

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was issued. Twenty-three errors are assigned as having occurred on the trial, but all except three are abandoned in the brief of the appellant. They are: (1) That the evidence is insufficient to justify or sustain the verdict. (2) That the court erroneously submitted the question of punitive damages to the jury. (3) That the court erred in admitting parol evidence of a judgment or decision of the federal bankruptcy court, holding the property levied upon exempt.

1. We have carefully considered the evidence as to its sufficiency to sustain the verdict, and are satisfied that the evidence conclusively shows the material falsity of the statements rendered to the mercantile agencies and to the defendant; but there is claimed to be a conflict in the evidence as to the knowledge and honesty of the plaintiff's firm in making such statements. While the writer is of the opinion that this court would be warranted in holding and should hold, that there was fraud, as a matter of law, by reason of which the verdict should have been vacated (Bigelow on Fraud, 513-520), yet the majority of the court thinks there is a substantial conflict, and that therefore the rule generally followed by appellate courts, namely, that when a new trial is applied for upon the alleged insufficiency of the evidence to support the verdict, and there exists a conflict in the evidence, the granting or refusing to grant it is largely within the sound judicial discretion of the trial court, and its decision should not be disturbed except for an abuse of such discretion (Pengilly v. Case Mfg. Co., 11 N. D. 249, 91 N. W. 63), and that, as far as the sufficiency of the evidence has a bearing upon our decision, the judgment should be sustained, except for one reason, hereafter referred to.

2. Prior to the levy on the property of the plaintiff, plaintiff's firm had been declared bankrupts, and we gather from the record and briefs that there had been a contest in the federal court as to whether they were entitled to exemptions, and counsel for the plaintiff was permitted to inquire what the decision of that court was, and answers were received to the effect that the federal court set aside the property sold by the defendant as exempt to plaintiff. The admission of this evidence was clearly erroneous, but, excepting in so far as it went to the question of punitive or exemplary damages, it was without prejudice, for the reason that the charge to the jury instructed it that the right to exemptions depended upon the truthfulness of the financial statements rendered defend-

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ant and the mercantile agencies, and on the honesty of plaintiff's firm in making them. This evidence was not collateral. Except for the charge of the court, it would have had a material effect upon the verdict of the jury, as tending to show that another court had held these goods exempt, leaving the inference that it had held them exempt as to the claim of the defendant. It was not introductory because it was not followed by the introduction of the judgment or order of the federal court. Section 7292, Revised Codes 1905; Amundson v. Wilson, 11 N. D. 193, 91 N. W. 37; Strecker v. Railson, 16 N. D. 68, 111 N. W. 612, 8 L. R. A. (N. S.) 1099; Wigmore on Evidence, section 1253.

3. The verdict was for $627. A simple computation shows the verdict to be just $100 in excess of the highest valuation placed upon the property, with interest added. The verdict must then have included at least $100 as exemplary damages. The right to damages of this kind depends upon malice on the part of the defendant. As we read the evidence, it discloses nothing indicating malice, except the parol evidence to which we have referred under subdivision two. Of course, if a court having jurisdiction of the person and the subject-matter had held that the property in question was exempt as against the debt owed the defendant, and that fact was known to the defendant when it caused the levy and sale to be made, and the judgment of such court was still in full force and effect, then it would be quite clear that the defendant was proceeding in defiance of law, and that it could have no purpose in making the levy and sale except to harass, annoy, and oppress the debtor; but, eliminating the evidence of the holding of the federal court, we repeat that nothing is left indicating anything except honest belief on the part of the defendant that plaintiff's firm had procured credit by means of false and fraudulent representations. A representative of the defendant testified that he was present at the bankruptcy hearings, heard the evidence as to their liabilities and assets, that he made an examination of their books and stock of goods, and that he acted in causing the levy to be made, upon the information so obtained. It is argued by the respondent that the evidence does not sufficiently show that defendant's representative made a complete and full statement to counsel of the facts on which the sale was advised by counsel, and that therefore the showing is not sufficiently full to relieve the defendant from liability for punitive damages. It is unnecessary to consider

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whether the statements made to counsel were properly shown by the evidence or not. Lack of malice can be shown in other ways than by showing that a party followed the advice of counsel. We find from the competent evidence nothing indicating malice and nothing from which malice can be inferred as a matter of law. The evidence shows that the defendant was justified in believing the financial statements false. It conclusively shows that they were relied upon as the truth, that plaintiff's firm commenced business a few months before his statement was made, on a little more than $1,000 capital, and the first statement showed assets aggregating over $11,000 after deducting exemptions, and that the bankruptcy proceedings resulted in the estate paying only 5 per cent. of its indebtedness. So we say there is nothing shown to indicate that the defendant did not act in good faith throughout the proceeding. Malice cannot be inferred, even though the parties acted mistakenly, unless they acted under such circumstances as to charge them with legal malice.

We therefore conclude that the verdict was excessive in the sum of $100. The district court is directed to permit the plaintiff to remit $100 of the judgment entered, if he does so within 30 days after the clerk receives the remittitur. If the plaintiff fails to remit this sum, a new trial is granted. Let each party pay his own costs. All concur.

Fisk, J., being disqualified, did not sit on the argument of this case nor take any part in the decision thereof; Hon. W. J. Kneeshaw, Judge of the Seventh Judicial District, sitting by request.

(119 N. W. 39.)

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BENJAMIN McDONELL v. MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY.

Opinion filed November 24, 1908.

Railroads — Injuries to Animals — Sufficiency of Evidence.

1. Action to recover damages for the negligent killing of stock which was trespassing upon defendant's right of way. Plaintiff recovered a verdict for $465. *Held,* that the evidence is amply sufficient to justify such verdict.

Same — Tresspassing on Right of Way — Degree of Care.

2. The duty of a railway company and its employes, in case of stock trespassing upon its right of way, is to exercise ordinary care not to injure it after it is discovered to be in a place of danger.

Same — Damages.

3. The complaint alleged, and the plaintiff was permitted over objection to show, certain special damages suffered by him, on account of extra care and attention required in rearing a sucking colt, the increase of one of the animals killed. *Held,* not error, as defendant's negligence in killing the dam of said colt was the proximate cause of the special damages thus claimed.

Same — Excessive Damages.

4. Evidence as to the extent of plaintiff's damages examined, and *held* that the verdict is not excessive.

Appeal from Ward County Court; *Davis*, J.

Action by Benjamin McDonell against the Minneapolis, St. Paul & Sault Ste. Marie Railway Company. Judgment for plaintiff and from an order denying a new trial, defendant appeals.

Affirmed.

L. W. Gammons, for appellant.

Defendant was bound only to ordinary care after discovery of animals on right of way. Wright v. Ry. Co., 12 N. D. 159, 96 N. W. 324.

On rebuttal of presumption of negligence, burden shifts to plaintiff to prove it. Smith v. Ry. Co., 3 N. D. 17, 53 N. W. 173; Hodgins v. Ry. Co., 3 N. D. 382, 56 N. W. 139.

LeSeuer, Bradford & Hurley, for respondent.

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Where there is a dispute in the evidence presumption is not overthrown, and case must go to the jury. Bishop v. Milwaukee Ry. Co., 4 N. D. 536, 62 N. W. 605.

FISK, J. Plaintiff had judgment in the court below for the sum of $484.30 damages and costs, and from such judgment, and from an order denying a new trial, defendant appeals.

Such recovery was for alleged negligence of defendant and its servants in the operation of one of its passenger trains, resulting in the killing of two of plaintiff's horses, which had strayed upon the defendant's railway track and were struck by such train, on September 4, 1905. The value of the horses was alleged at the sum of $500, and special damages were pleaded, and, over defendant's objection, proven, on account of extra care and attention required in raising a sucking colt, the increase of one of the animals killed, by reason of the death of such animal. Appellant advances the following reasons why the judgment and order appealed from should be reversed: "That the evidence is insufficient to justify the verdict; that the presumption of negligence was wholly overcome; that there is no evidence of any actual negligence on its part, but on the contrary, that the evidence discloses that the defendant exercised due care to avoid injury of the horses after discovering them upon the track; that the court erred in admitting evidence as to damages on account of the colt, the said damages, if any, being too remote; and that the verdict is excessive." These contentions do not require extended notice. It is conceded that the animals were trespassing upon defendant's right of way, and hence there is, and can be, no dispute as to the rule of law governing the degree of care exacted of defendant and its employes to avoid injury to the animals. As stated in Wright v. Ry. Co., 12 N. D. 159, 96 N. W. 324: "Plaintiff's horse was a trespasser upon defendant's right of way, and as to it the measure of defendant's duty was to exercise ordinary care not to injure it after it was discovered to be in a place of danger."

By the verdict the jury necessarily found that ordinary care was not exercised by defendant's employes to prevent the injury after discovering the animals upon the track. We are now asked to decide that the evidence is insufficient to justify such verdict, and this, notwithstanding the holding of the trial court to the contrary. This will not be done, except in a clear case of insufficiency. 9 Cur. Law, 215, and cases cited; 3 Cent. Dig. sections 3928, 3948-

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3950, and many cases cited; also Hardt v. Chicago, etc., R. Co., 130 Wis. 512, 110 N. W. 427; Graham v. Bryant, 4 Cal. App. xiii, 87 Pac. 232; Mo. Real Estate Syndicate v. Sims, 121 Mo. App. 156, 98 S. W. 783; Shively v. De Snell, 35 Mont. 508; 90 Pac. 749. That the verdict is amply justified under the evidence is too clear for discussion, and to review the testimony would be a needless task. The proof shows that the accident occurred in broad daylight; that both the engineer and fireman saw the animals in ample time before the accident to have avoided the same, as the engineer testified that he had the train under perfect control. There is a conflict in the testimony as to just how the accident occurred, but the plaintiff testified positively that he was an eye witness to the accident, and that the horses did not any time leave the track after he first saw them, until they were thrown off by the engine; that the train was, as nearly as he could judge, between 10 and 15 rods from the horses when he first saw them upon the track. The distance one of the horses was thrown, and other circumstances in the case, tend to corroborate the plaintiff's testimony. Suffice it to say that the record presents a clear case for the jury, and hence the verdict cannot be disturbed upon the alleged ground of insufficiency of the evidence to support the same. This sufficiently disposes of appellant's first three contentions.

It is next contended that the court erred in admitting evidence as to special damages occasioned by additional time and attention required in raising and caring for a suckling colt, the increase of one of the animals killed. These damages are specially pleaded in the complaint, being alleged as follows: "That at the time of said killing the plaintiff was the owner of a suckling colt, being the increase of the mare described herein, and by reason of said killing of said mare plaintiff was obliged to raise said colt by hand, and to care for it and nurse it specially; that the expenditure of time and labor thus employed was in the sum of $25; that the plaintiff is further damaged in said amount." The ground of objection to this testimony was that the damages thus claimed were too remote. No authorities are cited, either against or in support of the correctness of the court's ruling, and we have been able to find but one case bearing directly upon this question. That is the case of Teagarden v. Hetfield, 11 Ind. 522. There plaintiff sought to recover special damages, identically the same as in the case at bar, but such recovery was denied because not specially pleaded in the complaint. By inference, therefore, said case may

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be considered an authority in respondent's favor. The rule governing the measure of damages in cases like the one at bar is embraced in section 6582, Revised Codes 1905, as follows: "For the breach of an obligation not arising from contract the measure of damages, except when otherwise expressly provided by this code, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not." It is perfectly plain from the language employed in said section that plaintiff may recover all damages which are the proximate result of defendant's negligence, whether such damages could have been anticipated or not. Such was the construction placed upon this statute by this court in Ouverson v. City of Grafton, 5 N. D. 281, 65 N. W. 676, and such is the general rule recognized by the authorities. Brown v. C., M. & St. P. R. Co., 54 Wis. 342, 11 N. W. 356, 911, 41 Am. Rep. 41, and cases cited; Coy v. Indianapolis Gas Co., 146 Ind. 655, 46 N. E. 17, 36 L. R. A. 535. In the latter case it was said: "All damages directly traceable to the wrong done and arising without an intervening agency, and without fault of the injured person himself, are recoverable. The wrong in such cases is said to be the proximate cause of the injury." The correct test, therefore, would seem to be whether the special damages claimed are directly traceable to, and are the natural result of, defendant's negligence in killing the mother of the colt. We think it plain that they are. As the direct and immediate result of the injury, additional services were required by plaintiff in caring for the colt. It was one of the consequences naturally flowing from defendant's wrong. The rule or principal announced in the old and often cited squib case of Scott v. Shepherd, 2 W. Bl. 892, that, "the act of throwing the squib being unlawful, the defendant was liable to answer for the consequences, be the injury mediate or immediate," is still the rule, as shown by the modern authorities, many of which are cited in the foregoing cases.

The only remaining contention is that the verdict is excessive. It was for $465. Plaintiff testified that the true value of the horses was $500, and his undisputed testimony was that the special damages suffered by him, on account of extra work in rearing the colt, amounted to $25. If this testimony was true, and the jury had a right to accept it as true, the verdict was not only not excessive, but was for $60 less than the actual damage.

Finding no error in the record, the judgment and order appealed from are hereby affirmed. All concur.

(118 N. W. 819.)

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WILLIAM A. DUNCAN v. GREAT NORTHERN RAILWAY COMPANY, A CORPORATION.

Opinion filed November 27, 1908.

Carriers — Injury to Freight — Exemptions from Liability.

1. An inland common carrier is an insurer against loss of property consigned to it for carriage between its receipt at shipping point and arrival at destination when unaccompanied by the consignor, except from loss occasioned: (1) By an inherent defect, vice or weakness, or spontaneous action of the property itself; (2) the act of a public enemy of the United States or of this state; (3) the act of the law; or (4) any irresistible superhuman cause; (5) and it may also be assumed that certain acts of the consignor may exempt the carrier from liability.

Same — Evidence.

2. On proof of delivery of the property to the carrier in sound condition, and of its redelivery at the end of the route in damaged condition, or a failure to redeliver it, a sufficient case is made to sustain a recovery for the damages or loss by the shipper.

Same — Burden of Proof.

3. The burden of proof is upon the carrier to exempt himself from liability in case of loss or damage by showing that it was occasioned by one or more of the exceptions mentioned under paragraph 1.

Same — Loss of Freight — Evidence.

4. The evidence in this case shows that a quantity of flax was loaded by the plaintiff and his servants into a car furnished by the defendant for such purpose, that inside doors were furnished by the defendant carrier and used and fastened with appliances provided for that purpose by defendant, in the usual manner, and that the loss complained of occurred while such flax was en route to Duluth, some or all of it by reason of a small inside door used for retaining the flax in the car, hung on hinges at the top, coming open.

The defendant failed to show that the door opened by failure on the part of plaintiff to properly fasten it. It was closed by defendant's conductor at the station where the leak was discovered, but the inspector at Duluth reported a leak in the same place on the arrival of the car at its destination. *Held*, that the evidence fails to bring the defendant within the exceptions to the law holding it liable.

Same.

5. The shipper inserted in the car inside doors for retaining the flax, such doors being furnished by the carrier, and supplied with a fastening device. The evidence shows that these doors were properly fastened, with the device so furnished, by the shipper and assistants, all of whom were familiar with the use of such doors and

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devices. The car, after being so loaded with these doors inserted, was receipted for, and the outside doors closed and sealed by the defendant's agent, who had full opportunity to observe while closing the outside doors whether the inside doors were properly fastened. *Held* that, if they were not properly fastened, in view of these facts, the carrier is not relieved from liability for loss occasioned thereby.

Same — Direction of Verdict.

6. Plaintiff showed by himself and other competent witnesses that the inside doors referred to were properly closed and fastened with the device furnished by defendant for that purpose. The only evidence claimed to create a conflict arises from the fact that, a few miles after the car started on its journey, one of the inside doors referred to came open, and a quantity of flax with which the car was loaded ran out through the opening so made. *Held,* that such door opening may as readily be attributed to other causes as to the failure of the shipper to properly fasten it, and had the question been submitted to a jury, a verdict for defendant, based upon the fact that such door came open in transit, could only have been arrived at by inference, and would have been mere guesswork on the part of the jury under the facts of the case, and that the opening of this door did not create a sufficient conflict in the evidence to constitute error on the part of the trial court in directing a verdict for plaintiff.

Trial — Direction of Verdict.

7. On submission of all their evidence, both parties made motions for a directed verdict. Neither party requested the submission of any facts to the jury. *Held,* that they thereby waived any right which they might have otherwise had to an undirected verdict, and are estopped from assigning error for not submitting the facts to the jury.

Appeal from District Court, Rolette County; *Cowan,* J.

Action by William A. Duncan against the Great Northern Railway Company. Judgment for plaintiff. Defendant appeals.

Affirmed.

Murphy & Duggan, for appellant.

Revised Codes 1905, section 5690, imposing liability on carrier for shipper's fault is unconstitutional. Hutchinson on Carriers, sections 265, 328; Van Zile on Carriers, section 478; Texas & P. Ry. Co. v. Edins, 83 S. W. 253; Goodman v. Ore. Ry. Co., 28 Pac. 894; Cottrell v. Union Pac. Ry. Co., 21 Pac. 416; O. R. & N. Co. v. Smalley, 23 Pac. 1008; Birmingham Mineral Ry. Co. v. Parsons, 27 L. R. A. 263; Wadsworth v. Union Pac. Ry. Co., 23 L. R. A. 812; Railway Co. v. Parks, 32 Ark. 131; Zeigler v. Railway

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Co., 58 Ala. 595; Jenson v. Union P. Ry. Co., 21 Pac. 994; Schenck v. Union Pac. Ry. Co., 5 Wyo. 530; So. Alabama Ry. Co. v. Morris, 65 Ala. 193; Cooley Const. Lim. (5th Ed.) page 430, 436; Beelenberg v. Montana Union Ry. Co., 20 Pac. 314.

Burke & Middaugh, for respondent.

A corporation cannot complain of a law in force where its franchise is granted. Bohannan v. Hammond, 42 Cal. 227; Jackson v. Sac. V. R. Co., 23 Cal. 268; Thomas v. Ship Morning Glory, 13 La. Ann. 269, 71 Am. Dec. 509; Gage v. Tittell, 9 Allen. 299; Christenson v. Am. Express Co., 2 Am. St. Rep. 122; Powell v. Mills, 64 Am. Dec. 158; Davis v. Wabash Ry. Co., 1 S. W. 327; Woolf v. Am. Express Co., 97 Am. Dec. 406; Moses v. Norris, 4 N. H. 304; Gordon v. Little, 11 Am. Dec. 632; Klauber v. Am. Expr. Co., 21 Wis. 21, 91 Am. Dec. 452; Hooper v. Wells, 27 Cal. 11, 85 Am. Dec. 211; Costigan v. Michael Transp. Co., 33 Mo. App. 269; Porter v. Chicago Ry. Co., 71 Am. Dec. 286; Parker v. Flagg, 45 Am. Dec. 101; Miller v. Steam Co., 10 N. Y. 431; Schieffelin v. Harvey, 6 Johns 170; Rixford v. Smith, 13 Am. St. Rep. 42.

SPALDING, J. This is an appeal from an order denying a motion for a new trial made by the judge of the district court for and within Rolette county. Plaintiff brought this action to recover for the loss of 9,385 pounds of flax shipped by him over defendant's railway line from Rolla, N. D., to Duluth, Minn. The defendant denied the allegations of the complaint, and alleged that the loss occurred wholly through the negligence of the plaintiff in not properly loading the car, and in not properly securing and fastening the doors thereof, and that defendant was in no way to blame therefor. A verdict was directed for the plaintiff.

No question is raised as to the amount of flax lost, and the evidence does not disclose any special contract limiting in any manner the liability of the defendant. The evidence shows that the plaintiff was a grain buyer at Rolla, and had been in the grain business for some years, and was accustomed to loading cars and familiar with the kind of doors furnished by defendant for insertion in the car in which this flax was shipped. He, with the assistance of others who were likewise familiar with the shipping of grain and flax, loaded the car on defendant's track. The defendants furnished doors to be placed on the inside of the outside sliding doors,

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as is customary in the shipment of grain. These inside doors were fitted with a small door in the center, which opened outward and upward on hinges at the top, and were used for unloading purposes, and were fitted by defendant with a locking device. The plaintiff inserted these inside doors, and the doors and car were coopered; that is, strips of cheese cloth were nailed over the cracks at the bottom and sides of the doors and whereever there were cracks through which flax could escape. There is no evidence that the car was not properly coopered, except that the inspector's records at Duluth show that one of these small doors had no cooperage at the bottom when it arrived at Duluth. This is, however, not important, for the reason that, as will appear later, after the door burst open in transit, it was closed by the train conductor, without recoopering, and it could not have come open without destroying the cooperage placed upon it by plaintiff. The plaintiff and witnesses who assisted him in loading the car all testified fully and explicitly that they fastened these small doors with certain irons furnished by the railroad company for that purpose, and that they were properly closed and fastened. The outside doors of the car were closed and sealed by the agent of defendant. The car was picked up by a regular freight train at Rolla and started on its way. While the train was standing at Perth, the first station south of Rolla, a bystander noticed flax running under the outside door on one side of the car, and reported it to the conductor, who set the car out, and found one of the small hinge doors above referred to open, by swinging out from the bottom, and the flax leaking. The conductor closed the door and stopped the leak, gathered up such flax as he could gather, and replaced it in the car, which was picked up a day or two later and transported to Duluth. Subsequently the leak was traced along the track to a point some distance north of Perth. The fastenings to this door were such as are usual for fastening the kind of inner door used in this car.

Appellant only discusses two questions: First, that section 5690, Revised Codes 1905, is unconstitutional, because it fails to include, among the exceptions for relieving it from liability, loss occasioned by the act of the shipper or owner of the goods. Second, that if the law is constitutional, notwithstanding such omission, there was sufficient evidence that the loss of the grain was caused by plaintiff's negligence to entitle it to have the question submitted to a jury.

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Section 5690, supra, reads: "Unless the consignor accompanies the freight and retains exclusive control thereof, an inland common carrier of property is liable from the time that he accepts until he relieves himself from liability pursuant to sections 5638 to 5641, for the loss or injury thereof from any cause whatever, except; (1) An inherent defect, vice, or weakness or a spontaneous action of the property itself; (2) the act of the public enemy of the United States or of this state; (3) the act of the law; or (4) any irresistible superhuman cause." This section is in the main an enactment of the common law making common carriers insurers of property intrusted to them for transportation. In so far as it varies from the common law it does so in favor of the carrier. Many common-law authorities include the act of the shipper as among the exceptions relieving the carrier from liability, but even such authorities do not hold that all acts of every nature done by the shipper relieve the carrier. The liability of the carrier begins when he receives and accepts the goods, and continues until after the arrival at destination. The only defenses which the carrier can interpose, where property is lost in transit, are those named as exceptions relieving him from his liability as an insurer, except in cases where there is a special contract. This court cannot read into the statute an exception which existed at common law. State v. Smith, 2 N. D. 515, 52 N. W. 320. It will be presumed, by reason of the omission of the act of the shipper from the exceptions, that the legislature intended to still hold the carrier liable as against such actions as the principles of justice and fundamental law do not relieve it from. The difficulty lies in determining the line between those acts of the shipper which relieve the carrier from liability and those which by reason of the evident purpose of the legislature do not relieve it. The authorities on this subject are few in number. It is, however, clear that acts of fraud, misrepresentation, or concealment by the shipper relieve the carrier. Fraud invalidates all contracts, and concealment or misrepresentation is fraud. Where the shipper interferes with the property after accepted by the railway company, and the loss is occasioned by such interference, it may well be contended that the carrier is also relieved, and we are disposed to the belief that, when the shipper assumes the responsibility of loading the car and seeing that it is properly prepared for the transportation of the particular article which he is loading, he assumes responsibility for all

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defects in package and loading which are necessarily invisible to the agent of the carrier who accepts the freight, or which he cannot discern by ordinary observation, or such inspection as he can readily make. In this case there is no evidence showing that the car was not properly coopered.

The question is whether it was the duty of the carrier, under the circumstances, to see that the small door referred to was properly fastened, and, if it did not do so, whether it is liable. As stated, the agent accepted the car and its contents for transportation and he himself closed and sealed the outside doors. The devices for fastening the small doors were open to his inspection when he closed the outside doors, and were where he could not avoid seeing them if he looked at all or even used ordinary care or made the slightest effort to ascertain whether they were properly fastened. If he did not do so, or, doing so, failed to call the defect to the attention of the shipper or to remedy it himself, we think the fact, if it were a fact, that they were not properly fastened when he accepted the freight, under the circumstances of this case, does not relieve the defendant from its obligation as an insurer. The terms of the statute are very broad. It reads: "From any cause whatever."

The supreme court of Iowa passed upon this question in Kinnick Bros. v. Chicago, etc., Ry. Co., 69 Iowa, 665, 29 N. W. 772. The plaintiff in that case shipped a car load of hogs, some of which died in transit, and it was contended that their loss was occasioned by overloading the car. The court says: "Plaintiffs loaded the hogs on the car without assistance or direction from defendant's agents or employes. Defendant claimed that the car was overloaded, and that the injury was caused by such overloading. The court instructed the jury that, if defendant had knowledge of the number of hogs in the car, and of the condition of the car as to the loading when it received it, or if it might have known these facts, it could not escape liability for the damage on the ground that the car was overloaded. Exception is taken to this instruction, but we thing it correct. It is not claimed that there was any deceit or misrepresentation by plaintiff as to the condition of the car or to its loading. Defendant's agent, who made the contract for it, went to the car after the loading was done, and closed and sealed it. There was nothing to prevent him from seeing the manner in which it was loaded. As defendant received the property under

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these circumstances, and undertook to transport it to its destination, it should be held to have assumed all the liabilities of a common carrier with reference to it." This case is cited as authority in Swiney v. American Express Company (Iowa) 115 N. W. 212. The case at bar is a stronger one in plaintiff's favor than the Iowa case, for the reason that most authorities recognize a distinction in favor of the carrier of live stock as against a carrier of dead freight. The doctrine of the Iowa case is followed in McCarthy v. Louisville & N. Ry. Co., 102 Ala. 193, 14 South. 370, 48 Am. St. Rep. 29, where the court says: "If the improper loading was apparent—that is, was a fact which addressed itself to the ordinary observation of the carrier's servants—or if it was not apparent, but the carrier was guilty of negligence, but for which the injury would not have happened, the carrier would be liable, notwithstanding the negligence of or imputable to the plaintiffs. If the cars used in this transportation were closed cars and came to the defendant with their doors closed, so that without opening their doors the condition of their contents could not be seen, we should say the improper loading, if they were indeed improperly loaded, was not apparent within the meaning of the rule we have stated." And in Ohio it is said: "The carrier may well refuse to receive the property unless it is properly packed, but if he receives it the duty attaches of exercising due care for its safe carriage. Where the carrier takes charge of the property for the purpose of carriage, the duty rests on him to show that the injury is attributable to the defective packing, and not through any fault or neglect on his part." Union Express Company v. Graham, 26 Ohio St. 595.

On proof of the delivery of the property in sound condition, and its redelivery at the end of the route in damaged condition, or failure to redeliver all or part of it, a sufficient case is made to sustain a recovery for damages or loss. The plaintiff may rest his case on evidence of these facts, and, unless the defendant then submits evidence showing the cause of the loss to be one or more of the excepted causes, the plaintiff must prevail. The burden of proof changes from plaintiff to the defendant when plaintiff has proven the delivery and the failure to redeliver. The authorities are practically uniform on this question, and the reason given is stated to be that, after delivery of the goods to the carrier, they are no longer subject to the shipper's supervision or observation. If they are lost by the carrier, the circumstances surrounding such

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loss are without the knowledge of the shipper. The means and proof of the facts causing the loss are ordinarily wholly within the control of the carrier and its servants. In most instances the shipper is compelled to do business with the carrier and to intrust to its care on the road and in places distant from the shipper his property, and the burden of proving facts exempting itself from liability as an insurer rests upon the carrier, and requires it to show that the loss occurred by reason of one or more of the exceptions. Moore on Carriers, 386; Hull v. C., St. P., M. & O. Ry. Co., 41 Minn. 510, 43 N. W. 391, 5 L. R. A. 587, 16 Am. St. Rep. 722; Norway Plains Co. v. B. M. R. R., 1 Gray (Mass.) 263, 61 Am. Dec. 432, and note; Wolf v. Am. Express Co., 43 Mo. 421, 97 Am. Dce. 406; Swiney v. Am. Express Co., supra; I. C. R. R. Co. v. Frankenberg et al., 54 Ill. 88, 5 Am. St. Rep. 92; 6 Cyc. 518 (b), and cases cited. We see no reason for holding the statute in question unconstitutional by reason of the omission to include the act or fault of the shipper among the exceptions.

The second question raised by the appellant, namely, conceding the law to be constitutional, there was conflict enough in the evidence to require its submission to the jury, requires notice. As we have shown, the testimony of the plaintiff and his assistants who prepared and loaded the car and fastened the inside door with the appliances furnished by the carrier was all positive to the effect that the door had been properly fastened. It is contended that the fact that the door came open while the car was running creates a conflict in the evidence. We think there are two answers to this contention: First, the duty rested on the defendant to show that the loss was occasioned by the fault of the shipper, and the mere fact of the door coming open does not make the showing required. That the door was fastened is evident from the fact that it remained closed until some time after the car left Rolla. If it had not been fastened originally, the weight of the flax would have caused the door to swing open before the car started. The fact that it opened while in transit, in the absence of other proof as to the cause of its doing so, may be attributed just as logically to a rough track, or to the bunting of cars, or starting or stopping with a jar, or to a defect in the fastening, as to the failure to fasten it. Had it been given to the jury, any verdict which it might have found based upon the fact that the door came open would have been mere guesswork or conjecture, and, had it found this the cause of the

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loss, it could only have done so by inference. It will thus be seen that at the most the fact of its coming open, under the circumstances, furnished only a scintilla of evidence which might indicate a failure to fasten it. This court has long since, following the great weight of authority, rejected the scintilla theory of submitting cases to the jury. Fuller v. N. P. Elevator Co., 2 N. D. 220, 50 N. W. 359. In Ogdensburg, etc., Railroad Co. v. Pratt, 22 Wall. 123, 22 L. Ed. 827, the supreme court of the United States held that it is the duty of the carrier to furnish suitable vehicles for transportation, and, if he furnish defective or unsafe vehicles, he is not exempt from responsibility by the fact that the shipper knew them to be defective and used them. In Cleveland, C., C. & St. L. Railway Co. v. Louisville Tin & Stove Co., 111 S. W. 358, 33 Ky. Law Rep. 924, it is said that the owner is not required to see that the cars are suitable or safe. He is not required to show negligence on the part of the railway company. All that he is required to show is the loss of his goods. No defect in the vehicle can excuse a common carrier from its common-law liability. See, also, Hutchinson on Carriers, section 497; Elliot on Railroads, section 1478; 118 N. W. 344.

At the close of the case, both parties submitted motions for a directed verdict. The court denied the motion of the defendant and granted that of the plaintiff. The defendant, after the denial of his motion, made no request to have any question of fact submitted to the jury. It is well established that in such case the party making the motion waives any right to insist that the court should consider other questions, and in view of the fact that appellant did not call the court's attention to any other question, or request that any other part of the case be submitted to the jury, it is now estopped from making such claim. The language of Chief Justice Corliss, in Stanford v. McGill, 6 N. D. 536, 72 N. W. 938, 38 L. R. A. 760, is directly in point. He says: "The defendants having requested the court to direct a verdict in their favor, and the court having instructed the jury to find for the plaintiff, on his motion, the defendants must be regarded as having submitted all controverted facts to the court for decision; no requests having been made by them, after the motion for a directed verdict had been overruled, that any question of fact be submitted to the jury. It follows that if there is any evidence at all to support the verdict, in point of damages, the judgment must be affirmed. The defendants by their motion

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took the position that there was no question of fact which they desired to have submitted to a jury, and cannot complain of the decision of any question of fact on which the evidence is conflicting, which the court must be regarded as having made by instructing the jury to find for the plaintiff. After a party has moved the court that the jury be instructed to render a verdict in his favor, he must, if the court denies his motion, specifically request that there be submitted to the jury the questions of fact which he desires to have so submitted. Otherwise he is deemed to have acquiesced in the decision of such questions by the court, and, if the court directs a verdict in favor of the other party, on his motion, the defeated litigant is not in a position, in case of his failure to make such requests, to claim that any issue upon which the evidence is conflicting should have been left to the decision of the jury." See, also, Bank v. Laughlin, 4 N. D. 391, 61 N. W. 473; Bank v. Town of Norton, 12 N. D. 497, 97 N. W. 860; Larson v. Calder, 16 N. D. 248, 113 N. W. 103.

The order of the district court is affirmed.

Morgan, C. J., concurs.

Fisk, J. (concurring specially). I concur in the conclusion arrived at in the forgoing opinion; but in doing so I deem it unnecessary to express any opinion upon the question whether by section 5690, Rev. Codes 1905, the legislative intent was to depart from the well-established rule of the common law relieving the carrier from liability occasioned solely by the shipper's negligence. Conceding the law to be that the carrier is relieved from liability for loss occasioned solely by the negligence of the shipper, as at common law, which is the most favorable rule that is or can be contended for by appellant, still the order appealed from must be affirmed, for the reasons stated in the latter portion of the opinion, which meet with my approval.

(118 N. W. 826.)

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1. On the uncontroverted facts in this case, it is held, that, as to the principal of the notes secured by the mortgages sought to be foreclosed, this action was prematurely brought. Donovan v. Block, 406.
2. At the time of such seizure, other grain of the same kind, which had been intermingled by defendant with that covered by the mortgage, was also seized and converted in like manner. In his answer defendant pleaded a counterclaim for damages, based upon such conversion, and was allowed to recover in the lower court. Held error, as the cause of action contained in this so-called counterclaim had not accrued at the time the action was commenced. Strehlow v. McLeod, 457.
3. On the facts of this case, an application made by voters and taxpayers of a school district to be allowed to defend a pending action, brought to enjoin the issuance of the bonds of the district, did not constitute a petition to intervene. Schouweiler v. Allen, 510.

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AGENTS. See PRINCIPAL AND AGENT, 16, 224, 248.

AGISTMENT OF ANIMALS.

1. Defendant took a mare belonging to plaintiff to pasture for the season, and in the month of October, two or three days after having built a barbed-wire fence around a corral about eight rods in length connected with the pasture by a lane and a gate, permitted plaintiff's mare to be driven into such corral with other horses, and either closed or permitted the gate to be closed. While the horses were restrained in such corral, the mare of the paintiff got entangled in a barbed-wire and injured so it became necessary to kill her. Held, that in an action to recover her value, and charging her loss to the negligence of the defendant, the question of negligence was one of fact for the jury to determine. McBride v. Wallace, 495.

ALTERATION OF INSTRUMENTS.

1. The erasure by or on behalf of the obligee of a surety's name on a contractor's bond releases all sureties of said bond who signed after the surety whose name was erased and before the erasure, unless they consented to the erasure. Hilliboe Admr. v. Warner, 594.

2. The possession of a bond by the obligee while an alteration is made therein, together with the fact that an action is commenced on the bond in its altered form, is sufficient evidence to sustain a finding that the alteration was made by or with the consent of the obligee. Hilliboe Admr. v. Warner, 594.

ALIBI. See CRIMINAL LAW, 13.

AMENDMENT. See PLEADING, 91, 145, 389.

ANIMALS. See DAMAGES, 495.

ANSWER. See PLEADING, 91, 104, 389; GARNISHMENT, 110.

1. An amendment of an answer in district court filed on an appeal from a default judgment in justice's court is permissible, except as to matters wholly beyond the jurisdiction of the justice of the peace to determine. Erickson v. Elliott, 389.

APPEAL AND ERROR. See NEW TRIAL, 210, 310, 335, 364; BROKERS, 335; JUDGMENT, 368; VERDICT, 429; EVIDENCE, 519.

1. An order for the dismissal of an action is not an appealable order, and an attempted appeal from such an order confers no jurisdiction upon the supreme court. Dibble v. Hanson, 21.

2. An objection made to the admission of a record as a whole, and without distinguishing or pointing out in the objection the particular items, if any, which were competent evidence, and those which

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APPEAL AND ERROR—Continued.

were claimed to be incompetent, when a part of the items were competent. and some of them may have been incompetent evidence, is inadequate, and it is not error for the trial court to admit the whole record. State v. Dahlquist, 40.

3. Construing section 7811, Rev. Codes 1905, it is held that an order made after judgment in a condemnation suit, by the terms of which order the clerk is directed to retain in his possession certain moneys paid to him in satisfaction of such judgment until the final determination of a certain tax proceeding pending in such court under the Wood law, wherein Cass County as plaintiff seeks to recover certain delinquent taxes claimed to be a lien against the property thus condemned, is an appealable order, and hence the proper remedy for a review of said order is by appeal and not by certiorari. Held, further, that the district court did not exceed its jurisdiction in making a similar order in the tax case wherein these petitioners were defendants, and hence petitioners have mistaken their remedy in applying for the writ aforesaid. Soo Railway v. Blakemore, 67.

4. Any objection to the sufficiency of the allegations of the complaint could be amended as a matter of course if objection had been made before. Bank v. Warner, 76.

5. Under the pleadings in this case, the trial court was justified in holding proof of breach of warranty inadmissible, but, irrespective of any question as to breach of warranty made by the pleadings, other issues were made by reason of which it was error for the court to enter judgment on the pleadings. Scott v. N. W. Port Huron Co., 91.

6. The statement of the case contains a literal transcript of the testimony taken and reported by a referee to the district court, without any attempt to condense or eliminate immaterial matter. Held, following the rule announced in prior decisions of this court, that such practice is a plain violation of section 7058, Rev. Codes 1905, as well as rule 7 of this court, and does not constitute a statement of the case. Smith v. Kunert, 120.

7. Certain specifications of error relating to the findings of the referee are held insufficient under the statute and rule aforesaid, for the reason that no attempt is made to specify wherein the evidence was insufficient to support the findings complained of. Smith v. Kunert, 120.

8. Appellant's assignment of error, based upon rulings and findings of the referee, are not considered, for the reason that the statute and rule above mentioned have not been complied with. Smith v. Kunert, 120.

9. Appellant's contention that the contract was void under the statute of frauds is not available to him in this court, as such defense was not raised or passed upon in the court below. Schuyler v. Wheelon, 161.

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APPEAL AND ERROR—Continued.

10. Assignment of error not argued in the appellant's brief are deemed abandoned under rule 14 of this court (91 N. W. 8), and hence will not be considered. Foster Implement Co. v. Smith, 177.

11. An order denying an application to set aside a previous order made without notice, striking a cause from the trial calendar and dismissing the same, is not an appealable order. Larson v. Walker, 247.

12. Defendant appealed from the justice to the district court upon questions of law alone under section 8501, Rev. Codes 1905, where he was defeated upon every point urged. Held, that it was not error to thereafter refuse to grant him a trial upon the facts in the district court. A trial upon the merits is permissible in the district court only where the decision upon such appeal reopens the case for the trial of an issue of fact. Hanson v. Gronlie, 101.

13. In this case, if the variance were material, no claim of prejudice could avail, as the trial court held the case open for further proof by defendant if surprised by the decision that there was no variance. Maloney v. Geiser Mfg. Co., 195.

14. The sufficiency of the evidence to sustain a verdict cannot be considered by the trial court on a motion for a new trial, nor by this court on appeal, unless the settled statement of the case contains specifications of particulars wherein the evidence is insufficient to sustain the verdict. Lund v. Upham, 210.

15. Action upon a promissory note executed and delivered by defendants to the state bank of K. The defense is that such bank acted as their agent in the collection of certain drafts drawn against consignments of grain, and in collecting balances due on such consignments, and that it had in its possession enough funds thus collected to liquidate the balance due on such note, and that defendants requested the application of said funds accordingly. Plaintiff bank, the successor of the state bank of K., contends that one M., who was cashier, and not the bank, acted as such agent, and that no such funds came into the possession of said bank which were not accounted for. At the conclusion of the testimony the trial court directed a verdict in plaintiff's favor. Held, reversible error for the reason that the testimony tended to show that a sum in excess of the amount due on said note was received either by the bank or by M., individually, and not accounted for to defendants, and the evidence was sufficient to require a submission to the jury of the question whether the bank or whether M., acted as such agent. Bank v. Bakken, 224.

16. In reviewing a ruling of the trial court in directing a verdict, the testimony will be construed in its most favorable light towards the party against whom such ruling is made, and all reasonable and legitimate inferences which can be deduced in his favor will be deduced therefrom; and when thus considered, if it can be said

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APPEAL AND ERROR—Continued.

that reasonable men may fairly differ in the conclusion to be reached thereon, such ruling will be held reversible error. Bank v. Bakken, 224.

17. Certain alleged errors of law occurring at the trial in the rejection of testimony and in instructions to the jury examined, and held not prejudicial for reasons stated in the opinion. State v. Robb-Lawrence Co., 257.

18. Held, further, that such rulings and the giving of the instructions complained of, if error, cannot avail appellant, as the same were not properly specified in the notice of intention to move for a new trial; the motion for new trial being based upon the minutes of the court. State v. Robb-Lawrence Co., 257.

19. Appellant has the burden of showing that errors committed in rulings sustaining objections to the admissions of testimony were prejudicial. Certain rulings of this character considered, and held prejudicial. Bristol & Sweet Co. v. Skapple, 270.

20. Evidence examined, and held sufficient to support the verdict. Where the trial court has been asked and has refused to distrub the verdict upon the alleged ground that the same is not supported by the evidence, this court will not reverse such decision, except in a clear case of abuse of discretion. Bristol & Sweet Co. v. Skapple, 270.

21. On an appeal from a judgment, the failure to renew a motion for a directed verdict at the close of the testimony, or to make a new motion for a directed verdict, precludes a review of the correctness of a ruling on a motion for a directed verdict made at the close of plaintiff's case. Landis Machine Co. v. Konantz Saddlery Co., 310.

22. The admission of hearsay evidence is not prejudicial error, when the objecting party thereafter establishes by his own evidence the facts testified to, based on hearsay. Landis Machine Co. v. Konantz Saddlery Co., 310.

23. Under section 7058, Rev. Codes 1905, it is essential to a review of errors of law occurring at the trial of a law action that they shall be specified in the statement of the case. Bertelson v. Ehr, 338.

24. Counsel, in the preparation of the so-called statement of case, not only violated the provisions of the above section, but they failed to comply with rule 7 of the supreme court (91 N. W. 6), which requires the evidence to be set forth in narrative form. For these reasons the statement of case must be disregarded on appeal. Bertelson v. Ehr, 338.

25. The charge of the trial court should be considered in its entirety, and error cannot be predicated on parts thereof, where the charge as a whole is not subject to the objection made to a part thereof. Buchanan v. Minn. T. M. Co., 343.

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APPEAL AND ERROR—Continued.

26. So-called specifications of error not embraced in the settled statement of the case will not be noticed, and an assignment of error thereon cannot be considered. Kephart v. Continental Casualty Co., 379.

27. It is contended that a certain portion of the unpaid premium on said policy should have been deducted from plaintiff's recovery. Held, that such contention is without merit, as there is no foundation in the pleadings for any such allowance or deduction, and no such question was presented to or passed upon by the trial court. Kephart v. Continental Casualty Co., 379.

28. It is error to grant a motion for judgment on the pleadings, where the answer states matters of affirmative defense, as proof of the affirmative defense must be made before the allegations of the answer can have any effect, except to settle the issues. Erickson v. Elliott, 389.

29. Failure to serve notice of appeal by one defendant upon his co-defendant, against whom the action was dismissed by the trial court, is not ground for dismissing the appeal on motion of plaintiff, when the appellant does not rely upon the dismissal as error, and the respondent has not appealed from the order or judgment of dismissal. O'Keefe v. Omlie, 404.

30. Rule 7 of the supreme court (91 N. W. 6), is intended to facilitate the work of that court, and to aid litigants in pointing out and making clear the errors relied upon, and to relieve the court of the necessity of exploring the whole record. O'Keefe v. Omlie. 404.

31. In the statements of the case no attempt is made to comply with the requirements of the rule above cited by reducing the testimony to narrative form, or to eliminate those parts having no bearing upon the decision of the case, and the specifications of error do not comply with the requirements of the rule, but are scattered throughout the proceedings wherever an exception was taken. For these reasons this court will disregard everything except the judgment roll. O'Keefe v. Omlie, 404.

32. After the plea had been entered and the trial called and four jurors called into the box, the defendants asked for one day's time to prepare for trial, and the court denied the request. Held, not error. State v. Chase, 429.

33. Certain assignments of error predicted upon rulings of the trial court in the admission and rejection of testimony are deemed abandoned for the reason that they are not discussed or treated in the brief in accordance with rule 14 (91 N. W. 8) of this court. Pendroy v. Great Northern Railway Co., 433.

34. The trial court charged the jury that "the act or omission must contribute, in order to be contributory negligence, to the happening of the act or event causing the injury, * * * and, if the act

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APPEAL AND ERROR—Continued.

or omission merely increases or added to the extent of the loss or the injury, it will not have that effect." This instruction had no application to the facts in the case, but its giving is held not predjudicial error. Pendroy v. Great Northern Railway Co., 433.

35. Where a remittitur has been regularly issued and transmitted to the district court, the appellate court has lost jurisdiction; but, when irregularly, inadvertently, or erroneously issued, such court does not lose jurisdiction, but may recall for the purpose of correcting any error or mistake. Nystrom v. Templeton, 463.

36. When the plaintiff rested on the trial of his action, defendant moved for a directed verdict on the ground that plaintiff had failed to establish the allegations of his complaint. Held, that the defendant, not having renewed this motion after all the evidence was submitted, thereby waived any error in denying his motion. McBride v. Wallace, 495.

37. In such a case it is not reversible error to exclude a question as to defendant's reputation as a man of care in handling stock, as, while his reputation may have been of the best, he may have failed to exercise ordinary care in this instance. McBride v. Wallace, 495.

38. It does not constitute reversible error to exclude a question which has already been asked and answered by the same witness. McBride v. Wallace, 495.

39. Instructions to the jury must be considered as a whole, and an isolated sentence containing an erroneous statement of the law, but which, when taken with the rest of the charge, cannot have misled the jury, is harmless error, and does not warrant reversal. McBride v. Wallace, 495.

40. Said instructions, although erroneous, were not prejudicial in view of the subsequent explicit instructions given by the trial judge which are referred to at length in the opinion. State v. Denny, 519.

41. The state was permitted over defendant's objection to give secondary evidence as to the contents of a certain copy of letter claimed to have been written by one Miller to defendant, and tending to show defendant's guilty knowledge in receiving the stolen property. Held, for reasons stated in the opinion, that such ruling constituted prejudicial error, for the reason that no sufficient foundation for the introduction of such testimony had been shown. State v. Denny, 519.

42. Plaintiff showed by himself and other competent witnesses that the inside doors referred to were properly closed and fastened with the device furnished by defendant for that purpose. The only evidence claimed to create a conflict arises from the fact that, a few miles after the car started on its journey, one of the inside doors referred to came open, and a quantity of flax with which the car was loaded ran out through the opening so made. Held, that such door opening may as readily be attributed to other causes as

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APPEAL AND ERROR—Continued.

to the failure of the shipper to properly fasten it, and had the question been submitted to a jury, a verdict for defendant, based upon the fact that such door came open in transit, could only have been arrived at by inference, and would have been mere guesswork on the part of the jury under the facts of the case, and that the opening of this door did not create a sufficient conflict in the evidence to constitute error on the part of the trial court in directing a verdict for plaintiff. Duncan v. Great Northern Railway Co., 610.

43. On submission of all their evidence, both parties made motions for a directed verdict. Neither party requested the submission of any facts to the jury. Held, that they thereby waived any rights which they might have otherwise had to an undirected verdict, and are estopped from assigning error for not submitting the facts to the jury. Duncan v. Great Northern Railway Co., 610.

44. An assignment of error based upon the rulings of the trial court in directing a verdict, where no exception to such ruling was taken cannot be considered. Kephart v. Continental Casualty Co., 379.

APPEALABLE ORDER. See CERTIORARI, 67; APPEAL AND ERROR, 247.

APPROPRIATIONS. See STATE FAIR, 31.

ASSESSMENT. See TAXATION, 145.

ASSIGNMENT. See FORECLOSURE, 235.

ATTORNEY AND CLIENT.

1. A suitor has the right to discharge his attorney, either with or without reason, at any time during the progress of the litigation he was employed to conduct, on paying or securing payment for his services. Schouweiler v. Allen, 510.

AUCTION. See TAXATION, 296.

AUTOMOBILE. See NEGLIGENCE, 433.

AUSTRALIAN BALLOT. See ELECTIONS, 575.

BAILMENT. See CRIMINAL LAW, 140.

1. A public warehouseman, under sections 2262 and 2272, Rev. Codes 1905, may as security for his indebtedness, issue and deliver to his creditor a warehouse receipt upon property actually contained in such warehouse and owned by him; such a transaction creates the holder of such receipt a bailor and the warehouseman a bailee of the property under the warehouse statute, while such property remains in the warehouse, and the surety on the warehouseman's bond is liable for the safe-keeping thereof. State v. Robb-Lawrence Co., 257.

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BANKS AND BANKING.

1. Action upon promissory note executed and delivered by defendants to the State Bank of K. The defense is that such bank acted as their agent in the collection of certain drafts drawn against consignments of grain, and in collecting balances due on such consignments, and that it had in its possession enough funds thus collected to liquidate the balance due on such notes, and that defendants requested the application of said funds accordingly. Plaintiff bank, the successor of the State Bank of K., contends that one M., who was cashier, and not the bank, acted as such agent, and that no such funds came into the possession of said bank which were not accounted for. At the conclusion of the testimony the trial court directed a verdict in plaintiff's favor. Held, reversible error for the reason, that the testimony tended to show that a sum in excess of the amount due on said note was received either by the bank or by M., individually, and not accounted for to defendants, and the evidence was sufficient to require a submission to the jury of the question whether the bank or whether M., acted as such agent. Bank v. Bakken, 224.
2. If the bank, through its cashier, M., acted as such agent for defendants, and received the benefit of the transaction, it was under legal obligation to account to defendants for such funds, even though M., exceeded his authority in thus acting; but it is held that the bank through its proper officers, had a right to act as such agent, and hence if it did so act, such acts were not ultra vires, and the corporation would be liable to defendants for all funds thus collected. Bank v. Bakken, 224.

BANKRUPTCY. See EVIDENCE, 600.

1. An answer is amendable, subject to the discretion of the court, alleging a release of the debt sued on by virtue of bankruptcy proceedings begun after the action was commenced. Erickson v. Elliott, 389.
2. It is not necessary to reply to an answer alleging a release of the debt sued on by virtue of bankruptcy proceedings after the action was commenced, as an affirmative defense only is stated, and not a counterclaim. Erickson v. Elliott, 389.

BILLS AND NOTES. See JUDGMENT, 240; NEGOTIABLE INSTRUMENTS, 326, 368, 375, 406.

BONA FIDE PURCHASER. See USURY, 351.

1. A mortgagee in a real estate mortgage, without actual notice of the rights of a vendee in a contract for the purchase of the real estate covered by the mortgage, which contract has been orally assigned as security, is an innocent purchaser, although such vendee is in possession of the land when the mortgage is taken. Patnode v. Deschenes, 15 N. D. 100, 106 N. W. 573, followed as to the construction of section 6179, Rev. Codes 1905. Gray v. Harvey, 1.

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BONA FIDE PURCHASER—Continued.

2. The fact that two mortgages are executed, delivered and recorded on the same day and hour is notice to a subesequent purchaser of the land to put him upon inquiry as to the actual priority of such mortgage. State Finance Co. v. Halstenson, 145.

BONDS. See SCHOOL AND SCHOOL DISTRICTS, 570; PRINCIPAL AND SURETY, 594.

BRIEF. See APPEAL AND ERROR, 171; RULES OF COURT, 404, 433.

BURDEN OF PROOF. See EVIDENCE, 610.

CASES CRITICIZED, MODIFIED AND OVERRULED.

1. A mortgagee in a real estate mortgage, without actual notice of the rights of a vendee in a contract for the purchase of real estate covered by the mortgage, which contract has been orally assigned as security, is an innocent purchaser, although such vendee is in possession of the land when the mortgage is taken. Patnode v. Deschenes, 15 N. D. 100, 106 N. W. 573, followed as to the construction of section 6179, Rev. Codes 1905. Gray v. Harvey, 1.
2. Under section 9931, Rev. Codes 1905, the state can secure a change of the place of trial in a criminal action under the same circumstances as a defendant in a criminal action may under existing laws, and said section 9931 is a constitutional enactment. Barry v. Truax, 13 N. D. 131, 99 N. W. 769, 65 L. R. A. 762, 112 Am. St. Rep. 662, followed. Zinn v. District Court, 135.
3. Following the rule announced by this court in the recent case of Sucker State Drill Co. v. Wirtz Bros., 115 N. W. 844, it is held that plaintiff, a foreign corporation, did not violate the statute of this state (sections 4695-4697, Rev. Codes 1905) prescribing the conditions upon which such corporations may do business within our borders. State v. Robb-Lawrence Co., 257.

CERTIFICATE OF SALE. See FORECLOSURE, 466.

1. The certificate of sale in such case is only evidence of what transpired for the purpose of record, notice to protect purchasers against intervening claims, and to show who may become entitled to a deed, and it conveys no titile. The N. D. Horse & Cattle Co. v. Serumgard, 466.

CERTIORARI.

1. Construing section 7811, Rev. Codes 1905, it is held that an order made after judgment in a condemnation suit, by the terms of which order the clerk is directed to retain in his possession certain moneys paid to him in satisfaction of such judgment until the final determination of a certain tax proceeding pending in such court under the Wood law, wherein Cass County as plaintiff seeks to recover certain delinquent taxes claimed to be a lien against the property

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CERTIORARI—Continued.

thus condemned, is an appealable order, and hence the proper remedy for a review of said order is by appeal and not by certiorari. Held, further, that the district court did not exceed its jurisdiction in making a similar order in the tax case wherein these petitioners were defendants, and hence petitioners have mistaken their remedy in applying for the writ aforesaid. Soo Railway v. Blakemore, 67.

2. Under section 7811, Rev. Codes 1905, a writ of certiorari will not be granted in any case, unless the inferior court, officer, board, or tribunal has exceeded its jurisdiction, and there is no appeal, nor, in the judgment of the court, any other plain, speedy, and adequate remedy. Soo Railway v. Blakemore, 67.

3. On application of voters and taxpayers in such case for a writ of certiorari or other appropriate writ under the supervisory control of this court over inferior courts. Held, that such power should not be lightly exercised, and that inasmuch as the applicants have the right to apply to the district court for an order vacating the judgment so entered, and by such application become parties to the record, and, if such application is denied, may have the action complained of reviewed, no such exigency exists as warrants this court in granting the writ applied for. Schouweiler v. Allen, 510.

CHAMPERTY AND MAINTENANCE.

1. A sheriff's deed, issued on a foreclosure of a mortgage, while another is in possession of the land, is not void for champerty, when such sheriff's deed is based on a mortgage, executed before the claimant went into possession. State Finance Co. v. Halstenson, 145.

2. Such sheriff's deed is in the nature of deeds issued under judicial proceedings, and is not within the purview of the statute against champerty and maintenance. State Finance Co. v. Halstenson, 145.

3. The owner of land in the possession of another may properly mortgage the same without violating the statute against champerty. State Finance Co. v. Halstenson, 145.

CHANGE OF VENUE. See VENUE, CHANGE OF, 135.

CHATTEL MORTGAGES. See NOTICE, 165.

1. Defendant's chattel mortgage was not properly witnessed or acknowledged so as to entitle it to be filed; and hence the filing of the same did not operate to give constructive notice thereof. Pease v. Magill, 166.

2. A mortgagee in a chattel mortgage who sells the property mortgaged without foreclosure, is guilty of a conversion of the property, and the lien of the mortgage is extinguished. Force v. Peterson Machine Co., 220.

3. Where the mortgagor sues the mortgagee for damages for a wrongful sale without foreclosure, in such cases the mortgagee may plead

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CHATTEL MORTGAGES—Continued.

and show the amount due on the lien of the mortgage in mitigation of damages growing out of the wrongful conversion. Force v. Peterson Machine Co., 220.

4. The right to show the existence of liens in such cases is based upon equitable principles, but the rules of pleading in equity cases do not apply. Force v. Peterson Machine Co., 220.

5. Where a mortgage on its face shows that it must have been intended to be given on a crop to be sown during the season following its date, the intention of the parties will be given effect. notwithstanding the fact that the mortgage expresses another year by mistake. Gorder v. Hilliboe, 281.

6. On the uncontroverted facts of this case, it is held, that, as to the principal of the notes secured by the mortgages sought to be foreclosed, this action was prematurely brought. Donovan v. Block, 406.

7. Plaintiff contends that he was entitled to the possession of certain chattel security for the purpose of foreclosing mortgages of the same to recover two items of indebtedness from the defendant to him, aggregating $149. Held, that for this purpose the action cannot be maintained, for the reason that the liability of the defendant to plaintiff for said items was litigated and determined adversely to the plaintiff herein in the case of Block v. Donovan, 13 N. D. 1, 99 N. W. 72. Donovan v. Block, 406.

8. In an action brought to foreclose a chattel mortgage upon certain grain, a warrant was issued under the provisions of section 7513. Rev. Codes 1905, pursuant to which all the grain grown on the land described in the mortgage was seized by the plaintiff, and subsequently, and before trial, the same was wrongfully converted by a sale thereof. Such grain was the sole property covered by the mortgage, and its wrongful conversion by plaintiff extinguished the lien of the mortgage, and thereby the cause of action for foreclosure ceased to exist. Strehlow v. McLeod, 457.

9. At the time of such seizure, other grain of the same kind, which had been intermingled by defendant with that covered by the mortgage, was also seized and converted in like manner. In his answer defendant pleaded a counterclaim for damages, based upon such conversion, and was allowed to recover in the lower court. Held error, as the cause of action contained in this so-called counterclaim had not accrued at the time the action was commenced. Strehlow v. McLeod, 457.

CITIES. See MUNICIPAL CORPORATIONS, 5, 319, 409.

CLAIM AND DELIVERY.

1. In an action of claim and delivery brought by a third person as claimant to the property against an officer who levied upon and

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CLAIM AND DELIVERY—Continued.

took into his possession personal property under an execution as the property of the defendant in the execution, it is no defense that a sheriff's jury prior to the commencement of such action found that the title to such property was in the defendant in such execution. Pfeifer v. Hatton, 99.

2. Error is assigned in overruling defendant's motion for a directed verdict made at the close of all the evidence, and also his motion for judgment notwithstanding the verdict. These motions were properly overruled. The action was in claim and delivery to recover the possession of a horse. The complaint contained the usual allegations of ownership and right to possession in plaintiff; also, a detention of the horse by defendant and a prior demand for possession, etc. The answer contained no denials, either general or specific, but alleged a right of possession under a chattel mortgage executed by a former owner of the animal. The motions were predicated upon an alleged failure to prove ownership and right to possession in plaintiff and also a demand. Under the issues the sole question in dispute, aside from the question of the value of the horse and damages, was whether at the time plaintiff purchased the horse she had actual or constructive notice of defendant's chattel mortgage, and there was a conflict in the testimony upon this question. Pease v. Magill, 166.

3. In a replevin action for grain grown under a contract, providing that the title to the grain is to remain in the owner of the land until a division thereof, the verdict and judgment should determine the interest of each party in the crop ultimately, although one of the parties is found to be entitled to the present possession. Wadsworth v. Owens, 173.

COLOR OF TITLE. See DEEDS, 502.

COMMITTING MAGISTRATE.

3. The evidence before the committing magistrate disclosed that the milling corporation of which petitioner was an officer was not engaged in doing a shipping business. Therefore, the commitment under which petitioner is held to answer for the offense of larceny as defined in section 2251, Rev. Codes 1905, aforesaid. is contrary to law and void, and the writ prayed for is granted. Ex Parte Bellamy, 140.

2. Evidence examined, and held insufficient to establish that anything is due the plaintiffs for commissions under the contract, for the reasons that the proof is wholly lacking to show that plaintiffs introduced a purchaser to the defendant who was willing to purchase the property, or that defendant, in fact, sold or had an opportunity to sell for a price in excess of $20 per acre. Fulton v. Cretian, 335.

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COMMITTING MAGISTRATE—Continued.

3. A written contract supersedes all prior or contemporaneous oral agreements or negotiations relating to the subject-matter embraced therein. Rieck v. Daigle, 364.

COMMON CARRIERS. See EVIDENCE, 40.

1. An inland common carrier is an insurer against loss of property consigned to it for carriage between its receipt at shipping point and arrival at destination when unaccompanied by the consignor, except from loss occasioned: (1) By an inherent defect, vice or weakness, or spontaneous action of the property itself; (2) the act of a public enemy of the United States or of this state; (3) the act of the law; or (4) any irresistible superhuman cause; (5) and it may also be assumed that certain acts of the consignor may exempt the carrier from liability. Duncan v. Great Northern Railway Co., 610.

2. On proof of delivery of the property to the carrier in sound condition, and of its redelivery at the end of the route in damaged condition, or a failure to redeliver it, a sufficient case is made to sustain a recovery for the damages or loss by the shipper. Duncan v. Great Northern Railway Co., 610.

3. The burden of proof is upon the carrier to exempt himself from liability in case of loss or damage by showing that it was occasioned by one or more of the exceptions mentioned under paragraph 1. Duncan v. Great Northern Railway Co., 610.

4. The evidence in this case shows that a quantity of flax was loaded by the plaintiff and his servants into a car furnished by the defendant for such purpose, that inside doors were furnished by the defendant carrier and used and fastened with appliances provided for that purpose by defendant, in the usual manner, and that the loss complained of occurred while such flax was en route to Duluth, some or all of it by reason of a small inside door used for retaining the flax in the car hung on hinges at the top, coming open. The defendant failed to show that the door opened by failure on the part of plaintiff to properly fasten it. It was closed by defendant's conductor at the station where the leak was discovered, but the inspector at Duluth reported a leak in the same place on the arrival of the car at its destination. Held, that the evidence fails to bring the defendant within the exceptions to the law holding it liable. Duncan v. Great Northern Railway Co., 610.

5. The shipper inserted in the car inside doors for retaining the flax, such doors being furnished by the carrier, and supplied with a fastening device. The evidence shows that these doors were properly fastened, with the device so furnished, by the shipper and assistants, all of whom were familiar with the use of such doors and devices. The car, after being so loaded with these doors inserted, was receipted for, and the outside doors closed and sealed by the

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COMMON CARRIERS—Continued.

defendant's agent, who had full opportunity to observe while closing the outside doors whether the inside doors were properly fastened. Held that, if they were not properly fastened, in view of these facts, the carrier is not relieved from liability for loss occasioned thereby. Duncan v. Great Northern Railway Co., 610.

6. Plaintiff showed by himself and other competent witnesses that the inside doors referred to were properly closed and fastened with the devices furnished by defendant for that purpose. The only evidence claimed to create a conflict arises from the fact that, a few miles after the car started on its journey, one of the inside doors referred to came open, and a quantity of flax with which the car was loaded ran out through the opening so made. *Held,* that such door opening may as readily be attributed to other causes as to the failure of the shipper to properly fasten it, and had the question been submitted to a jury, a verdict for defendant, based upon the fact that such door came open in transit, could only have been arrived at by inference, and would have been mere guesswork on the part of the jury under the facts of the case, and that the opening of this door did not create a sufficient conflict in the evidence to constitute error on the part of the trial court in directing a verdict for plaintiff. Duncan v. Gt. N. Ry. Co., 610.

COMPLAINTS. See PLEADING, 76, 177, 191, 202, 335.

CONDEMNATION PROCEEDINGS. See EMINENT DOMAIN, 67, 102; SUPREME COURT, 543.

CONFIDENTIAL RELATIONS. See FRAUD, 110.

CONFUSION OF GOODS. See TROVER AND CONVERSION, 457.

CONSTITUTIONAL LAW. See SUPREME COURT, 543.

1. Chapter 113, page 167, of the laws of 1907, which is entitled "An act requiring elevator companies transacting business in this state to return certificates of inspection and weighmaster's certificate of weight to the local buyer," and which provides for the return of such certificates by the elevator companies, etc., to their local agents, and also that the latter shall post the same in a conspicuous place in the elevators, does not contravene section 61 of the state constitution, which requires that no bill shall embrace more than one subject which shall be expressed in its title. State v. Elevator Co., 23.

2. Such act is not vulnerable to the objection that it contravenes the provisions of the interstate commerce clause of the federal constitution, as its operation will not directly or remotely interfere with interstate commerce. State v. Elevator Co., 23.

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CONSTITUTIONAL LAW—Continued.

3. Under the provisions of sections 7046 and 7047, Rev. Codes 1905, a compulsory reference cannot be ordered without the written consent of the parties, unless the case comes within the provision of the latter section. Mere silence or failure to object or except to the order will not constitute a waiver of a party's constitutional right to a trial by jury. Smith v. Kunert, 120.
4. Subdivision 1, section 7047, Rev. Codes 1905, is not in conflict with section 7 of our state constitution, which provides that "the right to trial by jury shall be secured to all and remain inviolate." The right of trial by jury as thus guaranteed refers to such right as it existed by law at and prior to the adoption of the constitution. Smith v. Kunert, 120.
5. Under section 9931, Rev. Codes 1905, the state can secure a change of the place of trial in a criminal action under the same circumstances as a defendant in a criminal action may under existing laws, and said section 9931 is a constitutional enactment. Barry v. Truax, 13 N. D. 131, 99 N. W. 769, 65 L. R. A. 762, 112 Am. St. Rep. 662, followed. Zinn v. District Court, 135.
6. A witness, sworn before a grand jury, cannot be compelled to answer questions which would tend to criminate him, and is privilegel from answering such questions by section 13 of the constitution, which declares that "no person * * * shall be compelled in any criminal case to be a witness against himself," unless granted unconditional immunity from prosecution for the offense concerning which he is testifying by statute. In Re Beer, 184.
7. Section 9383, Rev. Codes 1905, which provides that "no person shall be excused from testifying * * * by reason of the testimony tending to criminate himself (the witness), but the testimony given by such person shall in no case be used against him," does not grant immunity from prosecution. In re Beer, 184.
8. Under section 13 of the constitution, the witness is protected from testifying to facts and circumstances from which his connection with, or guilt of, a crime, may be proven through other sources than his answers. In re Beer, 184.
9. Before a witness can be compelled to answer questions which tend to criminate him, the statute granting immunity must be co-extensive in scope and effect with the constitutional guaranty. In re Beer, 184.
10. The legislature has no power to restrict or abridge the privilege guaranteed by section 13 of the constitution. In re Beer, 184.
11. Following Tyler v. Shea, 4 N. D. 278, 61 N. W. 468, 50 Am. St. Rep. 660, held, that there is no violation of any constitutional provision, in having damages to real estate, resulting from the construction of a drain, assessed by a jury, and the benefits to the same property assessed by the drain commissioners. Ross v. Prante, 266.

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CONSTITUTIONAL LAW—Continued.

12. The provision of chapter 199, page 327, Laws of 1907, requiring railway corporations to sell 1,000 mile tickets to purchasers, to be used by themselves. their wives and children, at a rate lower than the maximum rate under which others may purchase such tickets, is a violation of the federal constitution, which entitles the railroad company to due process of law and the equal protection of the laws. State v. Great N. Ry. Co., 370.

13 A decision of the Supreme Court of the United States, holding a law similar to this provision of chapter 199, page 327, laws of 1907, unconstitutional under the federal constitution, is conclusive upon this court and all state courts in determining the validity of said provision. State v. Gt. N. Ry. Co., 370.

14. The drainage act, being sections 1818 to 1850, Rev. Codes 1905, does not conflict with section 25 of the state constitution, which vests the legislative power of the people of the state in the legislative assembly. Appellants' contention that such drainage law is an unwarranted delegation of legislative power to the board of drain commissioners is not sustained. Soliah v. Cormack, 393.

15. Such law does not violate the fourteenth amendment to the constitution of the United States, nor section 13 of the constitution of this state, prohibiting the taking of property without due process of law. Soliah v. Cormack, 393.

16. Chaper 77, page 159, Laws of 1905, which provides in effect that all organized counties, not having more than 6,500 inhabitants, and in which no court house had been constructed prior to the taking effect of the act, proceedings for the removal of county seats may be initiated by petition, signed by the inhabitants thereof equai to one-third of the votes cast therein for governor at the last election, further providing for the removal of such county seat by a mere majority vote, is unconstitutional and void as special legislation. In re Connoly, 546.

17. The act includes within its terms counties to be subsequently organized, but such classification of counties having no courthouse upon a certain date, and which perpetually precludes them from passing out of such class, into the general class after they have erected such buildings, is purely arbitrary having no reasonable basis to support it. In re Connoly, 546.

18. By enactment of sections 4695-4699, prescribing the conditions upon which foreign corporations may do business in this state, it was not intended that such provisions should apply to foreign corporations engaged solely in an interstate business. It will be presumed that the legislature intended no interference with the exclusive power vested in the congress of the United States to regulate or restrict interstate commerce. Sucker State Drill Co. v. Wirtz, 313.

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CONSTITUTIONAL LAW—Continued.

19. A portion of the drills sold to the defendants were in store in Grand Forks, and were shipped directly to defendants from that place, but it is held, for reasons stated in the opinion, that this shipment did not constitute the transacting of or doing business within the state in violation of said statute. Sucker State Drill Co. v. Wirtz, 313.

CONTRACTS. See VENDOR AND PURCHASER, 1, 161, 177; INSTRUCTIONS, 343; EVIDENCE, 313; NEGOTIABLE INSTRUMENTS, 364; JUDGMENTS, 368.

1. A mortgagee in a real estate mortgage, without actual notice of the rights of a vendee in a contract for the purchase of the real estate covered by the mortgage, which contract has been originally asigned as security, is an innocent purchaser, although such vendee is in possession of the land when originally taken. Patnode v. Deschenes, 15 N. D. 100, 106 N. W. 573, followed as to the construction of section 6179, Rev. Codes 1905, Gray v. Harvey, 1.

2. Plaintiffs, in real estate business in Bismarck, wrote defendant, a resident of New York, and owner of real estate near Bismarck, a letter asking defendant's lowest price and best terms on the same The letter contained the following: "There are a few buyers coming in here this fall, and we might sell it for you if the price and terms are right." Defendant replied, "Would sell for $10 an acre, part down and time for balance;" no mention being made regarding the portion of plaintiff's letter wherein they state that "they might be able to sell it for you." Held that such correspondence was ineffectual to create a contract authorizing plaintiffs to act as defendant's agent for the sale of the property, or to procure a purchaser thereof. Harris Bros. v. Reynolds, 16.

3. Declarations of a party to a contract as to its terms, are inadmissible as evidence, as a part of the res gestae when made after the contract is completed, and not in the presence of the parties, although soon after they separated. State v. Murphy, 48.

4. The presumption that the owner of land is entitled to the crops grown thereon is a prima facie one only, and may be overcome by the contract of the parties, in reference to the disposition to be made thereof. Wadsworth v. Owens, 173.

5. In replevin for grain grown under a contract, providing that the title to the grain is to remain in the land owner, until a division thereof, the verdict and judgment should determine the interest of each party in the crop ultimately, although one is found entitled to the present possession. Wadsworth v. Owens, 173.

6. A complaint in an action between vendor and vendee, for damages for breach of an executory contract for the sale of real estate, is sufficient, if it alleges a specific written agreement whereby the defendant promised to sell, and the plaintiff promised to buy,

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CONTRACTS—Continued.

certain real property upon specified terms alleged in the complaint, and that within a reasonable time thereafter (no specific date having been agreed upon for performance) plaintiff offered full performance of it upon his part according to its terms, alleging readiness, ability and willingness to perform, and that defendant at the time of such offer refused, and at all times since has refused to perform said contract on his part. Foster Implement Co., 177.

7. By defendant's demurrer to the complaint he admitted all the facts well pleaded, one of which was his refusal to perform the contract on his part upon offer of full performance by the plaintiff. Such refusal put defendant in default. Foster Implement Co. v. Smith, 177.

8. Plaintiff's offer of performance in good faith, pursuant to contract, with present ability and willingness to perform, was sufficient without an actual production of the notes and money called for by the contract. Such tender was not required as a basis for an action for a breach of the contract, especially in view of the defendant's unqualified refusal to perform. Foster Implement Co. v. Smith, 177.

9. Plaintiff inquired by letter of defendant his price for certain property, stating that he would buy it if the price was reasonable Defendant answered stating the price. Plaintiff accepted the offer, but asked the defendant to send the deeds to one of two banks, to assign the insurance policies and send them with the deed. Held, that the acceptance of the offer was not an unconditional one. Beiseker v. Amberson, 215.

10. An acceptance of an offer to become binding must be unconditional, without modification or the imposition of new terms. Beiseker v. Amberson, 215.

11. Offer of the performance of a contract in good faith, with present ability and willingness to perform is sufficient without production of money or notes according to contract. Foster Implement Co. v. Smith, 177.

12. Action by real estate brokers to recover commissions under an express contract for finding a purchaser for defendant's property. The complaint, in effect, alleges an express contract that plaintiff should receive the excess over $20 per acre at which a sale should be effected by defendant to prospective purchasers introduced by them, but it failed to allege that they introduced a prospective purchaser, who was willing to pay any sum in excess of $20 per acre, and it also failed to allege that defendant in fact sold or had any opportunity to sell said property for an amount in excess of such price. Held, that the complaint fails to state facts sufficient to constitute a cause of action. Fulton v. Cretain, 335.

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CONTRACTS—Continued.

13. Evidence examined and held insufficient to establish that anything is due the plaintiffs for commissions under the contract, for the reasons that the proof is wholly lacking to show that the plaintiffs introduced a purchaser to the defendant, who was willing to purchase the property, or that the defendant, in fact, sold or had any opportunity to sell for a price in excess of $20 per acre. Fulton v. Cretain, 335.
14. A written contract supersedes all prior or contemporaneous oral agreement or negotiations relating to subject matter embraced therein. Riesk v. Daigle, 364.

CONTRIBUTORY NEGLIGENCE. See NEGLIGENCE, 433; INSTRUCTIONS, 433.

CONVERSION. See TROVER AND CONVERSION, 220, 281, 457.

CONVEYANCE. See DEEDS, 145.

CORPORATIONS. See WITNESSES, 76; CRIMINAL LAW, 140; BANKS AND BANKING, 224; FOREIGN CORPORATIONS, 313.

1. Following the rule announced by this court in the recent case of Sucker State Drill Co. v. Wirtz Bros., 115 N. W. 844, it is held that plaintiff, a foreign corporation, did not violate the statute of this state (sections 4695-4697, Rev. Codes 1905), prescribing the conditions upon which such corporations may do business within our borders. State v. Robb-Lawrence Co., 257.

COSTS.

1. In its order retaxing the costs, the trial court allowed certain witnesses the sum of $10 per day for attendance. This was erroneous, and the judgment is modified accordingly by reducing such allowance to the sum of $2 per day. Pendroy v. Gt. N. Ry. Co., 433.

COUNTERCLAIM. See PLEADING, 220, 368, 389; NEGOTIABLE INSTRUMENTS, 364; ACTION, 457.

COUNTIES. See CONSTITUTIONAL LAW, 546.

1. The sovereignty or franchises of the state are not directly affected by proceedings for the division of a county. State v. Fabrick, 532.
2. Under section 2329, Rev. Codes 1905, as amended by chapter 60, page 85, laws of 1907, the electors of a county have a right to have submitted to them, and to vote upon, all petitions in reference to the division of a county that conform to the statute, although the petition last presented to the county commissioners may conflict, as to the territory to be embraced within the proposed counties, with the petitions first presented and acted upon. State v. Fabrick, 532.

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COUNTIES—Continued.

3. Where a petition is presented for a division of a county, and the county commissioners order the submission of the question of the division of the county, pursuant to the petition, to a vote at the next general election, the county auditor is without authority to refuse to give notice that the question of the division of the county, pursuant to the petition, will be voted on at the next general election, on the alleged ground that the county proposed to be organized, pursuant to the petition, is to contain in part the same territory as the territory to be embraced in another county proposed to be organized pursuant to another petition, which was on file and had been acted on by the commissioners when the petition in this case was presented to the commissioners and acted on. State v. Fabrick, 532.
4. The matter of the change of the location of the county seat of a county is not a question publici juris, affecting the sovereignty or franchises of the state. State v. Gottbreht, 543.
5. Chapter 77, page 159, Laws 1905, which provides in effect that in all organized counties not having more than 6,500 inhabitants and in which no court house had been constructed prior to the taking effect of the act, proceedings for county seat removals may be initiated by a petition signed by the inhabitants thereof equal in number to one-third of the vost cast therein for governor at the last election, and further providing for a removal of such county seat by a mere majority vote, is unconstitutional and void, as special legislation. In re Connolly, 546.

COUNTY AUDITOR. See ELECTIONS, 532.

COUNTY COMMISSIONERS. See ELECTIONS, 532, 561.

COURTS. See PLEADING, 91; EQUITY, 114; DISTRICT COURT, 285; CONSTITUTIONAL LAW, 370; CERTIORARI, 510.

1. The writ of prohibition is not a writ of right, but is available only when the inferior court, body or tribunal is about to act without any jurisdiction or in excess of jurisdiction. Zinn v. District Court, 128.
2. Courts cannot take jurisdiction to hear a motion for a new trial on a verbal agreement that it may do so, claimed by one party, and denied by the other. Kaslow v. Chamberlain, 449.

CRIMINAL LAW.

1. Section 8903 of the Revised Codes of 1905, reads: "Adultery is the voluntary sexual intercourse of a married person with a person other than the offender's husband or wife; and when the intercourse is between a married woman and a man that is unmarried the man is also guilty of adultery. No prosecution shall be commenced ex-

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CRIMINAL LAW—Continued.

cept on the complaint of the husband or wife, and no prosecution shall be commenced after one year from the time of the committing of the offence." Held, that by the provisions of this section the spouse of either of the guilty parties is empowered to make complaint against either or both of them. State v. Wesie, 567.

2. In prosecutions for perjury, proof of similar offenses in such cases as bearing on the intent alone is admissible, although the jury would be justified in finding a fraudulent intent without such proof, if they found that the accused was not authorized to sign the name of the person whose name is claimed to have been forged. State v. Murphy, 48.

3. Under section 9931, Rev. Codes 1905, the state can secure a change of the place of trial in a criminal action under the same circumstances as a defendant in a criminal action may under existing laws, and said section 9931 is a constitutional enactment. Barry v. Truax, 13 N. D. 131, 99 N. W. 768, 65 L. R. A. 762, 112 Am. St. Rep. 662, followed. Zinn v. District Court, 135.

4. Upon the application of the state for a change of the place of the trial of a criminal action, on account of local prejudice, the presiding judge transferred the cause to Barnes county, being about 140 miles from the county where the action was pending. It was shown that a speedier trial could be secured in Barnes county than in any county in the fifth judicial district. It was shown that the same prejudice existed in every county in the sixth judicial district as existed in the county where the action originated. The only other county nearer to the county where the action originated than Barnes county is Stutsman county, which is thirty-five miles nearer than Barnes county. Held, that it was not an abuse of discretion to transfer the trial to Barnes county under such circumstances. Zinn v. District Court, 135.

5. Petitioner, who was an officer of a milling corporation engaged solely in the manufacture of flour, is not guilty of larceny under section 2251, Rev. Codes 1905, for neglect or refusal to deliver on demand or to pay the market value of wheat delivered to such corporation by another. Ex parte Bellamy, 140.

6. Said section is construed, and held to apply only to such persons, associations and corporations as are embraced within the purview of section 2244, Rev. Codes 1905, defining public warehousemen. This section, by its terms, expressly excepts from its operation milling concerns not doing a shipping business. Ex parte Bellamy, 140.

7. The evidence before the committing magistrate disclosed that the milling corporation of which petitioner was an officer was not engaged in doing a shipping business. Therefore the commitment under which petitioner is held to answer for the offense of larceny as defined in section 2251, Rev. Codes 1905, aforesaid, is contrary to

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CRIMINAL LAW—Continued.

law and void, and the writ prayed for is granted. Ex parte Bellamy, 140.

8. On cross-examination of one of the state's witnesses, and for the purpose of impeachment, he was asked whether as a matter of fact he was running a certain saloon in violation of law and without a license. To this question counsel for the state objected, and the objection was sustained. Held error. Such question was admissible under the general rule that for the purpose of impeachment a witness may be asked questions as to collateral matters, the answers to which may tend to degrade or otherwise discredit him. State v Dennie, 519.

9. The state's attorney, who was a witness for the state, was permitted to give his opinion or conclusion to the effect that the alleged copy of letter claimed to have been sent from Montana to defendant was on letter paper different from that in use by the Great Northern Hotel at Williston. He was a non-expert witness, and his testimony should have been restricted to facts, leaving it to the jury to draw their own inferences or conclusions therefrom. State v. Denny, 519.

10. Defendants were convicted of the crime of grand larceny. In addition to a denial of guilt, the respondents furnished proof tending to establish an alibi. The trial court gave the following instructions to the jury, with reference to such defense: "There has been some evidence introduced tending to prove an alibi. The court instructs you that an alibi properly proven is considered a good defense, but it must be of a strong, convincing character, and exclude any reasonable hypothesis except the non-presence of the accused." Such instruction was duly excepted to, and the giving of the same was urged, among other grounds, for a new trial. Held, that the giving of said instruction constituted prejudicial error warranting the trial court in granting a new trial. State v. Nelson, 13.

11. On a prosecution for the crime of uttering a forged instrument knowingly, with intent to defraud, proof of similar offenses of forgery is admissible only as bearing on the intent with which the act for which the accused is informed against was done. State v. Murphy. 48.

12. Proof of similar offenses in such cases is admissible only as having a bearing on the intent, although the accused admits at the opening of the trial that he signed the name of the person to the instrument, whose name is claimed to have been forged, and knew when he uttered the instrument that he had signed the name of such person to such instrument. State v. Murphy, 48.

13. Under section 13 of the constitution the witness is protected from testifying to facts and circumstances from which his connection with, or guilt of, a crime, may be proven through other sources than his answers. In re Beer, 184.

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CRIMINAL LAW—Continued.

14. Before a witness can be compelled to answer questions which tend to criminate him, the statute granting immunity must be co-extensive in scope and effect with the constitutional guaranty. In re Beer, 184.

15. The right to one day's time for preparation for trial after the plea is entered is absolute if requested in time. State v. Chase, 429.

16. Under a statute providing for one day's time to prepare for trial, but not prescribing when the request shall be made, a reasonable construction thereof is that the request should ordinarily be made immediately after plea, and before any other steps preliminary to the trial is taken. State v. Chase, 429.

17. Unless the request for time to prepare for trial, pursuant to a statute giving that right, is made in time, the right thereto is waived. State v. Chase, 429.

18. After the plea had been entered and the trial called and four jurors called into the box, the defendants asked for one day's time to prepare for trial, and the court denied the request. Held, not error. State v. Chase, 429.

19. Whether the request for time to prepare for trial is made in time may depend in some cases upon special circumstances, and in such cases the action of the trial court will be entitled to great weight, and will not be disturbed, except in case of manifest abuse of discretion. State v. Chase, 429.

20. Evidence examined, and held not sufficient to warrant the conviction of appellant. State v. Minor, 454.

21. Malice is an essential ingredient of the crime of malicious mischief, and a conviction cannot be sustained in the absence of any evidence disclosing such malice. State v. Minor, 454.

22. An instruction defining the term "feloniously" as "an intent to commit a felony or an intent to commit a wrongful act which might result in the commission of a felony," etc., is erroneous. By the use of the word "might" the jury was told, in effect, that a person is by law presumed to intend all the possible, rather than the reasonably probable, consequences of his voluntarily wrongful act. Said definition was also erroneous as it in effect informed the jury than an intent to commit a wrongful act which might result in receiving stolen property, knowing the same to be stolen, constituted a felonious intent within the meaning of the law relating to the offense charged in the information, to-wit, receiving stolen property, knowing the same to be stolen. State v. Denny, 519.

23. In a prosecution for receiving stolen property, knowing the same to have been stolen, it is unnecessary to allege or prove who the thief was. It is accordingly held, that an instruction to the effect that it is immaterial who committed the larceny was not prejudicial, in view of the state of the proof, which in no manner tended to implicate the defendant in the larceny. State v. Denny, 519.

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CRIMINAL LAW—Continued.

24. An instruction that "guilty knowledge is made out and sufficiently proven to warrant a conviction in that respect by proof that the defendant received the property under such circumstances as would satisfy a man of ordinary intelligence and caution that they were stolen," is erroneous. Such instruction lays down an arbitrary rule for determining guilty knowledge, using as a test facts which would satisfy a man of ordinary intelligence and caution. The standard by which to impute guilty knowledge is not that of a man of ordinary intelligence and caution, but the test is a personal test of the defendant. Under such an instruction, no discretion was vested in the jury and hence the same constituted an invasion of the province of the jury. State v. Denny, 519.

25. Among other things the jury was instructed as follows: "This felonious intent, to warrant a conviction, must have consisted of his intentional receipt of stolen property, knowing the same to be stolen, with further intent in the defendant in receiving the same to deprive the owner of said property, or to derive gain, profit or consideration to himself from receiving or concealing said property or the disposal thereof." Such instruction was proper, as a person may be convicted, even though he receive the stolen property with the intention of restoring it to the owner, if his purpose was also to receive a reward therefor. State v. Denny, 519.

26. The state was permitted, over defendant's objection, to give secondary evidence as to the contents of a certain copy of a letter claimed to have been written by one Miller to defendant, and tending to show defendant's guilty knowledge in receiving the stolen property. Held, for reasons stated in the opinion, that such ruling constituted prejudicial error, for the reason that no sufficient foundation for the introduction of such testimony had been shown. State v. Denny, 519.

27. The sufficiency of the allegations of an information, when raised by a motion in arrest of judgment, will be construed with less strictness than when raised by demurrer. State v. Johnson, 554.

28. Where an information states facts constituting an offense in general words, and in the language of the statute defining the offense, the information is sufficient, as against a motion in arrest of judgment, although some of the necessary allegations are stated or appear by inference, and not by positive allegation. State v. Johnson, 544.

29. A person accused of a crime, in the commission of which a corrupt intent is a necessary ingredient thereof, may testify what his intent was in doing certain acts. State v. Johnson, 554.

30. A person accused of crime should be allowed the fullest latitude to explain what his intent was in writing or making statements, apparently incriminating, and in explaining what he meant by certain equivocal statements. State v. Johnson, 554.

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CRIMINAL LAW—Continued.

31. When attacked for the first time by a motion in arrest of judgment, an information for the crime of rape in the first degree, drawn under subdivision 3 of section 8890, Rev. Codes 1905, will not be held fatally defective in not charging, in direct and positive language, that the female ravished resisted, and her resistance was overcome by force or violence. State v. Rhoades, 579.

32. An alleagtion that defendant did, "by force and violence, then and there overcome the resistance then and there made by * * *," will, when its sufficiency is challenged only after verdict, be held equivalent to an allegation that the female ravished resisted, and that her resistance was overcome by defendant by force and violence. State v. Rhoades, 579.

33. Evidence examined, and held insufficient to support the verdict finding appellant guilty of rape in the first degree. State v. Rhoades, 579.

CROSS-EXAMINATION. See TRIAL, 519.

DAMAGES. See DRAINS, 266; RAILROADS, 413; EVIDENCE, 606; COMMON CARRIERS, 610.

1. Plaintiffs seek to recover damages against defendant in the sum of $540 and interest, being the amount they would have received as commissions if defendant had accepted the offer of their customer. Held, that they wholly failed to establish a cause of action as alleged; and hence that it was not error to direct a verdict in defendant's favor. Harris Bros. v. Reynolds, 16.

2. An action for damages for a refusal to convey real estate will not lie without a tender of the agreed price, unless it appears that a tender would be a futile act. If the refusal is conditional on future events, a tender is necessary before a cause of action is shown. Beiseker v. Amberson, 215.

3. Where the mortgagor sues the mortgagee for damages for a wrongful sale without foreclosure, in such cases the mortgagee may plead and show the amount due on the lien of the mortgage in mitigation of damages growing out of the wrongful conversion. Force v. Peterson Machine Co., 220.

4. Following Tyler v. Shea, 4 N. D. 278, 61 N. W. 468, 50 Am. St. Rep. 660, held, that there is no violation of any constitutional provision, in having damages to real estate, resulting from the construction of a drain, assessed by a jury, and the benefits to the same property assessed by the drain commissioners. Ross v. Prante, 266.

5. In an action for damages for the conversion of grain, it is competent to plead and show as an equitable defense that the grain was mortgaged to the defendant and that the mortgage was drawn by mistake to cover the crop of another year, without first reforming the mortgage through an equitable action. Gorder v. Hilliboe, 281.

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DAMAGES—Continued.

6. A person in passing over a public railway crossing is bound to use care commensurate with the known and reasonably apprehended danger; but it is only in exceptional cases that a trial court is justified in taking from the jury the question of the exercise of such care. Under the evidence, it cannot be said as a matter of law that plaintiff and his daughter were guilty of contributory negligence in not stopping the automobile before making such crossing. Certain instructions as to the meaning of the terms "proximate cause" and "contributory negligence" examined, and held correct. Pendroy v. Gt. N. Ry. Co., 433.

7. In an action for damages occasioned by a sale on execution of plaintiff's additional exemptions, when such sale is attempted to be justified by a claim that the debt forming the basis of the execution was contracted by reason of false pretenses, exemplary or punitive damages are not recoverable unless malice and a want of good faith is shown on the part of the party causing the sale. Galvin v. Tibbs, 600.

8. The good faith necessary to defeat a claim for exemplary damages may be shown in other ways than by showing a full statement of facts to counsel who advised the action complained of. Galvin v. Tibbs, 600.

9. Action to recover damages for the negligent killing of stock which was trespassing upon defendant's right of way. Plaintiff recovered a verdict for $465. Held, that the evidence is amply sufficient to justify such verdict. McDonell v. Soo. Ry. Co., 606.

10. The complaint alleged, and the plaintiff was permitted over objection to show, certain special damages suffered by him, on account of extra care and attention required in rearing a sucking colt, the increase of one of the animals killed. Held, not error, as defendant's negligence in killing the dam of said colt was the proximate cause of the special damages thus claimed. McDonell v. Soo. Ry. Co., 606.

DEDICATION.

1. The rule regarding dedication by estoppel with reference to streets applies equally to public squares and parks. Cole v. Minn. Loan & Trust Co., 409.

2. Section 3016, Rev. Codes 1905, which authorizes and empowers cities and villages to receive, by gift or devise, real estate for purposes of parks or public grounds, is not exclusive in its operation, and lands or easements therein may be acquired for such purposes by a common-law dedication thereof. The owners and proprietors of the townsite of K. left a square in the center thereof, undivided into lots, and designated simply by the numeral "2." The other blocks were divided into lots, and those blocks surrounding block

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DEDICATION—Continued.

2 were platted into lots, facing toward said square. One of the proprietors of the townsite had active charge of the sale of lots therein, and he represented to prospective purchasers that such square was and would remain a public square or park. Plaintiffs, in reliance thereon, and also upon like representations made by one C, who was also a partner in such townsite enterprise, purchased lots fronting on said square, and made valuable improvements thereon. Held, that said acts and representations constituted a common law dedication of such block as a public square or park. Held, further, that defendants are estopped, by reason of such acts and representations, to deny that said block 2 has been dedicated to the public for the uses aforesaid. Cole v. Minn. Loan & Trust Co., 409.

3. An intention to dedicate property to a public use must be clearly established, but such an intention may be shown by deed, by words or by acts. Construing the testimony in the light of such rule, it is held that the intention of the proprietors of the towsite to dedicate said block to the public is clearly established. Cole v. Minn. Loan & Trust Co., 409.

4. The statutes of this state, prescribing the method of dedicating real property to public uses, as well as easements therein for such purposes, are not and were not intended to be exclusive of the common-law method of dedication, nor do they abrogate the well settled rule of implied dedication by estoppel in pais. Cole v. Minn. Loan & Trust Co., 409.

DEEDS. See FORECLOSURE, 145, 466; MORTGAGES, 145; VENDOR AND PURCHASER, 161; QUIETING TITLE, 502.

1. Such sheriff's deed is in the nature of deeds issued under judicial proceedings, and is not within the purview of the statute against champerty and maintenance. State Finance Co. v. Halstenson, 145.

2. The dropping of an initial letter of a name in a conveyance is not such a variance or misnomer as to require extrinsic proof of the identity of the person. State Finance Co. v. Halstenson, 145.

3. Before a conveyance of real property will be set aside as having been given under duress or menace, the proof must be clear, specific and satisfactory. Anderson v. Anderson, 275.

4. Before a deed of real property will be set aside as having been executed through the influence of threats of violence or arrest, the proof must show that the deed was executed under the influence of such threats, and while the will was overcome by reason of such threats or duress or menace. Anderson v. Anderson, 275.

5. Whether a deed was executed under the influence of threats is a question of fact in all cases depending upon the circumstance of each particular case. Anderson v. Anderson, 275.

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DEEDS—Continued.

6. Facts recited in the opinion held to show that a deed was not executed under the influence of threats. Anderson v. Anderson, 275.
7. Appellant purchased a quitclaim deed for the land in controversy from one Bowdle, in August, 1890. The only title possessed by Bowdle was derived from a deed under sale for taxes for the year 1896. It is contended that such tax deed is invalid. Without determining this question, but conceding for the purposes of this case that it is invalid, and following Power v. Kitching, 10 N. D. 254, 86 N. W. 737, 88 Am. St. Rep. 691, it is held that the title so obtained by appellant is adequate as foundation for title in the appellant under section 4928, Rev. Codes 1905, which reads: "All titles to real property vested in any person or persons who have been or hereafter may be in actual, open, adverse and undisputed posssession of the land under such title for a period of ten years, and shall have paid all taxes and assessments legally levied thereon, shall be and the same are declared good and valid in law, any law to the contrary notwithstanding." Stiles v. Granger, 502.

DEMURRER. See PLEADINGS, 91, 177, 191; TRIAL, 554.

DEPOSITION.

1. A general objection to a deposition, on the ground of the incompetency or irrelevancy of the evidence contained therein, is not tenable where the deposition contains evidence material to the issues not subject to such objection. Hilliboe, Admr., v. Warner, 594.

DISCRETION. See SCHOOLS AND SCHOOL DISTRICTS, 510.

1. On this case being regularly called for trial, the defendant submitted a motion for a judgment upon the pleadnigs, whereupon plaintiff asked leave to amend his second amended complaint and the reply to defendant's answer. Held, that the record discloses no abuse of the legal discretion vested in the trial court by its refusal to permit such amendments. Scott v. N. W. Port Huron Co., 91.
2. When a change of the place of trial is obtained by the state on account of the existence of prejudice among the inhabitants against the enforcement of the prohibition or other laws, the selection of the county to which the case must be sent rests exclusively with the presiding judge in the exercise of a sound judicial discretion. Zinn v. District Court, 135.
3. Upon the application of the state for a change of the place of the trial of a criminal action, on account of local prejudice, the presiding judge transferred the cause for trial to Barnes county, being about 140 miles from the county where the action was pending. It was shown that a speedier trial could be secured in Barnes county than in any county in the fifth judicial district. It was shown that the same prejudice existed in every county in the sixth district,

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DISCRETION—Continued.

as exists in the county where the action originated. The only other county nearer to the county where the action originated than Barnes county is Stutsman county, which is thirty-five miles nearer than Barnes county. Held, that it was not an abuse of discretion to transfer the trial to Barnes county under such circumstances. Zinn v. District Court, 135.

4. Matters pertaining to amendment of pleadings, continuances, and the bringing in of the personal representatives of deceased parties at the trial of actions are within the discretion of trial courts, and their action will not be disturbed, except in case of abuse thereof resulting in prejudice. State Finance Co. v. Halstenson, 145.

5. It was not an abuse of discretion to permit certain testimony to be introduced by way of rebuttal, even if strictly speaking it was a part of plaintiff's case in chief. Pease v. Magill, 166.

6. Evidence examined, and held sufficient to support the verdict. Where the trial court has been asked and has refused to disturb the verdict upon the alleged ground that the same is not supported by the evidence, this court will not reverse such decision, except in a clear case of abuse of discretion. Bristol & Sweet Co. v. Skapple, 270.

7. While an action in which a jury trial was waived is still pending in the district court, that court has jurisdiction and power to correct its own errors, and may in the exercise of its discretion on notice and motion vacate its findings and judgment, and make new findings and enter a new and different judgment. Plano Mfg. Co. v. Doyle, 386.

8. An answer is amendable, subject to the discretion of the court, alleging a release of the debt sued on by virtue of bankruptcy proceedings begun after the action was commenced. Erickson v. Elliott, 389.

9. Whether the request for time to prepare for trial is made in time may depend in some cases upon special circumstances, and in such cases the action of the trial court will be entitled to great weight and will not be disturbed, except in case of manifest abuse of discretion. State v. Chase, 429.

10. The granting of a new trial for insufficiency of the evidence to sustain the verdict is largely within the sound judicial discretion of the trial court, and its decision should not be disturbed except for an abuse of such discretion. Galvin v. Tibbs, 600.

DISTRICT COURT. See COURTS, 128; PLEADINGS, 389; JURISDICTION, 532.

1. A district court may properly entertain jurisdiction of an action brought by parties whose property is about to be destroyed by the pure food commissioner, and who will, from the nature of their business and other facts, be thereby subjected to a multiplicity of

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DISTRICT COURT—Continued.

suits to enjoin him from unlawfully proceeding. State v. District Court, 285.

2. The writ of prohibition will not issue against a district court to restrain it from further proceedings in an action to enjoin the pure food commissioner, when the issue in that court is the legality or illegality of the act threatened by the commissioner, and the record leaves this question in doubt. State v. District Court, 285.

DRAINS.

1. Following Tyler v. Shea, 4 N. D. 278, 61 N. D. 468, 50 Am. St. Rep. 660, held, that there is no violation of any constitutional provision in having damages to real estate, resulting from the construction of a drain, assessed by a jury, and the benefits to the same property assessed by the drain commissioners. Ross v. Prante, 266.

2. Chapter 23, Rev. Codes 1905, known as the "Drainage Law," does not contemplate the assessment of benefits from the construction of a drain by a jury. Ross v. Prante, 266.

3. A judgment for damages, and condemning a right of way for a drain under chapter 23, Rev. Codes 1905, in an action in which no benefits were considered, does not preclude the drain commissioners from assessing benefits. Ross v. Prante, 266.

4. The drainage act, being sections 1818 to 1850, Rev. Codes 1905, does not conflict with section 25 of the state constitution, which vests the legislative power of the people of the state in the legislative assembly. Appellant's contention that such drainage law is an unwarranted delegation of legislative power to the board of drain commissioners is not sustained. Soliah v. Cormack, 393.

5. Such law does not violate the fourteenth amendment to the constitution of the United States, nor section 13 of the constitution of this state, prohibiting the taking of property without due process of law. Soliah v. Cormack, 393.

DURESS.

1. Before a conveyance of real property will be set aside as having been given under duress or menace, the proof must be clear, specific and satisfactory. Anderson v. Anderson, 275.

2. Before a deed of real property will be set aside as having been executed through the influence of threats of violence or arrest, the proof must show that the deed was executed under the influence of such threats, and while the will was overcome by reason of such threats or duress or menace. Anderson v. Anderson, 275.

3. Whether a deed was executed under the influence of threats is a question of fact in all cases depending upon the circumstances of each particular case. Anderson v. Anderson, 275.

4. Facts recited in the opinion held to show that a deed was not executed under the influence of threats. Anderson v. Anderson, 275.

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DUE PROCESS OF LAW. See CONSTITUTIONAL LAW, 393.

EASEMENT. See DEDICATION, 409; EMINENT DOMAIN, 202.

ELECTIONS. See VOTERS, 532.

1. The officers of a school district are in effect agents of the voters and taxpayers, and when the district, at a regularly called and conducted election, votes to issue the bonds of the district and from the proceeds to build a schoolhouse, such vote is an instruction by the principal, and such officers have no discretion as to obeying their instructions. Schouweiler v. Allen, 510.
2. After a majority of the voters of a school district had instructed the school board to issue bonds for building purposes, a taxpayer and voter of the district brought suit to enjoin the issuance of the bonds voted, alleging that enough illegal votes were cast in favor of the bonds to change the result. The school board answered, denying all allegations of the complaint, relating to illegal votes; but subsequently a majority of the board stipulated personally with the plaintiff in such action that judgment should be rendered and entered in favor of the plaintiff, permanently enjoining the defendants from issuing the bonds so voted. On such stipulation, without the submission of evidence, and without making any findings, the court ordered judgment as stipulated. Held, that such stipulation constitutes collusion between the plaintiff and the officers, and a legal fraud upon the district and the court, and furnished no basis for the judgment entered, and that it was error to order judgment upon such collusive, illegal and void stipulation. Schouweiler v Allen, 510.
3. Section 911, Rev. Codes 1905, which provides that, if a majority of all the votes cast at a school district election at which the issue of bonds is submitted, should be in favor of issuing bonds, the school board, through its proper officers, shall forthwith issue bonds in accordance with such vote, is mandatory. Schouweiler v. Allen, 510.
4. Where a petition is presented for a division of a county, and the county commissioners order the submission of the question of the division of the county, pursuant to the petition, to a vote at the next general election, the county auditor is without authority to refuse to give notice that the question of the division of the county, pursuant to the petition, will be voted on at the next general election, on the alleged ground that the county proposed to be organized, pursuant to the petition, is to contain in part the same territory as the territory to be embraced in another county proposed to be organized pursuant to another petition, which was on file, and had been acted on by the commissioners when the petition in this case was presented to the commissioners and acted on. State v. Fabrick, 532.

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ELECTIONS—Continued.

5. Where a voting place at a primary election is duly established by the county commissioners at a certain place, an election held at another place over three miles distant, pursuant to a resolution of a majority of the voters of the precinct assembled at a political meeting, is unauthorized, and the returns of the election at such place should not be canvassed. Elvick v. Groves, 561.
6. Evidence that no injury followed such change of the voting place is not admissible. Elvick v. Groves, 561.
7. It is only in case of emergency or extraordinary circumstances that such a change of a voting place should be upheld. Elvick v. Groves, 561.
8. In the performance of his duties as secretary of state, in certifying the names of candidates for state offices to the different county auditors for printing upon the ballot to be used at the general election, the secretary acts in a ministerial capacity; and, when certificates of nomination filed with him are legal in form, it is not any part of his duty to examine into the facts recited in such certificates to ascertain their truth or falsity. State v. Blaisdell, 575.
9. Certificates of nomination filed with the secretary of state, legal in form, are prima facie evidence of the facts which they recite. State v. Blaisdell, 575.
10. Certificates of nomination, provided for by section 501, Rev. Codes 1899, need not be verified. State v. Blaisdell, 575.
11. While authorities are not in harmony as to what principles constitute the principles of Socialism, their main tenets are sufficiently understood and agreed upon, so the word "Socialist" may be used to designate a political party. State v. Blaisdell, 575.
12. A certificate of nomination, to which are affixed the requisite number of signatures, nominating a person as a candidate of the Socialist party for a state office, in other respects conforming to law, is a valid certificate, and entitles the party nominated to have his name placed in the column provided for individual nominations on the Australian ballot for use at the general election. State v. Blaisdell, 575.

EMINENT DOMAIN.

1. Construing section 7811, Rev. Codes 1905, it is held that an order made after judgment in a condemnation suit, by the terms of which order the clerk is directed to retain in his possession certain moneys paid to him in satisfaction of such judgment until the final determination of a certain tax proceeding pending in such court under the Wood law, wherein Cass county as plaintiff seeks to recover certain delinquent taxes claimed to be a lien against the property thus condemned, is an appealable order, and hence the proper remedy for a review of said order is by appeal and not

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EMINENT DOMAIN—Continued.

by certiorari. Held, further, that the district court did not exceed its jurisdiction in making a similar order in the tax case wherein these petitioners were defendants, and hence petitioners have mistaken their remedy in applying for the writ aforesaid. Soo Ry. v. Blakemore, 67.

2. A complaint in an action by a railway company to condemn certain property as a site for a reservoir for the collection and storage of surface water for use in its engines sufficiently alleges a cause of action if it sets forth the ultimate facts that the property sought to be condemned is necessary for the purpose of obtaining water required in the operation of its trains. N. P. Ry Co. v. Boynton, 202.

3. Private property cannot be taken under the power of eminent domain except for a public use, but under the law of this state, the use of property reasonably necessary for the construction, maintenance or operation of a railroad is public use. N. P. Ry. Co. v. Boynton, 202.

4. Ultimate facts are all that is requisite or proper to plead, and hence a complaint in an action by a railway corporation to condemn property is sufficient if it alleges that the use thereof is necessary to its construction, maintenance or operation, without alleging in terms that such desired use is a public use. Such latter allegation would constitute a mere conclusion of law. N. P. Ry. Co. v. Boynton, 202.

5. Evidence examined, and held sufficient to sustain the allegations of the complaint as to the necessity for the use of the property and the whole thereof sought to be condemned. N. P. Ry. Co. v. Boynton, 202.

6. The description of the easement sought to be condemned for the construction of a pipe line is held sufficiently definite and certain. N. P. Ry. Co. v. Boynton, 202.

EQUITY. See INJUNCTION, 285.

1. Where a conveyance of real estate is delivered by a daughter to her father under an oral contract that it is given in trust for the daughter, and such contract is proven by declarations of the father at the time the deed is delivered, and it is shown that the trust has not been carried out, a court of equity will enforce the trust, as the refusal to carry it out is a constructive fraud, based on the relations of confidence existing between the parties. Cardiff v. Marquis, 110.

2. In such a case it is immaterial whether the fraud was intentional or not, or whether it existed when the conveyance was delivered. Cardiff v. Marquis, 110.

3. In such a case courts of equity do not enforce the trust in violation of the statute of frauds, but relief is granted as based on the constructive fraud and the confidential relation. Cardiff v. Marquis, 110.

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EQUITY—Continued.

4. The right to show the existence of liens in such cases is based upon equitable principles, but the rules of pleading in equity cases do not apply. Force v. Peterson Machine Co., 220.
5. In an action for damages for the conversion of grain, it is competent to plead and show as an equitable defense that the grain was mortgaged to the defendant and that the mortgage was drawn by mistake to cover the crop of another year, without first reforming the mortgage through an equitable action. Gorder v. Hilliboe, 281.
6. A district court may properly entertain jurisdiction of an action brought by parties whose property is about to be destroyed by the pure food commissioner, and who will, from the nature of their business and other facts, be thereby subjected to a multiplicity of suits to enjoin him from unlawfully proceeding. State v. District Court, 285.
7. The writ of prohibition will not issue against a district court to restrain it from further proceedings in an action to enjoin the pure food commissioner, when the issue in that court is the legality or illegality of the acts threatened by the commissioner, and the record leaves this question in doubt. State v. District Court, 285.

ESTOPPEL. See DEDICATION, 409.

1. The doctrine of estoppel cannot be invoked to prevent defendant from questioning plaintiff's title, first, because the evidence fails to show that defendant was plaitniff's tenant of the land; and, second, even if such tenancy existed, defendant would not be thus estopped in an action like this, where plaintiff claims title in fee. Hebden v. Bina, 235.
2. Section 3016, Rev. Codes 1905, which authorizes and empowers cities and villages to receive, by gift or devise, real estate for purposes of parks or public grounds, is not exclusive in its operation, and lands or easements therein may be acquired for such purposes by a common-law dedication thereof. The owners and proprietors of the townsite of K. left a square in the center thereof, undivided into lots, and designated simply by the numeral "2." The other blocks were divided into lots, and those blocks surroundnig block 2 were platted into lots, facing toward said square. One of the proprietors of the townsite had active charge of the sale of lots therein, and he represented to prospective purchasers that such square was and would remain a public square or park. Plaintiffs, in reliance thereon, and also upon like representations made by one C., who was also a partner in such townsite enterprise, purchased lots fronting on said square, and made valuable improvements thereon. Held, that said acts and representations constituted a common-law dedication of such block as a public square or park. Held, further, that defendants are estopped, by reason of such acts and representations, to deny that said block 2 has been dedicated

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ESTOPPEL—Continued.

to the public for the uses aforesaid. Cole v. Minn. Loan & Trust Co., 409.

3. On submission of all their evidence, both parties made motions for a directed verdict. Neither party requested the submisison of any facts to the jury. Held, that they thereby waived any right which they might have otherwise had to an undirected verdict, and are estopped from assigning error for not submitting the facts to the jury. Duncan v. Gt. N. Ry. Co., 610.

EVIDENCE. See INSTRUCTIONS, 13, 165; CONTRACTS, 16; FORECLOSURE, 84, 235; PLEADING, 104; RECORDING TRANSFERS, 145; APPEAL AND ERROR, 120, 375; ESTOPPEL, 235; PRINCIPAL AND AGENT, 248; NEW TRIAL, 310, 600; CRIMINAL LAW, 454; COMMON CARRIERS, 610; ADVERSE CLAIMS, 84.

1. Evidence examined, and held to show that possession was relinquished by the vendee in a contract for the purchase of land, and taken by the mortgagor before the mortgage in suit was executed and delivered. Gray v. Harvey, 1.

2. In an action by a fire company to recover from a city its proportionate share of the 2 per cent of the premiums received upon fire policies, issued on property in such city, under section 2968, Rev. Codes 1905, the plaintiff must show affirmatively that it had the management of at least one steam, hand or fire engine, hook and ladder truck, or hose cart, during the time wherein it claims to be entitled to such premium. Hose Co. v. Fargo, 5.

3. When a technical meaning of a word or term is relied upon to sustain the plaintiff's cause of action, and such meaning is not commonly known or understood, and is not given in dictionaries, encyclopedias, or legal works, and the word or term has a meaning commonly known and understood, the burden is upon the plaintiff to show by competent evidence the technical meaning of such term or word, and in the absence of such showing it will be presumed to have been used in the statute in the sense in which it is ordinarily and commonly used and understood by people in general. Hose Co. v. Fargo, 5.

4. A record describing articles of freight received at a local station, and delivered to the consignee, with his signature acknowledging receipt of such articles, is competent evidence, tending to show the nature of the articles so receipted for. State v. Dahlquist, 40.

5. A drayman, authorized in writing by the defendant to receive and receipt for freight at a local railway station, is an agent of the defendant for such purposes; accordingly held, receipts for freight, belonging to the defendant, taken from the railway station by a drayman possessing such authority, and receipted for by him, are competent evidence, as tending to show the receipt by the principal of the articles of freight described in the record of the station, containing such receipts. State v. Dahlquist, 40.

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EVIDENCE—Continued.

6. The competency of evidence depends on the state of the record when the evidence is offered, and the admission of evidence afterward shown to be incompetent, when no specific motion to strike it out or request to instruct the jury to disregard it is made, is not reversible error. State v. Dahlquist, 40.

7. A record of the local railway station, describing outgoing freight delivered to it by the defendant, which record is identified by the station agent, who testified that he received the information as to the character of the freight so shipped as described in the record, from the defendant, is competent evidence, to show the character of such shipments, in the action at bar. State v. Dahlquist, 40.

8. The records of a local railway station, containing receipts signed by the defendant. and others signed by his agent and a description of outgoing freight, described to the agent, and shipped by the defendant, are competent evidence, tending to show the defendant to be conducting the business of dealing in intoxicating liquors or beer, when such records describe large quantities of empty beer cases, bottles and casks, and especially when the quantity so received was so great as to render it impossible for the defendant to have made personal use of it, during the time covered. State v. Dahlquist, 40

9. An objection made to the admission of a record as a whole, and without distinguishing or pointing out in the objection the particular items, if any, which were competent evidence, and those which were claimed to be incompetent, when a part of the items were competent, and some of them may have been incompetent evidence, is inadequate, and it is not error for the trial court to admit the whole record. State v. Dahlquist, 40.

10. On a prosecution for the crime of uttering a forged instrument knowingly, with intent to defraud, proof of similar offenses of forgery is admissible only as bearing on the intent with which the act for which the accused is informed against was done. State v. Murphy, 48.

11. Proof of similar offenses in such cases is admissible only as having a bearing on the intent, although the accused admits at the opening of the trial that he signed the name of the person to the instrument, whose name is claimed to have been forged, and knew when he uttered the instrument that he had signed the name of such person to such instrument. State v. Murphy, 48.

12. Proof of similar offenses in such cases as bearing on the intent alone is admissible, although the jury would be justified in finding a fraudulent intent without such proof, if they found that the accused was not authorized to sign the name of the person whose name is claimed to have been forged. State v. Murphy, 48.

13. Declarations of a party to a contract, as to the terms of the contract, are not admisible as evidence as a part of the res gestae when made after the contract is completed, and not in the presence of

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EVIDENCE—Continued.

the parties, although made very soon after the parties separated. State v. Murphy, 48.

14. Such declarations in this case considered, and held not within the exception to the rule against hearsay evidence that such declarations are admissible as spontaneous expressions made in reference to the contract. State v. Murphy, 48.

15. The cashier of a national bank, which is a party to an action, is a competent witness to testify to the fact of the mailing of a notice to a deceased person, whose executor and heirs at law are parties to the action, as section 7253, Rev. Codes 1905, prohibits evidence of parties only in such cases. Bank v. Warner, 76.

16. The contractor of a building, pursuant to a contract with the owner of the building, is not a competent witness as to payments made on said contract, where the owner of the building has since died, and his executors and heirs at law are made parties defendant with said contractor in an action by the plaintiff to foreclose its lien as a subcontractor. Bank v. Warner, 76.

17. An objection to evidence as incompetent, irrelevant and immaterial is too general to suggest the objection that the evidence is incompetent as relating to a transaction with a deceased person, whose executor and heirs at law are parties to the action. Bank v. Warner, 76.

18. Where a contractor and the executors and heirs at law of the deceased owner of a building, erected under a contract between said contractor and the owner, are parties defendant in an action to foreclose a subcontractor's lien, the evidence of the contractor as to when the building was completed is not objectionable as referring to a transaction with a party since deceased, under section 7237, Rev. Codes 1905. Bank v. Warner, 76.

19. The fact that a witness is a proper party to an action in which the executor, administrator, or heirs at law of a deceased person are parties, disqualifies such witness from testifying to transactions or statements made by such deceased person. The fact that such witness is a party defendant with the administrator, executor, or heirs does not render him competent as a witness in such cases. Cardiff v. Marquis, 110.

20. The evidence of a witness who is a party in such cases is inadmissible to prove that letters were written and signed by the witness at the request and dictation of the deceased person, whose administrator is a party to the action. Cardiff v. Marquis, 110.

21. The evidence of a witness who is a party to an action in which the administrator of a deceased person is also a party is not admissible to prove the contents of lost letters written or received by the witness to or from such deceased person. Cardiff v. Marquis, 110.

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EVIDENCE—Continued.

22. Where a conveyance of real estate is delivered by a daughter to her father under an oral contract that it is given in trust for the daughter, and such contract is proven by declarations of the father at the time the deed is delivered, and it is shown that the trust has not been carried out, a court of equity will enforce the trust, as the refusal to carry it out is a constructive fraud, based on the relations of confidence existing between the parties. Cardiff v. Marquis, 110.

23. An answer by the defendant in a garnishee action alleging that the property in the garnishee's hand is exempt (referring to the time of making the answer), does not state a defense, and evidence that such property is exempt at that time is not admissible under such answer. Mahon v. Fansett, 104.

24. The evidence before the committting magistrate disclosed that the milling corporation of which petitioner was an officer was not engaged in doing a shipping business. Therefore the commitment under which petitioner is held to answer for the offense of larceny as defined in section 2251, Rev. Codes 1905, aforesaid, is contrary to law and void, and the writ prayed for is granted. Ex parte Bellamy, 140.

25. Evidence examined, and held to show that the names Ackerland and Ackenland refer to the same person. State Finance Co. v. Halstenson, 145.

26. Even if such instructions had been properly excepted to, it would not avail defendant as the burden of proof under the issues was upon defendant. Pease v. Magill, 166.

27. It was not an abuse of discretion to permit certain testimony to be introduced by way of rebuttal, even if strictly speaking it was a part of plaintiff's case in chief. Pease v. Magill, 166.

28. Certain other rulings regarding the admission and rejection of testimony considered, and held not error. Pease v. Magill, 166.

29. The presumption that the owner of land is entitled to the crops grown thereon is prima facie one only, and may be overcome by the contract of the parties in reference to the disposition to be made of the crop. Wadsworth v. Owens, 173.

30. Where a party on his cross-examination denies having made admission to a witness, material and relevant to the issues, it is proper to show by such witness that the party made such admissions, and it is error to strike out the evidence that such admissions were made. Wadsworth v. Owens, 173.

31. Objections to certain evidence held to be well taken, but that the evidence is not controlling of the decision, in view of other evidence in the record. Malony v. Geiser Mfg. Co., 195.

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EVIDENCE—Continued.

32. Evidence examined, and held sufficient to sustain the allegations of the complaint as to the necessity for the use of the property and the whole thereof sought to be condemned. N. P. Ry. Co. v. Boynton, 202.

33. Objections to certain questions considered in the opinion, and the rulings thereon held not prejudicially erroneous. Lund v. Upham, 210.

34. The sufficiency of the evidence to sustain a verdict cannot be considered by the trial court on a motion for a new trial, nor by this court on appeal, unless the settled statement of the case contains specifications of particulars wherein the evidence is insufficient to sustain the verdict. Lund v. Upham, 210.

35. If the bank, through its cashier, M., acted as agent for defendants, and received the benefit of the transaction, it was under a legal obligation to account to defendants for such funds, even though M. exceeded his authority in thus acting; but it is held that the bank through its proper officers, had a right to act as such agent, and hence if it did so act, such acts were not ultra vires, and the corporation would be liable to defendants for all funds thus collected. Bank v. Bakken, 224.

36. Evidence reviewed, and held to show a delivery of a bill of sale in accordance with the intention of the grantor. Aber v. Twichell, 229.

37. Evidence examined, and held insufficient to show possession of the real property in plaintiff prior to the commencement of the action, and hence the prima facie presumption of title resulting from possession does not apply in plaintiff's behalf. Hebden v. Bina, 235.

38. Evidence considered and reviewed, and held to show that nothing was due on the note or mortgage securing the same when the foreclosure was made. Pratt v. Beiseker, 243.

39. Notes taken by an agent in the name of his principal for the purchase price of a machine sold without authority, of which fact the principal was afterwards informed, are competent evidence bearing on the question whether there was a ratification of the act with knowledge of all the material facts. Russell v. Waterloo T. M. Co., 248.

40. Held, further, that such rulings and the giving of the instructions complained of, if error, cannot avail appellant, as the same were not properly specified in the notice of intention to move for a new trial; the motion for new trial being based upon the minutes of the court. State v. Robb-Lawrence Co., 257.

41. A person in actual possession of and having actual control over personal property is prima facie the owner thereof. Mariner v. Wasser, 361.

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EVIDENCE—Continued.

42. Action to recover the purchase price of goods sold and delivered to the copartnership of S. & M. at Wales, N. D., of which it is alleged the respondent was a member. By the separate answer and stipulation of respondent, all questions were eliminated, except the single one whether he was a member of such copartnership. Defendant, both by his answer and the stipulation, contended that there were two distinct firms at Wales doing business under said copartnership name, and that he was not a member of the firm with which plaintiff had its dealings. Held that, by thus narrowing the issues, the burden of proof as to the only remaining issue was not shifted from plaintiff to said defendant; hence the trial court's charge as to the burden of proof was correct. Bristol & Sweet Co., v. Skapple, 270.

43. A witness was asked in substance if defendant did not at a certain interview with plaintiff's collector treat the claim made by such collector as a claim against the firm of which he was a member. Such question did not call for an answer as to a fact, but merely a conclusion, and hence the objection on such ground was properly sustained. Bristol & Sweet Co. v. Skapple, 270.

44. Before a deed of real property will be set aside as having been executed through the influence of threats of violence or arrest, the proof must show that the deed was executed under the influence of such threats, and while the will was overcome by reason of such threats or duress or menace. Anderson v. Anderson, 275.

45. Whether a deed was executed under the influence of threats is a question of fact in all cases depending upon the circumstances of each particular case. Anderson v. Anderson, 275.

46. In an action for damages for the conversion of grain, it is competent to plead and show as an equitable defense that the grain was mortgaged to the defendant and that the mortgage was drawn by mistake to cover the crop of another year, without first reforming the mortgage through an equitable action. Gorder v. Hilliboe, 281.

47. In the statutory action to determine adverse claims to real property, it is incumbent upon plaintiff to prove a title sufficient to authorize him to maintain the action, and, until he furnishes such proof, the defendant is not required to prove his adverse title or claim. Youkers v. Hobart, 296.

48. An objection to the offer of notes or documents, in evidence, as incompetent, irrelevant and immaterial, is too general, and does not raise an objection thereto that the execution of the notes has not been proven. Landis Machine Co. v. Konantz Saddlery Co., 310.

49. Plaintiff's sole proof of title consisted of a tax deed based upon an alleged tax sale made on December 3, 1901, for the taxes for the year 1900. This deed is held void upon its face, for the reason that it discloses that the sale was conducted contrary to the pro-

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EVIDENCE—Continued.

visions of chapter 154, page 198, Laws 1901, which requires that "each tract shall * * * be struck off to the bidder * * * who will agree to accept the lowest rate of interest," etc., Youkers v. Hobart, 296.

50. The admission of hearsay evidence is not prejudicial error, when the objecting party thereafter establishes by his own evidence the facts testified to, based on hearsay. Landis Machine Co. v. Konantz Saddlery Co., 310.

51. Certain evidence as to prior, but wholly independent contracts and transactions of plaintiff with other citizens of the state claimed to have been violations of such statute, is held irrelevant. Sucker State Drill Co. v. Wirtz, 313.

52. Evidence examined, and held insufficient to establish that anything is due the plaintiffs for commissions under the contract, for the reasons that the proof is wholly lacking to show that plaintiffs introduced a purchaser to the defendant who was willing to purchase the property, or that defendant in fact, sold or had an opportunity to sell for a price in excess of $20 per acre. Fulton v. Cretian, 335.

53. For the same reasons, the conclusions of law of the trial court are wholly unwarranted by the findings of fact. Fulton v. Cretian, 335.

54. The complaint failing to allege and the proof failing to establish a cause of action in plaintiff's favor, the judgment in their favor and the order denying defendant's motion for a new trial are erroneous. Fulton v. Cretian, 335.

55. An objection that certain evidence called for by a question is incompetent, irrelevant and immaterial is too general ordinarily, and is for that reason no objection at all, so far as the objecting party is concerned. Buchanan v. Minn. T. M. Co., 343.

56. An objection to evidence based on the lack of a pleading to support it cannot be made for the first time in the Supreme Court. Buchanan v. Minn. T. M. Co., 343.

57. A written contract supersedes all prior or contemporaneous oral agreements or negotiations relating to the subject-matter embraced therein. Rieck v. Daigle, 364.

58. Defendant pleaded payment in full prior to the commencement of the action, but such defense is not supported by any evidence. He also attempted to prove a set-off for damages, based upon a breach of the contract, subject to the conditions of which the note was given, but it is held, for reasons stated in the opinion, that such defense was not established. Rieck v. Daigle, 364.

59. Permitting a witness to answer the following question under objection, viz: "Did you ever get a soda fountain from the American Soda Fountain Company?" was erroneous, as calling for the conclusion of the witness on a matter within the province of the court or jury. American Soda Fountain Co. v. Hogue, 375.

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EVIDENCE—Continued.

60. In an action upon an accident insurance policy, which contains a stipulation that satisfactory proof of claim must be furnished the company by the claimant within thirty days after the date of injury, and also the further stipulation that no suit shall be brought under said policy unless brought within nine months from the date of the accidental injury, defendant denies any liability thereunder on account of failure to comply with such stipulations. Defendant contends that the policy of insurance is an Illinois contract, and that under the statute of Illinois the limitations aforesaid are valid. Such defense is unavailing to defendant, as there is no allegation in the answer and no proof in the record as to the existence of such a statute in said state, and, in the absence of such allegation and proof, the law of the forum controls. Kephart v. Continental Casualty Co., 379.

61. The policy provides for the payment of benefits only in case of personal bodily injury, "through external, violent and purely accidental causes." It also provides that "where the accidental injury results from unnecessary exposure to danger or to obvious risks of injury," the amount payable shall be but one-tenth of the face of the liability for negligence of the insured contributing to his injuries, the injuries were received through accidental causes. Kephart v. Continental Casualty Co., 379.

62. An intention to dedicate property to a public use must be clearly established, but such an intention may be shown by deed, by words, or by acts. Construing the testimony in the light of such rule, it is held that the intention of the proprietors of the townsite to dedicate said block to the public is clearly established. Cole v. Minn. Loan & Trust Co., 409.

63. Admissibility of certain evidence considered, and its admission held immaterial. State v. Chase, 429.

64. Verdict held sustained by the evidence, on a review thereof. State v. Chase, 429.

65. A person passing over a public railway crossing is bound to use care commensurate with the known and reasonably apprehended danger, but it is only in exceptional cases that a trial court is justified in taking from the jury the questions of the exercise of such care. Under the evidence, it cannot be said as a matter of law that plaintiff and his daughter were guilty of contributory negligence in not stopping the automobile before making such crossing. Certain instructions as to the meaning of the term "proximate cause," and "contributory negligence," examined, and held correct. Pendroy v. Gt. N. Ry. Co., 433.

66. Malice is an essential ingredient of the crime of malicious mischief, and a conviction cannot be sustained in the absence of any evidence disclosing such malice. State v. Minor, 454.

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EVIDENCE—Continued.

67. The certificate of sale in such case is only evidene of what transpired for the purpose of record, notice to protect purchasers against intervening claims, and to show who may become entitled to a deed, and it conveys no title. The N. D. Horse & Cattle Co. v. Serumgard, 466.

68. In such a case it is not reversible error to exclude a question as to defendant's reputation as a man of care in handling stock, as, while his reputation may have been of the best, he may have failed to exercise ordinary care in this instance. McBride v. Wallace, 495.

69. It does not constitute reversible error to exclude a question which has already been asked and answered by the same witness. McBride v. Wallace, 495.

70. On cross-examination of one of the state's witnesses, and for the purpose of impeachment, he was asked whether as a matter of fact he was running a certain saloon in violation of law and without a license. To this question counsel for the state objected, and the objection was sustained. Held error. Such question was admissible under the general rule that for the purpose of impeachment a witness may be asked questions as to collateral matters, the answers to which may tend to degrade or otherwise discredit him. State v. Denny, 519.

71. The state was permitted over defendant's objection to give secondary evidence as to the contents of a certain copy of letter claimed to have been written by one Miller to defendant, and tending to show defendant's guilty knowledge in receiving the stolen property. Held, for reasons stated in the opinion, that such ruling constituted prejudicial error. for the reason that no sufficient foundation for the introduction of such testimony had been shown. State v. Denny, 519.

72. Certain other rulings in the admission of testimony examined, and held not error. State v. Denny, 519.

73. The state's attorney, who was a witness for the state, was permitted to give his opinion or conclusion to the effect that the alleged copy of a letter claimed to have been sent from Montana to defendant was on letter paper different from that in use by the Great Northern Hotel at Williston. He was a non-expert witness, and his testimony should have been restricted to facts, leaving it to the jury to draw their own inferences or conclusions therefrom State v. Denny, 519.

74. Evidence examined, and held that the rulings of the trial court in denying defendant's motion to advise an ecquittal and for a new trial, in so far as the ground of insufficiency of the evidence is concerned, were correct. State v. Denny, 519.

75. A person accused of a crime, in the commission of which a corrupt intent is a necessary ingredient thereof. may testify what his intent was in doing certain acts. State v. Johnson, 554.

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EVIDENCE—Continued.

76. Objections to certain questions considered, and held error to sustain them. State v. Johnson, 554.

77. A person accused of crime should be allowed the fullest latitude to explain what his intent was in writing or making statements, apparently incriminating, and in explaining what he meant by certain equivocal statements. State v. Johnson, 554.

78. Evidence that no injury followed such change of the voting place is not admissible. Elvick v. Groves, 561.

79. Certificates of nomination filed with the secretary of state, legal in form, are prima facie evidence of the facts which they recite. State v. Blaisdell, 575.

80. Evidence examined and held insufficient to support the verdict finding appellant guilty of rape in the first degree. State v. Rhoades, 579.

81. A general objection to a deposition, on the ground of the incompetency or irrelevancy of the evidence contained therein, is not tenable where the deposition contains evidence material to the issues not subject to such objection. Hilliboe Admr. v. Warner, 594.

82. The possession of a bond by the obligee while an alteration is made therein, together with the fact that an action is commenced on the bond in its altered form, is sufficient evidence to sustain a finding that the alteration was made by or with the consent of the obligee. Hilliboe Admr. v. Warner, 594.

83. Evidence as to the extent of plaintiff's damages examined, and held that the verdict is not excessive. McDonell v. Soo Ry. Co., 606.

84. The good faith necessary to defeat a claim for exemplary damages may be shown in other ways than by showing a full statement of facts to counsel who advised the action complained of. Galvin v. Tibbs, 600.

85. Parol evidence of the decision of a federal court of bankruptcy to show that on a hearing it had set aside certain property as exempt is inadmissible, when no reason is shown why the best evidence is not offered. Galvin v. Tibbs, 600.

86. Action to recover damages for the negligent killing of stock which was trespassing upon defendant's right of way, plaintiff recovered a verdict for $465. Held, that the evidence is amply sufficient to justify such verdict. McDonell v. Soo Ry. Co., 606.

87. The evidence in this case shows that a quantity of flax was loaded by the plaintiff and his servants into a car furnished by the defendant for such purpose, that inside doors were furnished by the defendant carrier and used and fastened with appliances provided for that purpose by defendant, in the usual manner, and that the loss complained of occurred while such flax was en route to Duluth, some or all of it by reason of a small inside door used for retaining the flax in the car, hung on hinges at the top, coming open.

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EVIDENCE—Continued.

The defendant failed to show that the door opened by failure on the part of plaintiff to properly fasten it. It was closed by defendant's conductor at the station where the leak was discovered, but the inspector at Duluth reported a leak in the same place on the arrival of the car at its destination. Held, that the evidence fails to bring the defendant within the exceptions to the law holding it liable. Duncan v. Gt. N. Ry. Co., 610.

88. Plaintiff showed by himself and other competent witnesses that the inside doors referred to were properly closed and fastened with the device furnished by defendant for that purpose. The only evidence claimed to create a conflict arises from the fact that, a few miles after the car started on its journey, one of the inside doors referred to came open, and a quantity of flax with which the car was loaded ran out through the opening so made. Held, that such door opening may as readily be attributed to other causes as to the failure of the shipper to properly fasten it, and had the question been submitted to a jury, a verdict for defendant. based upon the fact that such door came open in transit, could only have been arrived at by inference, and would have been mere guesswork on the part of the jury under the facts of the case, and that the opening of this door did not create a sufficient conflict in the evidence to constitute error on the part of the trial court in directing a verdict for plaintiff. Duncan v. Gt. N. Ry. Co., 610.

EXCEPTION. See INSTRUCTIONS, 165; VERDICT, 380.

EXECUTION. See EXEMPTION, 104.

1. In an action of claim and delivery brought by a third person as claimant to the property, against an officer who levied upon and took into his possession personal property under an execution as the property of the defendant in the execution, it is no defense that a sheriff's jury prior to the commencement of such action found that the title to such property was in the defendant in such execution. Pfeifer v. Hatton, 99.

2. A sheriff is not guilty of conversion of property when taken and sold under an execution when he finds the property in the actual possession and under the control of the execution debtor, until a demand for the return of the property is made or notice given of the ownership of the property, or the sheriff has knowledge of the actual ownership of the same. Mariner v. Wasser, 361.

3. In an action for damages occasioned by a sale on execution of plaintiff's additional exemptions, when such sale is attempted to be justified by a claim that the debt forming the basis of the execution was contracted by reason of false pretenses, exemplary or punitive damages are not recoverable unless malice and a want of good faith is shown on the part of the party causing the sale. Galvin v. Tibbs, 600.

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EXECUTORS AND ADMINISTRATORS. See WITNESSES, 76, 110.

1. The fact that a witness is a proper party to an action in which the executor, administrator or heirs at law of a deceased person are parties, disqualifies such witness from testifying to transactions or statements made by such deceased person. The fact that such witness is a party defendant with the administrator, executor, or heirs does not render him competent as a witness in such cases. Cardiff v. Marquis, 110.
2. The evidence of a witness who is a party in such cases is inadmissible to prove that letters were written and signed by the witness at the request and dictation of the deceased person, whose administrator is a party to the action. Cardiff v. Marquis, 110.
3. The evidence of a witness, who is a party to an action in which the administrator of a deceased person is also a party, is not admissible to prove the contents of lost letters written or received by the witness to or from such deceased person. Cardiff v. Marquis, 110.
4. Matters pertaining to amendment of pleadings, continuances and the bringing in of the personal representatives of deceased parties at the trial of actions are within the discretion of trial courts, and their action will not be disturbed, except in case of abuse thereof resulting in prejudice. State Finance Co. v. Halstenson, 145.

EXEMPTIONS. See EVIDENCE, 600.

1. Whether property in the hands of a garnishee is exempt or not is to be determined as of the day of the service of the garnishee summons. Mahon v. Fansett, 104.
2. An answer by the defendant in a garnishee action alleging that the property in the garnishee's hands is exempt (referring to the time of making the answer), does not state a defense, and evidence that such property is exempt at that time is not admissible under such answer. Mahon v. Fansett, 104.
3. A defendant in a garnishee action is not permitted to dispose of his property between the time of the service of the summons and the service of the answer, and thereby defeat a creditor's garnishment action, on the ground that the property in the hands of the garnishee is actually exempt when the answer is served. Mahon v. Fansett, 104.
4. In an action for damages occasioned by a sale on execution of plaintiff's additional exemptions, when such sale is attempted to be justified by a claim that the debt forming the basis of the execution was contracted by reason of false pretenses, exemplary or punitive damages are not recoverable unless malice and a want of good faith is shown on the part of the party causing the sale. Galvin v. Tibbs, 600.

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FAIRS. See STATE FAIR, 32.

FEDERAL COURTS. See CONSTITUTIONAL LAW, 370; EVIDENCE, 600.

FINDINGS. See REFEREE, 120; BROKERS, 335.

1. While an action in which a jury trial was waived is still pending in the district court, that court has jurisdiction and power to correct its own errors, and may in the exercise of its discretion, on notice and motion, vacate its findings and judgment, and make new findings, and enter a new and different judgment. Plano Mfg. Co. v. Doyle, 386.
2. The possession of a bond by the obligee while an alteration is made therein, together with the fact that an action is commenced on the bond in its altered form, is sufficient evidence to sustain a finding that the alteration was made by or with the consent of the obligee. Hilliboe Admr. v. Warner, 594.

FIRE DEPARTMENT. See MUNICIPAL CORPORATIONS, 5.

FIRE INSURANCE. See INSURANCE, 5.

FORECLOSURE. See JUDGMENT, 340.

1. Such instrument, whether a trust deed or a mortgage, contains no power of sale authorizing any one, except the trustees therein designated, or his successor in trust, to sell the property in case of default; hence the attempted foreclosure by advertisement by plaintiff, who was merely the assignee of the beneficiary under said instrument, was a nullity, and plaintiff acquired no title thereunder. Brown v. Comonow, 84.
2. Even if plaintiff had acquired title under such foreclosure proceedings, the proofs shows that he conveyed the same to another prior to the commencement of this action, and having failed to show any title to the property, the judment of the district court in defendant's favor was proper in so far as it denied any relief to plaintiff. The judgment, however, in so far as it quieted title in defendants, is erroneous, and the same is accordingly modified. Brown v. Comonow, 84.
3. A sheriff's deed, issued on a foreclosure of a mortgage, while another is in possession of the land, is not void for champerty, when such sheriff's deed is based on a mortgage, executed before the claimant went into possession. State Finance Co. v. Halstenson, 145.
4. Such sheriff's deed is in the nature of deeds issued under judicial proceedings, and is not within the purview of the statute against champerty and maintenance. State Finance Co. v. Halstenson, 145.
5. The foreclosure of a mortgage, simultaneously recorded with another, by advertisement, establishes nothing as to the priority of such mortgage. State Finance Co. v. Halstenson, 145.

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FORECLOSURE—Continued.

6. A delay of fourteen years before foreclosure of a mortgage is commenced does not make the mortgage claim a stale one; the statute of limitations not having run against he mortgage, and there being no fact in the case showing an intent to abandon the mortgage. State Finance Co. v. Halstenson, 145.

7. A mortgagee in a chattel mortgage, who sells the property mortgaged without foreclosure, is guilty of a conversion of the property, and the lien of the mortgage is extinguished. Force v. Peterson Machine Co., 220.

8. Where the mortgagor sues the mortgagee for damages for a wrongful sale without foreclosure, in such cases the mortgagee may plead and show the amount due on the lien of the mortgage in miigation of damages growing out of the wrongful conversion. Force v. Peterson Machine Co., 220.

9. A foreclosure by advertisement of a mortgage on real property is of no validity where the person in whose name the same is foreclosed has not the legal title to the mortgage at the date of such foreclosure. Hebden v. Bina, 235

10 An assignment of a real estate mortgage, which merely describes the instrument as "the mortgage executed by Matj Bina and his wife to the Bank of Minot, and recorded in Book F of Mortgages on pages 556-558, in the office of the register of deeds of the county of Walsh," is too indefinite in description to vest in the assignee the legal title so as to authorize such assignee to foreclose by advertisement a mortgage executed by B. alone to such bank, and which was recorded in Book 15 of mortgages. Especially is this true when the proof shows that two mortgages were executed by B. to said bank on the same day and both were recorded in Book 15 of Mortgages, and the proof fails to show that there was no mortgage corresponding to the description contained in such assignment. Hebden v. Bina, 235.

11. A foreclosure of a mortgage by advertisement before there is any sum due thereon is void. Pratt v. Beiseker, 243.

12. Evidence considered and reviewed, and held to show that nothing was due on the note or mortgage securing the same when the foreclosure was made. Pratt v. Beiseker, 243.

13. Chapter 5, page 9, Laws 1905, which excepts from the operation of the former statute, providing that absence or non-residence from the state shall suspend the running of the statute, all actions and proceedings for the foreclosure of mortgages on real property, is construed, and held not to apply to existing causes of action for the foreclosure of mortgages which accrued prior to the passage of such amendatory statute, for the reasons, first, that no time was fixed by the legislature for the commencement of such foreclosure proceedings after the taking effect of such statute; and second, that if the time between the passage and approval of

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FORECLOSURE—Continued.

the act (March 19th) and its taking effect (July 1st) was intended to be the time fixed for such purpose, the same is manifestly unreasonable. Adams & Freese Co. v. Kenoyer, 302.

14. A purchaser of real estate subject to a mortgage thereon for interest partly in excess of 12 per cent per annum is entitled to defend against the foreclosure of such mortgage so far as the entire interest is concerned, unless the amount of the usurious mortgage was deducted from the purchase price. Grove v. The Gt. N. Loan Co., 351.

15. A foreclosure by advertisement has the same binding force as foreclosures by action in which the parties are personally served with process. Grove v. The Gt. N. Loan Co., 351.

16. No personal notice to the mortgagor or his grantees is required to render a foreclosure by advertisement effectual. Grove v. The Gt. N. Loan Co., 351.

17. Mere inadequacy of the price at a foreclosure sale is not ground to set aside the foreclosure in the absence of fraud, undue advantage or prejudice. Grove v. The Gt. N. Loan Co., 351.

18. The statutory provision that a certificate of sale shall be filed thirty days after the sale is not mandatory. Grove v. Gt. N. Loan Co., 351.

19. The absence of a date in the mortgage as recorded will not vitiate a foreclosure thereof. Grove v. Gt. N. Loan Co., 351.

20. On the uncontroverted facts of this case, it is held that, as to the principal of the notes secured by the mortgages sought to be foreclosed, this action was prematurely brought. Donovan v. Block, 406.

21. Plaintiff contends that he was entitled to the possession of certain chattel security for the purpose of foreclosing mortgages of the same to recover two items of indebtednes from the defendant to him, aggregating $149. Held, that for this purpose the action cannot be maintained, for the reason that the liability of the defendant to plaintiff for said items was litigated and determined adversely to the plaintiff herein in the case of Block v. Donovan, 13 N. D. 1, 99 N. W. 72. Donovan v. Block, 406.

22. In an action brought to foreclose a chattel mortgage upon certain grain, a warrant was issued under the provisions of section 7513, Rev. Codes 1905, pursuant to which all the grain grown on the land described in the mortgage was seized by the plaintiff, and subsequently, and before trial, the same was wrongfully converted by a sale thereof. Such grain was the sole property covered by the mortgage, and its wrongful conversion by plaintiff extinguished the lien of the mortgage, and thereby the cause of action for such foreclosure ceased to exist. Strehlow v. McLeod, 457.

23. A "redemption" from the purchaser at a foreclosure sale by one not the mortgagor is a compulsory sale of the interest acquired

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FORECLOSURE—Continued.

by the purchaser at the foreclosure sale, and such redemption can only be enforced by one given that right by statute, and then only by pursuing the method prescribed by the statute conferring the right. The N. D. Horse & Cattle Co. v. Serumgard, 466.

24. The holder of a mortgage superior to the one foreclosed, assuming to be a redemptioner when not made so by statute, who tenders the amount necessary to redeem, becomes by the issuance to him of a certificate of redemption and the acceptance and retention by the holder of the certificate of sale of the money tendered, as between himself and the party who parts with such certificate, a "redemptioner." The N. D. Horse & Cattle Co. v. Serumgard, 466.

25. Real estate is subject to mortgage by the holder of the legal title between the act of sale on foreclosure under a power contained in a prior mortgage and the expiration of the period allowed by statute for redemption. The N. D. Horse & Cattle Co. v. Serumgard, 466.

26. The certificate of sale in such case is only evidence of what transpired for the purpose of record, notice to protect purchasers against intervening claims, and to show who may become entitled to a deed, and it conveys no title. The N. D. Horse & Cattle Co. v. Serumgard, 466.

27. The title conveyed by such completed foreclosure sale is all the right, title and interest in and to the mortgage premises which the mortgagor possessed at the time the mortgage was executed or which was subsequently acquired by him. The N. D. Horse & Cattle Co. v. Serumgard, 466.

28. The phrase "on the property sold," in the statutory definition of a redemptioner as being one holding "a lien by judgment or mortgage on the property sold," applied to the land or premises, as those words are commonly used. The N. D. Horse & Cattle Co. v. Serumgard, 466.

29. The sale in the exercise of a power contained in a mortgage which conveys the title of the mortgagor is the sale as completed by the execution of a deed at the expiration of the period allowed for redemption. The N. D. Horse & Cattle Co. v. Serumgard, 466.

30. Every person having an interest in property subject to a lien has a right to redeem it from the lien at any time after the claim is due, and before his right of redemption is foreclosed. Rev. Codes 1905, section 6141. The N. D. Horse & Cattle Co. v. Serumgard, 466.

FOREIGN CORPORATIONS. See CORPORATIONS, 257.

1. Appellant's contention that the law is void, because it attempts to make acts or omissions committed in a foreign state a crime in this state is not sustained. The conditions on which foreign corporations are permitted to do business in this state are within the

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FOREIGN CORPORATIONS—Continued.

legitimate power of the state to prescribe, and defendant corporation, having been authorized to transact business in this state, is amenable to its laws enacted under its police powers to the same extent as its citizens. State v. Elevator Company, 23.

2. Plaintiff, a foreign corporation, brought this action to recover the purchase price of certain drills sold and delivered by it to defendants. The defense interposed is that plaintiff has not complied with the law of this state, being sections 4695-4699, Rev. Codes 1905, prescribing the conditions upon which such corporations may do business within our borders; it being admitted by plaintiff that it has not complied with such law. Sucker State Drill Co. v. Wirtz, 313.

3. Evidence examined, and it is held that plaintiff did not violate such statute, as in its dealings with defendant out of which its cause of action accrued, it was engaged in transacting or doing an interstate, as contradistinguished from an intrastate, business. Sucker State Drill Co. v. Wirtz, 313.

4. By the enactment of sections 4695-4699, prescribing the conditions upon which foreign corporations may do business in this state, it was not intended that such provisions should apply to foreign corporations engaged solely in an interstate business. It will be presumed that the legislature intended no interference with the exclusive power vested in the congress of the United States to regulate or restrict interstate commerce. Sucker State Drill Co. v. Wirtz, 313.

FOREIGN STATUTE. See PLEADING, 380.

FORGERY. See CRIMINAL LAW, 48.

FRAUD.

1. Where a conveyance of real estate is delivered by a daughter to her father under an oral contract that it is given in trust for the daughter, and such contract is proven by declarations of the father at the time the deed is delivered, and it is shown that the trust has not been carried out, a court of equity will enforce the trust, as the refusal to carry it out is a constructive fraud, based on the relations of confidence existing between the parties. Cardiff v. Marquis, 110.

2. In such a case it is immaterial whether the fraud was intentional or not, or whether it existed when the conveyance was delivered. Cardiff v. Marquis, 110.

3. In such a case courts of equity do not enforce the trust in violation of the statute of frauds, but relief is granted as based on the constructive fraud and the confidential relation. Cardiff v. Marquis, 110.

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FRAUD—Continued.

4. Mere inadequacy of the price at a foreclosure sale is not ground to set aside the foreclosure in the absence of fraud, undue advantage, or prejudice. Grove v. The Gt. N. Loan Co., 351.

5. After a majority of the voters of a school district had instructed the school board to issue bonds for building purposes, a taxpayer and voter of the district brought suit to enjoin the issuance of the bonds voted, alleging that enough illegal votes were cast in favor of the bonds to change the result. The school board answered, denying all allegations of the complaint, relating to illegal votes; but subsequently a majority of the board stipulated personally with the plaintiff in such action that judgment should be rendered and entered in favor of the plaintiff, permanently enjoining the defendants from issuing the bonds so voted. On such stipulation, without the submission of evidence, and without making any findings, the court ordered judgment as stipulated. Held, that such stipulation constitutes collusion between the plaintiff and the officers, and a legal fraud upon the district and the court, and furnished no basis for the judgment entered, and that it was error to order judgment upon such collusive, illegal and void stipulation. Schouweiler v. Allen, 510.

FRAUDS, STATUTES OF.

1. In such case courts of equity do not enforce the trust in violation of the statute of frauds, but relief is granted as based on the constructive fraud and the confidential relation. Cardiff v. Marquis, 110.

2. Appellant's contention that the contract was void under the statute of frauds is not available to him in this court, as such defense was not raised or passed upon in the court below. Schuyler v. Wheelon, 101.

GARNISHMENT.

1. It is not incumbent on a plaintiff in a garnishee action to take issue upon the garnishee's answer, where it admits that the garnishee has money or property in his hands sufficient to satisfy the plaintiff's claim. Mahon v. Fansett, 104.

2. The defendant, in a garnishee action, by not raising the objection before the trial court that judgment has not been entered in the principal action, waives the objection, and cannot raise it for the first time in the Supreme Court. Mahon v. Fansett, 104.

3. Objections to the sufficiency of plaintiff's affidavit in a garnishee action cannot be raised in the Supreme Court for the first time. Mahon v. Fansett, 104.

4. Whether property in the hands of a garnishee is exempt or not is to be determined as of the day of the service of the garnishee summons. Mahon v. Fansett, 104.

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GARNISHMENT—Continued.

5. An answer by the defendant in a garnishee action alleging that the property in the garnishee's hands is exempt (referring to the time of making the answer), does not state a defense, and evidence that such property is exempt at that time is not admissible under such answer. Mahon v. Fansett, 104.

6. A defendant in a garnishee action is not permitted to dispose of his property between the time of the service of the summons and the service of the answer, and thereby defeat a creditor's garnishment action, on the ground that the property in the hands of the garnishee is actually exempt when the answer is served. Mahon v. Fansett, 104.

GRAND JURY.

1. The writ of prohibition is not available to arrest further proceedings by a trial court on an indictment found by a grand jury irregularly drawn, summoned and impaneled, as district courts have jurisdiction to impanel grand juries, and if erroneous rulings are made on these questions no question of the jurisdiction of the subject-matter nor of the person is presented which can be reviewed through a writ of prohibition. Zinn v. District Court, 128.

GRAND LARCENY. See CRIMINAL LAW, 13.

HABEAS CORPUS. See CRIMINAL LAW, 140.

1. The evidence before the committing magistrate disclosed that the milling corporation of which petitioner was an officer was not engaged in doing a shipping business. Therefore the commitment under which petitioner is held to answer for the offense of larceny as defined in section 2251, Rev. Codes 1905, aforesaid, is contrary to law and void, and the writ prayed for is granted. Ex parte Bellamy, 140.

HEIRS. See WITNESSES, 76, 110.

HIGHWAYS. See MUNICIPAL CORPORATIONS, 319, 409.

1. Chapter 252, page 389, Laws 1907, entitled: "An act to provide for paving, curbing or macadamizing the highways in civil townships adjoining incorporated cities of not less than 6,000 inhabitants, and for the construction of sewers and water mains therein connecting with city sewers and water mains or with their own trunk sewers, and for the construction of sidewalks," is held to be unconstitutional and void upon the grounds: First, that it constitutes an unwarranted and illegal discrimination between individuals affected thereby; and, second, it attempts to delegate legislative powers to individual property owners on certain highways in such townships. Morton v. Holes, 154.

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HUSBAND AND WIFE. See ATTACHMENT, 572.

INDICTMENT AND INFORMATION. See PROHIBITION, WRIT OF, 128.

1. The writ of prohibition is not available to arrest further proceedings by a trial court in an indictment found by a grand jury irregularly drawn, summoned, and impaneled, as district courts have jurisdiction to impanel grand juries, and if erroneous rulings are made on these questions no question of the jurisdiction of the subject-matter nor of the person is presented which can be reviewed through a writ of prohibition. Zinn v. District Court, 128.

2. The sufficiency of the allegations of an information, when raised by a motion in arrest of judgment, will be construed with less strictness than when raised by demurrer. State v. Johnson, 554.

3. Where an information states facts constituting an offense in general words, and in the language of the statute defining the offense, the information is sufficient, as against a motion in arrest of judgment, although some of the necessary allegations are stated or appear by inference, and not by positive allegation. State v. Johnson, 554.

4. When attacked for the first time by motion in arrest of judgment, an information for the crime of rape in the first degree, drawn under subdivision 3 of section 8890, Rev. Codes 1905, will not be held fatally defective in not charging, in direct and positive language, that the female ravished resisted, and her resistance was overcome by force or violence. State v. Rhoades, 579.

5. An allegation that defendant did, "by force and violence, then and there overcome the resistance then and there made by * * *," will, when its sufficiency is challenged only after verdict, be held equivalent to an allegation that the female ravished resisted, and that her resistance was overcome by defendant by force and violence. State v. Rhoades, 579.

INJUNCTION. See EQUITY, 285.

1. The legality of the acts of the pure food commissioner, and the question whether he is exceeding the powers conferred upon him by the law under which he is authorized to act, may be tested in an action to enjoin him from the commission of the acts alleged to be without authority. State v. District Court, 285.

2. The pure food commissioner may be enjoined from distributing circulars or bulletins condemning the property of manufacturers as harmful and deceptive to the public, when the acts of the commissioner are in excess of the power or authority conferred upon him by law, and would cause irreparable injury. State v. District Court, 285.

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INJUNCTION—Continued.

3. A district court may properly entertain jurisdiction of an action brought by parties whose property is about to be destroyed by the pure food commissioner, and who will, from the nature of their business and other facts, be thereby subjected to a multiplicity of suits, to enjoin him from unlawfully proceeding. State v. District Court, 285.

INSTRUCTION. See TRIAL, 40; VERDICT, 380.

1. Defendants were convicted of the crime of grand larceny. In addition to a denial of guilt, the respondents furnished proof tending to establish an alibi. The trial court gave the following instructions to the jury, with reference to such defense: "There has been some evidence introduced tending to prove an alibi. The court instructs you that an alibi properly proven is considered a good defense, but it must be of a strong, convincing character, and exclude any reasonable hypothesis except the non-presence of the accused." Such instruction was duly excepted to, and the giving of the same was urged, among other grounds, for a new trial. Held, that the giving of said instruction constituted prejudicial error warranting the trial court in granting a new trial. State v. Nelson, 13.

2. Errors in instruction and errors of law occurring at the trial do not constitute grounds for a motion for judgment notwithstanding the verdict. Pease v. Magill, 166.

3. Error is assigned upon the giving of the instruction relative to the burden of proof. No foundation was laid for such assignment by a proper exception to such instruction, and hence the same cannot be noticed. The exception is too general. The particular portion of the charge complained of must be specifically excepted to, and where the portion of the charge embraces, as it does in this case, several paragraphs and as many distinct subjects, the exception is bad. Pease v. Magill, 166.

4. Even if such instruction had been properly excepted to, it would not avail defendant as the burden of proof under the issues was upon defendant. Pease v. Magill, 166.

5. The instruction given relative to the law of notice examined, and held not prejudicial error. Pease v. Magill, 166.

6. Held, further, that such rulings and the giving of the instruction complained of, if error, cannot avail appellant, as the same were not properly specified in the notice of intention to move for a new trial: the motion for new trial being based upon the minutes of the court. State v. Robb-Lawrence, 257.

7. Action to recover the purchase price of goods sold and delivered to the copartnership of S. & M., at Wales, N. D., of which it is alleged the respondent was a member. By the separate answer and stipulation of respondent, all questions were eliminated, except the single one whether he was a member of such copartnership. De-

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INSTRUCTION—Continued.

fendant, both by his answer and the stipulation, contended that there were two distinct firms at Wales doing business under said copartnership name, and that he was not a member of the firm with which plaintiff had its dealings. Held that, by thus narrowing the issues, the burden of proof as to the only remaining issue was not shifted from plaintiff to said defendant; hence the trial court's charge as to the burden of proof was correct. Bristol & Sweet Co. v. Skapple, 270.

8. The trial court gave as part of an instruction the following language: "The contract will be sent to the jury box with you, gentlemen, and you can wrestle with it at your pleasure. I cannot read it in the present light." Held, not an unfavorable comment on the contract as having been printed in small type. Buchanan v. Minn. T. M. Co., 343.

9. The charge of the trial court should be considered in its entirety, and error cannot be predicated on parts thereof, where the charge as a whole is not subject to the objection made to a part thereof. Buchanan v. Minn. T. M. Co., 343.

10. The trial court charged the jury that "the act or omission must contribute in order to be contributory negligence, to the happening of the act or event causing the injury, * * * and, if the act or omission merely increases or adds to the extent of the loss or the injury, it will not have that effect." This instruction had no application to the facts in the case, but its giving is held not prejudicial error. Pendroy v. Gt. N. Ry. Co., 433.

11. Certain requests for instructions by defendant were denied, and properiy so, as their giving in effect would have amounted to a directed verdict. Pendroy v. Gt. N. Ry. Co., 433.

12. In the light of all the instructions to the jury in this case, held, that it did not constitute reversible error to inform them as to the different degrees of care and negligence, but served to more clearly define the degrees of care imposed upon the defendant. McBride v. Wallace, 495.

13. Instructions to the jury must be considered as a whole, and an isolated sentence containing an erroneous statement of the law, but which, when taken with the rest of the charge, cannot have misled the jury, is harmless error, and does not warrant reversal. McBride v. Wallace, 495.

14. An instruction defining the term "feloniously" as "an intent to commit a felony or an intent to commit a wrongful act which might result in the commission of a felony," etc., is erroneous. By the use of the word "might," the jury is told, in effect, that a person is by law presumed to intend all the possible, rather than the reasonably probable, consequences of his voluntarily wrongful act. Said definition was also erroneous as it in effect informed the jury

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INSTRUCTION—Continued.

that an intent to commit a wrongful act which might result in receiving stolen property, knowing the same to be stolen, constituted a felonious intent within the meaning of the law relating to the offense charged in the information, to-wit, receiving stolen property, knowing the same to have been stolen. State v. Denny, 519.

15. Said instruction, although erroneous, was not prejudicial in view of the subsequent explicit instructions given by the trial judge, which are referred to at length in the opinion. State v. Denny, 519.

16. In a prosecution for receiving stolen property knowing the same to have been stolen, it is unnecessary to allege or prove who the thief was. It is accordingly held that an instruction to the effect that it is immaterial who committed the larceny, was not prejudicial, in view of state of the proof, which in no manner tended to implicate the defendant in such larceny. State v. Denny, 519.

17. An instruction that "guilty knowledge is made out and sufficiently proven to warrant conviction in that respect by proof that the defendant received the property under such circumstances as would satisfy a man of ordinary intelligence and caution that they were stolen," is erroneous. Such instruction lays down an arbitrary rule for determining guilty knowledge, using as a test facts which would satisfy a man of ordinary intelligence and caution. The standard by which to impute guilty knowledge is not that of a man of ordinary intelligence and caution, but the test is a personal test of the defendant. Under such instruction, no discretion was vested in the jury and hence the same constituted an invasion of the province of the jury. State v. Denny, 519.

18. Among other things, the jury was instructed as follows: "This felonious intent, to warrant conviction, must have consisted of his intentional receipt of said stolen proeprty, knowing the same to be stolen, with further intent in defendant in receiving the same to deprive the owner of said property, or to derive gain, profit or consideration himself from receiving or concealing said property or the disposal thereof." Said instruction was proper, as a person may be convicted, even though he received the stolen property for the purpose of returning it to the owner, if his purpose was also to receive a reward therefor. State v. Denny, 519.

INSURANCE. See CONTRACTS, 215; COMMON CARRIERS, 610.

1. In an action by a fire company to recover from a city its proportionate share of the 2 per cent of the premiums received upon fire policies, issued on property in such city, under section 2968, Rev. Codes 1905, the plaintiff must show affirmatively that it had the management of at least one steam, hand, or fire engine, hook and ladder truck, or hose cart, during the time wherein it claims to be entitled to such premium. Hose Co. v. Fargo, 5.

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INSURANCE—Continued.

2. In an action upon an accident insurance policy, which contains a stipulation that satisfactory proof of claim must be furnished the company by the claimant within thirty days after the date of the injury, and also the further stipulation that no suit shall be brought under said policy unless brought within nine months from the date of the accidental injury, defendant denies any liability thereunder on account of a failure to comply with such stipulation. Defendant contends that the policy of insurance is an Illinois contract, and that under the statute of Illinois the limitations aforesaid are valid. Such defense is unavailing to defendant, as there is no allegation in the answer and no proof in the record as to the existence of such a statute in said state, and, in the absence of such allegation and proof, the law of the forum controls. Kephart v Continental Casualty Co., 379.

3. Under the law of this state (Rev. Codes 1905, sections 5978, 5371), the proof of loss under the policy was furnished and the action brought in ample time. Kephart v. Continental Casualty Co., 379.

4. Defendant seeks to escape liability under such policy upon the ground that the insured at the time he met with the accident was not engaged in the line of his duty as brakeman, but his contention is overruled. Kephart v. Continental Casualty Co., 379.

5. Defendant's contention that the insured was guilty of negligence which contributed to his injuries, and hence that the beneficiary cannot recover under such accident insurance policy, has no support in the evidence, and is therefore untenable. Kephart v. Continental Casualty Co., 379.

6. At the conclusion of plaintiff's testimony defendant moved for a directed verdict in its favor, which motion was denied. Thereafter plaintiff moved for a directed verdict in her favor, which motion was granted. No request was made by defendant's counsel to submit any question of fact to the jury; hence defendant waived its right, if such right existed, to have submitted to the jury the question as to whether the injury was accidental, or whether it resulted from unnecessary exposure to danger or to obvious risks of injury within the meaning of the terms of the policy. Kephart v. Continental Casualty Co., 379.

7. It is contended that a certain portion of the unpaid premium on said policy should have been deducted from plaintiff's recovery. Held, that such contention is without merit, as there is no foundation in the pleadings for any such allowance or deduction, and no such question was presented to or passed upon by the trial court. Kephart v. Continental Casualty Co., 379.

8. The policy provides for the payment of benefits only in case of personal bodily injury, "through external, violent and purely accidental causes." It also provides that, "where the accidental injury results from unnecessary exposure to danger or to obvious risks of

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INSURANCE—Continued.

injury," the amount payable shall be but one-tenth of the face of the policy. The policy contains no provision exempting the company from liability for negligence of the insured contributing to his injuries, and it will be presumed in the absence of proof to the contrary that the injuries were received through accidental causes. Kephart v. Continental Casualty Co., 379.

INTEREST. See USURY, 351.

INTERVENTION.

1. On the facts of this case, an application made by voters and taxpayers of a school district to be allowed to defend a pending action, brought to enjoin the issuance of the bonds of the district, did not constitute a petition to intervene. Schouweiler v. Allen, 510.

INTOXICATING LIQUORS.

1. The records of a local railway station, containing receipts signed by the defendant, and others signed by his agent, and a description of outgoing freight, described to the agent, and shipped by the defendant, are competent evidence, tending to show the defendant to be conducting the business of dealing in intoxicating liquors or beer, when such records describe large quantities of empty beer cases, bottles and casks, and especially when the quantity so received was so great as to render it impossible for the defendant to have made personal use of it, during the time covered. State v. Dahlquist, 40.

JUDGMENT. See QUIETING TITLE, 84; PLEADING, 91, REDEMPTION, 466; CERTIORARI, 510.

1. Error is assigned in overruling defendant's motion for a directed verdict made at the close of all the evidence, and also his motion for judgment notwithstanding the verdict. These motions were properly overruled. The action was in claim and delivery to recover the possession of a horse. The complaint contained the usual allegations of ownership and right to possession in plaintiff; also, a detention of the horse by defendant and a prior demand for possession, etc. The answer contained no denials, either general or specific, but alleged a right of possession under a chattel mortgage executed by a former owner of the animal. The motions were predicated upon an alleged failure to prove ownership and right to possession in plaintiff and also a demand. Under the issues the sole question in dispute, aside from the question of the value of the horse and damages, was whether at the time plaintiff purchased the horse she had actual or constructive notice of defendant's chattel mortgage, and there was a conflict in the testimony upon this question. Pease v. Magill, 166.

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JUDGMENT—Continued.

2. Errors in instructions and errors of law occurring at the trial do not constitute grounds for a motion for judgment notwithstanding the verdict. Pease v. Magill, 166.

3. In a replevin action for grain grown under a contract, providing that the title to the grain is to remain in the owner of the land until a division thereof, the verdict and judgment should determine the interest of each party in the crop ultimately, although one of the parties is found to be entitled to the present possession. Wadsworth v. Owens, 173.

4. A judgment for damages, and condemning a right of way for a drain under chapter 23, Rev. Codes 1905, in an action in which no benefits were considered, does not preclude the drain commissioners from assessing benefits. Ross v. Prante, 266.

5. A motion for judgment notwithstanding a verdict is not proper where no motion for a directed verdict was made at the close of plaintiff's case. Landis Machine Co. v. Konantz Saddlery Co., 310.

6. The complaint failing to allege and the proof failing to establish a cause of action in plaintiff's favor, the judgment in their favor and the order denying defendant's motion for a new trial are erroneous. Fulton v. Cretian, 335.

7. Following the rule announced in Welch v. N. P. R. R. Co., 14 N. D. 19, 103 N. W. 396, held, that it is not a proper case for ordering judgment notwithstanding the verdict, but a new trial is ordered. Rieck v. Daigle, 364.

8. The note and mortgage in a suit were assigned to plaintiff by one Alexander McKenzie, the payee and mortgagee. Prior to such assignment, it was adjudged in a former action brought against said McKenzie and others that they had no right, title or interest in and to the property covered by such mortgage, but his so-called judgment was a nullity in so far as the said McKenzie is concerned, for the reason that he was never legally served with a summons in said action, nor did he make any appearance therein Held, that the rights of McKenzie under said mortgage were in no manner affected by said former judgment; and hence the plaintiff acquired a good title to the note and mortgage through said assignment. Clarke & Co. v. Doyle, 340.

9. Action on a promissory note. The answer admits the execution and delivery of the note and the amount due thereon, but alleges two counterclaims based upon a contract under which plaintiff agreed to reimburse defendant for the expenses incurred by the latter in effecting sales of certain fanning mills theretofore sold by plaintiff to defendant, and for the purchase price of which the note in suit was given. The first counterclaim is for expenses theretofore incurred by defendant in making sales of seventeen of such mills. The second asks for the sum of $560 as the probable or estimated expense of effecting sales of twenty-eight mills which are

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JUDGMENT—Continued.

still unsold and in defendant's possession. Plaintiff admitted the first counterclaim. The other one was stricken from the answer on plaintiff's motion, and judgment ordered on the pleadings in plaintiff's favor. Held, not error, as no cause of action for the recovery of the expenses of making sales in the future of the mills on hand had accrued under the terms of the contract. Owens Co. v. Doughty, 368.

10. While an action in which a jury trial was waived is still pending in the district court, that court has jurisdiction and power to correct its own errors, and may in the exercise of its discretion on notice and motion, vacate its findings and judgment, and make new findings, and enter a new and different judgment. Plano Mfg. Co. v. Doyle, 386.

11. It is error to grant a motion for judgment on the pleadings, where the answer states matters of affirmative defense, as proof of the affirmative defense must be made before the allegations of the answer can have any effect, except to settle the issues. Erickson v. Elliott, 389.

12. After a majority of the voters of a school district had instructed the school board to issue bonds for building purposes, a taxpayer and voter of the district brought suit to enjoin the issuance of the bonds voted, alleging that enough illegal votes were cast in favor of the bonds to change the result. The school board answered, denying all allegations of the complaint, relating to illegal votes, but subsequently a majority of the board stipulated personally with the plaintiff in such action that judgment should be rendered and entered in favor of the plaintiff, permanently enjoining the defendants from issuing the bonds so voted. On such stipulation, without the submission of evidence, and without making any findings, the court ordered judgment as stipulated. Held, that such stipulation constitutes collusion between the plaintiff and the officers, and a legal fraud upon the district and the court, and furnished no basis for the judgment entered, and that it was error to order judgment upon such collusive, illegal and void stipulation. Schouweiler v. Allen, 510.

JURISDICTION. See JUSTICE OF THE PEACE, 389; JUDGMENT, 340; SUPREME COURT, 543.

1. An order for the dismissal of an action is not an appealable order, and an attempted appeal from such an order confers no jurisdiction upon the Supreme Court. Dibble v. Hanson, 21.

2. Construing section 7811, Rev. Codes 1905, it is held that an order made after judgment in a condemnation suit, by the terms of which order the clerk is directed to retain in his possession certain moneys paid to him in satisfaction of such judgment until the final determination of a certain tax proceeding pending in such court

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JURISDICTION—Continued.

under the Wood Law, wherein Cass county as plaintiff seeks to recover certain delinquent taxes claimed to be a lien against the property thus condemned, is an appealable order, and hence the proper remedy for a review of said order is by appeal and not by certiorari. Held, further, that the district court did not exceed its jurisdiction in making a similar order in the tax case wherein these petitioners were defendants, and hence petitioners have mistaken their remedy in applying for the writ aforesaid. Soo Ry. v. Blakemore, 67.

3. The writ of prohibition is not a writ of right, but is available only when the inferior court, body or tribunal is about to act without any jurisdiction or in excess of jurisdiction. Zinn v. District Court, 128.

4. The writ of prohibition is not available to arrest further proceedings by a trial court on an indictment found by a grand jury irregularly drawn, summoned and impaneled, as district courts have jurisdiction to impanel grand juries, and if erroneous rulings are made on these questions, no question of the jurisdiction of the subject-matter nor of the person is presented which can be reviewed through a writ of prohibition. Zinn v. District Court, 128.

5. Defendant appealed from the justice to the district court upon questions of law alone, under section 8501, Rev. Codes 1905, where he was defeated upon every point urged. Held, that it was not error to thereafter refuse to grant him a trial upon the facts in the district court. A trial upon the merits is permissible in the district court only where the decision upon such appeal reopens the case for the trial of an issue of fact. Hanson v. Gronlie, 191.

6. A district court may properly entertain jurisdiction of an action brought by parties whose property is about to be destroyed by the pure food commissioner, and who will, from the nature of their business and other facts, be thereby subjected to a multiplicity of suits, to enjoin him from unlawfully proceeding. State v. District Court, 285.

7. While an action in which a jury trial was waived is still pending in the district court, that court has jurisdiction and power to correct its own errors, and may in the exercise of its discretion on notice and motion, vacate its findings and judgment, and make new findings, and enter a new and different judgment. Plano Mfg. Co. v. Doyle, 386.

8. Courts cannot take jurisdiction to hear a motion for a new trial on a verbal agreement that it may do so, claimed by one party, and denied by the other. Kaslow v. Chamberlain, 449.

9. Where a remittitur has been regularly issued and transmitted to the district court, the appellate court has lost jurisdiction; but, when irregularly, inadvertently, or erroneously issued, such court does

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JURISDICTION—Continued.

not lose jurisdiction, but may recall the remittitur for the purpose of correcting any error or mistake. Nystrom v. Templeton, 463.

10. The jurisdiction of the Supreme Court to issue original writs extends to questions affecting the sovereignty, franchises or prerogatives of the state, or the liberties of the people. State v. Fabrick, 532.

11. Where the right to be enforced pertains to matters of private or local concern alone, though publici juris, the jurisdiction belongs to the district court, and not to the Supreme Court, unless circumstances of such exceptional character are shown to exist that adequate relief cannot be obtained in the district court. State v. Fabrick, 532.

12. The jurisdiction of the Supreme Court to issue writs under existing constitutional provisions ordinarily extends only to cases publici juris, wherein are directly involved the sovereignty of the state, its franchises or prerogatives, or the liberties of its people. State v. Gottbreht, 543.

JURY. See VERDICT, 224, 380; INSTRUCTIONS, 257, 519; NEGLIGENCE, 495; WITNESS, 519.

1. Entering the jury room by the trial judge in the absence of the attorneys, at the request of the jurors, after they have retired to deliberate on their verdict, and having any communication or conversation with the jury in reference to the case, requires the granting of a new trial, without consideration of the question whether such conversation was prejudicial or not. State v. Murphy, 48.

2. Under the provisions of sections 7046 and 7047, Rev. Codes 1905, a compulsory reference cannot be ordered without the written consent of the parties, unless the case comes within the provision of the latter section. Mere silence or failure to object or except to the order will not constitute a waiver of a party's constitutional right to a trial by jury. Smith v. Kunert, 120.

3. Subdivision 1, section 7047, Rev. Codes 1905, is not in conflict with section 7 of our state constitution, which provides that "the right to trial by jury shall be secured to all and remain inviolate." The right of trial by jury as thus guaranteed refers to such right as it existed by law at and prior to the adoption of the constitution. Smith v. Kunert, 120.

4. Following Tyler v. Shea, 4 N. D. 278, 61 N. W. 468, 50 Am. St. Rep. 660, held, that there is no violation of any constitutional provision, in having damages to real estate, resulting from the construction of a drain, assessed by a jury, and the benefits to the same property assessed by the drain commissioners. Ross v. Prante, 266.

5. Chapter 23, Rev. Codes 1905, known as the "Drainage Law," does not contemplate the assessment of benefits from the construction of a drain by a jury. Ross v. Prante, 266.

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JURY—Continued.

6. Defendant took a mare belonging to plaintiff to pasture for the season, and in the month of October, two or three days after having built a barbed-wire fence around a corral about eight rods in length, connected with the pasture by a lane and a gate, permitted plaintiff's mare to be driven into such corral with other horses, and either closed or permitted the gate to be closed. While the horses were restrained in such corral, the mare of the plaintiff got entangled in a barbed-wire and injured so it became necessary to kill her. Held, that in an action to recover her value and charging her loss to the negligence of the defendant, the question of negligence was one of fact for the jury to determine. McBride v. Wallace, 495.

7. Action to recover damages for injury done to plaintiff's automobile by a collision with defendant's train at a public crossing. Plaintiff's daughter was driving the automobile, and the plaintiff and others were riding therein at the time of the accident. The proof shows that at the time of the accident, and for some time prior thereto defendant's train crew was engaged in switching in its yards at the city of Towner where the accident occurred, but that plaintiff and his daughter, although they had been pleasure riding about the city for some time, did not know that such switching was being done. In approaching such crossing the view of the occupants of the car was obstructed by buildings and other structures. Plaintiff and his daughter testified that in approaching such crossing they looked and listened for trains, but heard none. Just prior to reaching the crossing the gear of the automobile was changed from high to low speed, and the noise which it made was about the same as that of an ordinary lumber wagon going at the same speed, which was about five miles per hour. The train which collided with the automobile was being backed over this crossing in a westerly direction, the first car and the one which came in contact with the automobile being a flat car loaded with iron. Held, that the question of the contributory negligence of plaintiff and his daughter was properly submitted to the jury. Pendroy v. Gt. N. Ry. Co., 413.

8. An instruction that "guilty knowledge is made out and sufficiently proven to warrant conviction in that respect by proof that the defendant received the property under such circumstances as would satisfy a man of ordinary intelligence and caution that they were stolen," is erroneous. Such instruction lays down an arbitrary rule for determining guilty knowledge, using as a test facts which would satisfy a man of ordinary intelligence and caution. The standard by which to impute guilty knowledge is not that of a man of ordinary intelligence and caution, but the test is a personal test of the defendant. Under such instruction, no discretion was vested in the jury and hence the same constituted an invasion of the province of the jury. State v. Denny, 519.

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JUSTICE OF THE PEACE.

1. A complaint in justice's court, which is sufficient to apprise a person of common understanding of the exact nature and extent of plaintiff's demand, is all the law required. Hanson v. Gronlie, 191.

2. Defendant appealed from the justice to the district court upon questions of law alone under section 8501, Rev. Codes 1905, where he was defeated upon every point urged. Held, that it was not error to thereafter refuse to grant him a trial upon the facts in the district court. A trial upon the merits is permissible in the district court only where the decision upon such appeal reopens the case for trial of an issue of fact. Hanson v. Gronlie, 191.

3. The justice took an adjournment of the case from Saturday evening, December 1st, to Monday, December 3d, at 1 o'clock p. m., the docket entry being as follows: "Case adjourned till Monday, 1 o'clock p. m." Defendant's contention that the justice thereby lost jurisdiction because such docket entry was not sufficiently definite as to the adjourned date, was properly overruled. Hanson v. Gronlie, 191.

4. An amendment of an answer in district court filed on an appeal from a default judgment in justice's court is permissible, except as to matters wholly beyond the jurisdiction of the justice of the peace to determine. Erickson v. Elliott, 389.

LACHES.

1. A delay of fourteen years before foreclosure of a mortgage is commenced does not make the mortgage claim a stale one; the statute of limitations not having run against the mortgage, and there being no fact in the case showing an intent to abandon the mortgage. State Finance Co. v. Halstenson, 145.

LANDLORD AND TENANT.

1. Land which is farmed by a tenant under a lease from the owner is in possession of the owner and not of the tenant. Gray v. Harvey, 1.

2. The doctrine of estoppel cannot be invoked to prevent defendant from questioning plaintiff's title, first, because the evidence fails to show that defendant was plaintiff's tenant of the land; and, second, even if such tenancy existed, defendant would not be thus estopped in an action like this, where plaintiff claims title in fee. Hebden v. Bina, 235.

LARCENY. See CRIMINAL LAW, 140, 519.

LEASE. See LANDLORD AND TENANT, 1, 235.

LEGAL TENDER. See OFFER OF PERFORMANCE, 466.

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LEGISLATURE. See State Fair, 131; Limitation of Actions, 302, 340; Statutory Construction, 319; Constitutional Law, 154.

1. The legislature has no power to restrict or abridge the privilege guaranteed by section 13 of the constitution. In re Beer, 184.
2. The drainage act, being section 1818 to 1850, Rev. Codes 1905, does not conflict with section 25 of the state constitution, which vests the legislative power of the people of the state in the legislative assembly. Appellant's contention that such drainage law is an unwarranted delegation of legislative power to the board of drain commissioners is not sustained. Soliah v. Cormack, 393.

LETTERS. See Deeds, 145.

LIENS. See Mechanic Liens, 76; Chattel Mortgage, 220; Pledge, 257; Redemption, 466.

LIMITATION OF ACTIONS. See Quieting Title, 502.

1. A delay of fourteen years before foreclosure of a mortgage is commenced does not make the mortgage claim a stale one, the statute of limitations not having run against the mortgage, and there being no fact in the case showing an intent to abandon the mortgage. State Finance Co. v. Halstenson, 145.
2. The legislature may by amendment shorten the statutory period for the commencement of actions, and make such amendment applicable to existing causes of action, provided a reasonable time is fixed for the commencement of suits on such existing causes of action. Adams & Freese Co. v. Kenoyer, 302.
3. Chapter 5, page 9, Laws 1905, which excepts from the operation of the former statute, providing that absence or nonresidence from the state shall suspend the running of the statute, all actions and proceedings for the foreclosure of mortgages on real property, is construed, and held not to apply to existing causes of action for the foreclosure of mortgages which accrued prior to the passage of such amendatory statute, for the reason, first, that no time was fixed by the legislature for the commencement of such foreclosure proceedings after the taking effect of such statute; and, second, that if the time between the passage and approval of the act (March 10th) and its taking effect (July 1st), was intended to be the time fixed for such purpose, the same is manifestly unreasonable. Adams & Freese Co. v. Kenoyer, 302.
4. The defense that plaintiff's cause of action is barred by the statute of limitations is accordingly overruled. Adams & Freese Co. v. Kenoyer, 302.
5. Following the decision of this court in Adams & Freese Company v. Kenoyer, et al., 17 N. D. 302, it is held that chapter 5, page 9, Laws 1905, which provides that a mortgagor's absence or non-

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LIMITATION OF ACTIONS—(Continued.)

residence from the state shall not suspend the running of the statute of limitations as to actions and proceedings for the foreclosure of mortgages on real propery, does not apply to causes of action which accrued prior to the passage of said statute, for the reasons, first, that no time was fixed by the legislature for the commencement of actions upon such existing causes of action after the taking effect of such statute; and, second, that if the time between the passage and approval of the statute (March 10th) and its taking effect (July 1st), was intended to be the time fixed for such purpose, the same is unreasonable. Clarke & Co. v. Doyle, 340.

MAINTENANCE. See CHAMPERTY AND MAINTENANCE, 145.

MALICIOUS MISCHIEF. See CRIMINAL LAW, 454.

MANDAMUS.

1. The mere fact that delays might occur if legal proceedings are instituted in the district court, and that an appeal might be taken to this court from the district court, does not present such exceptional circumstances as would constitute a reason for issuing a writ of mandamus by the Supreme Court to compel the county commissioners to act in matters solely pertaining to the removal of a county seat. State v. Gottbreht, 543.

MAXIMS.

1. The contract provides a method for determining the property to be sold, and this was sufficient. The maxim that "that is certain which can be made certain" is applied. Schuyler v. Wheelon, 161.

MECHANICS' LIENS. See WITNESS, 76.

1. Payment of the full sum due on a contract by the owner of a building to the contractor after ninety days from the time the last materials were furnished, and before the lien of a subcontractor was filed, exempts the building and land from a lien filed after such payment was made, although the owner does not show that payment was altogether made after the ninety days had expired and before the lien was filed. The fact that some payments were made before the ninety days had expired did not prejudice the subcontractor, as the last payment made was more than sufficient to protect it if the lien had been filed in time. Bank v. Warner, 76.

MISTAKE. See CHATTEL MORTGAGE, 281.

1. In an action for damages for the conversion of grain, it is competent to plead and show as an equitable defense that the grain was mortgaged to the defendont and that the mortgage was drawn by mistake to cover the crop of another year, without first reforming the mortgage through an equitable action. Gorder v. Hilliboe, 281.

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MORTGAGES. See FORECLOSURE, 145, 351; CHATTEL MORTGAGE, 406.

1. A mortgagee in a real estate mortgage, without actual notice of the rights of a vendee in a contract for the purchase of the real estate covered by the mortgage, which contract has been orally assigned as security, is an innocent purchaser, although such vendee is in possession of the land when the mortgage is taken. Patnode v. Deschenes, 15 N. D. 100, 106 N. W. 575, followed as to the construction of section 6179, Rev. Codes, 1905. Gray v. Harvey, 1.
2. Whether under section 4348, Comp. Laws 1887, being section 6151, Rev. Codes 1905, a person may give a trust deed as well as a mortgage upon real property as security for the payment of indebtedness, and whether the instrument referred to in the opinion is or was intended by the parties thereto to be a trust deed as distinguished from a mortgage, is not determined. Brown v. Comonow, 84.
3. Such instrument, whether a trust deed or a mortgage, contains no power of sale authorizing any one, except the trustees therein designated, or his successor in trust, to sell the property in case of default; hence the attempted foreclosure by advertisement by plaintiff, who was merely the assignee of the beneficiary under said instrument, was a nullity, and plaintiff acquired no title thereunder. Brown v. Comonow, 84.
4. Express statutory authority is conferred by section 6159, Rev. Codes 1905, upon a mortgagor to designate the mortgagee or any other person to execute the power of sale upon default in the payment of the mortgage indebtedness. Brown v. Comonow, 84.
5. A sheriff's deed, issued on a foreclosure of a mortgage, while another is in possession of the land, is not void for champerty, when such sheriff's deed is based on a mortgage, executed before the claimant went into possession. State Finance Co. v. Halstenson, 145.
6. The owner of land in the possession of another may properly mortgage the same without violating the statute against champerty. State Finance Co. v. Halstenson, 145.
7. The fact that two mortgages are executed, delivered and recorded on the same day and hour is notice to a subsequent purchaser of the land to put him upon inquiry as to the actual priority of such mortgages. State Finance Co. v. Halstenson, 145.
8. The foreclosure of a mortgage, simultaneously recorded with another by advertisement, establishes nothing as to the priority of such mortgage. State Finance Co. v. Halstenson, 145.
9. A delay of fourteen years before foreclosure of a mortgage is commenced does not make the mortgage claim a stale one; the statute of limitations not having run against the mortgage, and there being no fact in the case showing an intent to abandon the mortgage. State Finance Co. v. Halstenson, 145.

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MORTGAGES—(Continued.)

10. A foreclosure by advertisement of a mortgage on real property is of no validity where the person in whose name the same is foreclosed has not the legal title to the mortgage at the date of such foreclosure. Hebden v. Bina, 235.

11. An assignment of a real estate mortgage, which merely describes the instrument as "the mortgage executed by Matj Bina and his wife to the Bank of Minot, and recorded in Book F of Mortgages on pages 556-558 in the office of the register of deeds of the county of Walsh," is too indefinite in description to vest in the assignee the legal title so as to authorize such assignee to foreclose by advertisement a mortgage executed by B. alone to such bank, and which was recorded in Book 15 of mortgages. Especially is this true when the proof shows that two mortgages were executed by B. to said bank on the same day and both were recorded in Book 15 of Mortgages, and the proof fails to show that there was no mortgage corresponding to the description contained in such assignment. Hebden v. Bina, 235.

12. A foreclosure of a mortgage by advertisement before there is any sum due thereon is void. Pratt v. Beiseker, 243.

13. Evidence considered and reviewed, and held to show that nothing was due on the note or mortgage securing the same when the foreclosure was made. Pratt v. Beiseker, 243.

14. Chapter 5, page 9, Laws 1905, which excepts from the operation of the former statute, providing that absence or nonresidence from the state shall suspend the running of the statute, all actions and proceedings for the foreclosure of mortgages on real property, is construed, and held not to apply to existing causes of action for the foreclosure of mortgages which accrued prior to the passage of such amendatory statute, for the reasons, first, that no time was fixed by the legislature for the commencement of such foreclosure proceedings after the taking effect of such statute; and second, that if the time between the passage and approval of the act (March 10th) and its taking effect (July 1st), was intended to be the time fixed for such purpose, the same is manifestly unreasonable. Adams & Freese Co. v. Kenoyer, 302.

15. The note and mortgage in suit were assigned to plaintiff by one Alexander McKenzie, the payee and mortgagee. Prior to such assignment, it was adjudged in a former action brought against said McKenzie and others, that they had no right, title or interest in and to the property covered by such mortgage, but his so-called judgment was a nullity in so far as the said McKenzie is concerned, for the reason that he was never legally served with a summons in such action, nor did he make any appearance therein. Held, that the rights of McKenzie under said mortgage was in no manner affected by said former judgment; and hence the plaintiff acquired a good title to the note and mortgage through said assignment. Clarke & Co. v. Doyle, 340.

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MORTGAGES—(Continued.)

16. A mortgage given for interest partly in excess of 12 per cent per annum is not void in this state. Grove v. The Gt. N. Loan Co., 351.

17. A purchaser of real estate subject to a mortgage thereon for interest partly in excess of 12 per cent per annum is entitled to defend against the foreclosure of such mortgage so far as the entire interest concerned, unless the amount of the usurious mortgage was deducted from the purchase price. Grove v. Gt. N. Loan Co., 351.

18. The purchaser in such cases is permitted to defend as against usury, on the ground that he stands in privity of contract and estate with the mortgagor. Grove v. The Gt. N. Loan Co., 351.

19. The mere fact that the purchaser of real estate did not have actual notice of a mortgage on the land does not entitle him to set aside sheriff's deed under a foreclosure regular in all respects, where the mortgage was duly recorded, and the only ground on which relief is asked is that the mortgage was usurious. Grove v. The Gt. N. Loan Co., 351.

20. The absence of a date in the mortgage as recorded will not vitiate a foreclosure thereof. Grove v. The Gt. N. Loan Co., 351.

21. A purchaser of real estate on which there is a mortgage given for interest, partly usurious, is not entitled to have a sheriff's deed given on the foreclosure of the mortgage, regular in all particulars, set aside on account of such usury and on the ground that he had no actual notice of the mortgage or of the foreclosure, when the mortgage was duly recorded and the notice of foreclosure duly published, where the application is not made until about three months after the redemption period has expired. Grove v. Gt. N. Loan Co., 351.

22. No personal notice to the mortgagor or his grantees is required to render a foreclosure by advertisement effectual. Grove v. The Gt. N. Loan Co., 351.

23. On the uncontroverted facts of this case, it is held, that as to the principal of the notes secured by the mortgages sought to be foreclosed, this action was prematurely brought. Donovan v. Block, 406.

24. A "redemption" from the purchaser at a foreclosure sale by one not the mortgagor is a compulsory sale of the interest acquired by the purchaser at the foreclosure sale, and such redemption can only be enforced by one given that right by statute, and then only by pursuing the method prescribed by the statute conferring the right. The N. D. Horse & Cattle Co. v. Serumgard, 466.

25. The holder of a mortgage superior to the one foreclosed, assuming to be a redemptioner when not made so by statute, who tenders the amount necessary to redeem, becomes by the issuance to him of a certificate of redemption and the acceptance and retention by the holder of the certificate of sale of the money tendered, as between himself and the party who parts with such certificate, a "redemptioner." The N. D. Horse & Cattle Co. v. Serumgard, 466.

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MORTGAGES—Continued.

26. One who is not made by statute a redemptioner, but thus acquires the rights of a redemptioner, also assumes the obligations and liabilities of a redemptioner, and it follows that he must permit the lawful redemptioner to redeem from him within the period given by statute to a subsequent lienholder by judgment or mortgage for such purpose. The N. D. Horse & Cattle Co. v. Serumgard, 466.

27. Under section 7465, Rev. Codes 1905, the property sold may be redeemed within one year from the day of sale in like manner and to the same effect as provided in chapter 12 for redemption of real property sold upon execution, so far as the same may be applicable, by (1) The mortgagor or his successor in interest in the whole or any part of the property; (2) By a creditor having a lien by judgment or mortgage upon the property sold, or on some share or part thereof, subsequent to that on which the property was sold. Only those mentioned in subdivision 2 of the above section are redemptioners, and as such entitled to sixty days in which to redeem from a previous redemptioner. The N. D. Horse & Cattle Co. v. Serumgard, 466.

28. Real estate is subject to mortgage by the holder of the legal title between the act of sale on foreclosure under a power contained in a prior mortgage and the expiration of the period allowed by statute for redemption. The N. D. Horse & Cattle Co. v Serumgard, 466.

29. The title conveyed by such completed foreclosure sale is all the right title and interest in and to the mortgaged premises which the mortgagor possessed at the time the mortgage was executed or which was subsequently acquired by him. The N. D. Horse & Cattle Co. v. Serumgard, 466.

30. The sale in the exercise of a power contained in a mortgage which conveys the title of the mortgagor is the sale as completed by the execution of a deed at the expiration of the period allowed for redemption. The N. D. Horse & Cattle Co. v. Serumgard, 466.

31. The fact that a mortgage given after the act of sale occurred on a prior mortgage, and before the expiration of the period allowed for redemption, is not recorded until after the expiration of one year from the sale, but is recorded within the sixty days additional allowed where there has been a redemption, does not deprive the holder of the last mortgage given of the right to redeem on complying with the other statutory requirements. The N. D. Horse and Cattle Co. v. Serumgard, 466.

32. The holder of a mortgage given after the act of sale under a prior mortgage, and before the expiration of the period allowed for redemption from such sale, is a redemptioner. The N. D. Horse & Cattle Co. v. Serumgard, 466.

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MOTION. See TRIAL, 40, 310, 380, 519; VERDICT, 165; NEW TRIAL, 335; JUDGMENT, 368; CRIMINAL LAW, 579; APPEAL AND ERROR, 389, 495.

1. A motion for a new trial was duly noticed for hearing on a day and hour named at chambers of the judge of the district court of the proper district. On the day set for the motion the judge was not present, and no proceedings were had. Held, that in the absence of an order continuing the hearing or a written stipulation to that effect, the motion went down, and could not again be taken up without new notice or formal consent of the party on whom it was served. Kaslow v. Chamberlain, 449.
2. Courts cannot take jurisdiction to hear a motion for a new trial on a verbal agreement that it may do so, claimed by one party, and denied by the other. Kaslow v. Chamberlain, 449.

MUNICIPAL CORPORATIONS.

1. In an action by a fire company to recover from a city its proportionate share of the 2 per cent of the premiums received upon fire policies, issued on property in such city, under section 2968, Rev. Codes 1905, the plaintiff must show affirmatively that it had the management of at least one steam, hand or fire engine, hook and ladder truck, or hose cart, during the time wherein it claims to be entitled to such premiums. Hose Co. v. Fargo, 5.
2. Where the officials of the city fire department have sole charge of all fire apparatus for use at fires, all of which was owned by the city, and the duties of the other members of the fire department simply require them to repair to the fire on alarm, and to aid in extinguishing it, the department as companies has no such management of the apparatus named as is contemplated by section 2968, Rev. Codes 1905, to entitle it to a share of the fund received from insurance premiums. Hose Co. v. Fargo, 5.
3. In this case it is shown six members of the fire department of the defendant city were paid annual or monthly salaries, and all other members of the department were paid in accordance with the ordinance of the city; $1 for the first hour, and 50 cents per hour for all subsequent time in the daytime, and 75 cents in the nighttime, for time spent in actual attendance at fires, and that the amount so paid by the city to its fire department for a period of about eighteen months, the time involved in this action, was over $6,000. Held, that such department was a paid department within the meaning of section 2968, Rev. Codes 1905. Hose Co. v. Fargo, 5.
4. Under section 2658, Rev. Codes 1905, which provides that the mayor "shall have power to sign or veto any ordinances or resolution passed by the council," it is held that a resolution passed by the city council prescribing that certain streets and avenues shall be repaved in a certain designated manner is of a legislative character and subject to veto by the mayor. State v. Duis, 319.

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MUNICIPAL CORPORATIONS—Continued.

5. Section 3016, Rev. Codes 1905, which authorizes and empowers cities and villages to receive, by gift or devise, real estate for purposes of parks or public grounds, is not exclusive in its operation, and lands or easements therein may be acquired for such purposes by a common-law dedication thereof. The owners and proprietors of the townsite of K. left a square in the center thereof, undivided into lots, and designated simply by the numeral "2." The other blocks were divded into lots, and those blocks surrounding block 2 were platted into lots, facing toward said square. One of the proprietors of the townsite had active charge of the sale of lots therein, and he represented to prospective purchasers that such square was and would remain a public square or park. Plaintiffs, in reliance thereon, and upon like representations made by one C, who was also a partner in such townsite enterprise, purchased lots fronting on said square, and made valuable improvements thereon. Held, that said acts and representations constituted a common-law dedication of such block as a public square or park. Held, further, that defendants are estopped, by reason of such acts and representations, to deny that said block 2 has been dedicated to the public for the uses aforesaid. Cole v. Minn. Loan & Trust Co., 409.

6. The statutes of this state, prescribing the method of dedicating real property to public uses, as well as easements therein for such purposes, are not and were not intended to be exclusive of the common-law method of dedication, nor do they abrogate the well settled rule of implied dedication by estoppel in pais. Cole v. Minn. Loan & Trust Co., 409.

7. Chapter 252, page 389, Laws 1907, entitled "An act to provide for paving, curbing or macadamizing the highways in civil townships adjoining incorporated cities of not less than 6,000 inhabitants, and for the construction of sewers and water mains therein connecting with city sewers and water mains or with their own trunk sewers, and for the construction of sidewalks," is held to be unconstitutional and void upon the grounds: First, that it constitutes an unwarranted and illegal discrimination between individuals affected thereby; and second, it attempts to delegate legislative powers to individual property owners on certain highways in such townships. Morton v. Holes, 154.

NAMES.

1. The dropping of an initial letter of a name in a conveyance is not such a variance or misnomer as to require extrinsic proof of the identity of the person. State Finance Co. v. Halstenson, 145.

2. Evidence examined, and held to show that the names Ackerland and Ackenland refer to the same person. State Finance Co. v. Halstenson, 145.

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NEGLIGENCE. See INSURANCE, 380; DAMAGES, 606; RAILROADS, 606.

1. Action to recover damages for injury done to plaintiff's automobile by a collision with defendant's train at a public crossing. Plaintiff's daughter was driving the automobile, and the plaintiff and others were riding therein at the time of the accident. The proof shows that at the time of the accident and for some time prior thereto defendant's train crew was engaged in switching in its yards at the city of Towner where the accident occurred, but that plaintiff and his daughter, although they had been pleasure riding about the city for some time, did not know that such switching was being done. In approaching such crossing the view of the occupants of the car was obstructed by buildings and other structures. Plaintiff and his daughter testified that in approaching said crossing they looked and listened for trains, but heard none. Just prior to reaching the crossing the gear of the automobile was changed from high to low speed, and the noise which it made was about the same as that of an ordinary lumber wagon going at the same speed, which was about five miles per hour. The train which collided with the automobile was being backed over this crossing in a westerly direction, the first car and the one which came in contact with the automobile being a flat car loaded with iron. Held, that the question of the contributory negligence of plaintiff and his daughter was properly submitted to the jury. Pendroy v. Gt. N. Ry. Co., 433.

2. A person in passing over a public railway crossing is bound to use care commensurate with the known and reasonably apprehended danger; but it is only in exceptional cases that a trial court is justified in taking from the jury the question of the exercise of such care. Under the evidence, it cannot be said as a matter of law that plaintiff and his daughter were guilty of contributory negligence in not stopping the automobile before making such crossing. Certain instructions as to the meaning of the terms "proximate cause," and "contributory negligence," examined, and held correct. Pendroy v. Gt. N. Ry. Co., 433.

3. Defendant took a mare belonging to plaintiff to pasture for the season, and in the month of October, two or three days after having built a barbed wire fence around a corral about eight rods in length connected with the pasture by a lane and a gate, permitted plaintiff's mare to be driven into such corral with other horses, and either closed or permitted the gate to be closed. While the horses were restrained in such corral, the mare of the plaintiff got entangled in a barbed-wire and injured so it became necessary to kill her. Held, that in an action to recover her value, and charging her loss to the negligence of the defendant, the question of negligence was one of fact for the jury to determine. McBride v. Wallace, 495.

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NEGLIGENCE—Continued.

4. In such a case it is not reversible error to exclude a question as to defendant's reputation as a man of care in handling stock, as, while his reputation may have been of the best, he may have failed to exercise ordinary care in this instance. McBride v. Wallace, 495.
5. In the light of all the instructions to the jury in this case, held, that it did not constitute reversible error to inform them as to the different degrees of care and negligence, but served to more clearly define the degrees of care imposed upon the defendant. McBride v. Wallace, 495.
6. The complaint alleged, and the plaintiff was permitted over objection to show, certain special damages suffered by him, on account of extra care and attention required in rearing a sucking colt, the increase of one of the animals killed. Held, not error, as defendant's negligence in killing the dam of said colt was the proximate cause of the special damages thus claimed. McDonell v. Soo. Ry. Co., 606.

NEGOTIABLE INSTRUMENTS. See PRINCIPAL AND AGENT, 224, 248, TRIAL, 310; MORTGAGES, 340; PLEADINGS, 368.

1. A promissory note, which contains the following stipulation: "This note subject to conditions of hotel purchase contract of even date herewith," is nonnegotiable, and hence an indorsee thereof takes the same subject to all legal defenses or set-offs existing in favor of the maker of such note, at the date of the commencement of an action thereon. Rieck v. Daigle, 364.
2. Defendant pleaded payment in full prior to the commencement of the action, but such defense is not supported by any evidence. He also attempted to prove a set-off for damages, based upon a breach of the contract, subject to the conditions of which the note was given, but it is held, for reasons stated in the opinion, that such defense was not established. Rieck v. Daigle, 364.
3. The holder of a promissory note, payable to another or order, and unindorsed, is the real party in interest within the meaning of section 6807, Rev. Codes 1905, and may sue thereon where the consideration for the note passed solely between the holder and the maker, and the note was given to another person solely for the benefit of the present holder. Am. Soda Fountain Co. v. Hogue, 375.
4. On the uncontroverted facts of this case, it is held, that, as to the principal of the notes secured by the mortgages sought to be foreclosed, this action was prematurely brought. Donovan v. Block, 406.
5. The negotiable quality of a promissory note is not destroyed by a provision therein that the makers and indorsers thereof severally waive presentment of payment and notice of protest and consent that the time of payment may be extended without notice, when by its terms it is made payable on or before a day named. First Nat. Bk. of Pomeroy v. Buttery, 326.

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NEW TRIAL.

1. Entering the jury room by the trial judge in the absence of the attorneys at the request of the jurors, after they have retired to deliberate on their verdict, and having any communication or conversation with the jury in reference to the case, requires the granting of a new trial, without consideration of the question whether such conversation was prejudicial or not. State v. Murphy, 48.
2. The sufficiency of the evidence to sustain a verdict cannot be considered by the trial court on a motion for a new trial, nor by this court on appeal, unless the settled statement of the case contains specifications of particulars wherein the evidence is insufficient to sustain the verdict. Lund v. Upham, 210.
3. Remarks of counsel to the jury considered in the opinion, and held not grounds for a new trial under the circumstances shown in the record. Lund v. Upham, 210.
4. Held, further, that such rulings and the giving of the instructions complained of, if error, cannot avail appellant, as the same were not properly specified in the notice of intention to move for a new trial; the motion for new trial being based upon the minutes of the court. State v. Robb-Lawrence Co., 257.
5. Where no motion for a new trial is made, the sufficiency of the evidence to sustain a verdict cannot be reviewed. Landis Machine Co. v. Konantz Saddlery Co., 310.
6. The complaint failing to allege and the proof failing to establish a cause of action in plaintiff's favor, the judgment in their favor and the order denying defendant's motion for a new trial are erroneous. Fulton v. Cretian, 335.
7. Following the rule announced in Welch v. N. P. R. R. Co., 14 N. D. 19, 103 N. W. 396, held, that it is not a proper case for ordering judgment, notwithstanding the verdict, but a new trial is ordered. Reick v. Daigle, 364.
8. A motion for a new trial was duly noticed for hearing on a day and hour named at chambers of the judge of the district court of the proper district. On the day set for the motion the judge was not present, and no proceedings were had. Held, that in the absence of an order continuing the hearing or a written stipulation to that effect, the motion went down, and could not again be taken up without new notice or formal consent of the party on whom it was served. Kaslow v. Chamberlain, 449.
9. Courts cannot take jurisdiction to hear a motion for a new trial on a verbal agreement that it may do so, claimed by one party, and denied by the other. Kaslow v. Chamberlain, 449.
10. The granting of a new trial for insufficiency of the evidence to sustain the verdict is largely within the sound judicial discretion of the trial court, and its decision should not be disturbed except for an abuse of such discretion. Galvin v. Tibbs, 600.

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NOTES AND BILLS. See NEGOTIABLE INSTRUMENTS, 224, 364; 375, 406, 326.

NOTICE. See APPEAL AND ERROR, 404.

1. A mortgagee in a real estate mortgage, without actual notice of the rights of a vendee in a contract for the purchase of the real estate covered by the mortgage, which contract has been orally assigned as security, is an innocent purchaser, although such vendee is in possession of the land when the mortgage is taken. Patnode v. Deschenes, 15 N. D. 100, 106 N. W. 573, followed as to the constructions of section 6179, Rev. Codes 1905. Gray v. Harvey, 1.

2. The fact that two mortgages are executed, delivered and recorded on the same day and hour is notice to a subsequent purchaser of the land to put him upon inquiry as to the actual priority of such mortgages. State Finance Co. v. Halstenson, 145.

3. Error is assigned in overruling defendant's motion for a directed verdict made at the close of all the evidence, and also his motion for judgment notwithstanding the verdict. These motions were properly overruled. The action was in claim and delivery to recover the possession of a horse. The complaint contained the usual allegations of ownership and right to possession in plaintiff; also, a detention of the horse by defendant and a prior demand for possession, etc. The answer contained no denials, either general or specific, but alleged a right of possession under a chattel mortgage executed by a former owner of the animal . The motions were predicated upon an alleged failure to prove ownership and right to possession in plaintiff and also a demand. Under the issues the sole question in dispute, aside from the question of the value of the horse and damages, was whether at the time plaintiff purchased the horse she had actual or constructive notice of defendant's chattel mortgage, and there was a conflict in the testimony upon this question. Pease v. Magill, 166.

4. Defendant's chattel mortgage was not properly witnessed or acknowledged so as to entitle it to be filed; and hence the filing of the same did not operate to give constructive notice thereof. Pease v. Magill, 166.

5. The instruction given relative to the law of notice examined, and held not prejudicial error. Pease v. Magill, 166.

6. The giving of the notice prescribed by section 6951, Rev. Codes 1905, is not necessary in cases where a sheriff attaches and sells property in the possession of and owned by a third person not named in the writ. Aber v. Twichell, 229.

7. The demand for and accepance of an indemnity bond pursuant to a notice of claim to the property attached is a waiver of any defects in the notice. Aber v. Twichell, 229.

8. The mere fact that a notice of the failure of a machine to work as warranted is not given in the manner prescribed by the written

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NOTICE—Continued.

warranty or is not given at all is of no avail as a defense, where the company to whom such notice is to be given acts under some notice given under the warranty, and sends an expert to examine the machine, and does everything that it could have done had such notice been properly sent. Buchanan v. Minn. T. M. Co., 343.

9. No personal notice to the mortgagor or his grantees is required to render a foreclosure by advertisement effectual. Grove v. The Gt. N. Loan Co., 351.

10. The mere fact that the purchaser of real estate did not have actual notice of a mortgage on the land does not entitle him to set aside sheriff's deed under a foreclosure regular in all respects, where the mortgage was duly recorded, and the only ground on which relief is asked is that the mortgage was usurious. Grove v. Gt. N Loan Co., 351.

11. A purchaser of real estate on which there is a mortgage given for interest, partly usurious, is not entitled to have a sheriff's deed given on the foreclosure of the mortgage, regular in all particulars, set aside on account of such usury and on the ground that he had no actual notice of the mortgage or of the foreclosure, when the mortgage was duly recorded and the notice of foreclosure duly published, where the application is not made until about three months after the redemption period has expired. Grove v. Gt. N. Loan Co., 351.

12. A sheriff is not guilty of conversion of property when taken and sold under an execution when he finds the property in the actual possession and under the control of the execution debtor, until a demand for the return of the property is made or notice given of the ownership of the property, or the sheriff has knowledge of the actual ownership of the same. Mariner v. Wasser, 361.

13. A motion for a new trial was duly noticed for hearing on a day and hour named at chambers of the judge of the district court of the proper district. On the day set for the motion the judge was not present, and no proceedings were had. Held, that in the absence of an order continuing the hearing or a written stipulation to that effect, the motion went down, and could not again be taken up without new notice or formal consent of the party on whom it was served. Kaslow v. Chamberlain, 449.

14. The certificate of sale upon foreclosure is only evidence of what transpired for the purpose of record, notice to protect purchasers against intervening claims, and to show who may become entitled to a deed, and it conveys no title. The N. D. Horse & Cattle Co. v. Serumgard, 466.

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OFFER OF PERFORMANCE.

1. Payment or tender of all just taxes paid by a party is not necessary before bringing an action to quiet title, where there was no assessment of the land on account of a failure to describe the land. State Finance Co. v. Halstenson, 145.

2. An offer of performance in good faith by plaintiff, pursuant to the contract, with the present ability and willingness to perform, was sufficient, without an actual production of the money and notes called for by the contract. A tender of the money and notes as distinguished from a mere offer to deliver the same was not required as a basis for a cause of action for breach of the contract, especially in view of defendant's unqualified refusal to perform. Foster Implement Co. v. Smith, 177.

3. An action for damages for a refusal to convey real estate will not lie without a tender of the agreed price, unless it appears that a tender would be a futile act. If the refusal is conditional on future events, a tender is necessary before a cause of action is shown. Beiseker v. Amberson, 215.

4. The holder of a mortgage superior to the one foreclosed, assuming to be a redemptioner when not made so by statute, who tenders the amount necessary to redeem, becomes by the issuance to him of a certificate of redemption and the acceptance and retention by the holder of the certificate of sale of the money tendered, as between himself and the party who parts with such certificate, a "redemptioner." The N. D. Horse & Cattle Co. v. Serumgard, 466.

5. The tender, by a lawful redemptioner, of a bank check issued by a solvent and reputable bank for the sum necessary to be paid to effect a redemption, to a prior redemptioner, or his agent for the purpose of receiving redemption money, effects a redemption, unless refused because it is a check, instead of legal tender, and the subsequent lienholder given an opportunity to procure and tender the necessary currency to comply with the legal requirements of the holder of the certificate. The N. D. Horse & Cattle Co. v. Serumgard, 466.

6. The sheriff or other person who conducts the sale on foreclosure by advertisement, is the agent of the purchaser or holder of the certificate to receive redemption money, but is not such an agent as can bind his principal to accept a check, instead of money, from one qualified to redeem, or to retain the money received by such agent from one not a lawful redemptioner, if the principal makes seasonable objection to the form of payment, or refuses forthwith to recognize the party making the tender as entitled to redeem as a redemptioner, when he is not made so by statute. The N. D. Horse & Cattle Co. v. Serumgard, 466.

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OFFICERS. See Pure Food Commissioner, 281; School and School Districts, 510; Witness, 519.

1. In the performance of his duties as secretary of state, in certifying the names of candidates for state offices to the different county auditors for printing upon the ballot to be used at the general election, the secretary acts in a ministerial capacity; and, when certificates of nomination filed with him are legal in form, it is not any part of his duty to examine into the facts recited in such certificates to ascertain their truth or falsity. State v. Blaisdell, 575.

PARTIES. See Discretion, 145.

1. The cashier of a national bank, which is a party to an action, is a competent witness to testify to the fact of the mailing of a notice to a deceased person, whose executor and heirs at law are parties to the action, as section 7253, Rev. Codes 1905, prohibits evidence of parties only in such cases. Bank v. Warner, 76.
2. The fact that a witness is a proper party to an action in which the executor, administrators, or heirs at law of a deceased person are parties disqualifies such witness from testifying to transactions or statements made by such deceased person. The fact that such witness is a party defendant with the administrator, executor, or heirs does not render him competent as a witness in such cases. Cardiff v. Marquis, 110.
3. The evidence of a witness who is a party in such cases is inadmissible to prove that letters were written and signed by the witness at the request and dictation of the deceased person, whose administrator is a party to the action. Cardiff v. Marquis, 110.
4. The evidence of a witness, who is a party to an action in which the administrator of a deceased person is also a party, is not admissible to prove the contents of lost letters written or received by the witness to or from such deceased person. Cardiff v. Marquis, 110.
5. The holder of a promissory note payable to another or order, and unindorsed, is the real party in interest within the meaning of section 6807, Rev Codes 1905, and may sue thereon where the consideration for the note passed solely between the holder and the maker, and the note was given to another person solely for the benefit of the present holder. Am. Soda Fountain Co. v. Hogue, 375.

PARTNERSHIP. See Dedication, 409.

1. Action to recover the purchase price of goods sold and delivered to the copartnership of S. & M., at Wales, N. D., of which it is alleged the respondent was a member. By the separate answer and stipulation of respondent, all questions were eliminated, except the single one whether he was a member of such copartnership. Defendant, both by his answer and the stipulation, contended that there were two distinct firms at Wales doing business under said copartnership name, and that he was not a member of the firm

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PARTNERSHIP—Continued.

with which plaintiff had its dealings. Held that, by thus narrowing the issues, the burden of proof as to the only remaining issue was not shifted from plaintiff to said defendant; hence the trial court's charge as to the burden of proof was correct. Bristol & Sweet Co. v. Skapple, 270.

PAYMENTS. See WITNESS, 76; TAXATION, 145, 502; PLEADINGS, 364; REDEMPTION, 466; ATTORNEY AND CLIENT, 510.

1. The assumption by an agent of a debt due from a third party of the agent's principal, without authority from, or ratification by, the latter, does not constitute payment. Plano Mfg. Co. v. Doyle, 386.

PERFORMANCE. See PERFORMANCE, OFFER OF, 145, 177.

PERSONAL PROPERTY.

1. A person in actual possession of and having actual control over personal property is prima facie the owner thereof. Mariner v. Wasser, 361.
2. A sheriff is not guilty of conversion of property when taken and sold under an execution when he finds the property in the actual possession and under the control of the execution debtor, until a demand for the return of the property is made or notice given of the ownership of the property, or the sheriff has knowledge of the actual ownership of the same. Mariner v. Wasser, 361.

PLEADING. See TRIAL, 90; REFEREE, 120; WAIVER, 104; INDICTMENT AND INFORMATION, 554.

1. Any objection to the sufficiency of the allegations of the complaint is too late when made for the first time in the Supreme Court, where the complaint would be amended as a matter of course if objection had been made before. Bank v. Warner, 76.
2. On this case being regularly called for trial, the defendant submitted a motion for a judgment upon the pleading, whereupon plaintiff asked leave to amend his second amended complaint and the reply to defendant's answer. Held, that the record discloses no abuse of the legal discretion vested in the trial court by its refusal to permit such amendments. Scott v. N. W. Port Huron Co., 91.
3. While trial courts should be liberal in permitting amendments so justice may be done, such rule in granting amendments changes to the disadvantage of the applicant on each new amendment being allowed. Scott v. N. W. Port Huron Co., 91.
4. Under the code an allegation of new matter in the answer, not relating to a counterclaim, is deemed to be controverted by the adverse party. Held, that a general denial of new matter contained in the answer, made in a reply, is surplusage, and leaves the issues the same as though no such denial had been made. Scott v. N. W. Port Huron Co., 91.

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PLEADING—Continued.

5. Under the pleadings in this case, the trial court was justified in holding proof of breach of warranty inadmissible, but, irrespective of any question as to breach of warranty made by the pleadings, other issues were made by reason of which it was error for the court to enter judgment on the pleadings. Scott v. N. W. Port Huron Co., 91.

6. Supplying by the answer material allegations omitted from the complaint, which is not demurred to, cures the defects occasioned by such omission. Scott v. Port Huron Co., 91.

7. In an action of claim and delivery brought by a third person as claimant to the property against an officer, who levied upon and took into his possession personal property under an execution as the property of the defendant in the execution, it is no defense that a sheriff's jury prior to the commencement of such action found that the title to such property was in the defendant in such execution. Pfeifer v. Hatton, 99.

8. Defendant's answer contained a paragraph alleging the empanelling of such sheriff's jury, and the fact that the jury found against the contention of the claimant. On motion of plaintiff's attorneys such paragraph was stricken from the answer. Held not error. Pfeifer v. Hatton, 99.

9. It is not incumbent on a plaintiff in a garnishee action to take issue upon the garnishee's answer, where it admits that the garnishee has money or property in his hands sufficient to satisfy the plaintiff's claim. Mahon v. Fansett, 104.

10. Objections to the sufficiency of plaintiff's affidavit in a garnishee action cannot be raised in the Supreme Court for the first time. Mahon v. Fansett, 104.

11. An answer by the defendant in a garnishee action alleging that the property in the garnishee's hands is exempt (referring to the time of making the answer), does not state a defense, and evidence that such property is exempt at that time is not admisible under such answer. Mahon v. Fansett, 104.

12. Matters pertaining to amendment of pleadings, continuances, and the bringing in of the personal representatives of deceased parties at the trial of actions, are within the discretion of trial courts, and their action will not be disturbed, except in case of abuse thereof resulting in prejudice. State Finance Co. v. Halstenson, 145.

13. A complaint, in an action by a vendee against a vendor to recover damages for the breach of an executory contract for the sale of real property is sufficient, if it alleges a specific written agreement whereby the defendant promised to sell, and the plaintiff promised to purchase, certain described real property upon specified terms alleged in the complaint, and that within a reasonable time thereafter (no specific date having been agreed upon for performance), plaintiff offered full performance of the contract on its part, accord-

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PLEADING—Continued.

ing to its terms, alleging readiness, ability and willingness to perform, and that defendant at the time of such offer refused, and at all times since has refused to perform said contract on his part. Foster Implement Co. v. Smith, 177.

14. By his demurrer to the complaint defendant admitted the truth of all the facts well pleaded therein, one of which facts was his refusal to perform the contract on his part upon offer of full performance by plaintiff. Such refusal placed defendant in default. Foster Implement Co. v. Smith, 177.

15. A complaint in justice's court, which is sufficient to apprise a person of common understanding of the exact nature and extent of plaintiff's demand, is all the law required. Hanson v. Gronlie, 191.

16. The rulings of the lower court in overruling defendant's demurrer to the complaint, and in denying his motion for an order requiring the complaint to be made more specific, are sustained. Hanson v. Gronlie, 191.

17. Before a variance is to be deemed material it must be shown to the satisfaction of the court to be prejudicially misleading. Maloney v. Geiser Mfg. Co., 195.

18. In this case, if the variance were material, no claim of prejudice could avail, as the trial court held the case open for further proof by defendant if surprised by the decision that there was not variance. Maloney v. Geiser Mfg. Co., 195.

19. Plaintiff ordered a machine from defendant by written order, which was accepted, and the machine delivered to plaintiff, he paying the freight. The price was not fixed in the order, and the title was to remain in defendant until settlement. After its delivery to plaintiff, he contracted to sell it to another. Before delivery under the latter sale, defendant's general agent agreed with plaintiff that the price of the machine on the sale to plaintiff should be $1,000. Plaintiff then informed the general agent that he had sold it to another for $2,000, and asked the general agent if the company would take this purchaser's security, which the general agent agreed to, and further agreed that plaintiff should have all of said $2,000 over and above the $1,000. The general agent thereafter took the second purchaser's order for the machine, and took the security in defendant's name without mention of plaintiff's interest in the securities. The complaint alleges a sale of defendant's property by plaintiff as agent. Held, that there is not material variance between the proof and the complaint. Maloney v. Geiser Mfg. Co., 195.

20. A complaint in an action by a railway company to condemn certain property as a site for a reservoir for the collection and storage of surface water for use in its engines, sufficiently alleges a cause of action, if it sets forth the ultimate facts that the property sought to be condemned is necessary for the purpose of obtaining water required in the operation of its trains. N. P. Ry. Co. v. Boynton, 202.

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PLEADING—Continued.

21. Ultimate facts are all that is requisite or proper to plead, and hence a complaint in an action by a railway corporation to condemn property is sufficient if it alleges that the use thereof is necessary to its construction, maintenance or operation, without alleging in terms that such desired use is a public use. N. P. Ry. Co. v. Boynton, 202.
22. The description of the easement sought to be condemned for the construction of a pipe line is held sufficiently definite and certain. N. P. Ry. Co. v. Boynton, 202.
23. Where the mortgagor sues the mortgagee for conversion, for selling without foreclosure, the right to show the existence of liens in such cases is based upon equitable principles, but the rules of pleading in equity cases do not apply. Force v. Peterson Machine Co., 220.
24. The right to plead the existence of liens on the propery when the conversion took place is not based upon the statute defining what matters may be pleaded as a counterclaim. Force v. Peterson Machine Co., 220.
25. Action to recover the purchase price of goods sold and delivered to the copartnership of S. & M., at Wales, N. D., of which it is alleged the respondent was a member. By the separate answer and stipulation of respondent, all questions were eliminated, except the single one whether he was a member of such copartnership. Defendant, both by his answer and the stipulation, contended that there were two distinct firms at Wales doing business under said copartnership name, and that he was not a member of the firm with which plaintiff had its dealings. Held that, by thus narrowing the issues, the burden of proof as to the only remaining issue was not shifted from plaintiff to said defendant; hence the trial court's charge as to the burden of proof was correct. Bristol & Sweet Co. v. Skapple, 270.
26. In an action for damages for the conversion of grain, it is competent to plead and show as an equitable defense that the grain was mortgaged to the defendant and that the mortgage was drawn by mistake to cover the crop of another year, without first reforming the mortgage through an equitable action. Gorder v. Hilliboe, 281.
27. Action by real estate brokers to recover commissions under an express contract for finding a purchaser for defendant's property. The complaint, in effect, alleges an express contract that plaintiffs should receive the excess over $20 per acre at which a sale should be effected by defendant to prospective purchasers introduced by them, but it fails to allege that they introduced a prospective purchaser who was willing to pay any sum in excess of $20 per acre, and it also fails to allege that the defendant in fact sold or had any opportunity to sell said property for an amount in excess of such price. Held, that the complaint fails to state facts sufficient to constitute a cause of action. Fulton v. Cretian, 335.

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PLEADING—Continued.

28. The complaint failing to allege and the proof failing to establish a cause of action in plaintiff's favor, the judgment in their favor and the order denying defendant's motion for a new trial are erroneous. Fulton v. Cretian, 335.

29. An objection to evidence based on the lack of a pleading to support it cannot be made for the first time in the Supreme Court. Buchanan v. Minn. T. M. Co., 343.

30. Defendant pleaded payment in full prior to the commencement of the action, but such defense is not supported by any evidence. He also attempted to prove a set-off for damages, based upon a breach of the contract, subject to the conditions of which the note was given, but it is held, for reasons stated in the opinion, that such defense was not established. Rieck v. Daigle, 364.

31. Action on a promissory note. The answer admits the execution and delivery of the note and the amount due thereon, but alleges two counterclaims based upon a contract under which plaintiff agreed to reimburse defendant for the expenses incurred by the latter in effecting sales of certain fanning mills theretofore sold by plaintiff to defendant and for the purchase price of which the note in suit was given. The first counterclaim is for expenses theretofore incurred by defendant in making sales of seventeen of such mills. The second asks for the sum of $560 as the probable or estimated expense of effecting sales of twenty-eight mills which are still unsold and in defendant's possession. Plaintiff admitted the first counterclaim. The other was stricken from the answer on plaintiff's motion, and judgment ordered on the pleadings in plaintiff's favor. Held, not error, as no cause of action for the recovery of the expense of making sales in the future of the mills on hand had accrued under the terms of the contract. Owens Co. v. Doughty, 368.

32. In an action upon an accident insurance policy, which contains a stipulation that satisfactory proof of claim must be furnished the company by the claimant within thirty days after the date of the injury, and also the further stipulation that no suit shall be brought under said policy unless brought within nine months from the date of the accidental injury, defendant denies any liability thereunder on account of a failure to comply with such stipulations. Defendant contends that the policy of insurance is an Illinois contract, and that under the statute of Illinois the limitations aforesaid are valid. Such defense is unavailing to defendant, as there is no allegation in the answer and no proof in the record as to the existence of such a statute in said state, and, in the absence of such allegation and proof, the law of the forum controls. Kephart v. Continental Casualty Co., 379.

33. An amendment of an answer in district court filed on an appeal from a default judgment in justice's court is permissible, except as to matters wholly beyond the jurisdiction of the justice of the peace to determine. Erickson v. Elliott, 389.

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PLEADING—Continued.

34. It is contended that a certain portion of the unpaid premium on said policy should have been deducted from plaintiff's recovery. Held, that such contention is without merit, as there is no foundation in the pleadings for any such allowance or deduction, and no such question was presented to or passed upon by the trial court. Kephart v. Continental Casualty Co., 379.

35. An answer is amendable, subject to the discretion of the court, alleging a release of the debt sued on by virtue of bankruptcy proceedings begun after the action was commenced. Erickson v. Elliott, 389.

36. It is not necessary to reply to an answer alleging a release of the debt sued on by virtue of bankruptcy proceedings after the action was commenced, as an affirmative defense only is stated, and not a counterclaim. Erickson v. Elliott, 389.

37. It is error to grant a motion for judgment on the pleadings, where the answer states matters of affirmative defense, as proof of the affirmative defense must be made before the allegations of the answer can have any effect, except to settle the issues. Erickson v. Elliott, 389.

38. After the plea had been entered and the trial called and four jurors called into the box, the defendants asked for one day's time to prepare for trial, and the court denied the request. Held, not error. State v. Chase, 429.

39. At the time of such seizure, other grain of the same kind, which had been intermingled by defendant with that covered by the mortgage, was also seized and converted in like manner. In his answer defendant pleaded a counterclaim for damages, based upon such conversion, and was allowed to recover in the lower court. Held error, as the cause of action contained in this so-called counterclaim had not accrued at the time the action was commenced. Strehlow v. McLeod, 457.

40. The sufficiency of the allegations of an information, when raised by a motion in arrest of judgment, will be construed with less strictness than when raised by demurrer. State v. Johnson, 554.

41. When attacked for the first time by motion in arrest of judgment, an information for the crime of rape in the first degree, drawn under subdivision 3 of section 8890, Rev. Codes 1905, will not be held fatally defective in not charging, in direct and positive language, that the female ravished resisted, and her resistance was overcome by force or violence. State v. Rhoades, 579.

42. An allegation that defendant did, "by force and violence, then and there overcome the resistance then and there made by * * *," will, when its sufficiency is challenged only after verdict, be held equivalent to an allegation that the female ravished resisted, and that her resistance was overcome by defendant by force and violence. State v. Rhoades, 579.

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PLEDGE.

1. A public warehouseman licensed to do business in this state under the provisions of chapter 141, page 180, Laws 1901, being sections 2262-2272, Rev. Codes 1905, may, as security for his indebtedness, issue and deliver to his creditor a warehouse receipt upon property actually contained in such warehouse and owned by him. State v. Robb-Lawrence Co., 257.
2. The execution and delivery of such receipt operate as a valid pledge of the property without the necessity of an actual change of possession; a symbolical or constructive delivery through the issuance and delivery of such warehouse receipt being sufficient. State v. Robb-Lawrence Co., 257.
3. Such a transaction operates in law to create the holder of such receipt a bailor, and the warehouseman a bailee of the property under said warehouse statute, during the time such property remains in such warehouse, and renders the surety on the warehouseman's bond liable for its safe-keeping. State v. Robb-Lawrence Co., 257.

POLICE POWER.

1. Appellant's contention that the law is void, because it attempts to make acts or omissions committed in a foreign state a crime in this state is not sustained. The conditions on which foreign corporations are permitted to do business in this state are within the legitimate power of the state to prescribe, and defendant corporation, having been authorized to transact business in this state, is amenable to its laws enacted under its police powers to the same extent as its citizens. State v. Elevator Co., 23.

POSSESSION. See PLEDGE, 259; DEEDS, 502; ATTACHMENT, 572.

1. Land which is farmed by a tenant under a lease from the owner is in possession of the owner, and not of the tenant. Gray v. Harvey, 1.
2. Evidence examined, and held to show that possession was relinquished by the vendee in a contract for the purchase of land, and taken by the mortgagor before the mortgage in suit was executed and delivered. Gray v. Harvey, 1.
3. The owner of land in the possession of another may properly mortgage the same without violating the statute against champerty. State Finance Co. v. Halstenson, 145.
4. Evidence examined, and held insufficient to show possession of the real property in plaintiff prior to the commencement of the action, and hence the prima facie presumption of title resulting from possession does not apply in plaintiff's behalf. Hebden v. Bina, 235.
5. A person in actual possession of and having actual control over personal property is prima facie the owner thereof. Mariner v. Wasser. 361.

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POSSESSION—Continued.

6. A sheriff is not guilty of conversion of property when taken and sold under an execution, when he finds the property in the actual possession and under the control of the execution debtor, until a demand for the return of the property is made or notice given of the ownership of the property, or the sheriff has knowledge of the actual ownership of the same. Mariner v. Wasser, 361.
7. Plaintiff contends that he was entitled to the possession of certain chattel security for the purpose of foreclosing mortgages of the same to recover two items of indebtedness from the defendant to him, aggregating $149. Held, that for this purpose the action cannot be maintained, for the reason that the liability of the defendant to plaintiff for said items was litigated and determined adversely to the plaintiff herein in the case of Block v. Donovan, 13 N. D. 7, 99 N. W. 72. Donovan v. Block, 406.
8. Appellant took possession of the premises described in the deed referred to and placed the same under cultivation in 1891, and his possession and cultivation thereof have been continuous since 1891, and he paid all taxes and assessments levied thereon between the years 1890 and 1905, and while so in possession of said land. Held, that these facts are a complete defense to an action to quiet title, brought by one holding the record title from the Northern Pacific Railroad Company, under a deed from that company executed, delivered and recorded in 1879; none of the parties through whom plaintiff's title came having ever been in actual possession of the premises. Stiles v. Granger, 502.
9. The possession of a bond by the obligee while an alteration is made therein, together with the fact that an action is commenced on the bond in its altered form, is sufficient evidence to sustain a finding that the alteration was made by or with the consent of the obligee. Hilliboe Admr., v. Warner, 594.

POWER OF SALE. See FORECLOSURE, 84; MORTGAGES, 84.

PRACTICE. See TRIAL, 99, 310; INDICTMENT AND INFORMATION, 554.

1. An objection to the sufficiency of the allegations of the complaint is too late when made for the first time in the Supreme Court, where the complaint would be amended as a matter of course if objection had been made before. Bank v. Warner, 76.
2. While trial courts should be liberal in permitting amendments, so justice may be done, such rule in granting amendments changes to the disadvantage of the applicant on each new amendment being allowed. Scott v. N. W. Port Huron Co., 91.
3. Under the pleadings in this case, the trial court was justified in holding proof of breach of warranty inadmissible, but, irrespective of any question as to breach of warranty made by the pleadings.

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PRACTICE—Continued.

other issues were made by reason of which it was error for the court to enter judgment on the pleadings. Scott v. N. W. Port Huron Co., 91.

4. The statement of the case contains a literal transcript of the testimony taken and reported by a referee to the district court, without any attempt to condense or eliminate immaterial matter. Held, following the rule announced in prior decisions of this court, that such practice is a plain violation of section 7058, Rev. Codes 1905, as well as rule 7 of this court, and does not constitute a statement of the case. Smith v. Kunert, 120.

5. Certain specifications of error relating to the findings of the referee are held insufficient under the statute and rule aforesaid, for the reason that no attempt is made to specify wherein the evidence was insufficient to support the findings complained of. Smith v. Kunert, 120.

6. Under the law of this state (Rev. Codes 1905, sections 5978, 5371), the proof of loss under the policy was furnished and the action brought in ample time. Kephart v. Continental Casualty Co., 379.

7. The right to one day's time for preparation for trial after the plea is entered is absolute if requested in time. State v. Chase, 429.

8. Under a statute providing for one day's time to prepare for trial, but not prescribing when the request shall be made, a reasonable construction thereof is that the request should ordinarily be made immediately after plea, and before any other step preliminary to the trial is taken. State v. Chase, 429.

9. Unless the request for time to prepare for trial, pursuant to a statute giving that right, is made in time, the right thereto is waived. State v. Chase, 429.

10. Whether the request for time to prepare for trial is made in time may depend in some cases upon special circumstances, and in such cases the action of the trial court will be entitled to great weight, and will not be disturbed, except in case of manifest abuse of discretion. State v. Chase, 429.

11. A motion for a new trial was duly noticed for hearing on a day and hour named, at chambers of the judge of the district court of the proper district. On the day set for the motion the judge was not present, and no proceedings were had. Held, that in the absence of an order continuing the hearing or a written stipulation to that effect, the motion went down, and could not again be taken up without new notice or formal consent of the party on whom it was served. Kaslow v. Chamberlain, 449.

12. A general objection to a deposition, on the ground of the incompetency or irrelevancy of the evidence contained therein, is not tenable where the deposition contains evidence material to the issues not subject to such objection. Hilliboe Admr. v. Warner, 594.

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PREROGATIVE WRIT. See PROHIBITION, WRIT OF, 285; CONSTITUTIONAL LAW, 370; CERTIORARI, 510, 67; HABEAS CORPUS, 140; PROHIBITION, 128.

1. The jurisdiction of the Supreme Court to issue original writs extends to questions affecting the sovereignty, franchises or prerogatives of the state, or the liberties of the people. State v. Fabrick, 532.
2. The jurisdiction of the Supreme Court to issue writs under existing constitutional provisions ordinarily extends only to cases publici juris, wherein are directly involved the sovereignty of the state, its franchises or prerogatives, or the liberties of its people. State v. Gottbreht, 543.
3. The matter of the change of the location of the county seat of a county is not a question publici juris, affecting the sovereignty or franchises of the state. State v. Gottbreht, 543.

PRESUMPTIONS. See EVIDENCE, 173, 235, 380.

PRINCIPAL AND AGENT. SEE CONTRACT, 16; EVIDENCE, 248.

1. A drayman, authorized in writing by the defendant to receive and receipt for freight at a local railway station, is an agent of the defendant for such purposes; accordingly held, receipts for freight, belonging to the defendant, taken from the railway station by a drayman possessing such authority, and receipted for by him, are competent evidence, as tending to show the receipt by the principal of the articles of freight described in the record of the station, containing such receipts. State v. Dahlquist, 40.
2. The records of a local railway station, containing receipts signed by the defendant, and others signed by his agent, and a description of outgoing freight, described to the agent, and shipped by the defendant, are competent evidence, tending to show the defendant to be conducting the business of dealing in intoxicating liquors or beer, when such records describe large quantities of empty beer cases, bottles and casks, and especially when the quantity so received was so great as to render it impossible for the defendant to have made personal use of it, during the time covered. State v. Dahlquist, 40.
3. Plaintiff ordered a machine from defendant by written order, which was accepted, and the machine delivered to plaintiff, he paying the freight. The price was not fixed in the order, and the title was to remain in defendant until settlement. After its delivery to plaintiff, he contracted to sell it to another. Before delivery under the latter sale, defendant's general agent agreed with plaintiff that the price of the machine on the sale to plaintiff should be $1,000. Plaintiff then informed the general agent that he had sold it to another for $2,000, and asked the general agent if the company would take this purchaser's security, which the general agent agreed to, and further agreed that plaintiff should have all of said $2,000 over

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PRINCIPAL AND AGENT—Continued.

and above the $1,000. The general agent thereafter took the second purchaser's order for the machine and took the security in defendant's name, without mention of plaintiff's interest in the securities. The complaint alleges a sale of defendant's property by plaintiff as agent. Held, that there is no material variance between the proof and the complaint. Maloney v. Geiser Mfg. Co., 195.

4. Unless a principal repudiates the unauthorized act of his agent within a reasonable time after knowledge of the unauthorized act, he will be deemed to have ratified the same. Russell v. Waterloo T. M. Co., 248.

5. Action upon promissory note executed and delivered by defendants to the State Bank of K. The defense is that such bank acted as their agent in the collection of certain drafts drawn against consignments of grain, and in collecting balances due on such consignments, and that it had in its possession enough funds thus collected to liquidate the balance due on such note, and the defendant requested the application of said funds accordingly. Plaintiff bank, the successor of the State Bank of K., contends that one M., who was cashier, and not the bank, acted as such agent, and that no such funds came into the possession of said bank which were not accounted for. At the conclusion of the testimony the trial court directed a verdict in plaintiff's favor. Held, reversible error, for the reason that the testimony tended to show that a sum in excess of the amount due on said note was received either by the bank or by M., individually, and not accounted for to defendants, and the evidence was sufficient to require a submission to the jury of the question whether the bank or whether M. acted as such agent. Bank v. Bakken, 224.

6. In reviewing a ruling of the trial court in directing a verdict, the testimony will be construed in its most favorable light towards the party against whom such ruling is made, and all reasonable and legitimate inferences which can be deduced in his favor will be deduced therefrom; and when thus considered, if it can be said that reasonable men may fairly differ in the conclusion to be reached thereon, such ruling will be held reversible error. Bank v. Bakken, 224.

7. There may be an implied ratification by silence in reference to the unauthorized acts of an agent done with the principal's knowledge, where the party dealing with such agent is thereby led to believe to his prejudice that the act of the agent is acquiesced in. Russell v. Waterloo T. M. Co., 248.

8. Retaining possession of property purchased by an agent not authorized to do so, after knowledge of the unauthorized act, and acquiescing in the sale of such property to another, is an implied ratification of the unauthorized purchase of such property. Russell v. Waterloo T. M. Co., 248.

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PRINCIPAL AND AGENT—Continued.

9. The facts are set forth in the opinion, and are held to show a ratification of the act of an agent acting beyond his authority. Russell v. Waterloo T. M. Co., 248.
10. Notes taken by an agent in the name of his principal for the purchase price of a machine sold without authority, of which fact the principal was afterwards informed, are competent evidence bearing on the question whether there was a ratification of the act with knowledge of all the material facts. Russell v. Waterloo T. M. Co., 248.
11. If a principal intentionally ratifies an unauthorized act of an agent without full knowledge of all the facts, when such facts are ascertainable, he cannot thereafter repudiate the unauthorized act to the prejudice of the other party. Russell v. Waterloo T. M. Co., 248.
12. The assumption by an agent of a debt due from a third party to the agent's principal, without authority from ,or ratification by the latter, does not constitute payment. Plano Mfg. Co. v. Doyle, 386.
13. The sheriff or other person who conducts the sale on foreclosure by advertisement is the agent of the purchaser or holder of the certificate to receive redemption money, but is not such an agent as can bind his principal to accept a check, instead of money, from one qualified to redeem, or to retain the money received by such agent from one not a lawful redemptioner, if the principal makes seasonable objection to the form of payment, or refuses forthwith to recognize the party making the tender as entitled to redeem as a redemptioner, when he is not made so by statute. The N. D. Horse & Cattle Co. v. Serumgard, 466.
14. The officers of a school district are in effect agents of the voters and taxpayers, and when the district, at a regularly called and conducted election, votes to issue the bonds of the district and from the proceeds to build a schoolhouse, such vote is an instruction by the principal, and such officers have no discretion as to obeying their instruction. Schouweiler v. Allen, 510.

PRINCIPAL AND SURETY. See WAREHOUSEMAN, 257.

1. The erasure by or on behalf of the obligee of a surety's name on a contractor's bond releases all sureties of said bond who signed after the surety whose name was erased and before the erasure, unless they consented to the erasure. Hilliboe Admr. v. Warner, 594.

PRIORITY. See RECORDING TRANSFERS, 148; MORTGAGES, 357; REDEMPTION, 466.

PROCESS.

1. A foreclosure by advertisement has the same binding force as foreclosures by action in which the parties are personally served with process. Grove v. The Gt. N. Loan Co., 351.

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PROHIBITION, WRIT OF.

1. The writ of prohibtion is not a writ of right, but is available only when the inferior court, body or tribunal is about to act without any jurisdiction or in excess of jurisdiction. Zinn v. District Court, 128.
2. The writ of prohibition is not available to arrest further proceedings by a trial court on an indictment found by a grand jury irregularly drawn, summoned and impaneled, as district courts have jurisdiction to impanel grand juries, and if erroneous rulings are made on these questions no question of the jurisdiction of the subject-matter nor of the person is presented which can be reviewed through a writ of prohibition. Zinn v. District Court, 128.
3. Various objections to the validity of an indictment found by a grand jury considered, and held not to warrant the issuing of the writ of prohibition. Zinn v. District Court, 128.
4. The writ of prohibition will not issue against a district court to restrain it from further proceedings in an action to enjoin the pure food commissioner, when the issue in that court is the legality or illegality of the acts threatened by the commissioner, and the record leaves this question in doubt. State v. District Court, 285.
5. On the facts disclosed by the record, application for a writ of prohibition is denied. Nystrom v. Templeton, 463.

PUBLIC WAREHOUSEMEN. See WAREHOUSEMEN, 140, 257.

PURE FOOD COMMISSIONER.

1. The legality of the acts of the pure food commissioner, and the question whether he is exceeding the powers conferred upon him by the law under which he is authorized to act, may be tested in an action to enjoin him from the commission of acts alleged to be without authority. State v. District Court, 285.
2. A district court may properly entertain jurisdiction of an action brought by parties whose property is about to be destroyed by the pure food commissioner, and who will, from the nature of their business and other facts, be thereby subjected to a multiplicity of suits to enjoin him from unlawfully proceeding. State v. District Court, 285.
3. The pure food commissioner may be enjoined from distributing circulars or bulletins condemning the property of manufacturers as harmful and deceptive to the public, when the acts of the commissioner are in excess of the power or authority conferred upon him by law, and would cause irreparable injury. State v. District Court, 285.
4. The writ of prohibition will not issue against a district court to restrain it from further proceedings in an action to enjoin the pure food commissioner, when the issue in that court is the legality or illegality of the acts threatened by the commissioner, and the record leaves this question in doubt. State v. District Court, 285.

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QUIETING TITLE.

1. In an action to determine adverse claims to real property, the plaintiff must recover, if at all, upon the strength of his own title, and not upon the weakness of his adversary's title. Brown v. Comonow, 84.
2. Even if plaintiff had acquired title under such foreclosure proceedings, the proof shows that he conveyed the same to another prior to the commencement of this action, and having failed to show any title to the property, the judgment of the district court in defendant's favor was proper in so far as it denied any relief to plaintiff. The judgment, however, in so far as it quieted title in defendants, is erroneous, and the same is accordingly modified. Brown v. Comonow, 84.
3. Payment or tender of all just taxes paid by a party is not necessary before bringing an action to quiet title, where there was no assessment on the land on account of a failure to describe the land. State Finance Co. v. Halstenson, 145.
4. In an action to determine adverse claims to real property, it is incumbent upon plaintiff to establish his title to the property as alleged by him. This the plaintiff failed to do, and the action was therefore properly dismissed. Hebden v. Bina, 235.
5. In the statutory action to determine adverse claims to real property, it is incumbent upon plaintiff to prove a title sufficient to authorize him to maintain the action, and, until he furnishes such proof, the defendant is not required to prove his adverse title or claim. Youkers v. Hobart, 296.
6. Appellant took possession of the premises described in the deed above referred to and placed the same under cultivation in 1891, and his possession and cultivation thereof have been continuous since 1891, and he paid all taxes and assessments levied thereon between the years 1890 and 1905, and while so in possession of said land. Held, that these facts are a complete defense to an action to quiet title, brought by one holding the record title from the Northern Pacific Railroad Company, under a deed from that company executed, delivered and recorded in 1879; none of the parties through whom plaintiff's title came having ever been in actual possession of the premises. Stiles v. Granger, 502.
7. The title to the land in controversy ripened in appellant after the payment of ten years' taxes and possession during the same period, and such title is not affected by any subsequent negotiations which he may have had with the respondent for the purpose of quieting his title. Stiles v. Granger, 502.

RAILROADS. See EVIDENCE, 40; CONSTITUTIONAL LAW, 370; NEGLIGENCE, 433; COMMON CARRIERS, 610.

1. A complaint in an action by a railway company to condemn certain property as a site for a reservoir for the collection and storage

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RAILROADS—Continued.

of surface water for use in its engines, sufficiently alleges a cause of action if it sets forth the ultimate facts that the property sought to be condemned is necessary for the purpose of obtaining water required in the operation of its trains. N. P. Ry. Co. v. Boynton, 202.

2. Ultimate facts are all that is requisite or proper to plead, and hence a complaint in an action by a railway corporation to condemn property is sufficient if it alleges that the use thereof is necessary to its construction, maintenance or operation, without alleging in terms that such desired use is a public use. Such latter allegation would constitute a mere conclusion of law. N. P. Ry. Co. v. Boynton, 202.

3. Certain requests for instructions by defendant were denied, and properly so, as their giving in effect would have amounted to a directed verdict. Pendroy v. Gt. N. Ry. Co., 433.

4. Action to recover damages for the negligent killing of stock which was trespassing upon defendant's right of way. Plaintiff recovered a verdict for $465. Held, that the evidence is amply sufficient to justify such verdict. McDonell v. Soo Ry. Co., 606.

5. The duty of a railway company and its employes, in case of stock trespassing upon its right of way, is to exercise ordinary care not to injure it after it is discovered to be in a place of danger. McDonell v. Soo Ry. Co., 606.

RAPE. See CRIMINAL LAW, 579.

RATIFICATION. See CONTRACT, 16; PRINCIPAL AND AGENT, 248, 386.

1. Notes taken by an agent in the name of his principal for the purchase price of a machine sold without authority, of which fact the principal was afterwards informed, are competent evidence bearing on the question whether there was a ratification of the act with knowledge of all the material facts. Russell v. Waterloo T. M. Co., 248.

REAL ESTATE. See VENDOR AND PURCHASER, 215; DEEDS, 275; QUIETING TITLE, 296; JUDGMENT, 340; USURY, 351; DEDICATION, 409; FORECLOSURE, 466.

1. Real estate is subject to mortgage by the holder of the legal title between the act of sale on foreclosure under a power contained in a prior mortgage and the expiration of the period allowed by statute for redemption. The N. D. Horse & Cattle Co. v. Serumgard, 466.

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RECORDING TRANSFERS. See NOTICE, 165; FORECLOSURE, 351.

1. The fact that two mortgages were executed, delivered and recorded on the same day and hour is notice to a subsequent purchaser of the land to put him upon inquiry as to the actual priority of such mortgage. State Finance Co. v. Halstenson, 145.
2. The foreclosure of a mortgage, simultaneously recorded with another by advertisement, establishes nothing as to the priority of such mortgage. State Finance Co. v. Halstenson, 145.
3. The mere fact that the purchaser of real estate did not have actual notice of a mortgage on the land does not entitle him to set aside sheriff's deed under a foreclosure regular in all respects where the mortgage was duly recorded, and the only ground on which relief is asked is that the mortgage was usurious. Grove v. Gt. N. Loan Co., 351.
4. A purchaser of real estate on which there is a mortgage given for interest, partly usurious, is not entitled to have a sheriff's deed, given on the foreclosure of the mortgage, regular in all particulars, set aside on account of such usury and on the ground that he had no actual notice of the mortgage or of the foreclosure, when the mortgage was duly recorded and the notice of foreclosure duly published, where the application is not made until about three months after the redemption period has expired. Grove v. Gt. N. Loan Co., 351.
5. The absence of a date in the mortgage as recorded will not vitiate a foreclosure thereof. Grove v. Gt. N. Loan Co., 351.
6. The certificate of sale in such case is only evidence of what transpired for the purpose of record, notice to protect purchasers against intervening claims, and to show who may become entitled to a deed, and it conveys no title. The N. D. Horse & Cattle Co. v. Serumgard, 466.
7. The fact that a mortgage given after the act of sale occurred on a prior mortgage, and before the expiration of the period allowed for redemption, is not recorded until after the expiration of one year from the sale, but is recorded within the sixty days additional allowed where there has been a redemption, does not deprive the holder of the last mortgage given of the right to redeem on complying with the other statutory requirements. The N. D. Horse & Cattle Co. v. Serumgard, 466.

REDEMPTION. See FORECLOSURE, 351.

1. A "redemption" from the purchase at a foreclosure sale by one not the mortgagor is a compulsory sale of the interest acquired by the purchaser at the foreclosure sale, and such redemption can only be enforced by one given that right by statute, and then only by pursuing the method prescribed by the statute conferring the right. The N. D. Horse & Cattle Co. v. Serumgard, 466.

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REDEMPTION—Continued.

2. One who is not made by statute a redemptioner, but thus acquires the rights of a redemptioner, also assumes the obligations and liabilities of a redemptioner, and it follows that he must permit the lawful redemptioner to redeem from him within the period given by statute to a subsequent lienholder by judgment or mortgage, for such purpose. The N. D. Horse & Cattle Co. v. Serumgard, 466.
3. The holder of a mortgage superior to the one foreclosud, assuming to be a redemptioner when not made so by statute, who tenders the amount necessary to redeem, becomes by the issuance to him of a certificate of redemption and the acceptance and retention by the holder of the certificate of sale of the money tendered, as between himself and the party who parts with such certificate, a "redemptioner." The N. D. Horse & Cattle Co. v. Serumgard, 466.
4. The tender, by a lawful redemptioner, of a bank check issued by a solvent and reputable bank for the sum necessary to be paid to effect a redemption, to a prior redemptioner or his agent, for the purpose of receiving redemption money, effects a redemption, unless refused because it is a check, instead of legal tender, and the subsequent lienholder given an opportunity to procure and tender the necessary currency to comply with the legal requirements of the holder of the certificate. The N. D. Horse & Cattle Co. v. Serumgard, 466.
5. The sheriff or other person who conducts the sale on foreclosure by advertisement, is the agent of the purchaser or holder of the certificate to receive redemption money, but is not such an agent as can bind his principal to accept a check, instead of money, from one qualified to redeem, or to retain the money received by such agent from one not a lawful redemptioner, if the principal makes seasonable objection to the form of payment, or refuses forthwith to recognize the party making the tender as entitled to redeem as a redemptioner, when he is not made so by statute. The N. D. Horse & Cattle Co. v. Serumgard, 466.
6. Real estate is subject to mortgage by the holder of the legal title between the act of sale on foreclosure under a power contained in a prior mortgage and the expiration of the period allowed by statute for redemption. The N. D. Horse & Cattle Co. v. Serumgard, 466.
7. Every person having an interest in property subject to a lien has a right to redeem it from the lien at any time after the claim is due, and before his right of redemption is foreclosed. Rev. Codes 1905, section 6141. The N. D. Horse & Cattle Co. v. Serumgard, 466.
8. The fact that a mortgage given after the act of sale occurred on a prior mortgage, and before the expiration of the period allowed for redemption, is not recorded until after the expiration of one

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REDEMPTION—Continued.

year from the sale, but is recorded within the sixty days additional allowed where there has been a redemption, does not deprive the holder of the last mortgage given of the right to redeem on complying with the other statutory requirements. The N. D. Horse & Cattle Co. v. Serumgard, 466.

9. The holder of a mortgage given after the act of sale under a prior mortgage, and before the expiration of the period allowed for redemption from such sale, is a redemptioner. The N. D. Horse & Cattle Co. v. Serumgard, 466.

10. Under section 7465, Rev. Codes 1905, the property sold may be redeemed within one year from the day of sale in like manner and to the same effect as provided in chapter 12 for redemption of real property sold upon execution, so far as the same may be applicable, by (1) The mortgagor or his successor in interest in the whole or any part of the property; (2) By a creditor having a lien by judgment or mortgage upon the property sold, or in some share or part thereof, subsequent to that on which the property was sold. Only those mentioned in subdivision 2 of the above section are redemptioners, and as such entitled to sixty days in which to redeem from a previous redemptioner. The N. D. Horse & Cattle Co. v. Serumgard, 466.

11. The redemption statute is remedial in its nature, and is intended, not only for the benefit of creditors holding liens subsequent to a lien in process of foreclosure but more particularly for the purpose of making the property of the debtor pay as many of his debts as it can be made to pay, and to prevent its sacrifice, and should be liberally construed. The N. D. Horse & Cattle Co. v. Serumgard, 466.

12. A "foreclosure sale" under a power contained in the mortgage, which conveys the title of the mortgagor, is in a legal sense the complete foreclosure proceedings, beginning with the act of sale and terminating with the execution of the deed after the expiration of the period allowed for redemption. It includes all the proceedings for the foreclosure of the right of redemption by sale and deed. The N. D. Horse & Cattle Co. v. Serumgard, 466.

13. The phrase "on the property sold," in the statutory definition of a redemptioner as being one holding "a lien by judgment or mortgage on the property sold," applies to the land or premises, as those words are commonly used. The N. D. Horse & Cattle Co. v. Serumgard, 466.

14. The sale in the exercise of a power contained in a mortgage which conveys the title of the mortgagor is the sale as completed by the execution of a deed at the expiration of the period allowed for redemption. The N. D. Horse & Cattle Co. v. Serumgard, 466.

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REFERENCES AND REFEREES. See CONSTITUTIONAL LAW, 120.

1. The statement of the case contains a literal transcript of the testimony taken and reported by a referee to the district court, without any attempt to condense or eliminate immaterial matter. Held, following the rule announced in prior decisions of this court, that such practice is a plain violation of section 7058, Rev. Codes 1905, as well as rule 7 of this court, and does not constitute a statement of the case. Smith v. Kunert, 120.
2. Certain specifications of error relating to the findings of the referee are held insufficient under the statute and rule aforesaid, for the reason that no attempt is made to specify wherein the evidence was insufficient to support the findings complained of. Smith v. Kunert, 120.
3. Appellant's assignment of error, based upon rulings and findings of the referee, are not considered, for the reason that the statute and rule above mentioned have not been complied with. Smith v. Kunert, 120.
4. Under the provisions of section 7046 and 7047, Rev. Codes 1905, a compulsory reference cannot be ordered without the written consent of the parties, unless the case comes within the provision of the latter section. Mere silence or failure to object or except to the order will not constitute a waiver of a party's constitutional right to a trial by jury. Smith v. Kunert, 120.
5. Under the issues as framed by the pleadings in this case, held that the trial thereof involved the examination of a long account, within the meaning of section 7047, Rev. Codes 1905, and hence that the order of reference was properly made. Smith v. Kunert, 120.

REFORMATION OF INSTRUMENTS.

1. In an action for damages for the conversion of grain, it is competent to plead and show as an equitable defense that the grain was mortgaged to the defendant and that the mortgage was drawn by mistake to cover the crop of another year, without first reforming the mortgage through an equitable action. Gorder v. Hilliboe, 281.

REMITTITUR.

1. Where a remittitur has been regularly issued and transmitted to the district court, the appellate court has lost jurisdiction; but, when irregularly, inadvertently or erroneously issued, such court does not lose jurisdiction, but may recall for the purpose of correcting any error or mistake. Nystrom v. Templeton, 463.

REPLEVIN. See CLAIM AND DELIVERY, 99, 165, 173.

REPLY. See PLEADING, 381.

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REPUTATION. See APPEAL AND ERROR, 495.

RES JUDICATA.

1. The note and mortgage in suit were assigned to plaintiff by one Alexander McKenzie, the payee and mortgagee. Prior to such assignment, it was adjudged in a former action brought against said McKenzie and others that they had no right, title or interest in and to the property covered by such mortgage, but this so-called judgment was a nullity in so far as the said McKenzie is concerned, for the reason that he was never legally served with a summons in such action, nor did he make any appearance therein. Held, that the rights of McKenzie under said mortgage were in no manner affected by said former judgment; and hence the plaintiff acquired a good title to the note and mortgage through said judgment. Clarke & Co. v. Doyle, 340.
2. Plaintiff contends that he was entitled to the possession of certain chattel security for the purpose of foreclosing mortgages of the same to recover two items of indebtedness from the defendant to him, aggregating $149. Held, that for this purpose the action cannot be maintained, for the reason that the liability of the defendant to plaintiff for said items was litigated and determined adversely to the plaintiff herein in the case of Block v. Donovan, 13 N. D. 1, 99 N. W. 72. Donovan v. Block, 406.

RES GESTAE. See EVIDENCE, 48.

REWARD. See CRIMINAL LAW, 517.

RULES OF COURT.

1. The statement of the case contains a literal transcript of the testimony taken and reported by a referee to the district court, without any attempt to condense or eliminate immaterial matter. Held, following the rule announced in prior decisions of this court, that such practice is a plain violation of section 7058, Rev. Codes 1905, as well as rule 7 of this court, and does not constitute a statement of the case. Smith v. Kunert, 120.
2. Certain specifications of error relating to the findings of the referee are held insufficient under the statute and rule aforesaid, for the reason that no attempt is made to specify wherein the evidence was insufficient to support the findings complained of. Smith v. Kunert, 120.
3. Appellant's assignment of error, based upon rulings and findings of the referee, are not considered, for the reason that the statute and rule above mentioned have not been complied with. Smith v. Kunert, 120.
4. Assignments of error not argued in the appellant's brief are deemed abandoned under rule 14 of this court (91 N. W. viii), and hence will not be considered. Foster Implement Co. v. Smith, 177.

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RULES OF COURT—Continued.

5. Counsel, in the preparation of the so-called statement of case, not only violated the provisions of the above section, but they failed to comply with rule 7 of the Supreme Court (91 N. W. vi), which requires the evidence to be set forth in narrative form. For these reasons the statement of case must be disregarded on appeal. Bertelson v. Ehr, 339.

6. Rule 7 of the Supreme Court (91 N. W. vi), is intended to facilitate the work of that court, and to aid litigants in pointing out and making clear the errors relied upon, and to relieve the court of the necessity of exploring the whole record. O'Keefe v. Omlie, 404.

7. In the statement of the case no attempt is made to comply with the requirements of the rule above cited by reducing the testimony to narrative form, or to eliminate those parts having no bearing upon the decision of the case. and the specifications of error do not comply with the requirements of the rule, but are scattered throughout the proceedings wherever an exception was taken. For these reasons this court will disregard everything except the judgment roll. O'Keefe v. Omlie, 404.

8. Rule 19 of this court (91 N. W. xi), prescribing the size of the page and method of binding typewritten abstracts and briefs, should be followed. O'Keefe v. Omlie, 404.

9. Certain assignments of error predicated upon rulings of the trial court in the admission and rejection of testimony are deemed abandoned for the reason that they are not discussed or treated in the brief in accordance with rule 14 (91 N. W. viii), of this court. Pendroy v. Gt. N. Ry. Co., 433.

SALES. See PRINCIPAL AND AGENT, 248; TAXATION, 296; FORECLOSURE, 351, 466; REDEMPTION, 466.

1. Evidence reviewed, and held to show a delivery of a bill of sale in accordance with the intention of the grantor. Aber v. Twichell, 229.

2. Retaining possession of property purchased by an agent not authorized to do so, after knowledge of the unauthorized act, and acquiescing in the sale of such property to another, is an implied ratification of the unauthorized purchase of such property. Russell v. Waterloo T. M. Co., 248.

3. The mere fact that a notice of the failure of a machine to work as warranted is not given in the manner prescribed by the written warranty or is not given at all is of no avail as a defense. where the company to whom such notice is to be given acts under some notice given under the warranty, and sends an expert to examine the machine, and does everything that it could have done had such notice been properly sent. Buchanan v. Minn. T. M. Co., 343.

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SCHOOLS AND SCHOOL DISTRICTS.

1. On the facts of this case, an application made by voters and taxpayers of a school district to be allowed to defend a pending action, brought to enjoin the issuance of the bonds of the district, did not constitute a petition to intervene. Schouweiler v. Allen, 510.
2. The officers of a school district are in effect agents of the voters and taxpayers, and when the district, at a regularly called and conducted election, votes to issue the bonds of the district and from the proceeds to build a schoolhouse, such vote is an instruction by the principal, and such officers have no discretion as to obeying their instructions. Schouweiler v. Allen, 510.
3. After a majority of the voters of a school district had instructed the school board to issue bonds for building purposes, a taxpayer and voter of the district brought suit to enjoin the issuance of the bonds voted, alleging that enough illegal votes were cast in favor of the bonds to change the result. The school board answered, denying all allegations of the complaint, relating to illegal votes; but subsequently a majority of the board stipulated personally with the plaintiff in such action that judgment should be rendered and entered in favor of the plaintiff, permanently enjoining the defendants from issuing the bonds so voted. On such stipulation, without the submission of evidence, and without making any findings, the court ordered judgment as stipulated. Held, that such stipulation constitutes collusion between the plaintiff and the officers, and a legal fraud upon the district and the court, and furnished no basis for the judgment entered, and that it was error to order judgment upon such collusive, illegal and void stipulation. Schouweiler v. Allen, 510.
4. Section 911, Rev. Codes 1905, which provides that if a majority of all the votes cast at a school district election at which the issue of bonds is submitted should be in favor of issuing bonds, the school board through its proper officers, shall forthwith issue bonds in accordance with such vote, is mandatory. Schouweiler v. Allen, 510.

SHERIFF. See FORECLOSURE, 145, 351.

1. In an action of claim and delivery brought by a third person as claimant to the property, against an officer, who levied upon and took into his possession personal property under an execution as the property of the defendant in the execution, it is no defense that a sheriff's jury prior to the commencement of such action found that the title to such property was in the defendant in such execution. Pfeifer v. Hatton, 99.
2. The sole function of the summary proceeding of a sheriff's jury is to justify the officer in delivering the property to the claimant in the event the jury find in his favor, unless the plaintiff in the

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SHERIFF—Continued.

execution furnishes indemnity to the officer against the claims of such third person. Pfeifer v. Hatton, 99.

3. The giving of the notice prescribed by section 6951, Rev. Codes 1905, is not necessary in cases where the sheriff attaches and sells property in the possession of and owned by a third person not named in the writ. Aber v. Twichell, 229.

4. The demand for and acceptance of an indemnity bond by a sheriff pursuant to a notice of claim to the property attached is a waiver of any defects in the notice. Aber v. Twichell, 229.

5. A sheriff is not guilty of conversion of property when taken and sold under an execution when he finds the property in the actual possession and under the control of the execution debtor, until a demand for the return of the property is made or notice given of the ownership of the property, or the sheriff has knowledge of the actual ownership of the same. Mariner v. Wasser, 361.

6. The sheriff or other person who conducts the sale on foreclosure by advertisement is the agent of the purchaser or holder of the certificate to receive redemption money, but is not such an agent as can bind his principal to accept a check, instead of money, from one qualified to redeem, or to retain the money received by such agent from one not a lawful redemptioner, if the principal makes seasonable objection to the form of payment, or refuses forthwith to recognize the party making the tender as entitled to redeem as a redemptioner, when he is not made so by statute. The N. D. Horse & Cattle Co. v. Serumgard, 466.

SOCIALISM. See ELECTION, 575.

SOVEREIGNTY OF THE STATE. See COUNTIES, 532; PREROGATIVE WRIT, 543.

STALE CLAIMS. See LACHES, 145.

STATE FAIRS.

1. Under chapter 46, page 71, Laws 1905. relating to state fairs, the legislature vested the power to accept the title to lands to be conveyed to the state by the fair association in the governor and attorney general, and further provided that upon failure on the part of either of two state fair asociations to be organized under the act, to comply with the provisions of the act, all appropriations should be made to the one complying with the act and the state fair permanently located at the place complying with the provisions of the act. Held, that the fact that the land conveyed to the state by one fair association had a mortgage thereon could not be urged by the other association as a ground for payment to it of the appropriation after the governor and attorney general had accepted the title, and the association conveying the incumbered title had relied on such acceptance. State v. Holmes, 31.

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STATE FAIRS—Continued.

2. The governor and attorney general having been vested with full authority to accept the title, and having done so, no one but the state can question the legality of such acceptance, as to questions of the title of the land, or of the manner of organization of the association. State v. Holmes, 31.

3. It was upon failure to comply with the provisions of the act, as to matters that were preliminary to the acceptance of the title by the governor and attorney general on behalf of the state, that the appropriation could properly be claimed by the association that had complied with the act. State v. Holmes, 31.

4. The failure of one fair association to manage the state fair strictly in accordance with the law, or to use the appropriations and make reports strictly within the terms of the act, is not available to the other association as a ground for the payment to it of the appropriations. State v. Holmes, 31.

STATEMENT OF CASE. See APPEAL AND ERROR, 120, 210, 338, 380; RULES OF COURT, 404.

STATE'S ATTORNEY, See WITNESS, 519.

STATUTE OF FRAUDS. See FRAUDS, STATUTES OF, 110, 161.

STATUTE OF LIMITATIONS. See LIMITATION OF ACTIONS, 145, 302, 340.

STATUTES. SEE MUNICIPAL CORPORATIONS, 319.

1. Where the officials of the city fire department have sole charge of all fire apparatus for use at fires, all of which was owned by the city, and the duties of the other members of the fire department simply require them to repair to the fire on alarm, and to aid in extinguishing it, the department as companies has no such management of the apparatus named as is contemplated by section 2968, Rev. Codes 1905, to entitle it to a share of the fund received from insurance premiums. Hose Co. v. Fargo, 5.

2. In this case it is shown six members of the fire department of the defendant city were paid annual or monthly salaries, and all other members of the department were paid in accordance with the ordinance of the city, $1 for the first hour, and fifty cents per hour for all subsequent time in the daytime, and seventy-five cents in the night-time, for time spent in actual attendance at fires, and that the amount so paid by the city to its fire department for a period of about eighteen months, the time involved in this action, was over $6,000. Held, that such department was a paid department within the meaning of section 2968, Rev. Codes 1905. Hose Co. v. Fargo, 5.

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STATUTES—Continued.

3. Under section 7811, Rev. Codes 1905, a writ of certiorari will not be granted in any case, unless the inferior court, officer, board or tribunal has exceeded its jurisdiction, and there is no appeal, nor, in the judgment of the court, any other plain, speedy and adequate remedy. Soo Ry. Co. v. Blakemore, 67.
4. The cashier of a national bank, which is a party to an action, is a competent witness to testify to the fact of the mailing of a notice to a deceased person, whose executor and heirs at law are parties to the action, as section 7253, Rev. Codes 1905, prohibits evidence of parties only in such cases. Bank v. Warner, 76.
5. Where a contractor and the executors and heirs at law of the deceased owner of a building, erected under a contract between said contractor and the owner, are parties defendant in an action to foreclose a subcontractor's lien, the evidence of the contractor as to when the building was completed is not objectionable as referring to a transaction with a party since deceased, under section 7237, Rev. Codes 1905. Bank v. Warner, 76.
6. Whether under section 4348, Compiled Laws 1887, being section 6151, Rev. Codes 1905, a person may give a trust deed as well as a mortgage upon real property as security for the payment of indebtedness, and whether the instrument referred to in the opinion is or was intended by the parties thereto to be a trust deed as distinguished from a mortgage, is not determined. Brown v. Comonow, 84.
7. Express statutory authority is conferred by section 6159, Rev. Codes 1905, upon a mortgagor to designate the mortgagee or any other person to execute the power of sale upon default in the payment of the mortgage indebtedness. Brown v. Comonow, 84.
8. The statement of the case contains a literal transcript of the testimony taken and reported by a referee to the district court, without any attempt to condense or eliminate immaterial matter. Held, following the rule announced in prior decisions of this court, that such practice is a plain violation of section 7058, Rev Codes 1905, as well as rule 7 of this court, and does not constitute a statement of the case. Smith v. Kunert, 120.
9. Under the issues as framed by the pleadings in this case, held that the trial thereof involved the examination of a long account, within the meaning of section 7047, Rev. Codes 1905, and hence that the order of reference was properly made. Smith v. Kunert, 120.
10. Appellant's assignments of error, based upon rulings and findings of the referee, are not considered, for the reason that the statute and rule above mentioned have not been complied with. Smith v. Kunert, 120.
11. Under the provisions of section 7046 and 7047, Rev. Codes 1905, a compulsory reference cannot be ordered without the written

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consent of the parties, unless the case comes within the provision of the latter section. Mere silence or failure to object or except to the order will not constitute a waiver of a party's constitutional right to a trial by jury. Smith v. Kunert, 120.

12. Subdivision 1, section 7047, Rev. Codes 1905, is not in conflict with section 7 of our state constitution, which provides that "the right to trial by jury shall be secured to all and remain inviolate." The right of trial by jury as thus guaranteed refers to such right as it existed by law at and prior to the adoption of the constitution. Smith v. Kunert, 120.

13. Under the issues as framed by the pleadings in this case, held that the trial thereof involved the examination of a long account, within the meaning of section 7047, Rev. Codes 1905, and hence that the order of reference was properly made. Smith v. Kunert, 120.

14. Under section 9931, Rev. Codes 1905, the state can secure a change of the place of trial in a criminal action under the same circumstances as a defendant in a criminal action may under existing laws, and said section 9931 is a constitutional enactment. Barry v. Truax, 13 N. D. 131, 99 N. W. 769, 65 L. R. A. 762, 112 Am. St. Rep. 662, followed. Zinn v. District Court, 135.

15. Petitioner, who was an officer of a milling corporation engaged solely in the manufacture of flour, is not guilty of larceny under section 2251, Rev. Codes 1905, for neglect or refusal to deliver on demand or to pay the market value of wheat delivered to such corporation by another. Ex parte Bellamy, 140.

16. Said section is construed and held to apply only to such persons, associations and corporations as are embraced within the purview of section 2244, Rev. Codes 1905, defining public warehousemen. This section by its terms, expressely excepts from its operation milling concerns not doing a shipping business. Ex parte Bellamy, 140.

17. The evidence before the committing magistrate disclosed that the milling corporation of which petitioner was an officer was not engaged in doing a shipping business. Therefore the commitment under which petitioner is held to answer for the offense of larceny as defined in section 2251, Rev. Codes 1905, aforesaid, is contrary to law and void, and the writ prayed for is granted. Ex parte Bellamy, 140.

18. Section 9383, Rev. Codes 1905, which provides that "no person shall be excused from testifying * * * by reason of the testimony tending to criminate himself (the witness), but the testimony given by such person shall not in any case be used against him," does not grant immunity from prosecution. In re Beer, 184.

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19. Defendant appealed from the justice to the district court upon questions of law alone under section 8501, Rev. Codes 1905, where he was defeated upon every point urged. Held, that it was not error to thereafter refuse to grant him a trial upon the facts in the district court. A trial upon the merits is permissible in the district court only where the decision upon such appeal re-opens the case for the trial of an issue of fact. Hanson v. Gronlie, 191.

20. The giving of the notice prescribed by section 6951, Rev. Codes 1905, is not necessary in cases where a sheriff attaches and sells property in the possession of and owned by a third person not named in the writ. Aber v. Twichell, 229.

21. A public warehouseman licensed to do business in this state under the provisions of chapter 141, page 180, Laws 1901, being sections 2262-2272, Rev. Codes 1905, may, as security for his indebtedness, issue and deliver to his creditor a warehouse receipt upon property actually contained in such warehouse and owned by him. State v. Robb-Lawrence Co., 257.

22. Following the rule announced by this court in the recent case of Sucker State Drill Co. v. Wirtz Bros., 115 N. W. 844, it is held that plaintiff, a foreign corporation, did not violate the statute of this state (sections 4695-4697, Rev. Codes 1905), prescribing the conditions upon which such corporations may do business within our borders. State v. Robb-Lawrence Co., 257.

23. A judgment for damages, and condemning a right of way for a drain under chapter 23, Rev. Codes 1905, in an action in which no benefits were considered, does not preclude the drain commissioners from assessing benefits. Ross v. Prante, 266.

24. Chapter 5, page 9, Laws 1905, which excepts from the operation of the former statute, providing that absence or non-residence from the state shall suspend the running of the statute, all actions and proceedings for the foreclosure of mortgages on real property, is construed, and held not to apply to existing causes of action for the foreclosure of mortgages which accrued prior to the passage of such amendatory statute, for the reasons, first, that no time was fixed by the legislature for the commencement of such foreclosure proceedings after the taking effect of such statute; and second, that if the time between the passage and approval of the act (March 10th) and its taking effect (July 1st), was intended to be the time fixed for such purpose, the same is manifestly unreasonable. Adams & Freese Co. v. Kenoyer, 302.

25. Under the law of this state (Rev. Codes 1905, sections 5978, 5371), the proof of loss under the policy was furnished and the action brought in ample time. Kephart v. Continental Casualty Co., 379.

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26. The drainage act, being sections 1818 to 1850, Rev. Codes 1905, does not conflict with section 25 of the state constitution, which vests the legislative power of the people of the state in the legislative assembly. Appellants' contention that such drainage law is an unwarranted delegation of legislative power to the board of drain commissioners is not sustained. Soliah v. Cormack, 393.

27. The word "maliciously," as used in section 9315, Rev. Codes 1905, relating to the crime of "malicious mischief," is to be given a restricted meaning, and imports that the act to which it relates must have resulted from actual ill-will or revenge. It implies an intent to vex and annoy the owner of the property injured. State v. Minor, 454.

28. In an action brought to foreclose a chattel mortgage upon certain grain, a warrant was issued under the provisions of section 7513, Rev. Codes 1905, pursuant to which all the grain grown on the land described in the mortgage, was seized by the plaintiff, and subsequently, and before trial, the same was wrongfully converted by a sale thereof. Such grain was the sole property covered by the mortgage, and its wrongful conversion by plaintiff extinguished the lien of the mortgage, and thereby the cause of action for such foreclosure ceased to exist. Strehlow v. McLeod, 457.

29. Under section 7465, Rev. Codes 1905, the property sold may be redeemed within one year from the day of the sale in like manner and to the same effect as provided in chapter 12 for redemption of real property sold upon execution, so far as the same may be applicable, by (1) The mortgagor or his successor in interest in the whole or any part of the property; (2) By a creditor having a lien by judgment or mortgage upon the property sold, or on some share or part thereof, subsequent to that on which the property was sold. Only those mentioned in subdivision 2 of the above section are redemptioners, and as such entitled to sixty days in which to redeem from a previous redemptioner. The N. D. Horse & Cattle Co. v. Serumgard, 466.

30. The provision of section 7464, Rev. Codes 1905, that the certificate given on the execution of a power of sale contained in a mortgage shall have the same validity and effect as the certificate of sale in like manner furnished upon the sale of real property upon execution, provided for by section 7137, Rev. Codes 1905, does not relate to the effect of the act of sale, but to the validity and effect of the certificate. The N. D. Horse & Cattle Co. v. Serumgard, 466.

31. Appellant purchased a quitclaim deed for the land in controversy form one Bowdle in August, 1890. The only title possessed by Bowdle was derived from a deed under sale for taxes for the year 1886. It is contended that such tax deed is invalid. Without determining this question, but conceding for the purposes of this

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case that it is invalid, and following Power v. Kitching, 10 N. D. 254, 86 N. W. 737, 88 Am. St. Rep. 691, it is held that the title so obtained by appellant is adequate as foundation for title in the appellant under section 4928, Rev. Codes 1905, which reads: "All titles to real property vested in any person or persons who have been or hereafter may be in actual, open, adverse and undisputed possession of the land under such title for a period of ten years, and shall have paid all taxes and assessments legally levied thereon, shall be and the same are declared good and valid in law, any law to the contrary notwithstanding." Stiles v. Granger, 502.

32. When attacked for the first time by motion in arrest of judgment, an information for the crime of rape in the first degree, drawn under subdivision 3 of section 8890, Rev. Codes 1905, will not be held fatally defective in not charging, in direct and positive language, that the female ravished resisted, and her resistance was overcome by force or violence. State v. Rhoades, 579.

33. The appellant, during a long absence when traveling for his health, directed an agent to pay the taxes on the land in question, and other land owned by him assessed against it in the year 1897. By a mistake or oversight of the agent, and contrary to his instructions, instead of paying them in the usual manner, he purchased the land at tax sale in the name of the appellant. Appellant paid all subsequent taxes assessed prior to the bringing of this suit, and did not procure a tax deed under the certificate so obtained by such sale. Held, in the absence of any question of good faith on the part of appellant, that such purchase was void, and operated as a "payment" within the requirements of section 4928, Rev. Codes, 1905. Stiles v. Granger, 502.

34. Section 911, Rev. Codes 1905, which provides that, if a majority of all the votes cast at a school district election at which the issue of bonds is submitted should be in favor of issuing bonds, the school board through its proper officers shall forthwith issue bonds in accordance with such vote, is mandatory. Schouweiler v. Allen, 510.

35. Under section 2829, Rev. Codes 1905, as amended by chapter 60, page 85, Laws of 1907, the electors of a county have a right to have submitted to them, and to vote upon, all petitions in reference to the division of a county that conform to the statute, although the petition last presented to the county commissioners may conflict, as to the territory to be embraced within the proposed counties, with the petitions first presented and acted upon. State v. Fabrick, 532.

36. Section 8903 of the Revised Codes of 1905 reads: "Adultery is the voluntary sexual intercourse of a married person with a person other than the offender's husband or wife; and when the intercourse is between a married woman and a man that is unmarried

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STATUTES—Continued.

the man is also guilty of adultery. No prosecution shall be commenced except on the complaint of the husband or wife, and no prosecution shall be commenced after one year from the time of the committing of the offence." Held, that by the provisions of this section the spouse of either of the guilty parties is empowered to make complaint against either or both of them. State v. Wesie, 567.

37. Section 6951, Rev. Codes 1905, applies to cases where the property of a third person is levied on while in the possession of the defendant named in the writ, under such circumstances as to raise a presumption that it is owned by him. Probstfield v. Hunt, 572.

38. No demand or verified claim of title and ownership of property by the owner is required under section 6951, Rev. Codes 1905, where the property of the wife levied upon under a warrant of attachment in an action against the husband is in the possession of a third person with whom it is stored in the name of the husband by the agent of the owner of a house which the husband had leased and lived in with his wife. and upon leaving the house unoccupied, and not paying the rent, the owner of the house had removed the property therefrom and stored it with said third person. Probstfield v. Hunt, 572.

39. Plaintiff, a foreign corporation, brought this action to recover the purchase price of certain drills sold and delivered by it to defendants. The defense interposed is that plaintiff has not complied with the law of this state, being sections 4695-4699, Rev. Codes 1905, prescribing the conditions upon which such corporations may do business within our borders; it being admitted by plaintiff that he has not complied with such law. Sucker State Drill Co. v. Wirtz, 313.

40. Evidence examined, and it is held that plaintiff did not violate such statute as in its dealings with defendant. out of which its cause of action accrued, it was engaged in transacting or doing an interstate, as contradistinguished from an intrastate business. Sucker State Drill Co. v. Wirtz, 313.

41. By the enactment of sections 4695-4699, prescribing the conditions upon which foreign corporations may do business in this state, it was not intended that such provisions should apply to foreign corporations engaged solely in an interstate business. It will be presumed that the legislature intended no interference with the exclusive power vested in the congress of the United States to regulate or restrict interstate commerce. Sucker State Drill Co. v. Wirtz ,313.

42. A portion of the drills sold to defendants were in store at Grand Forks, and were shipped directly to defendant from that place, but it is held, for reasons stated in the opinion, that this shipment did not constitute the transacting or doing business within the state in violation of said statute. Sucker State Drill Co. v. Wirtz, 313.

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STATUTORY CONSTRUCTION. See Mortgages, 145; Drains, 373.

1. A forfeiture of an appropriation should not be decreed unless the act under which it is claimed clearly shows that such was the legislative intention. State v. Holmes, 31.
2. The right to plead the existence of liens on the property when the conversion took place is not based upon the statute defining what matters may be pleaded as counterclaim. Force v. Peterson Machine Co., 220.
3. Such a transaction operates in law to create the holder of such receipt a bailor and the warehouseman a bailee of the property under said warehouse statute during the time such property remains in such warehouse, and renders the surety on the warehouseman's bond liable for its safe-keeping. State v. Robb-Lawrence Co., 257.
4. Following the rule announced by this court in the recent case of Sucker State Drill Co. v. Wirtz Bros., 115 N. W. 844, it is held that plaintiff, a foreign corporation, did not violate the statute of this state (sections 4695-4697, Rev. Codes 1905), prescribing the conditions upon which such corporations may do business within our borders. State v. Robb-Lawrence Co., 257.
5. Statutes are presumed to be prospective, and not retrospective, in their operation, in the absence of a clear legislative intent to the contrary. Adams & Freese Co. v. Kenoyer, 302.
6. Following the decision of this court in Adams & Freese Company v. Kenoyer et al., 17 N. D. 302, it is held that chapter 5, page 9, Laws 1905, which provides that a mortgagor's absence or non-residence from the state shall not suspend the running of the statute of limitations as to actions and proceedings for the foreclosure of mortgages on real property, does not apply to causes of action which accrued prior to the passage of said statute, for the reasons, first, that no time was fixed by the legislature for the commencement of actions upon such existing causes of action after the taking effect of such statute; and, second, that, if the time between the passage and approval of the act (March 10th) and its taking effect (July 1st), was intended to be the time fixed for such purpose, the same is unreasonable. Clarke & Co. v. Doyle, 340.
7. The statutory provision that a certificate of sale shall be filed thirty days after the sale is not mandatory. Grove v. The Gt. N. Loan Co., 351.
8. The holder of a promissory note, payable to another or order, and unindorsed, is the real party in interest within the meaning of section 6807, Rev. Codes 1905, and may sue thereon where the consideration for the note passed solely between the holder and the maker, and the note was given to another person solely for the benefit of the present holder. Am. Soda Fountain Co. v. Hogue, 375.

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STATUTORY CONSTRUCTION—Continued.

9. Under the law of this state (Rev. Codes 1905, sections 5978, 5371), the proof of loss under the policy was furnished and the action brought in ample time. Kephart v. Continental Casualty Co., 379.

10. A construction, which completely nullifies a plain statutory provision, cannot be adopted when the law is susceptible of another construction, which is reasonably in harmony with the apparent object sought to be accomplished by the legislature. State v. Duis, 319.

11. The rule regarding dedication by estoppel with reference to streets applies equally to public squares and parks. Cole v. Minn. Loan & Trust Co., 409.

12. Under a statute providing for one day's time to prepare for trial, but not prescribing when the request shall be made, a reasonable construction thereof is that the request should ordinarily be made immediately after plea, and before any other step preliminary to the trial is taken. State v. Chase, 429.

13. Unless the request for time to prepare for trial, pursuant to a statute giving that right, is made in time, the right thereto is waived. State v. Chase, 429.

14. The word "maliciously," as used in section 9315, Rev. Codes 1905, relating to the crime of "malicious mischief," is to be given a restricted meaning, and imports that the act to which it relates must have resulted from actual ill-will or revenge. It implies an intent to vex and annoy the owner of the property injured. State v. Minor, 454.

15. The redemption statute is remedial in its nature, and is intended not only for the benefit of creditors holding liens subsequent to a lien in process of foreclosure, but more particularly for the purpose of making the property of the debtor pay as many of his debts as it can be made to pay, and to prevent its sacrifice, and should be liberally construed. The N. D. Horse & Cattle Co. v. Serumgard, 466.

16. Appellant purchased a quitclaim deed for the land in controversy from one Bowdle in August, 1890. The only title possessed by Bowdle was derived from a deed under sale for taxes for the year 1886. It is contended that such tax deed is invalid. Without determining this question, but conceding for the purposes of this case that it is invalid, and following Power v. Kitching, 10 N. D. 254, 8 N. W. 737, 88 Am. St. Rep. 691, it is held that the title so obtained by appellant is adequate as foundation for title in the appellant under section 4928, Rev. Codes 1905, which reads: "All titles to real property vested in any person or persons who have been or hereafter may be in actual, open, adverse and undisputed possession of the land under such title for a period of ten years, and shall have paid all taxes and assessments legally

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STATUTORY CONSTRUCTION—Continued.

levied thereon, shall be and the same are declared good and valid in law, any law to the contrary notwithstanding." Stiles v. Granger, 502.

17. The appellant, during a long absence when traveling for his health, directed an agent to pay the taxes on the land in question, and other land owned by him assessed against it in the year 1897. By a mistake or oversight of the agent, and contrary to his instructions, instead of paying them in the usual manner, he purchased the land at tax sale in the name of the appellant. Appellant paid all subsequent taxes assessed prior to the bringing of this suit, and did not procure a tax deed under the certificate so obtained by such sale. Held, in the absence of any question of good faith on the part of appellant, that such purchase was void, and operated as a "payment" within the requirements of section 4928, Rev. Codes 1905. Stiles v. Granger, 502.

18. Section 911, Rev. Codes 1905, which provides that, if a majority of all the votes cast at a school district election at which the issue of bonds is submitted, should be in favor of issuing bonds, the school board through its proper officers shall forthwith issue bonds in accordance with such vote, is mandatory. Schouweiler v. Allen, 510.

19. Section 8903 of the Revised Codes of 1905 reads: "Adultery is the voluntary sexual intercourse of a married person with a person other than the offender's husband or wife; and when the intercourse is between a married woman and a man that is unmarried the man is also guilty of adultery. No prosecution shall be commenced except on the complaint of the husband or wife, and no prosecution shall be commenced after one year from the time of the committing of the offense." Held, that by the provisions of this section the spouse of either of the guilty parties is empowered to make complaint against either or both of them. State v. Wesie, 567.

20. Section 6951, Rev. Codes 1905, applies to cases where the property of a third person is levied on while in the possession of the defendant named in the writ, under such circumstances as to raise a presumption that it is owned by him. Probstfield v. Hunt, 572.

21. Certificates of nomination, provided for by section 501, Rev. Codes 1899, need not be verified. State v. Blaisdell, 575.

STIPULATION. SEE FRAUD, 510.

1. Courts cannot take jurisdiction to hear a motion for a new trial on a verbal agreement that it may do so, claimed by one party, and denied by the other. Kaslow v. Chamberlain, 449.

STREETS. See MUNICIPAL CORPORATIONS, 319, 409; HIGHWAYS, 154.

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SUPREME COURT. See CERTIORARI, 67; WAIVER, 104; PROHIBITION, WRIT OF, 128; APPEAL AND ERROR, 210, 270; RULES OF COURT, 404.

1. An order for the dismissal of an action is not an appealable order, and an attempted appeal from such an order confers no jurisdiction upon the supreme court. Dibble v. Hanson, 21.
2. Any objection to the sufficiency of the allegations of the complaint is too late when made for the first time in the Supreme Court, where the complaint would be amended as a matter of course if objection had been made before. Bank v. Warner, 76.
3. The statement of the case contains a literal transcript of the testimony taken and reported by a referee to the district court, without any attempt to condense or eliminate immaterial matter. Held, following the rule announced in prior decisions of this court, that such practice is a plain violation of section 7058, Rev. Codes 1905, as well as rule 7 of this court, and does not constitute a statement of the case. Smith v. Kunert, 120.
4. Appellant's contention that the contract was void under the statute of frauds is not available to him in this court, as such defense was not raised or passed upon in the court below. Schuyler v. Wheelon, 161.
5. An objection to evidence based on the lack of a pleading to support it cannot be made for the first time in Supreme Court. Buchanan v. Minn. T. M. Co., 343.
6. A decision of the Supreme Court of the United States, holding a law similar to this provision of chapter 199, page 327, Laws of 1907, unconstitutional under the federal constitution, is conclusive upon this court and all state courts in determing the validity of said provision. State v. Gt. N. Ry. Co., 370.
7. In the statement of the case no attempt is made to comply with the requirements of the rule above cited by reducing the testimony to narrative form, cr to eliminate those parts having no bearing upon the decision of the case, and the specifications of error do not comply with the requirements of the rule, but are scattered throughout the proceedings wherever an exception was taken. For these reasons this court will disregard everything except the judgment roll. O'Keefe v. Omlie, 404.
8. Where a remittitur has been regularly issued and transmitted to the district court, the appellate court has lost jurisdiction; but, when irregularly, inadvertently or erroneously issued, such court does not lose jurisdiction, but may recall for the purpose of correcting any error or mistake. Nystrom v. Templeton, 463.
9. On application of voters and taxpayers in such case for a writ of certiorari or other appropriate writ under the supervisory control of this court over inferior courts, held, that such power should not be lightly exercised, and that inasmuch as the applicants have the

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SUPREME COURT—Continued.

right to apply to the district court for an order vacating the judgment so entered, and by such application become parties to the record, and, if such application is denied, may have the action complained of reviewed, no such exigency exists as warrants this court in granting the writ applied for. Schouweiler v. Allen, 510.

10. The jurisdiction of the Supreme Court to issue original writs extends to questions affecting the sovereignty, franchises or prerogatives of the state, or the liberties of the people. State v. Fabrick, 532.

11. Where the right to be enforced pertains to matters of private or local concern alone, though publici juris, the jurisdiction belongs to the district court, and not to the Supreme Court, unless circumstances of such exceptional character are shown to exist that adequate relief cannot be obtained in the district court. State v. Fabrick, 532.

12. The jurisdiction of the Supreme Court to issue writs under existing constitutional provisions ordinarily extends only to cases publici juris, wherein are directly involved the sovereignty of the state, its franchises or prerogatives, or the liberties of its people. State v. Gottbreht, 543.

13. The mere fact that delays might occur if legal proceedings are instituted in the district court, and that an appeal might be taken to this court from the district court, does not present such exceptional circumstances as would constitute a reason for issuing a writ of mandamus by the Supreme Court to compel the county commissioners to act in matters solely pertaining to the removal of a county seat. State v. Gottbreht, 543.

TAXATION. See QUIETING TITLE, 502.

1. Construing section 7811, Rev. Codes 1905, it is held that an order made after judgment in a condemnation suit, by the terms of which order the clerk is directed to retain in his possession certain moneys paid to him in satisfaction of such judgment until the final determination of a certain tax proceeding pending in such court under the Woods law, wherein Cass county, as plaintiff, seeks to recover certain delinquent taxes claimed to be a lien against the property thus condemned, is an appealable order, and hence the proper remedy for a review of said order is by appeal and not by certiorari. Held, further, that the district court did not exceed its jurisdiction in making a similar order in the tax case wherein these petitioners were defendants, and hence petitioners have mistaken their remedy in applying for the writ aforesaid. Soo Ry. v. Blakemore, 67.

2. Payment or tender of all just taxes paid by a party is not necessary before bringing an action to quiet title, where there was no assessment of the land on account of a failure to describe the land. State Finance Co. v. Halstenson, 145.

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TAXATION—Continued.

3. Plaintiff's sole proof of title consisted of a tax deed based upon an alleged tax sale made on December 3, 1901, for the taxes for the year 1900. This deed is held void upon its face, for the reason that it discloses that the sale was conducted contrary to the provisions of chapter 154, page 198, Laws 1901, which requires that "each tract shall * * * be struck off to the bidder * * * who will agree to accept the lowest rate of interest." Youkers v. Hobart, 296.

4. The tax sale upon which plaintiff's title is based was void because by an unlawful arrangement between the bidders at the sale all competitive bidding was eliminated; the proof of such unlawful combination and agreement being clearly disclosed by the evidence. Youkers v. Hobart, 296.

5. Appellant purchased a quitclaim deed for the land in controversy from one Bowdle in August, 1890. The only title possessed by Bowdle was derived from a deed under sale for taxes for the year 1886. It is contended that such tax deed is invalid. Without determining this question, but conceding for the purposes of this case that it is invalid, and following Power v. Kitching, 10 N. D. 254, 86 N. W. 737, 88 Am. St. Rep. 691, it is held that the title so obtained by appellant is adequate as foundation for title in the appellant under section 4928, Rev. Codes 1905, which reads: "All titles to real property vested in any person or persons who have been or hereafter may be in actual, open, adverse and undisputed possession of the land under such title for a period of ten years, and shall have paid all taxes and assessments legally levied thereon, shall be and the same are declared good and valid in law, any law to the contrary notwithstanding." Stiles v. Granger, 502.

6. The appellant, during a long absence when traveling for his health, directed an agent to pay the taxes on the land in question, and other land owned by him assessed against it in the year 1897. By a mistake or oversight of the agent, and contrary to his instructions, instead of paying them in the usual manner, he purchased the land at tax sale in the name of the appellant. Appellant paid all subsequent taxes assessed prior to the bringing of this suit, and did not procure a tax deed under the certificate so obtained by such sale. Held, in the absence of any question of good faith on the part of appellant, that such purchase was void, and operated as a "payment" within the requirements of section 4928, Rev. Codes 1905. Stiles v. Granger, 502.

TAX DEEDS. SEE TAXATION, 502.

TENDER. SEE OFFER OF PERFORMANCE, 145, 177, 215; REDEMPTION, 466.

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TIME. See ACTION, 406.

TITLE. See DEEDS, 502.

TRANSACTIONS WITH DECEDENTS. SEE WITNESS, 76, 110.

TRIAL. See PRACTICE, 76, 429, 594; WITNESS, 76; EVIDENCE, 104, 510; REFEREE, 120; APPEAL AND ERROR, 495; VERDICT, 610

1. The competency of evidence depends on the state of the record when the evidence is offered, and the admission of evidence afterward shown to be incompetent, when no specific motion to strike it out or request to instruct the jury to disregard it is made, is not reversible error. State v. Dahlquist, 40.
2. An objection made to the admission of a record as a whole, and without distinguishing or pointing out in the objection the particular items, if any, which were competent evidence, and those which were claimed to be incompetent, when a part of the items were competent, and some of them may have been incompetent evidence, is inadequate, and it is not error for the trial court to admit the whole record. State v. Dahlquist, 40.
3. Entering the jury room by the trial judge in the absence of the attorney, at the request of the jurors, after they have retired to deliberate on their verdict, and having any communication or conversation with the jury in reference to the case, requires the granting of a new trial, without consideration of the question whether such conversation was prejudicial or not. State v. Murphy, 48.
4. Where a contractor and the executors and heirs at law of the deceased owner of a building, erected under a contract between said contractor and the owner, are parties defendant in an action to foreclose a subcontractor's lien, the evidence of the contractor as to when the building was completed is not objectionable as referring to a transaction with a party since deceased, under section 7237, Rev. Codes 1905. Bank v. Warner, 76.
5. Under the pleadings in this case, the trial court was justified in holding proof of breach of warranty inadmissible, but, irrespective of any question as to breach of warranty made by the pleadings other issues were made by reason of which it was error for the court to enter judgment on the pleadings. Scott v. N. W. Port Huron Co., 91.
6. In considering a motion for judgment upon the pleading made when a case is called for trial, the court may properly take into consideration admissions and statements made by counsel for one of the parties showing what he expects to prove and rely upon at the trial. Scott v. N. W. Port Huron Co., 91.
7. Defendant's answer contained a paragraph alleging the empaneling of a sheriff's jury, and the fact that the jury found against the contention of the claimant. On motion of plaintiff's attorneys such paragraph was stricken from the answer. Held, not error. Pfeifer v. Hatton, 99.

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TRIAL—Continued.

8. When a change of the place of trial is obtained by the state on account of the existence of prejudice among the inhabitants against the enforcement of the prohibition or other laws, the selection of the county to which the case must be sent rests exclusively with the presiding judge in the exercise of a sound judicial discretion. Zinn v. District Court, 135.
9. Matters pertaining to amendment of pleadings, continuances and the bringing in of the personal representatives of deceased parties in the trial of action are within the discretion of trial courts, and their action will not be disturbed, except in case of abuse thereof resulting in prejudice. State Finance Co. v. Halstenson, 145.
10. It was not an abuse of discretion to permit certain testimony to be introduced by way of rebuttal. even if strictly speaking it was a part of plaintiff's case in chief. Pease v. Magill, 166.
11. Error is assigned in overruling defendant's motion for a directed verdict made at the close of all the evidence, and also his motion for judgment notwithstanding the verdict. These motions were properly overruled. The action was in claim and delivery to recover the possession of a horse. The complaint contained the usual allegations of ownership and right to possession in plaintiff; also, a detention of the horse by defendant and a prior demand for possession, etc. The answer contained no denials, either general or specific, but alleged a right of possession under a chattel mortgage executed by a former owner of the animal. The motions were predicated upon an alleged failure to prove ownership and right to possession in plaintiff and also a demand. Under the issues the sole question in dispute, aside from the question of the value of the horse and damages, was whether at the time plaintiff purchased the horse she had actual or constructive notice of defendant's chattel mortgage, and there was a conflict in the testimony upon this question. Pease v. Magill, 166.
12. The refusal to give certain requested instructions which in the abstract embraced correct statements of law, held not error, under the state of the proof. Pease v. Magill, 166.
13. Where a party on his cross-examination denies having made admission to a witness. material and relevant to the issues, it is proper to show by such witness that the party made such admissions, and it is error to strike out the evidence that such admissions were made. Wadsworth v. Owens, 173.
14. The justice took an adjournment of the case from Saturday evening, December 1st, to Monday, December 3d, at 1 o'clock p. m., the docket entry being as follows: "Case adjourned till Monday, 1 o'clock p. m." Defendant's contention that the justice thereby lost jurisdiction because such docket entry was not sufficiently definite as to the adjourned date was properly overruled. Hanson v. Gronlie, 191.

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TRIAL—Continued.

15. In this case, if the variance were material, no claim of prejudice could avail, as the trial court held the case open for further proof by defendant if surprised by the decision that there was no variance. Maloney v. Geiser Mfg. Co., 195.
16. Objections to certain evidence held to be well taken, but that the evidence is not controlling of the decision, in view of other evidence in the record. Maloney v. Geiser Mfg. Co., 195.
17. Objections to certain questions considered in the opinions, and the rulings thereon held not prejudicially erroneous. Lund v. Upham, 210.
18. Remarks of counsel to the jury considered in the opinion, and held not grounds for a new trial under the circumstances shown in the record. Lund v. Upham, 210.
19. In reviewing a ruling of the trial court in directing a verdict, the testimony will be construed in its most favorable light towards the party against whom such ruling is made, and all reasonable and legitimate inferences which can be deduced in his favor will be deduced therefrom; and when thus considered, if it can be said that reasonable men may fairly differ in the conclusion to be reached thereon, such ruling will be held reversible error. Bank v. Bakken, 224.
20. Where both parties make motions for a directed verdict, they are deemed to consent to a decision by the court of all questions as questions of law. Aber v. Twichell, 229.
21. In an action to determine adverse claims to real property, it is incumbent upon plaintiff to establish his title to the property as alleged by him. This the plaintiff failed to do, and the action was therefore properly dismissed. Hebden v. Bina, 235.
22. Certain alleged errors of law occurring at the trial in the rejection of testimony and in instructions to the jury examined, and held not prejudicial for reasons stated in the opinion. State v. Robb-Lawrence Co., 257.
23. A witness was asked in substance if defendant did not at a certain interview with plaintiff's collector treat the claim made by such collector as a claim against the firm of which he was a member. Such question did not call for an answer as to a fact, but merely a conclusion; and hence the objection on such ground was properly sustained. Bristol & Sweet Co. v. Sapple, 270.
24. Action to recover the purchase price of goods sold and delivered to the copartnership of S. & M., at Wales, N. D., of which it is alleged the respondent was a member. By the separate answer and stipulation of respondent, all questions were eliminated, except the single one whether he was a member of such copartnership. Defendant, both by his answer and the stipulation, contended that there were two distinct firms at Wales doing business under said

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TRIAL—Continued.

copartnership name, and that he was not a member of the firm with which plaintiff had its dealings. Held that, by thus narrowing the issues, the burden of proof as to the only remaining issue was not shifted from plaintiff to said defendant; hence the trial court's charge as to the burden of proof was correct. Bristol & Sweet Co. v. Skapple, 270.

25. Appellant has the burden of showing that errors committed in rulings sustaining objections to the admission of testimony were prejudicial. Certain rulings of this character considered, and held not prejudicial. Bristol & Sweet Co. v. Skapple, 270.

26. In the statutory action to determine adverse claims to real property, it is incumbent upon plaintiff to prove a title sufficient to authorize him to maintain the action, and, until he furnishes such proof, the defendant is not required to prove his adverse title or claim. Youkers v. Hobart, 296.

27. On an appeal from a judgment, the failure to renew a motion for a directed verdict at the close of the testimony, or to make a new motion for a directed verdict, precludes a review of the correctness of a ruling on a motion for a directed verdict made at the close of plaintiff's case. Landis Machine Co. v. Konantz Saddlery Co., 310.

28. A motion for judgment notwithstanding the verdict is not proper where no motion for a directed verdict was made at the close of plaintiff's case. Landis Machine Co. v. Konantz Saddlery Co., 310.

29. An objection to the offer of notes or documents in evidence, as incompetent, irrelevant and immaterial, is too general, and does not raise an objection thereto that the execution of the notes has not been proven. Landis Machine Co. v. Konantz Saddlery Co., 310.

30. The admission of hearsay evidence is not prejudicial error, when the objecting party thereafter establishes by his own evidence the facts testified to, based on hearsay. Landis Machine Co. v. Konantz Saddlery Co., 310.

31. An objection that certain evidence called for by a question is incompetent, irrelevant and immaterial, is too general ordinarily, and is for that reason no objection at all, so far as the objecting party is concerned. Buchanan v. Minn. T. M. Co., 343.

32. The trial court gave as part of an instruction the following language: "The contract will be sent to the jury box with you, gentlemen, and you can wrestle with it at your pleasure. I cannot read it in the present light." Held, not an unfavorable comment on the contract as having been printed in small type. Buchanan v. Minn. T. M. Co., 343.

33. At the conclusion of plaintiff's testimony defendant moved for a directed verdict in its favor, which motion was denied. Thereafter plaintiff moved for a directed verdict in her favor, which motion

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TRIAL—Continued.

was granted. No request was made by defendant's counsel to submit any question of fact to the jury; hence defendant waived its right, if such right existed, to have submitted to the jury the question as to whether the injury was accidental, or whether it resulted from unnecessary exposure to danger or to obvious risks of injury within the meaning of the terms of the policy. Kephart v. Continental Casualty Co., 379.

34. An assignment of error based upon the rulings of the trial court in directing a verdict, where no exception to such ruling was taken, cannot be considered. Kephart v. Continental Casualty Co., 379.

35. It is contended that a certain portion of the unpaid premium on said insurance policy should have been deducted from plaintiff's recovery. Held, that such contention is without merit, as there is no foundation in the pleadings for any such allowance or deduction, and no such question was presented to or passed upon by the trial court. Kephart v. Continental Casualty Co., 379.

36. It is error to grant a motion for judgment on the pleadings, where the answer states matters of affirmative defense as proof of the affirmative defense must be made before the allegations of the answer can have any effect, except to settle the issues. Erickson v. Elliott, 389.

37. After the plea had been entered and the trial called and four jurors called into the box, the defendants asked for one day's time to prepare for trial, and the court denied the request. Held, not error. State v. Chase, 429.

38. Certain requests for instruction by defendant were denied, and properly so, as their giving in effect would have amounted to a directed verdict. Pendroy v. Gt. N. Ry. Co., 433.

39. A person in passing over a public railway crossing is bound to use care commensurate with the known and reasonably apprehended danger; but it is only in exceptional cases that a trial court is justified in taking from the jury the question of the exercise of such care. Under the evidence, it cannot be said as a matter of law that plaintiff and his daughter were guilty of contributory negligence in not stopping the automobile before making such crossing. Certain instructions as to the meaning of the terms "proximate cause," and "contributory negligence" examined, and held correct. Pendroy v. Gt. N. Ry. Co., 433.

40. When the plaintiff rested on the trial of his action, defendant moved for a directed verdict on the ground that plaintiff had failed to establish the allegations of his complaint. Held, that the defendant, not having renewed this motion after all the evidence was submitted, thereby waived any error in denying his motion. McBride v. Wallace, 495.

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TRIAL—Continued.

41. On cross-examination of one of the state's witnesses, and for the purpose of impeachment, he was asked whether as a matter of fact he was running a certain saloon in violation of law and without a license. To this question counsel for the state objected, and the objection was sustained. Held, error. Such question was admissible under the general rule that for the purpose of impeachment a witness may be asked questions as to collateral matters, the answers to which may tend to degrade or otherwise discredit him. State v. Denny, 519.

42. Evidence examined, and held that the rulings of the trial court in denying defendant's motions to advise an acquittal and for a new trial, in so far as the ground of insufficiency of the evidence is concerned, were correct. State v. Denny, 519.

43. The sufficiency of the allegations of an information, when raised by a motion in arrest of judgment, will be construed with less strictness than when raised by demurrer. State v. Johnson, 554.

44. On submission of all their evidence, both parties made motions for a directed verdict. Neither party requested the submission of any facts to the jury. Held, that they thereby waived any right which they might have otherwise had to an undirected verdict, and are estopped from assigning error for not submitting the facts to the jury. Duncan v. Gt. N. Ry. Co., 610.

TRIAL JUDGE. See JURY, 48; INSTRUCTIONS, 343, 519.

1. A motion for a new trial was duly noticed for hearing on a day and hour named at chambers of the judge of the district court of the proper district. On the day set for the motion the judge was not present, and no proceedings were had. Held, that in the absence of an order continuing the hearing or a written stipulation to that effect, the motion went down, and could not again be taken up without new notice or formal consent of the party on whom it was served. Kaslow v. Chamberlain, 449.

TROVER AND CONVERSION.

1. A mortgagee in a chattel mortgage, who sells the property mortgaged without foreclosure, is guilty of a conversion of the property, and the lien of the mortgage is extinguished. Force v. Peterson Machine Co., 220.

2. Where the mortgagor sues the mortgagee for damages for a wrongful sale without foreclosure; in such cases the mortgagee may plead and show the amount due on the lien of the mortgage in mitigation of damages growing out of the wrongful conversion. Force v. Peterson Machine Co., 220.

3. The right to show the existence of liens in such cases is based upon equitable principles, but the rules of pleading in equity cases do not apply. Force v. Peterson Machine Co., 220.

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TROVER AND CONVERSION—Continued.

4. The right to plead the existence of liens on the property when the conversion took place is not based upon the statute defining what matters may be pleaded as counterclaim. Force v. Peterson Machine Co., 220.
5. In an action for damages for the conversion of grain, it is competent to plead and show as an equitable defense, that the grain was mortgaged to the defendant and that the mortgage was drawn by mistake to cover the crop of another year, without first reforming the mortgage through an equitable action. Gorder v. Hilliboe, 281.
6. A sheriff is not guilty of conversion of property when taken and sold under an execution when he finds the property in the actual possession and under the control of the execution debtor, until a demand for the return of the property is made or notice given of the ownership of the property, or the sheriff has knowledge of the actual ownership of the same. Mariner v. Wasser, 361.
7. In an action brought to foreclose a chattel mortgage upon certain grain, a warrant was issued under the provisions of section 7513, Rev. Codes 1905, pursuant to which all the grain grown on the land described in the mortgage was seized by the plaintiff, and subsequently, and before trial, the same was wrongfully converted by a sale thereof. Such grain was the sole property covered by the mortgage, and its wrongful conversion by plaintiff extinguished the lien of the mortgage, and thereby the cause of action for such foreclosure ceased to exist. Strehlow v. McLeod, 457.
8. At the time of such seizure, other grain of the same kind, which had been intermingled by defendant with that covered by the mortgage, was also seized and converted in like manner. In his answer defendant pleaded a counterclaim for damages, based upon such conversion, and was allowed to recover in the lower court. Held, error, as the cause of action contained in this so-called counterclaim had not accrued at the time the action was commenced. Strehlow v. McLeod, 457.

TRUSTS AND TRUSTEES. See TRUST DEEDS, 84.

1. Such instrument, whether a trust deed or a mortgage, contains no power of sale authorizing any one, except the trustee therein designated, or his successor in trust, to sell the property in case of default; hence the attempted foreclosure by advertisement by plaintiff, who was merely the assignee of the beneficiary under said instrument, was a nullity, and plaintiff acquired no title thereunder. Brown v. Comonow, 84.
2. Express statutory authority is conferred by section 6159, Rev. Codes 1905, upon a mortgagor to designate the mortgagee or any other person to execute the power of sale upon default in the payment of the mortgage indebtedness. Brown v. Comonow, 84.

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TRUSTS AND TRUSTEES—Continued.

3. An express trust in real estate cannot be created or declared except by a writing subscribed by the trustee. Cardiff v. Marquis, 110.
4. Where a conveyance of real setate is delivered by a daughter to her father under an oral contract that it is given in trust for the daughter, and such contract is proven by declarations of the father at the time the deed is delivered, and it is shown that the trust has not been carried out, a court of equity will enforce the trust, as the refusal to carry it out is a constructive fraud, based on the relations of confidence existing between the parties. Cardiff v. Marquis, 110.
5. In such a case it is immaterial whether the fraud was intentional or not, or whether it existed when the conveyance was delivered. Cardiff v. Marquis, 110.
6. In such a case courts of equity do not enforce the trust in violation of the statute of frauds, but relief is granted as based on the constructive fraud and the confidential relation. Cardiff v. Marquis, 110.

TRUST DEEDS.

1. Whether under section 4348, Comp. Laws 1887, being section 6151, Revised Codes 1905, a person may give a trust deed as well as a mortgage upon real property as security for the payment of indebtedness, and whether the instrument referred to in the opinion is or was intended by the parties thereto to be a trust deed as distinguished from a mortgage, is not determined. Brown v. Comonow, 84.
2. Such instrument, whether a trust deed or a mortgage, contains no power of sale authorizing any one, except the trustee herein designated, or his successor in trust, to sell the property in case of default; hence the attempted foreclosure by advertisement by plaintiff, who was merely the assignee of the beneficiary under said instrument, was a nullity, and plaintiff acquired no title thereunder. Brown v. Comonow, 84.

USURY.

1. A mortgage given for interest partly in excess of 12 per cent per annum is not void in this state. Grove v. The Gt. N. Loan Co., 351.
2. A purchaser of real estate subject to a mortgage thereon for interest partly in excess of 12 per cent per annum is entitled to defend against the foreclosure of such mortgage so far as the entire interest is concerned, unless the amount of the usurious mortgage was deducted from the purchase price. Grove v. The Gt. N. Loan Co., 351.
3. The purchaser in such cases is permitted to defend as against usury, on the ground that he stands in privity of contract and estate with the mortgagor. Grove v. The Gt. N. Loan Co., 351.

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USURY—Continued.

4. The mere fact that the purchaser of real estate did not have actual notice of a mortgage on the land does not entitle him to set aside sheriff's deed under a foreclosure regular in all respects, where the mortgage was duly recorded, and the only ground on which relief is asked is that the mortgage was usurious. Grove v. The Gt. N. Loan Co., 351.

5. A purchaser of real estate on which there is a mortgage given for interest partly usurious, is not entitled to have a sheriff's deed given on the foreclosure of the mortgage, regular in all particulars, set aside on account of such usury and on the ground that he had no actual notice of the mortgage or of the foreclosure, when the mortgage was duly recorded and the notice of foreclosure duly published, where the application is not made until about three months after the redemption period has expired. Grove v. The Gt. N. Loan Co., 351.

ULTRA VIRES. See BANKS AND BANKING, 224.

VARIANCE. See PLEADING, 195.

VENDOR AND PURCHASER.

1. A mortgagee in a real estate mortgage, without actual notice of the rights of a vendee in a contract for the purchase of the real estate covered by the mortgage, which contract has been orally assigned as security, is an innocent purchaser, although such vendee is in possession of the land when the mortgage is taken. Patnode v. Deschenes, 15 N. D. 100, 106 N. W. 575, followed as to the construction of section 6179, Rev. Codes 1905. Gray v. Harvey, 1.

2. Evidence examined, and held to show that possession was relinquished by the vendee in a contract for the purchase of land, and taken by the mortgagor before the mortgage in suit was executed and delivered. Gray v. Harvey, 1.

3. An executory contract for the sale of an interest in certain real property for townsite purposes, not exceeding thirty acres in extent, to be selected and platted into blocks and lots by the grantee from a larger tract, which is specifically described, held not void on account of uncertainty of description. Schuyler v. Wheelon, 161.

4. The contract provides a method for determining the property to be sold, and this was sufficient. The maxim that "that is certain which can be made certain," is applied. Schuyler v. Wheelon, 161.

5. An action for damages for a refusal to convey real estate will not lie without a tender of the agreed price, unless it appears that a tender would be a futile act. If the refusal is conditional on future events, a tender is necessary before a cause of action is shown. Beiseker v. Amberson, 215.

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VENDOR AND PURCHASER—Continued.

6. A complaint, in an action by a vendee against a vendor to recover damages for the breach of an executory contract for the sale of real property, is sufficient, if it alleges a specific written agreement whereby the defendant promised to sell, and the plaintiff promised to purchase, certain described real property upon specified terms alleged in the complaint, and that within a rasonable time thereafter (no specific date having been agreed upon for performance), plaintiff offered full performance of the contract on its part according to its terms, alleging readiness, ability and willingness to perform, and that defendant at the time of such offer refused, and at all times since has refused to perform said contract on his part. Foster Implement Co. v. Smith, 177.
7. An offer of performance in good faith by plaintiff, pursuant to the contract, with the present ability and willingness to perform, was sufficient, without an actual production of the money and notes called for by the contract. A tender of the money and notes as distinguished from a mere offer to deliver the same was not required as a basis for a cause of action for breach of the contract, especially in view of defendant's unqualified refusal to perform. Foster Implement Co. v. Smith, 177.
8. By his demurrer to the complaint, defendant admitted the truth of all the facts well pleaded therein, one of which facts was his refusal to perform the contract on his part upon offer of full performance by plaintiff. Such refusal placed defendant in default. Foster Implement Co. v. Smith, 177.
9. Plaintiff asked the defendant by letter what the price of certain property was, and stated that he would buy it if the price was reasonable. Defendant answered, stating the price. Plaintiff accepted the offer, but asking the defendant to send the deed to one of two banks and also asked him to assign the insurance policies and send them with the deed. Held, that the acceptance of the offer was not an unconditional one. Beiseker v. Amberson, 215.

VENUE, CHANGE OF.

1. Under section 9931, Rev. Codes 1905, the state can secure a change of the place of trial in a criminal action under the same circumstances as a defendant in a criminal action may under existing laws, and said section 9931 is a constitutional enactment. Barry v. Traux, 13 N. D. 131, 99 N. W. 769, 65 L. R. A. 762, 112 Am. St. Rep. 662, followed. Zinn v. District Court, 135.
2. When a change of the place of trial is obtained by the state on account of the existence of prejudice among the inhabitants against the enforcement of the prohibition or other laws, the selection of the county to which the case must be sent rests exclusively with the presiding judge, in the exercise of a sound judicial discretion. Zinn v. District Court, 135.

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VENUE, CHANGE OF—Continued.

3. Upon the application of the state for a change of the place of the trial of a criminal action, on account of local prejudice, the presiding judge transferred the cause for trial to Barnes county, being about 140 miles from the county where the action was pending. It was shown that a speedier trial could be secured in Barnes county than in any county in the Fifth judicial district. It was shown that the same prejudice existed is every county in the Sixth district as exists in the county where the action originated. The only other county nearer to the county where the action originated than Barnes county is Stutsman county, which is thirty-five miles nearer than Barnes county. Held, that it was not an abuse of discretion to transfer the trial to Barnes county under such circumstances. Zinn v. District Court, 135.

VERDICT. See CRIMINAL LAW, 379; NEW TRIAL, 600; EVIDENCE, 606.

1. Plaintiffs seek to recover damages against defendant in the sum of $540 and interest, being the amount they would have received as commissions if defendant had accepted the offer of their customer. Held, that they wholly failed to establish a cause of action as alleged; and hence that it was not error to direct a verdict in defendant's favor. Harris Bros. v. Reynolds, 16.

2. Error is assigned in overruling defendant's motion for a directed verdict made at the close of all the evidence, and also his motion for judgment notwithstanding the verdict. These motions were properly overruled. The action was in claim and delivery to recover the possession of a horse. The complaint contained the usual allegations of ownership and right to possession in plaintiff; also, a detention of the horse by defendant and a prior demand for possession, etc. The answer contained no denials, either general or specific, but alleged a right of possession under a chattel mortgage executed by a former owner of the animal. The motions were predicated upon an alleged failure to prove ownership and right to possession in plaintiff, and also a demand. Under the issues the sole question in dispute, aside from the question of the value of the horse and damages, was whether at the time plaintiff purchased the horse she had actual or constructive notice of defendant's chattel mortgage, and there was a conflict in the testimony upon this question. Pease v. Magill, 166.

3. At the close of plaintiff's case in chief, defendant moved for a directed verdict, which motion was denied. Thereafter defendant introduced testimony in support of his defense. Held, that he thereby waived the error, if any, in denying said motion. Pease v. Magill, 166.

4. Errors in instructions and errors of law occurring at the trial do not constitute grounds for a motion for judgment notwithstanding the verdict. Pease v. Magill, 166.

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VERDICT—Continued.

5. In a replevin action for grain grown under a contract, providing that the title to the grain is to remain in the owner of the land until a division thereof, the verdict and judgment should determine the interest of each party in the crop ultimately, although one of the parties is found to be entitled to the present possession. Wadsworth v. Owens, 173.
6. Where both parties make motions for a directed verdict, they are deemed to consent to a decision by the court of all questions as questions of law. Aber v. Twichell, 229.
7. The sufficiency of the evidence to sustain a verdict cannot be considered by the trial court on a motion for a new trial, nor by this court on appeal, unless the settled statement of the case contains specifications of particulars wherein the evidence is insufficient to sustain the verdict. Lund v. Upham, 210.
8. In reviewing a ruling of the trial court in directing a verdict, the testimony will be construed in its most favorable light towards the party against whom such ruling is made, and all reasonable and legitimate inferences which can be deduced in his favor will be deduced therefrom; and when thus considered, if it can be said that reasonable men may fairly differ in the conclusion to be reached thereon, such ruling will be held reversible error. Bank v. Bakken, 224.
9. On an appeal from a judgment, the failure to renew a motion for a directed verdct at the close of the testimony, or to make a new motion for a directel verdict, precludes a review of the correctness of a ruling on a motion for a directed verdict made at the close of plaintiff's case. Landis Machine Co. v. Konantz Saddlery Co., 310.
10. Whether a formal verdict in writing should be required where a verdict is directed not decided, as the question was not raised at the trial. Am. Soda Fountain Co. v. Hogue, 375.
11. At the conclusion of plaintiff's testimony defendant moved for a directed verdict in its favor, which motion was denied. Thereafter plaintiff moved for a directed verdict in her favor, which motion was granted. No request was made by defendant's counsel to submit any question of fact to the jury, hence defendant waived its right, if such right existed, to have submitted to the jury the question as to whether the injury was accidental, or whether it resulted from unnecessary exposure to danger or to obvious risk of injury within the meaning of the terms of the policy. Kephart v. Continental Casualty Co., 379.
12. An assignment of error based upon the rulings of the trial court in directing a verdict, where no exception to such ruling was taken cannot be considered. Kephart v. Continental Casualty Co., 379.
13. Verdict held sustained by the evidence on a review thereof. State v. Chase, 429.

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VERDICT—Continued.

14. Action upon promissory note executed and delivered by defendants to the State Bank of K. The defense is that such bank acted as their agent in the collection of certain drafts drawn against consignments of grain, and in collecting balances due on such consignments, and that it had in its possession enough funds thus collected to liquidate the balance due on such note, and that defendants requested the application of said funds accordingly. Plaintiff bank, the successor of State Bank of K., contends that one M., who was cashier, and not the bank, acted as such agent, and that no such funds came into the possession of said bank which were not accounted for. At the conclusion of the testimony the trial court directed a verdict in plaintiff's favor. Held, reversible error for the reason that the testimony tended to show that a sum in excess of the amount due on said note was received either by the bank or by M., individually, and not accounted for to defendants, and the evidence was sufficient to require a submission to the jury of the question whether the bank or whether M., acted as such agent. Bank v. Bakken, 224.

15. Evidence examined, and held sufficient to support the verdict. Where the trial court has been asked and has refused to disturb the verdict upon the alleged ground that the same is not supported by the evidence, this court will not reverse such decision, except in a clear case of abuse of discretion. Bristol & Sweet Co. v. Skapple, 270.

16. Where no motion for a new trial is made, the sufficiency of the evidence to sustain a verdict cannot be reviewed. Landis Machine Co. v. Konantz Saddlery Co., 310.

17. A motion for judgment notwithstanding the verdict is not proper where no motion for a directed verdict was made at the close of plaintiff's case. Landis Machine Co. v. Konantz Saddlery Co., 310.

18. Certain requests for instructions by defendant were denied, and properly so, as their giving in effect would have amounted to a directed verdict. Pendroy v. Gt. N. Ry. Co., 433.

19. Action to recover damages for the negligent killing of stock which was trespassing upon defendant's right of way. Plaintiff recovered a verdict for $465. Held, that the evidence is amply sufficient to justify such verdict. McDonell v. Soo Ry. Co., 606.

20. When the plaintiff rested on the trial of this action, defendant moved for a directed verdict on the ground that plaintiff had failed to establish the allegations of his complaint. Held, that the defendant, not having renewed this motion after all the evidence was submitted, thereby waived any error in denying his motion. McBride v. Wallace, 495.

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VERDICT—Continued.

21. Evidence examined, and held insufficient to support the verdict finding appellant guilty of rape in the first degree. State v. Rhoades, 579.

22. Plaintiff showed by himself and other competent witnesses that the inside doors referred to were properly closed and fastened with the device furnished by defendant for that purpose. The only evidence claimed to create a conflict arises from the fact that, a few miles after the car started on its journey, one of the inside doors referred to came open, and a quantity of flax with which the car was loaded ran out through the opening so made. Held, that such door opening may as readily be attributed to other causes as to the failure of the shipper to properly fasten it, and had the question been submitted to a jury ,a verdict for defendant, based upon the fact that such door came open in transit, could only have been arrived at by inference, and would have been mere guess work on the part of the jury under the facts of the case, and that the opening of this door did not create a sufficient conflict in the evidence to constitute error on the part of the trial court in directing a verdict for plaintiff. Duncan v. Gt. N. Ry. Co., 610.

23. On submission of all their evidence, both parties made motions for a directed verdict. Neither party requested the submission of any facts to the jury. Held, that they thereby waived any right which they might have otherwise had to an undirected verdict, and are estopped from assigning error for not submitting the facts to the jury. Duncan v. Gt. N. Ry. Co., 610.

VETO. See MUNICIPAL CORPORATIONS, 319.

VILLAGES. See MUNICIPAL CORPORATIONS, 409.

VOTERS. See SCHOOLS AND SCHOOL DISTRICTS, 510; ELECTION, 510, 561.

1. Under section 2329, Rev. Codes 1905, as amended by chapter 60, page 85, Laws of 1907, the electors of a county have a right to have submitted to them, and to vote upon, all petitions in reference to the division of a county, that conform to the statute, although the petition last presented to the county commissioners may conflict, as to the territory to be embraced within the proposed counties, with the petitions first presented and acted upon. State v. Fabrick, 532.

WAIVER. See SALES, 343.

1. The defendant, in a garnishee action, by not raising the objection before the trial court, that judgment has not been entered in the principal action, waives the objection and cannot raise it for the first time in the supreme court. Mahon v. Fansett, 104.

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WAIVER—Continued.

2. Under the provisions of sections 7046 and 7047, Rev. Codes 1905, a compulsory reference cannot be ordered without the written consent of the parties, unless the case comes within the provisions of the latter section. Mere silence or failure to object or except to the order will not constitute a waiver of the party's constitutional right to a trial by jury. Smith v. Kunert, 120.
3. At the close of plaintiff's case in chief, defendant moved for a directed verdict, which was denied. Thereafter defendant introduced testimony in support of his defense. Held, that he thereby waived the error, if any, in denying such motion. Pease v. Magill, 166.
4. The demand for and acceptance of an indemnity bond, pursuant to a notice of claim to the property attached is a waiver of any defects in the notice. Aber v. Twichell, 229.
5. At the conclusion of the plaintiff's testimony defendant moved for a directed verdict in its favor, which motion was denied. Thereafter plaintiff moved for a directed verdict in her favor, which motion was granted. No request was made by defendant's counsel to submit any question of fact to the jury, hence defendant waived its right, if any such right existed, to have submitted to the jury the question as to whether the injury was accidental, or whether it resulted from unnecessary exposure to danger or to obvious risks of injury within the meaning of the terms of the policy. Kephart v. Continental Casualty Company, 379.
6. Unless the request for time to prepare for trial pursuant to statute giving that right, is made in time, the right thereto is waived. State v. Chase, 429.
7. When the plaintiff rested on the trial of his action, defendant moved for a directed verdict on the ground that the plaintiff had failed to establish the allegations of his complaint. Held, that the defendant not having renewed his motion after all the evidence was submitted, thereby waived any error in denying his motion. McBride v. Wallace, 495.
8. On the submission of all their evidence, both parties made motions for a directed verdict. Neither party requested the submission of the facts to the jury. Held, that they thereby waived any right which they might have otherwise had to an undirected verdict, and are estopped from assigning error for not submitting the facts to the jury. Duncan v. Gt. N. Ry. Co., 610.

WAREHOUSEMEN.

1. The evidence before the committing magistrate disclosed that the milling corporation of which the petitioner was an officer, was not engaged in doing a shipping business. Therefore, the commitment under which the petitioner is held to answer for the of-

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WAREHOUSEMEN—Continued.

fense of larceny, as defined in section 2251, Rev. Codes 1905, aforesaid, is contrary to law and void, and the writ prayed for is granted. Ex parte Bellamy, 140.

2. A public warehouseman licensed to do business in this state under the provisions of chapter 141, page 180, Laws 1901, being sections 2262-2272, Rev. Codes 1905, may, as security for such indebtedness, issue and deliver to his creditor a warehouse receipt upon property actually contained in such warehouse and owned by him. State v. Robb-Lawrence Co., 257.

3. The execution and delivery of such a receipt operates as valid pledge of the property without the necessity of the actual change of possession; a symbolical or constructive delivery through the issuance and delivery of such warehouse receipt being sufficient. State v. Robb-Lawrence Co., 257.

4. Such transaction operates in law to create the holder of such receipt a bailor, and the warehouseman the bailee, of the property under said warehouse statute, during the time such property remains in such warehouse, and renders the surety upon such warehouseman's bond liable for its safe keeping. State v. Robb-Lawrence Co., 257.

WAREHOUSE RECEIPT. See WAREHOUSEMEN, 257.

WARRANTY. See PLEADING, 91; SALES, 343.

WITNESS.

1. The cashier of a national bank, which is a party to an action, is a competent witness to testify to the fact of the mailing of a notice to a deceased person, whose executor and heirs at law are parties to the action, as section 7253, Rev. Codes 1905, prohibits evidence of parties only in such cases. Bank v. Warner, 76.

2. An objection to evidence as incompetent, irrelevant and immaterial is too general to suggest the objection that the evidence is incompetent as relating to a transaction with a deceased person, whose executor and heirs at law are parties to the action. Bank v. Warner, 76.

3. Where a contractor and the executors and heirs at law of the deceased owner of a building, erected under a contract between said contractor and the owner, are parties defendant in an action to foreclose a subcontractor's lien, the evidence of the contractor as to when the building was completed is not objectionable, as referring to a transaction with a party since deceased, under section 7237, Rev. Codes 1905. Bank v. Warner, 76.

4. The fact that a witness is a proper party to an action in which the executor, administrator, or heirs at law of a deceased person are parties, disqualifies such witness from testifying to transactions

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WITNESS—Continued.

or statements made by such deceased person. The fact that such witness is a party defendant with the administrator, executor, or heirs, does not render him competent as a witness in such cases. Cardiff v. Marquis, 110.

5. The evidence of a witness who is a party in such cases is inadmissible to prove that letters were written and signed by the witness at the request and dictation of the deceased person, whose administrator is a party to the action. Cardiff v. Marquis, 110.

6. The evidence of a witness who is a party to an action in which the administrator of a deceased person is also a party, is not admissible to prove the contents of lost letters written or received by the witness to or from such deceased person. Cardiff v. Marquis, 110.

7. Where a party on his cross-examination denies having made admissions to a witness, material and relevant to the issues, it is proper to show by such witness that the party made such admissions, and it is error to strike out the evidence that such admissions were made. Wadsworth v. Owens, 173.

8. A witness, sworn before a grand jury, cannot be compelled to answer questions which would tend to criminate him, and is privileged from answering such questions by section 13 of the constitution, which declares that "no person * * * shall be compelled in any criminal case to be a witness against himself," unless granted unconditional immunity from prosecution for the offense concerning which he is testifying by statute. In re Beer, 184.

9. Section 9383, Rev. Codes 1905, which provides that "no person shall be excused from testifying * * * by reason of the testimony tending to criminate himself (the witness), but the testimony given by such person shall not in any case be used against him," does not grant immunity from prosecution. In re Beer, 184.

10. Under section 13 of the constitution the witness is protected from testifying to facts and circumstances from which his connection with, or guilt of, a crime, may be proven through other sources than his answer. In re Beer, 184.

11. Before a witness can be compelled to answer questions which tend to criminate him, the statute granting immunity must be coextensive in scope and effect with the constitutional guaranty. In re Beer, 184.

12. A witness was asked in substance if defendant did not at a certain interview with plaintiff's collector treat the claim made by such collector as a claim against the firm of which he was a member. Such question did not call for an answer as to a fact, but merely a conclusion; and hence the objection on such ground was properly sustained. Bristol & Sweet Co. v. Skapple, 270.

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WITNESS—Continued.

13. Permitting a witness to answer the following question under objection, viz.: "Did you ever get a soda fountain from the American Soda Fountain Company" was erroneous, as calling for the conclusion of the witness on a matter within the province of the court or jury. Am. Soda Fountain Co. v. Hogue, 375.
14. In its order retaxing the costs, the court allowed certain witnesses the sum of $10 per day for attendance. This was erroneous, and the judgment is modified accordingly, by reducing such allowance to the sum of $2 per day. Pendroy v. Gt. N. Ry. Co., 433.
15. It does not constitute reversible error to exclude a question which has already been asked and answered by the same witness. McBride v. Wallace, 495.
16. On cross-examination of one of the state's witnesses, and for the purpose of impeachment, he was asked whether as a matter of fact he was running a certain saloon in violation of law and without a license. To this question counsel for the state objected, and the objection was sustained. Held, error. Such question was admissible under the general rule that for the purpose of impeachment a witness may be asked questions as to collateral matters, the answers to which may tend to degrade or otherwise discredit him. State v. Denny, 519.
17. The state's attorney, who was a witness for the state, was permitted to give his opinion or conclusion to the effect that the alleged copy of letter claimed to have been sent from Montana to defendant was on letter paper different from that in use by the Great Northern Hotel at Williston. He was a non-expert witness, and his testimony should have been restricted to facts, leaving it to the jury to draw their own inferences or conclusions therefrom. State v. Denny, 519.
18. A person accused of a crime, in the commission of which a corrupt intent is a necessary ingredient thereof, may testify what his intent was in doing certain acts. State v. Johnson, 554.
19. A person accused of crime should be allowed the fullest latitude to explain what his intent was in writing or making statements, apparently incriminating, and in explaining what he meant by certain equivocal statements. State v. Johnson, 554.

WOODS LAW. See TAXATION, 67.

WORDS AND PHRASES. See INSTRUCTION, 433; WAREHOUSEMEN, 140; MAXIMS, 161.

1. In this case it is shown that six members of the fire department of the defendant city were paid annual or monthly salaries, and all other members of the department were paid in accordance with the ordinance of the city, $1 for the first hour, and fifty cents per hour for all subsequent time in the daytime, and seventy-five

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WORDS AND PHRASES—Continued.

cents in the night-time, for time spent in actual attendance at fires, and that the amount so paid by the city to its fire department for a period of about eighteen months, the time involved in this action, was over $6,000. Held, that such department was a paid department within the meaning of section 2968, Rev. Codes 1905. Hose Co. v. Fargo, 5.

2. The word "maliciously," as used in section 9315, Rev. Codes 1905, relating to the crime of "malicious mischief," is to be given a restricted meaning, and imports that the act to which it relates must have resulted from actual ill-will or revenge. It implies an intent to vex and annoy the owner of the proper injured. State v. Minor, 454.

3. The holder of a mortgage superior to the one foreclosed, assuming to be a redemptioner when not made so by statute, who tenders the amount necessary to redeem, becomes by the issuance to him of a certificate of redemption and the acceptance and retention by the holder of the certificate of sale of the money tendered, as between himself and the party who parts with such certificate, a "redemptioner." The N. D. Horse & Cattle Co. v. Serumgard, 466.

4. A "foreclosure sale," under a power contained in the mortgage, which conveys the title of the mortgagor, is in a legal sense the complete foreclosure proceedings, beginning with the act of sale and terminating with the execution of the deed after the expiration of the period allowed for redemption. It includes all the proceedings for the foreclosure of the right of redemption by sale and deed. The N. D. Horse & Cattle Co. v. Serumgard, 466.

5. The phrase "on the property sold," in the statutory definition of a redemptioner as being one holding "a lien by judgment or mortgage on the property sold," applies to the land or premises, as those words are commonly used. The N. D. Horse & Cattle Co. v. Serumgard, 466.

6. The sale in the exercise of a power contained in a mortgage which conveys the title of the mortgagor is the sale as completed by the execution of a deed at the expiration of the period allowed for redemption. The N. D. Horse & Cattle Co. v. Serumgard, 466.

7. The appellant, during a long absence when traveling for his health, directed an agent to pay the taxes on the land in question, and other land owned by him assessed against it in the year 1897. By a mistake or oversight of the agent, and contrary to his instructions, instead of paying them in the usual manner, he purchased the land at tax sale in the name of the appellant. Appellant paid all subsequent taxes assessed prior to the bringing of this suit, and did not procure a tax deed under the certificate so obtained by such sale. Held, in the absence of any question of good faith

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WORDS AND PHRASES—Continued.

on the part of appellant, that such purchase was void, and operated as a "payment," within the requirements of section 4928, Rev. Codes 1905. Stiles v. Granger, 502.

WRIT OF PROHIBITION. See PROHIBITION, WRIT OF, 128, 285, 463.

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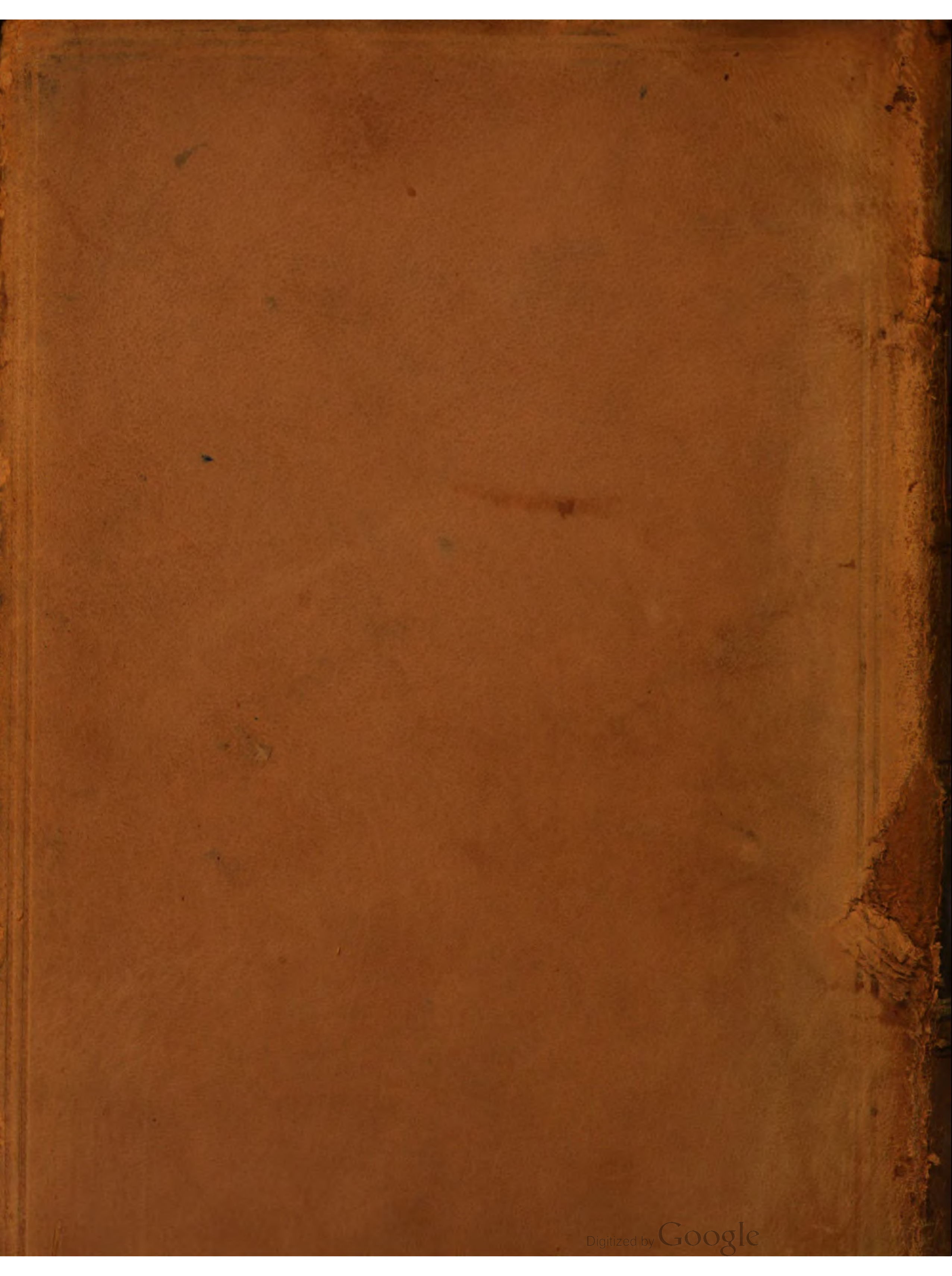
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