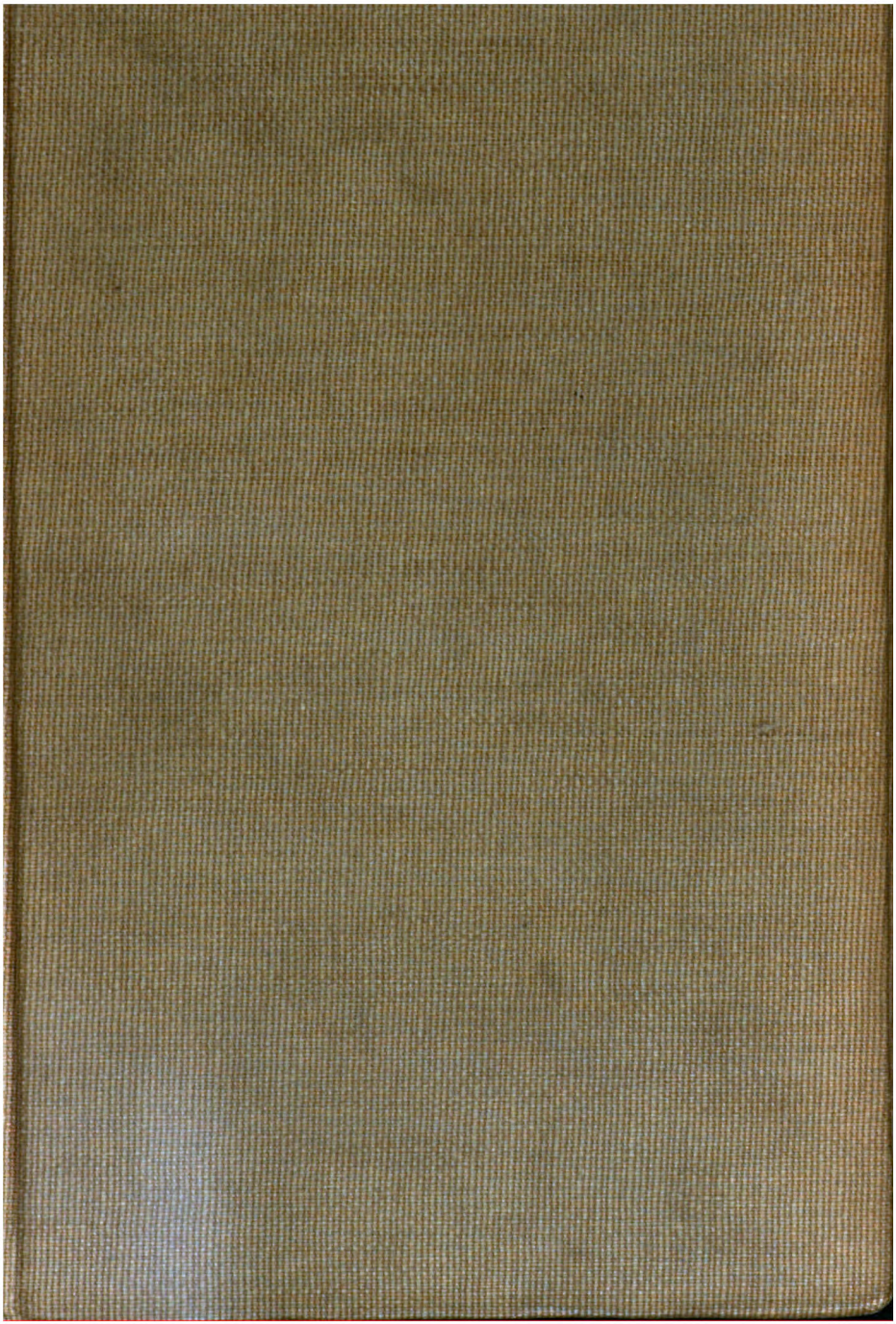

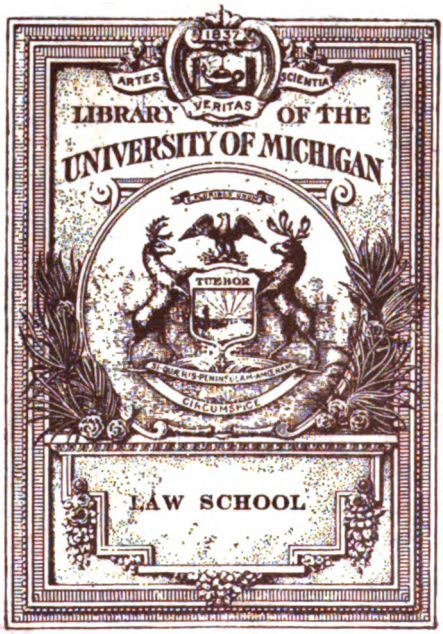

REPORTS OF CASES

DECIDED IN THE

SUPREME COURT

OF THE

STATE OF NORTH DAKOTA,

OCTOBER 1897 TO JUNE 1898.

JOHN M. COCHRANE,
REPORTER.

VOLUME 7

GRAND FORKS, N. D.:
HERALD, STATE PRINTERS AND BINDERS
1898.

OFFICERS OF THE COURT DURING THE PERIOD OF THESE REPORTS.

HON. GUY C. H. CORLISS, Chief Justice.
HON. J. M. BARTHOLOMEW and
HON. ALFRED WALLIN, Judges

R. D. HOSKINS, Clerk.
JOHN M. COCHRANE, Reporter.

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

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

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF NORTH DAKOTA

WILLIAM DUNSTAN *vs.* THE CITY OF JAMESTOWN, *et al.*

Opinion filed October 20th, 1897.

Highways—Establishment—Location.

Under the statutes in force for the establishment by county commissioners of highways in 1880, and where there was no objection to the highway or the report of the viewers, such highway, if established at all, must be established as located and described by the viewers.

Location Fixed by Viewers Controls.

While the statute provided that the plat and notes of the county surveyor, when a survey had been ordered by the board, should be held as presumptively correct, yet, when such plat differed from the location fixed by the viewers, the latter must prevail.

Definiteness of Proceedings.

When the proceedings under the statute to create a highway are so definite and certain that a competent surveyor, with the records before him can locate the road, they are sufficient.

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

Action by William Dunstan against the City of Jamestown, Charles L. Mitchell and John Mahoney to obtain an injunction restraining defendants from entering upon the lands of plaintiff for the purpose of constructing, working and maintaining a highway upon the course surveyed and marked out by them, and from

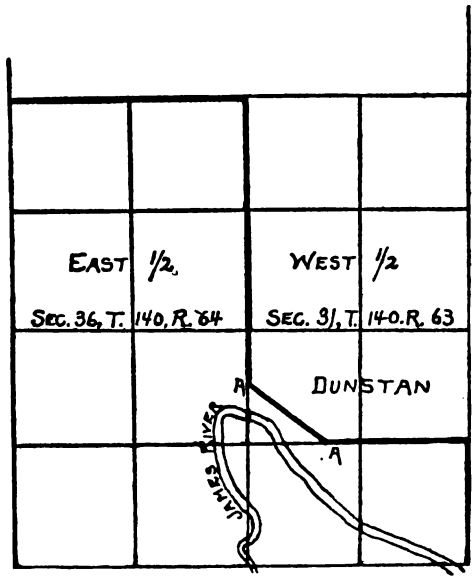
removing plaintiff's fences upon the line of such survey and from passing over and across and using the same as a public highway. Judgment for plaintiff and defendants appeal.

Affirmed.

Ormsby McHarg, for appellants.

S. E. Ellsworth, for respondent.

BARTHOLOMEW, J. This action was brought to obtain a permanent injunction restraining the defendants from entering upon the lands of plaintiff for the purpose of working, constructing, or maintaining a highway between certain points. The case involved the question whether or not a highway had been legally established between said points. In June, 1896, the defendants Mitchell and Mahoney—an alderman and chief of police of the defendant city—entered upon plaintiff's land, removed his fences, and marked out a highway between said disputed points. The trial resulted in granting the relief prayed, and defendants appeal. A diagram will simplify the facts.



The heavy lines represent the alleged highway. Respondent owns the N. ½ of the S. W. ¼ of section 31. The dispute is as

to the existence of a highway between the points "a" and "a." Respondent's land is within the corporate limits of the City of Jamestown, but is unplatted. The evidence showed that in 1880 a petition was presented to the board of county commissioners of Stutsman County asking the establishment of a highway described in the petition as follows: "To start from the eastern terminus of Pacific avenue, in Jamestown, Stutsman County, D. T., and from said terminus to run east one-half mile on section line between sections 25 and 36, township 140, range 64; run on section line between section 31, township 140, range 63, and section 36, township 140, range 64, to the James River; thence down the east bank of said river to the dividing line between S. ½ and N. ½ of S. W. ¼ of Sec. 31—140—63; thence east on said line," etc. The sufficiency of this petition is not questioned, and it is conceded that the eastern terminus of Pacific avenue is at the quarter post on the north line of said section 36. On March 10, 1880, this petition was duly received by the board and viewers appointed as the statute required. On March 29, 1880, these viewers made their report, recommending the establishment of the highway, and describing the same, for all practical purposes, the same as described in the petition. On April 5, 1880, the report of the viewers was received and read, and a public highway ordered, and the clerk authorized to make a record thereof. The records of the board show that on June 9, 1880, the county surveyor was ordered to make a plat of the road, with plans and specifications for a bridge across the James river at a point further down than is shown on the diagram. The surveyor's notes show that on June 11 he made a survey and plat of the road, and made his report on June 21, 1880.

Two objections were urged as fatal to the establishment of any legal highway between the disputed points. The first goes upon the theory that the establishment and location of the highway might be shown by the surveyor's plat and notes, and it is claimed that, while the plat showed a connected highway, yet it did not comply with the notes, as the notes showed an impossible

highway. It is true that the law then in force (§ 689, Comp. Laws) made the surveyor's plat and notes presumptively correct. But this survey could not be ordered until after the road had been established. In this case both parties introduced in evidence the original proceedings for the establishment of the highway. The plat and notes are only presumptively correct. If they do not describe the highway as originally established, the presumption that they are correct is overcome, and any inconsistency or variance between the plat and the notes would become entirely immaterial.

This brings us to the second objection. It is undisputed, under the testimony, that the points "a" and "a" on the plat, instead of being on the bank of the river, are from 150 to 200 feet distant therefrom, nor does the platted road between the two disputed points in any sense follow the bank of the river. The road runs in a direct line, while the bank line is constantly changing its direction. The statute under which it was attempted to establish this highway appears in the Comp. Laws as §§ 1206 to 1217, inclusive. The first section provides for the petition which gives the board jurisdiction, and for the appointment of three persons to view the proposed highway. The next section prescribes how the viewers shall qualify and proceed with their duties. Section 1208 provides that "such viewers or a majority of them shall make a report of their proceedings at the ensuing session of the board of commissioners, * * * * * * giving a full description of such location * * * by metes and bounds and by its course and distance," etc. Section 1209 declares that: "If no objection be made to such proposed highway, such board shall cause a record thereof to be made and shall order the same to be opened and kept in repair," etc. As we have seen, the viewers were properly appointed in this case. They made their report, recommending the establishment of the highway, and described its location in part as "running south on section line between sections 36 and 31 to the east bank of the James river; then following east bank of James river to division line between south

half and north half of southwest quarter of section 31, township 140, range 63; thence east on said line," etc. We have seen that this report was received by the board April 5, 1880, and accepted, and the highway ordered, and the clerk directed to make a record thereof. If the road was not established upon the report of the viewers, then it never has been established. The survey was not made until more than two months thereafter, and no order establishing the highway was ever entered after the survey. It cannot be claimed that a survey was necessary to identify the description in the report of the viewers. It is true, that report did not give the distance in feet that the road followed the river bank, but it designated a known point where the road struck the bank, and a known point where it left the bank. No man of intelligence could misunderstand it, or be mistaken as to the locality of the road. The points of contact and departure being established, the road between those points must follow the river bank, and the exact distance could in no manner help to fix the location. The law does not require useless things. If the proceedings under a statute to create a highway are so definite and certain that a competent surveyor, with the record before him, could locate the road, it is sufficient. *Warren* v. *Brown*, 31 Neb. 8, 47 N. W. Rep. 633. This description went far beyond that requirement, and it established the highway, if at all, along the bank of the river, and not 200 feet distant therefrom, as shown by the plat. As the defendants in this case undertook to open a highway, not along the river bank, but along the line shown on the plat, and where no highway had ever been established, it follows that they were properly restrained. Some points that were presented in argument have not been noticed. Whether or not a highway was legally established along the river bank is a question not before us, and manifestly it would be improper for us to say anything on that point.

Affirmed. All concur.

(72 N. W. Rep. 899.)

THE BANK OF GILBY *vs.* S. L. FARNSWORTH.

Opinion filed October 21st, 1897.

Lost Draft—Laches of Drawee—Discharge of Drawer.

A draft drawn by defendant to the order of the plaintiff was lost in transmission by mail from the city where the plaintiff was engaged in business to the city where the drawee resided, to be there presented for payment by the plaintiff's correspondent. Plaintiff failed to discover such loss for nearly six months, although it had in its possession a report from its correspondent which disclosed the fact that the draft had never reached such correspondent. *Held*, that the drawer was discharged from liability.

Waiver of Right to Release.

When a drawer who has been discharged because of the failure to take the necessary steps to charge him, promises to pay the draft or recognizes his liability thereon, with full knowledge of the facts releasing him from liability, he thereby waives his right to insist that he has been released.

Duplicate Draft—Evidence of Purpose in Giving it.

The giving by the drawer of a duplicate of the lost draft does not necessarily evince a purpose to waive such defense. Such duplicate does not, as a matter of law, import a promise to pay the draft. Therefore it is competent to show by parole evidence that the drawer informed the payee that he did not intend by the giving thereof to waive his rights, but merely to accommodate the payee by putting in his hands a paper which would enable him to collect the money from the drawee.

Duplicate Not a New Contract—Varying Written Contract.

Such evidence does not contradict or vary the terms of the written contract between the parties, for there is only one contract between them,—*i. e.* the original draft,—the duplicate adding nothing to the liability of the drawer, and not constituting a new or additional contract.

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

Action by the Bank of Gilby against S. L. Farnsworth. Judgment for defendant. Plaintiff appeals.

Affirmed.

J. B. Wineman and *Charles F. Templeton*, for appellant.

The failure of plaintiff to present the original bill was caused by circumstances over which it had no control, and his failure to present it is thereby excused. Section 4944, Rev. Codes; *Windham Bank* v. *Norton*, 22 Conn. 213; *Pier* v. *Heinrichsoffen*, 67 Mo.

163; *Brown* v. *Olmstead*, 50 Cal. 162. The drawing of the duplicate draft and delivery of it to plaintiff, was a waiver by defendant of the defense of laches. *Leonard* v. *Hastings*, 9 Cal. 236; *Martin* v. *Lennon*, 19 Minn. 74. The duplicate draft constituted a promise by defendant to pay the amount specified therein. An admission of liability or promise to pay after notice of facts constituting a release waives the defense of laches. *Thornton* v. *Wynn*, 12 Wheat. 183; *Sigerson* v. *Matthews*, 20 How. 496; *Yeager* v. *Farwell*, 13 Wall. 6; *Parsons* v. *Dickinson*, 23 Mich. 56; *Ladd* v. *Kenny*, 9 Am. Dec. 77; *Meyer* v. *Hibsher*, 47 N. Y. 265; *Ross* v. *Hurd*, 71 N. Y. 14; *Cady* v. *Bradshaw*, 116 N. Y. 188; *Tibbetts* v. *Dowd*, 23 Wend. 379; *Third Nat. Bank* v. *Ashworth*, 105 Mass. 503; *Rudge* v. *Kimball*, 124 Mass. 209; *Hobbs* v. *Straine*, 149 Mass. 212; Mayers Appeal, 87 Pa. St. 129; *Oxnard* v. *Varnum*, 111 Pa. St. 193; *First Nat. Bank* v. *Bonner*, 27 S. W. Rep. 699; *State Bank* v. *Bartlett*, 21 S. W. Rep. 816; *Curtis* v. *Sprague*, 51 Cal. 239; *Knapp* v. *Runals*, 37 Wis. 135; Daniels Neg. Inst. § 1147. No new consideration was necessary to support the waiver. *Sheldon* v. *Horton*, 43 N. Y. 93; *Matthews* v. *Allen*, 16 Gray 594; *Lockwood* v. *Bock*, 50 Minn. 142. All evidence relating to a conditional delivery of this new draft for showing prior or contemporaneous stipulations was incompetent. *Cowel* v. *Anderson*, 33 Minn. 374; *Harrison* v. *Morrison*, 39 Minn. 319; *Farwell* v. *St. Paul Trust Co.*, 45 Minn. 495; *Youngberg* v. *Nelson*, 51 Minn. 172; *Burke* v. *Ward*, 32 S. W. Rep. 1047; *National Ger. Am. Bank* v. *Lang*, 2 N. D. 66; *Kulenkamp* v. *Groff*, 40 N. W. Rep. 57; *Thompson* v. *McKee*, 37 N. W. Rep. 367; § 3888, Rev. Codes; *Brown* v. *Spafford*, 5 Otto, 374; *Martin* v. *Cole*, 14 Otto, 30. Notwithstanding the opinion in *Garr, Scott & Co.* v. *Green*, 6 N. D. 48; A written instrument cannot be conditionally delivered. Sections 3889, 3890 and 3517, Rev. Codes. The cashier of plaintiff could not bind it by any stipulation that defendant should not be held according to the legal effect of the writing. *Thompson* v. *McKee*, 5 Dak. 172.

Cochrane & Feetham, for respondent.

The loss of a bill or note is no excuse for want of demand,

protest, or notice, because it does not change the contract of the parties. The drawer and indorsers are at once discharged if there is a failure in respect to either demand, protest or notice. Daniels on Neg. Insts. 1464. The duplicate was not an original contract. It was made as a substitute for and to take the place of the original, and no new liability of the defendant was thereby created. *Benton* v. *Martin*, 50 N. Y. 347. There was no consideration for the new or duplicate draft. Rand Com. Paper, 1693. The evidence of statements made at the time of delivering the duplicate draft, and explaining the delivery was competent. *Warroll* v. *Munn*, 5 N. Y. 229; *Braman* v. *Bingham*, 26 N. Y. 483.

CORLISS, C. J. The plaintiff by this action is seeking to hold the defendant liable as drawer of a draft. The plaintiff is the payee named in such draft, and it was drawn on J. M. Gagen & Co., of Grand Forks City, the defendant being a resident of Gilby, N. D. Defendant had been engaged in buying wheat for J. M. Gagen & Co., for some time previous to the day when this draft was drawn. It was his custom to advance the money with which to make all purchases of wheat for his principal, and at the close of the day to draw upon them a draft through the plaintiff, a state bank at Gilby, to reimburse him for such advances. On the 26th of September, 1895, the moneys he had that day expended in buying wheat for his principal amounted at the close thereof to the sum of $612, and on that day he drew upon them, through the Gilby Bank, for that amount; that bank cashing the draft, as was its custom. The draft was lost in transmission by mail from Gilby to Grand Forks, it being forwarded by plaintiff to the First National Bank of Grand Forks for collection. The fact of such loss was not discovered by plaintiff until the latter part of March, 1896, or nearly, if not quite, six months afterwards. As soon as plaintiff learned that the draft had not been received by its agent, the First National Bank of Grand Forks, it notified the defendant, and requested him to give a duplicate thereof. Defendant refused so to do until he had ascertained whether the draft had in fact not been paid. Subsequently he signed and

delivered to plaintiff an exact duplicate of the lost draft, it being dated as of the 26th of September, 1895, the same as the original. Written upon the draft in two places was the word "Duplicate." Defendant testified, and his evidence was confirmed by that of his son, that he distinctly informed the plaintiff that he knew that he had been discharged from liability on the lost draft by reason of the negligence of the plaintiff, and that he did not intend, by the giving of the duplicate, to reinstate such liability. The evidence on this point is somewhat conflicting, but the learned trial judge, having all except one of the witnesses before him, found in favor of the defendant on this point. In a case where the evidence is so evenly balanced, we should not overthrow a finding of fact which necessarily rests in part upon a knowledge of the demeanor and appearance of witnesses which we do not and cannot possess. That the defendant was discharged from liability as drawer does not admit of doubt. Under the statute it was the duty of the plaintiff to present the bill for payment within 10 days after the time in which it could, with reasonable diligence, forward it to Grand Forks for such presentation. The draft was payable on demand, and did not draw interest. Our statute declares that, "if a bill of exchange payable at sight or on demand without interest is not duly presented for payment within ten days after the time in which it could with reasonable diligence be transmitted to the proper place for such presentment, the drawer and indorsers are exonerated, unless such presentment is excused." Rev. Codes, § 4941. Nor does the loss of the paper exonerate the plaintiff from the performance of this duty, which it owed the defendant, "The loss of a bill or note is no excuse for want of a demand, protest, or notice, because it does not change the contract of the parties, and the drawer and indorsers will be at once discharge if there be failure in respect of either the demand, protest, or notice. This rule applies whether the bill has been accepted or not, for the loss of the instrument does not relax the duty of the holder to make the demand for acceptance within due season." 2 Daniel, Neg. Inst.

§ 1464. It is possible that the time during which plaintiff remained in ignorance of the fact of such loss, without being chargeable with negligence, was not a part of the time mentioned in the statute. Probably § 4909, Rev. Codes, covers such a case. This section reads: "Delay in presentment or in giving notice of dishonor is excused when caused by circumstances which the party delaying could not have avoided by the exercise of reasonable care and diligence." It may be that the holder of a draft is not responsible for the carelessness of public servants in the carrying of the mails, and therefore that he does not take the risk of such carelessness. But the moment the exercise of reasonable diligence requires him to know the fact that the paper has been lost, he must then proceed under the statute to make the demand of payment, and give notice of dishonor. This duty the section referred to clearly recognizes. It is only when the delay is caused by circumstances which the party delaying could not have avoided by the exercise of reasonable care and diligence that he is excused. It is a mild form of expression to speak of the negligence of the plaintiff in failing to discover for six months the fact that this draft had never been paid, and had not even reached its correspondent and agent, the First National Bank of Grand Forks. Nearly six months intervened between the mailing of the draft and the discovery of its loss, during about five months of which time plaintiff's cashier admits that there was in his possession a statement from the First National Bank which would have disclosed the fact that that bank had never received the paper. From the standpoint of the defendant's rights and interests, the plaintiff was guilty of gross and inexcusable negligence; and defendant was thereby discharged from all liability on the paper. But it is urged that to allow the defendant to prove the oral understanding between him and the plaintiff's cashier at the time of the delivery of the duplicate draft is to contradict by parol evidence the terms of a written instrument. This contention must find support, if at all, in the postulate that the duplicate draft was an independent contract, creating an addi-

tional liability. This position is not tenable. All the evidence in the case, the duplicate itself, and the plaintiff's own pleading, speak but one language regarding the paper. It is not a new agreement, but merely a written evidence of the lost instrument executed to take its place. After a contract is duly entered into the making of a duplicate adds nothing to the liability of any of the parties to the agreement. There is still only one contract, although, for convenience of the parties, there may be two, or even more, original agreements, each the exact copy of all the others. Burrill defines a duplicate as "an original instrument repeated; a document which is the same as another in all essential particulars, and differing from a mere copy in having all the validity of an original." It is immaterial when a duplicate is executed. If it is in fact a duplicate, it adds no more to the obligations and rights of the parties to the agreement, when it is executed at a subsequent date, than when its execution is contemperaneous with that of the other duplicate. Suppose that the defendant had been properly charged as drawee, and that thereafter the draft had been lost, would it be claimed that the execution by defendant of a duplicate under those circumstances would have added anything to his liability, or that the duplicate would have been a new and distinct contract? Clearly not; otherwise he would then be liable for twice the sum which he had. The mere fact that the duplicate was executed after he had been discharged cannot make it a separate and independent agreement, although the execution thereof might, under some circumstances, be cogent evidence that the drawer had intended to admit his liability, and thus, under a familiar rule, waive his discharge. That, however, is another question having no connection whatever with the inquiry whether the defendant, by signing and delivering this duplicate as a duplicate, and as a dulicate only, has nevertheless entered into a new contract creating a distinct liability. That no new agreement was made by the execution of this duplicate cannot admit of doubt. All that was done was to furnish the plaintiff with a copy of the

lost paper; a copy, however, which has all the force (and no more) of the original, because signed by the defendant, the same as this old draft. Therefore the defendant's evidence that he stated, before signing the duplicate, that he did not thereby intend to add anything to his liability, was in harmony with the very nature of the act of executing a duplicate, and not in conflict therewith. His evidence was not incompetent on the ground that it tended to contradict or vary the terms of a written agreement. Clearly, his evidence that he informed the plaintiff before the delivery of the duplicate that he knew that he had been released from liability, and did not intend to yield his vantage ground by the execution of such duplicate, was not evidence which in any manner varied or contradicted the terms of the only contract between the parties. That contract was the original draft. By signing the duplicate, the defendant, as we have before stated, did not make a new agreement, or add anything to the old. He merely gave another written evidence thereof. Therefore the only contract between the parties whose terms can be varied by the oral evidence in the case is the draft drawn September 26, 1895. But defendant does not seek to add to or take from this agreement one *iota*. He concedes that it is a fair contract, and that it means just what the law says it means. But he asserts that the condition on which the liability thereunder was to become absolute has not been fulfilled, and that, therefore, he has been released as drawer of the draft. What he sought to prove was, not that the original draft was delivered on condition, or did not represent the real intent of the parties thereto, but that, by giving a duplicate, he did not intend to waive his right to insist that he had been exonerated from liability by the laches of the plaintiff.

Counsel for plaintiff treats the duplicate as a new contract, and then reasons that it imports an absolute liability on the part of the defendant, provided the proper steps were taken to charge him as drawer. Here is the fallacy of his reasoning. The postulate is false. It is no more a distinct contract than it would have

been had it been executed at the same time that the lost paper was executed. As a new contract it would have no consideration to support it. It is undisputed that no money was paid for the duplicate by the plaintiff. Nor was defendant under any moral, much less any legal, obigation to give it. He had been discharged through the gross carelessness of plaintiff; and the circumstances of the case show that, if the bank had acted with ordinary diligence, the loss of the draft would have been discovered in ample time to insure the collection of the money from J. M. Gagen & Co., as it is uncontradicted that between the time it was given and their suspension of business through insolvency they paid 74 drafts drawn on them by defendant. There might have rested upon defendant a certain business obligation to accommodate the bank by giving to it some written evidence that the bank was entitled to $612 of the funds of the defendant in the hands of J. M. Gagen & Co. But neither legally nor morally was defendant bound to pay a dollar, or in any manner help the plaintiff, by again becoming responsible, out of the dilemma in which it had placed itself by its own inexcusable negligence. If, therefore, we could treat this duplicate as an independent contract, it would be void as between the parties for want of a consideration to support it. But it is idle to talk of its being a new contract. The whole trend of the evidence, the writing of the word "Duplicate" on the paper itself, and the solemn averments of the plaintiff's own pleading, all point to one conclusion; *i. e.* that all that the parties intended was to make a duplicate of a draft which had theretofore been executed, and delivered by defendant to plaintiff. Plaintiff, in its complaint, avers "that on the 1st day of April, A. D. 1892, the defendant executed and delivered to the plaintiff a duplicate of said bill of exchange for the purpose of presenting the same to said J. M. Gagen & Co., and collecting from said J. M. Gagen & Co. the said sum of $612." We must, if we are not to lose ourselves in a labyrinth, take this duplicate, and assume it to have been executed as of the date of the lost draft, in considering the question whether there has been

an attempt on the part of the defendant to contradict or vary by parole evidence the terms of a written agreement. But what effect the execution of this paper has to restore the liability of the defendant as drawer is another question, which must be discussed entirely separate from the question of parol evidence. On this branch of the case the time when the duplicate was executed is very important. If it had been signed when the lost draft was signed, no one would contend that it was any evidence of waiver. But, as it appears to have been executed at a time when the defendant knew that he had been released as drawer, there might be a possibility of claiming that he thereby intended to admit his liability despite the fact that he had been discharged. If the paper were a note, and the defendant were an indorser thereon, his indorsing of a duplicate would be strong, perhaps conclusive evidence, that he intended thereby to admit his liability, although he had been discharged. In such a case there would be no other plausible explanation of his conduct. But in the case at bar there was a sufficient reason why the plaintiff should desire, and the defendant be willing to give, a duplicate, aside from a purpose to re-establish an extinguished liability. It was necessary that plaintiff should have some written authority from defendant to enable it to collect from J. M. Gagen & Co. $612 of the funds of defendant in their hands. For this purpose a duplicate was a very natural paper to give, for it would keep the records of all the parties in proper business shape. An order or an assignment would have been sufficient to enable the plaintiff to collect from J. M. Gagen & Co. the $612, but a duplicate of the original draft was the most natural document for the parties to select to effectuate this object. It was entirely competent for the defendant, at the time of giving it, to notify the plaintiff that he did not intend by the giving of such duplicate to waive his rights, but that his sole object was to put the plaintiff in shape to secure its money from J. M. Gagen & Co. According to his evidence, it was solely for this purpose that the plaintiff asked for the duplicate. It is possible that in this case the inference might be

drawn from the bare fact of giving a duplicate under the circumstances of this case that defendant intended to abandon his defense that he had been released. But this would not be on account of the terms of the paper, or of its legal effect. Nor would it follow as a legal conclusion from the giving of a duplicate. That would be merely a circumstance having certain probative force, and evidence to overthrow the inference would be competent. Such evidence would only go to show that what on the face of the transaction was presumably the intention of the defendant was not in fact his intention, and that the plaintiff knew that it was not. Unless a duplicate draft, as a matter of law, constitutes a promise to pay despite the release of the drawer,—unless this is the legal effect of such an instrument,—the parol evidence did not in any manner contradict or vary its terms. Now, it is obvious that a draft does not contain any promise by the drawer to be bound despite a prior discharge, for at the time it is given the drawer is never released. And the duplicate draft is not a new contract, but another copy of the original, signed like the original by the drawer. As a contract it imports nothing more than the original draft. As evidence of a purpose to waive a discharge it will have such force as other evidence and other circumstances in the case permit, and no other or different force. And proof of other facts bearing upon the question of waiver in no manner affects the terms or legal effect of the only contract between the parties; *i. e.* the original draft, which has been lost. The decision of the New York court of appeals in *Benton* v. *Martin*, 40 N. Y. 345; *Id.*, 52 N. Y. 570, is a direct authority in support of our decision. It is true that, when the case was before the court of appeals the last time (52 N. Y. 570,) Judge Folger appears to have thought that the doctrine that it is competent to prove that a written instrument was delivered conditionally had some bearing on the case, and it may be doubtful, in view of our statutes, whether that doctrine prevails in this state. See Rev. Codes, § § 3517, 3889, 3890. But no such foundation for the decision was stated by the

court in the decision in 40 N. Y. 345. Nor can we perceive how it is possible to talk about the conditional delivery of a mere duplicate of an actually delivered and perfectly valid contract, one which had previously taken effect without condition. The delivery in that case was not conditional in the sense of the doctrine referred to, or, indeed, in any sense whatsoever. The drawer of the draft in that case merely asserted that, while he recognized the fact that he had once been liable on a draft issued by him, and which had theretofore been delivered unconditionally, and while he was willing to give the payee a duplicate to enable it to obtain its money from the drawee, yet he wished it understood that he did not intend to have his act of accomodation construed as a recognition of the very liability from which he had been, by the payee's carelessness, released. Here was no condition, but merely a refusal to have his act, which was not necessarily an admission of liability, construed as such an admission. The duplicate was not delivered as a contract. The delivery of the contract had already taken place months before. How can it be said that any question of conditional delivery is involved in a case of this kind? What was done in that case and in this was not the delivering of a contract, thus for the first time making it effectual, but the furnishing of a duplicate of a contract which had been unconditionally delivered some time before. Such a thing as the conditional delivery of a duplicate, the contract already having taken effect by an unqualified delivery, is an utter impossibility. The defendant attached no condition to the delivery of the duplicate. He merely guarded against the possibility of having his act in so doing construed as a recognition of liability, and hence, under the authorities, as a waiver of his discharge. Certainly, the furnishing of a duplicate of a lost draft is an act susceptible of two different constructions. It may indicate a purpose to reinstate an extinguished liability, or it may be an act of accomodation to the payee to enable him to obtain the funds of the drawee in the hands of the drawer from such drawee, the payee being equitably

entitled thereto. Surely, evidence which throws light on this ambiguous transaction should not be excluded, nor is there any rule of law requiring this to be done. Had the defendant in express terms promised in writing to pay the draft, then it might be claimed that parol evidence tending to show that he did not mean what he said would fall within the rule excluding parol evidence to contradict a written instrument. But no such promise is found on the face of the duplicate, nor is one necessarily implied by the law. Whether such a promise was intended to be made,—whether it has, in fact, been made,—is to be gathered from all the circumstances of the case; and no act indecisive in character can control to the exclusion of other equally good, or rather more satisfactory and explicit, evidence. It is unjustifiable to force upon the defendant an intention to yield up his defense merely because he gave the plaintiff a copy of the original draft, when such act could be and was in fact an act of pure accommodation to the plaintiff. It must be kept in mind that it does not take a contract to reinstate an extinguished liability of this character. No new consideration is necessary. No agreement on the part of the other party (the creditor) is essential. All that is needed is that the drawer should manifest a purpose to be bound notwithstanding the fact that the holder has failed to charge him as drawer. 2 Daniel, Neg. Inst. §§ 1147, 1147a, and cases cited. How, then, has the doctrine relating to parol evidence any bearing on the question whether the drawer has in fact evinced a purpose to surrender his impregnable position? It is urged that the cashier of the bank had no power to bind it by agreeing that the delivery of the duplicate should not constitute a waiver of the drawer's defense. It is certainly remarkable if a principal can in this way force upon a party an agreement or waiver he never intended. Want of power in the agent will entitle the principal to claim that he is not bound. But it has remained for counsel for the plaintiff to discover that it likewise enables the principal to insist that another who has

dealt with the agent has made a contract to which he (such other party) has never assented, or has in law agreed to a waiver which he has expressly guarded against. When defendent and plaintiff's cashier came together, defendant had been relieved from all liability to the plaintiff; and whatever rights the plaintiff has obtained have accrued to it through the dealing of the defendant with such cashier. It can take only such rights as the defendant has seen fit to confer upon it. Claiming the benefit of this arrangement, it must take with it all its conditions. As the defendant declared to the cashier that he would not waive his discharge, the plaintiff cannot, on account of any want of power in the agent, transmute this refusal to waive into a waiver in fact. As the defendant was discharged from liability, and as he has not waived his right to rely on such discharge, the judgment of the District Court in his favor must be affirmed. All concur.

(72 N. W. Rep. 901.)

STATE OF NORTH DAKOTA *vs.* ALLEN J. WINE.

Opinion filed October 29th, 1897.

Embezzlement as Agent—Evidence.

The defendant was found guilty, under the provisions of § 7464 of the Rev. Codes, of the crime of embezzlement. The information alleges, in substance, that at the time and place stated the defendant, Joseph Miller, was the agent of one Swan Lagerberg, and that as such agent he was intrusted with the funds of said Lagerberg to the amount of $1,145, and that the defendant fraudulently appropriated said money to his own use, "not in the execution of his trust." After an examination of the evidence as set out in the opinion, *held*, that such evidence fails to establish the charge contained in the information, in this; it fails to show that the defendant, Miller, was an agent of Lagerberg when he received the money or at any time.

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

Allen J. Wine, informed against as Joseph Miller, was convicted of embezzlement, and appeals.

Reversed.

Taylor Crum and *Ida M. Crum*, for appellant.

Defendant's plea in abatement should have been sustained. It is not competent to try defendant upon a different charge from that named in the requisition upon which he was brought into the state. *State* v. *Hall*, 19 Pac. Rep. 919. No conviction for embezzlement can be had until a demand has been made for the property claimed to have been embezzled. *Peo.* v. *Tomlinson*, 5 Pac. Rep. 509. The defendant guaranteed the payment of money entrusted to him with interest. He became personally liable for the payment of the money and his failure to return it was not embezzlement. *Kribs* v. *Peo.*, 2 Am. Crim. Repts. 109. A partner cannot be held for an embezzlement of partnership funds. *State* v. *Butman*, 60 Am. Rep. 332; 1 Whart. Cr. Law, § § 1015, 1054, 922; *State* v. *Reddick*, 2 S. D. 124, 48 N. W. Rep. 846.

F. B. Morrill, *States Atty.*, and *John F. Cowan*, *Atty. Gen'l.*, for respondent.

A fugitive from justice extradited from another state can be tried for any offense against the laws of the state from which he fled. Subd. 2, § 2, Art. 4, Const. U. S.; *Lascelles* v. *State*, 148 U. S. 535; 37 L. Ed. 549. The jurisdiction of the court is not impaired even if the fugitive is taken by force from the state into which he has fled. *Mahon* v. *Justice*, 127 U. S. 700, 32 L. Ed. 283. No partnership was entered into between Lagerberg, Berg and Wine. There was talk of a partnership but it was never consummated. After Wine got Lagerbergs money into his possession he appropriated it to his own use and abandoned the enterprise. An executory contract to form a partnership is not a partnership. 1 Bates, 78; *Lycoming Ins. Co.* v. *Barringer*, 73 Ill. 230; *Baldwin* v. *Burrows*, 47 N. Y. 199. If the doing of certain things are conditions precedent to the existence of the partnership, the parties are not partners until they are performed. *Napoleon* v. *State*, 3 Tex. App. 522; *Metcalf* v. *Redmond*, 43 Ill. 264; *Hobart* v. *Ballard*, 31 Ia. 521; 2 Bish. Cr. L. § 345; Bates on Partnership, § 83.

WALLIN, J. The defendant is charged with the crime of embezzlement, and in January, 1897, was found guilty by a jury.

There was a motion for a new trial based upon a bill of exceptions embracing the evidence and the proceedings had at the trial. Upon his arraignment (it appearing that the charge of embezzlement as stated in the information was leveled against one Joseph Miller) the defendant declared that his name was not Joseph Miller, but Allen J. Wine. Accordingly, all subsequent proceedings in the case were had against the defendant under the name of Allen J. Wine. The information charged one Joseph Miller with embezzlement, and was drawn under the provisions of § 7464 of the Rev. Codes, which reads: "If any person being a trustee, banker, merchant, broker, attorney, agent, assignee in trust, receiver, executor, administrator or collector, or being otherwise entrusted with or having in his control property for the use of any other person, or for any public or benevolent use, fraudulently appropriates it to any use or purpose not in the due and lawful execution of his trust, or secrets it with a fraudulent intent to appropriate it to such use or purpose, he is guilty of embezzlement." In effect, the specific charge in the information is that defendant was the agent of one Swan Lagerberg at the time stated, and that as such agent he was intrusted by Lagerberg with $1,145, the property of Lagerberg, and that he feloniously appropriated said money to his own use, and not in the due and lawful execution of his trust. At the trial, all the evidence, or nearly all, converged upon the question of the defendant's identity. Witnesses for the state testified that the prisoner at the bar was the identical person who, under the name of Joseph Miller, had visited Fargo, in Cass County, in the year 1895, and while there had entered into certain business relations and transactions touching a gold mine with divers persons, among others with Lagerberg, as will further appear hereafter. The defendant produced a still larger number of witnesses, who testified that they knew said Joseph Miller, and saw him frequently at Fargo, in the year 1895, and also knew that the defendant on trial was not said Joseph Miller. In disposing of the case, however, in this court, we shall assume that the defendant is identified as the

Joseph Miller named in the information. Identity is a question of pure fact, and, inasmuch as the jury (upon competent evidence) returned a verdict of guilty, it must be assumed in this court that the question of defendant's identity was resolved adversely to the defendant.

The testimony relied on by the state to establish the offense charged is wholly undisputed, and is, in the main, harmonious with itself. The transactions and facts constituting the offense charged, if any there is, may be condensed within a brief statement. It appears that the defendant, under the name of Joseph Miller, came to Fargo in the month of April or May, 1895, and remained there until the early part of October of that year, and then departed, and never reported his whereabouts or returned to Fargo until he was brought back in the autumn of 1896 as a prisoner charged with obtaining money under false pretenses. While at Fargo in 1895 he represented himself to be a detective in the employ of the government. He also claimed to be the owner of a stock ranch in the State of Idaho. He further stated that he knew of a very valuable gold mine located in Montana, which mine he claimed to have secured an interest in by paying down a small amount to bind a bargain for the purchase of the mine. To whom this sum was claimed to have been paid does not clearly appear. He further stated that he knew, and was particularly well acquainted with, the original owner of the mine, had befriended him, and that he was certain that he could secure the rights of such owner. Such owner was, according to Miller's statements, then a refugee from justice in Mexico, and was known to Miller, and Miller stated that he could and would find him, and obtain a transfer of his interest in the mine; and, after obtaining such interest, he claimed that the interest of other parties in the mine, who were in Montana, could also be purchased, and thereby the whole title of the mine could be secured by the purchasers. To further bolster his credit and financial responsibility, Miller exhibited a certain check, which was put in evidence, upon a bank at Cincinnati, Ohio, for a large sum. This check Miller

placed in the hands of one Mrs. Berg, the wife of a policeman at Fargo, which policeman went into the mining deal that after wards was made with Miller. This check was seen and examined by the Fargo parties, who placed money in Miller's hands in furtherance of the mining deal, and it appears clearly that the check was one considerable factor, at least, in inducing several parties to enter into the arrangement which was made with Miller concerning the Montana mine. This check was left with Mrs. Berg when Miller went away with the understanding that he was going to Mexico to secure a transfer of the owner's claim in the mine. Miller stated that he would be absent on the Mexican trip a week or ten days, and that when he returned the money could be drawn on his check. Under the arrangement Berg was was to take the check, and go to Ohio, and get it cashed, and out of the proceeds Miller himself was to invest a large amount in the mine; but it was arranged that Berg should personally go to Montana, and buy out the interests in the mine held in Montana, using Miller's funds and certain funds contributed by parties at Fargo, as hereinafter shown. Miller also claimed that he knew of two parties in South Dakota who would invest in the mine, but to what amount seems not to have been stated, nor does it appear that their names were ever given by Miller. Upon such representations it appears that several parties residing at Fargo entered into the mining scheme with the defendant as outlined above, and paid over money to him for investment in the scheme. Swan Lagerberg, who is named in the information, paid over to defendant at different times divers sums of money, amounting to the sum charged in the information, viz. $1,145. One C. L. Berg and one Edward Ness about the same time placed considerable sums of money in defendant's hands upon his promise to use the same in purchasing the mine. Lagerberg, Ness, and Berg were witnesses in the case, and, while their testimony differs slightly in some details, it is the same in all vital particulars affecting the arrangement under which the money was placed in defendant's possession. Referring to a statement made to him by Berg, who

spoke Lagerberg's language, and who made the statement at Miller's request, Lagerberg testified as follows: "He told me that he had invested money in it, and said that he had confidence in the man, and that the deal was all right, and that the mine was located in Montana somewhere. I have forgotten the name of the mountain. Miller had told him that he had been to the mountain, and found gold enough to fill his hat, but that Miller had to go to Mexico to see a man down there, and that he (Berg) should buy the mine. Q. What language was being used then? A. English. Q. What further, on that subject, did Berg state at that time? A. When they had got money enough, which should be the amount of $9,000, should be put in there by different parties, they should go out there, and buy that mine,—all of us should go out there to buy the mine. But I understood that Berg was the man who should buy it, because Miller did not dare to go there himself. Miller was to go to Mexico, and get some papers. Miller would be gone about a week or ten days. Then he would return to Fargo, and then we should all go, and follow him out there; that is, all of us who had invested money should go. This Berg told me in the barn in Miller's presence. Soon as they could raise enough money, or $9,000, all of us who had invested money should go out there; but, as I understood it, Berg should buy the mine, because Miller did not dare to go there himself. We should start out west as soon as Miller had been down to Mexico, where he was to get some papers from a man down there, about the claim. He claimed the man was a Norwegian. Miller was to be absent about a week or ten days, and would be back to Fargo, and after that we should all go and follow him out there. About eleven o'clock we left Berg's house, and started down town,—Ness, Miller, and myself,—and on the way Miller took me by the arm, and said, 'Lagerberg, are you going with us?' I said: 'I don't know yet. I don't understand this.' He says: 'Well, if you don't, you will miss it. You will find it out by and by; and if you drop this you will lose your hold of a fortune.' So I remember we parted at twelve. I heard it strike twelve down on

First avenue. I went to my room at the hotel. The next morning I went to his room, in Graham's place, in this city, and invested $25. This happened, as far as I can recollect, in the latter part of August, 1895. Before we parted that night, Miller says, 'Now, before you go in the country again, I hope you will invest some with us, so we will know you are with us.' I said—I don't know if I did at that time—I promised them when we parted that I would be at his room the next morning. About four or five days after, I went to his room, and had a talk over this business, and invested $650 with him. He wanted me to invest more, but I told him that I could invest about one thousand dollars, but I had no more money with me, but told him that I could invest about one thousand dollars. He said I could invest as much as I liked. I offered him a certified check, but he did not care to go down to the bank and draw the money, but told me to leave it with Berg. So I left the check with C. L. Berg, and had the same indorsed as if it was payable to me. The check was on the Red River Valley National Bank, of this city, and amounted to $174.39. The $25 and $650 I paid Mr. Miller in cash. Then he explained to me that there were two fellows that had promised to go along that had sent word that they could not, because they could not get their money, and he wanted me to invest more, and he said: "If you invest with me $1,500, I will promise you $35,000 inside of a year.' It was on the occasion that I paid him the $650 that he told me the two men that he had expected were not going in. I went then to St. Paul, and drew some money, as I did not have any more here, and was absent about three days; and when I returned I invested with him $150 more, and the next day again I invested $46. A day or two afterwards I placed in his hands $100. This was on the 4th of October. He told me then to come back to his room about 8 o'clock in the evening, and he would make the contract and note on the money I invested, as he was going immediately to Mexico, so I could not see him then for about six or ten days. He wanted me to raise more money, but I said I could not. He then put the figures on a piece of

paper, and put it into his vest pocket. Then he said, when he got back from Mexico, Berg was going to Cincinnati to draw $7,000, and if I would like to take a trip along with Berg I might do so, and that it should not cost me anything, as he would stand the expenses. Then we parted, and I did not see him again until the fall or winter of 1896, here in Fargo, down to the justice office, at the time of the preliminary hearing of this case. I might also state that I went to his room at 8 o'clock that evening when I paid him the last $100, but he was not there. The room was empty, and his trunk was taken out also. The reason he gave me for going to the room again that night was that he was to give me a contract or note showing the amout of money I had put into the investment. I asked him for a note or contract, so I would know where I would be. 'That is all right,' he says, 'and I will make it out for you this evening.' He told me to come at eight o'clock. I never received any memorandum of any kind whatever for that money I invested, and received no message or communication from him whatever." Cross-examination by Mr. Crum: "I invested money with Miller in the mining deal, but I do not know anything about Berg and Ness. Berg said he had invested money in it, but I did not see it, nor did I see Ness invest any. Miller claimed he was going to invest the $7,000 from Cincinnati. The way I understood it, was that the $7,000 of Miller, and what money I put in, and what Berg and Ness put in, should go to this mine, and for mining stock. I don't know whether the profits of this mining business should be divided between me, Berg, Ness, and Miller; only he offered me if I would put in $1,500, $35.000, or else I could have $3.50 back for every dollar I put in; that was the only profit I should have. I don't know what profit Berg and Ness should have, only what he offered me himself. I don't remember if I ever asked Miller to give me back my money. He left that night before he drew up the contract. When we were talking about it, it was promised I should have the money back on a fair deal. There was a check left with Mrs. Berg as security for this money, and for the faithful

performance by Miller of his part of the contract,—that he would do as he agreed. I believed Miller when he told me that my share of the profit would be $3.50 on every dollar, and I relied on that promise. I did not exactly rely upon the security of the check, but asked Berg about it,—if he had found out about the check. But at the time I paid the money I relied on the security of the check. I asked Berg about it, and he said it was good, and I believed what Berg said." Upon this state of facts, based upon the undisputed evidence in the case, the question arises whether the evidence in its entirety establishes the criminal charge contained in the information. The District Court charged the jury, in effect, that, if the arrangement made between Lagerberg and the defendant was a co-partnership arrangement, the verdict must be "not guilty," and in this connection the statutory definition of a co-partnership was read to the jury; but the jury were not instructed in terms that the arrangement was a co-partnership. That question was left to be determined as a question of fact. It was clearly correct to instruct the jury that, if the relation created by the arrangement made between the defendant and Lagerberg was that of a co-partnership, the defendant must be acquitted. This is sound for a double reason: First, the statute defining embezzlement does not include partners as persons who can commit the offense charged, and it is well settled that, in the absence of statutory provisions to that effect, a partner cannot commit the offense of embezzling property belonging to the firm. Again, the instruction was correct because the defendant was not charged in the information either with receiving partnership property in trust or with being a partner at the time he received the money. The offense charged is purely statutory in its origin, and the statute was originally passed in England to supplement the law of larceny by punishing those who, in a trust capacity, like that of clerks, agents, and servants, came into the possession of property belonging to their employers, and thereafter, without a felonious taking, fraudulently appropriated it or its proceeds to their own use. The information in this

case in express terms charges that the defendant was the agent of Lagerberg when the latter intrusted him with his money, and that defendant received the money in his capacity of agent, and that the defendant appropriated the money fraudulently, "and not in the due and lawful execution of his trust"; *i. e.* his trust as an agent. To sustain the charge made in the information, and make out the offense under the section of the statute upon which the charge is based, the averments in the information must be sustained by the evidence. The decisive question is whether the evidence shows that at the time the money was placed in Miller's hands he (Miller) was the agent of Lagerberg, and acted as such in taking the money under the arrangement made between them at that time. Defendant's counsel contends that the evidence clearly establishes the relation of partners, and that the transactions show a joint venture as co-partners in a mining scheme or enterprise. Counsel for the state opposes this view of the evidence, and insists that the arrangement was merely preliminary to the formation of a parnership which was never completed, and never culminated in a co-partnership as a fact. We quote from the brief of respondent's counsel: "The partnership was to be consummated after Miller returned from Mexico. Then the money in Cincinnati, which Miller claimed belonged to him, was to be drawn, and they were all going west, and the partnership talked of was to be carried out and the mine purchased. Lagerberg's money was simply placed in Miller's hands in trust until these arrangements could be carried out. Miller was Lagerberg's agent up to the time that Miller left with Lagerberg's money. Miller had not advanced one cent in the enterprise. His money was to be put in after his return from Mexico, and his money drawn from Cincinnati, where he claimed it was then on deposit. In the meantime the two men from South Dakota were to come in; and not until all this was done was the partnership which had been talked of to go into effect and have an existence. Miller did nothing in the performance of the conditional agreement between the parties." In support of this contention counsel

cites, among other authorities, 1 Bates, Partn. § 78, which reads: "An executory contract to form a partnership is not a partnership, though it may ripen into one by being what is commonly called 'launched'; that is, by carrying the agreement into effect, and engaging in the joint undertaking. But the effect and the agreement itself are two different things." Also: "A mere intention to form a partnership does not constitute one until an actual agreement is made." *Id.* § 79. Tested by the law as stated above, it is certainly quite clear that the proposed co-partnership, if such it was, never was "launched"; that is, it never culminated as a business concern. Assuming that the evidence shows that the defendant fraudulently appropriated the money placed in his possession by Lagerberg, and never bought the mine, the business contemplated by the arrangement between the parties had no basis of operations, and therefore was not, and could not be, "launched" as a co-partnership business. We are inclined to the view, however, and shall so rule, that the arrangement made between Lagerberg and the defendant should be classed as an executory agreement to enter into a partnership in a mining scheme, whereby a gold mine was to be bought and exploited. We think the arrangement may fairly be tested by an inquiry as to what would have been the legal status, or rather the relation, of the parties, if the arrangement agreed upon had been consummated by the purchase of the mine, and followed by going to Montana, and taking possession of it, as it was agreed should be done. Had such purchase been actually made, and been followed by entering into possession of the mine, there can be no doubt whatever that all persons who had invested their funds under the arrangement shown in this case would have sustained the relation of partners with reference to such property, and with reference to each other. It will not do to argue that, because the agreement was violated by Miller, and hence that the co-partnership never materialized as a fact, no agreement to enter into a co-partnership was ever made. The fundamental question in the case is this: What, under the arrangement, was the relation sus-

tained between Largerberg and the defendant when the former placed the money in the defendant's possession, to be invested in the mining property? Was there an agency existing at that time? Was the money intrusted to the defendant to be paid out by the latter for the exclusive benefit of Lagerberg, or for the benefit of Lagerberg and the others at Fargo, who had also put their money in the defendant's hands? Under the evidence, these questions must all receive a negative answer. The evidence is clear and conclusive that it was agreed that the fund put into defendant's hands by Lagerberg and others at Fargo was to be augmented by the addition of a much larger sum, to be contributed out of the defendant's funds derived from the proceeds of a check belonging to the defendant; and that the mine was to be purchased out of the joint fund so obtained. Under this arrangement the defendant would have been the larger owner of the mine, and the evidence in the case shows that such was the expectation of the parties concerned. In fact, Miller claimed that he had secured the right to purchase the mine before coming to Fargo, and held the right while negotiating with the others interested. Under these circumstances it would be manifestly unwarranted to say that the defendant acted as the agent of Lagerberg in the premises. He was in a position to dictate terms according to the scheme as unfolded by him to the others, and with reference to which the money was paid over to the defendant. In brief, we are entirely satisfied that no agency was shown by the evidence, and this must reverse the case. We might add, however, that some of the evidence indicates that Lagerberg relied chiefly upon the personal promise given by the defendant to pay him back $3.50 for each dollar invested by him if Lagerberg became dissatisfied with the venture, and desired to withdraw from it. Under this aspect of the evidence, there certainly was no agency in the case, even if there was no agreement to form a co-partnership. It would be simply a loan by Lagerberg upon the defendant's personal promise to repay the principal with a large bonus or profit, re-enforced, perhaps, by the check left in Fargo as an

"evidence of good faith." But, as we have said, we are inclined to class the agreement as an executory agreement to enter into a co-partnership.

There are numerous assignments of error upon the record based upon the proceedings had at the trial, but in view of the grounds upon which the case is reversed, there cannot be another trial upon the information charging embezzlement, and hence such rulings below as are assigned as error are not likely to again occur in this case, and therefore the assignments need not be further considered. To this, however, there may possibly be one exception: If defendant is informed against for some other offense, it may become necessary to determine whether he can or should be tried in this state for any offense other than that of "obtaining money under false pretenses," which was the offense named in the requisition of the governor upon which he was arrested and brought here from the State of Missouri. The case cited by defendant's counsel (*State* v. *Hall*, [Kan. Sup.] 19 Pac. Rep. 919) animadverts upon the act of trying a person after rendition from a sister state, upon a particular charge, for another crime; but no court has claimed that the courts of the state where the offense was committed are ousted of their jurisdiction to try the offender for any offense committed in the state where the trial is had, whether such offense was or was not named in the requisition papers. The utmost claimed in the Kansas case is that a trial upon a charge not mentioned in the requisition would be an act of perfidy, and grossly discourteous to the state whose governor honored the requisition. The cases cited below are clear that the point cannot be urged by a defendant in bar of a prosecution for any crime against the laws of the state where he is tried. This defense is not available even to a defendant who has been kidnapped by an armed force, and forcibly taken from another state, and brought to the state where he is tried. The question is of some delicacy, as it involves the rghts of the states under the federal constitution, and also the comity between states. In cases of this character we are disposed to give the greatest weight to

the decisions of the Supreme Court of the United States, and upon the authority of the cases cited below we shall overrule the defendant's contention. *Lascelles* v. *Georgia*, 148 U. S. 537, 13 Sup. Ct. Rep. 687; *Mahon* v. *Justice*, 127 U. S. 700, 8 Sup. Ct. Rep. 1204.

The judgment and sentence of the District Court are reversed. All the judges concurring.

(72 N. W. Rep. 905.)

IOWA AND DAKOTA LAND COMPANY *vs.* BARNES COUNTY.

Opinion filed October 29th, 1897.

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

Actions by the Iowa and Dakota Land Company against Barnes County. Judgments for defendant, and plaintiff appeals. Affirmed.

Newman, Spalding & Phelps, for appellant.

Edward Winterer, for respondent.

PER CURIUM. Following the dicision of this court in *Iowa & Dakota Land Co.* v. *Barnes County*, 72 N. W. Rep. 1019, 6 N. D. 601.

The judgment of the District Court is affirmed. All the judges concurring.

(72 N. W. Rep. 1135.)

KATHERINE WELTER *vs.* C. A. JACOBSON.

Opinion filed October 30th, 1897.

Replevin Against Sheriff—When Maintainable.

Replevin will not lie against a sheriff who is in possession of the property under a requisition in claim and delivery proceedings in a pending replevin action, unless he fails to deliver the property to the party to the first replevin action entitled thereto, within a reasonable time after it becomes his duty to do so.

Interference with Sheriff's Possession—Contempt of Court.

To interfere with his possession by claim and delivery proceedings in a second replevin suit against him before such failure is a contempt of court.

Sheriff Liable in Trover to Third Person—When.

Under § 5341, Rev. Codes, the sheriff becomes liable in trover in case the statute is complied with, and he, nevertheless, delivers the property to the plaintiff in the replevin action. If the plaintiff refuses to indemnify him, and he promptly surrenders it to the defendant, he is exonerated from all liability.

When Sheriff Protected by the Writ.

The sheriff is protected by his writ only when he takes the property from the possession of the defendant. If he takes it from a third person, who is in fact the owner, he becomes instantly liable for the tort. But replevin will not lie against him even in such a case except upon his failure, after a reasonable time to deliver it to the party to the original action entitled thereto.

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

Action by Katherine Welter against C. A. Jacobson, sheriff of Walsh County. Judgment for plaintiff, and defendant appeals. Reversed.

John H. Fraine, (*J. H. Bosard*, of counsel,) for appellant.

The complaint does not state a cause of action in that it is no where alleged that plaintiff was the owner, in possession or entitled to the possession of the grain at the time the same was seized by the sheriff. An allegation that plaintiff was owner at the time suit was begun is not sufficient. *Pitts Agr. Works* v. *Young*, 62 N. W. Rep. 433; *Willis* v. *DeWitt*, 52 N. W. Rep. 1090; *Branch* v. *Wiseman*, 51 Ind. 1; *Middlesworth* v. *Sedgwick*, 10 Cal. 392. It is no where alleged in the complaint that plaintiff made

the statutory affidavit of title to the property or served the same on defendant under § 4982, Comp. Laws, and this is necessary. *Willis* v. *DeWitt*, 52 N. W. Rep. 1090; *Welhite* v. *Williams*, 21 Pac. Rep. 257; *Campbell* v. *Jones*, 38 Cal. 507; *Bacon* v. *Robson*, 53 Cal. 399. The action cannot be maintained because the property sought to be recovered was not in the actual or constructive possession of defendant when the action was begun. *Willis* v. *DeWitt*, 3 S. D. 281, 52 N. W. Rep. 1090; *Hickey* v. *Hensdale*, 12 Mich. 100; *Gildas* v. *Crosby*, 61 Mich. 413, 28 N. W. Rep. 153; *Moses* v. *Morris*, 20 Kan. 208; *Feder* v. *Abrahams*, 28 Mo. App. 454; *Hall* v. *White*, 106 Mass. 599; *Johnson* v. *Garlick*, 25 Wis. 705; *McHugh* v. *Robinson*, 71 Wis. 565; *State* v. *Jennings*, 14 Ohio St. 73; *Coffin* v. *Gephart*, 18 Ia. 257; *Ames* v. *Boone Co.*, 8 Minn. 467.

Spencer & Sinkler, for respondent.

If no recovery can be had against an officer under § 5341, Rev. Codes, until after the statutory affidavit has been served. The failure to serve the affidavit is a matter to be plead in defense by the officer, but way of answer. *Paden* v. *Goldbaum*, 37 Pac. Rep. 759; *Brenot* v. *Robinson*, 41 Pac. Rep. 37. An officer is protected by his writ. *Shipman* v. *Clark*, 4 Denio, 446. But when he does what his writ does not authorize him to do he is not protected. *Billings* v. *Thomas*, 114 Mass. 570; *Stimson* v. *Reynolds*, 14 Barb. 506; *Otis* v. *Williams*, 70 N. Y. 208; *Foster* v. *Pettibone*, 20 Barb. 250; *Bullis* v. *Montgomery*, 50 N. Y. 352. The fact that the taking was tortious, relieves the plaintiff from the necessity of making or proving a demand. *Boulward* v. *Craddock*, 30 Cal. 190; *Moore* v. *Muddock*, 26 Cal. 515; *Sharon* v. *Nunan*, 63 Cal. 235; *Stone* v. *O'Brien*, 4 Pac. Rep. 792; *Lynd* v. *Picket*, 7 Minn. 184; *Moser* v. *Jenkins*, 5 Or. 447; *Homan* v. *Laboo*, 1 Neb. 204.

CORLISS, C. J. The plaintiff is pursuing a wrong remedy to vindicate her rights. She is seeking in an action of replevin to recover the possession of certain wheat seized by the defendant, as the sheriff of Walsh County, in this state under a requisition

in claim and delivery proceedings instituted in another action of replevin by other parties against the husband of the plaintiff. The property was, when the second replevin suit was commenced, in custody of law, the sheriff not having at that time delivered the property to either of the parties to the first replevin action, and therefore it was not then subject to seizure in the new replevin action. Whatever differences of opinion have arisen touching the question whether, after delivery to one of the parties to the case, the property is still in custody of law, there is unanimity on this point. The sheriff is charged under the law with the duty of ultimately delivering the property to one of the parties to the litigation, to be held by him *pendente lite*. The court, through its executive officer, lays its hands upon the property until the question of the right to the custody of the *res* while the controversy over it remains unsettled, is determined. To assert the right of a stranger to the action to wrest the property from the sheriff's control is to proclaim the impotence of the court to protect its own jurisdiction and its own officers when obeying its commands. The property is seized to be held by the court until one party or the other shall have established his legal right to the possession thereof *pendente lite*; and the law commands the executive officer of the court to keep it until this question is settled, to the end that, when it is settled, the sheriff may deliver it to the party who is entitled thereto until final judgment. But how can the sheriff perform this duty if it may be taken from him by the plaintiff in another replevin action? If the defendant does not except to the sureties, or if they justify despite his challenge of their sufficiency, and if he does not rebond, the sheriff must deliver the property to the plaintiff. If, on the other hand, the plaintiff's sureties do not justify, or if the defendant does rebond, the sheriff must deliver the property to him, the defendant. In any event, one of the parties is, after a brief period during which the sheriff must hold the property, entitled to the possession thereof *pendente lite*. Will the law suffer the executive officer of a court to be embarrassed in the discharge of

his duty by allowing the property to be taken from him in a second replevin suit, thus rendering the prompt performance of that duty impossible and the performance of it at all out of the question unless he rebonds, thereby being put to trouble and subjected to the hazard of loss in a matter in which he has no interest, but in which he stands indifferent between all the parties,—those who are parties to the original replevin action and the claimant as well? On principle, there can be only one answer to this inquiry. The property is in the custody of the law, and cannot, in judicial proceedings, be seized by any one, not even the owner thereof, when such owner is a stranger to the suit. Considerations of justice from the standpoint of the sheriff reinforce the argument based on principle, and the authorities present an unbroken front on this point. They hold without exception that, in the absence of statutory change, the rule is that, while the officer has the custody of the property, replevin will not lie. *Sanborn* v. *Leavitt*, 43 N. H. 473; *Powell* v. *Bradlee*, 9 Gill & J. 220, 274; *Hagan* v. *Deuell*, 24 Ark. 216; *Weiner* v. *Van Rensselaer*, 43 N. J. Law, 547; *White* v. *Dolliver*, 113 Mass. 400, 407. To same effect are *Watkins* v. *Page*, 2 Wis. 98; *Weinberg* v. *Conover*, 4 Wis. 803; *Griffith* v. *Smith*, 22 Wis. 646; *Tremaine* v. *Mortimer*, (Super. N. Y.) 7 N. Y. Supp. 681; *Bank* v. *Dunn*, 97 N. Y. 149. The cases of *Gross* v. *Bogard*, 18 Kan. 288; *Reiley* v. *Haynes*, 38 Kan. 259, 16 Pac. Rep. 440, and *Davis* v. *Gambert*, 57 Iowa, 239, 10 N. W. Rep. 658, rest upon statutory provisions construed by the courts in those cases as authorizing a second replevin suit by a stranger to the first replevin action while the property was still in the custody of the sheriff. In *Gross* v. *Bogard*, 18 Kan. 288, the court expressly recognized the common-law rule which we apply in this case. "The question must be settled by a reference to our statutes, for it will not be doubted that, at common law, property in the hands of an officer under a writ of replevin was in *custodia legis*, and could not be taken from him by means of another writ." Some of the decisions prohibit the seizure of the property on execution or in a second replevin

action even after it has been delivered to one of the parties to the first action of replevin, or has been left by the officer in the custody of a third person under a forthcoming bond. *Bank* v. *Dunn*, 97 N. Y. 149; *Goodheart* v. *Bowen*, 2 Ill. App. 578; *Pipher* v. *Fordyce*, 88 Ind. 436; *Bank* v. *Owen*, 79 Mo. 429; *Rhines* v. *Phelps*, 3 Gilman, 455; *Selleck* v. *Phelps*, 11 Wis. 380; *Hagan* v. *Lucas*, 10 Pet. 400; *Acker* v. *White*, 25 Wend. 614. On the other hand, many adjudications treat the property as subject to seizure under execution or in replevin the moment it is delivered into the hands of the plaintiff or the defendant in the original replevin action, and we believe that they state the true doctrine. *Kelleher* v. *Clark*, 135 Mass. 45; *White* v. *Dolliver*, 113 Mass. 400; *Ilsley* v. *Stubbs*, 5 Mass. 280; *Coen* v. *Watkins*, 1 Mo. App. Rep'r, 555; *Hagan* v. *Deuell*, 24 Ark. 216; *Bell* v. *Bartlett*, 7 N. H. 178–190; *Sanborn* v. *Leavitt*, 43 N. H. 473; *Larson* v. *Nichols*, (Minn.) 64 N. W. Rep. 553. We need not in this case settle this very interesting and somewhat important question. It is not here involved. An examination of the very decisions which hold that the grasp of the law upon the *res* is released by the delivery thereof to one of the parties to the litigation discloses the fact that they all recognize the doctrine that replevin will not lie against the sheriff.

The question has thus far been discussed on the theory that no change in the common-law rule has been effected in this state by legislation, and it now becomes necessary to ascertain whether any provision of the code has modified this doctrine of the common law. Section 5341, Rev. Codes, provides: "If the property taken is claimed by any other person than the defendant or his agent, and such person shall make affidavit of his title thereto and right to the possession thereof, stating the grounds of such right and title, and serve the same upon the sheriff, the sheriff shall not be bound to keep the property or deliver it to the plaintiff, unless the plaintiff on demand of him or his agent shall indemnify the sheriff against such claim by an undertaking executed by two sureties accompanied by their affidavits, that

they are each worth double the value of the property as specified in the affidavit of the plaintiff exclusive of property exempt from execution, and freeholders or householders of the county. And no claim to such property by any other person than the defendant or his agent shall be valid against the sheriff, unless made as aforesaid; and notwithstanding such claim, when so made, he may retain the property a reasonable time to demand such indemnity." What was the purpose in view in enacting this statute? What liability, if any, does it impose upon the sheriff from which, independently of this section, he would be exempt? These questions it is not difficult to answer. Without such a law on the statute book, the sheriff would be absolutely protected by his writ,—the requisition. Neither replevin nor trover would lie against him. Under such a condition of the law, the court would not stop to inquire whether the suitor was essaying to disturb the officer in his possession of the property, but would refuse to subject him to any liability whatsoever for obeying the positive mandate of a court, and following strictly the requirements of the law. Unlike an execution, a requisition in claim and delivery proceedings points out the specific property to be seized by the officer, and peremptorily directs him to take and hold it thereunder. Having obeyed the court whose executive officer he is, by taking from the possession of the defendant in the requisition (for if he take it from another, a different question is presented) the very property described in the requisition, no tribunal will, without a statute, hold him responsible to a third person for this act. On this point the authorities are agreed. *Bullis* v. *Montgomery*, 50 N. Y. 352; *Foster* v. *Pettibone*, 20 Barb. 350; *Otis* v. *Williams*, 70 N. Y. 208; *Boyden* v. *Frank*, 20 Ill. App. 169; Murfree, Off. Bonds, § 104c; *Shipman* v. *Clark*, 4 Denio, 446; *Willard* v. *Kimball*, 10 Allen, 211.

But it is obvious that § 5341, Rev. Codes, has wrought some change in the law touching the sheriff's liability on seizure of property under requisition in replevin actions, even when the property is taken from the possession of the defendant in such

action. It was seen that, in case the defendant in such replevin action should not rebond, the property would, by the claim and delivery proceedings therein instituted, be transferred from the possession of the defendant to that of the plaintiff, thus substituting, perhaps, an irresponsible for a responsible party, who could be sued by a third person who might be the real owner of the property. To render the sheriff liable for the act of taking it from the defendant and delivering it to the plaintiff (the very act which the law requires him to perform,) without giving him notice of the owner's claim, would be great injustice. And, even after he had received notice thereof, it would still be an indefensible policy to subject him to liability to the owner without releasing him from the obligation to make delivery to the plaintiff. Therefore the law permits him to hold the property a reasonable time to procure indemnity from the plaintiff in the action, and, if the plaintiff fails to give him such indemnity, he need not deliver the property to such plaintiff, or keep it himself, but may return it to the defendant from whom he originally took it. *Haskins* v. *Kelly*, 1 Abb. Prac. (N. S.) 63, 70; *Edgerton* v. *Ross*, 6 Abb. Prac. 189–191. In such a case he is not liable to the claimant at all. What renders him liable is a delivery of the property to the plaintiff in the replevin action after he has been served with the notice specified in § 5341; and, of course, it makes no difference with respect to such liability whether the plaintiff does or does not indemnify him. That provision of the law is for his benefit, and it may be waived by him. He may be satisfied with the responsibility of such plaintiff, and therefore be willing to deliver the property to him on his promise of indemnity, without obtaining the security of sureties upon an indemnity bond. But he may refuse to make such delivery unless he is indemnified, and escape all liability by promptly delivering the property to the defendant in the replevin suit, from whose possession he took it on the requisition. The statute appears to have been framed in part for the purpose of allowing the plaintiff in replevin to determine whether he is willing to incur, by taking possession of the

property under the requisition, the hazard of a double liability when the property is claimed by a third person,—the liability to restore it to the defendant in case of defeat in the replevin suit, and the liability to the sheriff on the indemnity bond in case the claimant makes good his title to the property, and recovers a judgment against the sheriff. If this risk is too great in his judgment, he may relinquish the further prosecution of his claim and delivery proceedings in the action, and proceed with the case as though they had not been originally instituted. He is deemed to have relinquished such proceedings if, after a reasonable time, he fails properly to indemnify the sheriff. In this event the sheriff must restore the property to the defendant in the replevin action, unless he is willing to take the risk of a delivery to the plaintiff. It is true that the statute does not in terms so declare; but this is made his duty by necessary implication from its terms. In case he is not indemnified, he need not keep the property or deliver it to the plaintiff. To whom shall he deliver it? To the claimant who has not instituted any action to establish his rights, who is not a party to the replevin action, who was not originally in possession of the property, and who gives no security either to the defendant from whom the property was taken or to the sheriff or to anyone at all? Such a construction of the statute would be monstrous. Nor does the language of the section permit such an interpretation. It merely declares that, on failure of the plaintiff to give security, the sheriff need proceed no further with the execution of the requisition. Thereafter he need not deliver the property to the plaintiff, or keep it himself; and it follows that he must restore it to its former possessor, there being no direction in the statute that he hand it over to the claimant. That the statute does contemplate that the sheriff shall be liable if, after notice, he delivers the property to the plaintiff, is obvious, and the authorities so hold. *Manning* v. *Keenan*, 73 N. Y. 45; *Manning* v. *Keenan*, 9 Hun., 686. But this liability is for conversion, and not in replevin. It was never intended by this section to abrogate by implication the doctrine that property in custody of the

law cannot be replevied. The statute contemplates that there shall be no liability on the part of the sheriff at all until a reasonable time has elapsed in which to procure indemnity from the plaintiff; and that, as soon as this is done, he will deliver the property to the plaintiff in the replevin action. How could the sheriff be sued in replevin after he had parted with possession of the property? Moreover, the sheriff is charged with a duty with respect to the property in his hands, despite the fact that it has been claimed by a stranger to the suit. If the plaintiff indemnifies him, and the defendant does not rebond, he must deliver it to the plaintiff. If the plaintiff does not indemnify him or the defendant does rebond, he (the sheriff) must deliver it to the defendant. In any event, he must, as an officer of the Court, under the mandate of the law, surrender it to one of the parties to the litigation. The law is not so unreasonable as to exact from him the performance of a duty, and yet place it in the power of another to render impossible, or at least burdensome and difficult, the performance by him of such duty.

It appears in this case that the defendant, as sheriff, took the property from the possession of the plaintiff in this action, and not from the possession of the defendant in the first replevin suit. Under such circumstances, it is the rule that the officer cannot justify his seizure under the writ. It commands him to take the property described from the possession of the defendant in the action only. By wresting it from another who has control over it, he becomes a trespasser if it is in fact the property of such third person. *Otis* v. *Williams*, 70 N. Y. 208; *Bullis* v. *Montgomery*, 50 N. Y. 352. This, however, does not show that replevin will lie against him. In the replevin suit in which he took the property, the defendant in such action may set up his possession at the time of suit, and recover judgment against the plaintiff therein. The Court may find, either on an admission of the fact or in a contest with respect to the question of possession, that the defendant was in fact in possession. The sheriff must proceed on the theory that this contingency is possible, and in fact it is usually probable.

He must therefore keep and deliver the property on the hypothesis that, in the course of that litigation, this fact will, or at least may be, established. A finding in another replevin action, to which the parties to the original suit are not parties, that the sheriff took the property from the possession of the plaintiff in the second replevin action, and not from the control of the defendant in the first replevin suit, would not bind the parties to the first suit, and therefore would not affect their right to demand that the sheriff keep and deliver the property as directed by law; the fact being established in that case that the property was taken from the defendant in that action. If their rights to insist upon the discharge of this official duty by the sheriff is in no manner affected by the finding of the court in the other case, how can the sheriff be disturbed in a possession absolutely indispensable to enable him to perform such duty?

This same argument applies to the claim that the sheriff in this case, in seizing the property in the first replevin action, took not only the wheat specified in the requisition, but also some that was not therein described. This presents a question of identity. Doubtless, the sheriff is liable in conversion for the wheat taken without right. But the property is in fact in custody of the law. If it is the very wheat described in the requisition, the sheriff is charged with a duty with respect to it; and that duty is, so far as the possession of the property is concerned, a duty owing to the parties to the first replevin action, and not to the plaintiff herein or any one else. The finding in this case that it is not the identical property in no manner settles that issue as against either of the parties to the first action. They still have a right to claim and show that it is the very property described in the requisition, and such may be the fact. If it is the identical property, the sheriff is bound to keep and deliver it according to the statute. He must therefore be allowed to retain possession of it in order to respond to the parties to the first action, on the theory that it is the property to which the replevin action relates. To interfere with his possession is to prevent his delivery of the property to

the proper party to the first suit, although the property is shown in that action to be the very property which that action is instituted to recover. Moreover, even if the wheat is not that which the plaintiff in the first action intended to reach, still the property is in custody of the law, for the defendant therein has a right to the return thereof. The law, having taken it from him, will not permit a stranger to take it from the sheriff, who, if the defendant rebonds, must restore it to him whoever may be the owner thereof, and without any reference to any question of identity. It is obvious that, if a second replevin action is allowed to be commenced at all against the sheriff under any conceivable circumstances, he will be bereft of that protection in the discharge of his duty which the law should throw around him. In a replevin action the interference with the sheriff's possession comes at the very outset of the case, as claim and delivery proceedings may be, and almost invariably are, instituted simultaneously with the action itself. Once permit the second action to be brought against the sheriff while holding the property as sheriff, and he will in every instance in which the second suit is commenced be disturbed in his possession long before it can ever be known whether the property was taken from the possession of the defendant in the first action, or is the identical property sought to be replevied, or whether it belongs to the plaintiff in the second suit at all. The only safe doctrine is to treat the seizure or attempted seizure of the property in a second action as a contempt of court, and hold that the sheriff may lawfully resist all interference with his possession. That it was contempt of court at common law to replevy property in the custody of a sheriff was well settled. Cobby, Repl. § 299, and cases cited in note 4. It is true that the old doctrine that property seized under execution is not in *custodia legas* as against the real owner has been in many states overthrown; and in some jurisdictions replevin will lie against the officer even in favor of the defendant in execution when the property seized is exempt. But these cases merely modify the old doctrine that property is under such circumstances in *custodia legis*. They do not in any

manner affect the proposition that if, in a particular case, the property is in fact in the custody of the law, any interference with the sheriff's possession thereof is a contempt of court. There is no statute in this state which either expressly or by implication alters the doctrines of the common law that property in the hands of an officer in a replevin action is in the custody of the law, and that to wrest such possession from such officer is a contempt of court. Nor has the true owner of the property any reason to complain. If it is taken from his possession in a replevin action against a stranger, he may immediately sue in conversion, and hold the sheriff and his official bonds responsible for the tort. While there is a dispute among the authorities whether the sureties on a sheriff's bond are liable for the wrongful act of their principal in seizing the property of a third person, the more numerous decisions are found arrayed in support of the rule that they are liable, and these cases appear to us to have the best of the argument. See *Lammon* v. *Feusier*, 111 U. S. 17, 4 Sup. Ct. 286, where the authorities are reviewed, and where the doctrine we deem sound is enunciated. If the property was taken from the possession of the defendant in the replevin action, the true owner, on making claim under the statute, may hold the sheriff and his bond liable if he delivers the property to the plaintiff; and, if he returns it to the defendant, the claimant is in the precise position with respect to all rights which he occupied before the replevin suit was commenced. He has merely been deprived a few days of his right to sue in replevin for the property. Whatever other rights he had before the seizure are unaffected thereby, and it is probable that as soon as this brief period has passed, and the property is in the possession of either party to the replevin suit, the real owner may vindicate his title to the same by an action for possession, as well as an action for damages. If he proceeds under the statute, the statute will not allow the sheriff, even when he takes the property from the possession of the defendant in the replevin action, to transfer the possession to another—*i. e.*, the plaintiff—and thus change the person

against whom the owner must carry on his replevin action, without subjecting himself and his sureties to liability for the value of the property; and, if the sheriff takes it from the true owner himself, he and his bondsmen are instantly liable for the damages such owner sustains.

We do not wish to be understood as holding that, after a reasonable time has expired in which to obtain indemnity from the plaintiff in a replevin action, the sheriff is not liable merely because he retains possession of the property. To protect himself from liability thereafter, he must surrender the property to the defendant in the replevin suit. In other words, it is not our purpose to hold that replevin will not lie against the sheriff after it has become his duty to deliver the property to one of the parties to the first replevin suit, and he fails after a reasonable time to make such delivery. Thereafter he cannot claim the protection of the law, for he does not need it. It is his own wrong that renders him liable in such a case. He may then be sued in conversion or in replevin. So long as he is acting as sheriff, charged with a duty with respect to the property, the law will not permit his possession to be interfered with. But when, after a reasonable time in which to perform his duty, and thus shield himself from liability in a replevin action, has passed, he is still found in possession of the property, he is not acting as sheriff, and the property is not in custody of the law, It is in the same position with respect to a second replevin action that property replevied is after it has been delivered to one of the parties to the action. In such a case the better rule is that a second replevin suit will lie against the party in possession; and the sheriff cannot defeat the right of the claimant to maintain replevin by withholding such possession, but, on the contrary, he himself becomes liable to be sued in replevin if he does not, in a reasonable time after his duty to do so arises, deliver the *res* to the party to the first action entitled thereto. The judgment is reversed, and a new trial is ordered. All concur.

(73 N. W. Rep. 65.)

HENNEY BUGGY CO. *vs.* W. H. HIGHAM.

Opinion filed November 1st, 1897.

Conversion—Review of Evidence.

New trial ordered because the verdict was not supported by the evidence.

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

Action by the Henney Buggy Company against W. H. Higham. Judgment for plaintiff, and he appeals.

Reversed.

Burke Corbet, for appellant.

F. H. McDermont and *J. H. Bosard*, for respondent.

CORLISS, C. J. It is unnecessary to enter into the consideration of the somewhat complicated facts of this case to reach a correct solution of the problem which confronts us on this appeal. We are asked by the plaintiff to reverse the judgment in its favor on the ground, among others, that the verdict on which such judgment rests should have been for a larger amount. In its complaint the plaintiff has joined a cause of action on contract with a cause of action for conversion. But, as the misjoinder of causes of action was not attacked by demurrer, the right to insist that separate actions should have been brought has been waived. Defendant, having in his possession certain goods of the plaintiff, sold a portion of them on commission, and the price for which the jury found he was bound to account to the plaintiff was the sum of $728. Against this amount the jury found that defendant had charges aggregating $682.24 for storage, freight and taxes. It then appears from their verdict that there was owing the plaintiff from the defendant the sum of $45.76, and their verdict was for this amount. It is undisputed that defendant, on the 31st of March, 1895, had in his possession goods belonging to the plaintiff of the value of several hundred dollars. On that day plaintiff demanded these goods of defendant, and defendant refused to deliver them, claiming the right to hold them for storage, etc.

But it is evident that at this time he had been more than paid out of the proceeds of the sales referred to all that he could claim from plaintiff. The amount of the proceeds of this property sold, for which he was accountable to the plaintiff, exceeded all sums due him from plaintiff by $45.76, and the jury have so declared in their verdict. It follows that defendant had no right to withhold from plaintiff the possession of the property belonging to plaintiff, and his act in so doing constituted a conversion thereof. But the jury, in the very face of these uncontradicted facts, rendered a verdict in favor of the defendant on the question of conversion, whereas their verdict should have been for the market value of the property converted on March 31, 1895, with interest thereon. It follows that there must be a new trial herein. The verdict and judgment are reversed, and a new trial is ordered. All concur.

(72 N. W. Rep. 911.)

RED RIVER LUMBER COMPANY *vs.* CHILDREN OF ISRÆL, *et al.*

Opinion filed November 1st, 1897.

Mechanic's Lien Notice Need Not State Name of Owner.

Under section 5476, Comp. Laws, a mechanic's lien is valid, although the notice of lien does not state the name of the owner of the land against which the lien is filed.

Verification by Agent.

The statement required to be filed to secure a mechanic's lien may be verified by an agent.

Sufficient Account.

The statement set forth in the opinion *held* to be in proper form, and to embrace a sufficient itemized account within the statute.

Payments by Owner—Rights of Subcontractor.

The owner cannot, by payment to the contractor within the 60 days specified in section 5470, Comp. Laws, defeat the right of a subcontractor to a lien.

Failure of Contractor to Complete Building.

Nor will the fact that the contractor does not complete the building affect the subcontractor's right to a lien.

Notice of Lien—When Sufficient.

It is not necessary, under section 5470, Comp. Laws, for the notice of lien required by that section to be filed to set forth all the facts necessary to entitle a party to a lien. All that is required is that such notice shall embody the facts stated in section 5470.

Failure of Clerk to Enter Lien Does Not Destroy It.

All that the claimant need do to perfect his lien is to file a just and true account of the demand due him, after allowing all credits, and containing a correct description of the property to be charged with a lien, and verified by his affidavit.

The failure of the clerk to comply with the provisions of section 5477, Comp. Laws, does not affect the lien, which is perfected by the filing of the verified account under section 5470.

Sufficiency of Description.

The case of Howe v. Smith, 6 N. D. 432, followed on the question of sufficiency of description in a mechanic's lien notice.

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

Action by the Red River Lumber Company against the Congregation of the Children of Isræl, B. Friel, and others, to foreclose a mechanic's lien. From a judgment for defendants, plaintiff appeals.

Reversed, and rehearing denied.

Cochrane & Feetham, for appellant.

The mechanic's lien law is exclusively a creature of the statute. Phillips Mech. Liens, § 14. Our statute and that of South Dakota are the same. *Albrecht* v. *Smith*, 2 S. D. 577, 3 S. D. 632, and as there shown our statute is copied from Iowa and it is fair to presume that in adopting her statute we also adopted the construction placed upon it by her courts. 23 Am. & Eng. Enc. L. 433. It is held in Iowa that the lien need not be claimed against the owner of the land. *Welch* v. *McGrath*, 59 Ia. 519, 10 N. W. Rep. 810. When the account states substantially the facts required to be stated by statute and is duly verified it is sufficient. *Pinkerton* v. *LeBeau*, 3 S. D. 446. The claimant has fully complied with the statute in filing its lien and this is all the law imposes. *Haxton Steam Heater Co.* v. *Gordon*, 2 N. D. 254; *Hill* v. *Alliance Building*

Co., 6 S. D. 160. Verification of the lien by an agent was sufficient. *Fullerton* v. *Leonard*, 3 S. D. 118. Defendant's cannot raise the question of plaintiff's capacity to sue. *Washburn Mill Co.* v. *Bartlett*, 3 N. D. 138; *Wright* v. *Lee*, 2 S. D. 596.

J. H. Bosard for B. Friel.

J. B. Wineman, for the Congregation of the Children of Israel.

The statement for lien was defective in that it did not contain the name of the owner of the land. 2 Jones on Liens, 1397, 1398. Phillips on Mec. Liens, § 345; *Harrington* v. *Miller*, 31 Pac. Rep. 325; *West Coast Lumber Co.* v. *Newkirk*, 80 Cal. 275. And if the owner of the land and of the building are different persons, the name of the owner of the building should also be stated. 2 Jones on Liens, § 1402; *Kezartee* v. *Marks*, 12 Pac. Rep. 406; *Allen* v. *Rowe*, 23 Pac. Rep. 901. Plaintiff is a foreign corporation and has not complied with the laws of this state entitling it to do business, sue or be sued; § 3265 Rev. Codes, Ch. 193, Laws 1890; § § 3190, 3191, 3192, Comp. Laws.

CORLISS, C. J. Plaintiff has thus far been unsuccessful in its efforts to establish an alleged mechanic's lien. The ground on which the District Court based its decision that the lien was void is the insufficiency of the notice of lien. This notice is claimed to be defective, because it does not contain a correct statement as to the owner of the property. The legal title was, at the time the lien was filed, in the defendant Griffith. Defendant the Congregation of the Children of Israel was in possession of the premises under a contract with Griffiith to purchase such property. The agreement for the erection of the building on this land, for which the plaintiff furnished materials, was made with the vendees in this contract of purchase. Plaintiff sold the lumber which was used in this structure, and for which it claims a lien to the person with whom the vendee, the Congregation of the Children of Israel, made the agreement for the construction thereof. It is therefore a subcontractor under the statute, and, in determining what facts the notice of lien must embody, we must turn to section 5476, Comp. Laws, the statute in force when the notice of

lien was filed. That section is entirely silent on the subject of ownership. It is impossible to discover therein any requirement that the name of the owner of the land be set forth in the statement to be filed. All that is necessary under the section is that he should file "a just and true account of the demand due him after allowing all credits, and containing a correct description of the property to be charged with said lien, and verified by affidavit." This section was exactly, literally, and fully complied with by the plointiff. On this point there is no dispute; but it is insisted, and this contention was upheld by the lower court, that another section (5477) prescribing the duties of the clerk of court on receiving a notice of lien for filing has, in some way, not explained and to us inexplicable, injected an additional requirement into section 5476. This section provides that "the clerk of the District Court shall indorse upon every account the date of its filing, and make an abstract thereof in a book to be kept by him for that purpose, and properly indorsed, containing the date of its filing, the name of the person filing the lien, the amount of said lien, the name of the person against whose property the lien is filed, and a description of the property to be charged with the same." Although section 5476 required only certain facts to be specified to constitute a valid lien, it is claimed that the courts should ingraft upon this section another requirement, merely because the legislature, after it has declared what a valid notice of lien should contain, has instructed the clerk touching his duties in connection with such notice after it has been filed. It seems to us that this case illustrates a dangerous tendency on the part of courts to tamper with the plain import of statutory law, by reading into unambiguous statutes a conjectured meaning, which the legislature has excluded therefrom. The duty cast upon the clerk by section 5477 can in the great majority of cases be so performed that the name of the person against whom the lien is filed will appear in the abstract thereof which the clerk is directed to make by this section. In most cases, the public records, accessible to him, will

disclose the name of the owner of the legal title to the property; and, as a rule, it is against such an owner that a mechanic's lien is claimed. The mere fact that in a small percentage of cases it may be difficult or impossible for the clerk to ascertain the name of the persons against whom the lien is filed, unless the notice of lien states the name of such person, is no reason for holding that a statute which, in effect, declares that the name of the owner need not be inserted, should, by judicial legislation, be so amended as to require this very thing to be done. The notice in this case did in fact correctly state the name of the owner of the legal title. But the lien was not and could not be filed against his interest in the land, for he did not contract for or authorize the erecting of the building for which the plaintiff furnished the lumber for which the lien was filed. Had an innocent purchaser or incumbrancer dealt with the vendee in the contract of sale, relying upon what might perhaps be regarded as a statement in the notice of lien that the lien was claimed against the vendor's interest in the land, and not against the vendee's interest, it might be that the plaintiff would be estopped from setting up the lien as against such purchaser or incumbrancer. But no such question arises in this case. The contest is between the vendee in the contract of sale and the holder's of subsequent mechanic's liens on the property, on the one hand, and the plaintiff herein, on the other. There is no pretense that the holder of any lien has been misled, by the statement in the notice of lien that the vendor in the contract of sale was the owner of the land, into believing that the lien was filed against such vendor, and not against the vendee. The only question is whether the lien is valid. We hold that it is, nor do we regard the question as at all debatable. The case of *Welsh* v. *McGrath* (Iowa) 10 N. W. Rep. 810, is directly in point in support of our view.

It is urged that the plaintiff cannot maintain this action, because it is a foreign corporation, and the agent appointed by it, under the statute requiring such corporations to appoint agents on whom process can be served, had at the time the lumber was furnished

ceased to reside within the state. Since that time no other resident agent for this purpose has been selected by it. It is urged that it follows that the plaintiff, when the lumber was delivered, and when this action was commenced, and also when it was tried, was in the same position that it would have occupied had it never complied with the statute at all requiring the appointment of such an agent. We may concede this without affecting the plaintiff's right to maintain this suit. The question is settled in this state adversely to the contention of counsel for defendant. *Mill Co.* v. *Bartlett*, 3 N. D. 138, 54 N. W. Rep. 544. See, also, *Wright* v. *Lee*, 2 S. D. 596. 51 N. W. Rep. 706. There is no force in the claim that the lien was not filed in time. The trial court found that it was, and the evidence fully supports the finding.

It is urged that the notice of lien was not properly verified. An agent of the plaintiff swore to an affidavit in which he positively stated that, "under and by virtue of said contract, said Red River Lumber Company furnished lumber and materials for said frame church building as specified in the annexed account, at the respective dates, and at and for the respective prices specified in said account; that said account is a just and true account of the demand due him after allowing all credits and offsets under said contract for the lumber and materials aforesaid; that there is due and owing on said account to said Red River Lumber Company, after allowing all credits, the sum of five hundred sixty-seven 57-100 dollars, etc. Attached to the affidavit was an itemized account. That the verification could be made by an agent is clear. *Fullerton* v. *Leonard*, 3 S. D. 118, 52 N. W. Rep. 325. The form of the verification was sufficient. Nor is it material that in the itemized account the dollar mark was not used to differentiate dollars from cents. The separation of the two figures at the right hand from the other figures by a period indicates which of these figures represent dollars and which represent cents. Over each column stands the word "price," showing that money was intended to be expressed by the figures below.

It is immaterial whether or not Friel had been paid in full at

the time the plaintiff filed its lien. During the period of 60 days referred to in section 5470, the owner pays at his peril. It is only when the subcontractor suffers the 60 days to elapse without filing his lien that the owner can safely pay the contractor. If the subcontractor thereafter files his lien, it is good only to the extent that there is money still due the contractor under the contract. Section 5472. The fact that Friel may not have completed the building affords no answer to the lien of one who has furnished the materials which have actually gone into the building, under the contract between the owner and such contractor.

There is no force in the contention that the complaint is insufficient. We have examined the evidence bearing on the question of the application of the payments, and are satisfied that no payment has been made on the claim of the plaintiff against Friel for the lumber which was used in the construction of the building in question, except that for which plaintiff has given Friel credit.

It is insisted that in the itemized account there are no figures showing the year in which the lumber was sold and delivered. The month and day of the month are opposite each item, but there is no reference to the year except at the head of the bill. We regard this as sufficient. Moreover, it is apparent, when reference is made to the affidavit, that the lumber was furnished in 1892, as it is there stated that the contract made by Friel for the erection of the building was not made until October, 1892; and the affidavit was sworn to in February, 1893. The months named in the bill are October, November and December. They could not be such months in any year except 1892. It is apparent from the notice that the materials were not furnished before October 1, 1892, or after February, 1893; and therefore it is manifest that the several deliveries of lumber were in 1892, in the several months and on the various days named.

Without further dwelling upon points which appear to us to be plainly without merit, we declare that the judgment of this court is that the District Court shall set aside its judgment herein, and enter the usual decree of foreclosure of the plaintiff's lien,

which is established by this court as a valid lien on the premises described, for the sum of $567.57, with interest thereon from December 13, 1892, at the rate of 7 per cent. The rights of the other defendants are subject to such lien, and will be cut off by the foreclosure herein. The lien of the defendants Luke & Barnes is hereby established for the sum of $93.65, with interest from January 31, 1893. Plaintiff will recover costs in both courts. All concur.

APPLICATION FOR REHEARING.

The petition for a rehearing herein must be denied. Counsel for respondent insists that it is necessary that the lien statement should show upon its face all the facts which entitle the appellant to a lien, and that, inasmuch as the statement filed by it fails to disclose facts which show that it has a lien upon the equitable interest of the respondent in the property, no lien was obtained by the filing of such statement. We are unable to find anything in our statute which sustains this contention of respondent's counsel. He confounds two entirely distinct questions. When one who claims a mechanic's lien is seeking to establish such lien upon a trial, he must prove all the facts which are necessary to bring him within the category of persons entitled to such a lien. But whether he has taken the necessary steps to transmute the inchoate right to a lien into an absolute legal incumbrance on the property is to be settled by reference to that provision of the statute which prescribes the acts to be done to accomplish this result. Having complied with such provision of the law, he has secured a lien, provided the other facts exist which bring him within the class of persons entitled to such a lien. The mechanic's lien law in force when the statement was filed by the appellant did not in terms or by implication require appellant to set forth therein all the facts necessary to give it a lien on the equitable interest of respondent in the property. On the contrary, it merely provided that the claimant should file "a just and true account of the demand due him, after allowing all credits, and containing a correct description of the property to be charged

with said lien, and verified by his affidavit." We have no power to add anything to this statute, as legislation is not our province.

The Minnesota cases cited by counsel for respondent arose under a statute radically different from ours. These cases are founded on the construction placed by the court on § 18 of Ch. 90 of the Minnesota statutes of 1878. That section, by setting forth a form to be used by the claimant in making out and filing his notice, was held by the court to require that all the facts necessary to show the claimant's right to a lien should be embraced therein. *Clark* v. *Schatz*, 24 Minn. 304; *Rugg* v. *Hoover*, 28 Minn. 407, 10 N. W. Rep. 473; *Keller* v. *Houlihan*, 32 Minn. 488, 21 N. W. Rep. 729; *Anderson* v. *Knudsen*, 33 Minn. 172, 22 N. W. Rep. 302; *Dya* v. *Forbes*, 34 Minn. 17, 24 N. W. Rep. 309; *Merriman* v. *Bartlett*, 34 Minn. 525, 26 N. W. Rep. 728; *McGlauflin* v. *Beeden*, (Minn.) 43 N. W. Rep. 86. That the peculiar holding of the Minnesota Supreme Court is based upon section 18, heretofore referred to, is apparent from the decisions in *Clark* v. *Schatz*, and *Keller* v. *Houlihan*, *supra*. In *Clark* v. *Schatz*, the court, after referring to sections 1, 7, and 18, said: "The three sections we have referred to, taken together, show that the statutes intend that the record made by the claimant of the lien, and which is to operate as a lien, shall show *prima facie* that the party is entitled to the lien which he claims." In *Keller* v. *Houlihan*, Judge Mitchell says: "The question of the sufficiency of a statement for a lien is one that is to be determined entirely by what the statute required. In the present case, in order to a full understanding of our statute respecting mechanic's liens, a brief reference to its history may be necessary. Prior to 1874 the statute (Ch. 40, St. 1866) gave no lien except to those who performed labor or furnished material under a contract with the owner or his agent. Section 7 of this chapter provided for filing with the register of deeds a written account of the items of labor or material, verified by the oath of the party, and, in case the contract was written, accompanied by the contract or a copy. But this section nowhere specifies what this affidavit

should contain. This was provided for by section 18, which gave a form which might be used 'under this chapter,' which among other things, required an allegation that the labor was performed or the material furnished under and by virtue of a contract between the claimant and the owner. An examination of this form will show that it required a statement (in brief, and not with the fullness, perhaps, required in a pleading) of every fact necessary to entitle the party to the lien which he claimed, including that of a contract with the owner. The record made by the claimant must disclose *prima facie* a valid lien. This court has so construed it, and held that the form given in the statute, although it may be varied to suit the circumstances, must, in all matters of substance, be followed." There was, in fact, no room for construction as to the meaning of the Minnesota statutes, as the form of notice set forth in section 18, contained statement of all the facts necessary to show that the claimant had a right to a lien. That section was subsequently repealed, and the law was thereafter very nearly assimilated to the statute involved in this case. Under this new statute, the Supreme Court of Minnesota held that a *prima facie* right to a lien need not be shown by the statement, and the earlier decisions were distinguished on the ground that they rested upon the explicit provisions of a statute requiring a claimant to set forth in the document filed all facts necessary to make out a *prima facie* case. *Hurlbert* v. *Basket Works*, (Minn.) 49 N. W. Rep. 521. In this case the court said: "The sufficiency of the lien statement is questioned, for the reasons—First, that it is not alleged therein that the materials and machinery were furnished by virtue of a contract with the owner of the property, or at his instance. * * * We deem the first of these objections to be not well founded, because the statute prescribes what should be set forth in the lien statement; and this does not embrace a statement that the furnishing of labor or material was by virtue of a contract with, or at the instance of, the owner of the property. Our former decisions, among which are *Clark* v. *Schatz*, 24 Minn. 300,

and *Keller* v. *Houlihan*, 32 Minn. 486, 21 N. W. Rep. 729, holding that such a statement was necessary, were based upon the express requirement of the statute then in force." That the Minnesota statute under which this decision was rendered is practically the same as the mechanic's lien law involved in this case is evident from a comparison of the two statutes. See 2 St. Minn. 1891, § 4306. Other decisions are in harmony with our view. *Post* v. *Milles*, (N. M.) 34 Pac. 586; *Lumber Co.* v. *Gottschalk*, (Cal.) 22 Pac. Rep. 860; *Hauptman* v. *Catlin*, 20 N. Y. 247; *Osborn* v. *Logus*, (Or.) 42 Pac. Rep. 997. Indeed, we do not regard the question as debatable, and it is therefore a matter of little importance whether there is authority for or against our decision on this point.

It is claimed that the description of the land in the notice was not correct, and that, therefore, the notice is insufficient. The land was described as "Lots 2 and 4, Block 58, Budge & Eshelman's First Addition to the City of Grand Forks." As a matter of fact, the correct description of the land on which the building was erected is "Lots 2 and 4, Block 58, Budge & Eshelman's Addition to the City of Grand Forks." It is undisputed, however, there is no Budge & Eshelman's First Addition to Grand Forks City, but only a single addition, known as "Budge & Eshelman's Addition." Therefore the description in the notice did not accurately describe any other piece of property, and as it did accurately describe the property in question, with the simple addition of the word "First," the description was sufficient.

Since the decision in *Howe* v. *Smith*, 6 N. D. 432, 71 N. W. Rep. 552, the question whether the description was sufficient under the facts in this case is not open to debate in this court. It is also insisted that until the clerk of court has complied with the provisions of § 5477, Comp. Laws, no lien is established. This is not the law. The claimant obtains his lien by making and filing the statement mentioned in section 5470. Whether the clerk makes or omits to make the abstract required by section 5477 has no effect upon the lien which has already been acquired,

although it is possible that innocent purchasers and incumbrancers might be in a better position than the owner of the land with respect to such lien should the clerk fail to comply with the provisions of that section. That point however, is not involved in the case at bar. In support of our view, see *Smith* v. *Headley*, (Minn.) 23 N. W. Rep. 550.

We are unable to find any evidence in the case to justify the conclusion that $200 of the money paid by the contractor, Friel, to the appellant, was money paid to him by the respondent. It follows that the appellant was under no obligation to apply such payment to the account against Friel for the lumber furnished for the building he erected for the respondent. Neither party having made any application of this payment, the law applies it to the older item of the account of the appellant against Friel, he being indebted to appellant at the time of such payment for other lumber purchased and used by him in the construction of other buildings. After making such application, and after applying upon the proper account other payments made directly to appellant by the owner of another building erected by Friel (such money being paid on Friel's order upon such owner in favor of appellant,) we find that the balance due, and for which appellant is entitled to a mechanic's lien, in the sum of $551.78, with interest thereon since December 13, 1892, instead of the sum of $567.57. Whether the court should have rendered a decree adjudging that the rights of the defendant Griffith and the Union National Bank in the property are subject to the plaintiff's lien is a question in which the respondent, the Congregation of the Children of Isræl, has no interest. Besides, the defendants Griffith and the Union National Bank have made default, and have thereby confessed the allegations of the complaint that their interests in the property are subordinate to the appellant's mechanic's lien. This court is therefore bound to render the decree against them prayed for, and which they, by their silence, admit should be pronounced against them. The application for

a rehearing is denied, and the judgment is modified as to the amount as indicated in this additional opinion. All concur.

(73 N. W. Rep. 203.)

STATE OF NORTH DAKOTA *vs.* EDWARD D. CAMPBELL.

Opinion filed November 4th, 1897.

Burglary—Evidence of Burglars Tools.

The defendant was charged with the crime of burglary in the first degree. At the trial, certain exhibits (blacksmith's tools) were allowed, against objection, to be put in evidence. These tools were found in the building where the burglary was committed, and were shown to have been brought there, without authority, by some one. They were tools such as might have been used in breaking the outside door, which was broken, or endeavoring to open the safe, which safe had been battered as with a punch. *Held*, not error. The exhibits were concomitants of the crime, and tended to show its commission in fact and the manner of its commission.

Tools in His Possession—Evidence of Hiding.

There was a fresh pursuit of the burglar, and he was tracked through the snow some 3½ miles from the scene of the burglary. The defendant was arrested as the guilty party within two hours after the burglary, and when arrested he had cartridges and a chisel in his possession. When arrested he was concealed under the driveway of an elevator, and within 2 or 3 feet of his place of concealment there were found a revolver and a punch. These articles were put in evidence against objection. *Held*, that the ruling is not error. The punch and chisel were such tools as might have been used in the commission of the offense as shown by the evidence. The defendant admitted that the revolver belonged to him, and he explained why it was taken from his person. Under the circumstances it was for the jury to determine what weight should be given this evidence.

Instructions as to Burglary.

In charging the jury the trial court read all the definitions of burglary found in the Penal Code. *Held*, under the undisputed evidence and facts of this case, that such reading did not prejudice the substantial rights of the accused.

Exceptions in Writing Waives all Objectionable Matter Not Specified in Writing.

After the trial closed, counsel for the defendant, pursuant to the provisions of § 8178, Rev. Codes, elected to file exceptions with the clerk of the District Court to the instructions and refusals to instruct the jury. *Held*, that by so doing the defendant voluntarily limited his exceptions to such exceptions as he saw fit to file with the clerk.

Exceptions Overruled.

Certain exceptions to the instructions to the jury and to the refusal of certain requests for instructions, as appears in the opinion, are considered and overruled.

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

Edward D. Campbell was convicted of burglary, and he appeals. Affirmed.

Taylor Crum and *Ida M. Crum*, for appellant.

It was incompetent to introduce and parade before the jury the burglars tools, without in any manner connecting the defendant with their use. *People* v. *Winters*, 29 Cal. 659; *Peo.* v. *Kennedy*, 32 N. Y. 223; *Peo.* v. *Sansome*, 24 Pac. Rep. 143. The inculpatory evidence being purely circumstantial, it was error to refuse an appropriate instruction expounding the nature and cogency of that character of proof. *Peo.* v. *Lachnais*, 32 Cal. 434; *Hunt* v. *State*, 7 Tex. App. 235. Requests for instructions which are found correct should be given in the language of the request. Section 8176, Rev. Codes; *Galloway* v. *McLean*, 2 Dak. 372. The court charged on a theory not raised or indicated by the evidence. *Foster* v. *State*, 8 Tex. App. 249; *State* v. *Mize*, 13 Pac. Rep. 1; *Morris* v. *Lachman*, 8 Pac. Rep. 799–801; *Searcey* v. *State*, 1 Tex. App. 440. It was error for the court to charge the jury that defendant was an interested party. *Unruh* v. *State*, 4 N. E. Rep. 456; *Bird* v. *State*, 8 N. E. Rep. 15.

Fred B. Morrill, *State's Atty.*, for respondent.

The general charge covered all points of law applicable to the case, and it was not error to refuse special requests. *State* v. *Kent*, 5 N. D. 562; *State* v. *McGahey*, 3 N. D. 293; *Peo.* v. *Hubbard*, 52 N. W. Rep. 729; *State* v. *Phelps*, 59 N. W. Rep. 471. It is not error for the court to call attention to the interest of the accused and instruct the jury that they are to take that fact into consideration in arriving at a conclusion. *State* v. *Hing*, 4 Am. Crim. Rep. 375; *Johnson* v. *State*, 51 N. W. Rep. 835; *St. Louis* v.

State, 1 N. W. Rep. 371; *Murphy* v. *State*, 19 N. W. Rep. 489; *Peo.* v. *Calvin*, 26 N. W. Rep. 851; *Peo.* v. *Herrick*, 26 N. W. Rep. 767.

WALLIN, J. The defendant was charged with and convicted of the crime of burglary, committed in a dwelling house occupied by human beings, on the night of December 25, 1896, at Leonard, in the County of Cass, N. D. It appears by the evidence that the dwelling house was, at the time, occupied by one John Boos and his family, the living rooms being connected, by a door through a partition, with a store of general merchandise belonging to said Boos. In the store, and near the door leading into the living rooms, there was an iron safe, the outer door of which was not locked on the night of the burglary, but the inner door, to the cash drawer, was locked. There was also a door leading directly outdoors from the store, which door was closed and bolted that night, but was pried or forced open by the burglar, by breaking off a part of the side piece where the bolt went in, and removing the bolt. On an examination made after the burglary, the door of the cash drawer in the safe appeared to have been indented or hammered as if with a punch. About 11 o'clock P. M. of the night in question, Boos, who was then in the living rooms with his family and others, heard pounding in the storeroom, and, upon peering into the storeroom through the connecting door, he heard some one moving rapidly towards the outer door of the store, and caught a view of some of the outlines of the retreating figure of a man; but in so doing he did not identify the intruder. The defendant was in the store in the forenoon of the day of the burglary, and admits that he remained in the village of Leonard until the evening of that day, and then (according to his testimony) left, stealing a ride on the train going in the direction of Woods station, where he was subsequently found and arrested. It was a cold night, and there was snow on the ground nearly kneedeep. Fresh tracks resembling those made by the defendant were found leading circuitously from the broken outside door to the railroad, located some 200

feet from the store, and along said railroad the same tracks, being the tracks of one person only, were followed to the next station, which was called "Woods Station," and which was distant from Leonard about 3½ miles. Several persons followed the tracks, some by a hand car and some by a team, to Woods station, leaving Leonard within less than one hour after the commission of the crime. There was no depot building at Woods station, and the only buildings there were two dwelling houses and two elevators. The defendant was found under an elevator driveway, crouched down on a pile of stovewood, and was arrested. There was a space of three or four feet between the wood pile and the top of the driveway. On the person of the defendant, when arrested, were certain cartridges, and the next day a revolver was found on a sill under the driveway, which the defendant admitted belonged to him, and stated that he put it on the sill to attend a call of nature. The defendant also had a chisel in his pocket when arrested. There was a punch also found on a sill within two or three feet from where the defendant was discovered when arrested. There was also another punch found outside the store, and near the door which was broken open. A brace and two drills were found in the store, and also a file. A blacksmith shop at Leonard was entered on the night of the burglary, and some articles were taken, and the chisel and one of the punches in evidence were identified as tools taken from the shop. The various articles we have enumerated, when offered in evidence, were objected to by defendant's counsel upon the ground that they were too remote, and not shown to be connected with the defendant. These objections were overruled, and we think properly so. The tools found scattered about within the store, and the punch which was found outside, but near the door which was broken, together with certain other tools of a like character which we have not deemed it necessary to specifically mention, did not belong where they were found just after the burglar was frightened away from the scene of the crime. We think, under the circumstances of the case, that the tools were a part of the

res gestæ, and were concomitants of the offense charged, and as such the jury could properly consider their character, and their relation to the offense charged, as tending to show that the burglary was in fact committed, and also the mode of its commission. The articles found in and about the store had no direct tendency, in and of themselves, to connect the defendant with the commission of the crime, and therefore their introduction in evidence could not, in our judgment, have prejudiced the defendant. The chisel found in defendant's possession when arrested, and the punch found on the sill of the driveway, within reach of which the defendant was found when arrested, were, in our opinion, proper evidence to go to the jury under the circumstances we have detailed, as tending to show defendant's connection with the commission of the crime. The chisel might have been used in prying open the outside door of the store, and the punch might have been used in producing the indentations which were found to have been made upon the inner door of the safe. Whether these articles were so used or not was a question for the jury to consider, in connection with the testimony offered by the defendant whereby he seeks to account for his possession of the chisel. The revolver is not shown to have been used in committing the crime; but a revolver is a deadly weapon, such as criminals usually carry when about to commit a serious offense. This revolver belonged to the defendant, and was found under the driveway on a sill, and near where he was when arrested. Under these circumstances we think the jury were properly allowed to consider all the facts connected with the exhibits put in evidence, and where they were found, as bearing on the question of defendant's connection with the crime. There are other errors assigned upon rulings of the trial court upon questions connected with the evidence, but none of them involve the merits of the case or the substantial rights of the defendant, and hence we shall overrule such assignments without further discussion.

Defendant, by his counsel, made nine separate requests for instructions, numbered from 1 to 9, inclusive. Requests num-

bered 2, 3, 5, and 7 were given to the jury. Requests numbered 1, 8, and 9 were refused. On examination we do not find that the requests which were refused were objectionable for any reason, and therefore they might properly have been given in charge to the jury. But the subject-matter of these requests was fully covered in the general charge of the court to the jury in other language. Under an established rule settled in this state, no error can be predicated upon the refusal to give requests in the language of counsel, where the court of its own motion gives the law embodied in the request in other language. *State* v. *McGahey*, 3 N. D. 293, 55 N. W. Rep. 753; *State* v. *Kent*, 5 N. D. 519, 67 N. W. Rep. 1052.

Defendant claims error in this court upon the ground that his two requests, numbered, respectively, 4 and 6, were wrongfully modified by the trial court, and read to the jury after such modification, and then were indorsed by the court erroneously as "given." If this claim is sustained as a matter of fact, the request was not given, and should have been indorsed as "refused." Such a modification as that claimed is forbidden by the statute. Section 8176, Rev. Codes, declares that "all instructions asked for by either party shall be given or refused by the court without modification or change unless modified or changed by the consent of the counsel asking the same." We think the changes claimed to have been made in these requests could make little or no difference in their meaning, and were intended to bring out the same idea and meaning with greater emphasis. But we cannot endorse the practice of modifying requests without the consent of counsel. The statute distinctly forbids any such alteration of requests. In the case at bar, however, we are not required to pass upon the alleged error, nor determine whether or not it was prejudicial to the substantial rights of the defendant, for the reason that an inspection of the abstract fails to disclose the fact, affirmatively, that the two requests we are considering here, or either of them, were modified by the trial court, "without the consent of counsel." Conceding, without

deciding, that the fact of the modification appears of record as a fact in this court, it is yet true that the statute does not forbid the alteration of a request where the same is made with the consent of the counsel who made the request. This court cannot in any case presume error for the purpose of reversing a judgment. Error to be available as ground of reversal, must be made to appear affirmatively. It follows that this court cannot assume, without proof in the record, that the trial court modified a request for instructions without the consent of counsel. To do so would be to assume, without proof, that the court below had deliberately violated the provisions of the code forbidding him to do so. See § 8176, *supra*. Also *Garr, Scott & Co.* v. *Spaulding*, 2 N. D. 414, 51 N. W. Rep. 867. The language of the exception we are discussing was framed by counsel and filed with the clerk, and the same does not purport to declare on its face that the modification of either of the requests was made without the consent of counsel; nor do we desire to be understood that any language which counsel might have used, in an exception filed with the clerk of the district court after the trial was over, and not subsequently settled in a statement, would be sufficient. The statute permits counsel, at his option, to file exceptions to instructions with the clerk, and, if he does so, such exceptions can go no further than challenges of the correctness of the instructions or refusals which are on file with the clerk. Such exceptions cannot settle any question of pure fact *dehors* the record. Counsel cannot be permitted to go beyond the papers on file, and declare that a certain request, claimed to have been modified, was in fact modified without the consent of counsel. It follows that no assignment of error can be sustained upon this record, predicated upon the alleged modification by the trial court of the two requests under consideration.

The court, in its charge to the jury, used the following language: "Now, gentlemen of the jury, in this case the defendant has seen fit to go upon the stand; and I charge you, with reference to that, that you are to consider his testimony just as you would consider

the testimony of any other witness who comes before you. The rule of law with reference to the testing of the credibility of any witness is to test the ability of the witness to know of the things of which he speaks,—whether he has had the advantage of seeing and hearing the things about which he testifies. You are to consider his interest in the matter; and in weighing the testimony of this defendant, as well as that of any of the defendant's witnesses or the witnesses on the part of the state, you are to consider the interest which he has in this matter. Now, there is some conflict of evidence. You have heard the testimony of the various witnesses wherein the conflict has occurred. You have heard the explanation of the defendant as to why he was at certain places at certain times on that night, and you have heard what has been perhaps contradictory evidence relative thereto. Now, the rule of law with reference to the credibility of witnesses is that, if you find that any witness has sworn falsely with reference to any material fact at issue, you are at liberty to disregard all of his evidence, unless you find his testimony is corroborated by other evidence in the case. This rule applies to the defendant as well as to the witnesses for the state, because, as I said before, the defendant in this case has seen fit to go upon the stand, and his testimony must be measured by the same means as the testimony of any other witness." To this feature of the charge counsel excepts as follows: "The defendant says there is error in said instruction, in this; That it is an unfair selection of the defendant from other witnesses, and calling attention to his particular interest,—a plain intimation that the defendant's testimony had been contradicted, which was not the fact as defendant understands, and in the connection made; that it is misleading, and not a correct statement of the law." It will be observed that the trial court, in using the language we have quoted, has introduced two or three distinct features or propositions. By this instruction, attention is first called to the fact that the defendant had seen fit to go upon the stand as a witness; and the court in this connec-

tion, and we think not unfairly, directs the attention of the jury to a well settled rule of law given as a guide to courts and juries in weighing testimony. It is this: Where a witness is shown to have an interest in the result of the litigation, courts and juries are permitted and required to take such interest into account in determining the weight of the testimony of such interested witness. If, in calling attention to this feature of the law, a court should unfairly comment upon the testimony of an interested witness in charging the jury, it would be reversible error. See *Territory* v. *O'Hare*, 1 N. D. 30, 44 N. W. Rep. 1003. But we find no unfairness in this feature of the charge, and hence the exception cannot be sustained.

Another distinct feature of the charge under consideration deals with the question of the effect produced upon the credibility of a witness by false swearing. The court said in its instruction: "If you find that any witness has sworn falsely with reference to any material fact at issue, you are at liberty to disregard all of his evidence, unless you find his testimony is corroborated by other evidence in the case." This charge cannot be sustained as a correct exposition of the law. The court omitted to state the qualification. To swear falsely upon a material point does not necessarily have the effect stated by the court, unless it is done willfully or knowingly. See *McPherrin* v. *Jones*, 5 N. D. 261, 65 N. W. Rep. 685. But this case cannot be reversed for this error in the charge, because it has not been excepted to by counsel. The language of the exception points unmistakably to the other feature of the instruction, viz. that relating to the interest which the defendant had in the result of the trial, with reference to the weight of his testimony as a witness. It is well settled that where a charge to the jury embodies several features, one of which is proper, an exception to the entire charge will not be sustained. It is equally well settled that, where an exception is leveled at one of several features in an instruction, other features not pointed out by the exception are not affected by it.

It appears that the defendant's counsel in this case saw fit to

file exceptions with the clerk of the District Court to the instructions given in charge to the jury. This he might lawfully elect to do under the provisions of § 8178 of the Rev. Codes. But, having pursued this course, he must be governed by such election, and will be limited to the exceptions which he has seen fit to write out and file with the clerk of the District Court. By filing exceptions he has notified counsel for the state, as well as the courts, that he will predicate error on such exceptions, and none others, so far as relates to the instructions given to the jury. The exigency of the case at bar does not require this court to determine whether, in a case where no such exceptions to the charge are filed by counsel, an exception to each feature of the charge will be presumed to result under the statute and by operation of law. See Rev. Codes, § § 8178, 8269, 8297.

In the course of its charge to the jury, the trial court read to the jury the several sections of the statute which respectively define burglary in its several degrees, from the first to the fourth, inclusive. Defendant assigns error in this court especially upon the reading of those sections of the code which severally define burglary in the second and fourth degrees. The point of these exceptions is that the law defining the crime of burglary in the second and fourth degrees did not apply to the evidence or the facts of this case, and hence, as counsel claims, tended to mislead and confuse the jury. The question presented is whether, under the evidence and facts of this case, it was prejudicial error to read from the statute the definitions of burglary in the second and fourth degrees, such reading not being accompanied with comments on the part of the court bearing upon either the second or fourth degree of burglary. The evidence as to the time, place, and circumstances of the offense is undisputed, and was all offered by the state; and it tended to show, and did show conclusively, that the offense charged, viz. burglary in the first degree, was committed, if any crime was committed. Nor does the evidence raise any doubt to be settled by the jury as to the degree of the offense. Under the facts of this case, we think a

failure to read the statute defining burglary in the second, third, and fourth degrees would not have been error. In many cases (those where is any doubt under the evidence as to the degree of the offense) it is the manifest duty of the trial court to direct the attention of the jury to the various degrees of the offense as defined in the code. This is necessary because the jury are required by the terms of the code to declare the degree of the offense, if their verdict is "guilty," and are further required to resolve all doubts under the evidence as to the degree of the crime in favor of the accused. Rev. Codes, § § 8242, 8186. In the case under consideration, the evidence pointing only to the offense of burglary in the first degree, we cannot see wherein the jury could have been confused or misled either as to the fact of the commission of the offense or as to its degree under the statute. We therefore conclude that reading to the jury the statutory definitions of burglary in the second and fourth degrees did not nor could not have prejudiced any substantial right of the defendant.

There are other minor features of the charge to the jury upon which counsel have assigned error. This court has considered all of them carefully, and they are not sustained. We think, however, that no good purpose will be subserved by a discussion of such features in this opinion. After a careful examination of the charge of the court to the jury as a whole, and of all of its parts, we are of the opinion that the defendant's rights were safeguarded carefully by the trial court, and that none of his substantial rights under the law have been prejudiced.

The judgment of the court below will be affirmed. All the judges concurring.

(72 N. W. Rep. 935.)

In re EDGAR W. CAMP.

Opinion filed November 5th, 1897.

State Examiner—Power to Compel Testimony.

Order adjudging appellant guilty of contempt of court, in refusing to testify before the state examiner in obedience to a subpœna, reversed, because the examiner was, in the particular case, acting without authority of law, in essaying to compel appellant to testify before him.

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

Edgar W. Camp was adjudged guilty of contempt of court, and he appeals.

Reversed.

Glaspell & Ellsworth, for appellant.

CORLISS, C. J. The appellant has been convicted of contempt of court, for refusing to obey a subpœna issued by the state examiner for the State of North Dakota while examining into the financial condition and affairs of the state hospital for the insane at Jamestown. The ground on which it is claimed that such examiner had power to compel by subpœna the attendance of appellant as a witness before him, and the giving by appellant of testimony on such investigation, is that appellant some years prior thereto had some business transaction with the board of trustees of such hospital, and was paid a sum of money in connection with such transaction. The statute under which the examiner claimed the power to compel the appellant to appear before him and testify is § 143 Rev. Codes. So far as its provisions are material to this case, they are as follows: "And the said examiner shall have full power for the purposes named to examine any books * * * or property of any or all of the aforesaid state institutions, money banking, insurance, annuity, safe deposit, trust company and moneyed or insurance corporations and county or state officers and custodians of any county or state fund; also to examine under oath any or all trustees, managers, officers, or employes or agents of said institutions and

and moneyed or saving corporations and other persons in the control of or doing business with said moneyed or savings institutions, and the county and state officers and custodians of county and state funds aforesaid. Said examiner is empowered to issue subpœnas and administer oaths in the performance of his duties." Having refused to obey the subpœna issued by the examiner, and also the order of the District Court directing him to testify, appellant was adjudged guilty of contempt of court, under § 5953, Rev. Codes, and was fined the sum of $100. The order adjudging him so guilty must be reversed. The examiner had no power, under the statute, to compel appellant to testify. He was not a trustee, manager, officer, employe, or agent of such institution, *i. e.* the hospital for the insane. Nor was he a person in control of, or who was doing business with, any moneyed or savings institution of the state. The affairs of no such institution were being investigated. The examination related solely to the management of a state institution which was not either a moneyed or a savings institution. Neither was appellant a county or a state officer, or the custodian of county or state funds. He was a private citizen, who five years before had had a single business transaction with the hospital trustees, and been paid a sum of money. The examiner had no authority to interfere with him in any way whatsoever. He stood upon his undoubted legal rights, in refusing to testify, and it follows that he should not have been adjudged guilty of contempt.

The order is reversed, and the contempt proceeding dismissed. All concur.

(72 N. W. Rep. 912.)

STATE OF NORTH DAKOTA *vs.* JOHN B. HAYNES.

Opinion filed November 4th, 1897.

Accused as Witness—Cross-Examination—Rebuttal Evidence.

In this case collateral and irrelevant matter, not adverted to in the examination in chief, was drawn out on cross-examination of the defendant as a

witness. In rebuttal, and against objection, the state was permitted to contradict such collateral matter by testimony of a damaging nature highly prejudicial to the defendant. *Held*, that the ruling was prejudicial error, and the judgment must be reversed therefor.

BARTHOLOMEW, J., dissenting.

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

John B. Haynes was convicted of burglary, and appeals. Reversed.

Taylor Crum and *Ida M. Crum*, for appellant.

It was error to allow Mrs. Webster to testify for the state over defendant's objection, her name not being indorsed upon the information. *State* v. *Kent*, 5 N. D. 535; *Peo.* v. *Hall*, 12 N. W. Rep. 667; *Peo.* v. *Howes*, 45 N. W. Rep. 962; *Peo.* v. *Quick*, 25N. W. Rep. 302; *Gandy* v. *State*, 40 N. W. Rep. 305; *Stevens* v. *State*, 28 N. W. Rep. 304; *Binkly* v. *State*, 52 N. W. Rep. 708. When a witness is cross-examined on a matter collateral to the issue, his answer cannot be subsequently contradicted by the party putting the question. Whart. Cr. Ev. 484; Starkie on Ev. 200; *Welch* v. *State*, 3 N. E. Rep. 852; 1 Whart Ev. 558–559; Greenl. Ev. 449; *George* v. *State*, 20 N. W. Rep. 311; *Peo.* v. *Jones*, 31 Cal. 571; *Hamilton* v. *Peo.*, 9 N. W. Rep. 248; *Peo.* v. *McKellar*, 53 Cal. 65; *Peo.* v. *Bell*, 53 Cal. 119; *Johnson* v. *Spencer*, 70 N. W. Rep. 983; *Frederick* v. *Ballard*, 20 N. W. Rep. 872; *Pierce* v. *Schaden*, 59 Cal. 540; *State* v. *Townsend*, 24 N. W. Rep. 537; *Peo.* v. *Deitz*, 48 N. W. Rep. 298; *Stokes* v. *Peo.*, 53 N. Y. 440; *State* v. *Davidson*, 70 N. W. Rep. 879; *Carpenter* v. *Ward*, 30 N. Y. 243; *Peo.* v. *Hillhouse*, 45 N. W. Rep. 486; *Trust Co.* v. *Montgomery*, 46 N. W. Rep. 216; *Hooper* v. *Browning*, 27 N. W. Rep. 419; *Simmons* v. *State*, 4 Tex. App. 144; *Peo.* v. *Chin Mook Sow*, 51 Cal. 600; *Peo.* v. *Jenkins*, 56 Cal. 6.

F. B. Morrill, *State's Atty.*, for respondent.

The witness objected to was not known to the state's attorney at the time the information was filed. Section 7985, Rev. Codes; *State* v. *Kent*, 5 N. D. 535; *Territory* v. *Godfrey*, 6 Dak. 46, 50 N. W. Rep. 481; *State* v. *Dickson*, 6 Kan. 209; *State* v. *Medlicott*, 9 Kan. 282; *State* v. *Lewis*, 19 Kan. 265; *State* v. *Cook*, 30 Kan. 82;

1 Pac. Rep. 33. The evidence complained of by appellant was competent as tending to rebut evidence offered by the defense tending to establish an alibi *Peo.* v. *Gibson*, 9 Am. Cr. Rep. 85; *State* v. *McKinney*, 5 Am. Cr. Rep. 538; *Power* v. *Leach*, 26 Vt. 270; *Cady* v. *Owen*, 34 Vt. 598; *Howe* v. *Thayer*, 17 Pick. 91.

WALLIN, J. The defendant, together with one Thomas McKenzie, was charged in the information with the crime of burglary, committed at Hunter, in Cass County, on the 15th day of November, 1896, and was found guilty, and sentenced for such offense. A motion for a new trial based on a statement of the case was overruled, and the record embracing the evidence and proceedings at the trial is now before this court for review. We find numerous assignments of error in the record, all of which have been considered by the court; but we deem it necessary, in disposing of the case, to discuss only such of the assignments as are hereafter mentioned. The evidence is not disputed that a burglary was committed on the night of the 15th or morning of the 16th day of November, 1896, at Hunter, N. D., in the Great Northern depot building. An entry was made in the building either by raising the window sash, over which there was or had been a nail, or through the door, which was locked the night of the burglary, but was not broken. A safe in the depot was blown open with gunpowder, and money and other property within the safe was taken. McKenzie, who was accused by the information as a co-defendant, on a plea of guilty, was convicted of the offense, and is servlng a term in the state's prison. One James Ream, who was also informed against for the same offense, testified in behalf of the state, and his testimony is to the effect that McKenzie, the defendant, and himself were in the vicinity of Hunter for several days immediately prior to the night of the burglary, and that all three were in Hunter on that night, and left the locality before daylight on the morning of the 16th of November, and that all three reached Moorhead on the night of November 17, 1896. Ream testifies also that at the time of the actual commission of the burglary he was not present, but that, soon after,

the three were together, and that the witness was given some of the stolen property taken from the depot. On the night of the 17th of November, 1896, the defendant and the witness Ream, were arrested while occupying the same bed in an hotel at Fargo, but defendant was soon after discharged from such arrest. Defendant was again arrested on November 20, 1896, and, on being searched by the officer, two drills and a punch were found on his person. These tools were put in evidence, the defendant objecting to such evidence on the ground that it was too remote, and did not connect the defendant with the commission of the offense charged. The defense interposed at the trial was that of an alibi. It was claimed in defendant's behalf that he was at Moorhead and Fargo on the 14th, 15th, and 16th days of November, 1896. If this claim was true, it is conceded that defendant could not have been at Hunter on the night of the burglary. William Oliver, Walter Garrison, and John Keating were called as witnesses by the defendant, and they testified, in substance, as follows: Oliver testified that he was the clerk of the Northern Pacific Avenue Hotel in Fargo on the 15th day of November, 1896, and that there was then a barber shop in the hotel, kept by said Garrison; that in the forenoon of that day the defendant came to the hotel, and was shaved by Garrison. This was corroborated by the testimony of Garrison. Oliver further testified that in the evening of the same day the defendant came back to the hotel in an intoxicated condition, and that he (Oliver,) after receiving the sum of 50 cents from the defendant, showed him to bed; and that he remained in the hotel that night. Keating also testified that he was present the same night, and saw the clerk of the hotel show defendant to bed. Two other witnesses testified that they were saloon keepers, and knew defendant, and remembered his arrest in Moorhead on November 20th, and that defendant had for a week or ten days preceding his arrest been frequently engaged in drinking and buying drinks and playing cards in their saloon at Moorhead. In further support of the alibi the defendant testified in his own behalf, corroborating the

other witnesses as to where he was on the 15th and 16th days of November. There was no other feature of the defendant's testimony in chief of importance, except that he testified that he did, at McKenzie's request, and for his accommodation, purchase a couple of drills and a piece of steel of one Loudon, at Moorhead, on the day of his last arrest, and never had an opportunity to deliver them to McKenzie. Loudon testified also as to the purchase of these articles on the 20th, and further states that the tools were such as are commonly used by machinists and other mechanics. On his cross-examination defendant stated as follows: "I paid my lodging before I went to bed. I had eight dollars or ten dollars, which I had earned up at Conway, North Dakota, in the fall of 1896, through October. Was at Conway in October, 1896, working at threshing—connected with the engine,—for Mr. McCann. * * * He lives one mile south and seven west of Conway. I worked all through threshing for him, I think twenty-seven days, firing engine, until October, when I left. Then I left there, and went to work at Larimore. Went to work for a a man by the name of Mills. I left Mills about October 20th." He further testified: "I don't remember of earning any money from early in September to the time of my arrest, except what I have mentioned. That was about all I had until my arrest." The state, in rebuttal, and against defendant's objections thereto, showed by the testimony of two of the officials of Steele County, N. D., that the defendant was arrested in Steele County on or about the 12th day of September, 1896; and that after a preliminary examination defendant was held to answer at the next term of the District Court for Steele County, and in default of bail he was imprisoned, and remained in jail continuously until November 10, 1896, at which date the defendant was discharged from arrest in a state of penury. At the proper time all of this testimony as given by the officials of Steele County was objected to by the defendant's counsel, and a motion was make to strike it from the record, upon the ground that such testimony was "matter introduced by the state for the purpose of contradicting collateral

matter brought out by the state upon cross-examination, and matter not adverted to in the direct examination." Defendant's counsel saved exceptions to these rulings, and they are assigned as error in this court. It is manifest that the testimony thus offered in rebuttal was of a highly prejudicial character. If the jury believed the same to be true, and the testimony was, in its nature, credible, the defendant was thereby discredited and wholly impeached as a witness, and the defense of an alibi (in so far as it rested on the testimony of the defendant) was completely demolished, and the defendant himself was degraded in the eyes of the jury as a deliberate falsifier under oath. A verdict of guilty was certainly a result which followed naturally, if not inevitably, from testimony so damaging as this. The propositions of fact made in support of these assignments of error by the defendants may be stated as follows: First, that the rebutting evidence was offered by the state for the sole purpose of contradicting the statements of the defendant as to certain matters drawn out for the first time on defendant's cross-examination; second, that such matter was not adverted to on defendant's examination in chief; third, that such matter (drawn out on cross-examination) was wholly collateral to the issue which the jury was sworn to try, viz.: whether the defendant committed a burglary at Hunter, on the 15th day of November, 1896, as charged in the information. These propositions, so far as they embody statements of fact, are undeniably true. The statement that the defendant had worked near Conway, N. D., for twenty-seven days, on a threshing machine, for one McCann, in the months of September and October, 1896, and thereby earned wages, and that defendant had performed other labor for one Mills at Larimore, N. D., in October, 1896, for which he received wages, or that he had money to any amount, or ever earned wages at any time or place, were statements of fact constituting new matter never alluded to on defendant's examination in chief. The testimony offered in rebuttal was for the ostensible purpose of disproving these specific facts by showing that the defendant never

performed any of the labor which he had testified to performing, and hence had never earned any of the wages which he claimed, in his cross-examination, to have had and earned in September and October. That the evidence we are now considering was for the first time drawn out on cross-examination is perfectly clear, and it is conceded. In the opinion of this court, such evidence was also purely collateral in character. If it was such, it was clearly error (against objection) to contradict such evidence by the testimony offered in rebuttal by the state, or at all. It is manifest that the evidence drawn out on defendant's cross-examination, and tending to show where and for whom he worked in the months of September and October, 1896, would be inadmissible if offered by the state in support of the allegations in the information. Such evidence could have no possible relevancy to a burglary committed long subsequent thereto, and in another county. But the fact that such evidence so drawn out on cross-examination would be inadmissible if offered by the state in support of its case is precisely the criterion, under the authorities, which determines its character as collateral testimony. This well-established rule is variously stated by the elementary writers cited below as follows: "The test of whether a fact inquired of in cross-examination is collateral is this: Would the cross-examining party be entitled to prove it as a part of his case tending to establish his plea?" Whart. Cr. Ev. § 484. In Starkie, Cr. Ev. § 200, the author says: "It is here to be observed that a witness is not to be cross-examined as to any distinct collateral facts for the purpose of afterwards impeaching his testimony by contradicting him." In *Welch* v. *State* (Ind. Sup.) 3 N. E. Rep. 852, the court says: "Whether the matter inquired of on cross-examination was collateral to the main inquiry or not is determined by this inquiry: Would the prosecuting attorney have been permitted to introduce it in evidence as part of the state's case? If he would not, it was collateral. If it was collateral, it was not competent to contradict it,"—citing Whart. Cr. Ev. § 559. In Greenl. Ev. § 449, the rule is thus stated: "And, if a question is put to a wit-

ness which is collateral or irrelevant to the issue, his answer cannot be contradicted by the party who asked the question, but it is conclusive against him." This salutary, firmly settled, and long-established rule of evidence has been applied in adjudicated cases too numerous to mention, and therefore we shall not consume space unnecessarily by citations of further authority in its support, especially as the existence of the rule as it has been stated is conceded by counsel for the prosecution. The philosophy of the rule is that it tends to prevent the multiplication of irrelevant issues, which, if permitted to be lugged into the case, would not only protract trials to an interminable length, but would directly tend to confuse and divert the minds of the jury from the merits of the case on trial, and thereby tend to thwart the chief purposes of the law. Moreover, it would be manifestly unjust to require a suitor entirely without notice to meet collateral issues of fact which he could not anticipate because irrelevant; *i. e.* not embraced within any issue of fact joined by the pleadings. The case in hand strikingly illustrates the necessity for the rule which is invoked by the defendant. The accused was charged with the commission of a burglary at Hunter, in Cass County, on November 15, 1896. His plea put the change in issue. Therefore defendant was chargeable with notice that any fact bearing on that specific issue would be competent as evidence at the trial, and he must be prepared to meet it. But how was the defendant forewarned by this accusation that irrelevant matter, not referred to in his examination in chief, would be investigated at the trial? How was he apprised in advance that his own statements as to such foreign matter would or could be drawn from him on cross-examination, and then contradicted on rebuttal by the state? How could the defendant be expected to be ready with his witnesses to meet the witnesses against him on this side issue, and be prepared to overthrow their testimony by other witnesses of his own, who would corroborate his own statements on the stand, and also impeach the witnesses on the part of the state? These questions illustrate the necessity of the enforcement of the rule,

and we must, therefore, give the defendant the benefit of the rule. The state's attorney seeks to evade the force of the rule, while admitting its existence. His contention is, in a nutshell, that the cross-examination of defendant was proper, and that all matter elicited by it is also proper. He argues that, inasmuch as the defense of an alibi as testified to in chief by the defendant showed the fact that the defendant was being entertained at hotels and in saloons at Moorhead and Fargo on the 15th and 16th of November, 1896, it was therefore proper on cross-examination to follow this feature up by showing where the defendant earned the money which it was assumed he was disbursing, and hence (according to the argument) all of the statements made by defendant on cross-examination relative to his working for wages in the month of September and October preceding the date of the crime in question were properly drawn out under the rules of cross-examination. In this case the matter drawn out on cross-examination was not objected to, and hence is properly in evidence, despite the fact that it would be entirely inadmissible if offered by the state in support of the charge. We doubt very much whether the greater part of the new matter could have been received as against objection. But the rule which we have applied to the case is not a rule regulating the right of cross-examination. Its scope is to declare that any collateral evidence which is drawn out by the cross-examiner shall not be contradicted in rebuttal, but must be allowed to stand as drawn out. It follows that the consequences of the application of the rule cannot be evaded by the contention that the collateral matter drawn out by the cross-examination was properly elicited under the right of cross-examination. Indeed, the rule never has, nor can have, an application until the cross-examination has drawn out matter collateral to the issue. We think the rule was violated. Therefore, upon the grounds we have stated, the judgment must be reversed, and a new trial granted.

Another feature of the case may become important in the event of another trial. It appears that the defendant was arrested

on the night of the 17th of November, 1896, at Fargo, and was discharged after being in custody a few hours. The officers searched the defendant, and it does not appear that any burglarious tools, or any kind of tools, were found in his possession on that occasion. He had a package of gunpowder on his person, which was put in evidence, and properly, as we think. The arrest was near in point of time to the date of the burglary. Moreover, it is undisputed that the safe in question was blown up by means of gunpowder. This fact, in connection with the other evidence tending to inculpate the defendant, and connect him with the crime, would, we think, justify the introduction in evidence of the gunpowder taken from defendant's person. The weight of such evidence would be for the jury. But the prisoner was arrested a second time, to-wit, on November 20th, which was four days after the date of the burglary. On his person were found a punch and two drills, which were put in evidence against defendant's objection. It was shown that the defendant purchased the two drills at Moorhead on the day of his last arrest, and, further, that the drills were such as might be used and were commonly used by machinists, blacksmiths, and other mechanics. Under the circumstances, and particularly in view of the fact that no such tools were found in the defendant's possession upon the occasion of his first arrest, we are inclined to the opinion that the evidence was improperly admitted, and especially so as no evidence offered tended to show that either a punch, or a drill, or similar tools were used in the commission of the crime, although such instruments may have been used in perforating the safe for the introduction of gunpowder, which was shown to have been used. But, as the case must be reversed upon another point, it will be unnecessary to determine whether, under the circumstances, the error involved in the admission of these exhibits in evidence was of such a character as to be prejudicial to the substantial rights of the defendant. The judgment is reversed, and a new trial granted.

CORLISS, J., concurring.

BARTHOLOMEW, J. (dissenting). I am unable to concur with my associates in this case. The rule of evidence upon which the opinion of the majority is based is elementary, but I do not think this case comes within the rule; in other words, I do not think the matters drawn out on cross-examination of the defendant when on the stand as a witness for himself were collateral. I will state my reasons briefly. Defendant rested his defense entirely upon alibi. On the stand he denied his guilt, denied being present at the scene of the crime, and claimed that he had been elsewhere, to-wit, at Fargo and Moorhead, for two days prior to the time of the commission of the crime. To fortify this claim, and make it appear reasonable to the jury, he proceeded to relate in detail where he had been, and what he had done during those two days and nights, and he testified to staying over night at certain hotels, procuring meals at certain restaurants, getting drinks at saloons, and getting shaved by a barber. All this was on his direct examination. True, he did not in so many words testify that he paid for these things, but such entertainment can, ordinarily, be obtained only by payment, and there is no possible doubt that he intended the jury to understand that he did pay for them, just as other witnesses for him had testified. Now, it seems very clear that it would discredit his alibi to show that he was without means to pay for all this entertainment to which he testified. I think it too plain for argument that the state had the right at that stage of the case, and in rebuttal of defendant's examination in chief, to show that he had no money. The state could do this by cross-examination, and, if the defendant answered falsely as to such matter, it was the right of the state, if it could, to contradict such false answers by its own witnesses in rebuttal. In my judgment, the state did nothing more. Defendant, on his cross-examination, promptly said that he paid his hotel bill the first night; that he had eight or ten dollars that he earned at a particular time and place; and, in substance, said that he had no other money. To that extent the state succeeded in showing on cross-examination that he had no money. If, then,

the state could show by its own witnesses that he did not earn any money at the time and place that he claimed to have earned the only money he claimed to have, it would conclusively have shown that he in fact had no money at the time he claimed to have been procuring all this entertainment, and thus his alibi would have been, to some extent at least, discredited. The state did nothing more. True, the testimony introduced by the state had a tendency not only to contradict the defendant, but also to discredit and disgrace him before the jury. But that is no reason for excluding it, provided it is pertinent to the issues, which I think it was. The judgment should be affirmed.

(72 N. W. Rep. 923.)

K. I. MATHEWS *vs.* GREAT NORTHERN RAILWAY COMPANY.

Opinion Filed November 3rd, 1897.

Fire Set by Locomotive—Prima Facie Negligence.

The rule that negligence is presumed from the mere fact that an engine set out a fire is a rule of evidence, and is therefore unaffected by the allegations of the complaint. If the plaintiff narrows his avertment to a charge of negligence in the operation of the engine, he can still make out a prima facie case by showing that the engine did in fact set the fire. But, so long as the pleading remains unamended, the plaintiff can recover only for the negligence specified; and the defendant is not required to rebut any other presumption of negligence, as it would be under a complaint charging negligence generally.

Ownership of Property Destroyed.

To entitle one to recover damages for the destruction of property by fire, he must be the owner thereof. Mere possession, such as would support an action for trespass *de bonis asportatis*, will not suffice.

Ownership of Hay Cut on Public Land.

There is an implied license to the public to go upon the unappropriated public lands of the United States, and pasture stock thereon, and cut the native grasses therefrom, for the purpose of making hay. One who has cut hay from such land is the owner thereof, and therefore may sue for destruction by fire negligently set out by another.

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

Action by K. I. Mathews against the Great Northern Railway Company for damages for the destruction of hay and grass by fire negligently set out by defendant. From a judgment on a verdict directed for defendant, plaintiff appeals.

Reversed.

N. A. Stewart and *J. H. Bosard*, for appellant.

W. E. Dodge, for respondent.

CORLISS, C. J. The appeal in this case is taken from a judgment based upon a verdict in favor of the defendant, directed by the court. The action was to recover damages for the destruction of hay and standing grass, by fire, alleged to have been negligently set out by the defendant. In his complaint the plaintiff did not charge that the engine was lacking in proper appliances, or was out of repair, but averred that the carelessness which caused the fire was that of the servants and employes of the defendant in the operation of the train. The only evidence of negligence was the arbitrary presumption thereof from the mere fact that the defendant's engine started the fire. This, however, was not overthrown by any countervailing proof, the defendant not offering any testimony on this point. That a *prima facie* case of negligence would have been made out had the allegations in the complaint been as broad as the presumption is undisputed. But it is contended that the presumption of negligence, whether resting upon the decisions of the courts or express statutory enactment, does not arise in a case in which the plaintiff has so narrowed his charge of carelessness as to exclude one or more grounds of liability. Counsel's argument on this point was ingenious, but it has not convinced us. This rule, which casts upon the defendant in cases of this kind the burden of disproving every conceivable form of negligence where the setting out of a fire by the defendant is proved, is a rule of evidence having no connection with any question of pleading. Under a complaint sufficiently broad, counsel for defendant must concede that a verdict which found specifically that the defendant's employes were guilty of negligence in operating the engine

would be supported by the evidence, although the case disclosed no other proof of negligence than the mere fact that the engine started the fire, there being no rebutting evidence in the case. In other words, proof that the defendant set out the fire is sufficient evidence that the engine was negligently handled. If not, then it is not evidence of any carelessness whatever. If it is not evidence of negligence in any one respect, how can a verdict rest upon it at all? Counsel's argument strikes a blow at the very existence of the rule that a *prima facie* case is made out when the fact that the defendant is responsible for the fire is shown. If the plaintiff is willing to take the risks incident to limiting his charge of negligence to one particular, the defendant cannot complain, for it is thereby relieved of the burden of disproving any negligence save that set forth in the pleading. The attitude of the plaintiff on the trial is that the setting out of the fire is evidence, not of every species of negligence, but of the particular carelessness stated in the complaint. Whether such fact is *prima facie* evidence of the particular form of negligence specified in the complaint does not depend upon any rule of pleading, is not governed by the scope of the averments of the complaint, but is determined by one general rule of evidence, which applies in all cases alike, whatever the allegations of that pleading are; *i. e.* the rule that the jury may infer negligence in any particular in which negligence is possible from the bare fact that the defendant caused the fire. The plaintiff having established a *prima facie* case that the engine was negligently operated, it is unnecessary for us to follow counsel for defendant in his argument that the fire did not start upon defendant's right of way.

We now come to the merits. It is urged that plaintiff has failed to establish his right to recover the value of the hay and standing grass burned, even conceding the negligence of the defendant. Defendant attacks the plaintiff's title to this property. We are clear that it may do so. Had plaintiff, as a naked trespasser, cut this hay on private property not owned by him, and not in his possession, his actual possession of such hay, while

sufficient to support an action of replevin in the *cepit* or an action for trespass *de bonis asportatis*, would not entitle him to sue in an action on the case one who had destroyed the property while still in his possession. The injury in such a case is suffered by the real owner, and not by the one who has possession without right as against such real owner. A thief in possession may maintain conversion or replevin against one who, without any right to possession, wrests the property from such thief. But, when the property itself is destroyed by the wrongful act of another, the wrongdoer is allowed to interpose the defense that the plaintiff has no title in order to protect himself against double liability, the right to institute the action for damages in such a case being vested by the law in the real owner of the property, and not in the one who without shadow of right is in the possession thereof. These principles are elementary, although courts, from failure to discriminate, have sometimes departed from them, as in *Railroad Co.* v. *Lewis*, 2 C. C. A. 446, 51 Fed. 658. The law on this subject is stated with great clearness and force by Mr. Justice Peckham in *Railroad Co.* v. *Lewis*, 162 U. S. 366, 16 Sup. Ct. 831.

We must therefore inquire whether the plaintiff was a trespasser, as in the Lewis case, or whether he cut the native grasses of the prairie under an implied license from the government of the United States, the owner of the land from which it was cut. It is true that it is here urged that there is no evidence that that land was in fact government land, but we are of the opinion that there was some evidence tending to prove that plaintiff had, in accordance with a custom of long standing, established a ranch upon the unsurveyed public domain, and was in such possession thereof at the time this hay was severed from the ground as is usual in such a case. It is possible that we might rest our decision that he was the owner of the hay, and therefore entitled to recover its value if defendant negligently destroyed it, upon the fact that he was in possession of the land from which it was cut. But we think that our decision should be placed on a broader

ground. We take judicial notice of the fact that the uniform course of the government of the United States with respect to the use of the unsurveyed public lands by stockraisers has been such as to constitute an implied license to all persons to go thereon with their horses, cattle and sheep, and use them for purposes of pasture and as hay lands from which to cut the native grasses necessary to feed their stock during the months of the more or less severe and protracted winters of the northern latitudes. For decades after the Louisiana purchase, the annexation of Texas, the cession of California and New Mexico, and the settlement of the Oregon controversy, there sprang up, flourished, and decayed each season a luxuriant vegetation on wild prairies, along thousands of valleys, and upon unnumbered hillsides, embracing an area of tens of thousands of square miles. These nutritious grasses were for many years lost as a source of national wealth, for they were far beyond the outposts of civilization. And, even after the settlement of this vast region of country had commenced, there were destined to be millions of acres which for half a century or more would remain as formerly—unappropriated public domain. What was to be the true policy of the federal government with respect to the use of such lands and the incalculable wealth of their natural products? A statesman who should express in poetic form his regret that national resources of such magnitude should be each year lost might well speak of this wasted wealth in language in which, in another age and another clime, the vegetation of another unpeopled region was described—a vegetation "wherewith the reaper filleth not his hands, neither he that bindeth up the sheaves his bosom." To forbid—to discourage—the use of these wide areas for the purpose of feeding stock until such time in the distant future as should find them in the hands of private owners would have been imbecility. Not to have encouraged their use for this purpose would have been to display an utter incapacity for large and liberal views, an indifference to the true interests of the people, and an inexplicable blindness to the laws which regulate the growth of national

wealth and greatness. With meat commanding an exceptionally high price in the markets of Europe because of the density of population rendering land there too valuable to be used for pasturing stock on a large scale, what could ever excuse the folly of shutting out our almost unlimited public domain from use for purposes of grazing, because the government, as a distinct entity, was not to profit thereby? The people are the nation, and whatever augments their prosperity increases the national greatness and strength.

Unlike the deforesting of large tracks, taking from the land its value, and seriously affecting the rainfall and the water courses of wide areas, the use of the native grasses works no appreciable diminution in the value of the land for the purpose to which it is adapted, and no general injury whatsoever. For the government, under such circumstances, to prohibit others from obtaining the benefit of that which it can not use itself, would make it a veritable dog in the manger. But when it is considered that no special injury would result to it, as the owner of the fee, from allowing cattle to range over its prairies and through its valleys, and that, on the other hand, a great fountain of wealth would thus be opened up to its own citizens, which must else remain sealed for decades to come, it is unthinkable that it should ever be or ever have been the policy of the government to treat as a trespass the pasturing of stock upon the public lands, and the cutting of hay therefrom. We might, placing ourselves at the threshold of this century, know, *a priori*, what course the government would pursue with respect to these lands; and that policy we could then predict we know has in fact been followed without deviation or shadow of turning from the earliest times to the present day. Even with regard to timber on public lands the governmental policy has been liberal. All the mineral wealth of its great mountain ranges has been free to individual quest. And, by the acquiescence of all branches of the government for nearly a century, the public domain has been thrown open to all its citizens alike, as land which they might use, until otherwise appropriated, for the pur-

pose of feeding their stock, whether by ranging over it with their herds, or severing the grasses therefrom to make hay for their winter supplies. Congress, with full knowledge that its citizens have for many years used the public lands as ranges for stock, and that this has been done upon a large scale, has enacted no legislation to prohibit such use. And yet, at the same time, it has regulated the cutting of timber upon the unappropriated lands of the government, making it a criminal offense except under special circumstances. What inference can be deduced from this silence of congress save that of actual consent that that practice. which was of great benefit to the citizen, and could work no injury to the government, should be suffered to continue. That department of the government which is charged with the control of the public lands has never adopted any regulations hostile to this notorious practice of owners of stock in using the public domain as pasture and hay lands; and the federal judiciary has set the seal of its approval upon this known usage, declaring that those who follow it are not trespassers, but are acting under the implied invitation of the owner of the soil. In *Buford* v. *Houtz*, 133 U. S. 320, 10 Sup. Ct. 305, Mr. Justice Miller, speaking for the whole bench, said: "We are of the opinion that there is an implied license, growing out of the custom of nearly a hundred years, that the public lands of the United States, especially those in which the native grasses are adapted to the growth and fattening of domestic animals, shall be free to the people who seek to use them, where they are left open and uninclosed, and no act of government forbids their use. For very many years past, a very large proportion of the beef which has been used by the people of the United States is the meat of cattle thus raised upon the public lands, without charge, without let or hindrance or obstruction. The government of the United States, in all its branches, has known of this use, has never forbidden it, nor taken any steps to arrest it. No doubt, it may be safely stated that this has been done with the consent of all branches of the government, and as we shall attempt to show, with its direct encouragement."

We hold that the plaintiff was the owner of the hay, even as against the United States, and could defend an action of replevin brought against it by the government. It follows that he can recover the value thereof, providing it was negligently destroyed by the defendant. The judgment of the District Court is reversed, and a new trial ordered. All concur.

(72 N. W. Rep. 1085.)

A. L. PLUMMER *vs.* A. E. KELLY.

Opinion filed November 3rd, 1897.

Specific Performance—Sale of Real Estate.

Under the facts held forth in the opinion, *held*, that defendant was entitled to the specific performance of a contract for the sale to her of real property.

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

Action by A. L. Plummer against A. E. Kelly, and by A. E. Kelly against A. L. Plummer. The actions were consolidated, and judgment rendered for A. E. Kelly. Plummer appeals.

Modified.

Carmody & Leslie, for appellant.

P. G. Swenson and *J. F. Selby*, for respondent.

CORLISS, C. J. Two actions have been consolidated and tried as one. We will speak of the parties according to their positions as plaintiff and defendant in the first suit, in which A. L. Plummer was plaintiff, and Mrs. Kelly was defendant. Plaintiff having failed to secure a favorable judgment in the District Court, brings the whole case before us for a new hearing. The two actions, which, by the consent of the parties, were tried as one case, were, respectively, actions to annul a contract for the sale of land, and to secure the specfic performance of such contract. The plaintiff Plummer instituted the action to have the contract canceled; and thereafter the defendant Kelly commenced an action against

Plummer to compel the specific performance of such contract by him. The only question in either case was the right of the defendant Kelly to a decree directing Plummer to convey the land to her on making payment of the balance due under the contract. It was therefore entirely proper that the issues in these two suits should all be tried at the same time. The contract of which Mrs. Kelly seeks the specific performance was entered into between her and Plummer on the 13th of April, 1891, and, omitting formal parts, is in the following language: "This agreement, made and entered into this thirteenth day of April, A. D. 1891, by and between A. L. Plummer, of Hillsboro, Traill County, North Dakota, of the first part, and Mrs. A. E. Kelly, of Portland, Traill County, North Dakota, of the second part, witnesseth: That the said party of the first part, in consideration of the covenants and agreements of said party of the second part hereinafter contained, hereby sell and agree to convey unto said party of the second part, or her assigns, by deed of warranty, upon the prompt and full performance of said party of the second part of her part of this agreement, the following described premises, situate in the County of Traill and State of North Dakota, to-wit: West one-half of section twenty-nine, town one hundred forty-five, range fifty-three, (west ½ of section 29, town 145, range 53). And the said party of the second part, in consideration of the premises, hereby agree to pay said party of the first part, as and for the purchase price of said premises, the sum of four thousand dollars, in manner and at the times following, to-wit: According to one promissory note, dated April 13, 1891, and due April 12, 1895. Interest at 8 per cent. from June 12, 1891, payable annually, payable in one-half of all crops raised on the above tract, delivered in any elevator in Clifford, not later than December 1, 1891, and every year thereafter until the above described note and interest has been paid in full. The proceeds of all grain to be applied as follows: First, to pay all taxes or assessments that may hereafter be levied or assessed upon said premises; second, in the payment of the accrued interest, balance to be indorsed on the note. But

should default be made in the payment of said several sums of money, or any or either of them, or any part thereof; or in the payment of said interest or taxes, or any part thereof, or in any of the covenants herein to be by said party of the second part, kept or performed, then this agreement to be void, at the election of the said party of the first part, time being the essence of this agreement. And in case of default by the said party of the second part, in whole or in part, in any or either of the covenants of this agreement to be by her kept and performed, she hereby agrees, upon demand of said party of the first part, quietly and peaceably to surrender to him possession of said premises, and every part thereof; it being understood that, until default, said party of the second part is to have possession of said premises. Party of the second part further agrees to give party of the first part a chattel mortgage on her share of the crops grown on the above described tract during the years of 1891, 1892, 1893, 1894, and 1895, and every year thereafter until the above note is paid in full. It is mutually agreed that all the covenants and agreement as herein contained shall extend to and be obligatory upon the heirs, executors, administrators, and assigns of the respective parties to this contract."

Whether Mrs. Kelly delivered one-half of the grain grown on the farm during the season of 1891 is a controverted question. We can safely assume that she failed to do so, for the plaintiff did not elect to treat her rights under the agreement as in any manner affected by such default, but, on the contrary, allowed her to remain in possession of the land, and cultivate the same, during the next two seasons, and received from her, at the close of each of these seasons, a large amount of grain raised upon the land, in payment of the purchase price under the terms of the contract. Whatever breach of contract she was guilty of in 1891 was waived by plaintiff's subsequent conduct. It is undisputed that in 1892 and 1893 more than one-half of all crops grown upon the land in those two seasons, respectively, was delivered to Plummer according to the agreement. It is true that in 1893

only a small payment was made on the purchase price, not enough to pay the interest in full; but this was owing to the fact that Plummer applied the proceeds of the 1893 crop turned over to him in payment of the debts of Thomas Kelly, the husband of Mrs. Kelly, owing to him (Plummer), and to the bank with which he was connected. As a matter of fact, the grain was delivered to Plummer to be applied on the debt of Mrs. Kelly for the land, and the diversion of any portion of the proceeds to the payment of her husband's debts was an unwarranted act on the part of Plummer. Mrs. Kelly, however, is not complaining of this, and certainly Plummer cannot avail himself of this illegal use of Mrs. Kelly's money to liquidate her husband's debts, as the basis of the claim that she violated her contract in 1893. When the spring of 1894 arrived, Mrs. Kelly was in the possession of the land through her tenant, Charles W. Moran, and her right to retain that possession and operate the farm and carry out the terms of the agreement could not at that time be challenged in any court. She had faithfully kept her part of the agreement, and was preparing, through her tenant, to crop the land during the season of 1894, when the plaintiff, without right in law or morals, and on a mere suspicion that she might not put in a crop, served upon her notice that unless she furnished her tenant, Moran, with the necessary seed to sow the land within ten days, he would annul the agreement for the sale of the land. This was on the fifth of April. Mrs. Kelly, in her lease to Moran, had agreed to furnish him four horses to work the farm, but he was to furnish the seed. It appears that the horses were taken from Mrs. Kelly some time before this, and Moran refused to go on under his lease unless Mrs. Kelly would agree to supply him with the seed grain in place of the horses. While this condition existed, and some time before it could be known whether Moran would put in the crop, or whether, if he did not, Mrs. Kelly could not make other arrangements about seeding the land, the plaintiff, in defiance of the rights of Mrs. Kelly under the agreement, assumed to intermeddle with her private affairs, to dictate on what terms she

should settle with Moran for her failure to furnish him the horses, and when she should sow her farm lawfully in her possession, and held over her head the threat that, in case she did not surrender to him the management of her own business matters, he would annul the agreement. Subsequently he took possession of the land without her knowledge or consent, and rented the same to the same tenant to whom she had rented it. When the plaintiff entered upon the farm, and leased it to Moran, he was guilty of a flagrant breach of his contract. He had no more right to take possession of the land than an utter stranger. In equity, Mrs. Kelly was the owner of the land, and entitled to the possession thereof, to enable her to perform the conditions remaining for her to perform. She had in the past lived up to her agreement. In the very lease to Moran, she had stipulated that one-half of the crop was to be delivered to Plummer, according to her contract with him; and, just as she was in the act of making preparations for paying another installment of the purchase price, the plaintiff arbitrarily directed her how to run the farm, what arrangements to make with her tenant, when to furnish seed for the crop, and thereafter on an alleged suspicion that she would not crop the land during that year, took possession of the same, and from that time to the present day has acted in hostility to her rights under the agreement. The plaintiff can offer as an apology for this conduct nothing but a bare suspicion that Mrs. Kelly would not crop the land in 1894. At the time he leased the property to Moran (early in April), it was impossible to tell whether defendant would fail to seed the land during that season. Everything pointed to the probability that she would. She had made an effort to have a tenant put in the crop. It was still possible for her to make other arrangements with him, or rent the land to another, or crop it herself. Nor do we find in the contract any provision requiring her to raise a crop on this land every year. Plummer merely stipulated that she should deliver him each year one-half of all crops she might raise, leaving the acreage, which should be sown or summer-fallowed entirely to her discretion.

Had she distinctly informed him in the spring of 1894 that she did not intend to sow a kernel of grain on the farm that year, plaintiff could not have claimed that she had broken the agreement. It is true that it is urged that, through mistake, the agreement does not contain a provision that Mrs. Kelly was to put in a crop each year; that this was the understanding of the parties; and that, when the agreement was reduced to writing, this element of the contract was, through mistake, left out. But the plaintiff, when he brought his action to have the contract annulled, did not allege this error, but, on the contrary, based his action upon the agreement as written. He did not seek to have the agreement reformed; nor did he allege any fact warranting a reformation thereof. And, in his answer in the action for specific performance, he does not pray that the writing be reformed to correspond to the true agreement. Nor does the testimony of the plaintiff himself prove that there was any distinct agreement that defendant was to put in a crop every year; and there is positive evidence to the contrary. It could not in any year be known until the time for delivery should arrive whether Mrs. Kelly would fail that year to make a payment. All that Plummer was interested in was the payment of the purchase price and interest. Mrs. Kelly, so far as any one could tell, might, after failing to put in any grain whatever, pay him a larger installment of the purchase money than he would have received had she cropped all of the land. Acting upon a mere suspicion, which may have been utterly groundless, he assumed to terminate the agreement, because there was a possibility that she might break it. His conduct in taking possession under these circumstances, and leasing the land to Moran, was illegal; and he thereby violated that provision of the agreement in which he stipulated that Mrs. Kelly should have possession of the farm. She did not know that Moran was holding under Plummer, instead of under the lease from her, until late in the season of 1894. In the spring of 1895, she attempted to take possession of the farm, but was prevented by the plaintiff. A few days thereafter she made a tender to him of a sum of money

which she deemed sufficient to entitle her to a conveyance, and demanded a deed. Upon plaintiff's refusal to transfer to her the property, she brought her action for specific performance. No tender was necessary. The attitude of the plaintiff constituted a waiver of tender. That the defendant is entitled to a decree for specific performance under the facts in this case is too clear to justify argument. The claim that she made default in paying the taxes in 1891, 1892 and 1893 is answered by the fact that the agreement contemplated that they should be paid out of the one-half of the crop to be delivered to Plummer in each year. When he paid them, it was out of this fund that they were paid. The defendant was credited with only the balance after deducting the taxes.

The remaining question is: How much, under the circumstances, is defendant bound, in equity, to pay the plaintiff for a deed? The interest was paid up to February 28, 1893, and $1,000 on the principal. Thereupon the amount due November 1, 1894, (being $3,000, and the interest then due, at 8 per cent.) was $3,400. In 1894 defendant was prevented from making any payments on the contract by reason of the wrongful act of plaintiff in taking possession of the farm. Plaintiff must account to her for the reasonable value of the use and occupation of the farm during that year. The trial court found this to be $587.50. There is evidence to support this finding. Therefore we shall hold that there must be deducted from the $3,400 due November 1, 1894, the sum of $587.50, leaving the balance then due $2,812.50; interest thereon to November 1, 1895, at 8 per cent., $225—total amount due November 1, 1895, $3,037.50. Deduct the value of the use and occupation for 1895, ($587.50), leaves $2,450; interest thereon to November 1, 1896, $196—total amount due November 1, 1896, $2,646. Deduct the value of the use for 1896, ($587.50), leaves $2,058.50 due November 1, 1896. The judgment of this court is that defendant must pay to the Clerk of the District, in and for the County of Traill, State of North Dakota, the sum of $2,058.50, with interest thereon at 8 per cent. from November 1, 1896; said

money to be paid within thirty days after the final judgment is entered herein by the District Court, in pursuance of the mandate of this court. Plaintiff shall be entitled at any time after such payment to receive such money on executing and delivering to said clerk, for the benefit of the defendant Mrs. Kelly, a warranty deed of the property described in the complaint herein, excepting from the warranty against incumbrances the taxes for 1897. This decree shall immediately upon the payment of such money to the clerk stand as a transfer of the title to said property from the plaintiff Plummer to the defendant Mrs. Kelly, without the execution of any deed. But the plaintiff shall not be allowed to receive such money until he executes and delivers the deed hereinabove specified. The defendant shall be entitled to the possession of the land immediately on the payment of the money; and the District Court will, on a proper showing that this has been done, order that a writ of assistance issue for that purpose. As the judgment is more favorable to the plaintiff than the judgment of the District Court, the plaintiff will recover costs in this court, less $82.20, costs taxed in favor of the defendant in the District Court; this amount to be deducted from the plaintiff's costs in taxing the same. If defendant fails to make payment within the time specified, her rights in this land shall be forever barred. Let judgment be entered in accordance with this opinion, and said judgment shall be without prejudice to the right of Mrs. Kelly to recover the value of the use of the land for 1897. All concur.

(73 N. W. Rep. 70).

HERMAN ROEHR *vs.* GREAT NORTHERN RAILWAY COMPANY.

Opinion filed November 8th, 1897.

Verdict—Findings—Evidence to Sustain.

Where a jury follow instructions of the court, limiting them to a particular ground of negligence, their verdict cannot be sustained if there is no evidence

to support a finding of that particular negligence, even though there was evidence in the case tending to prove other negligence, and such negligence was set up in the complaint.

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

Action by Herman Roehr against the Great Northern Railway Company to recover for hay destroyed by fire negligently set out by defendant. From a judgment for plaintiff, defendant appeals.

Reversed.

W. E. Dodge, for appellant.

N. A. Stewart and *J. H. Bosard*, for respondent.

CORLISS, C. J. Plaintiff has recovered a judgment for damages caused by the alleged negligent setting out of a fire by one of defendant's locomotive engines. The property destroyed by the fire was hay. That plaintiff was the owner thereof does not admit of doubt. It was cut by him on the land of another, under an agreement with the owner of such land, by the terms of which plaintiff was sold the right to cut such hay. The land had been filed on at the time the plaintiff made this agreement and severed the grass, and was in the actual possession of the person with whom he made the contract. Two grounds of negligence are set forth in the complaint. It is alleged that defendant's servants negligently operated the engine, and also that it carelessly permitted combustible material to accumulate on its right of way, and that the fire caught thereon, and from that point spread to the plaintiff's land, and destroyed his hay. The judgment cannot be sustained on the theory of negligence in operating the engine; for while the complaint averred such negligence, and there was evidence to sustain the allegation, yet, the District Court having instructed the jury that they could consider only the charge of negligence which related to the right of way, we cannot assume that the jury have found any other carelessness on the part of the defendant. Indeed, the jury, by their special verdict in the case, have negatived any possible inference that they intended to assert by their general verdict that there was any negligence in the

operation of the engine. While we believe it was error to thus restrict the jury to a single ground of negligence where two grounds were set forth, yet the court's instructions became the law of the case, and the jury had no right to disregard them. Any verdict based upon a refusal to apply the law as laid down by the court would be a verdict against law, although the law itself was erroneously stated to the jury. *Crane* v. *Railway Co.* (Iowa) 37 N. W. Rep. 397; *C. Aultman & Co.* v. *Reams* (Neb.) 4 N. W. Rep. 81; *Graham* v. *McGeoch* (Iowa) 15 N. W. Rep. 592; *Emerson* v. *County of Santa Clara*, 40 Cal. 543.

It is possible that, in a case where it is clear that the jury have applied the correct rule of law, the verdict should not be disturbed. On that point we express no opinion. But in this case we have no right to assume, in the very face of the special verdict of the jury, that the general verdict rests upon a finding by the jury that the engine was carelessly managed by defendant's servants. It affirmatively appears that the jury have obeyed the instructions of the court, and that, therefore, they have not decided the case on the theory of any negligence other than that connected with the defendant's conduct with respect to the right of way. The question therefore is presented whether there is any evidence to support the finding that the fire started on the right of way. We think there is not. There was no direct proof as to the width of defendant's right of way at the point where the fire caught. There was evidence tending to show that the fire was ignited more than 90 feet, but less than 100 feet, from the center of the track. But the important inquiry is whether the right of way at this point was 100 feet wide. If it was only fifty feet, or even if it was 90 feet, the verdict of the jury that the sparks fell on the right of way is not supported by the evidence. We are entirely in the dark as to any use by the defendant of the land at this point as a right of way. It appears that, a year before, several furrows had been plowed, by persons hired by the defendant for that purpose, at a distance of about 140 feet from the

center of the track, the furrows running practically parallel with the roadbed. But it is undisputed that this was an act of trespass on the part of the defendant, as it appears that those furrows were upon the land of another; and the owner of this land is positive in his testimony that he had been in possession thereof for six years. Never at any other time or in any other way has the defendant used the land between those furrows and the point where the fire started, as a right of way. There is no evidence of user whatever. The fire was set on the north side of a creek which is north of defendant's track, and which flows in the same general direction in which the roadbed runs. At the point where the fire was started, the north side of this creek is 92 feet from the center of defendant's track. Between this creek and the furrows referred to, the distance was about 50 feet. Thomas Gains, who owned the land at this point, testified as follows, with reference to the land which it is claimed was a part of the defendant's right of way in 1895, when the fire was set out: "Q. You have referred to a furrow which was plowed some time in 1893 alongside of Stony creek, on the north side of the creek. Now I will ask you to state on whose land that was plowed. A. It was on mine. I claimed the land at the time, and had a filing on it. I have since acquired a title to the land. I have been in possession of it since about six years ago. During that time I have been in possession of the strip of land between those furrows and the north bank of Stony creek. I have cut hay on it. Q. Now there is a little misunderstanding as to your testimony. Do you mean to be understood to say that the section foreman ever burned off that strip there on the north side of the Stony, on your land? A. Not to my knowledge has it ever been burned off since I lived there. When I stated it had been burned two or three hundred feet from the track, I referred to other places. Q. Now, has the Great Northern, to your knowledge, ever in any way used that strip of land between Stony creek and those furrows for the purpose of a right of way? A. By plowing it. That is all that I know. I fenced that in some time last summer, before the fire, and that

strip of land between the furrows and the creek was included within my inclosure, and it has not been burned off by the company since I went there." It is evident from this testimony that the place where the fire started was within the inclosed land of the witness Gains, and that he was in the possession thereof, claiming title to the same; and, in addition, there is not a particle of evidence tending to show that the defendant has ever done any thing on its part which has any tendency to prove that the right of way is of any particular width at that point. It trespassed upon the land of Mr. Gains in 1894, in running a line of furrows a distance from the track. But, as it is undisputed that its right of way did not extend to the point where it plowed, we are at a loss to determine how, from this evidence, we can fix the line which there marks the boundary of its right of way. All the direct evidence in the case shows that the land where the fire started was private property, and not a part of the right of way. There is no data in this case on which to base an inference that the right of way is of any particular width at this place. The judgment is reversed, and a new trial is ordered. All concur.

(72 N. W. Rep. 1084.)

SCOTTISH AMERICAN MORTGAGE COMPANY *vs.* BUDD REEVE AND HARRIET E. REEVE.

Opinion filed Nov. 8th, 1897.

Appeal from Default Judgment—Defective Complaint.

On appeal from a default judgment, the judgment will be reversed, if the complaint does not state facts sufficient to constitute a cause of action; but the appellant must make out a clear case, to secure a reversal.

Complaint Sufficient.

Complaint examined, and *held* sufficient as against such an attack.

Proper Relief.

Held, also, that the relief granted by the judgment was such relief as the defendants were bound to know, under the law, might be granted in the action upon the complaint served.

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

Action by the Scottish American Mortgage Company against Harriet E. Reeve and another. Judgment for plaintiff. Defendants appeal.

Affirmed.

Benton & Bradley, for appellants.

Newman, Spalding & Phelps, for respondent.

CORLISS, C. J. The appeal is from a judgment rendered on default. The action is for the foreclosure of a real estate mortgage. It is urged that the complaint does not state facts sufficient to constitute a cause of action. That an appeal will lie from a default judgment is settled by our statute. Rev. Codes, § 5605. If the complaint is insufficient, the judgment must be reversed. All that a defendant admits by his default are the facts which are alleged in the complaint. At common law he could move in arrest of judgment when no cause of action was stated. In this jurisdiction he can accomplish the same result by appeal. We are to test the complaint on this appeal as we would on demurrer; not examining it, however, so critically as we would if the attack had been promptly made by demurring to the sufficiency of the allegations thereof. That a default judgment must be reversed when the complaint is deficient in substance is well settled. Elliott, App. Proc. § 475; *Old* v. *Mohler*, 122 Ind. 594, 23 N. E. Rep. 967; *Abbe* v. *Marr*, 14 Cal. 210; Bliss, Code Pl. § 438; Gould, Pl. 471. But we do not think that the practice should be encouraged. An appeal from a default judgment may be taken at any time within one year. In this way the defendant can secure a large extension of time in which to attack the complaint for insufficiency. The law contemplates that this should be done before final judgment, so that all defects therein may be remedied. And while it is true that a defendant may assail the sufficiency of the complaint by an appeal from a default judgment, on the theory that he has only made default as to facts which do not state a cause of action, yet he will be held to the necessity of

making out a very clear case of insufficiency, where he adopts this course, and not that of demurring or raising the question on the trial.

The mortgage is not set forth in *hæc verba* in the complaint, nor is a copy thereof attached. Whether it could have been made a part of the pleading by annexing a copy, we need not here decide. Section 5286, Rev. Codes, relates exclusively to instruments "for the payment of money only." Has the plaintiff set forth the mortgage according to its legal effect? We think that it has, although the allegation is very imperfect. It is as follows: "That at the same time and place said defendants executed and delivered to this plaintiff, as security for the payment of the above described notes, as the same should become due, their mortgage deed of and upon the following described real estate." This averment contains an element which, in our judgment, answers another point made by counsel for the defendants. It is said that the complaint shows upon its face that the action was brought for the foreclosure of interest due, long before the principal debt had matured. The allegation, "as security for the payment of the above notes" (those which are claimed by defendants' counsel to be the interest notes), "as the same shall become due," shows sufficiently, for the purpose of sustaining the complaint as against the attack made upon it in this way, that even assuming that these notes are interest notes, yet the mortgage was to be enforced as to such notes in case of default in their payment. But the complaint does not state that these notes are interest notes. So far as appears from its face, they represent a part of the principal indebtedness.

The remaining question is whether the relief granted was greater than that prayed for. We think not. The court, under the provisions of sections 5877, 5879, 5800, Rev. Codes, ordered a sale of the entire property, and directed that the proceeds be applied to the payment of that portion of the indebtedness which was not due, as well as that which was due. The prayer for general relief at the end of the complaint is broad enough to warrant the judgment

given, in view of the fact that a plaintiff can never know when he commences his suit just what course the court will pursue with respect to the matter of the sale of the land as an entirety. His prayer cannot determine that question. The court will not order the land sold in one body merely because he so desires, but to further the interests of all parties concerned. Every defendant in a foreclosure action knows, whatever the prayer for relief may be, that the court, without reference thereto, will determine whether there ought not to be a sale of the whole security in one body, and the application of the proceeds of such sale to the extinguishment of the entire debt—that which is not, as well as that which is, due. He can never be surprised by a judgment in an action to foreclose for an installment which orders a sale of all of the property, and the payment of the entire debt out of the proceeds of such sale. The judgment has behind it a sufficient complaint, and the relief granted is not greater than that prayed for; and, moreover, it is just the relief that defendants were bound to anticipate might be granted under the complaint, had there been no general prayer for relief at all. The judgment is therefore affirmed. All concur.

(72 N. W. Rep. 1088.)

The Nichols & Shepard Company *vs.* Edward Stangler.

Opinion filed October 18th, 1897.

Review of Questions of Fact When Findings Waived.

In a case tried in the District Court under the provisions of section 5630 of the Revised Codes, and brought to this court on appeal, this court will not retry issues of fact in a case where findings of fact are waived below, and never filed in that court. Said section, in connection with section 5467, Id., requires the settlement of a statement of the case embracing specifications the same as in jury cases.

Objections to Evidence—How Treated on Appeal.

Objections to evidence noted in the court below and preserved in a statement will be reviewed in this court only in a connection with a re-trial of the issues of fact, and will not be reviewed as errors merely, as is done in jury cases.

Specifications and Assignments of Error.

In cases tried under said sections, specifications of error in the statement and assignments of error in this court will be required as in other cases.

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

Action by the Nichols & Shepard Company against Edward Stangler, in which Joseph Miller was allowed to intervene. From a judgment in favor of intervener, plaintiff appeals.

Affirmed.

Morrill & Engerud, for appellant.

Newman & Spalding, (*John O. Hanchett*, of counsel), for respondent.

WALLIN, J. The only question before us for decision upon the record in this case is presented by a motion made in behalf of the respondent. It is this: Can this court consider the evidence embodied in the statement and printed in the abstract for the purpose of reviewing the facts? Counsel for the appellant contends that the case was tried as a court case in the District Court, and hence tried under section 5630 of the Revised Codes. This is not conceded by counsel for the respondent. But we deem it unnecessary to consider this question, and shall, for the purposes of the motion, assume that the case was regularly tried as a court case, under section 5630, *supra*. If it was in fact tried as a jury case, it is conceded by the appellant that the record does not permit an examination of questions of fact in this court. At the close of the case, findings of fact were waived by counsel, and none were ever made by the trial court. Certain conclusions of law were filed by the trial court, and a judgment directed to be entered in favor of the respondent, and such judgment was thereupon entered. The appeal is from this judgment. A statement of the case was settled, and appended thereto were certain specifications of error. The first eight of such specifications relate wholly to matters of fact, and undertake to point out wherein the evidence is insufficient to "justify the conclusions of law and judgment in this case." Following these were seven specifica-

tions of error, which plaintiff, in its brief, denominates "errors of law." An examination of these alleged errors of law discloses that they are all predicated upon the rulings of the trial court admitting testimony which plaintiff claims should have been excluded. These alleged errors of law, however, in the view we have taken of the case, are wholly immaterial, and cannot be considered in any aspect of the record, for the reason that none of such errors are assigned as errors in the brief of appellant's counsel filed in this court. The only errors assigned in this court are as follows: First, the conclusions of law are not justified by the evidence; second, it was error to order judgment for the intervener; third, it was error to enter judgment against the plaintiff. It must not be inferred from what has been said that this court would rule upon the errors of law predicated upon rulings upon the admissibility of evidence in the court below, if such rulings had been regularly assigned as errors in this court. Under section 5630, such rulings cannot be reviewed or made the basis of reversing the case for error, as could be done in a jury case. In this class of cases this court does not sit as a court of errors. On the contrary, we are required in such cases to try the case anew upon all the evidence offered below. In this class of cases objections to evidence may be "noted," and thereafter preserved in a statement, if the case is appealed. In this court such objections would only be considered in connection with a new trial of the facts, and for the sole purpose of considering whether evidence so objected to was admissible under common-law rules of evidence. If inadmissible, such evidence will be rejected in deciding the case here; otherwise it will be considered. But in no event will mere rulings upon evidence below, however erroneous, furnish a basis for an order reversing the case, if the evidence itself is embraced in the record sent to this court. In the case at bar we cannot enter upon the consideration of the alleged errors below in admitting testimony, because the record does not permit this court to enter upon a new trial of the issues. Upon this

record we cannot examine the issues of fact tried in the court below, because no findings of fact were ever made below. "

This brings us to the pivotal question presented by the motion. Respondent contends that we are debarred from a trial of the issues of fact anew, and, consequently, from a re-examination of the evidence contained in the record. This contention must be sustained. Section 5630 declares: "For the purpose of reviewing upon appeal questions as to the sufficiency of the evidence to sustain the findings of fact in any action tried under the provisions of this section a statement of the case may be prepared and settled within the time and in the manner provided in article 8 of chapter 10 of this Code." Turning back to the section referred to (now section 5467, Rev. Codes), we find the following language: " 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," etc. It is well settled that the phrase " other decision " has reference to findings of fact, and does not refer to the judgment, and entirely settles that specifications of errors of fact which are leveled at the judgment only are futile, and will be ignored. The section last cited is explicit on the point. It declares, " If no such specification is made, the statement shall be disregarded on motion for a new trial and on appeal." See, also, *Coveny* v. *Hale*, 49 Cal. 552; *Moyes* v. *Griffith*, 35 Cal. 556; *Investment Co.* v. *Boyum*, 3 N. D. 538, 58 N. W. Rep. 339; *O'Brien* v. *Miller*, 4 N. D. 308, 60 N. W. Rep. 841; *Hostetter* v. *Elevator Co.*, 4 N. D. 357, 61 N. W. Rep. 49; *First Nat. Bank* v. *Merchants Nat. Bank*, 5 N. D. 161, 64 N. W. Rep. 941; *Schmitz* v. *Heger*, 5 N. D. 165, 64 N. W. Rep. 943. Being precluded by the condition of the record—*i. e.* by the entire absence of findings of fact—from proceeding to retry the case in this court under the provisions of the statute, we are likewise, and for the same reason, precluded from any review of the rulings, if they may be styled rulings, upon the admission of evidence below of which the appellant now complains. As has been seen, such rulings or " objections " become important only upon a trial anew in

this court. The errors actually assigned in the brief of appellant's counsel are leveled at the conclusions of law and the judgment entered below, and it is conceded that these specifications must fall unless this court shall retry the case, and upon such retrial take a different view of the facts and evidence from that taken by the trial court. As we cannot try the case anew, it follows that the judgment below must stand, and said judgment will therefore, in all things, be affirmed. All the judges concurring.

ON PETITION FOR REHEARING.

The petition for a rehearing in this case is denied upon the ground that the points urged in the petition are, in substance, the same as those adjudicated in the decision, and hence were fully considered by the court before its opinion was handed down. The rule permitting petitions for rehearings is intended to afford an opportunity of directing the attention of this court to some fact, rule, or legal principle overlooked by the court in deciding the case, and was not intended to give counsel an opportunity to present an *ex parte* reargument upon the questions considered and disposed of in deciding the case. Among the statements made in the petition are the following: "In equity cases, however, the appellate court sits, not as a court merely for the correction of errors of law, but it must retry the case on the facts. In such cases findings of fact are not required, and are not customary. They are absolutely of no use. They are not binding on the appellate court if made, and in fact are entirely disregarded. The appellate court tries the case *de novo*, and disposes of it finally, if all the evidence is before it. Such was the practice in all the states before the adoption of the code, and is still the practice in the United States courts, and in those states which have not adopted the code practice." In our judgment, it is more than probable that an examination of the early chancery practice on appeals would be of little aid to the bar of this state in seeking to understand the anomolous practice inaugurated by the recent statutes which have attempted to regulate trials and appeals in cases at law and in equity tried in the District Courts of this state without a jury.

We shall not attempt any comparisons of systems so widely asunder, but will simply direct attention to some of the more obvious differences between the two systems.

First. The chancery system proper embraced only suits where equitable relief was sought, while the system of procedure introduced in this state by the act of 1893 (see chapter 82, Laws 1893) applies to cases at law as well as those in equity. Again, in the chancery practice there was no system of express findings of fact and law which is denominated a "decision" in the code states. This salutary and well digested system of express findings, and which discarded all implied findings, was not disturbed by the statute of 1893, except in one particular. That statute declared (section 1) that "no exception need be taken on findings of fact made." The language in terms clearly perpetuates the system of express findings. Besides, the act did not, in terms, repeal the statute which requires findings to be filed preliminary to the entry of judgment. In chancery no application for a new trial was ever made to the court of original jurisdiction. This was not the case under the reformed procedure which obtained in all the code states, and prevailed here prior to 1893; nor did that enactment in terms either repeal or refer to any of the pre-existing statutes regulating applications for new trials. Indeed, it is a problem only too familiar (and one much discussed at the bar and in the courts of this state since the act of 1893 was passed), whether that act was ever intended to repeal any feature of the laws of the state which govern motions for new trials. In the very case we are discussing the distinguished counsel for the respondent insisted in his argument before this court that the act of 1893 did not, as originally passed, or as amended in 1895, repeal any part of the law regulating new trials, but, on the contrary, counsel contended that such laws were available in court cases, and could be resorted to by suitors according to the exigencies of their cases. Other advisers of this court have strenuously contended that the right to move for a new trial in court cases was materially curtailed, but was not wholly destroyed, by the act of

1893. If either of these constructions of the statute are correct, then the innovations upon the practice which have resulted from the act in question, whatever they may be, do not operate to reintroduce that ancient and venerable system vaguely known as the "chancery practice." In fact, the old system of conducting suits for equitable relief has been deliberately discredited in all the code states, and, with the full approval of the most eminent members of the profession, has been superseded by the code system, which system, after many years of trial, has fully vindicated the wisdom of its founders. However this may be, there can be no room for doubt, under the amended statutes embraced in section 5630, Rev. Codes, that on appeal in a court case the evidence adduced at the trial can only be reviewed in that particular mode pointed out by that section, and in other portions of the code expressly referred to in that section. Nor can this court permit counsel, at their election, by merely waiving findings of fact, to inaugurate another and wholly unwarranted and unfamiliar method of investigating questions of fact arising upon the evidence. The statutory method is clear and unambiguous, and we are not permitted, upon suggestion of counsel, to disregard that method, and resort to some other. Nor do we agree with counsel in his assumption that in cases retried in this court findings of fact "are of no use." In this class of cases, as much as under the system displaced by the act of 1893, it will, in our judgment, aid both court and counsel to have the real points at issue sifted out in advance, and enucleated in the manner carefully pointed out in the code. If counsel are early advised upon the the specific points to be discussed in the court of last resort, they are likely to be in a better position to intelligently advise this court with respect to its duties. Besides, there is often great advantage resulting from knowing just what view was taken of the facts and the evidence in the trial court. In equity cases, when tried *de novo* in an appellate court, the view taken below of questions of fact arising upon the evidence was not ignored in the court of review. Where evidence was evenly balanced, or nearly

so, a doubtful scale would always turn in favor of that view of the evidence which was adopted below; and this rule rested upon the well known fact that the trial court has facilities for weighing the testimony which a reviewing court cannot have. This rule was examined and applied by this court in *Jasper* v. *Hazen*, 4 N. D. 1, 58 N. W. Rep. 454.

(72 N. W. Rep. 1089.)

STATE OF NORTH DAKOTA *vs.* ALEC COUDOTTE.

Opinion filed Nov. 8th, 1807.

Testimony of Accomplice—Corroboration.

The testimony in this case relied upon by the state as furnishing the corroboration required to warrant a conviction upon the testimony of an accomplice examined, and *held* to furnish no corroboration, under section 8195, Rev. Codes, which declares that "a conviction cannot be had upon the testimony of an accomplice unless he is corroborated by such other evidence as tends to connect the defendant with the commission of the offense, and the corroboration is not sufficient if it merely shows the commission of the offense, or the circumstances thereof."

Corroboration Must be Independent of Accomplice.

Testimony that tends to connect the defendant with the commission of the offense charged only when supplemented by certain testimony of the accomplice is not such corroborating testimony as the statute requires.

Attempt at Suicide—Not Evidence of Guilt.

There is no presumption of guilt arising from the fact that a person charged with crime, and while in confinement, and before trial, attempts to commit suicide.

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

Alec Coudotte was convicted of murder and appeals.

Reversed.

R. N. Stevens and *John Stowell*, for appellant.

John F. Cowen, Attorney-General, *H. A. Armstrong*, State's Attorney of Emmons County, and *E. S. Allen*, for the State.

BARTHOLOMEW, J. The appellant, Alec Coudotte, was informed against by the state's attorney of Emmons County for the crime

of murder in the first degree, in killing one Thomas Spicer, in said county, on the 17th day of February, 1897. He was tried, convicted, and sentenced to be hung, in the District Court of said county. A motion for a new trial, made on a statement of the case, was denied, and the appellant brings the entire record to this court by appeal. The errors alleged, and which we shall discuss, relate exclusively to the sufficiency of the evidence to support the conviction. If there was in the case no question as to the proper corroboration of an accomplice, our task, in this instance, would be brief. True, there is strong evidence in the case tending to support the appellant's claim of alibi; but, on the state of this record, no court would be warranted in disturbing the finding of the jury upon that point. But the principal evidence for the state in this case came from two confessed accomplices. Our statute, voicing the almost universal practice in both Enggland and the United States even in the absence of statute, declares, in section 8195, Rev. Codes: "A conviction cannot be had upon the testimony of an accomplice unless he is corroborated by such other evidence as tends to connect the defendant with the commission of the offense, and the corroboration is not sufficient if it merely shows the commission of the offense, or the circumstances thereof." The specific requirement, under this section, is that the corroborating evidence tends to connect the defendant with the commission of the offense. Whart. Cr. Ev. § 442, declares: "The corroboration requisite to validate the testimony of an alleged accomplice should be the person of the accused. Any other corroboration would be delusive, since if corroboration in matters not connecting the accused with the offense were enough, a party who, in the case against him, would have no hope of escape, could, by his mere oath, transfer to another the conviction hanging over himself." And Rosc. Cr. Ev. 130, states the principle thus: "There may be many witnessess, therefore, who give testimony which agrees with that of the accomplice, but which, if it does not serve to identify the accused parties, is no corroboration of the accomplice." Under this principle, which

courts were compelled originally to adopt to protect innocent persons, and which, by innumerable decisions, was crystalized into universal law, and which is declared in clear and specific language by our statutes, it will not be necessary or proper for us to discuss any of that portion of the so-called corroborating testimony which simply goes to show that the crime was committed, and the time and manner of its commission. We can profitably discuss only such portions of this testimony as it may be claimed in some degree tend to identify this defendant with the commission of the crime.

The confessed accomplices are Philip Ireland and Paul Holy Track. These parties also accuse the defendant and one George Defender with being present, and aiding and participating in the commission of the crime. All these parties are Indians, or persons of Indian descent. They belong at the Standing Rock Indian agency. This agency is situated on the west bank of the Missouri River, and opposite the town of Winona, in Emmons County. The residence of Thomas Spicer, where the crime was committed, was about 1¾ miles north of Winona, and on the same side of the river, which at that season of the year (February 17th) was frozen over solidly, and could be crossed at any point. The crime that was committed has few parallels in atrocity and wanton cruelty. The sole object for its commission was to plunder the house. To accomplish this purpose, Thomas Spicer and his wife, and his wife's aged mother, Mrs. Waldron, and their married daughter, Mrs. Rouse, were foully murdered; and then, actuated, it would appear, solely by the instincts of a savage, the perpetrators proceeded to murder the twin baby boys of Mrs. Rouse. Six persons in all were killed. It could not be otherwise than that a deed of such depravity should arouse the community where committed almost to frenzy. Every instinct of humanity and of justice demanded the swift and certain punishment of the inhuman miscreants whose minds could conceive and whose hands could execute a deed so dastardly. Standing face to face with such a crime the judgment of a juror, however intelligent

and honorable he may be, must inevitably be influenced in some degree by his surroundings. It is to the credit of his nature that it cries out for punishment for such a crime. But under such circumstances it is too plain for argument that the court, if such a thing could be possible, should exercise all the greater care to see to it that the evidence does conform to a well-established and statutory rule, which the experience of ages has shown to be necessary for the protection of innocent persons. It was suggested in argument that as there were two accomplices, and their testimony was substantially the same, a less amount of corroborating evidence than in ordinary cases, and where there was but one accomplice, would suffice. This argument should be addressed to the jury. It can have no weight here, because we are not concerned with the amount of corroborating testimony. If there be any such evidence, coming within the requirements of the statute, its weight was for the jury, and we cannot disturb their verdict. But, if there was no such testimony, then the jury should have been so instructed, or, failing in that, the motion for a new trial based upon that ground should have been granted.

We shall discuss the testimony only so far as may be necessary to an understanding of those portions which the state claims furnish the corroboration required by the statute. It appears that after Coudotte's arrest, and prior to his preliminary hearing, he was confined in jail at Williamsport, the county seat of Emmons County. While thus confined he was visited by several parties who spoke the Sioux language, which was Coudotte's native tongue—and he could speak no other—and they endeavored to procure from him a confession. Prior to this time he had gashed himself in the abdomen with a knife. The state claims, and perhaps correctly, that this was an attempt to commit suicide. He was suffering from the wound at the time of the interview, and stated to the witnesses that he expected to die from its effects. In that interview, if we accept as true what the witnesses state, Coudotte said that he was in Winona on said February 17, 1897; that he left there about two o'clock in the afternoon, and crossed

over to the agency, where he met one Frank Blackhawk; that Blackhawk was intoxicated, and took another drink of whisky from a supply that he (Coudotte) had; that Blackhawk then said to Coudotte that he was going over to kill the Spicer family, and asked Coudotte to go with him, which Coudotte refused to do, but immediately proceeded to his home. He gave as his reason for going home—to quote one of the witnesses: "Because people were going to be killed, and he would be home, so there would not be any blame for him." He also stated, according to the witnesses, that on February 20th he again met Blackhawk at one of the agency stores, and Blackhawk told him that he had killed the Spicer family, and wanted to give him money to keep the secret. We notice that the testimony of the accomplices in no manner implicates Blackhawk in the crime. But we assume that he was implicated. The utmost that can be claimed for this statement is that Coudotte was told beforehand that the Spicers were to be killed, and was told afterwards that they had been killed. But how can knowledge alone tend to connect him with the commission of the offense? Clearly, in no manner, and to no extent. The proposition is self-evident. It is proper to add that, through this statement wherein this knowledge is admitted, the appellant emphatically denies any connection with the commission of the crime.

The learned state's attorney claims much in the way of corroboration from the testimony of one Welch, who testifies that he thinks he saw the defendant and George Defender together on horseback at the Ft. Yates mule corral at or a little after six o'clock in the evening of the day on which the murder was committed. This would, at best, be very dangerous testimony on which to base a conviction for murder. The witness was 200 yards—nearly one-eighth of a mile—distant from the parties. We know that at or soon after 6 o'clock in the evening of February 17th, in this latitude, it is nearly or quite dark. Positive identification at that distance would be impossible, and in fact the

witness does not pretend to be positive. But assume that his surmise was correct; in what manner does the presence of Coudotte and Defender together at the corral, three miles southwest from the Spicer place, at 6 o'clock in the evening, tend to connect them with the commission of the offense? We doubt not, many other men might have been found together at that hour at points much nearer the Spicer place. Had the accomplices accused such other parties, their presence together would have been no evidence whatever tending to connect them with the commission of the offense. A contrary contention reaches absurdity, and yet the fact, standing alone, would be just as much evidence in one case as in the other. But the state's attorney argues that the accomplices testified that, after the murder had been committed, Coudotte and Defender left the Spicer place, on horseback, going north; that this evidence establishes the parties together on horseback at the scene of the murder; and that, taken with the further fact that they were seen together on horseback, two or three hours later, by another party, tends to connect them with the commission of the crime. We do not concede that the conclusion follows the premises, but in any event, in order that this testimony should show any force whatever as corroborating testimony, it is necessary to include the portion given by the accomplices. In other words, the accomplices must be permitted to corroborate themselves. This is utterly untenable. What we have just said applies with still greater force to the claim made for the testimony tending to show these same parties together at Winona on the night of February 18th. There is much conflict in the testimony as to whether or not they were there. In our judgment it is immaterial. The fact alone of their presence at Winona 30 hours later would in no manner tend to connect this defendant with the commission of the crime. Nor would such fact, if it were a fact, be any more incriminating because the defendant, on oath, denied it.

The state also claims some corroboration in the evidence relating to some beef which it is admitted was sold by Coudotte in

Winona about 4 o'clock on Tuesday, February 16th. We have read and re-read this testimony. We find no element of corroboration of the nature required by statute in it. Paul Holy Track testified that himself, the defendant, and Blackhawk killed a steer about daylight in the morning of February 16th in the timber near the Spicer house, and that the beef sold by Coudotte was a part of this animal. Coudotte claims that it was a portion of an animal killed by himself and Blackhawk at an entirely different place, and more than 24 hours earlier. But let us concede that the steer was killed as Holy Track testifies, and that Coudotte sold a portion of it in Winona on Tuesday afternoon; how does that tend to connect Coudotte with a crime committed 24 hours later? What possible connection could exist between the sale of this beef and the murder of Thomas Spicer? If there be any, it is found in the testimony of Paul Holy Track, and there only.

Persons who examined the body of Thomas Spicer testified that four different weapons had been used, either in committing the murder or mutilating the body, to-wit, a gun loaded with a leaden bullet and shot, an ax, a pitchfork, and a spade or shovel. The state claims that this raises a presumption that four persons participated in the crime. This is surmise, merely. The dastard who fired the gun would not hesitate to dispatch a wounded victim with an ax. There is no presumption that a murderer will use but one weapon. But if, from the fact that four weapons were used, a jury would be warranted in saying that four persons participated in the crime, where is the corroborating testimony that declares, or tends to declare, who these four persons were? The use of the weapons points as directly towards any other Indian on the reservation, or any citizen of Winona, as towards this defendant. This evidence is a striking instance of the precise vice against which the rule as to corroborating an accomplice is directed. It fails to tend to identify the party.

There remains but one further fact from which the state claims any corroboration whatever—the only fact that has given us any trouble—and that is the attempted suicide. Upon this question

we get no direct aid from the authorities. The question whether or not any presumption of guilt arises from an attempt to commit suicide, made before trial, is one that has never been discussed, or even adverted to, so far as we can ascertain. Counsel seek to assimilate an attempt to commit suicide with flight, and, since the fact of flight is generally allowed to go to the jury as some evidence of guilt, it is urged that, where a party charged with crime attempts to commit suicide, that fact raises a presumption, more or less strong, that such party is guilty of the crime charged. The argument is specious, but we think the parallel deceptive and dangerous. One who flees does so, generally, for the purpose of avoiding the punishment that follows violated law. One who commits or attempts suicide seeks to avoid no punishment. He deliberately accepts the highest punishment that the law could possibly inflict—death. Hence the very circumstance that raises the presumption of guilt from flight is absolutely wanting in suicide. In this, some impelling motive other than a desire to evade the punishment by law must be the basis for the act, and we think this motive will usually be found along the line of those facts and circumstances which make flight itself innocent. Whart. Cr. Ev., in speaking of flight, concealment, etc., says (section 750): "But it must be remembered that, while these acts are indications of fear, they may spring from causes very different from that of conscious guilt." And the author quotes from Best, Ev. (5th Ed.) 578: "Many men are naturally of weak nerve, and under certain circumstances the most innocent person may deem a trial too great a risk to encounter. He may be aware that a number of suspicious, though inconclusive, facts, will be adduced in evidence against him. He may feel his inability to procure legal advice to conduct his defense, or to bring witnesses from a distance to establish it. He may be assured that powerful or wealthy individuals have resolved on his ruin, or that witnesses have been suborned to bear false testimony against him." He who commits or attempts suicide, since he does not seek to avoid punishment, must seek to avoid the disgrace that attaches to being charged

with crime—the ignominy that attaches to a public trial for crime. He is deficient in the nerve necessary to face the situation, or it may be that a wild, untamed nature rebels beyond all bounds at being confined. But with what natures would these motives of delicacy be most powerful—the innocent or the guilty? That person whose nature was so depraved and hardened that he could commit the crime charged in this information would feel no sensitive shrinking from the disgrace of an arrest or trial. It is a well known fact that the suicidal tendency frequently manifests itself in insane persons. It has been said that no perfectly sane person ever committed suicide, and there is doubtless an element of truth in the statement; and, the greater the dementia, the more probable the desire of self-destruction. When we essay the task of accounting for suicide on any general grounds, we undertake a task that, from its very nature, is impossible of performance. The human mind is so wonderfully, yet so delicately, constructed, the human passions are so powerful, yet so varied, that it is idle for any one person to pretend to enter the consciousness of another, and account for the inner workings of that other mind. We only know that, whatever may be the motive, it is not, and cannot be, a desire to avoid punishment. The number of innocent persons who commit suicide within any given time is always many times greater than the number of guilty persons who commit suicide within the same time. Hence suicide can always be accounted for upon the hypothesis of innocence more readily than upon the hypothesis of guilt. This being true, a jury never could be permitted to treat it as an evidence of guilt. We believe that it would be dangerous to innocence to declare, as a legal proposition, that an attempt to commit suicide before trial raises a presumption of guilt in any case. The danger of such a proposition is well illustrated by this case. This defendant, an Indian, finds himself torn from his tribal surroundings, and incarcerated in a prison of those whom he regards as his hereditary enemies. He is charged with the murder of a white man. He believes himself to be absolutely in the hands of

those who hate his race. He is ignorant of our laws and our court proceedings. He knows only too well what would be the result were the conditions reversed, and he cannot understand why he should receive treatment different from that which he would mete out to an enemy. Seeing only the blackness of darkness ahead of him, and that irrespective of his innocence or guilt, would it be strange that his nerve should fail him, and he seek to shut out the hated picture by severing his hold upon life? Moreover, he comes of a race whose untamed natures cannot brook confinement. The defendant was asked on cross-examination why he attempted to commit suicide, and promptly answered that he did it because he did not like to be confined. And a witness in the case, who has spent practically his entire life with the Sioux Indians, speaks their language, and understands every phase of their character, and whose testimony is entirely uncontradicted, says: "I have often known, if an Indian is put in the guard house for any little offense, I have known them to cut themselves, and try to commit suicide in many different ways. That seems to be a predisposition among them, in confinement. I have frequently known of Indians attempting suicide because they were in confinement. I was present at a conversation with Coudotte in the Emmons County jail. He spoke in my presence in relation to his attempt to commit suicide. He said he could not stand to be confined, and he would just as soon be dead as to have to stay in there and stand the confinement." In view of these undisputed facts and the surrounding circumstances, it would shock the sense of justice to say that this attempt at suicide, standing alone, raises a presumption of guilt which so far corroborates the testimony of an accomplice that a conviction could be based upon his testimony.

We have discussed every point in the evidence from which the state claims any corroboration whatever, and we find that in each instance the testimony fails to meet the statutory requirement. It follows that the motion for a new trial should have been granted, and that the judgment based upon the verdict must be

set aside, and a new trial ordered. It is proper to add that owing to the enormity of the crime in this instance, and the deep indignation of the public, and the positive statements of the confessed murderers, Paul Holy Track and Philip Ireland, the learned state's attorney of Emmons County could not, in the performance of his official duty, do less than present to the court this information against Coudotte. He has certainly pursued with diligence and intelligence every source of information open to him that promised any corroborating testimony, and he presented the testimony that he could procure to this court in the strongest light that it will bear. But, tested by an inflexible rule of law, that testimony cannot support a conviction.

Reversed. All concur.

(72 N. W. Rep. 913.)

STATE OF NORTH DAKOTA *vs.* DANIEL MALONEY.

Opinion filed Nov. 8th, 1897.

Assault with Intent to Kill—Conviction of Lesser Offense.

The defendant was charged by an indictment framed under section 7115, Rev. Codes, with the offense of assault and battery with intent to kill, while armed with a deadly weapon, to-wit, a knife. *Held*, construing section 8244, Id., that it was legally competent, under such a charge, for the jury to return a verdict of guilty of an aggravated assault, defined in section 7145, Id.

Sending Jury Back to Correct Verdict.

After being charged by the court, the jury retired for deliberation, and later returned into court, and announced that they had agreed upon a verdict, and upon the request of the court the foreman of the jury read such verdict, which verdict, (omitting formal parts,) is as follows: "We, the jury, in the above-entitled cause, find the defendant, Daniel Maloney, guilty of assault and battery with a sharp and dangerous weapon, with intent to do bodily harm." The court declined to receive said verdict, and it was not recorded. The court, in effect, stated to the jury that a verdict for the offense indicated by the terms of their verdict would be insufficient if it omitted to declare that the offense was committed "without justifiable cause or excuse." Error is assigned upon this instruction, and also upon the action of the court in sending the jury back for further deliberation. *Held*, that both assignments of error are valid, and must be sustained. *Held*, further, under the circumstances, of this case, that such errors did not prejudice the defendant.

Judgment Not Reversed for Mere Error in Procedure.

The jury went out under said instructions, and subsequently returned into court with a verdict which was received and recorded, and upon which the judgment appealed from was entered. Error is assigned upon the last verdict upon the ground that the jury had exhausted their powers in returning their first verdict (which was valid and sufficient), and hence could not return another verdict in the case. The last verdict was identical with the first in all material features except that the words aforesaid—*i. e.* "without justifiable cause or excuse"—were added in the last verdict. *Held*, that the last verdict was valid. *Held*, further, upon facts stated in the opinion, that this court will not reverse a judgment for errors of mere procedure unless the error appears of record affirmatively.

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

Daniel Maloney, indicted under the name of Thomas Maloney, was convicted of assault with a dangerous weapon, and appeals.

Affirmed.

M. H. Brennan, for appellant.

J. F. Cowan, Attorney-General, for respondent.

WALLIN, J. In this action the defendant was charged by indictment with the crime of assault and battery with intent to kill, while armed with a deadly weapon, to-wit, a knife. The indictment was obviously framed under the provisions of section 7115 of the Revised Codes. It was challenged by a motion in arrest of judgment. We think the indictment was sufficient in form and substance, and there can be no doubt of the jurisdiction of the trial court over the subject matter. It appears that, after being instructed by the trial court, the jury retired for deliberation, and subsequently came into court, and stated that they had agreed upon a verdict; whereupon, at the request of the court, the foreman of the jury read the verdict, which was as follows, omitting formal parts: "We, the jury in the above entitled action, find the defendant, Daniel Maloney, guilty of assault and battery with a sharp and dangerous weapon, with intent to do bodily harm." Upon hearing the verdict read, the court said to the jurors that the verdict could not be received by the court, and said verdict was never received or recorded. The court then instructed the jury as follows: "I will give you this additional instruction in

writing, and no more. You ask me to tell you whether a certain portion of one of the verdicts can be left out or omitted from your verdict, and have the same received. Answering this question as to whether you can omit from one of the verdicts the words 'without justifiable cause or excuse,' I will say that you cannot omit those words from that verdict, and have it be a verdict of guilty of the offense of assault and battery with a sharp or dangerous weapon without justifiable cause or excuse, as the assault and battery must be without justifiable cause or excuse before the defendant can be guilty at all of the offense named. If the assault and battery were committed from a justifiable or excusable cause, the defendant would not be guilty. These several verdicts were prepared under my direction, and are in accordance with the statute in such cases made and provided, and it is for you to say which one is to be agreed to under the evidence and the law as given you." After receiving these instructions, the jury retired for further deliberation, and later returned into court with the following verdict, which was received and recorded, omitting formal parts: "We, the jury in the above entitled cause, find the defendant, Daniel Maloney, guilty of assault with a sharp or dangerous weapon with intent to do bodily harm, without justifiable cause." Upon this verdict the judgment appealed from was entered.

The errors assigned in this court relate, first, to the order overruling the motion in arrest of judgment. This we have already disposed of, and in fact this assignment seems to have been abandoned by counsel, not having been discussed in his brief. Second. Error is assigned upon a certain instruction to the jury relating to the doctrine of reasonable doubt. We think the assignment is wholly untenable (when the entire charge is taken into consideration), and shall, therefore, over-rule the point without further discussion. Third. Error is assigned upon the ground that counsel for the defendant was not present in court when either of the verdicts in question was brought into court by the jury. The record fails to disclose whether this statement is

true in fact or not. The record on the point being silent, the point is over-ruled on the ground that the error, if any, does not affirmatively appear upon the record. See *State* v. *Haynes*, 7 N. D. 70, 72 N. W. Rep. 923.

The most important questions in the case arise upon errors assigned upon the verdicts, and the instructions given to the jury when the jury came into court with their first verdict. Counsel claims that the court erred in not receiving the first verdict, and erred in stating the grounds and reasons to the jury upon which the court declined to receive such verdict. Counsel further contends that the second verdict was improperly and unlawfully found and returned into court, for the reason, as counsel claims, that a valid verdict upon the issues had previously been returned into court by the jury, and that the original verdict had exhausted the functions of the jury in the case; or, in other words; that the verdict last returned is absolutely void. Hence, as counsel contends, the judgment, which is based wholly upon the second verdict, cannot be lawful, and should therefore be reversed.

It will aid in the solution of the questions presented to consider, first, certain statutes bearing upon the subject matter. As we have stated, the indictment charges an offense defined by section 7115 of the Revised Codes. This section declares that any person "who commits an assault and battery upon another by means of any deadly weapon, * * * with intent to kill any other person is punishable," etc. This statute defines an aggravated assault and battery with a deadly weapon, committed with a specific felonious intent, viz. an intent to kill. On a trial for this offense a simple verdict of guilty would legally declare that the accused was guilty of the aggravated assault and battery charged; *i. e.* an assault and battery with intent to kill. But it frequently happens that in trials based upon such a statute the evidence fails to show that the accused is guilty of the aggravated assault, and yet does show that he is guilty of an assault and battery or of a simple assault. To meet such a contingency, a statute has been enacted, voicing a rule existing at common law, declaring: "The

jury may find the defendant guilty of any offense, the commission of which is necessarily included in that with which he is charged in the information or indictment," etc. Rev. Codes, § 8244 Under this statute the defendant could lawfully have been found guilty of the offense of assault and battery, because that offense is necessarily involved in the commission of the aggravated offense charged in the indictment, and defined by section 7115. But the inclusive principle declared by section 8244, *supra*, is still more comprehensive, and will embrace an offense not included within the particular statute under which an information or indictment is framed. It will permit a jury to find a defendant guilty of any offense necessarily included in the commission of the offense charged. Applying this test, we discover that the aggravated assault and subordinate offenses mentioned in section 7145, Id., are within this principle of inclusion. It is manifest that an assault, or assault and battery, while armed with a sharp or dangerous weapon, with intent to do bodily harm, is an offense necessarily included in the offense of assault and battery with intent to kill, while armed with a deadly weapon. These explanations will show that in the case under consideration it was legally possible for the jury to return any one of five verdicts, viz. a verdict of not guilty, a verdict of guilty of assault, or guilty of assault and battery, or guilty of the aggravated assault set out in section 7145, or guilty of the aggravated assault and battery defined in section 7115. It appears in the record that the learned trial judge very properly prepared and furnished the jury with various forms of verdicts adapted to the various legal phases of the case, and instructed the jury to use the form adapted to the verdict which they might desire to return. Under the law and instructions of the court, the jury retired, and later came into court, and announced that they had agreed upon a verdict, and the foreman read the verdict which they had agreed to return. This verdict has already been set out. The trial court, as has been seen, declined to receive this verdict, and sent the jury out for further deliberation, after instructing them upon the law of the case, and

with respect to the forms of verdict in their possession. The instructions then given to the jury were to the effect that the verdict was incomplete, because it failed to declare on its face in terms that the assault and battery which the defendant committed when armed with a sharp or dangerous weapon with intent to do bodily harm was done "without justifiable cause or excuse." This instruction is challenged by an exception, and defendant further excepts to the action of the court in sending the jury out for further deliberation upon the case.

The question first presented on these exceptions is whether the verdict first brought into court was a valid verdict. We think it was valid. It declared that the "jury in the above entitled cause find the defendant, Daniel Maloney, guilty of of assault and battery with a sharp and dangerous weapon, with intent to do bodily harm." It would doubtless be correct to charge the jury as a matter of law, to guide them in weighing the evidence in the case, that the defendant could not be found guilty of either an assault, an assault and battery, or an assault, armed with a sharp or dangerous weapon, with intent to do bodily harm, unless the fact appeared in evidence that the criminal act was committed "without justifiable cause or excuse." But the question before the trial court was not a question of evidence, but was whether the verdict brought in was sufficient in substance and form. To our minds, it is obvious that the verdict was, first, a verdict of guilty. This incriminates the defendant, and excludes a verdict of not guilty. Second, it found in express terms that the defendant was guilty of assault and battery. This feature implies that the defendant was guilty of the willful and unlawful use of force upon the person of another. Rev. Codes, § 7142. If the residue of the language of the verdict had been incomplete in fact, as it was thought to be by the court below, because the words, "without justifiable cause or excuse," were omitted, such residue could have been rejected as surplusage. If rejected, there would then remain a complete and formal verdict for assault and battery, which is an offense necessarily included in

the offense charged, and hence a legitimate verdict in the case. Surplusage can always be rejected. But we are of the opinion that the omission from the verdict of the words above quoted does not render the meaning of the verdict indefinite, or at all obscure. Omitting the words, "without justifiable cause or excuse," the verdict is clear and intelligible, and points directly to one offense, and one only, viz. an aggravated assault and battery, defined by section 7145 of the statute. In terms, it finds the defendant guilty of an assault and battery while armed with a sharp or dangerous weapon, and superadds the felonious intent named in the statute; *i. e.* with intent to do bodily harm. We see no essential element of this statutory offense which is not described by the language found in the verdict with reasonable clearness and certainty, and this is all the law requires in construing the language of verdicts. The well settled rule is that the language of verdicts must have a reasonable and liberal construction. If the verdict "finds the defendant guilty of something duly charged, and constituting an offense, yet less than the entire allegation, it cannot be treated as void; it is a conviction of a part." 1 Bish. New Cr. Proc. § 1005. The same author (section 1005) says: "The language of the verdict, being that of 'lay people,' need not follow the strict rules of pleading, or be otherwise technical. Whatever conveys the idea to the common understanding will suffice, and all fair intendments will be made to support it." See, to the same effect, *State* v. *Ryan*, 13 Minn. 370 (Gil. 343); *Hart* v. *State*, 38 Tex. 383. Applying the liberal rules of construction as laid down by these authorities, we have no difficulty in reaching the conclusion that the verdict first returned into court in this case was sufficient in both form and substance, and would sustain a judgment for the aggravated assault and battery described in the verdict, and defined in section 7145, which offense, as has been shown, is within the purview of the statute under which the indictment was framed. In the case at bar the record does not require us to determine whether an information or indictment which omits the statutory language, viz.

" without justifiable or excusable cause," would be insufficient in substance. On that point we express no opinion. Counsel cites *State* v. *Johnson*, 3 N. D. 150, 54 N. W. Rep. 547, as authority to show that it was fatal to omit from the first verdict the words, " without justifiable or excusable cause." It does not sustain the contention. In that case, as in this, the verdict operated to acquit the defendant of the offense charged in the information. But in the Johnson case, unlike the case at bar, the words employed in the verdict failed to point out clearly and distinctly another offense. In that case there was no reference to a sharp weapon, a dangerous weapon, a deadly weapon, or to any weapon. To have sustained the conviction for the aggravated assault defined in section 7145, for which offense Johnson was sentenced, required the court to go beyond any language used in the verdict, and spell out a public offense by mere inference or conjecture. This we declined to do in a criminal case. The verdict here is not at all similar. Its language points with unerring certainty to a particular offense, and to none other. The very terms of the verdict direct the attention of the court to the statute under which the sentence of the court must be pronounced. Our conclusion is that the court erred in requiring the jury to retire for further deliberation, and erred in instructing them that the words omitted from the first verdict—*i. e.* " without justifiable or excusable cause "—were essential parts of any verdict which was legally proper to return in the case.

But the jury, after having been sent out, returned into court with a verdict which has been quoted, and this verdict was received and recorded. The verdict as recorded was like the first in all of the material features. But the words, " without justifiable cause or excuse," were appended to it. In our opinion, for reasons already given, the last verdict was perfectly valid, but no more valid in matter of substance than was the first. It follows, necessarily, that the last verdict, if not impeached by some considerations extraneous to itself, will support the judgment and sentence in the case under consideration.

The question remaining is whether the jury which brought in the final verdict was a jury in the sense that it could lawfully return the verdict which it did finally return. We think this question must receive an affirmative answer. After being impaneled and sworn to try the case, the jury heard the evidence, received the charge of the court, and retired for deliberation. It came into court with a verdict in a certain form. The verdict was erroneously deemed insufficient by the trial court, and, after the defects existing in the verdict (from the standpoint of the trial court) had been pointed out, the jury were sent back for deliberation upon the case. We discover in this episode in the trial only what is constantly occurring in the trial courts. Juries very frequently come into court, and, after announcing an agreement, present what they consider a valid verdict, but which is either informal or invalid in some respect, or is deemed to be by the trial court. In either of the contingencies suggested, the court has the undoubted right and authority to require a correction of the verdict at the hands of the jury, so as to make it conform to the views of the court in matter of law; and the views of the court in such a case are the law of the case so far as the duty of the jury is concerned. The jury must conform to the directions of the court in matters of law, and modify their action accordingly. The jury cannot determine for themselves whether or not the court is mistaken in its view of the law, while the court, on the other hand, is clothed with plenary judicial power to determine whether or not the verdict offered is valid in form and substance, and whether or not it will send the jury back for further deliberation. Hence, from the standpoint of authority, the trial court has jurisdiction in all such cases to send the jury back for deliberation, and to instruct them with respect to the law of the case before sending them back. That the jury, after being instructed, has a right to retire, and deliberate upon their verdict, and in so doing to conform their action to the instructions of the court, is a necessary sequence. It is their clear duty to obey the instructions of the court in all matters of law. In

this case, the jury, by their verdict, did conform to the instructions given by the court with respect to the form of their verdict. They supplied in their last verdict the very words which they were told by the court were essential words. We cannot concede for a moment that the jury was not a jury when it returned its last verdict. Whether the last verdict is valid or not is an independent question. Verdicts are often invalid when brought into court by a jury having full authority to return a verdict. We have said that the instructions given to the jury were erroneous. In our opinion, the original verdict was valid, and the words appended to the original when it was brought into court the second time, viz. "without justifiable or excusable cause," were superfluous words.

The question is now presented whether the defendant has been in any wise prejudiced by the errors we have pointed out in the procedure had at the trial. This question, in our judgment, must be answered in the negative. True, it might have happened, under the directions given the jury before sending them out for further deliberation, that the trial would have resulted differently. The jury had full control of the evidence and facts, and consequently had authority to return any of the various verdicts warranted by the law of the case. So far as authority goes, the jury might have returned into court with a verdict either more or less favorable to defendant than that originally brought into court by them. But counsel contends that, inasmuch as the jury had the power to bring in a verdict for the offense charged, viz. assault and battery with intent to kill, which is punishable with greater severity than the offense described in the first verdict, he was prejudiced. We could indorse this view of the counsel if the verdict finally returned had in fact found the defendant guilty of a more aggravated offense than the first, because, in the event suggested, the defendant would have been liable to receive a much more severe penalty than could have been inflicted under the first verdict. But the actual case is wholly different. The defendant stands before this court, and stood in the trial court, in

no worse position than he occupied when the first verdict was brought into court. The two verdicts were identical in their legal effect and in all possible consequences which could hinge upon them. Finding no substantial error in the record, the judgment will, in all respects, be affirmed. All the judges concurring.

(72 N. W. Rep. 927.)

JAMES BLACK *vs.* MINNEAPOLIS & NORTHERN ELEVATOR CO.

Opinion filed Nov. 9th, 1897.

Seed Lien—Enforcement—Right of Possession.

The holder of a seed lien had, before the enactment of section 4845, Rev. Codes, no right to take possession of the property covered by his lien, even after default, but must have enforced his right to possession in a court of equity in an action to foreclose the lien.

Owner Cannot Maintain Trover.

One who bought the property covered by such lien took it subject thereto, but could not, under any circumstance, be held liable for the conversion thereof, or even in an action on the case for damages to the lienholder's rights, when such purchaser had done nothing to effect the lienholder's rights (as by destruction or removal of the property beyond his reach), but had merely refused to deliver him the property on demand.

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

Action by James Black against the Minneapolis & Northern Elevator Company to recover damages for the alleged conversion of wheat upon which said Black held a seed lien. From an order setting aside a verdict for defendant, and granting a new trial, defendant appeals.

Order reversed.

Cochrane & Feetham, for appellant.

The account in writing attached to the complaint is not such an account as the statute requires. *Parker* v. *Bank*, 3 N. D. 89. The statutory lien can neither be acquired or enforced unless there has been a substantial compliance with the act of the legislature from which the lien arises. *Lavin* v. *Bradley*, 1 N. D. 291;

Parker v. *Bank*, 3 N. D. 88. The complaint avers no facts showing any right to possession in plaintiff. *Hathaway* v. *Brayman*, 42 N. Y. 322; *Manning* v. *Monaghan*, 28 N. Y. 588; *Dunning* v. *Fitch*, 66 Ill. 51. No demand is averred or proved. *Sanford* v. *Duluth & D. Elev. Co.*, 2 N. D. 6. Under the seed lien law plaintiff was not entitled to the possession of the property sued for and there is no allegation of the insolvency of McCoy. *Marsh* v. *White*, 3 Barb. 518; *Lain* v. *Hitchcock*, 14 Johns. 213; *Gardner* v. *Heartt*, 3 Denio 232; *Frink* v. *Pratt*, 22 N. E. Rep. 820. Plaintiff by consenting to a sale of the wheat waived his lien thereon. *N. E. Mortgage Security Co.* v. *Great Western Elevator Co.*, 6 N. D. 407; 2 Waits A. & D. 182, 2 Cobby Chat. Mtgs. 637; Jones Chat. Mtgs. 465; *Littlejohn* v. *Pierson*, 36 N. W. Rep. 477; *Stafford* v. *Whitcomb*, 8 Allen 518; *Roberts* v. *Crawford*, 54 N. H. 532; *Pratt* v. *Maynard*, 116 Mass. 388; *Cohn* v. *Smith*, 2 So. Rep. 244. The grain grown from Anderson and Black seed was mixed in one bin. Plaintiff has not identified the grain in suit as the grain produced from the Black seed. *Clark* v. *Voorhees*, 12 Pac. Rep. 529; Jones Chat. Morts. 483; *Saunders* v. *Voorhees*, 12 Pac. Rep. 526; *Robinson* v. *Holt*, 75 Am. Dec. 233; *Wood H. M. Co.* v. *M. & N. El. Co.*, 48 Minn. 404; *Mowry* v. *White*, 21 Wis. 417; *Simmons* v. *Jenkins*, 76 Ill. 479; *Hubbell* v. *Allen*, 90 Mo. 574; 3 S. W. Rep. 22; *Rosenberg* v. *Thompson*, 8 S. W. Rep. 895.

Carmody & Leslie, for respondent.

The account and notice are sufficient if they contain all the statute requires, and the notice need contain only such things as the statute requires it to contain. *Neihous* v. *Morgan*, 45 Pac. Rep. 255; *Clifford* v. *Tomlinson*, 64 N. W. Rep. 381; *Ramsey* v. *Merriam*, 6 Minn. 168; *Tibbetts* v. *Moore*, 23 Cal. 213; *Maxwell* v. *Newton*, 27 N. W. Rep. 32; *Trofton* v. *Cornwell*, 64 N. W. Rep. 1148.

The grain having been mixed without respondent's fault, his lien attached to an undivided interest in the entire mass in the proportion his wheat bears to the mass. *Stone* v. *Quaale*, 29 N. W. Rep. 326, 36 Minn. 46; *Reed* v. *King*, 12 S. W. Rep. 772; *Claf-*

lin v. *Cont'l J. Works*, 11 S. E. Rep. 721; *Creighton* v. *Cole*, 38 Pac. Rep. 1007; *First National Bank* v. *Scott*, 44 N. W. Rep. 987; *Wells* v. *Batts*, 17 S. E. Rep. 417; *D. M. Osborne & Co.* v. *Cargill Elevator Co.*, 64 N. W. Rep. 1135.

CORLISS, C. J. We are compelled to reverse the order granting a new trial. The court after having directed a verdict for defendant, set aside such verdict, and ordered a new trial. Plaintiff bases his right to recover upon a seed lien. The statute (chapter 150, Laws 1887) under which he claims this lien is silent on the subject of possession. It is clear that the lien is given without reference to the possession by the holder of such lien of the crop on which it is filed. The owner is to remain in possession of the land on which the crop is growing, and harvest and thresh the same. All this is contemplated. Unlike a common law lien, it is independent of possession by the one claiming the lien. Nor can we discover in the statute any provision that the holder of the lien may ever take possession thereof preliminary to a foreclosure of his lien thereon. It is true that section 5 declares that "the lien may be foreclosed by a sale of the property embraced in such lien upon the notice and in the manner provided by law for the foreclosure of chattel mortgages." But it cannot be inferred from this provision that the holder of the lien has any right to take possession for the purpose of foreclosure. This section does not attempt to regulate the matter of possession, but merely provides how the party should proceed in enforcing his right. It does not place the holder of a seed lien in any better position than a chattel mortgagee whose security does not, in terms, give him a right to take possession. At common law the legal title was vested in the mortgagee, and this is still the rule in some states. But it is not the law in this jurisdiction. Here the mortgagee has a mere lien, and, if his instrument gives him no right to possession, there is no principle of law which confers such right upon him. He is the holder of a lien which does not require the aid of possession, and will not, in terms, authorize the taking of possession, except when the holder of it is armed with the

order of a court of equity in proceedings instituted for the foreclosure of such lien. Said the court in *Fowler* v. *Merrill*, 11 How. 374: "The mortgaged property is given up or taken possession of by the mortgagee usually at the time of the decree; and, if not surrendered then, its value at that time, instead of the specific property mortgaged, must be and was regarded as the rule of damages." But the right to demand that a court of equity shall put him in possession, so that he can exhibit the property on the day of sale, and deliver it to the purchaser, is entirely different from the possessory right which will support an action for conversion or in replevin. It is a right which is not absolute, like the right of a mortgagee to take possession when his mortgage in terms so provides, but depends upon the action of a court of equity, which may withhold its order until the merits of the foreclosure action have been disposed of, or may even refuse to order the property delivered to the plaintiff at all, but, on the contrary, direct that it be turned over to a receiver, or some person who is appointed to sell. Under the statute regulating the foreclosure of chattel mortgages which was in force when the act of 1887 was passed, and to which this act refers, a mortgagee whose security did not, in terms, vest in him any right to take possession, was not empowered to take possession the same as if his mortgage had so provided. This foreclosure statute does not attempt to settle this question of possession, or change the law on the subject. See chapter 32, Laws 1885. Plaintiff could have foreclosed his lien in equity. The statute so expressly declares. In that action the large powers of a court of chancery would supply him with every remedy necessary to protect his rights. It is significant that our statutes now authorize any one who has a lien on personal property to take possession for the purpose of foreclosure after default in the payment of the debt secured by such lien. Rev. Codes, § 4845. But it seems to be urged that, as all distinctions between actions are abolished, it matters not what name is given to the present suit so long as the plaintiff has a right which should be enforced by the courts. This is true, but care

must be taken not to confound two utterly dissimilar ideas. What was intended to be accomplished by the sweeping declaration that all distinctions should be destroyed was not any change in the substantive law, but merely an alteration in the manner of setting forth causes of action in the plaintiff's pleading. The language of the statute is: "The distinction between actions at law and suits in equity and the forms of all such actions and suits heretofore existing are abolished; and there shall be in this state hereafter but one form of action for the enforcement or protection of private rights and the redress of private wrongs, which shall be denominated a civil action." Rev. Codes, § 5181. Those distinctions between actions which are intrinsic have not been, and cannot be, destroyed by any legislative fiat. True, it is that the distinctions between actions, so far as the mode setting forth the cause of action is concerned, have been done away with, and now the facts are to be stated in every case alike. But whether the facts so alleged constitute any cause of action at all is to be determined by the substantive law, and this law has not been changed by the code. If, on common law principles, the plaintiff could not recover for damages for an injury to his possessory right, because he had no such right, he cannot now recover such damages. The old distinctions in the manner of stating the cause of action are abolished. It is not necessary that the plaintiff should plead with all the technical precision of the common law. It is sufficient if he spreads out the facts upon the face of his pleading; and it is not even important that he should correctly name the nature of his cause of action. But it is still true that, if his facts do not show a right to possession, but only a right to have his lien respected, he cannot recover the value of the property as damages for the disturbance of the right to possession, but only the amount of the special injury he has sustained by an unlawful interference with his rights. Nor can it be said that the code has abolished even the names of different causes of action. It is still true, as formerly, that an action to secure the possession of a specific chattel is an action of replevin, and that a suit to recover

damages for the wrongful taking thereof is an action for conversion; and bar an bench will continue to recognize these inherent distinctions despite all legislative efforts to obliterate them. We do not hold that plaintiff should have failed because he has sued in trover, and has not shown a conversion. His complaint warranted a recovery on the theory of a special injury to his lien rights. But he failed in his proof. The owner of the wheat subject to the lien had an undoubted right to sell it to any one. He who bought it would take it subject to the lien, but it is also true that he would succeed to all the owner's rights. The defendant purchased the grain subject to the lien, but it had the same right to retain possession, as against the plaintiff, that the owner had. The plaintiff's remedy was not to recover possession, and then foreclose his lien, but to obtain possession in the foreclosure action itself. His demand upon the defendant did not render it liable for an action to recover the value of the wheat, or for damages to his security. The lien rights of a party are injured only when the property is placed beyond his power to reach it for purposes of foreclosure. So far as we know from this record, the property which is subject to the plaintiff's lien is still in the possession of the defendant, and can be taken by plaintiff in an action to foreclose his lien. All that was proved in the case was the fact of a purchase of the wheat by defendant, and the further fact that it had refused on demand to deliver the property to the plaintiff. In buying the grain, its act was lawful, and was not an invasion of the plaintiff's rights. When it refused to deliver up the property, it merely subjected itself to an action in equity to foreclose the lien. Such an action has not been brought. This suit is either for the conversion of this wheat or to recover damages for the injury to the plaintiff's rights as a lienholder. By nothing that it has done has the defendant subjected itself to either liability. It does not appear that it has mixed the grain with other grain, or has shipped it out of the state. See, as sustaining our views, *Manning* v. *Monaghan*, 23 N. Y. 545; *Id.*, 28 N. Y. 585; *Hull* v. *Carnley*, 11 N. Y. 501; *Id.*, 17 N. Y. 202; *Hale* v. *Bank*, 64 N. Y. 550; *Marsh* v. *White*, 3 Barb. 522.

The order is reversed. All concur.

(73 N. W. Rep. 90.)

THE GULL RIVER LUMBER COMPANY *vs.* T. P. LEE, *et al.*

Opinion filed November 30th, 1897.

Lien of Taxes—Repeal of Statute.

Section 90, Ch. 132, Laws 1890, made taxes assessed upon personal property a lien upon the personal property of the person assessed. This law was expressly repealed by the Revised Codes, which went into effect January 1, 1896. *Held*, that the lien created by the act of 1890 was destroyed by the repeal of the statute creating it.

Continuation of Provisions of Repealed Statute.

It is only when the provisions of a repealing statute are identical, or practically identical, with the provisions in the statute repealed, that the provisions can be considered as continuing in force without intermission.

Appeal from District Court, Emmons County, *Winchester*, J.

Action by the Gull River Lumber Company against Jerome B. Brock and T. P. Lee to foreclose a chattel mortgage.

From an order sustaining a demurrer to the separate answer of the defendant, T. P. Lee, he appeals.

Affirmed.

H. A. Armstrong, for appellant.

The taxes for the years 1890 and 1891 became liens upon the personal property of Brock, prior to the giving of the chattel mortgage to plaintiff, under which it claims the property in controversy. The lien for taxes is therefore superior and paramount. Sec. 90 Ch. 132, Laws 1890. *Reynolds* v. *Fisher*, 61 N. W. Rep. 695; *Farmers L. & T. Co.* v. *Memminger*, 66 N. W. Rep. 1014, and the lien extended to all personal property of the person assessed, even though acquired subsequent to the date when the lien attached. *Hill* v. *Palmer*, 49 N. W. Rep. 718; *Gaar* v. *Hurd*, 92 Ill. 330.

Taxes are not released by the neglect of the treasurer to enforce them at the time fixed by law. *Iowa Land Co.* v. *Douglas County*, 67 N. W. Rep. 52. The power to collect remains until the taxes are paid. *Horner* v. *Cilley*, 14 N. H. 85; *Perry County* v. *Selma*

Ry. Co., 58 Ala. 546. The statutory remedy for collection of personal taxes is exclusive. *Raynsford* v. *Phelps*, 43 Mich. 342; *Peo.* v. *Lee*, 112 Ill. 113.

Newton & Patterson, for respondent.

The statutory time for the treasurer to distrain for Brock's personal property taxes of 1891 expired June 1st, 1892. Sec. 56, Ch. 132, Laws 1890. *Hutchins* v. *Board*, 46 N. W. Rep. 678; Cooley on Taxation, 280; *Gardner* v. *Early*, 28 N. W. Rep. 427. When the statutes direct a thing to be done or provide the form, time and manner of doing it, it must be done in the form, time and manner prescribed, or it is invalid. *Chandler* v. *Spear*, 22 Vt. 388. The tax law of 1890 was repealed January 1st, 1896. This ended the right to distrain for taxes under the provisions of the prior statute. Cooley Taxation 18, *Butler* v. *Palmer*, 1 Hill 324; *Philip* v. *Township*, 35 N. W. Rep. 918.

BARTHOLOMEW, J. This case comes into this court on an appeal from an order sustaining a demurrer to defendants' answer. The action was in equity to foreclose a chattel mortgage. Plaintiff obtained a warrant of seizure under section 5898, Rev. Codes, and the mortgaged property was taken from the possession of the defendant Lee. Defendant Brock, who was the mortgagor, made no appearance in the action. The answer of Lee shows that he was treasurer of Emmons county, and as such treasurer he had seized the property on September 12, 1896, under a distraint for unpaid and delinquent personal property taxes assessed against the mortgagor, Brock, for the years 1890, 1891 and 1895. All the facts were alleged necessary to show a valid tax against Brock for the years named. Plaintiff's mortgage was given by Brock in 1893. Appellant Lee claims that his possession was lawful, and his right to the same as such treasurer was superior to any rights of plaintiff under its mortgage. Section 90 of chapter 132 of the Laws of 1890, and which section was in force when all of said taxes were levied, declares: "The taxes assessed upon personal property shall be a lien upon the personal property of the person

assessed from and after the time the tax books are received by the county treasurer." Section 1225, Rev. Codes, which went into effect January 1, 1896, makes it the duty of county treasurers to collect the taxes remaining unpaid on the lists of former years. Under the authority given by this latter section, the treasurer was proceeding to collect the delinquent personal property taxes against Brock for the years mentioned, and he insists that the lien given by the statute of 1890 was superior to the lien of the mortgage, at least as to the taxes which were prior in time to the execution of the mortgage. The lien for taxes thus created was purely statutory. In no manner and to no extent whatever did it rest upon contract. It was arbitrarily declared by the legislature in the interests of the public revenue. But chapter 132, Laws 1890, was expressly repealed by the Revised Codes.

The question, then, arises whether or not the repeal of the statute creating the lien did not completely destroy the lien itself. Upon this point, and when the lien arises between private parties, the authorities are not uniform. There is a class of cases holding that a statutory lien pertains to the remedy merely; that it is simply cumulative to the ordinary right to enforce an obligation; and that taking it away does not affect that right; and, since it is always within the power of the legislature to control the remedy when the right is not impaired, these cases hold that a statutory lien is absolutely destroyed by the repeal of the statute creating the lien. *Templeton* v. *Horne*, 82 Ill. 491; *Bangor* v. *Goding*, 35 Me. 73; *Woodbury* v. *Grimes*, 1 Colo. 100. Other courts hold, when a statute gives a lien for the enforcement of an obligation arising on contract, that, when a party has brought himself within the terms of the statute, his right to the lien becomes a vested right, which the legislature cannot take away from him. See *Streubel* v. *Railroad Co.*, 12 Wis. 67; *Chowning* v. *Barnett*, 30 Ark. 560; *Handel* v. *Elliot*, 60 Tex. 145; *Weaver* v. *Sells*, 10 Kan. 609; *Hoffman* v. *Walton*, 36 Mo. 613.

Under these latter cases, mechanics' liens, or, in this state, seed grain liens, threshers' liens, and other liens of that character,

given by statute, would not be destroyed by a repeal of the statute. But we express no opinion upon this controverted point. It is not in this case. The lien here claimed rests upon no such specific consideration as is required to support the class of statutory liens above mentioned. As we have said, there is no element of contract about it. It arises in a proceeding in *invitum*, and is based solely upon that duty which the law casts upon every man to contribute his share to the public revenue. It was declared in the interests of the public revenue, and it was certainly competent for that branch of the government to which the public revenue is peculiarly intrusted to waive or destroy it. This we think it did by a repeal of the statute creating it, unless it was saved by some provision in the repealing statute.

This suggests another inquiry. It is a well settled principle of law that where a statute is repealed, and the repealing statute, which goes into effect the moment the former is repealed, contains provisions identical, or practically identical, with those in the statute which is repealed, such provisions are not to be regarded as repealed, but rather as continuing in force without intermission. *Steamship Co.* v. *Joliffe*, 2 Wall. 450; *Wright* v. *Oakley*, 5 Metc. (Mass.) 406. But, as stated, in order to work a continuation of such provisions, they must be practically identical in the two statutes. *Woodbury* v. *Grimes*, *supra*. While chapter 132, Laws 1890, was expressly repealed by the Revised Codes, yet the chapter on revenue in said Revised Codes was a substitute for the act repealed, and contained (section 1239, Rev. Codes) a provision making personal property taxes a lien upon the personal property of the taxpayer. But, in our opinion, the dissimilarity in the two statutes is so great that a court would be entirely unwarranted in construing the latter provision as a continuation of the former. The law of 1890 declared a lien on the personal property of the taxpayer good as against all the world, and which could not be affected by any act of the taxpayer except the payment of the tax. The lien of the Revised Codes is very much more restricted. It attaches only so long as the title to the

personal property remains in the taxpayer, thus placing it in his power to divert the lien at any time. We cannot read into this mild and modified lien any legislative intent to continue in force liens created by the earlier drastic provision. It follows, then, that there was no lien whatever for the unpaid personal property tax against Brock upon this property prior to its seizure by the treasurer. The lien, under the law of 1890, had fallen with the repeal of that law, and the lien of the Revised Codes, which was declared long after all these taxes had been assessed and were overdue, could not attach, because that statute was prospective only. Of course, the seizure could give the treasurer no claim upon the property that would be superior to a prior existing mortgage thereon. The demurrer was properly sustained. All concur.

Affirmed.

(73 N. W. Rep. 430.)

G. WILLETT VAN NEST *vs.* SARGENT COUNTY.

Opinion filed December 2d, 1897.

Tax Sale of Exempt Land—Liability of County.

Under section 88 of chapter 126 of the Laws of 1897, a county is not liable for taxes paid on a tax sale which has not been adjudged void, although the land is exempt from taxation.

Money Paid Upon Void Sale Cannot be Recovered.

And until such sale is adjudged void the county is not liable for taxes subsequently paid by the purchaser at the tax sale to protect his title, even though the land on which such taxes were paid was exempt from taxation.

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

Action by G. Willett Van Nest against Sargent County and the State of North Dakota. From an order sustaining defendants' demurrer to the complaint, plaintiff appeals. Affirmed. Petition for rehearing denied.

Morrill & Engerud, for appellants.

Section 88, Ch. 126, Laws 1897, is retroactive. This revenue law is borrowed from Minnesota, and this feature of the revenue law has been construed as retroactive in its effect. *State* v. *Cronkhite*, 28 Minn. 197; *Easton* v. *Hayes*, 35 Minn. 418; *Cole* v. *Washington*, 35 Minn. 124. We adopted this statute with this construction upon it. *Tyler* v. *Cass County*, 1 N. D. 369.

E. W. Thorp, for respondent.

Section 88, Ch. 126, Laws 1897, is not retroactive in its effect. *Tyler* v. *Cass County*, 1 N. D. 400. Potter's Dwarris on Statutes, 163-164. Independent of statute the purchaser at a void tax sale cannot recover the moneys paid. 2 Blackwell on Tax Titles, 994. *McCormick* v. *Edwards*, 6 S. W. Rep. 32. Neither can he be subrogated to whatever rights the state may have against the land. *Barber* v. *Evans*, 27 Minn. 94. One who buys at a tax sale is never a *bona fide* purchaser, and if his title fails he has no remedy against the municipality for whose benefit the land was sold. *American Investment Co.* v. *Beadle County*, 5 S. D. 410, 59 N. W. Rep. 212; *Budge* v. *Grand Forks*, 1 N. D. 319; *Powell* v. *Supervisors*, 50 N. W. Rep. 1014.

CORLISS, C. J. From an order sustaining a demurrer to four of plaintiff's thirteen causes of action, this appeal is taken. Plaintiff is seeking to recover certain sums of money paid by his assignor on tax sales, and for subsequent taxes paid in defense of his supposed tax title. He rests his right to restitution of this money upon the statute. Independently of the statute, the county would not be liable for moneys voluntarily paid to it for taxes under a mistake of law, where no taxes were due, nor could it be sued for money received by it on void tax sales. *Budge* v. *City of Grand Forks*, 1 N. D. 309, 47 N. W. Rep. 390; *Tyler* v. *Cass Co.*, 1 N. D. 369, 48 N. W. Rep. 232. The statute under which plaintiff seeks to sustain his action is § 88 of Ch. 126, of the laws of 1897. It provides as follows: "When any sale of land for taxes is adjudged to be void, the judgment shall state the reason why it is void, and in all such cases, and in cases

where, by the mistake or the wrongful act of the county treasurer or auditor, land has been sold upon which no taxes were due, and in cases where taxes have been or may be paid on lands not subject to taxation, or on lands where subsequent to payment the entry has been or may be cancelled, the money so paid and all subsequent taxes, penalties and costs which have been or which may be paid, shall be refunded, with interest at seven per cent. per annum from the date of payment, to the person making such payment, his heirs or assigns," etc. It is very clear that two of the causes of action do not fall within the scope of this enactment. They merely set forth void tax sales because the land was exempt from taxation by reason of the fact that it was property of the United States. When the object of the suit is to recover money paid on a tax sale, as contradistinguished from money voluniarily paid in extinguishment of a tax, without any proceedings being instituted to enforce it, the sale must have been adjudged void, or the land must have been sold by the mistake or the wrongful act of the treasurer or auditor, and there must have been no tax due thereon. There is no pretence that the tax sales set forth in these two causes of action have ever been adjudged void. Nor can we agree with counsel for the plaintiff that the statute can in this respect be satisfied by praying for such adjudication in the very suit to recover back the money paid; the owner of the land not being a party thereto, and not requesting that any such judgment be rendered. It is only after the owner of the fee has obtained such adjudication that the right to sue accrues. As the land was exempt from taxation because owned by the United States, it is clear that in these two causes of action we do not have presented cases where land has been sold, by the mistake or wrongful act of the county treasurer or auditor, when there were no taxes due thereon. *Tyler* v. *Cass Co.*, 1 N. D. 369, 48 N. W. Rep. 232; *Iowa & Dakota Land Co.* v. *Barnes Co.*, 6 N. D. 601, 72 N. W. Rep. 1019. These observations apply to the other causes of action, in so far as the plaintiff seeks therein to establish a liability for money paid by

his assignor on the sale of the land for taxes, which was exempt from taxation because owned by the United States. But these two causes of action contain other allegations. It is averred in each of them that, after making the attempted purchase of the land at the tax sale, the plaintiff's assignor paid certain taxes subsequently assessed againt this land, which was not subject to taxation, because it was property of the United States. It is claimed that the plaintiff has a right to recover the amount paid for such subsequent taxes, without reference to the question whether the defendant is liable for the sums paid on the tax sales. It is true that the statute contains a provision that the county shall be liable for taxes paid on lands not subject to taxation. But this provision refers to the payment of taxes by the person who is the fee owner, or who claims to be the fee owner. It does not relate to a stranger who has purchased the property at a tax sale. Whatever right he is given by the act to recover taxes subsequently paid is based upon the theory that his tax title has been annulled, and that, therefore, he ought to be reimbursed, not only as to the amount paid on the sale, but also as to all subsequent taxes paid to protect his supposed interest as tax-title purchaser. Under the statute his right to recover the sum paid on the sale does not accrue until after the sale has been adjudged void, and it follows that until such adjudication he cannot recover those incidental sums, the recovery of which is dependent on the right to sue for the amount paid for the property on the tax sale. As the plaintiff's assignor is a purchaser at tax sales, and plaintiff is seeking, as assignee of such purchaser, to compel the county to refund moneys paid on account of such sales, and for taxes subsequently assessed against the land, it follows that he cannot recover, because the sales set forth in the complaint have never been adjudged void. We fully agree with the learned District Judge that the complaint, so far as the four causes of action before us are concerned, fails to state any cause of action.

The order sustaining the demurrer is affirmed. All concur.

ON REHEARING.

The petition for rehearing is denied. Two of the very cases cited by counsel for plaintiff to sustain their contention are against them. They claim that, although the statute provides that the right to recover shall be dependent on the fact that the tax sale has been adjudged void by some court, nevertheless the cause of action accrues before this is done. The adjudication, it is urged, may be made in the very suit brought to recover the money paid on the tax sale. Waiving the question whether mandamus is not the proper remedy in cases of this kind,—see, on this point, *State* v. *Norton*, (Minn.) 61 N. W. Rep. 458, and *Fleming* v. *Roverud*, 30 Minn. 276, 15 N. W. Rep. 119,—it is apparent that the condition precedent prescribed by the statute must be performed before the right to recover the debt exists. When the tax sale has been adjudged void, then for the first time the right to commence proceedings against the county accrues. The Supreme Court of Minnesota, in one of the cases cited by counsel for plaintiff, distinctly recognizes the soundness of this view. The court, in *State* v. *Norton*, 61 N. W. Rep. 458, said: "It is true that relator's right of action for refundment does not accrue until the judgment declaring the tax sale void is entered in the prior action." And further along in the opinion the court said: "But the entry of this judgment is not merely a step in the remedy. It is a part of the right, or a condition precedent in the contract, and no cause of action accrues until the condition happens." Nor is there anything in the Minnesota decisions warranting the statement of counsel for plaintiff that the tax purchaser may bring a suit against the county for the purpose of having his purchase adjudged void. Doubtless, such purchaser is not bound to wait for the owner of the fee to sue. As soon as he obtains a deed, he may institute ejectment, or an action to determine adverse claims to the property, and in such action have the validity of his tax title passed upon. An adverse judgment in such an action would doubtless satisfy the statute. But no court has ever held that the statute vests in the tax pur-

chaser the right to commence an action against the county to have his own tax title adjudged void. When the statute speaks of an adjudication affecting the tax purchaser's title, it refers to an ordinary judgment rendered in a case to which the owner of the fee is a party. The form of the action is unimportant, nor is it material which party is plaintiff. But it must be an action, the judgment in which will bind the owner of the fee, and settle forever the fact that the tax purchaser has obtained no title to the land. In each of the above two cases relied upon by counsel for plaintiff, the title of the tax purchaser had been adjudged void in an action to which the fee owner was a party. In each of them the action had been brought by such fee owner. And in *State* v. *Norton*, as we have already seen, the court recognized the necessity of such a judgment in a prior action as the very foundation of the proceeding against the county to recover the sum paid on the tax sale. That this most extraordinary doctrine, that the tax purchaser can satisfy the statute by bringing a suit against the county to have his own tax title adjudged void, has no support in any of the Minnesota decisions, is apparent from the language of the court in *Fleming* v. *Roverud*, 30 Minn. 276, 15 N. W. Rep. 119. All that the court said in that case was that it mattered not how the litigation was carried on. But the necessity of its being a controversy between the fee owner and the tax purchaser is recognized in every word of the opinion which bears on the point. The argument of counsel for plaintiff destroys the force of the condition in the statute, that there must first be an adjudication that the tax sale is void, before the right to proceed against the county arises. If the adjudication can be had in the very proceeding against the county to recover the money, without any prior suit against the fee owner, or without his being made a party to the suit, then it is evident that the county is liable whenever the tax sale is illegal, for in every such case an adjudication that such sale is void is inevitable. If this is the adjudication meant by the statute, why take the pains to insert this useless condition in the law? The right to sue, on this theory, depends

on the illegality of the tax sale, and upon nothing else. In every case where the tax sale is illegal, there will necessarily be such an adjudication in the very action brought to recover the purchase money as will satisfy the statute, if the theory of counsel for plaintiff be correct. But the legislature has not given the right of action where nothing but the illegality of the tax sale exists. There must be an adjudication to that effect before the tax purchaser can take a step against the county At the time this statute was enacted, the clause, "when any such sale of land for taxes has been adjudged void," had a well-defined meaning. Tax sales were adjudged void in actions between the tax purchaser and the fee owner, and never in suits between such purchaser and the county, which can have no possible interest in the title. It was such an adjudication which was meant by the statute. If the legislature had intended any other adjudication, it would have so declared. So far from evincing any such purpose, it has shown that it intended only the adjudication then known to the law; for on the other theory, the condition that the tax title must be adjudged void is stripped of all force in the statute. The case of *Webb* v. *Bidwell*, 15 Minn. 479, (Gil. 394,) is not in point, except as to the necessity of an adjudication in a prior action. And even on that question it is not a direct authority. What the court said was obiter, as the right to enforce the tax lien was not in fact sustained in that case. And this dictum must be regarded as overruled by the later case of *State* v. *Norton*, (Minn.) 61 N. W. Rep. 458. Moreover, the statute there construed is not strictly analogous to the statute here involved, which contemplates that, before the designated county officer shall be applied to for the relief given by the statute, there shall have been a judgment against the validity of the tax sale, in a suit to which the fee owner is a party. On the question whether the owner of the fee must not be a party to the action in which the judgment is rendered, that case, so far from being an authority in favor of the plaintiff, is directly against

him, as the fee owner was a party to the suit in which it was sought to have the tax sale adjudged void, and the tax declared a lien on the land. When both kinds of relief are necessarily demanded against the same party (the fee owner,) as in cases under a statute allowing the tax purchaser to foreclose the tax lien against the owner of the land, it might perhaps be held, without great violence to reason, that both kinds of relief could be had in the same action. But when the judgment which destroys the tax title must be rendered in an action to which the owner is a party, and a judgment that the purchaser recover the sum paid on the sale is necessarily rendered in an action or proceeding against a different party (*i. e.* the county,) it seems to us a perversion of the meaning of the statute to hold that in the same action the adjudication that the tax sale is void, and a judgment for money, should be embodied in one and the same judgment rendered in the same action. Certainly this cannot be the law when no one but the county is a party to the suit. In every Minnesota case cited, court and counsel proceeded on the theory that the adjudication must be in an action to which the fee owner is a party.

(73 N. W. Rep. 1083.)

NORTHERN LIGHT LODGE, NO. 1, I. O. O. F., *et al.*, *vs.* JAMES KENNEDY, *et al.*

Opinion filed December 2d, 1897.

Building Contract—Construction.

A building contract between a corporation and a firm provided that the corporation "shall be at liberty to make such changes or alterations during the construction of the building as they shall consider necessary, and the contract shall not be violated by such acts;" and also provided that "no alterations shall be made in the work shown or described in the drawings and specifications except upon a written order of the architects." *Held*, construing the two provisions together, and in the light of the customs of the business, that the contract meant that the corporation had the right to order changes and alterations,

but that such orders must be in writing, and the architects were merely designated as the agents of the corporation in giving such orders.

Liability of Surety.

While, under our statute (section 4651, Rev. Codes) and settled rules of law, a surety cannot be held beyond the express terms of his contract, yet, in ascertaining those terms, the same rules of construction must be applied as in other contracts.

Alterations of Contract.

It is further *held* that the provision in said contract, declaring that no alterations should be made except upon written order, was inserted for the mutual benefit of the owner and contractor, and the owner alone could not waive or abrogate it. The contractor might legally have refused to make any changes or alterations not ordered in writing.

Alteration Discharged Sureties.

Where a bond had been given by the contractor for the faithful performance of the above contract, and where, without the knowledge of the sureties, the owner ordered, by parol, certain changes that materially increased the cost of such building, and such changes were executed by the contractor, *held*, that the parties thereby changed their contract, and to hold the sureties liable under this substituted arrangement would be to hold them beyond the express terms of their contract.

When Sureties Not Released.

The fact that the owner paid the contractor in full, without retaining money to pay off claims of mechanics and material men, when by the contract it was authorized so to do, would not release the sureties on the bond.

Mechanic's Lien—Recovery on Before Judgment.

In order to recover the amount of a mechanic's lien which had been filed against the building, it was not necessary that such lien should have been reduced to judgment, provided the amount of the account was duly proven.

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

Suit by the Northern Light Lodge, No. 1, I. O. O. F., and Frank Marsh and others, trustees, against M. W. Shanley and T. Mournin, co-partners, and James Kennedy and others as sureties, to recover upon a bond. From the judgment for plaintiffs, defendants appeal.

Reversed.

J. W. Tilly, for appellants.

The contract provided that no alterations should be made in

the work except on a written order of the architects. This provision was a condition precedent to the making of any changes and is material to holding the sureties on the bond. Bishop on Contracts, 1422; *Drake* v. *Hill*, 53 Ia. 37. The liability of a surety is not extended by implication. He has the right to stand upon the very terms of his contract. *Judah* v. *Zimmerman*, 22 Ind. 388; *Evens* v. *Gronden*, 28 S. W. Rep. 439; *Killoren* v. *Mechan*, 55 Mo. App. 427; *Erickson* v. *Brandt*, 55 N. W. Rep. 62; *Beers* v. *Stremple*, 22 S. W. Rep. 620; § 4651, Rev. Codes; Brandt on Suretyship, 601; *Sumonson* v. *Grant*, 36 Minn. 439; *Ide* v. *Churchill*, 14 Ohio St. 372. It is not sufficient that he may sustain no injury by a change in the contract or that it may be for his benefit. *Simonson* v. *Thom*, 31 N. W. Rep. 861; *Miller* v. *Stewart*, 9 Wheat, 703; *Tomlinson* v. *Simpson*, 33 Minn. 446; *Bill* v. *Paul*, 52 N. W. Rep. 1110. On application to take a case from the jury the evidence of the opposite party must be assumed to be true, and inferences are against the moving party. *Marshall* v. *Homey*, 47 N. W. Rep. 29; *Christie* v. *Barnes*, 6 Pac. Rep. 599; *Purcell* v. *English*, 86 Ind. 34; *Myers* v. *Dixon*, 45 How. Pr. 48.

Ball, Watson & Maclay, for respondents.

It was specially provided that the owners might make changes as they considered necessary, and that the contract should not be vitiated thereby. Such provisions will be given effect. *Risse* v. *Hopkins*, 40 Pac. Rep. 904; *Hayden* v. *Cook*, 52 N. W. Rep. 165; *Consaul* v. *Sheldon*, 52 N. W. Rep. 1104; *Beers* v. *Strimple*, 22 S. W. Rep. 620. The provision that alterations in the work should be ordered in writing by the architect, being one for the benefit of the owner might be waived by the owner without releasing the sureties. *Smith* v. *Molleson*, 42 N. E. Rep. 669; *Consaul* v. *Sheldon*, 52 N. W. Rep. 1104; *DeMattos* v. *Jordon*, 46 Pac. Rep. 403.

BARTHOLOMEW, J. The plaintiff the Northern Light Lodge, No. 1, I. O. O. F., is a corporation. The defendants Shanley & Mournin were co-partners as building contractors. In June, 1894,

the plaintiff entered into written contract with said Shanley & Mournin for the erection of a certain building in the City of Fargo. To secure the faithful performance of the contract upon their part, Shanley & Mournin gave the usual bond in such cases, with the defendants Kennedy, O'Neil, and Elliott as sureties. Plaintiff brought suit upon the bond. The sureties alone defended, their main defense being such a change in the building contract, without their consent, as released them as sureties. There was a directed verdict against them, and they appeal.

The first difficulty in the case arises upon the construction of the written contract. By a provision in the contract the specifications were made a part thereof. In the specifications it is provided that: "The I. O. O. F. shall be at liberty to make such changes or alterations during the construction of the building as they shall consider necessary, and the contract shall not be violated by such acts, but a proper allowance shall be made in the price of contract at the time of such changes, either to the I. O. O. F. or the contractors, as the case may be." In the body of the contract it is declared: "No alterations shall be made in the work shown or described in the drawings and specifications except upon the written order of the architects, and the amount so ascertained shall be added to or deducted from the contract price." It is conceded the evidence shows that alterations were made which increased the cost of the building over $1,000, and that such alterations were not made upon the orders of the architects, either written or oral, but that they were made upon the oral orders of plaintiff. Do these conceded facts change the contract in a manner that releases the sureties on the bond given for its faithful performance? Our statutes declare (§ 4651, Rev. Codes,) that "a surety cannot be held beyond the express terms of his contract," and that is the elementary law of the text-books. The difficulty in this case lies in determining the terms of the contract. It is clear that the contract expressly declares that the plaintiff may make such alterations or changes as it may

deem necessary, and that the contract shall not be vitiated by such acts. If it went no further, the case would be plain, as such provisions are proper, and will be enforced as against a surety on a bond to secure the performance of the contract. *Hayden* v. *Cook*, (Neb.) 52 N. W. Rep. 165; *Risse* v. *Mill Co.*, (Kan. Sup.) 40 Pac. Rep. 904; *Beers* v. *Strimple*, (Mo. Sup.) 22 S. W. Rep. 620. The complication arises when we consider the foregoing provision in connection with the provision which declares that no alterations shall be made in the work "except upon a written order of the architects." If we construe this provision to mean that the right to order changes or alterations in the work is placed exclusively with the architects, then, necessarily, we destroy the provision which gave the owner that right, and declared that the exercise of the right by the owner should not vitiate the contract. On that construction both provisions cannot stand. One or the other must be nullified. But, on familiar rules of construction, it is our duty to so construe the contract as to give some effect to all its provisions, if its language will reasonably bear such construction. And while it is true that a surety cannot be held beyond the express terms of his contract, yet in ascertaining those terms the same rules of construction must be applied that would be applied as between the principals to the contract. Brandt, Sur. § 80, declares: "The rules for construing the contract of a surety or guarantor should by no means be confounded with the rule that sureties and guarantors are favorites of the law, and have a right to stand upon the strict terms of their obligations. * * * In the construction of the contract of a surety or guarantor, as well as of every other contract, the true question is, what was the intent of the parties, as disclosed by the instrument, read in the light of the surrounding circumstances? * * The meaning of the words is not affected by the fact that the party sought to be charged is principal surety or guarantor." And see, also, *Crist* v. *Burlingame*, 62 Barb. 351; *Belloni* v. *Freeborn*, 63 N. Y. 383; *Standley* v. *Miles*, 36 Miss. 434; *Birdsall* v. *Heacock*, 32 Ohio St. 177. It has often been said that one of the

greatest aids in reaching the true meaning and intent of an uncertain contract is to consider the condition and surroundings of the parties, and the objects they are seeking to attain. We have here a corporation, acting through certain trustees, as appears by the contract, entering into an agreement with a building contractor. Was it the purpose of the parties to secure any rights to the architects? Clearly not, because the architects were not parties to the contract. It was not the intention by that contract to give them the right to preserve the particular symmetry or strength in the building that they might prefer. It will not be contended for a moment that, had the owner and contractors agreed upon any particular alteration, the architects could have interposed to prevent the execution of such agreement. They occupied no contractual relations that gave them any such power. Clearly, it was not the purpose to confer rights upon the architects. The contract must have some other construction. We think it reasonably certain that a correct construction will be reached when we remember that one party to that contract was a corporation; that the building, when erected, would be the property of such corporation, hence it was immediately interested in every detail thereof; that corporations ordinarily act through agents; that, if any act was to be performed, it would be natural and customary to mention the agent by whom such act should be performed; that these parties were contracting in the light of the customs and usages pertaining to the building trade; that in the construction of buildings of the character of this one the architect, who is supposed to be an expert in such matters, generally acts as the agent of the owner, who is presumed to be a non-expert. The building contractor, being himself an expert, can be depended upon to look after his own interests. These facts were well known to the contracting parties, and they doubtless contracted with reference thereto. If this be correct, then the contract was, in legal effect, simply this: The plaintiff had the right to make such changes or alterations as it might desire, and such acts should not vitiate the contract; but no such changes

or alterations should be made except upon plaintiff's written order, through its agents, the architects. But the fact still remains that plaintiff never gave the written order. Can the sureties take advantage of that fact to defeat a recovery against them? They insist that they can, and, construing the agreement to mean that plaintiff had the right to make such alterations as it saw proper, but that no alterations should be made except upon the written order of plaintiff, it next concerns us to discover the purpose that was to be served in thus requiring a written order. Plaintiff insists that the provision was entirely for its benefit, and, being for its exclusive benefit, and the contractor having no interest whatever therein, that plaintiff had a perfect right, under the law, to waive such requirement; that defendants are charged with knowledge of this right, and must be held to have contracted with reference thereto. But we are not satisfied with the assumption that the provision was exclusively for plaintiff's benefit. The plaintiff cites three cases as supporting this view. The first is *Smith* v. *Molleson*, (N. Y. App.) 42 N. E. Rep. 669. In that case—which was an action against a surety upon a builder's contract—the contract provided that payments were to be made upon certificates furnished by plaintiff's superintendent. Payments were made without such certificates, but in no greater amount than would have been made had the certificates been exacted. The court held that the surety was not thereby released upon the express ground that the surety was not prejudiced. The court say: "We are not dealing now with any actual change in the terms of the contract, but with acts or omissions of the plaintiff in the performance, which, in order to release the surety, must be of such a character that it can be said that his position was changed to his prejudice." It is true that the court said that this provision was intended for the benefit of the owner alone, and he could waive it without affecting the defendant's rights. But this was *dicta* merely, as the court expressly refrained from deciding the case on that ground. *Consaul* v. *Sheldon*, (Neb.) 52 N. W. Rep. 1104, was also an action against a surety

on a builder's contract. The provision in that case was in this language: "No new work of any description done on the premises, or any work of any kind whatsoever, shall be considered extra, unless a separate estimate in writing for the same, before its commencement, shall have been submitted by the contractor to the superintendent and the proprietor, and their signatures obtained thereto." Quoting this, the court say: "Complaint is made because the above provision was disregarded. Obviously, said stipulation was inserted in the contract solely for the protection of the defendant in error, and a compliance therewith he might waive. It was made the duty of the contractor to make and submit estimates of all new work to the superintendent and the owner, and the sureties cannot be heard to urge the failure of their principal to comply with the terms of the contract on his part to be performed as a reason why they should be released from liability on the bonds." Here, again, the statement that the provision was for the sole benefit of the owner becomes mere *dicta*. The case was decided, and rightly so, upon the ground that it was the principal in the bond who was in default. The third case is *De Mattos* v. *Jordan*, (Wash.) 46 Pac. Rep. 402. That case is more nearly analogous to this. There the provision required the contractor, upon receiving written authority from the architect, approved by the owner, to perform any work that might be required in the alteration, modification, or addition. The court said: "Moreover, this provision was for the benefit of appellant, and to protect him against unauthorized bills for extra work, and it affected the contractor only in so far that he could collect nothing for additional work not authorized as provided by the agreement." This case recognizes that the contractor had some interest in the provision. We think this is correct, notwithstanding the *dicta* in the other cases cited. It is common knowledge that at least a moiety of all cases arising upon building contracts arise upon this one question of extra work and materials, and the parties often find themselves litigating the single question of fact whether or not such extras were ordered.

The clause requiring a written order was, in our judgment, inserted for the express purpose of cutting off all possibility of such a controversy. The owner could not be required to pay for any extras for which the contractor could not produce the proper order, and, on the other hand, the contractor was entitled to receive pay for all extras for which he could present the proper order. We think these parties were mutually interested in that provision, the contractor as well as the owner. Suppose, after the execution of the contract, the owner had gone to the contractor, and orally ordered a change from the specifications involving an increased expenditure of $500, and the contractor had positively refused to make such changes unless the same was ordered in writing, would he have thereby violated any contractual obligations to the owner? In other words, could he have been compelled to make changes that were not ordered in writing? It seems very clear to us that these practical questions must be answered in the negative. And, if the contractor could insist upon the written order, it was because he had rights thereunder; and, if he had rights thereunder, the owner alone could not waive the provision requiring such written order; and, if the owner and contractor united in waiving such provision, then they changed their contract, and the sureties are not liable on the substituted contract. Every increase in their liability is to their prejudice. Under the contract for the performance of which they became sureties, their liability could be increased, but only in a specified manner. To hold them to a liability that has been increased in any other manner is to hold them "beyond the express terms of their contract." This cannot be done.

When the plaintiff tries this case upon the theory of the law as we have announced it, different evidence may be produced, and we shall therefore remand the case. And, as the case goes back, it is proper to say that, upon the theory that the sureties are not discharged, there was no error in permitting a recovery for the amount of a mechanic's lien that had been filed, where the account was proved, although it had not been put into judgment.

Belloni v. *Freeborn*, 63 N. Y. 383; *Kohler* v. *Matlage*, 72 N. Y. 259. Nor were the sureties released by the fact that plaintiff failed to retain money to pay liens that might be filed, although authorized by the contract to do so. One of the purposes of the bond was to relieve plaintiff from looking after such claims. But, for reasons already stated, the judgment of the trial court is reversed, and a new trial ordered.

Reversed. All concur.

(73 N. W. Rep. 524.)

STATE *vs.* NORMAN MARKUSON.

Opinion filed December 6th, 1897.

Injunction Pendente Lite.

An injunctional order in an equity case, *pendente lite*, issued by a court having full equity powers and complete jurisdiction of the subject-matter, must be obeyed while it remains in force, however irregularly or erroneously it may have issued.

Description of Place to be Searched.

Section 18, Const., declares that no search warrant shall issue but upon probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons or things to be seized. *Held*, that a description of the premises as a certain lot, in a certain block, in a certain city, was sufficiently specific, where there was in fact but one building on the lot, and said building was occupied entirely by the defendants in the action.

Only Place Where Liquor Found—Closed.

Where a search warrant it issued under the provisions of the prohibitory liquor law directing the search of a building occupied by two or more tenants in separate and distinct tenements, and intoxicating liquors are found in one of such tenements only, the officer must, under the statute, take possession of and close such tenement, but cannot close the tenements of the other tenant or tenants.

Description of Property to be Seized.

Where personal property to be seized under such search warrant is described as "all articles found therein used in or about the carrying on of the business aforesaid," such description being as particular as the circumstances of the case will ordinarily permit, it is sufficient to satisfy the constitutional requirement above quoted.

Construction of Statute.

The words "take and hold possession of all personal property found on such premises," found in § 7605, Rev. Codes, read in connection with the context, and, under the authorities, *held* to mean the personal property found on the specific premises; *i. e.* the particular tenement or room where intoxicating liquors are kept for sale contrary to law.

No Jury in Trial for Contempt.

When, under the provisions of said § 7605, Rev. Codes, a defendant is brought before the court to be tried for an alleged contempt of court in violating the terms of an injunctional order issued in the case, such defendant is not entitled to a jury trial. *State* v. *Markuson*, 5 N. D. 147, reaffirmed.

Pleading Former Conviction.

In pleading a former conviction for coutempt of court, in order that a defendant may be adjudged guilty as of a second offense, it is only necessary, under § 7614, Rev. Codes, to allege briefly that such conviction was had.

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

Action by the State of North Dakota against Norman Markuson and another to abate a nuisance caused by the keeping and selling of intoxicating liquors in violation of law, in which a temporary injunction was issued, and the state's attorney afterwards filed an affidavit showing that defendant Markuson had been guilty of a contempt of court in that he had violated the injunctional order. A plea of "not guilty" was interposed and a trial had to the court without a jury, defendant was adjudged guilty of contempt and sentenced to one years imprisonment in the state penitentiary. He appeals.

Affirmed.

M. Conklin, *M. E. Remmen*, and *W. H. Barnett*, for appellant.

The restraining order in this case was broader than the statute, was without authority and in excess of the prayer for relief. It enjoined the doing of acts not within the statutory prohibition. Section 7605, Rev. Codes. The order being void, it was not contempt to disobey it. 2 High on Inj. 1425; *Lester* v. *Peo.*, 35 N. E. Rep. 387; *In re McLain*, 68 N. W. Rep. 163. Before defendant could be properly convicted for a second offense, the complaint should specifically charge the former conviction and also

the judgment entered upon such conviction. Clarke's Crim. Pro. 204; *Tuttle* v. *Com.*, 2 Gray, 506; *Com.* v. *Harrington*, 130 Mass. 35; *Reg.* v. *Willis*, 12 Cox Crim. Cases, 192; *State* v. *Adams*, 13 At. Rep. 785; *Harris* v. *Com.*, 107 Mass. 198. Defendant was convicted of a felony without a jury trial in violation of his constitutional rights. Sections 7 and 8, Const. Neither the affidavit or search warrant describe the building or premises to be searched, neither named the owner or person in possession. Such a warrant is void. Cooley Const. Law, 304; *Humes* v. *Tabor*, 1 R. I. 464; *Com.* v. *Intoxicating Liquors*, 109 Mass. 371; *Jones* v. *Fletcher*, 41 Me. 254; *Grumon* v. *Ramond*, 6 Am. Dec. 200.

Edward Winterer, *States Atty.*, for respondent.

If the injunctional order was improvidentially issued still a violation of the same would be contempt. 5 Crim. Law, Mag. 178; *Sullivan* v. *Judah*, 4 Paige, 442; *Stimpson* v. *Putnam*, 41 Vt. 238; *Peo.* v. *Bergen*, 53 N. Y. 404; High on Inj. 847; *Peo.* v. *Spalding*, 2 Paige 326; *Mead* v. *Norris*, 21 Wis. 310; *Erie Co.* v. *Ramsey*, 45 N. Y. 637. Only an entire want of jurisdiction will relieve the offending party of contempt. 5 Cr. L. Mag. 185; *Matter of Morton*, 10 Mich. 208. The description in a search warrant will be sufficiently certain if it is such as would if used in a deed convey specific real estate. Black Int. Liq. 411; *State* v. *Bartlett*, 47 Me. 388; *State* v. *Robinson*, 33 Me. 564. If the description of the place to be searched is faulty or meagre, that does not invalidate the warrant. *Metcalf* v. *Weed*, 19 At. Rep. 1091. The description was sufficient. *State* v. *Minnehan*, 22 At. Rep. 177; *In re Hougan's Liquors*, 18 At. Rep. 279; *Meek* v. *Pierce*, 19 Wis. 300; *Paquet* v. *Emery*, 32 At. Rep. 881; *Peo.* v. *Hess*, 48 N. W. Rep. 181.

BARTHOLOMEW, J. In June, 1896, an action in equity was commenced by the assistant attorney general against the defendant Norman Markuson and one Murphy, for the purpose of abating a nuisance which it was alleged the defendants kept and maintained on lot 4 in block 25 of the original plat of the City of Valley City, in Barnes County. The nuisance consisted in keeping a place

where intoxicating liquors were sold and kept for sale in violation of the constitution and laws of this state. The action was brought under that portion of § 7605, Rev. Codes, which reads as follows: "The attorney general, his assistant, state's attorney, or any citizen of the county where such nuisance exists or is kept or is maintained, may maintain an action in the name of the state to abate and perpetually enjoin the same. The injunction shall be granted at the commencement of the action in the usual manner of granting injunctions, except that the affidavit or complaint or both, may be made by the state's attorney, attorney general or his assistant upon information and belief; and no bond shall be required; and if an affidavit shall be presented to the court or judge, stating or showing that intoxicating liquor,' particularly describing the same, is kept for sale, or is sold, bartered or given away on the premises, particularly describing the same, where said nuisance is located contrary to law, the court or judge must at the time of granting the injunction issue his warrant commanding the officer serving said writ of injunction, at the time of such service, to search diligently the premises and carefully invoice all the articles found therein, used in or about the carrying on of the unlawful business, for which search and invoicing said officer shall receive the sum of ten dollars in addition to the fees now allowed by law for serving an injunction. If such officer upon such search shall find upon such premises any intoxicating liquor or liquors of any kind, he shall take the same into his custody and securely hold the same to abide the final judgment in the action (the expenses for such holding to be taxed as part of the costs in the action;) and such officer shall also take and hold possession of all personal property found on such premises, and shall take and hold possession of such premises and keep the same closed until such final judgment. The finding of such intoxicating liquor or liquors on such premises shall be *prima facie* evidence of the existence of the nuisance complained of. Any person violating the terms of any injunction granted in such proceedings shall be punished for contempt, for the first

offense by a fine of not less than two hundred nor more than one thousand dollars, and by imprisonment in the county jail not less than ninety days nor more than one year, and for the second and every successive offense of contempt by imprisonment in the penitentiary no exceeding two years and not less than one in the discretion of the court or judge thereof. In case judgment is rendered in favor of the plaintiff in any action, brought under the provisions of this section, the court or judge rendering the same shall also render judgment for a reasonable attorney's fee in such action in favor of the plaintiff and against the defendants therein; which attorney's fee shall be taxed and collected as other costs therein, and when collected paid to the attorney or attorneys of the plaintiff therein; provided, if such attorney is the state's attorney such attorney's fee shall be paid into the county treasury as in § 7603 provided. In contempt proceedings arising out of the violation of any injunction granted under the provisions of this chapter, the court, or in vacation the judge thereof, shall have the power to try summarily and punish the party or parties guilty as required by law. Process shall run in the name of the State of North Dakota. The affidavits upon which the attachment for contempt issues shall make a *prima facie* case for the state. The accused may plead in the same manner as to an information or indictment, in so far as the same is applicable. Evidence may be oral or in the form of affidavits, or both; the defendant may be required to make answer to interrogatories, either written or oral, as in the discretion of the court or judge may seem proper; the defendant shall not necessarily be discharged upon his denial of the facts stated in the moving papers; the clerk of the court shall upon the application of either party, issue subpœnas for witnesses, and except as above set forth, the practice in such contempt proceedings shall conform as nearly as may be to that adopted by the ninetieth rule of the Supreme Court of the United States for proceedings in equity in the circuit courts."

The complaint was in the usual form, and prayed the usual

temporary injunction *pendente lite*, which was issued; and, the affidavit required by the statute being also filed, a search warrant was issued at the same time. The injunctional order, after reciting the preliminary facts, enjoined and restrained the defendants, their agents, etc., from using "lot 4 in block 25 of the original townsite of the City of Valley City, Barnes County, N. D.," as a place for keeping or selling intoxicating liquors, or permitting the same to be so used, and contained a further clause, as follows: "And if the sheriff, constable, or marshal, or any other officer, serving or executing the summons, complaint, affidavit for search warrant, search warrant, injunctional order, or any other order of this court, issued in said action, shall take possession of said premises or any part thereof, or of any personal property found in or upon said premises, the defendants, their attorneys, agents and servants, and each of them, are hereby restrained and enjoined from interfering in any way whatever with said premises or personal property, or any part thereof, after such possession is taken, and from entering into said premises so taken possession of, or disturbing in any manner the possession of said sheriff, constable, or marshal or other officer, until the further order of this court." In the search warrant the premises to be searched were described in the same language as in the injunctional order, and the warrant continued: "Now, therefore, you are hereby commanded, at the time of serving the aforesaid injunctional order, bearing even date herewith, to diligently search the premises above described, and carefully invoice all articles found therein, used in or about the carrying on of the business aforesaid; and if, upon such search, you shall find upon said premises any intoxicating liquors of any kind, you shall take the same into custody, and securely hold the same to abide the final order and judgment of this action, and also take and hold possession of all personal property found on such premises, and take and hold possession of such premises, and keep the same closed until such final judgment." In June, 1897, said equity case being still pending and undecided, the state's attorney for Barnes County filed

his own affidavit and that of one Hans O. Hagen, showing that said defendant Markuson had been guilty of a contempt of court, in that he had violated the injunctional order issued in the case. The affidavits also recited a former conviction for contempt under that same statute. Upon these affidavits an attachment for contempt was issued against the defendant, and he was brought before the court thereon. Upon being arraigned, the defendant moved that the information and attachment be dismissed and quashed, for the reason that the search warrant and injunction in the case are void: (1) Because the search warrant is contrary to the provisions of § 18 of our state constitution, in that it does not particularly describe the place to be searched or the things to be seized; and (2) the provisions of § 7605, Rev. Codes, which directs the officer, in case he finds intoxicating liquors on the premises to be searched, to seize and take into his possession all personal property found on said premises, are in conflict with § 13 of the constitution, in that said section authorizes the seizure of property without due process of law. Defendant also claimed that the contempt set forth in the information did not come within the provisions of said § 7605, and that, therefore, he should be permitted to plead and be tried under the terms of the general statute on contempt, (Rev. Codes, § 5932, *et seq.*) He also demanded a trial by jury. All these points were ruled against defendant, and exceptions saved. Thereupon the court proceeded to hear the matter summarily under the provisions of said § 7605. Evidence was introduced both by the state and by the defendant. The court made findings of fact and conclusions of law against defendant, and judgment was pronounced thereon, declaring defendant guilty of contempt of court, as of a second offense, and sentencing him to imprisonment in the penitentiary for the term of one year. Exceptions were saved to the findings and judgment, and the case comes to this court on a statement.

In disposing of the case, it will be convenient to first discuss the point that the alleged contempt does not come within the provi-

sions of § 7605, and that, therefore, the defendant was improperly tried thereunder. The informing affidavit states, in substance, that immediately after the service of the injunctional order and search warrant in the original case, and after the officer had found intoxicating liquor on said premises, and had seized the same, and had taken possession of and closed the premises, the defendant, with the unlawful aid and assistance of certain persons, broke open said premises, and took the said intoxicating liquors therefrom, and carried the same away. It will be noticed that this was a violation of the exact terms of the injunctional order. But it is contended that said section does not authorize an injunction of so broad scope; that it authorizes, at least before final judgment, only an injunction restraining the maintenance or continuance of a nuisance on the premises named. We do not think this point is before us. The original action in equity was brought under § 7605, before a court with full equity powers; and in the exercise of those powers, and acting under said section, the court issued its order prohibiting the very acts specified in the information. So far as we are advised, no steps whatever have been taken to have that injunction set aside or modified. Rather, the defendant elected to defy it, and override its commands by force. This he cannot do, however irregularly or erroneously the injunction may have been issued, provided only the court had jurisdiction of the subject-matter. High, Inj. (2d Ed.) § 1416, *et seq.*, and the authorities there cited. The case of *Mayor, etc. of New York* v. *New York & S. I. F. Co.*, 64 N. Y. 623, is a direct answer to defendant's claim that the injunction was broader than the prayer in the bill.

Section 18, Const. N. D., reads: The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated; and no warrant shall issue but upon probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons and things to be seized." Were the premises to be searched and the property to be seized sufficiently described

in this case? The premises were described as "lot 4, block 25, of the original townsite of the City of Valley City, Barnes County, N. D." Black on Intoxicating Liquors (§ 357) says: "There is perhaps no single test that could be invariably applied to the description in a warrant to determine its sufficiency. But it has been said in general terms that the description will be sufficiently certain if it is such as would be required in a deed to convey a specific parcel of real estate." To same effect, see *State* v. *Robinson*, 33 Me. 564, and *State* v. *Bartlett*, 47 Me. 388. Taking this test as conclusive, the description in the case before us would be perfect in every particular, as it contains exactly the language that would be used in a conveyance of the title. It is urged, however, that this test cannot be conclusive, as there might be several buildings on "lot 4 in block 25," and several tenants in each building, and under this description the rights of innocent parties might be invaded. Said the court in *State* v. *Robinson*, *supra*: "The administration of law is occasionally and perhaps unavoidably so imperfect that innocent persons may be subjected to inconvenience and expense by official acts and processes designed for the punishment of the guilty." But this description does not need the aid of that concession. It is undoubtedly true, as stated by Mr. Black, that there is no single test by which the sufficiency of a description can be invariably determined. Much must depend upon the nature and condition of the premises and the surroundings. In *Flaherty* v. *Longley*, 62 Me. 420, the premises were alleged to be in the possession of one N., but by metes and bounds a block was described which contained two houses, only one of which was occupied by N. It was held in that case that the officer was not warranted in searching the house not occupied by N.; three judges dissenting, and holding that the officer was warranted in searching both houses. See, also, *Com.* v. *Newton*, 123 Mass. 420; *State* v. *Thompson*, 44 Iowa, 399. These cases established the doctrine that where there is more than one building upon the described premises, only one of which is occupied by the defendant, or where one building is occupied by the

defendant, and another in seperate tenements, then the officer may search the building or tenement occupied by the defendant. In this case the complaint alleged the ownership of the building in one Murphy, and that he leased it to Markuson. Murphy and Markuson were joint defendants in the equity action, and the search warrant ran against both. The affidavit alleged the existence of the nuisance on said lot, and that Markuson was conducting the business, which was equivalent to an allegation that Markuson was in possession of the portion where the nuisance was conducted. There was, in fact, but one building on the lot. Markuson rented and occupied the lower part, and had keys to all the entrances thereto. Murphy used the upper part for dwelling purposes. Inasmuch as the search warrant ran against both, there can be no doubt as to the sufficiency of the description of the place to be searched.

We think, too, the description of the property to be seized was sufficient. We must not place a construction either upon the constitution or the statute that will render compliance therewith impossible. A description as specific as the nature of the case will warrant ought generally to be sufficient. To require more might result in a failure of justice. The object of our statute is to enforce compliance with the prohibitory article in the constitution, and, to that end, the legislature has seen proper to declare all places where intoxicating liquors are sold contrary to law public nuisances; and, the better to suppress such nuisances, it has provided that the premises where such nuisance is maintained may be seized and closed, and that the intoxicating liquors so kept for sale may be seized, together with all the personal property used in carrying on such unlawful traffic. Statutes authorizing a search for and seizure of intoxicating liquors kept for sale in violation of law have long been in force in some of the states; and, under these statutes, it has never been required that the search warrant should specifically describe the liquors to be seized. Where the liquors are described as "certain spirituous and intoxicating liquors, to-wit, beer, whisky, rum, brandy," etc.,

the description is sufficient, and the officer under such warrant may seize any one or more of the kinds of liquors described, although none of the other kinds be found; and, if the quantity of liquor be specially named, still the officer may seize a less quantity or a greater quantity. *State* v. *Whisky*, 54 N. H. 164; *In re Horgan's Liquors*, (R. I.) 18 Atl. 279; *Com.* v. *Intoxicating Liquors*, 97 Mass. 63; *State* v. *Brennan's Liquors*, 25 Conn. 278. All these cases—and they were decided under constitutional provisions the same in substance as ours—proceed upon the theory that the substantial thing to be seized is intoxicating liquor; and neither the character nor quantity of the liquor is material. The other property to be seized by the officer is the paraphernalia used in conducting the nuisance. It matters not whether the articles be many or few, costly or crude, so they be the particular articles used in any given case to enable a party to carry on a business prohibited by law. If it be necessary that the search warrant shall particularly describe the counters, mirrors, tables, chairs, decanters, bottles, glasses, etc., in each instance, then it would be impossible to seize these articles once in a hundred times. We cannot thus nullify the law. We think, where they are described as "all articles found therein used in and about the carrying on of the business aforesaid," that such description is as specific as the circumstances will admit or as the law requires. But the search warrant in this case, following the exact language of the statute, directs the officer to "also take and hold possession of all personal property found on such premises." This, appellant insists, is taking property without process of law, and is a clear violation of § 13 of the Const. He argues that under this command, if the officer found intoxicating liquors in a room in the basement of a large hotel, it would be his duty to seize and hold all personal property in the hotel, irrespective of ownership. This construction would render the statute palpably unconstitutional. But, under well settled rules of construction, it is our duty to so construe this statute that it will stand, if its language will reasonably admit such a construction. In this case

we have no doubt or hesitation whatever. When the warrant directed the officer to "hold possession of all personal property found on such premises," what premises were intended? Under the decisions already cited on the question of the description of the premises, as well as the connection in which we find the language in the statute, it is clear that "such premises" means the particular premises—the tenement, the rooms—in which such unlawful business is carried on. The officer can seize and search and close up no other premises. The personal property so to be held is simply the personal property used in conducting the nuisance. The statute—and the search warrant followed its wording—first directed the officer to "diligently search the premises above described, and carefully invoice all articles found therein, used in or about the carrying on of the business aforesaid." Then, if the officer found intoxicating liquor on the premises, he was directed to seize and hold the same, and "also to take and hold possession of all personal property found on the premises, and take and hold possession of such premises, and keep the same closed until final judgment." It would be exceedingly unreasonable to say that while the legislature, in one line, directed the officer to carefully invoice the personal property used in conducting the nuisance (usually very limited in amount, and worth but a few dollars,) in the next line it should direct him to seize thousands of dollars' worth of personal property without any invoice or identification whatever. That it never did so intend is clear when we remember that he is required to take possession of "such premises," and keep them closed; but the only place that he can thus keep closed is the specific tenement wherein the unlawful traffic was maintained. The personal property must be the personal property found in the same place, and that would necessarily be the property that he had invoiced. Thus construed, the statute is entirely constitutional, and the search warrant was fully authorized by the law.

The right of a defendant to a trial by jury in contempt proceedings of this character was fully considered by this court in

State v. *Markuson*, 5 N. D. 147, 64 N. W. Rep. 934. We held that such right did not exist. That conclusion was reached only after protracted and careful consideration. Counsel attack that decision, and asked us to reconsider it. But further study has only strengthened our convictions. We find nothing in that opinion that we desire to retract or modify. Nor need we here repeat what was there said. True, this defendant in this case stands convicted of a second offense of contempt of court, and a much more severe punishment has been pronounced against him. Counsel inveighs against this punishment, as being beyond that which any court may constitutionally inflict without the intervention of a jury. But in the former case counsel took the position —and, no doubt, correctly—that the diverse punishments under the statute were so interwoven and interdependent that, if one fell, both must fall; hence counsel in that case directed his arguments against the augmented punishment, knowing that its destruction would carry with it the destruction of the lesser punishment. Hence, necessarily, the very point here involved was decided in that case. To avoid any misapprehension, we wish to emphasize one thought in the former opinion. While the statute expressly authorizes the punishment here inflicted, and while constitutional courts recognize the legislative right to control their power to punish for contempt so long as such control does not lessen the effectiveness of such power, yet the power itself is not derived from or in any manner dependent upon the statute. It is a necessarily inherent power, and, as shown in the former opinion, this must be so, or courts must abdicate their function. And this power must include the right to punish to an extent that will secure obedience to its lawful orders; and as we, in effect, said in the former opinion, it is entirely immaterial whether this punishment falls within or beyond the limit that our statute fixes as a punishment for misdemeanors. The fact that this same defendant stands before this court again, convicted of a further contempt of court, in a proceeding under the same statute as before, clearly demonstrates that the punishment

heretofore inflicted has been inadequate to secure obedience to the orders of the court. He has apparently demonstrated the truth of what we said before. He has found the profits arising from the illegal traffic in intoxicating liquor so great that he can afford to pay the fine imposed, and yet make money in violating the orders of the court. It was the imperative duty of the court to see that these conditions did not continue.

The point that there are not sufficient allegations or proof to sustain a judgment for a second offense is without merit. The rule requiring the former conviction and judgment to be pleaded at length is entirely abrogated in these cases by our statute (§ 7614, Rev. Codes,) which declares that "it shall not be requisite to set forth in the information or affidavit or indictment the record of the former conviction, but it shall be sufficient briefly to allege such conviction." This was done in the affidavit in this case, and the former record was introduced in evidence.

It is also urged that the evidence in the case fails to establish the fact that the defendant committed the contempt of which he stands convicted. The findings of the trial court fully cover the point. We have examined the evidence, but its reproduction here could serve no good purpose. It is enough to announce as our conclusion that we are fully satisfied with the finding of the trial court.

Finding no error in the record, the order and judgment of the District Court must be affirmed. All concur.

(73 N. W. Rep. 82.)

NOTE—Other decisions under the prohibitory liquor law. *State* v. *Markuson*, 5 N. D. 147; *In re Markuson*, 5 N. D. 180; *State* v. *McNulty*, *infra*; *State* v. *O'Grady*, *infra*; *State* v. *Swan*, 1 N. D. 5; *State* v. *Haas*, 2 N. D. 202; *State* v. *Barnes*, 3 N. D. 319; *State* v. *Kerr*, 3 N. D. 523; *State* v. *Fraser*, 1 N. D. 425; *State* v. *Dellaire*, 4 N. D. 312; *Leisey* v. *Harden*, 135 U. S. 100; *Territory* v. *O'Connor*, 5 Dak. 397.

STATE *vs.* PATRICK M. MCNULTY.

Opinion filed December 6th, 1897.

Liquor Nuisance—"Premises" Defined.

Where, in distinct and separate rooms of the same building, two different lines of business are transacted, one lawful and the other unlawful, the "premises" where the unlawful business is carried on must be confined to the rooms used in that business.

Constitutional Question—Who May Raise.

No one can take advantage of an unconstitutional provision of law who has no interest in and is not affected by it.

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

Patrick M. McNulty was convicted of conducting a liquor nuisance, and appealed.

Affirmed.

M. Conklin, *M. E. Remmen*, and *W. H. Barnett*, for appellant.
Edward Winterer, for respondent.

PER CURIAM. The question of right to a jury trial is not raised in this case, nor was defendant charged with a second offense; otherwise the law points raised are identical with those raised in *State* v. *Markuson*, 7 N. D. 155, 73 N. W. Rep. 82, and that case must rule this unless the facts differentiate them. The record shows this to be a companion case to the Markuson case. The original actions were commenced at the same time, the papers were served the same morning, and by the same officer. The injunctional orders and the search warrants are identical, except as to parties defendant, and the description of the place, which in this case was described as "lot 4 in block 24," etc. There is just one point of difference in the facts. There was but one defendant in this case, and the building on the lot was all occupied by said defendant,—the upper stories as an hotel, and the alleged nuisance was in the basement. Under the warrant, the officer was authorized to search the entire building had such search been necessary in order to definitely locate the nuisance.

As a matter of fact, he searched only the basement, and took possession of two rooms therein, in one of which was a bar and fixtures, with a small amount of intoxicating liquors, and in the other liquors were stored. He also took possession of said liquors and the personal property in said rooms, and it was this property that was taken from the officer or his representative by force. It is urged, however, that, since the entire building was in the possession of the defendant, the warrant authorized the seizure of all property in the building, and thus the property of guests might be taken without due process of law so far as they were concerned. This contention is, under the circumstances, exceedingly technical and somewhat strained. Our decision in the Markuson case and the authorities there cited lead logically and necessarily to another result. Where, in separate rooms in the same buildings, two distinct, disconnected lines of business are carried on, one legitimate and the other unlawful, the premises where the unlawful business is carried on must be confined to the rooms used for that purpose. The other rooms are not contaminated or placed under the ban of the law, and no logical reason can be suggested why the rule should be different where the distinct lines of business are carried on by one man from what it is when carried on by two men. Another principle must defeat this contention so far as this defendant is concerned. In law, it can make no possible difference to him whether the property of third persons is seized or not. It is a well established and wholesome rule of law that no one can take advantage of the unconstitutionality of any provision who has no interest in and is not affected by it. *State* v. *Becker*, 3 S. D. 29, 51 N. W. Rep. 1018; *Stickrod* v. *Com.*, (Ky.) 5 S. W. Rep. 580; *State* v. *Snow*, 3 R. I. 64.

The order and judgment appealed from must be affirmed.

(73 N. W. Rep. 87.)

STATE *vs.* JOHN O'GRADY.

Opinion filed December 6th, 1897.

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

John O'Grady was found guilty of contempt, and sentenced to imprisonment in the county jail for ninety days, and to pay a fine of two hundred dollars, and that he be imprisoned in said county jail until the fine is paid in addition to the ninety days imprisonment and beginning at the expiration thereof, nor exceeding however, one hundred days additional. He appealed.

Affirmed.

M. Conklin, *M. E. Remmen*, and *W. H. Barnett*, for appellant.

Edward Winterer, *States Atty.*, for respondent.

PER CURIAM. This defendant was found guilty of a contempt of court as an agent or servant of McNulty, the defendant in the case of *State* v. *McNulty*, 7 N. D. 169, 73 N. W. Rep. 87. That case must rule this. It is urged that the evidence fails to show that O'Grady took part in the proceedings which resulted in retaking the property from the officer, and destroying the same, or that he knew that any injunction had issued, or that said property had been seized. We need only say that, after a careful perusal of the evidence, we are satisfied with the finding of the trial court on these points.

Affirmed.

(73 N. W. Rep. 1102.)

PHŒNIX ASSURANCE COMPANY *vs.* FRED H. MCDERMONT, *et al.*

Opinion filed December 6th, 1897.

Frivolous Appeal—Damages.

In this case a penalty of 10 per cent. is awarded respondent on the ground that the appeal was taken solely for delay.

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

Action by the Phœnix Assurance Company of London against Fred H. McDermont, R. M. Carothers, and Charles Carothers on a bond. From a judgment for plaintiff, defendants appeal.

Affirmed.

McDermont & Meyer, for appellants.

Cochrane & Feetham, for respondent.

BARTHOLOMEW, J. Plaintiff brought this action on the bond of the defendant McDermont as principal with the other defendants as sureties. The bond was given for the faithful performance by McDermont of his duties as an agent for plaintiff. The complaint claimed a certain balance due from said McDermont as agent and unaccounted for. The answer was a qualified denial of of indebtedness, with an admission of the agency and the bond, and a counterclaim. On the trial the plaintiff called McDermont as a witness, and proved the balance due and unpaid, and rested its case. Plaintiff objected to any evidence under the counterclaim, on the ground of its insufficiency in law. Thereupon the counterclaim was withdrawn without prejudice to the right to bring an action thereon. Thereupon verdict was directed for plaintiff, but entry of judgment was stayed for a reasonable time, in order to permit an action on the counterclaim. Such action was brought, but afterwards dismissed, and finally, after a delay of more than two years, judgment was entered on the verdict. From that judgment an appeal was perfected in April, 1897. Appellants failed to have any statement settled or the record transmitted to this court within the time prescribed by statute.

Thereupon respondent procured a statement to be settled, and brought the record to this court. In this court appellants file no brief. The judgment is therefore affirmed, and under the facts recited we deem this a proper case, under the discretion lodged in this court by § 5575, Rev. Codes, to inflict a penalty for the delay.

Judgment affirmed, with 10 per cent penalty. All concur.

(73 N. W. Rep. 91.)

R. H. HECKMAN *vs.* P. S. EVENSON.

Opinion filed December 6th, 1897.

Obstruction in Street—Negligence—Jury Question.

Where, in determining whether or not a given obstruction or defect in a street renders such street unsafe, reasonable men might reach different conclusions, the determination of the matter should be left to the jury, and this is true even though there be no dispute whatever as to the character of the defect or obstruction.

Foot Passengers on the Street.

A foot passenger in a city is not limited to traveling on the sidewalks or crosswalks. He may, while exercising due care in so doing, walk along or across a street, and may leave the sidewalk at such points as suits his convenience; and he has a right to presume, and act upon the presumption, that the street is reasonably safe, and free from dangers to travelers, for its entire width.

Contributory Negligence.

In determining whether or not a plaintiff has been guilty of such contributory negligence as will defeat a recovery, his actions must be measured by the actions of an ordinarily prudent man, under the same circumstances and in the same position.

Question of Negligence is for the Jury.

It is only when but one conclusion can reasonably be drawn from conceded or undisputed facts that the question of negligence becomes purely a question of law. If from such facts reasonable men might draw different conclusions or deductions, then the question of negligence must be left to the jury.

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

Action by R. S. Heckman against P. S. Evenson to recover

damages for personal injury. Verdict and judgment for plaintiff for $500 damages. Defendant appeals from an order denying him a new trial.

Affirmed.

F. H. McDermont, *W. E. Rowe*, (*H. Steenerson*, of counsel,) for appellant.

The evidence shows that the surface of the stones in the street though uneven, were in such shape that traffic could be carried on over them more conveniently than before, and that horses stood on them daily. This unevenness is not such a defect as would render any one liable for an injury that might occur from stumbling on them. *Raymond* v. *City*, 6 Cush. 524, 53 Am. Dec. 57; *Coombs* v. *Purrington*, 42 Me. 332; *Town* v. *Evens*, 18 A. & E. Corp. Cas. 275; *Indianapolis* v. *Cook*, 99 Ind. 10; *Quincy* v. *Baker*, 81 Ill. 300; *Richmond* v. *Courtney*, 32 Gratt. 792; *Chicago* v. *Bixby*, 84 Ill. 82; *Aurora* v. *Pulfer*, 56 Ill. 270; *Dubois* v. *City*, 12 Am. and Eng. Corp. Cas. 630; *Waggener* v. *Town*, 26 S. E. Rep. 352; *Grant* v. *Town*, 42 N. Y. Supp. 107. Plaintiff was guilty of contributory negligence in jumping off the walk onto the stones without looking. *Raymond* v. *City*, 53 Am. Dec. 57; *City* v. *Milner*, 20 N. E. Rep. 235; *Wright* v. *City*, 55 N. W. Rep. 819; *Howes* v. *District of Columbia*, 2 App. (D. C.) 188; *Howes* v. *District of Columbia*, 22 Wash. Law. Rep. 41; *Hudson* v. *City*, 71 N. W. Rep. 678. Plaintiffs injuries resulted solely in consequence of an error of judgment on his part; for this defendant cannot be held responsible. *Burr* v. *Plymouth*, 48 Conn. 460; *Alline* v. *LeMars*, 18 A. & E. Corp. Cas. 262; *Potter* v. *Castleton*, 53 Vt. 435; *Hill* v. *Scranton*, 50 Am. Rep. 743; *Pittman* v. *City*, 46 Pac. Rep. 495; *Perry* v. *City*, 54 N. W. Rep. 225; *Smith* v. *City*, 63 N. W. Rep. 982; *City* v. *Harrison*, 19 S. E. Rep. 179.

O. A. Wilcox, for respondent.

Whether the facts impute negligence is a question for the jury, when the circumstances are such that men of ordinary prudence and discretion might differ as to the character of the act. Thomp.

on Neg. 365. *Alt.* v. *C. & N. W. Ry. Co.*, 5 S. D. 20, 57 N. W. Rep. 1126. If the facts and circumstances though undisputed are ambiguous and of such a nature that reasonable men might disagree as to the inference or conclusions to be drawn from them, the case should be submitted to the jury. *Craig* v. *N. Y. Elev. Ry. Co.*, 118 Mass. 431; *Greany* v. *L. I. R. Co.*, 101 N. Y. 419, 5 N. E. Rep. 425. A person is not guilty of contributory negligence in not being on the lookout for excavations on the street. *City* v. *Isaacs*, 3 S. W. Rep. 693; *City* v. *Mizee*, 29 Pac. Rep. 754; *Ott* v. *City*, 131 N. Y. 594; *Veits* v. *Skinner*, 47 Ill. App. 325. The traveling public have a right to suppose that there are no dangerous pitfalls in any part of the street, without a light or railing to guard the same. *Durand* v. *Palmer*, 29 N. J. L. 544; *Wright* v. *Saunders*, 58 Barb. 214, 3 Keyes, 323; *Gordon* v. *City*, 2 S. E. Rep. 727, 2 Thomp. Neg. 1199. The public have a right to use the whole street from side to side. Tiedman on Muc. Corp. § 300. Contributory negligence must be pleaded. *Durand* v. *Palmer*, 29 N. J. L. 544. It will not be presumed. *Durand* v. *Palmer*, 29 N. J. L. 544. It is a question of fact for the jury. *Hanson* v. *Taylor*, 8 At. Rep. 331; *Orleans* v. *Perry*, 40 N. W. Rep. 417; *City* v. *Gore*, 17 At. Rep. 144; *Sandy Lake* v. *Foraker*, 18 At. Rep. 609; *Barr* v. *Kansas City*, 16 S. W. Rep. 483; *City* v. *Dolan*, 31 N. E. Rep. 416; *City* v. *Babcock*, 32 N. E. Rep. 271; *City* v. *Dale*, 90 Ill. 46; *Clayton* v. *Brooks*, 37 N. E. Rep. 574; *Dale* v. *City*, 24 N. Y. Supp. 968; *Lichtenberger* v. *Town*, 58 N. W. Rep. 1058.

BARTHOLOMEW, J. This action was brought to recover damages for a personal injury. There was a verdict for plaintiff, a new trial was denied, and defendant appeals. There is but little conflict in the testimony. The plaintiff was a farmer living a few miles from the town of Northwood, in Grand Forks County, and was in the habit of marketing his produce and doing his trading in such town. The defendant was the owner of a store building on the principal business street in said town. This street had been improved in such a manner that it was highest in the center, and sloped gradually from the center to the sidewalk, so that at the

outer edge of the sidewalk the street was between two and three feet lower than the top of the sidewalk; at least, that was the condition along the block where defendant's store was situated. Rings had been fastened along the outer edge of the sidewalk for the accommodation of parties who desired to hitch their teams. The defendant caused two loads of stones to be placed in the street in front of his building. The stones extended for about fifteen feet lengthwise of the street, and from the edge of the sidewalk out into the street for two or three feet. The largest of these stones were not more than twelve inches in diameter, and the smallest were not more that one-fourth that size. It was nearly or quite two feet from the top of the sidewalk down to these stones. There is some conflict as to the condition in which these stones were left, defendant claiming that he practically covered them with dirt and gravel. The jury were warranted, however, under the evidence, in saying that they had been covered very little, if any, and that the surface was very rough and uneven. On the evening of October 20, 1895, the plaintiff drove his team up to the sidewalk at a point twenty to twenty-five feet north of defendant's store, and tied his horses to the ring in the walk, and went into defendant's store building, having some business with the man who occupied the same. It was dark, and the lamps in the store were lighted. Plaintiff did not know of these stones, but he knew, in a general way the condition of the street. His usual trading place was about a hundred feet north, where practically the same conditions prevailed, except as to the stones. It was his intention when he concluded his business to untie his team, and go directly home, and as it was already dark, he was presumably in something of a hurry. His testimony so indicates. When he left the store he walked directly out to the edge of the sidewalk. The light from the windows shone out on the walk, and into the street, but, of course, the street close up to the sidewalk was in the shade, so that objects could not readily have been observed. Plaintiff, however, makes no claim that he endeavored to see what was there. On the contrary, he says that

when he reached the edge of the walk, without halting, he stepped down into the street. In so doing his foot struck upon a projecting stone in such a manner that his ankle turned and his leg was broken.

Whether or not the stones in the street, in the condition in which they were, or in which, under the evidence, the jury was warranted in saying they were, constituted a defect of which the plaintiff could legally complain, was a question for the jury. In other words, it was for the jury to say whether or not the defendant had, by placing the stones in the street, rendered it unsafe. *Gerald* v. *City of Boston*, 108 Mass. 580; *Dowd* v. *Chicopee*, 116 Mass. 93; *Lane* v. *Town of Hancock*, 142 N. Y. 510, 37 N. E. Rep. 473; Shear. & R. Neg. § 350, and cases cited. Cases can be found where courts have held, as a matter of law, that no recovery could be had for injuries resulting from certain defects or obstructions in the street. *Raymond* v. *City of Lowell*, 6 Cush. 524, *Beltz* v. *City of Yonkers*, 148 N. Y. 67, 42 N. E. Rep. 401; *Grant* v. *Town of Enfield*, (Sup.) 42 N. Y. Supp. 107. But these courts all admit that where, on the question of whether or not a given obstruction or defect renders the street unsafe, different minds might honestly reach different conclusions, such question must go to the jury, although there be no dispute whatever as to the character of the defect or obstruction. Upon this latter theory, even, it is clear that the question of the nature of the defect was for the jury in this case. Nor must this case be confounded with cases of accidental and temporary defects, which might arise by a brick working loose in a walk, or from an accidental block in the street,—things which ordinary prudence might not successfully guard against. In this case the obstruction, if such it was, was placed there purposely and in a manner to make it permanent in its character.

Nor do we find any error in the instructions of the court on this branch of the case. Numerous exceptions to the charge were taken, but most of them are too general for us to notice,

and are abandoned in the assignment of errors. As to the other exceptions, it is sufficient to say that by no fair construction of the language used did the court at any time presume to tell the jury what particular fact or circumstance would render the street unsafe or dangerous, for the purpose of ordinary travel, by persons in the exercise of due care. That matter was studiously left to the determination of the jury, and we think the evidence was sufficient to warrant the jury in finding that the acts of the defendant had rendered the street unsafe, and from such fact negligence followed as matter of law.

It is strenuously urged, however, that plaintiff cannot recover, by reason of his contributory negligence. It is claimed that his act in stepping from the sidewalk to the street in the dark, and without stopping to examine the condition of the street into which he was stepping, and without halting or taking any precautions for his safety, was, *per se*, such an act of negligence as bars his recovery. We can perceive no sufficient reason for entering, at this time and in this case, upon any lengthy discussion of the law relating to contributory negligence. The matter has certainly been exhausted, and by writers who were masters of the subject. We need only apply the law as it has been decided. "Contributory negligence, in its legal signification, is such an act or omission on the part of a plaintiff, amounting to a want of ordinary care, as, concurring or co-operating with the negligent act of the defendant, is a proximate cause or occasion of the injury complained of." Beach, Contrib. Neg. § 7. As a general rule, it is conclusively settled that the presence of such negligence on the part of a plaintiff will defeat any recovery. "The failure to exercise such care, prudence, and forethought as duty requires to be given or exercised under the circumstances is negligence." *Brotherton* v. *Improvement Co.*, 48 Neb. 563, 67 N. W. Rep. 479. "By ordinary care is meant such care as a prudent man would use under the same circumstances. It must be measured by the character and risks of the business." *Railway Co.* v. *Barrett*, 166 U. S. 617, 17 Sup. Ct. 707. "The standard of

the ordinarily prudent man must be applied in every case where the inquiry is whether or not a party has acted with due care." *Laufer* v. *Traction Co.*, 68 Conn. 475, 37 Atl. 379. To determine whether or not plaintiff was guilty of contributory negligence in this case, his acts must be measured by what an ordinarily prudent man, under the same circumstances and surroundings, would have done. The legal proposition that a foot passenger, while exercising ordinary care in so doing, has a right to travel along or across a street as may suit his convenince, and in so doing he has right to presume and act upon the presumption that such street is reasonably safe for its entire width and free from dangers to travelers, is, we think, well sustained by *Gordon* v. *City of Richmond*, 83 Va. 436, 2 S. E. Rep. 727; *Durant* v. *Palmer*, 29 N. J. Law, 544; *Street* v. *Holyoke*, 105 Mass. 85; 2 Thomp. Neg. 718, 1197; Beach Contrib. Neg. § 260, and cases cited; Tied. Mun. Corp. 575. Hence the act of leaving the sidewalk and going upon the street, not at a crosswalk, was not of itself an act of negligence.

The defendant assigns as error the refusal of the court to give the following instruction requested by the defendant: "If you find from the evidence that the plaintiff, without cause walked across the sidewalk, and stepped off from it into the gutter, without looking where he was stepping, the court charges you that he was guilty of negligence in so doing." There was no evidence whatever that the plaintiff left the sidewalk "without cause." All the evidence showed that he had a well defined purpose in so doing, and that was to unfasten his team and get into his vehicle. It would be most unreasonable to say that he should unfasten his team from a ring in the sidewalk while standing thereon. It might be done, but the ordinary man does not voluntarily assume a position so strained and uncomfortable, when, by stepping from the sidewalk, it could be avoided. Neither would it be reasonable for the jury to say that he should have gotten into his vehicle—a common farm wagon—without leaving the sidewalk. Again, it was misleading to talk to the

jury about stepping into the gutter. There was no gutter there, in the proper sense of the word. True, the street was lowest next to the walk, but there was no gutter, as distinguished from the street proper. The instruction requested was unfortunately worded, and its refusal was not error.

Appellant argues upon the theory that the fact that the walk was two feet above the street was in itself a dangerous defect; that plaintiff knew of this defect; and that, in attempting to pass it, he voluntarily assumed the risks attendant thereon, and that his injury was simply the result of his error of judgment in thinking that he could safely pass the defect. That reasoning, when applied to the facts in this case, would carry us to this result: Where a party assumes the risk of passing a known danger, and in making such passage encounters another and unknown danger, whereby he is injured, he is without remedy because in presuming to pass the known danger he assumed all risk of being hurt. But, of course, such is not the law. Had the street been in fact as plaintiff had a right to presume it was,—reasonably safe and free from danger,—and had plaintiff nevertheless been injured, he might have been without remedy. But instead of stepping from the sidewalk down upon a dirt street as he supposed he would, plaintiff stepped upon a projecting stone placed and fastened there by the act of the defendant, and that, under the evidence, was the proximate and sole cause of the injury; and, where the cause of an injury is thus specifically ascertained, the law will not stop to speculate upon what might have occurred had such cause been absent.

Was plaintiff negligent in stepping off the walk as he did, and in not seeing the stone that caused the accident? Here again we must use the same standard of measurement,—the actions of men of ordinary prudence under the same circumstances. We think the jury, as practical men, would at once say that the man of average prudence, coming out of that store for the purpose of unhitching his team, would have stepped from the walk down into the street. If so, there was no negligence in stepping down

unless it was done in a negligent manner. It will be conceded, that, had plaintiff known of the presence of the stones, it would have been his duty to be alert to avoid them; or, not knowing of them before, had he seen them before he stepped down he must have avoided them. But not knowing of their presence, and not seeing them, was he negligent in stepping down without ascertaining the condition of the street? We cannot say, as matter of law, that he was, unless we disregard that other principle, which declares that he may rightfully presume that the street is reasonably safe and free from dangers, and act upon that presumption. If a party must be charged with negligence in making a step in advance when he does not clearly see where he is stepping, then, of course, all presumption that the street is safe is swept away. In this connection appellant cites *Raymond* v. *City of Lowell*, 6 Cush. 524; *Dubois* v. *Kingston*, 102 N. Y. 219, 6 N. E. Rep. 273; *City of Indianapolis* v. *Cook*, 99 Ind. 10; *Wright* v. *City of St. Cloud*, (Minn.) 55 N. W. Rep. 819; and *Hudson* v. *City of Little Falls*, (Minn.) 71 N. W. Rep. 678. But an examination of these cases will show that in nearly every instance the injured party either knew beforehand of the defect, or saw it at the time. The case from 6 Cush. goes a step further, and holds a plaintiff guilty of contributory negligence who, in the day time, failed to see an obstruction that was in plain view. This case is no doubt much weakened as an authority by the subsequent cases of *George* v. *Haverhill*, 110 Mass. 511; *Hill* v. *Seekonk*, 119 Mass. 85; *Hawks* v. *Northampton*, 121 Mass. 10. We think the better rule is as stated in 2 Thomp. Neg. 1197: "There is no rule of law which obliges a person while upon the highway to keep his eyes constantly on the road before him that he may avoid injury from any defects therein. He may presume the road is in a fit condition for travel; in other words, he is not obliged to presume negligence on the part of those whose duty it is to keep the highway in repair." But no case has been cited, and we are confident that none can be cited, holding that a party is negligent in not avoiding a defect of which he had no knowledge, which he did not see, and which

he could not have seen in the ordinary exercise of his faculties. It is undisputed in this case that, by reason of being in the shadow of the walk, the defect that caused the injury was not readily discernible. We think we need pursue this line no further in order to demonstrate that the facts of this case bring it within no decision where a court has declared negligence to exist as matter of law. True, it has often been said that, where there is no dispute about the facts, negligence is a pure question of law. This language has been used without qualification in cases where no necessity for qualification existed. But the Supreme Court of Wisconsin in *Hoye* v. *Railway Co.*, 62 Wis. 666, 23 N. W. Rep. 14, said: "It is only when the inference of negligence or contributory negligence is necessarily deducible from the evidence and the circumstances proven that the court is justified in taking the case from the jury." Or to state the qualification differently, but not so well, it is only when but one conclusion can reasonably be drawn from the conceded or undisputed facts that negligence becomes purely a question of law. If the undisputed facts be of such a character that reasonable men might draw different conclusions or deductions therefrom, then the question of negligence must be submitted to the jury. Shear & R. Neg. § 56; Thomp. Neg. 365; Beach, Contrib. Neg. § 454, *et seq.*; *Beltz* v. *City of Yonkers*, 148 N. Y. 67, 42 N. E. Rep. 401; *Greany* v. *Railroad Co.*, 101 N. Y. 419, 5 N. E. Rep. 425; *Craig* v. *Railway Co.*, 118 Mass. 431; *City of Chicago* v. *Babcock*, (Ill. Sup.) 32 N. E. Rep. 271; *Kane* v. *Railway Co.*, 128 U. S. 91, 9 Sup. Ct. 16. Under this qualification to the proposition, which is as thoroughly grounded in the law as the proposition itself, the question of contributory negligence was properly submitted to the jury, and their finding cannot be disturbed. We have discussed all the points raised by the assignment of errors which we consider worthy of space. All concur.

Affirmed.

(73 N. W. Rep. 427.)

NOTE—One making an excavation adjoining a public way is liable to one who

deviates from the road and falls into the excavation. *Sanders* v. *Reister*, 1 Dak. 146. City held liable for permitting a threshing engine to remain on street from which a horse took fright, injuring person driving upon the street. *Ouverson* v. *City*, 5 N. D. 281. Also for injury from porch overhanging sidewalk. *Larson* v. *City of Grand Forks*, 3 Dak. 307. City held liable for injury to one driving into an unguarded ditch upon public street. *Ludlow* v. *Fargo*, 3 N. D. 485. Also for injury to a foot passenger who stepped into a hole in the side walk made by the displacement of a loose plank. *Chacey* v. *Fargo*, 5 N. D. 175. Notice will be inferred if the defect in a street has existed for a considerable time. *Larson* v. *City of Grand Forks*, 3 Dak. 307; *Ludlow* v. *Fargo*, 3 N. D. 485; *Chacey* v. *Fargo*, 5 N. D. 173. The power conferred upon a city to provide for keeping its streets and sidewalks clear from obstructions, carries the duty to keep the same in safe condition. *Ouverson* v. *Grafton*, 5 N. D. 281; *Larson* v. *Grand Forks*, 5 Dak. 307. Whether an excavation is deep and dangerous, and in dangerous proximity to the public way are questions for the jury. *Sanders* v. *Reister*, 1 Dak. 146. The question of contributory negligence is for the jury. *Herbert* v. *Ry. Co.*, 3 Dak. 38; *Mares* v. *Ry. Co.*, 3 Dak. 336; *Elliot* v. *Ry. Co.*, 5 Dak. 523; *Ouverson* v. *Grafton*, 5 N. D. 381. And the burden of proving it is on the defendant. *Sanders* v. *Reister*, 1 Dak. 146; *Ouverson* v. *Grafton*, 5 N. D. 281; *Mares* v. *Ry. Co.*, 3 Dak. 336; *Gram* v. *Ry. Co.*, 1 N. D. 252; *Bostwick* v. *Ry. Co.*, 2 N. D. 440; *Bennett* v. *Ry. Co.*, 3 N. D. 91; *Sogstad* v. *Ry. Co.*, 5 Dak. 517; *Elliott* v. *Ry Co.*, 5 Dak. 523. Where there is no conflict in the evidence, contributory negligence may become a question of law. *Schmidt* v. *Leistekow*, 6 Dak. 386; *Herbert* v. *Ry. Co.*, 3 Dak. 38. Proximate cause defined. *Ouverson* v. *Grafton*, 5 N. D. 281; *Chacey* v. *Fargo*, 5 N. D. 173. Expense of medical attendance is recoverable as damages. *Chacey* v. *Fargo*, 5 N. D. 173.

OWEN FARGUSSON *vs.* FRANK S. TALCOTT, *et al.*

Opinion filed December 7th, 1897

Vendor and Purchaser—Forfeiture—Waiver.

Where the vendor in the contract for the sale of real property is required by the terms thereof to give written notice to the vendee of his election to treat the contract as terminated on failure of the vendee to pay at the time specified therein, time being declared to be of the essence of the agreement, such vendor must act with diligence in giving such notice, or he will be deemed to have waived his right to insist that the vendee has lost his rights in equity on account of such breach. Under the facts of this case, the vendor is held to have waived his rights to insist upon a termination of the contract by waiting for three months before giving the notice.

Contract Construed.

Contract construed, and *held* to contain no provision which overrides the clause which declares that time shall be of the essence thereof.

Time of Performance—Time Essence of Contract.

An agreement that time shall be of the essence need not be in any particular form. Such an agreement will be enforced in a court of equity as well as a court of law; and, if the party fails to perform at the time stipulated, the other party may treat the contract as at an end for all purposes, and thereafter no court will declare specific performance thereof. But, even after such a default, the one who was not guilty of it may waive his right to treat the contract as at an end.

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

Action by Owen Fargusson against Frank S. Talcott and Gertrude S. Talcott, to determine adverse claims to real property. From a judgment directing plaintiff to execute to defendants a warranty deed on their payment to him of the amount found, the plaintiff appeals.

Modified.

John E. Greene, for appellant.

Evidence of the practical construction given to a contract by the parties thereto in their dealings under it may be considered in determining a proper construction. *Hosmer* v. *McDonald*, 49 N. W. Rep. 112; *First Nat. Bank* v. *Jagger*, 41 Minn. 308, 43 N. W. Rep. 70.

Leonard A. Rose, for respondent.

Where the time for the delivery of the deed has arrived, the action of the vendor is for specific performance. *Shelley* v. *Mikkelson*, 5 N. D. 22, 68 N. W. Rep. 213. Conditions will always be construed so as to save a forfeiture if it can fairly be done. Martindale Conv. 292. Respondents offer to do equity—taxes are paid and they tender the purchase price. *Curtis* v. *Gritz*, 58 N. W. Rep. 883. That clause of the contract which says: "Time is of the essence of the contract" has been waived by appellants accepting interest on delayed payments and his failure to forfeit in time. *Merriam* v. *Goodlett*, 54 N. W. Rep. 686; *Robinson* v. *Trufant*, 56 N. W. Rep. 769; *Ganghan* v. *Kerr*, 68 N. W. Rep. 694. An action will lie to foreclose the rights of the purchaser in a contract for real estate and the decree will direct that

the purchaser comply with the terms of his contract within a reasonable time to be named therein or the premises be sold. *Gardels* v. *Kloke*, 54 N. W. Rep. 834.

CORLISS, C. J. In this action instituted to determine adverse claims to real property under § 5904, Rev. Codes, the defendants have set up an equitable interest in the land involved by virtue of a written contract with the plaintiff for the purchase thereof, and pray that the court decree specific performance of such agreement. There is practically no controversy about the facts. The land agreed to be sold consisted of a whole section. The contract was made in the spring of 1892. The purchase price was to be paid by the delivery to the plaintiff of 15,000 bushels of No. 1 Northern wheat, 3,000 bushels thereof to be delivered on or before October 15, 1892, and 4,000 bushels on or before October 15th in each of the next three succeeding years. The place of delivery was the town of Buffalo, in the County of Cass, in this state. For a failure to deliver the full amount specified in any year the defendants were not to lose their rights under the contract, but were to pay interest on the deficiency; it being the obvious purpose of the parties that the payment of such deficiency should be deferred until the next season, when it should be made good, with interest thereon at 7 per cent. But it was undoubtedly the understanding of the parties that at least one-third of the crop raised on the land in each year should be delivered by the defendants to enable them to escape the consequences in equity of a default. To insure a reasonable payment each year, the defendants bound themselves to crop at least 400 acres every season. Time was declared to be of the essence of the contract, and a clause commonly spoken of in cases of this kind as a forfeiture clause was inserted therein. The mere failure of the defendants punctually to comply with the terms of the contract was not of itself to work the termination thereof, but only after a written notice served upon the defendants in a particular manner had been given was the agreement to cease to be of further binding effect. Under this contract the defendants entered upon the possession of the

land in the spring of 1892, and have been in the possession thereof ever since. In 1892, 1893, and 1894 they delivered more than one-third of the crop raised upon the farm, but did not in any of these years deliver the specified number of bushels; *i. e.* 3,000 bushels in 1892, 4,000 bushels in 1893, and 4,000 bushels in 1894. Whether defendants violated their contract in those years is immaterial, for it is undisputed that they were permitted by the plaintiff to farm the land in 1895, and this was a waiver of all prior breaches. But in 1895 no wheat whatever was delivered by the defendants, nor did they during this season in any manner communicate with the plaintiff explaining their failure to perform or asking further time, although they in fact raised that year 3,000 bushels of wheat upon this land. Had plaintiff promptly given the defendants the notice required by the contract, that he elected to treat it as at an end because of their violation of its obligations, his position would have been unassailable. It is evident that time was of the essence of the contract with reference to the delivery of one-third of the wheat raised each year. No extension of time as to a deficiency arising from a failure to deliver one-third of the grain in any year is contemplated so far as such deficiency is concerned. With respect to that amount of wheat, time was of the essence of the contract. But, if one-third was delivered, the failure to deliver the specified number of bushels was not to put the defendants at the mercy of the plaintiff, but would only render them liable for interest thereon because the payment was not made at a particular time. The general principles which govern the decision of this case are well settled. In equity time is not ordinarily regarded as an essential element in a contract. But the parties may make it so by express agreement. This was done by the terms of the contract here involved. It is true that there is an express agreement that, for failure to comply with the provisions of the contract, the defendants shall be liable in damages. But this did not in any manner qualify the clause making time of the essence. In the absence of a stipulation that time shall be of the essence of the

contract, a failure to perform on the exact day named will not work the destruction in a court of equity of the rights of the party who is dilatory in the fulfillment of his promise. In equity he may, despite this default, have specific performance. If, however, he agrees that time shall be of the essence of the agreement, he waives his right to invoke equitable protection. But the fact that he has no standing in a court of equity to excuse his default furnishes no argument to permit him to escape the consequences of his default in a court of law. The same breach of the contract which destroys his rights in equity also renders him liable for damages in a court of law. Inserting a provision that such liability shall exist adds nothing to it. Neither should it be taken as evincing a purpose to nullify the explicit language of the contract that time is of the essence thereof. Construed as a whole, the agreement in this case merely contains provisions which entitle the plaintiff to treat a breach thereof as a termination of the defendants' rights thereunder in a court of equity, and as subjecting them to damages in a court of law. Sound policy requires that those stipulations, making time of the essence of the agreement, should be enforced where the vendor, without being in any manner responsible for the vendee's default, acts promptly, and clearly manifests a purpose to avail himself of such provisions of the contract. The owner of land, having other business interests, may foresee that he will need or can use to great advantage the money at a particular time, and that if he can have the money on the very day named he can afford to sell on the terms specified. But he may be unwilling to sell on such terms if the payment is to be deferred. The profit to him may not be in the sale of the land, but in the use to which he can put the money, provided he can have it on the very day on which the vendee agrees to pay it. For this reason he should be allowed to stipulate in his contract that a failure to pay on the day specified shall destroy the rights of the defaulting party in a court of equity as well as in a court of law. This provision need not be in any particular form, but it is usual to express it in the

manner in which it was expressed in the contract in question. After some vacillation on the part of the English chancellors, the rule was there adopted, and it prevails in this country as well, that the parties may by their agreement make time of the essence thereof; and that in such a case a failure to comply with the terms of the contract, at the time named therein for performance, will debar the person in default from claiming any rights thereunder, even in a court of equity. Our statute recognizes this doctrine. Rev. Codes, § § 3806, 3916.

But all the authorities agree that the vendor may waive, as to any installment, the provision of the contract making time of the essence of the agreement. We think that, under the facts of this case, we are compelled to hold as a matter of law that the plaintiff waived such provision as to the default occurring on the 15th of October, 1895. It was not until January 15, 1896, that he served upon the defendants the notice specified in the agreement. This was the first indication on his part of any purpose to insist strictly upon his rights. Prior to October 15, 1895, the defendants had requested an extension of time of one year on the contract, and the plaintiff had put them off without any definite answer. It is true that this did not excuse the default. Had plaintiff acted promptly, and given the written notice specified in the agreement, the defendants could have claimed nothing from his silence and his evasive conduct. But where it is a question whether, under all the circumstance, he has not so acted that they were justified in assuming that he did not intend to take advantage of the default, the fact that he did not absolutely refuse to grant an extension, but, on the other hand, rather held out hopes that he might grant it, is a fact of some significance. During a reasonable period of time after their default they were undoubtedly at the mercy of the plaintiff. He might promptly have cut off their rights by giving the notice required by the agreement. But he did not give it within a reasonable time, when we consider the circumstances of the case. Here was a large farm of land in the possession of the defendants, as equitable owners under this

contract; and the plaintiff well knew that, unless he in some way promptly indicated his purpose to exercise his election to terminate the agreement, the defendants would naturally infer that the plaintiff intended to give them further time. The plaintiff knew that the preparation of the ground for the next year's crop would be made in the fall, and that whatever plowing was to be done before winter set in must be done in the course of the next few weeks. His contract required the defendants to plow and crop at least 400 acres in each year, and yet he waited until long after the season for plowing, according to the general custom of farmers, had passed before he notified them that they could no longer enjoy any rights under the agreement. So long as he withheld the notice, the contract was an existing contract, and the duty of the defendants under it was to go on with the plowing of the land. Under such circumstances, nothing but prompt action on his part could prevent the inference that he had decided not to insist upon the letter of the contract as to time. When a party stipulates that he will give written notice of his election to take advantage of a breach, where time is of the essence of the agreement, an unreasonable delay in giving this notice is equivalent to an assurance that as to that default the provision with respect to time has been waived. It is not at all burdensome to require diligence of action on the part of the vendor who holds the vendee absolutely in his power. He should not be allowed to watch for a season the fluctuation in the value of the thing agreed to be sold, and shape his conduct with respect to the termination of the agreement according as it appears at a much later day to be or not to be to his interests to insist upon the annulment of the contract. Especially is this the case when the medium of payment is itself not money, but property subject to considerable variations in market value. Plaintiff was to receive his pay in wheat. Had the price of wheat risen materially between October 15, 1895, and January 15, 1896, when the notice was given, we venture the prediction that, instead of receiving notice of a cancellation of the agreement, the defendants would

have been met with a demand that they perform by delivering the wheat or by paying its then market value. Time being of the essence of the entire contract, it was as much incumbent on the plaintiff to act promptly in giving his notice of cancellation as it was incumbent on the defendants to deliver the wheat on the day specified in the agreement. It would be intolerable to allow one who holds the whip over the head of the other party to the agreement to take his time in watching for a favorable turn in the market price of the commodity in which he is to be paid, with the undisclosed mental reservation that if it appears later on to be to his interests to terminate the contract he will do so. He may, of course, enforce his agreement as to time, because parties are, as a rule, allowed to make such contracts as they please, and because it is important in the business world that these understandings should be upheld, whatever excuse the defaulting party may present to save his rights. But the power which this option places in the hands of one party to an agreement, after the default has occurred, over the other party, is so great, and is so liable to abuse, if the one who wields it is allowed much latitude as to time in making and manifesting his election to give or withhold the notice required to be given by the contract, that a court of equity should exact of him the utmost good faith, fairness, and promptness in deciding that he will terminate the agreement by such notice. As he is seeking to hold the other party strictly to the agreement in respect of time, it is bare justice that he himself should not be permitted to be dilatory in disclosing his determination to put an end to the agreement. It is always possible for him to act without delay. His silence is calculated to induce the belief that he does not intend to insist upon his strict rights. And if at any time in the future he desires to fix a time within which the other party must perform or be deemed to have lost his rights, even in equity, he can accomplish this end by giving notice that, unless the other party performs his part of the agreement within a time designated (which must be a reasonable time,) he will be deemed to have forfeited his rights there-

under. If, after such a notice, the default continues, the party in default will cease to have any right to the benefits of the contract, even in a court of equity.

We think that, under the circumstances of this case, the plaintiff waived his right to terminate the contract for the breach on October 15, 1895. There is ample evidence of the good faith of the defendants. Had they remained silent, and taken no steps towards performance, during the whole of the season of 1895, and down to the time the notice was served on them, the case might fall within another rule, which requires diligence and good faith of the person who seeks specific performance. But it appears that the defendants were endeavoring to perfect arrangements to raise the money to pay up all that was due on the contract at the time this notice was served, and that they had been making these efforts for some time prior thereto. The time for the payment of the last installment had passed; and as the crop raised in 1895 was not sufficient to pay the balance due, (8,000 bushels) the crop being only about 3,000 bushels, defendants were trying to effect a loan on the property, and, with the proceeds thereof, satisfy the plaintiff's claim for the unpaid balance of the purchase price. No tender or offer to perform was required before setting up the counterclaim in this case. Plaintiff, by his positive refusal to perform, waived such tender. Thereafter defendants could, without an offer to perform, maintain an action for specific performance; and hence it follows that without any such offer they could interpose the counterclaim for specific performance interposed in this action.

Defendants did not, however, establish a right to unconditional specific performance. Their own evidence shows that they owe more than 8,000 bushels of wheat on this contract. Having asked for specific performance, and having admitted their obligation to make further payments to entitle them to specific performance, the burden was upon them to furnish the court the data on which the amount due could be ascertained. Have they done so? If not, they must be defeated in the case, notwithstanding

the fact that they have shown a right to specific performance on paying the amount still due. Under the Newman law as originally passed, and as amended by the Rev. Codes, we have no power to send the case back for a new trial or to have more evidence taken, nor have we any authority to take further evidence ourselves. We are required to make a final decision on the record transmitted to us from the lower court. If, therefore, there is no evidence from which we can ascertain what defendants should pay to entitle them to specific performance, we are powerless to do the very thing the Newman law commands us to do; *i. e.* decide the cause according to the justice of the case. It is conceded that the defendants still owe 8,000 bushels of wheat, and the interest thereon, or the money value thereof. Four thousand bushels of this amount was due October 15, 1894, and 4,000 bushels was due October 15, 1895. If we are to take the money value of this grain on these two dates, and compute the interest thereon, we are utterly without evidence from which we can discover the amount the defendants should pay. There is no proof in the case as to the value of the wheat on either of these dates. We confess that there is language in the contract which indicates that, after an installment should fall due, the speculative element in the contract should cease as to that installment, and that thereafter the defendants must pay the money value of such wheat on the day when it was due, with interest thereon. But plaintiff's own counsel strenuously contends in this court that the deficiency was to be paid in wheat, and the interest thereon was to be computed in bushels of wheat, and it is clear that both parties to the agreement so construed it from the very beginning. Whenever there was a deficiency, plaintiff would send defendants a statment the following year, claiming, not the value of the number of bushels of wheat which defendants had failed to pay on time, but the wheat itself, with interest thereon computed in bushels of wheat. The notes which he took from time to time, representing the successive deficiencies, were payable in wheat, and not in money, and the interest thereon was computed in wheat, and not

in money. When these notes were paid, they were paid by the number of bushels of wheat they called for (principal and interest,) without any reference to the value of the wheat when it was originally due or the value at the time of such payments. Following the construction placed upon the contract by the parties themselves, and contended for in this court by their respective counsel with equal zeal, it is clear that, when plaintiff sought to terminate the contract by notice on the 15th day of January, 1896, there was due him from the defendants in wheat 8,000 bushels, with interest at 7 per cent. on 4,000 bushels thereof from October 15, 1894, and 4,000 bushels thereof from October 15, 1895, making in all 8,420 bushels of wheat due January 15, 1896. Plaintiff having taken the attitude that he would not perform, and the defendants then being in position to insist upon performance, they are regarded as having then tendered the balance, and been met with a refusal. The value of the wheat at this time was 43 cents a bushel, making the total amount then due $3,620.60. The amount the defendants must pay to secure a deed is $3,620.60, with interest thereon at the rate of 7 per cent. from January 15, 1896, to the date of payment.

It is urged that the decision of this court must direct the delivery of wheat. We think not. Neither party ever contemplated that, after the defendants had offered to deliver the wheat at a time when they could deliver it under the contract, they should still take the risk of the fluctuations in the market price thereof. Indeed, the contract allowed them to deliver the whole of the wheat at any time. Could plaintiff defeat this provision by refusing to accept, and then successfully insist that the decree should require the delivery of wheat at a time when the price thereof might be much higher than at the time the defendants had offered to deliver it? The defendants are deemed in law to have offered to perform the contract on January 15, 1896, and to have been met with a refusal on the part of the plaintiff. At that moment the amount they must pay to secure a deed became fixed.

The judgment of this court is that the judgment heretofore appealed from be set aside, and that a new judgment be entered by the District Court in substance as follows: The defendants shall deposit with the clerk of the District Court of the Third Judicial District, in and for the County of Cass, N. D., the sum of $3,620.60, with interest thereon from January 15, 1896, at 7 per cent. per annum, less $21.10 costs, within 30 days after the District Court enters the judgment herein which it is hereby ordered to enter. The plaintiff, at any time thereafter, shall be entitled to receive such money on executing and delivering to the clerk of said court, for the benefit of the defendants herein, a warranty deed of the real property described in the complaint herein. In case defendants make such deposit, and the plaintiff fails to execute and deliver such deed within 10 days after the expiration of said 30 days, this decree shall operate as a transfer of the title to said land from the plaintiff, Owen Fargusson, to the defendants herein, Frank S. Talcott and Gertrude S. Talcott. Until the delivery of said deed the plaintiff shall not be entitled to receive said money, or any portion thereof, although the period of 10 days after said period of 30 days has expired, and this decree, therefore, operates as a transfer of title. As the amount directed to be paid by the defendants by the judgment of the lower court is less than the amount we find to be due the appellant, the respondents should not recover their costs and disbursements on this appeal. But, in view of the fact that they have been successful on the main question, we think that no costs should be taxed against them. The judgment shall provide that, in case of the failure of the defendants to make the payment specified within the time prescribed, they shall be forever barred and foreclosed of all right, title and interest in and to the land described, and that the plaintiff shall thereafter be entitled to the immediate possession thereof. Let judgment be entered in accordance with the foregoing directions. All concur.

(73 N. W. Rep. 207.)

NOTE—Unless the contract by express words creates the relation, the vendor and

vendee under a contract for sale of land upon crop payments do not become tenents in common of the crop, nor is the relation of landlord and tenent created. *Moen* v. *Lillestal*, 5 N. D. 327. Where notes were executed by the vendee for the purchase price of land bought under contract for deed—the notes and contract must be construed together as part of one indivisible transaction. *Shelly* v. *Mikkelson*, 5 N. D. 22. So long as the vendee retains actual possession under his contract, his right to control is not impaired because of his default. *Nearing* v. *Coop*, 6 N. D. 345. After division of the grain the vendor under farm contract cannot maintain conversion for vendees portion of the grain. *Lloyd* v. *Powers*, 4 Dak. 62. A refusal by one party to perform his contract excuses performance by the other party. *Brace* v. *Doble*, 3 S. D. 110–416. The purchaser cannot be compelled to accept a deed until the title is free from doubt. *Black Hills Nat. Bank* v. *Kellogg*, 4 S. D. 312. But to recover back money paid under a contract of purchase, the vendee must show that he has performed his part of the contract, or tendered performance or that the contract has been rescinded. *Way* v. *Johnson*, 5 S. D. 237. To rescind a contract the vendee must restore or offer to restore all the consideration he received under it. *Johnson* v. *Burnside*, 3 S. D. 230. A contract for forfeiture of all payments made thereunder in case of the vendees failure to perform his contract, is not void under § 3581, Comp. Laws. *Barnes* v. *Clement*, 8 S. D. 421.

OTTO GAS ENGINE WORKS *vs.* WILLIAM A. KNERR.

Opinion filed December 8th, 1897.

Action Tried by Court—Evidence Not Received—Mistrial.

In this case an issue of fact was joined, and the action was tried in the District Court, without a jury, under § 5630 of the Rev. Codes. At the trial the defendant offered to prove a certain state of facts orally, by witnesses produced by him. The offer and the evidence were objected to on various grounds, and the evidence was excluded by the court, and never taken down in writing or in any manner received or preserved upon the record. *Held*, that such rulings prevented a trial of the action below, within the spirit and meaning of said section of the code, and that this court cannot consider or dispose of the case finally upon such a record. The evidence, whether admissible or not, under the rules of evidence, should have been taken down and brought upon the record and transmitted to this court for its consideration.

Rules of Evidence Enforced.

Held, further, that, while all evidence offered at a trial under said section must be preserved and brought upon the record, such section does not operate to abrogate the common law rules of evidence. Such rules are in full force, and must be applied in the decision of such cases in the District Court and in this court.

Mistrial.

No trial being had below, within the meaning of said section, the judgment must be reversed, and the record remitted for further proceedings.

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

Action by the Otto Gas Engine Works against William A. Knerr to foreclose a chattel mortgage. From a judgment for plaintiff, defendant appeals.

Reversed.

Smith Stimmel and *Pollock & Scott*, (*Newton & Smith*, of counsel,) for appellant.

William C. Resser, and *Arthur B. Wright*, for respondent.

WALLIN, J. This is an action to foreclose a chattel mortgage upon an Otto gas engine. The mortgage was given by defendant to secure the payment of a promissory note made by the defendant, and payable to the firm of Schleicher, Schumm & Co., or to the order of that firm. The plaintiff is a corporation, and alleges in its complaint "that thereafter, and prior to its maturity, said note was, for value, transferred to this plaintiff, which has since been, and now is, the holder and owner thereof." The complaint also states that the chattel mortgage in question was made and delivered of even date with the note, and that the same has been kept alive by a proper renewal thereof, and that the conditions of the mortgage had been broken by the non-payment of the note. To this complaint defendant filed an answer, which in terms admitted the execution of the note and mortgage, and, by its silence, admits all the other averments contained in the complaint. The answer further embodied new matter by way of counterclaim, which, in the view we have taken of the record, need not be set out in detail. It will suffice to say that the answer avers, in substance, that said note was given for part of the purchase price of said Otto gas engine, which engine was sold by said firm of Schleicher, Schumm & Co. to the defendant; that said firm entered into certain warranties as to the construction and capacity of said engine, which warranties were broken; and that defendant was damaged thereby. To the new matter in the answer, plaintiff replied by a general denial. At the trial the plaintiff, under objection, introduced in evidence a deposition

which is contained in the record, and from which it appears that the plaintiff purchased the note for value, before its maturity, and that, at the time of the purchase, the note was indorsed by the payee, and in due course delivered to the plaintiff, and that plaintiff received the note without notice of any defenses thereto. Upon this evidence, plaintiff rested its case. The defendant then offered certain depositions in evidence, which were received without objection, and which are embodied in the record. Defendant next offered in evidence the deposition of one Ames, which deposition, being objected to, was ruled out by the trial court, and does not appear in the record sent to this court. Defendant's counsel then offered orally to show certain specific facts by the deposition. This offer was objected to, and the objection was sustained. The defendant, who had been previously sworn as a witness, was then recalled to testify in defendant's behalf; whereupon defendant's counsel, without propounding a question to the witness, made a certain offer of testimony, in the following language: "I offer to prove by Mr. Knerr the same things stated in Mr. Ames' deposition, and for the same reasons, and further offered to show that defendant has been damaged in the sum of over three thousand four hundred and ten dollars, by reason of the engine not having the power that he claims it should have had under the purchase of this engine." The defendant at the same time further offered to show, "by letter dated Philadelphia, October 5, 1894, addressed to Mr. Knerr, and signed by the Otto Gas Engine works, per Frederick Berdan, secretary and treasurer, going to show that they had notice of the claims of Mr. Knerr for a defense in this action." The defense also, at the same time, offered another letter from plaintiff to defendant, dated October 8th, and still another letter to defendant, written by Schleicher, Schumm & Co. All of the evidence so offered was objected to by plaintiff's counsel, for various reasons, which appear in the record. The objection was sustained, and the evidence excluded. The letters so offered appear in the record, but the oral testimony of the defendant does not and cannot appear in this record, for

the obvious reason that such oral testimony was never given at all, nor was any part of it given or taken down in writing in the trial court, or in any manner preserved. Defendant's counsel next offered the depositions of two other witnesses with reference to the character of the engine in question. These depositions were excluded upon the same ground advanced by plaintiff as against the Ames deposition. Neither of these two last named depositions appears in the record. Other oral testimony bearing upon the defensive matter set out in the answer was offered in behalf of the defendant, and was excluded upon the same grounds. Such oral evidence, never having been reduced to writing, nor received at all by the trial court, does not and cannot appear in the record sent to this court.

Pausing here, and summarizing what has been said concerning the state of the record before us, it appears that in addition to certain evidence which was offered and received at the trial, and which is incorporated with the record, a certain deposition, viz. that of Ames, was offered in evidence by the defendant, and ruled out below, and that such evidence is not embraced in the record sent here; second, that a certain oral evidence, having reference to the subject matter of the defense pleaded in the answer, was offered, and, upon plaintiff's objection was excluded by the order of the court below, and not taken down or preserved. This oral evidence so offered and excluded was of the same general tenor as that embodied in the Ames deposition, and was excluded by the trial court upon precisely the same ground, viz. that, when it was offered, the defendant had not by any evidence shown that the plaintiff was not a good faith purchaser of the note, without notice of defenses. This record presents an important question of procedure. The issues joined were issues of fact, and the trial was had before the court without a jury. At the time of the trial, § 5630 of the revised Codes was in force, and hence the case was necessarily heard and determined under the provisions of that section. Said section provides that in "all actions tried in the District Court without a jury, in which an

issue of fact has been joined, all the evidence offered on the trial shall be received." Assuming that a certain deposition offered in evidence by the defendant, which, by the ruling of the trial court, was excluded as evidence, and has not been sent to this court, is omitted from the statement of the case by the laches of the appellant, and that appellant cannot take advantages here of the absence of such deposition, the important fact remains that the oral evidence of certain witnesses for the defendant, which was offered in the court below, was not received nor taken down in writing or otherwise preserved in the court below. Counsel for plaintiff strenuously contend in this court that the evidence so offered and excluded was clearly inadmissible under the rules of evidence, and this upon the ground that the defense set out in the answer was not available as against the plaintiff, because at the time when it was offered, the defendant had not shown that the plaintiff, when it purchased the note, had notice of any defenses to the note. In view of all the evidence offered and received in the case, we deem it improper, upon this record, to pass upon the merits of the legal questions presented by counsel. It is defendant's contention that the evidence, in certain letters, tends to show notice to plaintiff of the defense set out in the answer; and, further, that, aside from all questions of notice, the defense set out in the answer is available to defendant as a counterclaim, because the plaintiff, in the same transaction whereby it bought the note, assumed all the liabilities of the payees, and thereby, as counsel argue, assumed the liability arising out of the warranties made upon the sale of the engine. Defendant further contends that, on account of the relation of the note to the mortgage given to secure the same, the note was nonnegotiable, and hence was taken by the plaintiff as a mere chose in action. As we have said, these contentions and arguments present questions of law, which cannot now be considered. We are not sitting in this case, nor can we sit in any case tried under § 5630, *supra*, to review errors of mere procedure in the court below. In this class of cases we are required by the statute to "try the case anew and

render final judgment thereon according to the justice of the case." This statute clearly contemplates a new trial in this court upon the record made below, embracing the evidence offered below and the whole of that evidence. The section as originally enacted expressly required that "all evidence offered in the trial shall be taken down in writing." Laws 1893, Ch. 82, § 1. This precise language was omitted in the revision of the codes, but we are clear that the substance of the provision is retained, inasmuch as § 5630 requires that the statement of the case which the section provides for shall contain "all the evidence offered at the trial." This provision is in harmony with the original purpose of the statute, which was to transmit to the Supreme Court all evidence offered below, to the end that the court of last resort might dispose of the controversy finally, without a new trial in the District Court. To accomplish such purpose, the statute provides that all evidence offered below shall be preserved in the record to be sent to this court. We are to deal with the evidence offered, and, to do so, it must assume the form of evidence, and be written down or otherwise preserved in the court below. This was not done in the case at bar. What the witnesses whose testimony was excluded would have said if allowed to testify is matter of mere conjecture, and whether under the rules of evidence, their testimony could be properly considered, either in the court below or in this court, is foreign to the question we are considering. Whether admissible or not under common-law rules of evidence, the court below, under the provisions of the statute, was bound to have it brought upon the record, objections thereto being noted and preserved. We do not imply nor intend to say that improper or inadmissible evidence can be considered in deciding a case in any of the courts of this state when properly objected to. Such a holding, in our opinion, would amount to a public calamity. What we say and intend to say is that in trials under § 5630, where an appeal is taken. all evidence offered must be brought upon the record in the District Court, in order that it may furnish the basis for a decision in this court. If, against

objection, improper evidence is introduced below, we can correct the error here by excluding such evidence in considering the record. In the trial of this case it affirmatively appears that the court below violated the letter and spirit of the statute by excluding from the record certain oral testimony offered by the defendant, thereby preventing any consideration of such testimony in this court. We cannot uphold such a ruling, and allow it to stand as a precedent. To do so, in our view of the statute, would operate to defeat the legislative purpose. This holding must necessarily result in the disposition of the case by this court upon a question of mere procedure,—a result always to be deplored. The adjustment of the real controversy between the parties must be postponed until a trial is first had in the District Court, in conformity to the requirements of the statute under which the action was necessarily tried. The statute was a sweeping innovation, upon well-established procedure as it existed in all the code states; and, in the opinion of the writer at least, it has proven to be a disastrous experiment.

The judgment must be reversed, and the record will be sent down for further proceedings. All the judges concurring.

(73 N. W. Rep. 87.)

UNION NATIONAL BANK OF OSHKOSH *vs.* MOLINE, MILBURN & STODDARD COMPANY, *et al.*

Opinion filed December 10th, 1897.

Mortgage for Future Advances Valid.

A mortgage to secure future advances is valid as to the mortgagor, and also as to third persons.

Second Mortgagee with Notice, Subject to First Mortgage.

If such mortgage states on its face that it is given as security for future advances, or if it appears to be a mortgage for a specified sum, and the total amount claimed to be due under it does not exceed such sum, the holder of a second lien on the same property, who has notice, either actual or constructive,

of such mortgage, takes subject thereto, not only as to all advances which had been made when his lien attached, but also as to all future advances made by the holder of such mortgage before notice that another lien has attached to the property.

Record of Second Lien Not Notice to Prior Incumbrancer.

The recording of the second lien does not give the holder of the prior mortgage constructive notice of such second lien, and therefore advances thereafter made are protected the same as advances made before such second lien is recorded, provided the holder of the first lien has no other notice of the existence of such subsequent lien.

Marshalling Securities—Subrogation.

Where a person holds a first lien on property on which another holds a second lien, and he also has a lien upon other property, on which there is no other lien, it becomes his duty, as soon as he learns of the second lien, to respect the rights of the holder of such second lien to have the property on which he (the second lien holder) has no lien first applied in extinguishment of the first lien. The law will thwart every attempt of the holder of the first lien to escape the obligation of this equitable duty. If he releases the property on which he alone holds a lien, such lien will, to the extent of the value of such property, be postponed to the second lien on the other property. If he attempts to enforce his lien as to the property on which the other party holds a lien, a court of equity will, except under special circumstances, restrain him until he has exhausted his remedy against the other property. If he does, in fact, first enforce his lien against the property covered by the second lien, the holder thereof will, to the extent that he is prejudiced thereby, be subrogated to the rights of the other party under his first lien upon the other property.

Advances Made After Notice of Second Lien.

One who holds a first mortgage to secure future advances on two pieces of land, on one of which there is a second incumbrance, of which he has notice, cannot, after such notice, advance more money to the mortgagor, and then claim the right, as against the holder of the other incumbrance, on the foreclosure of the mortgage against the parcel on which he alone holds a lien, to apply the proceeds of such foreclosure, either in whole or in part, upon such subsequent advances, but he must first apply them upon the debt due him at the time he learned of the existence of the second mortgage upon the other property.

Action by Second Mortgagee—Burden of Proof—Damages.

One who holds a chattel and also a real estate mortgage to secure a claim (such mortgages being first liens on such property,) and who takes possession of the personal property for the purposes of foreclosure (the same being in the possession of the sheriff under attachment thereof, creating an inferior lien thereon,) is bound to respect the rights of the holder of such attachment lien of which he has notice, and therefore must proceed with reasonable diligence to foreclose his mortgage. If he merely holds the property, without taking any steps to foreclose his mortgage for an unreasonable time (in this case, for the period of six

years,) and in the meantime such property becomes lost to the holders of both liens, he is liable in an action on the case for the value thereof, less the amount of his prior lien thereon; the theory of such liability being that he has by his negligence damaged the holder of the second lien. But in such a case the holder of the second lien cannot recover if he holds a lien on other property of sufficient value to pay the same. When it appears that he has other security, he must prove the value thereof, to establish his damages, as the burden is upon him, and the law will not presume that the other security is inadequate at all. Certainly there is no presumption with respect to the extent of such inadequacy.

Negligent Loss of Property Subject to Lien.

But in such a case the holder of the first lien loses, by such negligent conduct, his first lien on the real estate, on which also such attachment was a second lien, to the extent of the value of the property so negligently allowed by him to be lost to himself and the holder of the other lien.

Claim and Delivery—Sale of Property Pendente Lite.

While it may be true that the party to a replevin action, who is in possession *pendente lite* because he has given security, cannot sell the property so as to affect the title of the other party to the action, yet, if such other party is claiming only a lien on the property, and is seeking to recover or regain possession only for the purpose of enforcing such lien, the party in possession may sell such property if he is owner, or may sell it under foreclosure of any lien he may have thereon, and the purchaser will obtain a title free from the lien of the party not in possession, without reference to the question of priority of liens between him and the one who is so enforcing his lien. In such a case the bond takes the place of the property, unless, after final judgment, it can be found in the possession of the other party, it not having in the meantime been disposed of or incumbered by him.

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

Action by the Union National Bank of Oshkosh against the Moline, Milburn & Stoddard Company, James Morrison, Harriet J. Morrison, and others to foreclose a mortgage, and establish the same as a first lien upon the property mortgaged. From a decree awarding priority to plaintiff, the Moline, Milburne & Stoddard Company appeal.

Reversed.

George D. Emery and *L. A. Reed*, for appellant.

Respondent held personal property taken by it in claim and delivery from 1888 until 1894, claiming that the property could not be sold under its mortgage while the suit was pending. When

it took possession to satisfy its lien, it assumed the implied obligation to proceed without unreasonable delay and with due regard for the rights of the mortgagor. *Murray* v. *Loushman*, 66 N. W. Rep. 413. The mortgagee is bound to account for any surplus left after satisfying his lien and if he keeps the property and fails to sell it in the manner provided by law, he becomes liable for its market value at the time of the taking. *Denny* v. *Faulkner*, 22 Kan. 83; *Miller* v. *McElwain*, 52 Kan. 94; *First Nat. Bank* v. *Wilbur*, 26 Pac. Rep. 777; *Stewart* v. *Long*, 44 N. E. Rep. 63; *Craig* v. *Tappin*, 2 Sandf. Ch. 78. When a creditor has security upon two pieces of property, upon one of which only another has security. The creditor having two securities must first resort to and exhaust that security upon which the other creditor has no lien. And where such creditor takes possession of personal property upon which he has one of the securities and neglects to foreclose his mortgage, the value of the chattels at the time of taking will be applied upon his debt. 2 Jones on Morts. 1628–9, 1630; Jones on Chat. Morts. 773–774; *Moody* v. *Haseldon*, 1 S. C. (N. S.) 129, *Straub* v. *Screven*, 19 S. C. 445; *Wygal* v. *Bigelow*, 42 Kan. 477; *In re Haake*, 2 Sawy. 231; *Stoddard* v. *Denniston*, 7 Abb. Pr. N. S. 309; *Craig* v. *Tappin*, 2 Sandf. Ch. 85; *Olcott* v. *Tioga*, 40 Barb. 179; *Drayton* v. *Chandler*, 53 N. W. Rep. 558; *Des Moines* v. *Harding*, 53 N. W. Rep. 99; *Linninger* v. *Herror*, 36 N. W. Rep. 481; *Rockford* v. *Mainfold*, 55 N. W. Rep. 236; *Everett* v. *Buchanan*, 6 N. W. Rep. 439; 2 Dak. 249, 8 N. W. Rep. 31; *Brong* v. *Brown*, 3 N. W. Rep. 291; *Lee* v. *Fox*, 14 N. E. Rep. 889.

Ball, Watson & Maclay, for respondent.

The machine company never brought itself within § 5051, Rev. Codes. It never required the bank to first exhaust the personalty before resorting to the real estate. *Richards* v. *Spicer*, 23 Minn. 212. Independently of statute it was bound to notify the bank to first exhaust the personal property security. *Ross* v. *Duggan*, 9 Colo. 85; Harnings Appeal, 90 Pa. St. 388. While appellant was contesting with the bank for a paramount lien upon the personal

property, the bank was not required to sell this property. *Evertson* v. *Booth*, 19 Johns. 486. The equitable rule as to marshalling does not apply where the validity of the attachment lien depends upon the invalidity of a transfer of the property attached. *Schaff* v. *Meyer*, 34 S. W. Rep. 858; *Coburn* v. *Stephens*, 36 N. E. Rep. 132.

CORLISS, C. J. In this action, instituted to foreclose a mortgage, a contest for priority of lien has arisen between the plaintiff and the defendant the Milburn & Stoddard Company. The mortgage was executed by James Morrison, the owner of the land. It was delivered November 26, 1887. Morrison was at that time indebted to the plaintiff on several notes, and was also liable to it as indorser upon the notes of others. Simultaneously with the execution of this mortgage, he borrowed from the plaintiff $4,000. The mortgage was given to secure his indebtedness to the plaintiff, and his contingent liability on the notes referred to, and also as security for future advances. At the same time Morrison executed and delivered to plaintiff as further security a chattel mortgage on a large amount of personal property situated at that time in this state, the property being located on the farm covered by the real estate mortgage, and being stock and farming implements and machinery used by Morrison in the operation of such farm. A few days after the delivery of these two mortgages, the defendant Milburn & Stoddard Company attached the land and chattels in an action against Morrison as guarantor on a bond signed by him guarantying the fidelity of Hughes & McDonold as agents of the defendant Milburn & Stoddard Company. On the 27th of February, 1891, judgment was rendered in that action in favor of Milburn & Stoddard Company and against Morrison for $17,658.18. While the sheriff was holding the chattel property under the attachment, it was taken from him by the coroner in claim and delivery proceedings in an action of replevin instituted by plaintiff, the mortgagee in the chattel mortgage thereon, plaintiff claiming priority of lien over the attachment. The defendant in that action, the sheriff, having failed to rebond, the coroner

delivered the property to the plaintiff, and such property remained in the possession of the plaintiff during the pendency of the replevin action, or rather until it was lost to the plaintiff, and to the defendant as well, part of it being sold by Morrison, who had the custody thereof as agent for the plaintiff, part of it being destroyed by fire, and some of it (the live stock) dying of old age, or being killed by accident. For six years—*i. e.* from May 1888, when it was delivered to plaintiff in the claim and delivery proceedings, until July, 1894, when plaintiff attempted to foreclose its mortgage, and found only a trifling amount of property, from which it realized on foreclosure only $5.50—the plaintiff suffered the property covered by its mortgage to remain in the possession of its agent, James Morrison, who was the owner of such property; and during all this time it is apparent that plaintiff took no steps to protect its interests under such mortgage, but, on the contrary, permitted Morrison to deal with the property as owner, without any reference to the rights of the plaintiff as mortgagee. While the litigation involving the question of priority was pending, the plaintiff does not pretend that it ever looked after the property, or in any manner attempted to exercise any control over it as mortgagee in possession. While it is said that the possession of Morrison was that of a mere agent, the facts of the case indicate very strongly that plaintiff allowed such possession to become that of an owner. It would almost seem that the object of instituting the replevin action was to secure possession of the property for the purpose of helping Morrison in his financial trouble, and that the purpose from the beginning was to hand the property right over to him as mortgagor and owner. But we shall adopt the theory of the learned trial judge that the litigation was an honest one on the part of the plaintiff, the sole object of the plaintiff being to settle the question of priority between these two liens. After a protracted contest in the courts of this state (the law of the case being declared by this court in *Bank* v. *Oium*, 3 N. D. 193, 54 N. W. Rep. 1034,) the plaintiff was successful in its claim of priority,

and secured judgment confirming its right to the possession of the property already in its possession under the claim and delivery proceedings before referred to. Without further discussing at this time this phase of the case, we now turn to another complication.

The mortgage on the real estate, given by Morrison to the plaintiff, was a mortgage to secure future advances. On its face it secured $20,000, according to a bond executed at the same time. And the bond discloses the fact that one of the objects of the transaction was to protect the plaintiff by this lien not only as to present indebtedness, but also with respect to the future liability of Morrison to it. At the time the defendant's attachment became a lien on the real estate, there was due on the plaintiff's mortgage a certain sum. Subsequently a portion of this was paid. The amount of that indebtedness still unpaid is $7,000, with interest thereon from December 31, 1890. Taking up our position at this period of time to ascertain the relative rights of the parties, we find that plaintiff then held a first lien on the real estate for $7,000 and interest, and the defendant a second lien thereon, which would be defeated by its failure to recover judgment on its claim against Morrison, but which would become a fixed second lien as of the date of such attachment if it succeeded in establishing in court the justice of its claim. Were it not the fact that plaintiff's mortgage secured future advances as well as present indebtedness, we would have no further trouble with this branch of the case. But it appears that the plaintiff, relying on its lien for future advances, loaned Morrison the further sums of $1,000 on November 17, 1891, and $1,600 on January 5, 1891. A portion of the $1,000 note has been paid, but there is still due on these two notes a large amount of principal and interest, and the question is whether, as to this amount also, the plaintiff's mortgage is a first lien on the real estate. That a mortgage to secure future advances is lawful as between the parties, and also with respect to third persons who deal with the land or secure liens thereon, has become an elementary principle. 3 Pom. Eq. Jur. § §

1197, 1198, and cases cited. See also, the decisions subsequently cited in the opinion on this branch of the case. To the extent that advances are made under it before another lien attaches to the property, all the adjudications agree that it is a prior lien thereon. The only difficulty arises when, intermediate the execution and recording of the instrument and the making of some of the future advances, other liens are affixed to the land. In such a case, shall the mortgage be a first lien as to all advances, or only as to those made before the second incumbrance has fastened itself upon the property? When we turn to the voice of authority to settle this question, we hear not a single clear utterance, but a veritable Babel of tongues. Originally, it was the rule in England that, without reference to the question whether the mortgagee was obligated by contract to make future advances, all advances secured by the mortgage, no matter when made, or whether the mortgagee then knew of the inferior lien, were a first lien on the property. *Gordon* v. *Graham*, 7 Vin. Abr. 52 pl. 3, 2 Eq. Cas. Abr. 598. But in *Hopkinson* v. *Rolt*, when this case was before the house of lords (9 H. L. Cas. 514,) Lord Campbell declared the rule laid down by Lord Cowper in *Gordon* v. *Graham*, to be unsound, and the doctrine was there enunciated that the mortgagee who advances money under his security, with knowledge of a subsequent incumbrance, must, as to such advances, be content with a lien inferior to that of the holder of such later incumbrance. In this country there has been some leaning towards the early English rule. See *Witczinski* v. *Everman*, 51 Miss. 841; 1 Jones, Mortg. § 373; 3 Pom. Eq. Jur. § 1199; *Rowan* v. *Manufacturing Co.*, 29 Conn. 282; *Brinkmeyer* v. *Helbling*, 57 Ind. 435; *Brinkmeyer* v. *Browneller*, 55 Ind. 487; *Wilson* v. *Russell*, 13 Md. 495, But the stronger array of authority is found on the side of the doctrine established by the house of lords in the Hopkinson case. See *Frye* v. *Bank*, 11 Ill. 381; 1 Jones, Mortg. § § 368, 369; 3 Pom. Eq. Jur. § 1199, and cases in note 1, p. 180. This doctrine is recognized by many of the decisions to be hereafter cited. All the adjudications appear to agree that, in

the absence of notice of the inferior lien, the holder of the security for future advances may continue to treat the property as free from subsequent incumbrance, and therefore can safely make further loans to the debtor. His prior equity under the mortgage is superior to the subsequent equity of the one who holds the latter lien as to all advances made in ignorance of such subsequent incumbrance, whether made before or after it attaches to the property. *Truscott* v. *King*, 6 Barb. 346; *Shirras* v. *Caig*, 7 Cranch, 34; *Ackerman* v. *Hunsicker*, 85 N. Y. 43; *Reynolds* v. *Webster*, (Sup.) 24 N. Y. Supp. 1133; *Planing Mill Co.* v. *Schuda*, (Wis.) 39 N. W. Rep. 558; *Tapia* v. *Demartini*, (Cal.) 19 Pac. 641; *Ward* v. *Cooke*, 17 N. J. Eq. 93; 1 Jones, Mortg. § 368; *Central Trust Co.* v. *Continental Iron Works*, 51 N. J. Eq. 605, 28 Atl. 595; 3 Pom. Eq. Jur. § 1198; *Lanahan* v. *Lawton*, (N. J. Ch.) 23 Atl. 476. Some cases go further, and hold, as we have already shown, that even notice of the inferior lien will not suffice to debar the mortgagee of a right to priority as to advances made subsequent to such notice. On the other hand, there are decisions which hold that the recording of the instrument creating the latter lien, or the docketing of a subsequent judgment, constitutes constructive notice to the prior mortgagee, so that all advances thereafter made by him are deemed to have been made with knowledge of the existence of the inferior lien, and that, therefore, they become liens as against such inferior lien only from the time such advances are made. *Ladue* v. *Railroad Co.*, 13 Mich. 380; *Savings Inst.* v. *Thomas*, 29 Grat. 483; Bank of Montgomery Co's Appeal, 36 Pa. St. 170; *Ter-Hoven* v. *Kerns*, 2 Pa. St. 96; *Spader* v. *Lawler*, 17 Ohio, 371; *Boswell* v. *Goodwin*, 31 Conn. 74. See, also, note to *Boswell* v. *Goodwin*, 3 Am. Law Reg. (N. S.) 92; 1 Washb. Real Prop. 542. While there is much force in the arguments adduced in the support of this doctrine, we regard the opposite rule as more consistent with principle, and more just in character, and better calculated to subserve business convenience; and at the present time it is certainly upheld by a greater number of

decisions. Moreover, all text writers appear to favor it; and some of them go further (as, indeed, some of the courts do,) and insist that actual notice of the subsequent incumbrance ought not to affect the priority of lien of the first mortgage, even as to advances thereafter made. We cite some of the cases which enunciate the rule that the holder of the inferior lien must bring home knowledge thereof to the owner of the first mortgage if he would defeat his right to claim priority as to advances made after the latter lien has attached, and that the recording of the subsequent lien will not constitute constructive notice. *Ackerman* v. *Hunsicker*, 85 N. Y. 43; *Truscott* v. *King*, 6 Barb. 346; *M'Daniels* v. *Colvin*, 16 Vt. 300; *Reynolds* v. *Webster*, (Sup.) 24 N. Y. Supp. 1133; *Central Trust Co.* v. *Continental Iron Works*, 51 N. J. Eq. 605, 28 Atl. 595; *Ward* v. *Cooke*, 17 N. J. Eq. 93; *Tapia* v. *Demartini*, (Cal.) 19 Pac. Rep. 641; 3 Pom. Eq. Jur. § 1199; 1 Jones, Mortg. § 372; *Nelson's Heirs* v. *Boyce*, 7 J. J. Marsh. 401. See 11 Am. Law Reg. (N. S.) 273. Of course, the holder of a second lien must have notice of the prior mortgage. The registration thereof constitutes such notice. But it is not enough that there is another mortgage on record when his second lien attaches. It is necessary that that instrument should inform him on its face that it is given to secure future advances, or it must state an amount for which it is security, and the sum as to which priority is claimed must not exceed this amount. If, with a mortgage on record, which on its face asserts that it is intended to secure contemplated advances, another person obtains a lien on the property, he should see to it how much in fact has been loaned at that time; and, if he desires to prevent the increase of the prior lien, he must notify the holder thereof that another lien has attached to the property. If the mortgage is for a specified sum, the one who obtains a subsequent lien is informed by the record that there may be this sum due on the prior lien, and, if no greater amount is allowed by the law to become a prior lien, he has not been prejudiced in the least. In the case at bar, the mortgage, while not stating that it was for future advances, appeared to be

a first lien for $20,000, ahead of defendant's attachment. Defendant would actually be in better shape than it had any right to hope to be in view of what appeared to be due on the mortgage, if we should hold that the plainntiff's lien was prior as to all debts of Morrison to plaintiff, whether contracted before or after the second lien attached. The mortgage informed defendant that there was $20,000 due thereon, while the utmost that plaintiff claims upon its mortgage is about $12,000. Our decision is that the mortgage is, so far as this point is concerned, a superior lien as to the whole amount due thereon, unless the plaintiff had actual notice of the existence of defendant's lien by attachment before the loans of $1,000 on November 17, 1890, and $1,600 on January 5, 1891, and before certain other still later advances, which it is not necessary here to mention in detail, were made.

Plaintiff's cashier, who was a witness on the trial of this case, testified as follows: "I remember hearing about the claim of a lien on the real estate and personal property described in the two mortgages taken November 26, 1887, by the Moline, Milburn & Stoddard Company, but I have no remembrance about the date. I have known for a long time such a claim was made. At the time of the taking of my deposition in June or July, 1888, taken before Harshaw, I understood that the Moline, Milburn & Stoddard Company claimed a lien." That his knowledge was the knowledge of the bank does not admit of doubt. We therefore find that plaintiff, before making these later advances, knew of the lien on the land which the defendant had obtained by attachment. As the plaintiff, when it made the subsequent advances to Morrison, know that there was another lien on the property, it cannot, as to those advances, claim priority.

The case before us is not a case where the mortgagee who holds the security for future advances has obligated himself to make such advances. It does not appear from the record that the bank bound itself to advance Morrison a dollar in the future. If it had so agreed, and the moneys subsequently loaned him had been loaned in pursuance of such agreement, it is possible that

we might reach a different conclusion on the question of priority here discussed for the stronger array of authorities is found on the side of the doctrine that under such circumstances the mortgagee's rights, even as to subsequent advances, made with full notice of the second lien, are superior to those of the holder of such lien. *Rowan* v. *Manufacturing Co.*, 29 Conn. 282, 325; *Boswell* v. *Goodwin*, 31 Conn. 74; *Brinkmeyer* v. *Helbling*, 57 Ind. 435; *Brinkmeyer* v. *Brownelle*r, 55 Ind. 487; 1 Jones, Mortg. § 370, and cases cited; 15 Am. & Eng. Enc. Law, 799. It is urged that after the lien of the attachment was fastened upon the land the plaintiff loaned Morrison another $1,000, in March, 1888, and that as to this sum plaintiff cannot claim priority of lien. But it does not appear that at this time the plaintiff knew that defendant's lien had attached. It was, therefore, protected as to this subsequent loan. Moreover, it appears that Morrison paid this $1,000 and the interest thereon, and that, therefore, the amount due was not permanently increased by this temporary additional loan. Our conclusion on this branch of the case is that, but for other facts, to be now referred to, the plaintiff would be entitled to a first lien on the land as against the defendant for the sum of $7,000, with interest thereon from December 29, 1890.

Heretofore we have been discussing this case on the theory that the plaintiff held only this real estate mortgage. But it appears that it was otherwise secured. It held the chattel mortgage already mentioned, and, in addition, it had a mortgage on real property in Algoma, in the State of Wisconsin. For the sake of brevity, we will hereafter speak of this mortgage as the "Algoma mortgage," and will refer to the mortgage on the North Dakota land as the "Dakota mortgage." The Algoma mortgage also was given to secure future advances, and it was the only incumbrance on the land it covered. In view of the fact that both of these mortgages embraced all indebtedness of Morrison to the plaintiff, past, present, and future, it is evident that they secure the same claims. Therefore, at the time the defendant attached the Dakota land, the plaintiff held double security for the sum

then due on the Dakota mortgage, which is still due; *i. e.* $7,000, and interest. It had the Dakota mortgage and the Algoma mortgage. Before the debt of Morrison to the plaintiff had been increased, the plaintiff became cognizant of the existence of the defendant's lien. At the very moment plaintiff learned there was an inferior lien on one of the securities held by it,—*i. e.* the Dakota land,—it became its duty to treat its claim as a first lien on the Dakota land only to the extent of the balance due after exhausting its remedy against the Algoma property. There then sprang up in favor of the defendant an equitable right to insist that plaintiff should, in enforcing its liens, respect defendant's lien right's, and do nothing to the prejudice thereof. Had plaintiff released its security on the Algoma land, its lien on the Dakota land would have been postponed to that of the defendant to the extent of the value of such Algoma land. Had it essayed to foreclose the Dakota mortgage before exhausting its Algoma security, a court of equity (assuming such security to have been sufficient) would have restrained it until it had foreclosed the mortgage on the land on which the defendant had no incumbrance. If the defendant had not seen fit in the supposed case to invoke the aid of equity at this stage, or if equity would not have interposed because the Algoma land was not sufficient to pay the amount of plaintiff's prior lien, defendant would, after plaintiff had sold the Dakota land, and cut off its second lien thereon, have been subrogated to all the rights of the plaintiff as the holder of a first mortgage on the Algoma land to the extent necessary to indemnify it for plaintiff's disregard of its equitable rights. The great underlying principle in such cases is that, no matter what device or shift the holder of the first lien may resort to, every attempt to evade his duty to the owner of the inferior lien will be thwarted by the law. In equity he has a lien on the particular land covered by both incumbrances only as to the amount due after applying the value of the other security in extinguishment of his debt. He can bind the other party with respect to the value thereof by a public sale on foreclosure. But, if he sees

fit to release such land, he is then accountable for its actual value in the adjustment of the equities of the parties with regard to the other property on which they both have liens. The principle we here invoke is so elementary that citation of authority seems almost unnecessary. See 3 Pom. Eq. Jur. § 1414; *Gotzian & Co.* v. *Shakman*, 89 Wis. 52, 61 N. W. Rep. 304. See, also, § 4690 of the Rev. Codes.

But in the case at bar the plaintiff did not, by its mode of dealing with the Algoma land, invade the defendant's equitable rights. It did, in fact, exhaust that security before attempting to foreclose its mortgage on the Dakota real estate. It is only by its attitude on the question of the application of the proceeds of the sale of the Algoma land on foreclosure that it has taken a position prejudicial to the equities of the defendant. The net amount realized on such sale was $4,790.17. The qustion arises, how must this sum be applied? At the time it was received by plaintiff (April 6, 1894,) there was due on the $7,000 note the sum of $8,890, being the principal sum and interest thereon from December 29, 1890, to that date. This principal sum of $7,000 was, as we have already seen, due on plaintiff's mortgage at the time it learned of defendant's inferior lien. It follows that plaintiff has an undisputed right to apply the net proceeds of the Algoma foreclosure on the amount of this note, principal and interest. After making this application, we find that there was still due from Morrison on this note, on the 6th of April, 1894, the sum of $4,099.83. But it is contended by counsel for plaintiff that plaintiff was not bound to make such an application of the funds of that foreclosure. At the time thereof there was a much larger sum due on these two mortgages because of advances made by plaintiff to Morrison after it knew of defendant's lien; and it is urged that plaintiff could apply all of the moneys received from the sale of the Algoma land on such of the indebtedness as was not in existence when plaintiff learned of defendant's equitable rights as the holder of a second lien on the Dakota real estate; or, at least, that it had a right to apply a

proportionate amount on such indebtedness. We must be careful not to confound this case with one involving a mere question of application of payments between a debtor and his creditor. As Morrison does not appear to have directed how this money should be applied, it may be that the plaintiff can, as against him, apply it as it sees fit, although we are not prepared to hold that this is the rule when the money sought to be applied by the creditor is not paid to him by the debtor, but is received by him on sale of securities. Be that, however, as it may, it is obvious that, when the rights of the holder of an inferior lien are involved, and the question is how moneys shall be applied as affecting only the relative priorities of liens, we must consider the obligation of the holder of the first lien at the time he learns of the existence of the inferior lien. The obligation which then rests upon him he cannot escape by any conceivable device. In equity he is bound to apply the value or the proceeds of the security on which the other party holds no lien to the extinguishment of the debt then due him, and he can look to the other security only for the balance. It follows that, although his claim may be subsequently increased, and he may enforce it as against the property on which he alone holds a lien to the full amount of the value of such property, yet when he comes to apply the proceeds of the sale thereof he must apply them in accordance with the fixed obligation resting upon him to extinguish, so far as such proceeds will go, the debt he held at the time he discovered the fact that another lien had attached to the other property. To allow him to apply them wholly or in part to the payment of the subsequent debt would be to permit him to accomplish by indirection that which he could not accomplish in any other way. In the case at bar the plaintiff, as soon as it learned of the defendant's subsequent lien on the Dakota land, became obligated (as much as if it had solemnly covenanted so to do) to first apply the value of the Algoma security in extinguishment of the then indebtedness of Morrison to it. It cannot escape the force of this obligation by suffering Morrison to increase that indebted-

ness, and then applying the whole or a portion of the value of this security to the new debt, leaving all of the old debt to be made out of the Dakota land, or a greater portion thereof to be so made than would have fallen thereon had it respected its equitable obligation to the defendant. We are clear that all of the moneys received from the sale of the Algoma lands must be applied on the $7,000 and interest, and that plaintiff has a first lien on the Dakota land for only the balance; *i. e.* $4,099.83. Of course, it has a lien on the Dakota land for all its claims against Morrison; but such lien is subordinate to that of the defendant as to all except this sum of $4,099.83, with interest thereon from April 6, 1894. As to this amount, plaintiff's lien would be paramount, were it not for facts to be now considered.

We have already referred to the chattel mortgage held by plaintiff upon a large amount of property owned by Morrison, and situated on this Dakota farm, and to the fact that the property was taken by the plaintiff in an action of replevin against the sheriff, who was holding under defendant's attachment. Plaintiff was finally successful in that action. It established its right to priority of lien on these chattels as against defendant. When plaintiff seized this property, its attitude was that its lien was superior. But it did not dispute the fact that defendant held a lien thereon subordinate to its lien. It knew of such lien. In no event could it defeat defendant's rights thereunder. Moreover, the plaintiff knew that defendant had secured by attachment a second lien on the Dakota land, and it was therefore bound to do nothing with this chattel security inconsistent with defendant's right to insist that it should not suffer any property on which it had a lien to escape therefrom to the prejudice of the defendant, even on the assumption that defendant had obtained no lien on the chattels whatsoever. Three facts stand out in bold relief in this case: First, that plaintiff took the property from the possession of the sheriff, who was holding it for defendant under the attachment, for the express purpose of foreclosing its lien under the chattel mortgage; second, that it never made any attempt to

foreclose the mortgage for over six years, but suffered the property to be controlled by Morrison, who was its agent; third, that because of this delay it has lost the security of such property, and has, therefore, failed to realize on its debt a large sum of money, which, if realized, would to that extent have relieved the Dakota land of the lien of plaintiff's mortgage thereon prior to defendant's lien under the attachment, and the judgment subsequently rendered in its favor. The plaintiff is chargeable with the value of these chattels, with interest thereon from the time it took them (it never having made any effort to foreclose its mortgage,) unless the pendency of the replevin action excused it from proceeding with the foreclosure, or unless we can find as a fact that defendant agreed that plaintiff need not foreclose the chattel mortgage during the time the contest relating to priority remained unsettled. The only ground on which plaintiff can claim that the pendency of the replevin suit justified its nonaction is that it would be bound, in case of defeat, to return the property to the sheriff, the defendant in that action, to the end that he might proceed to sell the same on execution issued upon the judgment in the case; and that, if it had foreclosed its mortgage, the purchaser or purchasers on the sale would not have obtained a clear title to the property sold. Of course, if plaintiff were not, while the replevin action was pending, in position to give an unincumbered title on the foreclosure of the mortgage, the law would not require it to make such foreclosure during that period. And it must be conceded that there is strong authority for the proposition that, when the parties to a replevin action are litigating the question of title, neither party in whose possession the property remains *pendente lite* can transfer good title to a third person. *Lockwood* v. *Perry*, 9 Metc. (Mass.) 440; *Hunt* v. *Robinson*, 11 Cal. 262; *White* v. *Dolliver*, 113 Mass. 402; *Bruner* v. *Dyball*, 42 Ill. 34; *Farnham* v. *Chapman*, (Vt.) 14 Atl. 690. See, also, *Lovett* v. *Burkhardt*, 44 Pa. St. 174; Wells Repl. § 470; Cobbey, Repl. § § 721, 722. When there is a contest over the title to personal property, much can be said in favor of the rule

that the party to the litigation who retains possession *pendente lite* should not have the power to devest the title of the rightful owner by a sale while the question of title is being judicially investigated between the parties to the replevin action. The argument applies with peculiar force to the case in which the true owner is the plaintiff. He is powerless to prevent the rebonding of the property by the defendant. And yet he may be seeking to recover property that he is particularly desirous of possessing, and it may be a grievous wrong to deprive him of the right to secure possession thereof. But if the mere fact that the defendant in a replevin action has the custody of the property *pendente lite* (and he can always have it, if he so pleases) invests him with the right to transfer a good title thereto to a stranger, the plaintiff, by instituting the replevin suit, has, so far as possession and title are concerned, actually placed himself in a worse position than he would have occupied had he not sued at all. Before he commenced his action, the defendant could not give another a good title to the property. But, after he rebonds, he can do so, provided the sound rule be that in such cases the party holding possession while the action is pending can, by sale, cut off the owner's rights to the specific chattel. The decided weight of authority is against this doctrine. See cases above cited. But there are cases which support the contrary rule. *Stewart* v. *Wolf*, (Pa. Sup.) 7 Atl. 165; *Bain* v. *Lyle*, 68 Pa. St. 64; *Gray* v. *Wilson*, 4 Watts, 39. See also, *Gordon* v. *Jenny*, 16 Mass. 465; Wells, Repl. § 465; *Taylor* v. *The Royal Saxton*, 23 Fed. Cas. 797–802. When, however, the defendant fails to rebond, there may be some force in the proposition that he has thereby elected to rely upon the security of the bond given by the plaintiff. He has an option whether he will rely upon the bond or take the property, while the plaintiff has no such option. It would be sufficient for the purposes of this case to hold that the defendant in replevin can never pursue the property in the hands of a third person, to whom the plaintiff sells it *pendente lite*, while it is in his possession in claim and delivery proceedings. But we are not prepared to lay

down that rule in this case. It is sufficient to place our decision on this phase of the case on another ground. When the party to the replevin suit, who is not in possession of the property during its pendency, has only a lien thereon, and is not entitled to the possession of the property generally as owner, but only for the purpose of enabling him to enforce his lien thereon, and the other party to the action has a right therein as owner, or as the holder of an inferior lien thereon, it is obvious that; if the party who is not in possession is successful, he has no right to have the property delivered to him as an owner would have. He is merely seeking to enforce a lien thereon. As security is all he is after, there is no reason why the replevin bond should not take the place of the property itself. As security it is as good as the property, and, after he has obtained a substitute security as adequate as the original, there is no reason why the owner of the property should be further embarrassed in dealing with the property, or why the holder of an inferior lien thereon should not thereafter be permitted to proceed to enforce his lien, the same as though the other lien had been extinguished. Indeed, when the action is between the owner and a lienholder, or between two lienholders, the money judgment in favor of the lienholder is never for the full value of the property, if that exceeds the sum due upon his lien, but only for the amount of his lien. *Wolfley* v. *Rising*, 12 Kan. 535; *State* v. *Kinkaid*, 23 Neb. 641, 37 N. W. Rep. 612; *Dodge* v. *Chandler*, 13 Minn. 114 (Gil. 105;) *Booth* v. *Ableman*, 20 Wis. 23; *Hayden* v. *Anderson*, 17 Iowa, 158; *Kerr* v. *Drew*, 90 Mo. 147, 2 S. W. Rep. 136; *Wheaton* v. *Thompson*, 20 Minn. 196, (Gil. 175;) *Jones* v. *Hicks*, 52 Miss. 682; *Lyle* v. *Barker*, 5 Bin. 457; *Benjamin* v. *Stremple*, 13 Ill. 468; *Kennedy* v. *Whitwell*, 4 Pick. 466. In such a case he has no right to secure possession of the property, provided the other parties offers to pay the amount of the judgment in his favor. The main object of his action is to recover his debt. The possession of the property is merely an incidental matter. In the replevin action brought by the plaintiff against the sheriff, and therefore virtually against the

defendant, the attaching creditor, the sheriff (had the priority of the attachment lien been sustained) could have had an alternative judgment only for the amount of the defendant's claim against Morrison. It is true that in that particular case that claim greatly exceeded the value of the property. But it might have been much less. The property was worth $6,000. If the defendant's claim had been only a few hundred dollars, it is clear that the alternative judgment for money would have been for only the amount of such claim, and the plaintiff could have retained possession of the property by paying such money judgment. As against the plaintiff in the replevin suit, the defendant therein (representing the defendant herein) was not entitled absolutely to the possession of the property but only as security for the lien of the attachment, and when the bond was given by plaintiff, and accepted by defendant as sufficient, he assented to a change of security, and thereafter the plaintiff was at liberty to proceed with the foreclosure of its mortgage without reference to the attachment lien thereon. As to a purchaser at such a foreclosure sale, the lien would be gone, the bond standing in place of it. There seems to be absolutely no controversy among the decisions touching the right of the plaintiff in this action, after it had secured possession of the mortgaged property in the replevin suit, to foreclose its mortgage, and by such foreclosure transfer a good title to the purchaser at the foreclosure sale, free from the attachment lien. Since the early case of *Bradyll* v. *Ball*, 1 Brown, Ch. 427, decided in 1785, the rule has been that, as against a person who is merely seeking to obtain possession to enforce a lien on the property (whether he is the plaintiff in the suit or the defendant asking for a return of the property seized by the plaintiff therein,) the party in possession may dispose of the property *pendente lite*, and that thereafter the holder of the lien must look to the bond for protection. *Speer* v. *Skinner*, 35 Ill. 282, 300; *Woglam* v. *Cowperthwaite*, 2 Dall. (U. S.) 68; *Frey* v. *Leeper*, *Id.* 131; *Acker* v. *White*, 25 Wend. 614. See Wells, Repl. § 649. In some of the cases in

which it has been decided that, when the contest is over title to property, the party who holds the property during the pendency of the litigation cannot, while in possession, transfer title to a third person, the principle is recognized that the one seeking to secure possession merely to enforce a lien is not entitled to the protection of this rule. In *Bruner* v. *Dyball*, 42 Ill. 34, the court said: "In the case of *Speer* v. *Skinner*, 35 Ill. 282, it was held that a landlord who had distrained goods of his tenant for rent in arrear lost his lien on the goods when they were replevied by the tenant, and it is now urged that the principle announced in that case governs this. In such a case the landlord does not claim to own the property, but simply to hold it by a lien as security for his debt. He only, by the distress, changes the custody of the property to enforce his lien. He has rightfully reduced it to possession in enforcing his lien, but the ownership of the property is not changed by the distress, but simply the possession. The ownership, in such a case, is only changed by a sale of the property. The tentant has the right to repossess himself, under the law, by discharging the debt for the rent, thereby extinguishing the lien of the landlord, and thus prevent a sale. Or, if he choose, he may contest the landlord's claim and repossess himself of the property by an action in replevin. And when he resorts to the latter course he is required to give bond with security for the return of the property in case he fails in his action, and this bond the law substitutes for the landlord's lien. Before, he held a lien on the property as security for the rent in arrear; but the tenant, by executing the replevin bond, releases the property from the lien, and the bond becomes a new security; and, if the tenant fails in his action, the landlord's only action is on the replevin bond. But it is believed that such a rule only applies to cases where property is held by the defendant under a lien, and as a security for the payment of a debt, or the performance of some other duty, and the plaintiff in replevin substitutes the replevin bond as security, in lieu of the lien held for the same purpose. And where a party simply

has a lien on property, there is no hardship in remitting him to the security which the replevin bond affords, but it would be otherwise where the suit is brought to test the right of property." See, also, *Lockwood* v. *Perry*, 9 Metc. (Mass.) 440. Our conclusion is that plaintiff had a perfect right, and that it was its duty, to proceed with diligence to foreclose its mortgage as soon as it secured possession of the mortgaged property in the replevin action. It was for this specific purpose that it took the property from the sheriff, who was holding it for the defendant therein, which was the plaintiff in the action in which it was attached. Having wrested the possession from the sheriff on a claim of priority of lien to enable it to enforce such prior lien, it was bound to do nothing to injure the rights of the defendant as the holder of an inferior lien thereon. The plaintiff has at all times conceded that defendant held a lien on these chattels subject to its mortgage, and it knew of such lien, and of its second lien on the Dakota land, when it commenced its replevin action. Sound principle, authority, and the claims of justice combine to support the doctrine that under the facts of this case the plaintiff is accountable to the defendant (so far as the question of priority of lien is concerned) for the value of this chattel property at the time it was taken, with interest thereon at the legal rate, unless the evidence in this case shows an assent by defendant that no foreclosure should take place while the replevin action was pending. See *Moody* v. *Haselden*, 1 S. C. 129; *In re Haake*, 2 Sawy. 231, Fed. Cas. No. 5,883. We consider this point as too plain to require the citation of authorities. Common honesty demands that when one who holds a first lien on chattels and real property knows of a second lien upon the real property, he must so proceed with respect to the chattel security as to make as much as possible from such security, to the end that the burden of his prior mortgage on the land may be lessened. The plaintiff, by its laches with respect to the chattel property, has suffered it to become lost as security to it and to the defendant, although it is responsible for the loss of defendant's control thereof, and was

entitled to proceed to collect its claim out of such property the moment it secured possession in the replevin action.

Did the defendant, through its attorney, Judge Emery, who appears to have had full charge of the whole matter, agree that the plaintiff need not foreclose its mortgage until the happening of two events in the future,—the decision of defendant's case against Morrison in its favor, and the trial of the question of priority of lien in the replevin suit? We have very carefully studied the evidence on this branch of the case, and have reached the conclusion that there is practically no dispute about the facts Col. Ball, one of the attorneys for the plaintiff through all the various stages of this long contest between plaintiff and defendant, admits that he never had any express agreement with Judge Emery, who represented the defendant, to the effect that the plaintiff need not foreclose its mortgage until all these mooted questions had been finally settled. The utmost scope of his evidence is that it was talked over between him and Judge Emery that plaintiff could not foreclose during the pendency of these two law suits. Judge Emery distinctly testifies that there was no agreement that plaintiff should not foreclose until after these cases had been disposed of. He says: "There never was any talk at any time between Mr. Ball and myself, or anybody else, with regard to what should or should not be done, or could or could not be done, as to foreclosing that mortgage, and to my knowledge there was no understanding whatever in regard to the the further disposition of that property; at least none that I participated in, or ever talked about with Mr. Ball, or any one else. I never had any arrangement with Mr. Ball, and never agreed with him, that they should delay the foreclosure of the mortgage until the result of the litigation between the Moline, Milburn & Stoddard Company, and Hughes, *et al*, should be determined, and emphatically never had made any arrangement or understanding or had any agreement that the foreclosure of the mortgage should be delayed until the result of litigation should be decided in the replevin suit. I never had any under-

standing or agreement with Mr. Ball that, as a matter of fact, they could not foreclose until the result of the litigation could be known. Never had anything in substance or to the effect of that. Mr. Ball and I confined our agreement entirely to the question of rebonding, or not rebonding, replevying or not replevying; nothing about the mortgage." On the trial of the replevin action itself Col. Ball was sworn as a witness, and stated that the reason why foreclosure of the mortgage had not at that time taken place was that he had advised the plaintiff that it could not be done. The evidence of Col. Ball on this point was as follows: "I am one of the attorneys for the plaintiff in this action. Q. You may state to the court what you have had to do with the interests of the bank in respect to the foreclosure of the mortgage on this personal property. A. Well, after the attachment suit was commenced, the bank employed my firm to look after its interest, in view of the fact that I had had mortgages on this same property myself in this suit, and under my advice the suit was instituted in replevin, to get the property from the sheriff, who had been claiming to hold a lien under his attachment from the fall of 1887. At the time when the suit was actually commenced, which I think was in the spring of 1888,—when the suit was commenced,—Mr. Emery, a representative of the Moline, Milburn & Stoddard Company, one of the defendants in this action, and myself entered into an agreement, which I am not sure whether it was reduced to writing or was oral, to the effect that, if we would give a good replevin bond, no rebonding would be made, but that they would stand upon the bond. There was never any rebonding made, and after the commencement of this suit the coroner took possession of the property, and I thereupon advised the bank that it would not be safe,— advised the bank that no foreclosure of that mortgage on this personal property could safely be made until this suit was terminated. At that time no one anticipated that this suit would be of such long standing. Following my advice, no foreclosure was commenced, awaiting the conclusion of this action. It was a matter that was intrusted to me and my

firm, and the foreclosure was not made for the reason that we deemed it advisable to await the adjudication of the question as to who had the right to the possession of the property. That is the reason no foreclosure was made. Q. Have any foreclosure proceedings been begun? A. No, sir; no foreclosure proceedings have ever been begun, and for that reason." It will be noticed that no reference is here made to any agreement that the bank need not or should not sell. The only explanation offered by him why there had been no foreclosure was not that it was agreed that there should be no foreclosure, but that he thought it would not be safe so to do, and so advised his client. In the course of this evidence of Col. Ball above quoted it appears that he stated that when the replevin suit was brought Judge Emery entered into an agreement with him that Judge Emery's clients would not rebond, but would stand upon the plaintiff's bond in replevin. This evidence would indicate that the defendant herein intended to look to the security of the bond, and not to the property itself, in case it should be successful in the replevin action. This was a very natural solution of the problem, as defendant had no reason for retaking the property, provided a sufficient bond was put up in its place. Having received such a bond, it was entirely reasonable that the attorney for defendant herein should agree just as Col. Ball testifies that he did agree, "to stand upon the bond." We think a fair construction of Col. Ball's evidence is that there was a talk about the advisability of foreclosing *pendente lite*; but that there was no assent on the part of the defendant that plaintiff should not sell until after the termination of all the pending litigation. It appears that Judge Emery had come to Fargo for the purpose of applying for an order to sell some of the attached property as perishable, under § 5001, Comp Laws. Col. Ball appears to have had the impression that Judge Emery presented his motion, and was defeated thereon. But Judge Emery denies this, and the absence of any evidence of a record of such a motion confirms the testimony of Judge Emery.

Indeed, he is not positively contradicted by Col. Ball on this point. The greater portion of this property consisted of horses and stock, and was perhaps "perishable" property, within the meaning of the statute. See 1 Shinn, Attachm. § 262, and cases cited. At any rate, from Judge Emery's standpoint, here was a means of protecting his client against the risks incident to the holding for perhaps a long period of time of a class of property which might all die before the action against Morrison could be tried. His attitude at that time was that he did not care or propose to incur the hazard of waiting until some future day to sell this property. This attitude must have been evident to counsel for the plaintiff. That it was evident to him is apparent from the testimony of Judge Emery, which is not controverted by Col. Ball, that he said to Col. Ball that the property was perishable, that it was liable to depreciate in value and deteriorate, and that, if the bank would give a good bond in replevin, Judge Emery's clients would not rebond. From Judge Emery's standpoint, he could sell most of this property as perishable. This would cut off the plaintiff's lien thereon. *Young* v. *Keller*, (Mo. Sup.) 7 S. W. Rep. 293; *Betterton* v. *Eppstein*, (Tex. Sup.) 14 S. W. Rep. 861; *Meyer* v. *Sligh*, (Tex. Sup.) 16 S. W. Rep. 1022; *Megee* v. *Beirne*, 39 Pa. St. 50; *Taylor* v. *Carryl*, 24 Pa. St. 267; 1 Shinn. Attachm. § 262; 1 Wade, Attachm. § 27. Thereafter the plaintiff's lien would be transferred to the proceeds of the sale, and it could, of course, hold the sheriff and his bondsmen, as well as the plaintiff in the attachment action, for the conversion of the property if its lien was prior to that of the attachment. By a sale Judge Emery could fully protect his clients against the ravages of time among this large herd of horses and cattle. He could see to it that the property should bring a fair figure, or buy it in at less than value. And thereafter, whatever the result of the litigation might be, his clients would be saved all possible loss from the death of this live stock. Should defendant recover judgment against Morrison, and defeat plaintiff's claim to priority of lien, it would have this fund to resort to for payment. Should

the plaintiff be successful, it could turn over this fund to plaintiff to apply on the plaintiff's prior lien, thereby extinguishing to that extent the amount due on the real estate mortgage held by plaintiff, and thus rendering defendant's security better, or keep it to reimburse itself in case plaintiff compelled it to pay for the conversion of the property. Whatever might be the outcome of those cases, a sale of this property as perishable would be very advantageous to the defendant. For what, then, did Judge Emery surrender this right, as he regarded it? It is incredible to us that he should deliberately abandon his purpose, and agree that this very perishable property might, after years of litigation, be turned back to defendant, as the successful party in the replevin suit, a mere fragment and wreck. That this was not his purpose, and that Col. Ball could not have understood it to be his purpose, is apparent from the following evidence of Judge Emery, which is not disputed in the case: "We then talked over the question of rebonding the property or replevying the property, and I said to Col. Ball: 'This property is perishable. It is liable to depreciate in value, and deteriorate. If you will give us a good bond in replevin,—one that is good, and we can approve, —we will not rebond the property.' Mr. Ball said that they would do so, and thereafter, as he stated, made arrangements with Rush Adams and one other to sign the bond." What Judge Emery was seeking to guard against, and what Col. Ball knew he was seeking to guard against, were the risks incident to being obliged to look to this property to make defendant's claim at some other time when it might all be dead. And yet this very risk would be incurred by defendant if plaintiff was to hold the property while this litigation was going on. Here were two liens on the same property. The defendant could not enforce its lien because it had not yet secured judgment. But the plaintiff was in position to foreclose its lien at once. What more natural than that the party entitled to enforce its lien should proceed to do so, leaving the question of priority open to litigation? Plaintff, in the event of ultimate defeat, would be liable for only the value of

of the property and interest. By taking care that it was not sold at a sacrifice on the foreclosure sale, it could practically protect itself against all loss by reason thereof. When we consider all the surrounding circumstances, the fact that Col. Ball disclaims any express agreement on the subject of refraining from foreclosing the mortgage, and the fact that Judge Emery is emphatic in his testimony that no such agreement was made, we are of opinion that plaintiff did not secure from defendant such an agreement as would protect it in not proceeding with the foreclosure of its mortgage, as it had the right, and was bound, to do, and could do without subjecting itself to serious risk. Nor is the course of plaintiff's counsel in not foreclosing inexplicable on any other theory than that of an express agreement that he need not do so. No branch of the law is more complicated than that which relates to actions of replevin. At the time plaintiff's counsel deemed it safer not to foreclose there was no decision in this state on the point whether the sale would devest the lien of the attachment if it was found to be superior to that of this mortgage. Indeed, there was very little law in the books on this subject. Counsel might well deem it a safer course for his client, under all the circumstances, to leave everything in *statu quo* for a season, hoping for a speedy determination of the controversies which were embarrassing him. But under the inexorable rule that every one must know the law, there is imputed to his client a knowledge of its right, and therefore of its duty, to immediately enforce its lien by foreclosure. Having failed in this duty, it must so far as the question of priority of lien is concerned, account to the defendant Moline, Milburn & Stoddard Company, for the value of this chattel property, found by the court to be $5,000, together with the interest thereon from May, 1888, when it took possession of the same, at the legal rate of 7 per cent. to April 6, 1894, when the amount of plaintiff's first lien on this land was reduced by the application of the proceeds of the sale of the Algoma real estate to the sum of $4,099.83. Applying the value of this property, with interest, to the balance for

which the plaintiff's mortgage was a first lien on the Dakota land, such lien is utterly wiped out, so far as it takes precedence of the defendant's lien under its attachment and the judgment in that action. Of course, the plaintiff's mortgage is not extinguished as a lien on this land as against the defendant Morrison. It is merely postponed to the lien of the defendant Moline, Milburn & Stoddard Company under its attachment and judgment. The amount of plaintiff's lien on the property is found to be $10,761.22 on the 13th of February, 1897. No complaint is made by defendant Morrison with respect to this amount. The plaintiff is therefore entitled to the usual decree of foreclosure and sale, but the land will be sold subject to the judgment lien of the defendant Moline, Milburn & Stoddard Company, which is hereby established as a prior lien on the land described in the complaint for the sum of $17,658.18, with interest thereon at 7 per cent. from February 27, 1891. But the defendant Moline, Milburn & Stoddard Company is not content with what it regards as only a partial victory. It insists that it should have a money judgment against the plaintiff. The ground of its contention is as follows: After applying the value of the chattel property in extinguishment of the balance for which plaintiff's mortgage was a first lien thereon and on the Dakota land, there appears to be a sum not exhausted by such application. To this extent defendant claims that its second lien on these chattels was a valuable interest therein, and that, having been deprived of such interest by the wrongful act of the plaintiff, it must respond to defendant in damages, on the theory of a liability to be enforced by an action in the nature of an action on the case for injury to their lien. Under the pleadings, we think that defendant is in position to make this claim. Nor do we find any obstacle to its doings so in the fact that this is an action in equity to foreclose a mortgage. In the course of adjusting the equities of the parties it becomes necessary to inquire into and to take account of the plaintiff's breach of its equitable obligation to the defendant, and the same negligence on its part which entitles defendant to charge against its

prior lien on the land the value of the chattel property; also gives it a right to hold plaintiff responsible for the damages thereby caused its second lien on such property. It is axiomatic that when a court of equity assumes jurisdiction it will do full justice between the parties, although it becomes necessary to administer relief ordinarily secured in an action at law. But the great difficulty with the position of counsel for defendant is that they have not proved that defendant has been damaged by the action of the plaintiff in suffering property on which it held a lien to be lost. It does not follow that, because defendant has lost a lien on these chattels, therefore it has suffered any injury whatsoever. The land on which it holds a lien may be ample security for its claim. There is no proof as to the value of such land. Unlike an action for conversion, an action on the case for damages to security is not made out by fixing the value of the property lost, but the plaintiff in such action must go further, and show that his remaining security is inadequate. If this section of land is worth $30,000, it would be very unjust to allow the defendant to compel the plaintiff to pay damages, when it has not in fact been injured at all. On this point the decisions are uniform and clear. *Hull* v. *Carnley*, 17 N. Y. 204; *State* v. *Weston*, 17 Wis. 107; *Marsh* v. *White*, 3 Barb. 518; *Manning* v. *Monaghan*, 23 N. Y. 545, 28 N. Y. 585. See, also, *Lane* v. *Hitchcock*, 14 Johns. 213. The plaintiff did not become liable to defendant for the full value of the property as for a conversion. The wrong done to it was in impairing its security by negligently permitting the property to be lost while under the plaintiff's control. But defendant's security embraced other property, and, until the inadequacy thereof to pay its lien is shown, there is no evidence that defendant has in fact been damaged at all. Indeed, there is evidence that this land is worth a great deal more than the judgment. Plaintiff's cashier testified as follows: "At that time the value of the Morrison homestead was, in round numbers, about $5,000. I understand that the Dakota property was worth anywhere from $30,000 to $35,000. I do not know the value of Morrison's prop-

erty aside from the Dakota property." Deducting from this the value of the personal property, and the section on which defendant holds a lien for about $18,000 is shown to be worth at least $25,000. There is no evidence to the contrary in the whole case. Our conclusion is that defendant Moline, Milburn & Stoddard Company is not entitled to a money judgment against the plaintiff.

The District Court will vacate the judgment heretofore rendered in this case, and enter judgment in favor of the plaintiff against the defendant James Morrison for $10,700.22, with interest thereon from February 23, 1897, at 7 per cent., and the usual foreclosure judgment for the sale of the land described in the complaint to satisfy such judgment. The rights of all the defendants except Moline, Milburn & Stoddard Company will be adjudged to be subordinate to the lien of the plaintiff's mortgage, and to be barred by the foreclosure and sale of the premises under such judgment. But the defendant Moline, Milburn & Stoddard Company will be decreed to have a lien on said premises superior to that of the plaintiff's mortgage for the full amount due upon such judgment, to-wit, $17,658.18, with interest thereon from February 27, 1891.

Defendant Moline, Milburn & Stoddard Company will recover costs and disbursements in this court. All concur.

(73 N. W. Rep. 527.)

E. E. REDMON, *et al vs.* P. P. CHACEY.

Opinion filed January 18th, 1898.

Drainage Warrants—No County Liability Created Thereby.

Section 7 of the drainage law now in force (being Ch. 51, Laws 1895) provides that the county drain commissioners may issue warrants drawn upon the county treasurer and payable out of the drainage fund (which could be raised only by special assessments within a limited district) and negotiate the same, for the purpose of raising funds with which to pay damages allowed for right-of-way for drains. *Held*, that said warrants would create no general

liability against the county, and their issuance would not constitute a loan of the credit of the county, within the meaning of § 185 of the state constitution.

Drainage Bonds Not Loan of County Credit.

Said drainage act provides that the entire cost of locating and constructing drains shall be paid by special assessments upon the property and municipalities benefited, and in proportion to benefits received; but § 31 of the act provides that, instead of levying this entire cost in one year, the county may issue and negotiate bonds for the amount, running for a series of years, and then collect from the proper taxing district the necessary fractional part of the cost during each year of the life of the bonds, and keep the same as a sinking fund with which to pay the bonds at maturity. The section also declares that no county shall be liable for the payment of such bonds, but that they shall be paid only out of the sinking fund thus created, and the bonds shall recite that they are issued under said act, and are to be paid out of such sinking fund. *Held*, that the issuance of said bonds would not amount to a loan of the credit of the county, under the provisions of § 185 of our constitution.

Uniform Taxation—Constitutional Limitation.

Granting that all special assessments for local improvements in excess of benefits received are, in effect simple taxation, and void, under our constitution, if not uniform, yet the question cannot arise in this case, as under this statute no drain can be constructed where the total cost exceeds the total benefits.

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

Action by E. E. Redmon, C. Shepard, and George F. Clark, as drain commissioners for Cass County, N. D., against P. P. Chacey. From an order overruling defendant's demurrer to the complaint, he appeals.

Affirmed.

D. A. Lindsey, for appellant.

Ball, Watson & Maclay, and *F. B. Morrill*, for respondents.

BARTHOLOMEW, J. This action was brought by the plaintiffs in their capacity of drain commissioners of Cass County, and the object sought was the condemnation of a strip of ground across defendant's land for drain purposes. There was a demurrer to the complaint, which was overruled; and defendant, electing to stand thereon, brings the ruling upon the demurrer into this court for review. The demurrer was not leveled at any defect in allegation, but was based entirely upon the ground of the alleged unconstitutionality of the statute under which plaintiffs were

assuming to act. In 1893 the legislature enacted a general drainage law (see Ch. 55, Sess. Laws, 1893,) which was before us in 1894, in *Martin* v. *Tyler*, 4 N. D. 278, 60 N. W. Rep. 392. We held that statute unconstitutional, primarily upon the ground that it violated § 14 of the constitution, which provides that private property shall not be taken for public use unless the owner be first compensated in money therefor, and also that it violated § 185 of the constitution, which prohibits any county from loaning its credit. In 1895 the legislature passed another drainage law, with the evident intent and purpose of obviating the defects of the law of 1893. See Ch. 51, Laws 1895. It is urged in this case that the efforts of the legislature were futile, and that the new law is vulnerable to the same objections that required us to hold the former law unconstitutional. In this we think appellant is mistaken, and, in view of the discussion that the points received in the former case, we can state our reasons briefly. The general features of the present law are practically the same as those of the law of 1893. It provides for county boards of drainage commissioners, and that drains shall only be established when petitioned for in the manner provided in the statute, and that the expenses of the construction of the drains shall be met by taxation of the property and municipalities benefitted thereby. But the former law required parties whose land was taken under condemnation proceedings to receive warrants on the drainage fund as security for the pay, while under other provisions of the act there could be no money in the fund drawn against until after the levy and collection of a special tax. That, we held, was not the compensation contemplated and required by § 14 of the constitution. The present act provides that, when the amount of compensation to be paid has been ascertained by the proper tribunal, a special tax shall be levied against the benefited property and municipalities to raise such amount, but if, in the meantime, the drain commissioners desire to proceed with the work, they may issue warrants, in an amount sufficient to pay such amount, drawn upon the county treasurer, and payable out of the fund pertaining

to that particular drain, and which warrants may be negotiated at not less than par, and the proceeds used in paying for such right-of-way. If warrants are not so issued and negotiated, no further proceeding can be taken in the matter until the special tax is collected. Appellant urges that these warrants are in fact county obligations, and the proceeding amounts to a loan of the credit of the county, which this court condemned as unconstitutional in *Martin* v. *Tyler*, *supra*. But we see no force in the contention. These warrants are issued, not by the county commissioners, but by the drain commissioners,—a board whose authority in that line is limited to dealing with the drainage fund, and that cannot bind the county generally. Moreover, these warrants are expressly drawn against the drainage fund. That a warrant so drawn creates no general liability against the municipality is well settled. See Burr. Pub. Secur. 635, *et seq*; 15 Am. & Eng. Enc. Law, 1214, *et seq*. The case of *U. S.* v. *Clark Co.*, 96 U. S. 211, cited by appellant, decides nothing differently, when read in the light of its facts. The act of 1893, (§ 38) provided that instead of imposing in one year, upon the persons and municipalities subject to taxation, the entire burden of locating and constructing the drain, the county might issue its bonds running for a series of years, and in the meantime collect yearly the proper portion of said expense, and hold the same as a sinking fund out of which to pay the bonds at maturity. But under that act the county was absolutely liable on the bonds, whether it succeeded in collecting the tax or not; and we held that it amounted to a loan of the credit of the county to the parties primarily liable for the expense, and hence was a violation of § 185 of the constitution. The same objection is urged against the present law, which also provides for the issuance of county bonds under the same circumstances, and for the accumulation of a sinking fund in like manner. But it goes further and provides (§ 31.) "No county shall be liable for the payment of any bonds issued under the provisions of this act, but such bonds shall be paid only out of the sinking funds created as in this act provided;" and further,

"Such bonds shall contain a recital that the same are issued in accordance with the provisions and pursuant to the authority of this act, and that they are to be paid out of sinking funds to be created as in this act provided." The same reasoning which requires the holder of a county warrant drawn upon a particular fund to look to that fund alone for payment must require the holder of a bond issued under this statute to look alone to the sinking fund for his payment. The statute becomes a part of his contract. This is elementary.

One more point is urged. It is based upon a question discussed, but not decided, in *Martin* v. *Tyler*. It is asserted that special assessments for local improvements cannot exceed the benefits received from such improvement. If special assessments do exceed benefits, then, as to the excess, it is taxation, pure and simple, and void for lack of uniformity. We are not required to decide whether special assessments may not exceed benefits. The authorities upon both sides of that question are cited in *Martin* v. *Tyler*. But the question cannot arise under this statute, unless we assume that the drain commissioners will not proceed in the performance of their duties according to the plain directions of the statute. This presumption we cannot indulge. The first duty of the drain commissioners, when a petition for a drain is presented to them, is to ascertain the entire cost of locating and constructing the drain, and also to assess the benefits accruing therefrom,—all persons interested having a right to be heard as to such matters; and, if it appear that the total cost of the drain will exceed the benefits derived therefrom, the drain commissioners can proceed no further, and the petitioners are liable for all costs incurred in the matter up to that time. If this statute be obeyed, the special assessments can never exceed the benefits. The objections urged against the complaint in the brief of counsel (and we have considered no others) are not well taken, and the order overruling the demurrer is affirmed. All concur.

(73 N. W. Rep. 1081.)

RED RIVER VALLEY LAND AND INVESTMENT COMPANY *vs.* JAMES H. SMITH.

Opinion filed January 27th, 1898.

Vendor and Purchaser—Party in Possession—Notice.

The rule of law which declares that a purchaser of real estate in possession of another than his grantor is chargeable with knowledge of all the rights of such party in possession has its exceptions. It does not apply where the possession of such party is entirely consistent with the record title, nor where such party was a former vendor of the land, and remained in possession; and when such party in possession holds a lease of the land, and the purchaser knows of the existence of such lease, he may attribute the possession to such lease.

Evidence of Notice to Vendee.

Certain evidence examined, and *held* to have no tendency to establish actual notice on the part of a vendee of real estate of any outstanding equites in the party in possession.

Knowledge of Officer of Corporation—When Notice to Corporation.

In order to charge a corporation vendee of real estate with knowledge of outstanding equities therein, on the sole ground that its managing officer had such knowledge, it is not sufficient to show simply that such officer obtained such knowledge more than three years before the organization of such corporation. It must at least further appear that such knowledge was present in the mind of such officer at the time of the transaction in which the corporation is sought to be charged.

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

Action by the Red River Valley Land and Investment Company against James H. Smith. From a judgment entered on a verdict directed for plaintiff, defendant appeals.

Affirmed.

W. C. Resser, (*A. B. Wright*, of counsel,) for appellant.

Ball, Watson & Maclay, and *Bartlett & Lovell*, for respondent.

BARTHOLOMEW, J. This action was commenced in March, 1897, in justice court. The object was to obtain possession, under the forcible entry and detainer statute, of a section of land in Cass County. The material allegations in the complaint were to the effect that in the spring of 1896 the plaintiff, by written lease, a copy of which was attached to the complaint, leased the said

land to the defendant, the said lease, by its terms, terminating on December 31, 1896, and giving the lessor a right of re-entry; that, after the termination of the lease, due notice to quit and surrender possession was served upon defendant, but that he continued to hold said premises contrary to the terms of his lease, and without the permission of the plaintiff. An answer having been filed setting forth that the title to said land would come in question as a defense to said action, and the proper bond having been filed, the case was transferred to the District Court, under the provisions of § 6671, Rev. Codes. In the District Court an amended answer was filed. It is very prolix, and we will condense its substance. The ownership of plaintiff and the execution of the lease are denied, and it is affirmatively alleged that in 1884 the defendant and his brother purchased said land from a corporation known as the "Amenia & Sharon Land Company," which was then the owner of said land, for the sum of $9,000; that said purchase was evidenced by a written contract between said parties, by the terms of which it was agreed that said purchase price should draw interest at the rate of 7 per cent. payable annually, and that one-tenth of the purchase price should be paid in each year, and, after the payment of a certain amount, a deed was to be given, with a mortgage back for the balance; that, under said contract, the defendant went into possession of the land, and paid the annual interest for 1885 and 1886, but paid no part of the principal in those years, and that in the years 1887, 1888, and 1889, he paid neither principal nor interest; that in the fall of 1889 defendant was also indebted in a large amount to other parties, and on this outside indebtedness he was paying interest at the rate of 12 per cent. per annum; that at said time he entered into a contract with the said Amenia & Sharon Land Company, through its president and general manager, one E. W. Chaffee, by which it was agreed that said land company should loan defendant sufficient money to pay off this outside indebtedness, and also to carry on his farming operations for the succeeding year; upon this loan defendant was to pay interest at the rate

of 7 per cent. per annum, and, as security for the payment of such loan and interest, defendant surrendered his contract for the purchase of said land, and executed a quit-claim deed for the same back to said land company, and took a lease or farm contract from said company, and that this arrangement should continue from year to year until such time as defendant should have entirely repaid the money so loaned to him, with the interest thereon, and, when that was done, that defendant should receive back his original contract for said land; that, by virtue of such agreement, leases or farm contracts, under which defendant farmed said lands, were executed for the years 1891 to 1894, inclusive, by the terms of which defendant was to have one-half or two-thirds of the crop raised by him, but the land company had a lien upon such share for the repayment of such loan. These leases are entirely silent upon the question of the disposition of the share of the crop which should go to the lessor, but, of course, it is defendant's theory that such share was to be applied upon the original contract of purchase, and he so alleges. The answer further alleges that in the spring of 1895 the said Amenia & Sharon Land Company transferred the legal title of said land to one Guernsey, and the lease or farm contract for that year was made with said Guernsey; but it is alleged that Guernsey took the land with full knowledge of defendant's rights therein, and the lease with him was executed for the same purpose and with the same understanding as the prior leases. In 1895 Guernsey transferred the legal title to the plaintiff herein, the Red River Valley Land & Investment Company, and the lease for 1896 was made with plaintiff; but it is alleged that plaintiff took the land with full knowledge of defendant's rights therein, and the contract with it was made for the same purpose as those preceding. There was no prayer to be allowed to pay up under the original contract. There was no prayer for an accounting. All that was asked, in effect, was the dismissal of the action, with costs, which might with equal propriety have been asked under a general denial. But it is evident that the object of the answer was to

show an equitable title in defendant, that entitled him to possession, and thus defeat plaintiff's claim of right to immediate possession. Whether or not these facts might not have been shown under a general denial, we need not stop to discuss.

This case cannot be controlled by those cases in which a tenant is denied the right to dispute his landlord's title. While these leases or contracts are in the usual form, and contain a stipulation on the part of the defendant to quit and surrender possession at the termination of the contract, with a right of re-entry to the other party, and while defendant admits the execution of all those contracts, yet the central thought of the answer is that, while defendant was a tenent in form, he never was such in fact; that, in fact, he was during all of said years the equitable owner of the land, and entitled to possession as such; and that the quit-claim deed and subsequent leases were all parts of an arrangement by which defendant secured the Amenia & Sharon Land Company for money loaned. The answer seeks to bring the case within that principle which permits a conveyance absolute in form to be shown, by parol, to be a security only. Without objection by either party, the case was tried to a jury, and, after the evidence was all in, defendant moved that the questions whether or not the quit-claim deed and subsequent leases were in fact given and received as security be submitted to the jury for its determination. This the court refused, but, on motion of plaintiff, the court proceeded to make findings upon those points, which findings were adverse to defendant. Plaintiff then moved for a directed verdict upon the law issues; whereupon the court stated to the jury that the only issue for them to decide was whether or not plaintiff was entitled to the immediate possession of the land, and instructed them that the plaintiff was so entitled, and directed a verdict accordingly, which was rendered. Exceptions were saved by defendant to all of these rulings.

It is perfectly clear to us, after a full and thorough examination, that no other result would have been proper under the evidence, and we cannot therefore disturb it, unless we find

prejudicial error in the record. It is urged that it was error to refuse to submit all the issues in the case to the jury, and error for the court to make findings in the case, and it is also urged that such findings are not supported by the evidence, but are contrary thereto. We shall not stop to discuss these matters. We shall assume, in the interests of defendant, that the action was a law action, and that there were no "equitable issues," properly so called, and that all the special matters pleaded in the answer might have been shown in evidence under the general denial. We shall also assume that the action of the court amounted to a direction to the jury to find a general verdict for plaintiff. This gives the defendant the advantage of having everything regarded as proven that his evidence has any legal tendency to establish. Defendant, in his answer, pleaded the conveyances to Guernsey and plaintiff; and inasmuch as whatever equities defendant claimed in the land had their basis in a parol agreement between defendant and the manager of the Amenia & Sharon Land Company, which was made in 1889, it was incumbent upon defendant, under his answer, to show that when Guernsey purchased the land, in 1895, he took it with knowledge of defendant's rights; and it was also incumbent upon defendant to show that when plaintiff purchased the land from Guernsey, it took the same with knowledge of defendant's equities. *Anthony* v. *Wheeler*, (Ill. Sup.) 17 Am. St. Rep. 281, and cases in note (s. c. 22 N. E. Rep. 494.) A failure of proof on either point must defeat defendant. If Guernsey took without notice then the title was perfect in him, and he could transfer such perfect title to plaintiff, although plaintiff had full knowledge of defendant's equities. On the other hand, Guernsey may have had full knowledge of such equities, yet, if plaintiff was a good faith purchaser, it took the lands freed from all such claims. Hence it was neccessary for defendant to show that both Guernsey and plaintiff purchased with knowledge. We think he signally failed on both points.

True, the defendant was in actual possession of the land at the time the purchases were made, and it has been reiterated times

without number that where a party purchases real estate in the possession of another, not his vendor, he is chargeable with knowledge of all the rights of such party in possession. We remark, however, that neither in their brief nor in oral argument do learned counsel claim anything in this case by reason of their client's possession; and doubtless counsel were well advised. The rule has its exceptions. Where the possession is consistent with the record title, it is presumed to be under such title, and is not notice of outstanding unrecorded equities. *Smith* v. *Yule*, 31 Cal. 180; *Dutton* v. *McReynolds*, 31 Minn. 66, 16 N. W. Rep. 468; *Townsend* v. *Little*, 109 U. S. 504, 3 Sup. Ct. 357; *Williams* v. *Sprigg*, 6 Ohio St. 585. Again, where a vendor remains in possession after conveyance, such possession is not notice that he claims any rights inconsistent with the conveyance he has made. *Abbott* v. *Gregory*, 39 Mich. 68; *Sprague* v. *White*, 73 Iowa, 670, 35 N. W. Rep. 751; *Eylar* v. *Eylar*, 60 Tex. 315; *Cook* v. *Travis*, 20 N. Y. 400; *Van Keuren* v. *Railroad Co.*, 38 N. J. Law, 165; *Bank* v. *Batty*, 30 N. J. Eq. 126. How stood the record when Guernsey purchased from the Amenia & Sharon Land Company? The fee title was in the grantor, and there were four consecutive contracts of lease of record, wherein defendant acknowledged such title, and covenanted to surrender possession to said land company at the termination of his contract. His possession was entirely consistent with what appeared of record. Moreover, there was on record a deed from defendant to said land company of this same land; thus bringing defendant into the position of a grantor remaining in possession after conveyance. Nor was there any change to defendant's advantage when plaintiff purchased from Guernsey. The record remained the same, with the addition of the contract between Guernsey and defendant. The point has been squarely held that where the party in possession holds a lease, and a purchaser knows of such lease, he can attribute the possession to the lease, and the possession is not constructive notice to him of any outstanding equities. *Leach* v. *Ansbacher*, 55 Pa. St. 85.

But an effort was made at the trial to show actual notice on the part of Guernsey. The transactions between the defendant and Guernsey were conducted on the part of Guernsey through an agent. Guernsey held title to a large amount of land in the vicinity. One Cobb was his general agent, but Cobb employed one Clark to assist him, and it was Clark who first opened the negotiations, with defendant. The defendant testified: "I made this contract in 1895 with Mr. Cobb, as agent for Mr. Guernsey. I found out that Guernsey had a deed of Sec. 29. [That is the section in controversy.] I went to Guernsey or his agent for the purpose of getting a lease of Sec. 29 for 1895, and told the agent what claim I had against it. * * * I told G. Lee Clark I never met Mr. Guernsey. I never told Mr. Cobb that I had a claim against 29. I never talked with Mr. Cobb on the subject at all. The only man I claim to have talked with on that subject, representing Mr. Guernsey, was Clark." It is clear then, that, if Guernsey is to be charged with notice, it must be by reason of what the defendant told Clark. What that was defendant himself nowhere attempts to disclose. He simply gives his conclusion that he stated facts showing that he had some claim on the land, but he gives no facts. Subsequently, however, he called Mr. Clark as a witness in his behalf, and Mr. Clark discloses the facts. He testified: "Under the direction of Mr. Cobb, I went to Smith's, and inquired of him if he wished to rent Sec. 29. He said he did, and, further in that conversation, he stated to me that there was an old matter existing that he had hoped to get settled, and get the title of,—get the contract that he had originally had from Mr. Chaffee back again." That is all so far as the record shows, and it signally fails to disclose that defendant claimed any present existing right or interest, legal or equitable, in or to the land. Under the circumstances, it clearly shows that he made no such claim. Defendant's claim now is that he is, and at all times since the execution of the original contract in 1884 has been, the full equitable owner of said land, and entitled to the entire beneficial use thereof, and that the surrender of the

contract, the execution of the quit-claim deed, and the subsequent contracts of lease, were all for the purpose of enabling him to give the Amenia & Sharon Land Company security for the payment of an outside debt which he owed said company. He had learned that a third party had received a deed for the land from the same party who, on his theory, was eventually bound to deed the land to him. Smith owed this third party nothing. No claim for security for an outstanding indebtedness could exist in favor of Guernsey, because no such indebtedness existed. Guernsey is in no manner connected with the indebtedness owing by Smith to the Amenia & Sharon Land Company; yet, when Guernsey's agent asked Smith if he wanted to lease the land for 1895, he did not repudiate the idea as an owner would have done. He did not state that he was the equitable owner of the land, and entitled to the full beneficial use thereof. On the contrary, he stated that he wanted to lease it, and subsequently entered into a lease, by the terms of which Guernsey had one-third of the crop, and Smith covenanted to quit and surrender possession at the termination of the lease. It is difficult to conceive of a course more inconsistent with any claim of right as owner by Smith. True, Smith stated that there was an old matter which he had hoped to get settled up, and get his contract back. But that was no assertion of any right or legal claim to the land. It was rather a confession to the contrary,—a confession that he had hoped to get some legal claim or right, but had not succeeded. It was certainly no notice to Guernsey of any outstanding equity in Smith.

Guernsey being an innocent purchaser, plaintiff, who succeeded to his rights, would be protected on elementary principles. We need not therefore go further. But we remark that it is clear that plaintiff was also an innocent purchaser. Defendant seeks to charge plaintiff with notice in this manner: He claims that the parol contract with the Amenia & Sharon Land Company, by which he turned the land over as security, was made with E. W. Chaffee, who was an officer in and general manager of said cor-

poration; that the knowledge of E. W. Chaffee was the knowledge of the company. In October, 1892, E. W. Chaffee died; and thereafter his son, H. F. Chaffee, who prior to that time had been a bookkeeper in his father's office, succeeded his father as an officer in and general manager of said company. It is claimed that H. F. Chaffee had knowledge of such parol agreement through his father during the latter's lifetime, or, at any rate, he is chargeable with such knowledge from the time he became an officer of the Amenia & Sharon Land Company. In 1895 the plaintiff corporation was formed, and H. F. Chaffee became an officer in said corporation; and thereupon, defendant claims, the plaintiff corporation became chargeable with knowledge of such parol contract.

We think no case can be found which carries the doctrine of constructive notice to a corporation to any such length. As to this plaintiff corporation, H. F. Chaffee was, at the time he received such knowledge, simply a private citizen. There is nothing in the record to show or intimate that the plaintiff corporation is simply the old corporation under a new name, and we think it has never been held that knowledge received by an individual can be charged to a corporation which was not organized, and of which he did not became a member, until three years thereafter. In this case express notice to plaintiff is not claimed, but only the technical constructive notice arising from the knowledge of its officer. An officer of a corporation is simply an agent of the corporation. On this doctrine of notice, it is stated in Thompson's Commentaries on the law of corporations (§ 5191:) "The most comprehensive rule with reference to this subject which can be stated is that notice communicated to or knowledge acquired by the officers or agents of corporations, when acting in their official capacity, or within the scope of their agency, becomes notice to or knowledge of the corporation for all judicial purposes." This announces the strict rule as to the time when the knowledge must be acquired or the notice received. It has direct authority to support it. *Hood* v. *Fahnestock*, 8 Watts, 489;

Houseman v. *Association*, 81 Pa. St. 256; *Congar* v. *Railway Co.*, 24 Wis. 124; Jones, Mortg. § 584. In subsequent sections of his work, Judge Thompson is inclined to modify this strict rule, and later authorities are in that direction. They hold that where an officer of a corporation, or other agent, is engaged in a tranaction for his principal, and has at the time, present in his mind, a knowledge of certain facts of vital importance to his principal, and bearing directly upon the transactions then before him, and has no selfish interest that prompts him to withhold such knowledge from his principal, and where such knowledge was not received in any confidential relation, the duty of the officer or agent to communicate such knowledge to his principal is so strong that the law presumes it to have been done. If such knowledge was received while acting in an official capacity as such officer, or within the scope of his agency, then the law requires nothing more to raise the presumption; but, if such knowledge was received before such official capacity or such agency began, then no presumption of knowledge on the part of the principal will arise, unless it appears by clear and satisfactory proof either that the knowledge was present in the mind of the officer or agent at the time of the transaction in which the principal is sought to be charged with such knowledge, or that such knowledge was received by such officer or other agent at so short a time before such transaction that, in the language of Lord Eldon, it is impossible "to give a man credit for having forgotten it." As supporting these views, see The Distilled Spirits, 11 Wall. 356; *Bank* v. *Chase*, 72 Me. 226; *Bank* v. *Cushman*, 121 Mass. 490; *Hart* v. *Bank*, 33 Vt. 252; *Hayward* v. *Insurance Co.*, 52 Mo. 181. But neither under the strict rule or the relaxed rule could the plaintiff in this case be charged with knowledge of defendant's equities by reason of the knowledge of H. F. Chaffee. If he ever obtained such knowledge, it was at least three years before he became an officer of plaintiff, or before the plaintiff corporation had an existence. On the trial there was no attempt whatever to show that such knowledge was present in the mind

of Mr. Chaffee when plaintiff received the conveyance from Guernsey, and the lapse of time precludes any presumption that such was the case. Under no view of the case, as the evidence stands, could a verdict for defendant be supported; hence it was not error to direct a verdict against him.

Affirmed. All concur.

(74 N. W. Rep. 194.)

WELLS COUNTY *vs.* E. H. MCHENRY, *et al.*

Opinion filed January 31st, 1898.

Railroad Land Grant—Taxation.

The decision of this court in *Jackson* v. *La Moure Co.*, 46 N. W. Rep. 449, 1 N. D. 238, and *Grandin* v. *La Bar*, 57 N. W. Rep. 241, 3 N. D. 446, followed on the question of the taxability of indemnity lands of the Northern Pacific Railroad Company before the selection thereof has been approved by the secretary of the interior. Before that time such lands are not taxable.

Place Lands When Taxable.

Place lands are taxable after they have been surveyed in the field, although the plat of survey has not yet been filed in the local land office; the survey made being thereafter approved as made, and the plat thereof being duly filed in such office.

Failure of Equalization Board to Meet—Effect.

In a proceeding to obtain a tax judgment under Ch. 67 of the Laws of 1897, the failure of the county board of equalization to meet at all is not fatal to the tax, for the reason that the act gives the taxpayer a full hearing, in the very proceeding to enforce the tax, as to the fairness of the assessment and the justice of the tax, and confers upon the court the power to reduce the tax if, on such hearing, it appears that the land has been partially, unfairly, or unequally assessed.

Curative Legislation.

So far as matters of form are concerned, that act is a curative law in all cases in which the defects in the tax proceeding have not prejudiced the taxpayer.

Assessment and Levy of Tax—Vital.

When, however, there is no assessment or levy, no tax judgment can be rendered. The act does not vest in the courts the power to assess property or levy taxes, but merely provides the machinery for enforcing and sustaining taxes.

Illegal Levy.

The taxes for 1890, having been assessed by percentages instead of in specific amounts, as required by the act of 1890, are void, and, no tax judgments thereon can be rendered in this proceeding.

BARTHOLOMEW, J., dissenting.

Items of Levy—Miscellaneous Expenses.

It will not defeat a tax that one of the items of levy of taxes for general county purposes was stated to be "miscellaneous expenses."

No Limitation of Action to Foreclose Tax Lien.

A tax lien on real estate being declared to be perpetual, no lapse of time will bar a remedy to enforce such lien against the land. It follows that no limitation statute can be invoked as a defense to a proceeding, under the law of 1897, to foreclose a tax lien.

Penalties and Interest.

Certain questions decided relating to penalties and interest on taxes levied prior to the act of 1890, and also on taxes levied subsequently to that act, but prior to the time when the Rev. Codes took effect.

Taxes of Land Grant Void.

Following the decision of the Federal Supreme Court in *McHenry* v. *Alford*, (decided January 3, 1898, and not yet officially reported) 18 Sup. Ct. Rep. 242, *held*, that the taxes against the land grant of the Northern Pacific Railroad Company, assessed in 1887 and 1888, are illegal, and hence that no tax judgments therefor can be rendered.

Proceeding by Wells County against Edwin H. McHenry and Frank G. Bigelow, as receivers of the Northern Pacific Railroad Company, to enforce payment of taxes. A judgment was rendered for plaintiff. Certain questions are certified here by the trial court; *Glaspel*, J.

Judgment modified.

J. E. Robinson and *J. J. Youngblood*, for plaintiff.

Ball, Watson & Maclay, *James B. Kerr* and *J. B. McNamee*, for defendants.

Section 9, Ch. 67, Laws 1897 is substantially the same as § 1588, Rev. Stats. Minn. 1894. The Minnesota adjudications upon this law declare that its purpose is to cut off technical defenses which do not go to the merits. *Commissioners* v. *Nettleton*, 22 Minn. 356; *State* v. *Certain Lands*, 42 N. W. Rep. 474; *County* v. *Bachelder*, 50

N. W. Rep. 536. Until there is an assessment there can be no tax —and until there is a levy there is no tax. *Township* v. *Rose*, 53 N. W. Rep. 927; *Powers* v. *Larabee*, 2 N. D. 155, 49 N. W. Rep. 728; *Swenson* v. *Greenland*, 4 N. D. 532, 62 N. W. Rep. 603; *O'Neil* v. *Tyler*, 3 N. D. 47, 53 N. W. Rep. 434. The levy of taxes is not a judicial function it is exclusively legislative. *State Railroad Cases*, 92 U. S. 575; *Heine* v. *Levee Commissioners*, 19 Wall. 660; *Marsh* v. *Supervisors*, 42 Wis. 502. Under the constitution the assessment is jurisdictional. In no other way can taxes be collected upon property by uniform rule. *Philleo* v. *Hiles*, 42 Wis. 527; *Plumer* v. *Supervisors*, 50 N. W. Rep. 416; *Adams* v. *Tonella*, 14 So. Rep. 17; *Bank* v. *Hins*, 3 Ohio St. 15. Proceedings to enforce taxes for 1890, and prior years are barred by the statute of limitations § 5199, 5201, 5208, Rev. Codes. A tax is a "liability created by statute" within the terms of the code. *State* v. *Certain Lands*, 42 N. W. Rep. 473; *San Francisco* v. *Jones*, 20 Fed. Rep. 188; *San Francisco* v. *Linning*, 15 Pac. Rep. 311; *State* v. *Mining Co.*, 14 Nev. 226; *Forster* v. *Railroad Co.*, 23 Pa. St. 371; *Pine County* v. *Lambert*, 57 Minn. 203. Taxes cannot be levied in any other manner than that designated by law. 1 Desty 467; *Warren County* v. *Klein*, 51 Miss. 807. A tax levied in any other manner is void. *State* v. *Shreveport*, 33 La. Ann. 1179; *Miller* v. *Corbin*, 46 Ia. 150; *Mix* v. *People*, 72 Ill. 241; *Marion County* v. *Barker*, 25 Kan. 258. The levy being void it was not the intent of the law of 1897 to validate the same. *Prindle* v. *Campbell*, 9 Minn. 212; *Weller* v. *St. Paul*, 5 Minn. 95. Evidence of the auditor was competent to show that it appeared from the record that the taxes for the year 1890 were not based upon an itemized statement of the county expenses. *Maxwell* v. *Paine*, 18 N. W. Rep. 546. The statute is mandatory requiring the commissioners to make itemized statement of the county expenses and the same should show of record *Shattuck* v. *Smith*, 6 N. D. 56; Cooley Taxation, 339. Statutes requiring a record are mandatory and must be strictly complied with. *Perry Co.* v. *Selma Ry. Co.*, 65 Ala. 391; *State* v. *Warford*, 32 N. J. L. 207; *Paldi* v. *Paldi*, 84

Mich. 346. Every proceeding in the course of a levy of taxes must appear in some written and permanent form in the record of the bodies authorized to act upon them. *Moser* v. *White*, 29 Mich. 59; Appeal of Powers, 29 Mich. 504; *Doe* v. *McQuilkin*, 8 Blackf. 335; 2 Desty, 1066. The failure of the board of equalization to meet was fatal to the tax. *Auditor General* v. *Reynolds*, 47 N. W. Rep. 442. *Power* v. *Larabee*, 49 N. W. Rep. 724; *Prindle* v. *Campbell*, 9 Minn. 212. A tax law manifestly intended to embrace and include all legislation on that subject, will repeal all provision of former laws not re-enacted in it. *Baer* v. *Choir*, 36 Pac. Rep. 286; Cooley on Taxation, 295; 1 Desty, 105; *Fox* v. *Com.*, 16 Grat. 1; *Merserean* v. *Merserean Co.*, 26 At. Rep. 682; Suth. on St. Cr. 154; *Com.* v. *Standard Oil Co.*, 101 Pa. St. 119–150; *Belvidere* v. *R. R. Co.*, 34 N. J. L. 193. A statute providing that unpaid taxes after a certain date shall bear a certain rate of interest has no application to taxes assessed and levied before the act took effect. 2 Desty, 765; *Peo.* v. *Thatcher*, 95 Ill. 109; *Peo.* v. *Peacock*, 98 Ill. 172. A statute prescribing a penalty can not operate retrospectively. 1 Desty 104; *Fuller* v. *Grand Rapids*, 40 Mich. 396; *Clark* v. *Hall*, 19 Mich. 356. The odd numbered sections were not taxable for the year 1892. The official plats of survey were not filed in the land office until after the levy for that year, although the survey was made before the assessment. The survey fees had not been paid. 5 Copps Land Owner, 5; *U. S.* v. *Curtner*, 38 Fed. Rep. 1; *Barnard* v. *Ashley*, 18 How. 43; *Frasher* v. *O'Connor*, 115 U. S. 102; *McCreary* v. *Haskell*, 119 U. S. 327.

CORLISS, C. J. The record in this proceeding is certified to us by the District Court without an appeal, under the provisions of § 10, Ch. 67, Laws 1897. The proper steps having been taken under this statute to obtain tax judgments against lands owned by the Northern Pacific Railroad Company, the defendants, who are receivers of such company, filed their answers setting up various defenses, which will be more specifically referred to as the points certified to us for decision are severally discussed.

Some of the lands are indemity lands. They were selected by the company, in manner and form as prescribed by the secretary of the interior, prior to the levy of the taxes in question. But it appears that the selection was not approved by the secretary of the interior until May 25, 1896. While the facts of this case are different from the facts in *Jackson* v. *LaMoure Co.*, 1 N. D. 238, 46 N. W. Rep. 449, and *Grandin* v. *La Bar*, 3 N. D. 446, 57 N. W. Rep. 241, in that the selection has, in the case at bar, finally been approved, yet the principle of those cases must govern this. The groundwork of those decisions was that an approval of the secretary of the interior was necessary to vest in the company title of any kind, either legal or equitable. If such approval is the act which transfers the title, it is evident that it is immaterial whether the approval be absolutely refused or withheld or subsequently given. In all cases, whatever action the secretary of the interior takes, the whole title to the property, legal and equitable, remains in the government until he has passed upon the various questions which must be settled before it can be known whether such selection should be assented to by the government or modified or wholly disapproved. When we construed the words, "under the direction of the secretary of the interior," in the act containing the grant of the Northern Pacific Railroad Company, as equivalent to the language used in the Price County Case, 133 U. S. 496, 10 Sup. Ct. 341, we took ground which made it necessary for us to hold, under the ruling of the Federal Supreme Court in that case, that the Northern Pacific Railroad Company is, as to indemnity lands selected by it, a stranger to the title, and has no taxable interest therein until such selection is approved. The fact that the secretary of the interior has approved the selection, made in 1886, of the land in this case taxed as indemnity land, does not give the company, as of the date of such selection, any greater right therein than it would have had if the approval had been withheld. Unlike place lands, the title to indemity lands does not vest in the company as of the date of the act of congress containing the grant, but only from the time of the selection

thereof; and until the selection is approved there is no selection in fact, but only preliminary steps, which may or may not result in a selection, according to the subsequent action which the proper representative of the government may take in the matter of such selection. This is the explicit declaration of the Federal Supreme Court in the Price County case, and, so long as the opinion in that case stands unmodified, we consider it our duty to hold that until approval no title whatever to indemnity lands vests in the Northern Pacific Railroad Company. In the Price County case the court said that, "until the selections were approved, there were no selections in fact, only preliminary proceedings taken for that purpose, and the indemnity lands remained unaffected in their title." It follows that we must answer in the negative the following question certified to us by the District Court: "Should not judgment be given against indemnity lands for all taxes charged against the same, with interest and penalty as provided by law?"

It is urged that some of the lands within the place limits were not surveyed until after the taxes for the year 1892 had been levied, and that, therefore, such taxes are illegal, so far as they effect such lands. The basis of this claim is the fact that while the survey in the field antidated the assessing and levying of the taxes, yet the plat of the survey was not filed in the land office until after such levy had been made. Counsel for the receivers cite in this connection the following cases: *U. S.* v. *Curtner*, 38 Fed. Rep. 1; *Frasher* v. *O'Connor*, 115 U. S. 102, 5 Sup. Ct. 1141; *McCreery* v. *Haskell*, 119 U. S. 327, 7 Sup. Ct. 176; *Barnard* v. *Ashley*, 18 How. 43; and also the ruling of Secretary Schurz in the case of *In re Foster*, 5 Copp, Landowner, 5. They insist that these decisions establish the rule that a survey is not complete until after the plat is filed in the proper office. As we regard the matter, these cases have no bearing on the point now under discussion. It is undisputed that the survey as made in the field was the survey which was in fact approved, and that the plat which was subsequently filed was in fact the plat of such survey. The

lands being within the place limits, the grant, as soon as it attached on the filing of the plat (assuming that it did not attach before,) related back to the date of the act containing the grant to the Northern Pacific Railroad Company. The grant as to place lands is a grant in *præsenti*, and when it attaches it becomes a grant of the land from the very day the act took effect. See *Jackson* v. *La Moure Co.*, 1 N. D. 238, 46 N. W. Rep. 449, and cases cited. It therefore appears in this case that the company was the owner of land when it was assessed and when the tax was levied. Such land having been at that time surveyed in the field, the assessor could value it, for its boundaries were then established just as they now exist and ever since have existed.

But it is insisted that this land was not taxable because the survey fees had not been paid. In this connection counsel for the receivers cite the Rockne Case, 115 U. S. 600, 6 Sup. Ct. 201. The act of Congress which modified the rule laid down in that case was qualified by the proviso that it should not apply to unsurveyed lands. If these lands were at the time they were assessed unsurveyed, within the meaning of that statute, it is clear that they could not be taxed. *Railroad Co.* v. *McGinnis*, 4 N. D. 494, 61 N. W. Rep. 1032. The cases cited throw no light upon the question as to the meaning of the word "unsurveyed" as used in the act of 1886. That statute had for its object the abrogation of an unjust rule that the railroad company could, under the guise of protecting the lien of the government (and to protect such lien no such ruling was necessary,) interpose as a defense to state taxation its own failure to discharge its obligation to the federal government. The extraordinary spectacle was presented of a recipient of governmental bounty escaping one just obligation to the state because it had failed to discharge another obligation to the general government. The statute, passed to wipe out such an inequitable rule, should be given a liberal construction,—one which will carry out the purpose of congress to compel the company to pay taxes when they are justly due. On this ground we hold that the lands mentioned were not surveyed lands, within

the meaning of the proviso embodied in the act of 1886, after they had been surveyed in the field, althought the plat of such survey had not at that time been filed. Such plat was in fact filed, and the survey as made was approved, without alteration. The objection is highly technical, and we do not deem it consonant with the spirit of the act of congress already referred to, to sustain such objection. We therefore answer in the affirmative the following question certified to us by the District Court: "Were the odd-numbered sections in township 145 of ranges 71, 72, and 73 taxable for the year 1892, although the final plat of the survey was not filed in the United States land office until August 8, 1892, the levy of the county taxes having been made on July 15, 1892, and although the survey fees were not paid until May 27, 1892, it being conceded that the lands were surveyed in the field prior to said levy?"

One of the defenses is that the taxes levied in the year 1889 are void because the county board of equalization failed to meet as required by law, and our decision in *Power* v. *Larabee*, 3 N. D. 502, 57 N. W. Rep. 789, is cited to support the claim that this omission rendered illegal the entire tax levied for that year. The ground of this contention is the denial of the citizen's constitutional right to a hearing on the question of valuation. We do not wish to qualify anything said by this court in that case. A hearing is vital in tax proceedings based on valution. In *Power* v. *Larabee*, no hearing in court was granted by statute. In this respect that case differs from the case at bar. The legislature having designated a certain tribunal to pass on the question of just apportionment of the tax on the basis of value, we held that no court had authority to exercise such a function. This must be the law, for it is not one of the inherent powers of a court of justice to participate in any way in the levy of a tax. Such power is usually lodged in administering officers and boards. In the absence of statutory permission, no court has jurisdiction to review the action of an assessing officer in the valuation of property for purposes of taxation, where the only claim is that the

assessing officer erred in judgment as to such valuation. Of course, in case of fraud, a different question would be presented. But we are not aware of any principle of law which prevents the legislature from vesting in the ordinary courts of justice the duty of revising the action of assessors whenever their valuation of property is challenged by the citizen, or even the power to act as equalizing boards before which all assessments shall be brought for revision prior to their becoming final. We doubt the expediency of any legislation which should vest all the powers of boards of equalization in the ordinary judicial tribunals. Local boards are better qualified to exercise such functions. And the imposition of such burden upon the courts would seriously impair their efficiency in the discharge of those duties which are germane to the judicial branch of the government. These considerations, however, are for the legislature. With them the courts have naught to do. The question with which the judicial tribunals have to deal is one of power, and not of sound statesmanship.

We must now turn our attention to the statute, which it is urged satisfies the demand of the organic law that the citizen should be afforded an opportunity for a hearing before the value of his property, as the basis of the apportionment of a tax, shall be finally fixed. The act of 1897, providing the machinery for transmuting taxes into tax judgments, contains a curative feature as to past taxes. The effect of this law with respect to taxes thereafter assessed, we need not now stop to consider, as no such taxes are before us. Section 9 of this act (Ch. 67, Laws 1897,) provides as follows: "If all the provisions of the law in force at the time of such assessment and levy in relation to the assessment and levy of taxes, shall have been complied with, of which the list so filed with the clerk shall be *prima facie* evidence, then judgment shall be rendered for such taxes and the interest, penalties and costs. But no omission of any of the things provided by law in relation to such assessment and levy or of anything required by an officer or officers to be done prior to the filing of the list with the clerk shall be a defense or objection to

the taxes appearing on any piece or parcel of land, unless it be also made to appear to the court that such omission resulted to the prejudice of the party objecting, or that the taxes against such piece or parcel of land have been partially, unfairly or unequally assessed; and, in such cases, but in no other, the court may reduce the amount of taxes upon such piece or parcel and give judgment accordingly. It shall always be a defense in such proceedings, when made to appear by answer and proof, that the taxes have been paid, or that the property is lawfully exempt from taxation." In construing this section we must not lose sight of the fundamental fact that it speaks of taxes, and that the object of this enactment is to provide the necessary machinery for putting a tax claim in judgment. A lien is to be fastened upon the land of a citizen by a tax judgment,—not for money loaned to the citizen by the public or on account of a breach of contract or the commission of a tort, but for a tax. The basis of the proceeding authorized by the statute is the ascertained obligation of the owner of the land to pay, on account of such ownership, a specified sum towards the maintenance of civil government. We think that there must be an assessment and levy to warrant a judgment under this statute. We do not believe that the legislature intended to vest in the courts the power of making the assessment or the levy. But, if there is an assessment and levy, we believe that all omissions in matters of form are cured by the act of 1897. It is true that § 9 of that act does not in terms cure omissions in tax proceedings which should come before the court under that act. But this is the legal effect of the law where the taxpayer cannot show prejudice, for all defenses based on such omissions are swept away as defenses, except when prejudice can be affirmatively shown by the taxpayer. When the legislature, in authorizing an action in court upon a tax, provides, in the same law, that omissions in the proceedings shall not constitute a defense to the tax, the necessary consequence of such legislation is to validate whatever has been done in the assessment and levy, notwithstanding omissions in matters of form, provided, an assess-

ment and levy are in fact made. The validity of curative statutes in relation to tax proceedings has been sustained by this court, and that such legislation is constitutional has become one of the elementary principles of law. See *Shattuck* v. *Smith*, 6 N. D. 56, 69 N. W. Rep. 5. Barring the matter of the right to a hearing, (For this cannot be dispensed with,) the legislature may legalize any step or declare immaterial any omission in a tax proceeding, provided, of course, there is something which may be called an assessment and levy. If the officer authorized to make the assessment fails to make it, but the property is assessed by another, the act of the latter may be declared an assessment, provided he could have been authorized originally to make such assessment. In *Shattuck* v. *Smith*, we hold that a levy made without any authority of law could be validated by a subsequent statute. But we would not wish to be understood as carrying this argument so far as to validate the equalization of an assessment by a board which did not possess authority to equalize it at the time of such equalization, for in such case the citizen would be denied a hearing, he having no notice and being under no obligation to assume that such board would exercise functions not then vested in it by law. If somebody other than the county board of equalization had passed upon the assessment during the year when that board failed to meet, and the legislature had attempted to legalize such equalization, we would have before us a case widely different from the one we are actually discussing. The legislature has not attempted to declare that the taxpayer should have known that some then unauthorized body would hear and redress his grievance, but that in the very proceeding to determine the amount of the tax he should pay he may be heard in court as fully as he could have been heard had the proper board met at the proper time and listened to his complaint. The statute declares: "But no omission of any of the things provided by law in relation to such assessment and levy, or of anything required by an officer or officers to be done prior to the filing of the list with the clerk shall be a defense or objection to

the taxes appearing on any piece or parcel of land, unless it be also made to appear to the court that such omission resulted to the prejudice of the party objecting, or that the taxes against such piece or parcel of land have been partially, unfairly or unequally assessed, and in such cases, but in no other, the court may reduce the amount of taxes upon such piece or parcel and give judgment accordingly." It is obvious that the time of the hearing is unimportant. If at any period in the tax proceeding, or in the course of the judicial proceeding instituted to enforce the tax, the right to demonstrate that the tax against the land is excessive is granted by the statute, that protection which the constitution guaranties is fully enjoyed by the citizen. When the hearing shall be had, before what board, officer, or tribunal, what the procedure shall be, and, generally, all matters of detail, are wholly within the control of the legislature, provided the substance of the right be not impaired. Tax proceedings are summary in character. The public exigencies will not permit of the delays incident to ordinary proceedings in the courts of justice. The constitutional right to be heard in such proceedings must necessarily partake of the character thereof. Investigation need not be in a court of justice. It seldom is. The rigid rules of evidence which there obtain do not fetter the action of the reviewing board in its search for the truth. These principles are settled beyond debate. *State* v. *Certain Lands in Redwood Co.*, (Minn.) 42 N. W. Rep. 473; *Davidson* v. *New Orleans*, 96 U. S. 97; *Hagar* v. *Reclamation Dist. No. 108*, 111 U. S. 701, 4. Sup. Ct. 663. Wider latitude is and should be allowed the legislature in tax proceedings in determining what hearing will satisfy the constitution. It cannot be doubted that under this general principle it would have been competent for the legislature to have provided, in the law under which the taxes in question were levied, that the hearing should be had, not in the earlier stages of the proceedings before the county board of equalization, but at a later period, to-wit, in the action instituted to secure a tax judgment and

before another tribunal, *i. e.* the District Court. That hearing which the lawmaking power could have constitutionally declared sufficient it had the power to subsequently declare sufficient; the hearing being available to the citizen after the law providing for it had been enacted. On this branch of the case the decision of the Minnesota Supreme Court is directly in point. *State* v. *Certain Lands in Redwood Co.*, (Minn.) 42 N. W. Rep. 473. See, also, *Scott Co.* v. *Hines*, (Minn.) 52 N. W. Rep. 523. In *State* v. *Certain Lands in Redwood Co.*, Judge Mitchell said: "Appellant's second point, to-wit, that this statute violates section 7, article 1, of the constitution is predicated upon the assumption that it provides for the assessment of these back taxes without notice to the property owner, and without giving him any opportunity of being heard in the matter. Without following counsel through their exhaustive arguments upon this point, it is sufficient to say that it seems to proceed upon what we consider two false assumptions, to-wit: First, that in proceedings in the exercise of the taxing power the property owner is entitled to notice, and to be heard in each preliminary step in the proceedings, *pari passu* with their progress; and, second, that under the tax law (Gen. St. 1878, Ch. 11, §§ 75, 79; Gen. St. 1894, §§ 1584, 1588) the defenses which he may interpose by answer, when the state applies for judgment, are so restricted as not to include all the objections which go to the merits of the proceedings. Where, as in the present case, the tax is levied on property, not specifically, but according to its value, to be ascertained by some person appointed for that purpose, undoubtedly a party is entitled to notice and an opportunity to be heard; but we know of no case where it was ever held that a party was entitled to notice of, and to be heard in, each step in tax proceedings as it is taken. We doubt whether any tax law ever provided for any such thing. The principle running through all the cases is that a law does not infringe upon the constitutional provision under consideration if the property owner has an opportunity to question the validity or amount of the tax either before that amount is determined or in subsequent proceedings

for its enforcement. Whenever by law a tax is imposed upon property, and those laws provide for a mode of confirming or contesting it in the ordinary courts of justice, with such notice to the person, or such proceeding in regard to the property, as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law. *Davidson* v. *New Orleans*, 96 U. S. 97; *Hagar* v. *Reclamation Dist. No. 108*, 111 U. S. 701, 4 Sup. Ct. 663. This right is fully given under the sections of the tax law already referred to." The court in this case interpreted the same statute which we are here construing. Having borrowed our law from Minnesota with this construction already placed upon it, the legislature, under a familiar rule, must be deemed to have adopted the construction as a part of the act itself. It follows that our answer must be in the affirmative to the following question certified to us by the District Court: "Should judgment be rendered in favor of the county for the taxes for the year 1889, with penalties and interest, regardless of the alleged failure of the county commissioners in that year to hold a session as a board of equalization?" We do not wish to be understood as holding that the act of 1897 operates to dispense with the necessity for any assessment or levy at all. The statute contemplates that there must be a valid assessment and levy antedating the institution of the action by the filing of the delinquent list. Aside from the matter of a hearing (for the hearing is allowed in the very action itself,) the act is curative only as to the omission of something in relation to the assessment or levy, or of some step in the subsequent proceedings, and is not a law vesting in the courts all the powers of administrative officers to make assessments and levy taxes. Before the suit is commenced there must be a tax. In this respect we agree fully with the reasoning of the court in *Adams* v. *Tonella*, (Miss.) 14 South. Rep. 17. Our criticism of that decision is that it assumes that a tax cannot be valid unless the hearing granted by the constitution has already been had when the action is instituted; whereas, it is not the fact

that the party has been heard, but that he has at some stage, before his liability is finally established, a right to a hearing, which takes away the constitutional objection that his property is sought to be wrested from him without due process of law. Does the law give him a hearing? If so, it matters not that the time for the hearing has not arrived when the action to enforce the tax is commenced. It is, nevertheless, a valid tax because the right to be heard is protected. The fallacy of the opinion in *Adams* v. *Tonella*, is that it assumed that, because the hearing had not been had when the action was brought, therefore the tax was void, although the very court which declared it void because the citizen had not yet been heard had full authority and was commanded by the statute to grant him the very constitutional hearing the denial of which was held by the court to be fatal to the tax. But, so far as the court in that case recognized the necessity of a tax as the basis of an action under a statute like Ch. 67 of the Laws of 1897, we fully indorse its views. The decisions in Minnesota, under practically the same statute, are in harmony with this interpretation of the law of 1897. *State* v. *Certain Lands in Redwood Co.*, (Minn.) 42 N. W. Rep. 473; *Commissioners* v. *Nettleton*, 22 Minn. 356. As the objection to the want of an opportunity to be heard is obviated by the statute, and as it cured all omissions in matters in relation to the assessment, levy, and subsequent proceedings, it is evident that at the time this tax action was instituted the taxes, so far as the omissions we have been considering are concerned, were valid taxes. If at the time the action is commenced there is no tax whatever, the institution of the suit will not authorize the rendition of a judgment therein as for the tax.

It is urged that judgment should not be rendered for the taxes of 1890, because the levy for that year was by percentages, and not in specific amounts, as required by the law of 1890, nor was the levy based upon an itemized statement. See § 48, Ch. 132, Laws 1890, and *Shattuck* v. *Smith*, 6 N. D. 56, 69 N. W. Rep. 5. Whether the curative feature of the act 1897 relates

to matters of substance as well as matters of form is not necessarily involved in the consideration of this point. It is evident from the opinion of Judge Mitchell in *State* v. *Certain Lands in Redwood Co.*, (Minn.) 42 N. W. Rep. 473, that the Supreme Court of Minnesota considered it as embracing only omissions in matters of form. But even if we should hold that it included those steps in a tax proceeding which, according to the adjudications, are regarded as substantial, the question would still remain whether the failure to make the levy, according to the statute, is a mere omission of something in relation to the levy, or a total failure to make a levy at all. Had the statute required the board, in making the levy, to spread upon the record the names of the members voting and how they voted on the matter of levy, and were the omission before us an omission to follow this requirement of the law, we would have a case of the omission of something in relation to the levy, and not the failure of the board to make any levy at all. But the case we are called upon to decide is widely different. It is not a case where, disregarding the omission of the board, we can still say that there has been a levy made. The omission was in failing to levy the tax in specific amounts. It is evident that it is only by holding that the act 1897 not only cures the omission, but also declares the act which was done, *i. e.* the levy by percentages, to be a good levy, that the validity of such levy can be sustained. Certainly a levy must be made in one of two ways, either in specific amounts or by percentages. At the time the pretended levy in question was made, a levy by percentages was not a levy at all. We have therefore the case of a failure to levy, and not a mere omission of some step in relation to the levy. The statement, in dollars and cents, of the sum of money for which the levy was made, was a vital part of the levy itself, and not some merely formal step in connection therewith. It is true that the legislature might have subsequently declared such levy valid. *Shuttuck* v. *Smith*, 6 N. D. 56, 69 N. W. Rep. 5. But the statute we are dealing with has no such scope. It cures omissions, but it does not attempt to provide

that that which was not a levy at all is nevertheless to be deemed to have been a levy as fully as though the things done had been originally declared sufficient to constitute a legal levy. In *Commissioners* v. *Nettleton*, 22 Minn. 356, the court held, under a statute precisely the same, that when there is no such levy as the law requires, the statute is not curative of such failure to make any legal levy at all. As there was no levy made in 1890, and as the act of 1897 does not purport to transmute into a levy that which was not a levy originally, we must answer in the negative the following question certified to us by the District Court, viz.: "Can judgment be rendered in favor of the county for the taxes of the year 1890, notwithstanding the finding as to the character of levy and the aforesaid evidence as to the failure to make an estimate of the county expenses and the levy based on the same?" Of course, the penalties and interest fall with the county tax, although the rest of the taxes for that year are unaffected. *State* v. *Certain Lands in Redwood Co.*, (Minn.) 42 N. W. Rep. 473.

We come now to another branch of the case. It is found by the District Court that in each of the years 1891, 1892, 1893, and 1894 there was included in the levy for that year a specified sum of money for miscellaneous expenses. On the basis of this finding we are asked to hold the levy in each of these years void to the extent of the amount extended against the lands in question on account of these sums for miscellaneous expenses in the several years, respectively. At the time these levies were made the act of 1890, requiring an itemized statement to be made by the board of commissioners as the basis of the county levy, and the levy itself to be made in specific amounts, was in force. As the appearance of the tax on the delinquent list created a *prima facie* case against the defendants (Laws 1897, Ch. 67, § 9), it is evident that, except in so far as there are findings in the case with respect to omissions in these tax proceedings, we must assume, in support of the tax, that every statutory step was regularly taken in the course of such tax proceedings up to the filing of the delinquent list in court. There being no finding that an itemized

statement was not made in these years, we must assume that in each of such years such a statement was made. Now, if in this statement, or in the levy of the tax, it appeared that there was an item for miscellaneous expenses, and this item was included in the levy for general county purposes, there would be nothing illegal in the action of the board in this respect. Assuming, in favor of the defendants, that § 1589 of the Compiled Laws of 1887 was not repealed by the act of 1890 (see the repealing section thereof, § 107), and that, therefore, the board was, under the act of 1890, restricted in the amount of its levy for general county purposes, yet, if the item for miscellaneous expenses was included in the general sum total of estimated county expenses for which a levy for general county purposes could be made up to the specified percentage permitted by statute, it is plain that no violation of the policy of limiting the amounts of levies for different purposes could result from sustaining a levy of which such an item formed a part. Had the board made a levy for all the purposes named in the statute, and had it then added a levy for miscellaneous expenses, the case would be radically different from the one which is before us. There is no finding that such is the fact. The finding is merely that in the levy made there is a sum for miscellaneous expenses. This finding is entirely consistent with this sum being set forth in the itemized statement as a part of general county expenses, and in the levy as an integral part of the levy for general county purposes. We must assume, in support of the tax, that a proper itemized statement, showing the different items of estimated county expenses, was made, and that this item for miscellaneous expenses is included in the list of such expenses. The presumption that the tax is legal cannot be overthrown by a finding of fact which is entirely consistent with the legality thereof. If the restriction on the amount of the levy, contained in § 1589, Comp. Laws, 1887, was not abrogated by the act of 1890, then the county auditor, on comparing the amount of the levy with the assessed valuation as equalized by said board, and finding that the levy as made would necessitate his extending

against the property for general county purposes a greater percentage than allowed by § 1589, Comp. Laws, 1887, must have reduced the levy to the maximum percentage permitted by that section. Laws 1890, Ch. 132, § 48. In support of the tax we must assume that this was done, or that the levy for general county purposes, in which this item for miscellaneous expenses must be deemed to have been included, did not exceed the maximum percentage allowed by the statute. We answer in the negative the following question certified to us by the District Court, to-wit: "Does the inclusion of a sum for miscellaneous expenses in the levy made by the county commissioners for the years 1891 to 1894, inclusive, prevent the attachment of interest and penalties on the taxes for the said years?"

Another defense is the statute of limitations. It is insisted that an action to enforce a tax is an action on a liability created by statute, and that, therefore, under § 5201, Rev. Codes, such action must be brought within six years. Our limitation statutes are made applicable to actions by or on behalf of the state. Section 5208, Id. As we view the case, the statute of limitations has no application to this proceeding. It is analogous to a proceeding to foreclose a tax lien. This action is not *in personam*, but *in rem*. The land alone is proceeded against. No personal judgment is sought, nor does the statute contemplate that such a judgment should be rendered. We may assume that all right to recover a personal judgment for the taxes, the right to enforce which had accrued more than six years before this action was commenced, had been lost when this action was commenced. But this is not an action of that character. Our statutes have from an early period, uniformly declared that the lien of taxes on real estate should be perpetual. Such is still the law. Pol. Code 1877, § 56; Comp. Laws 1887, § 1612; Rev. Codes 1895, § 1239; Laws 1897, Ch. 126, § 72. It is impossible to give effect to this word "perpetual" if we assume that any limitation law applies to the taxes themselves so as to utterly extinguish them, or to the right to enforce the lien thereof on the land against which they were

levied. As a perpetual lien was given, it is obvious that it was not intended that after any period of time, however long, the taxes themselves should become extinguished or the lien thereof destroyed. So far as any right to enforce such taxes by an action against the owner of the land is concerned, it may be that the six-year limitation would apply. But the lawmaking power clearly manifested a purpose that no lapse of time should destroy taxes, or the right to enforce the lien thereof against the real estate on which they were levied, when it declared that such lien should be perpetual. A perpetual tax lien presupposes the continuance of the obligation of the citizen to pay the tax without reference to the lapse of time. A lien for taxes, after the taxes themselves have been wiped out, is unthinkable. And it is impossible to believe that the legislature meant to subject this lien, and the right to enforce it, to any limitation law; for then we would witness the anomalous condition, presented by a perpetual lien, of a perpetual tax, without any power in the public to make such lien available. A lien that cannot be enforced is no lien at all. No person in purchasing the property subject to it would pay any heed to it, for it could never work him an injury. When the act of 1897 was passed, no flight of time would bar the right to foreclose these perpetual tax liens. The passage of that act has not made the six year limitation statute, or any other limitation statute, applicable. Save in form no change was wrought in the remedy by that statute. The remedy given thereby is analogous to a foreclosure suit. While there is some difference in the details or practice, the statutory remedy is, in substance, the same as the then existing remedy by a bill in equity. The object of this proceeding is the same as that of a foreclosure action. It is to have the lien established for the amount thereof, and the property sold to satisfy the same. It follows that this statutory remedy is no more barred by the six year limitation statute than a suit in equity would be; and, while the authorities are not uniform, yet the great weight of authority, as well as the better reason, is in favor of the doctrine that an action in equity may be

maintained to enforce a lien, even after an action at law to recover the debt secured by the lien is barred by the statute. See *Norton* v. *Palmer*, 142 Mass. 433, 8 N. E. Rep. 346; *Shaw* v. *Silloway*, 145 Mass. 503, 14 N. E. Rep. 783; *Cerney* v. *Pawlot*, 66 Wis. 262, 28 N. W. Rep. 183; *Coles* v. *Withers*, 33 Grat. 186; *Smith* v. *Railroad Co.*, *Id.* 617; *Lashbrooks* v. *Hatheway*, 52 Mich. 124, 17 N. W. Rep. 723; *Webber* v. *Ryan*, 54 Mich. 70, 19 N. W. Rep. 751; *Baent* v. *Kennicutt*, 57 Mich. 268, 23 N. W. Rep. 808; *Pratt* v. *Huggins*, 29 Barb. 277; *Grant* v. *Burr*, 54 Cal. 298. And for cases exactly in point, under a statute making taxes a perpetual lien identical with ours, see *Beard* v. *Allen*, (Ind. Sup.) 39 N. E. Rep. 665; *Adams* v. *Davis*, 109 Ind. 10, 9 N. E. Rep. 162; *Rinard* v. *Nordyke*, 76 Ind. 130; *Adams* v. *Osgood*, (Neb.) 60 N. W. Rep. 869. It follows from these observations that we must answer in the negative the following question certified to us by the District Court, to-wit: "Is the statute of limitations, found in § § 5199 and 5201, Rev. Codes, a bar to this proceeding?"

The following questions can be considered together: "Are the penalties and interest allowed by the District Court as to any of the lands involved in the three answers excessive or insufficient?" "Should the judgment herein be modified in any respect?" It is claimed that chapter 132 of the Laws of 1890 repealed all statutes regulating interest and penalies on taxes for 1887, 1888, and 1889, and that, therefore, interest thereon ceased to run after such law took effect. The general doctrine that one complete revenue law supersedes another, is invoked by counsel for the defendants to sustain this contention. But repeals by implication are not favored. And the very repealing clause found in the act of 1890 negatives the idea that the legislature regarded that act as so complete in itself as to preclude the survival of any existing revenue statute. See section 107. As the act of 1890 is clearly prospective in its operation, there is nothing in its provisions inconsistent with the continued existence of the old statutes regulating interest on delinquent taxes. The old policy of imposing interest at the rate of 1 per cent. a month was continued by the law of

1890, and this is significant of a purpose not to abrogate such policy as to past unpaid taxes, but to leave those provisions of the old statutes which related to interest unaffected as to taxes which had been levied and had become delinquent under the previous system.

It is next urged that all right to interest ceased when the Revised Codes went into operation, *i. e.* January 1, 1896. It is true that the repealing section contained in the Revised Codes includes every statute on which rested the right to interest and penalties on taxes levied prior to the time when such codes became law. But the feature common to all the prior statutes, that delinquent taxes should draw interest at the rate of 1 per cent. a month, was preserved. See § § 1610, 1611, Comp. Laws, 1887; Ch. 119, Laws 1889; § 1, Ch. 145, Laws 1890; § 1, Ch. 107, Laws 1891; § 1, Ch. 115, Laws 1893; § 1238, Rev. Codes. Section 2683 of the Revised Codes provides that "the provisions of this Code, so far as they are substantially the same as existing statutes, must be construed as continuations thereof and not as new enactments." This feature of the prior acts is therefore to be regarded as never having been abrogated. It is merely continued in force, although, for convenience of future reference, the form is adoped of repealing all the existing laws containing it, and at the same moment re-enacting it in the new revenue law. So far as penalties are concerned, it is unimportant to determine whether the old statutes are in this respect still in force as to past taxes, for the penalties on all those taxes accrued long before the Revised Codes became the law, and the repeal of a penal statute does not affect penalties which have accrued. Section 5142, Rev. Codes. All interest, however, will cease after the day when chapter 126 of the Laws of 1897 went into operation. This was March 8, 1897. The last section of this act (§ 110) repeals the revenue law contained in the Revised Codes. The new policy with reference to penalties and interest is so radically different from that found in the Revised Codes that it cannot be said

to be a mere continuation of the old law in this respect. Compare § 71, Ch. 126, Laws 1897, with § 1238, Rev. Codes.

We will now take up each year separately, and determine what penalties and interest were due March 8, 1897. Under the law in force in 1887 (§§ 1610, 1611, Comp. Laws, 1887,) a penalty of 5 per cent. must be added, with interest from the first Monday of February, 1888, at the rate of 10 per cent. per annum, and also in addition 1 per cent. per month to be added on the 1st of each month. The interest at the rate of 10 per cent. per annum will stop on January 1, 1896; this feature not being found in the Revised Codes. But the interest at 1 per cent. a month, payable on the 1st of each month, continues to the 8th of March, 1897; the feature of the old law as to this rate of interest having been continued in force by the Revised Codes. Total penalty and interest on taxes for 1887, 192 per cent. Under Ch. 119, Laws 1889 (the interest feature of this law being continued under §§ 1238, 2683, Rev. Codes,) the total amount of penalties and interest on taxes for 1888, up to March 8, 1897, is 102 per cent. Under Ch. 145, Laws 1890, total amount of penalty and interest on taxes for 1889 is 90½ per cent. Under section 66, Ch. 132, Laws 1890, penalties on taxes for 1891 are 10 per cent. The act of 1893 does not relate to back taxes. It is prospective in its operation. All that could be collected under section 66 of the revenue law of 1890 is the 10 per cent. penalty therein named. Under the act of 1893 the total amount of penalties and interest for taxes for 1892 is 51 per cent. Under the same act the total amount of penalty and interest for taxes for 1893 is 39 per cent., and on taxes for 1894 is 27 per cent.

The only remaining inquiries certified to us present the mineral land question, which we have already passed upon. See *Railroad Co.* v. *McGinnis*, 4 N. D. 494, 61 N. W. Rep. 1032. The facts of this case are not more favorable to the railroad company than were the facts in that case. Without further discussion of that question, we will state our conclusion that all of the place lands described in the first and second answers were subject to taxation in the years in which taxes were levied against them. We there-

fore answer in the affirmative the two following questions certified to us by the District Court, viz.: "Were the lands described in said schedule, attached to said first answer, subject to taxation for the years 1887, 1888, and 1889?" "Were the lands described in said second answer subject to taxation in the years 1890, 1891, 1892, 1893, and 1894?" The judgment will be modified in conformity with the views expressed in this opinion. It is so ordered.

Since this opinion was written the decision of the Federal Supreme Court in the case of *McHenry* v. *Alford*, (decided Jan. 3, 1898, and not yet officially reported) 18 Sup. Ct. 242, has been rendered. That decision is binding on this court, and it is therefore our duty to hold, in accordance therewith, that the taxes levied against the place lands in 1887 and 1888 are not legal. To this extent our opinion is modified. It is not claimed by the counsel for the receivers that the taxes for 1889 are affected by that case. On the contrary, they concede that, under the evidence in this case, that decision has no bearing on the legality of such taxes.

BARTHOLOMEW, J. I concur in all that is contained in the opinion of the court in this case, except that portion thereof pertaining to the taxes for the year 1890. As to that I dissent.

(74 N. W. Rep. 241.)

In re EATON.

Opinion filed April 8th, 1898.

Costs—Disbarment of Attorney.

In a disbarment proceeding instituted under § 434 of the Revised Codes, no costs or disbursements can be recovered by either party.

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

Proceeding for the disbarment of Robert A. Eaton, attorney-at-law. A judgment of disbarment was reversed, 4 N. D. 514,

and the cause remanded, with directions to dismiss. A motion by defendant for the allowance of his costs was denied, and he appeals from the final judgment of dismissal.

Affirmed.

Robert A. Eaton, in pro per.

The office of attorney is a *quasi* public one, all persons are interested in his rectitude, any person may oppose his admission or may move to suspend or disbar him. *Gooch* v. *Peebles*, 11 S. E. Rep. 420; *Matter of Mosness*, 39 Wis. 509, 20 Am. Rep, 55; *State* v. *Garesche*, 36 Mo. 260; *Ex parte Walls*, 73 Ind. 106. Some states do not permit private individuals to institute disbarment proceedings. 8 Cent. L. J. 253; *Matter of Brewster*, 12 Hun. 110; *Anon*, 22 Wend. 656; *Percys Case*, 36 N. Y. 651. North Dakota has by statute extended the right to private persons to prosecute such proceedings. Section 434, Rev. Codes; *Ex parte Alabama State Bar Association*, 8 So. Rep. 768; 12 L. R. A. 134. The code seems to regard every original application to a court of justice for a judgment or an order as a remedy. *Belknap* v. *Waters*, 11 N. Y. 477. A disbarment proceeding being a remedy other than an action is a special proceeding. Sections 5157, and 6097, Rev. Codes; *Matter of Dodd*, 27 N. Y. 633; Weeks on Atty's, 157; *In re Houghton*, 59 N. W. Rep. 733; *In re Orton*, 11 N. W. Rep. 584; *State* v. *Clarke*, 46 Ia. 158; *In re Eaton*, 4 N. D. 514; *State* v. *Root*, 5 N. D. 487. On the assumption that the proceedings were brought by Wineman and Carothers for the bar association, they are personally liable for the costs. Field on Corp. 179; Story Agency, 281; 22 A. and E. Enc. L. 806–816; *Thompson* v. *Garrison*, 22 Kan. 765; *Lewis* v. *Tilton*, 64 Ia. 220; *Fredenall* v. *Taylor*, 23 Wis. 538, 99 Am. Dec. 203; *McCarter* v. *Chambers*, 22 Am. Dec. 556; *Herod* v. *Rodman*, 16 Ind. 241; *Heath* v. *Gaslin*, 80 Mo. 310. In any event appellant is entitled to his costs against the persons who unsuccessfully prosecuted him for his disbarment. *Ex parte Alabama State Bar Association*, 92 Ala. 113, 8 So. Rep. 768; 12 L. R. A. 134; *In re Bowman*, 8 Cent. L. Jr. 253; *Montray* v. *Peo.*, 44

N. E. Rep. 498; *State* v. *Kemp*, 82 Mo. 213. The committee will have recourse to the other members of the bar association who voted for the proceedings for reimbursement. *Volger* v. *Ray*, 131 Mass. 439; *Ray* v. *Powers*, 134 Mass, 22; *Ash* v. *Guie*, 97 Pa. St. 493; *Lizer* v. *Daniels*, 66 Barb. 426.

R. M. Carothers, and *J. B. Wineman*, for the proceedings.

A disbarment proceeding is not a remedy. 20 A. and E. Enc. L. 971. It is of a public nature and *quasi* criminal. It involves the control of the court over its officers and however terminating will neither enforce or vindicate a private right. By this circumstance it is excepted from the class of ordinary prosecutions set on foot by one party against another. *In re Attorney*, 83 N. Y. 166. It is the duty of the court to cause charges to be preferred against its offending officers. *Farlin* v. *Snook*, 1 Pac. Rep. 128; *In re Percy*, 36 N. Y. 652; *State* v. *Burr*, 28 N. W. Rep. 269. Both admission and removal of attorneys are judicial acts and judges are not liable to civil action unless they act corruptly. Weeks on Atty's, § § 90–157–190; *Stewart* v. *Cooley*, 23 Minn. 350; *Ex parte Bradley*, 7 Wall. 364; *Bradley* v. *Fisher*, 13 Wall. 335; *Yates* v. *Lansing*, 6 Am. Dec. 290. It is the duty of any attorney to bring to the notice of the court the misdoings of another attorney. *Bar Association* v. *Taylor*, 13 L. R. A. 767. Public policy demands that the court and public be protected against unworthy practitioners. *In re Gates*, 2 At. Rep. 214. Disbarment proceedings are of a public nature. An injured client cannot dismiss proceeding begun by himself. *In re Davis*, 93 Pa. St. 116; *In re Knott*, 12 Pac. Rep. 780; *In re Chandler*, 63 N. W. Rep. 67. Neither can a bar association control them. *McCarthy's Case*, 42 Mich. 71. The informants do not prosecute as a matter of their own, and are therefore not parties in the legal sense. *Bar Association* v. *Taylor*, 12 L. R. A. 767; *Peo.* v. *Palmer*, 61 Ill. 259. Costs cannot be adjudged against one not a party. *Storthmeyer* v. *Zeppenfeld*, 28 Mo. App. 143; *Moore* v. *Mann*, 29 Me. 559; *Wallace* v. *Espy*, 68 Ill. 143. Nor in the absence of express statutory authority. 5 Enc. Pl. and Pr. 111.

WALLIN, J. This is a disbarment proceeding, brought under section 434 of the Revised Codes. The District Court entered a judgment suspending the accused from practice as an attorney-at-law. This court, on appeal reversed the judgment of the District Court, and directed the court below to enter a judgment reversing its former judgment, and dismissing the proceeding. See *In re Eaton*, 4 N. D. 514, 62 N. W. Rep. 597. The record now before us discloses the following facts: In October, 1895, and pursuant to the direction of this court so to do, an order was made and entered in the District Court annulling said judgment of suspension, and dismissing the proceedings. This order is silent as to the costs of the proceeding. Later, and in January, 1896, the matter of the costs was brought before the District Court, and was disposed of by an order as follows: "The order to show cause entered herein on the 30th day of December, A. D. 1895, citing the petitioners in the above entitled proceeding to show cause why the respondent, Robert A. Eaton, should not have his costs and disbursements herein adjusted in his favor and against the petitioners, J. B. Wineman and R. M. Carothers, having come on for hearing before the undersigned trial judge, all parties appearing personally, and the matter herein having been considered, it is now hereby ordered that the application of said respondent for such adjustment be, and the same is hereby, denied." Thereafter, and in August, A. D. 1896, judgment was entered annulling the judgment of suspension, and dismissing the proceeding; but said judgment gave no costs or disbursements, and was wholly silent as to the costs and disbursements of the proceeding. From the last mentioned judgment, the respondent appeals to this court, and claims here that the court below erred in not giving him a judgment for his costs and disbursements, and this is the sole question involved on this appeal.

Appellant's contention, briefly stated, is that a disbarment proceeding under the statute, being neither a civil nor a criminal action proper, is necessarily a "special proceeding," citing Rev. Codes, § § 5155–5160, and contends further, that, under various

provisions of the code, costs and disbursements are awarded to the successful litigant in a special proceeding. Our first view of the case was (conceding that a disbarment proceeding is a special proceeding, within the meaning of the code) that defendant had lost his right to have the matter of the costs reviewed in this court by failing to appeal from the order of the District Court refusing to allow him his costs. The judgment as entered failing to embody any adjudication as to costs, we were led into holding that the question was not raised on the record. Further investigation has led us to change our views in this respect. We now think that the order disallowing the costs was in its nature an order requiring a judgment to be entered of a particular character, viz. a judgment without costs, and such a judgment was entered. A mere order for judgment is nonappealable, while, on the contrary, an order for judgment is reviewable on appeal from the judgment. The order preceding the judgment was not a final order. See *Felber* v. *Railroad Co.*, 28 Minn. 156, 9 N. W. Rep. 635; *Closen* v. *Allen*, 29 Minn. 86, 12 N. W. Rep. 146; *Dooly* v. *Morton*, 41 Cal. 439; *In re Weber*, 4 N. D. 119, 59 N. W. Rep. 523. We are of the opinion that, under the authorities cited, the question of the right of the respondent to recover the costs and disbursements of the proceeding arises upon the record, and must therefore be disposed of upon its merits.

We have decided to hold that neither costs nor disbursements can be recovered in a proceeding of this character. It must be conceded, however, that, in a certain broad sense, the contention of the appellant that this proceeding is a "special proceeding" is correct. It is special, in that it is neither a civil action nor a criminal action, but is, on the contrary, a remedy in court, which is readily distinguishable from both, not only with respect to the objects sought in actions, but as well with respect to the procedure which governs in actions. For purposes of general classification, such as was attempted to be made by the code makers in the sections thereof already cited, this proceeding is certainly a

special proceeding. But while the point is somewhat embarrassing, and not wholly free from doubt, we are inclined to hold, following precedents already made by this court, that it was not the legislative purpose, in making the general classification of remedies in court, to settle all details of practice and procedure in such purely statutory proceedings as the legislature might have authorized or might thereafter see fit to authorize, regardless of their objects or character. Doubtless it was the legislative purpose, by this broad classification, to embrace all special proceedings proper; *i. e.* such proceedings as gave remedies in court through the agency of the remedial writs which had been adopted at the common law, and had, when the code was adopted, a recognized status and name in court procedure, and which were then well known to the profession under the name of special proceedings. These remedial writs with their statutory modifications, were clearly in the mind of the code makers, and are, by universal consent, governed by the provisions of the Code of Civil Procedure, so far as the code attempts to deal with the same, including the regulations governing costs, disbursements, and appeals. But this court held in *State* v. *Davis*, 2 N. D. 461, 51 N. W. Rep. 942, that a proceeding for the punishment of a criminal contempt, which is clearly a remedy had in court, and which is certainly not an action, either civil or criminal, could not be classed with "special proceedings" for the purposes of an appeal to this court from a final order punishing the accused for a criminal contempt. See, also, *Myrick* v. *McCabe*, 5 N. D. 422, 67 N. W. Rep. 143. The Davis case is a precedent which commits this court to the theory that a remedial proceeding in court, which is neither a civil nor a criminal action, need not necessarily be classed as a special proceeding for all purposes. We are still of the opinion that this theory, if maintained, will tend to promote the orderly administration of the law, and thereby promote the ends of justice. Under the statute, this proceeding may be commenced either by the direction of the court, or upon the motion of any individual without the direction or permission of the court. If the court directs an attorney to

institute the proceeding, it possesses the power to compel obedience to the order; and, whether an attorney acts upon his own motion or pursuant to an order of court, there is no provision of law whereby he can be compensated for his services. In theory, the attorney who prosecutes acts as impartially and disinterestedly as the judge who presides in such a proceeding; and both act wholly for a public object, and that object is the purification of the bar and the protection of the court and the public from the evil consequences sure to result from allowing an unworthy person to exercise the official functions of an attorney-at-law. The legislature, whether wisely or not, has not seen fit to provide in this statute for the recovery of either costs or disbursements by either side; but it is expressly provided that only the accused can appeal from the judgment. The effect of this is, of course, to prevent the attorney who prosecutes, and against whom costs may be adjudged, from having the merits reviewed for the purpose of showing that the matter was erroneously decided against the prosecution. He would, under this theory, be compelled to pay costs, without the privilege of attempting to show in this court that he was erroneously cast in his suit, and that judgment should have been in his favor. Nor could such prosecutor have the consolation of knowing that his services for the public good would be compensated out of the public treasury. They are not so compensated. It is, moreover, wholly without precedent in this state to award costs to a person who is unsuccessfully prosecuted for public ends. We think, too, that the legislalature, in denying the right of appeal to the prosecution in a disbarment case, has intentionally taken the proceeding out of the category of cases in which costs are awarded, and the right of appeal to both sides is secured. In brief, our conclusion is that, on account of the anomalous and wholly unique character of a disbarment proceeding, costs should not be awarded to either party in the proceeding, in the absence of express legislative authority. There is in this state no such authority.

The judgment will be affirmed, without costs in this court. All concur.

(74 N. W. Rep. 870.)

WILLIAM FLUEGEL, JR. *vs.* FRANK HENSCHEL, *et al.*

Opinion filed April 9th, 1898.

Fraudulent Conveyances—Knowledge of Grantee.

Where a conveyance of real estate is made by a grantor with intent to hinder, delay, and defraud creditors, and the grantee, not being a creditor of the grantor, has knowledge of such fact, the consummation of the transfer is such a participation in the fraud by the grantee as will invalidate the transfer, even where full consideration is paid.

Suspicious Circumstances Exciting Inquiry.

In such a transfer, knowledge on the part of the grantee of such suspicious facts and circumstances as would put a prudent man on inquiry is equivalent to knowledge of all facts that would have been developed by a reasonable pursuit of such inquiry; but no duty of inquiry whatever devolves upon a grantee unless he has actual knowledge of some suspicious fact or circumstance.

Transfer to Relative—Innocent Grantee Protected.

The fact that the parties to a conveyance are relations (in this case brothers-in-law) raises no presumption that such conveyance is fraudulent, but courts will scrutinize such transaction more closely than where no relationship exists. Where a grantee, who is innocent at the time he receives his deed, of any intent on the part of the grantor to defraud creditors, learns of such intent before final payment, he makes further payments to such grantor at his peril; and this is true even when the grantor holds the grantee's negotiable promissory note, not yet due, for such balance. When a grantee makes further payments under such circumstances, his deed will be set aside *pro tanto*, at the suit of the grantor's creditors, but such conveyance will protect such grantee for all payments innocently made, and his lien on the premises for such payments will be superior to the liens of the judgment creditors of the grantor, whose judgments are junior in time to the conveyance.

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

Action by William Fluegel, Jr., against Frank Henschel, Julia A. Henschel, F. W. Froemke, and Richard Crozier, to set aside a conveyance as fraudulent. From a judgment dismissing the action, plaintiff appeals.

Reversed.

M. A. Hildreth, for appellant.

The moment Froemke knew a suit had been commenced, he was aware that the bona fides of the land transfer were involved.

This notice was before full payment and as to moneys subsequently paid he was not a bona fide purchaser. Bump. Fraud. Conv. 477–478; 2 Bigelow on Fraud. 473; *Merritt* v. *Lambert*, 6 Hoffman Ch. Repts. 1103. He is protected for all payments made before notice but no farther. *Hardingham* v. *Nicols*, 3 Atk. 304; *Story* v. *Wilson*, 2 Atk. 630; *Jewett* v. *Palmer*, 7 Johns Ch. 65; *Ellis* v. *Tonsey*, 1 Paige, 280; *Frost* v. *Beekman*, 1 Johns Ch. 298. Notice arrests all further proceedings towards the completion of the purchase and payment. *Hedrick* v. *Strauss*, 60 N. W. Rep. 929; *Dougherty* v. *Cooper*, 77 Mo. 532; *Arnholt* v. *Hartwig*, 73 Mo. 485; *Bishop* v. *Schneider*, 46 Mo. 472; 8 A. and E. Enc. L. 756; 2 Pom. Eq. Jur. 209; *Wormley* v. *Wormley*, 5 L. Ed. 651. The claim of plaintiff should be paid out of the proceeds of the sale of the land subject to the right of Froemke for all payments made prior to notice of suit. *Clements* v. *Nicholson*, 18 L. Ed. 788. Froemke is protected *pro tanto*. *Pratt* v. *Clemens*, 4 W. Va. 447; *Merritt* v. *Lambert*, Hoff. Ch. 170; *Jewett* v. *Palmer*, 7 Johns Ch. 65; *Ellis* v. *Tonsley*, 1 Paige, 280. Deed can stand as security for what was actually paid. *Boyd* v. *Dunlap*, 1 Johns Ch. 477. Form of judgment. *Van Wyck* v. *Baker*, 16 Hun. 168; *Sargent* v. *Eureka*, 46 Hun. 19.

Benton & Bradley, for respondent.

The giving of a negotiable promissory note was sufficient to sustain the sale when attacked as fraudulent even though the note was not paid at the time of notice. *Tillman* v. *Heller*, 78 Tex. 597; 11 L. R. A. 628; *Nicol* v. *Crittenden*, 55 Ga. 497; *Prestige* v. *Cooper*, 54 Miss. 77. The transfer was valid upon the facts as they stood at the time it was made subsequent notice was not retroactive. 2 Bigelow on Fraud. 474; *Collom* v. *Cadwell*, 16 N. Y. 484; *Leitch* v. *Hollister*, 4 Comst., 211; *Barnaby* v. *Griffin*, 2 Comst. 365.

BARTHOLOMEW, J. The plaintiff, Fluegel, is a judgment creditor of the defendant Frank Henschel. Execution on said judgment having been returned nulla bona, he brought his action to

set aside as fraudulent the conveyance of a certain quarter section of land, made by Frank Henschel and Julia Henschel, his wife, to F. W. Froemke. Froemke is a brother to Mrs Henschel. Crozier was a mere nominal defendant. Nothing was claimed as against him, and he made no appearance. All the allegations of fraud contained in the complaint were put in issue by the joint answer of the other defendants. The trial court found that the conveyance was made by the Henschels with intent on their part to defraud the plaintiff, Fluegel. But the eighth finding of fact was as follows: "That the defendant F. W. Froemke purchased the land described in the fourth finding of fact in good faith, and for a valuable consideration, and without any knowledge whatever of any intent on the part of the defendants Frank Henschel and Julia A. Henschel to delay or defraud any creditors or other persons out of their demands against them, or either of them, and without any knowledge of facts and circumstances sufficient to put a prudent man upon inquiry as to the fact that it was the intention of the said Frank Henschel and Julia A. Henschel, in making such transfer, to delay and defraud creditors or other persons out of their demands against them, or either of them." Upon this finding, and the conclusion of law that necessarily followed, judgment was entered dismissing the complaint, with costs. From this judgment plaintiff appeals, and the case comes into this court for trial *de novo*.

Of the findings made, only the eighth is attacked; hence we need only consider the evidence in relation to that one finding. And it will be conceded, because nothing more is claimed, that we need consider the evidence only in its bearing upon two propositions: First: Did the grantee, Froemke, at the time he made the purchase, have knowledge of the fraudulent intent of the grantors in disposing of the land? It is, we think, the prevailing and correct rule that, where a conveyance is made to one not a creditor, and the grantee knows at the time that the grantor intends by such transfer to hinder, delay, or defraud his creditors, that mere consummation of the transfer under such

circumstances, even though based upon full consideration, is such a participation in the fraud by the vendee as will invalidate the transfer against existing creditors. *Wood* v. *Chambers*, 20 Tex. 247; *Craig* v. *Zimmermon*, 87 Mo. 475; *Chapel* v. *Clapp*, 29 Iowa. 191; *Liddle* v. *Allen*, 90 Iowa, 738, 57 N. W. Rep. 603; *Biddinger* v. *Wiland*, 67 Md. 359, 10 Atl. 202; *Smith* v. *Collins*, 94 Ala. 394, 10 South 334; *Bank* v. *Durant*, 22 N. J. Eq. 35; *Hathaway* v. *Brown*, 18 Minn. 414, (Gil. 373;) *Hough* v. *Dickinson*, 58 Mich. 89, 24 N. W. Rep. 809; *Plow Co.* v. *Sherman*, 3 Okl. 204, 41 Pac. Rep. 623. And, second: Did the grantee, at the time of the transfer, have knowledge of such facts and circumstances as would put a prudent man upon inquiry, and which inquiry, if reasonably pursued, would have developed the fraudulent intent of the grantor? In law, knowledge of such suspicious facts or circumstances is equivalent to knowledge of whatever might have been learned by a reasonable pursuit of the inquiry suggested. *Jones* v. *Hetherington*, 45 Iowa, 681; *Rindskopf* v. *Myers*, 87 Wis. 80, 57 N. W. Rep. 967; *Dyer* v. *Taylor*, 50 Ark. 314, 7 S. W. Rep. 258; *Holliday Case*, 27 Fed. 830; *Dodd* v. *Gaines*, 82 Tex. 429, 18 S. W. Rep. 618; *Iron Works* v. *Bresnahan*, 66 Mich. 489, 33 N. W. Rep. 834; *Hanchett* v. *Kimbark*, 118 Ill. 121, 7 N. E. Rep. 491. But there is great danger of pressing this rule too far. The law casts upon the vendee no duty to inquire into the motives or circumstances of his vendor unless he is in possession of such suspicions, facts, or circumstances. *State* v. *Merritt*, 70 Mo. 276; *Baker* v. *Bliss*, 39 N. Y. 70; *Stearns* v. *Gage*, 79 N. Y. 102; *Woodworth* v. *Paige*, 5 Ohio St. 70; *Tuteur* v. *Chase*, 66 Miss. 476, 16 South. 241; *Kemmerer* v. *Tool*, 78 Pa. St. 147. In this case the grantee testifies that he had no knowledge of any fraudulent intent upon the part of the grantor; that he had no knowledge that the grantor was indebted in any sum whatever except the sum of $800, which was secured by a mortgage upon the premises purchased, and which the grantee assumed; and that he had no knowledge of any fact or circumstance that led him to believe or suspicion that the grantors had any fraudulent intent in making the transfer; that

the consideration paid ($2,500) was the fair value of the premises, and that it was paid by assuming the mortgage of $800, and paying $400 in cash, and two promissory notes, one for $500 and one for $800, executed by the grantee to the grantor. There is no direct testimony tending to contradict the grantee in any manner whatever, but appellant claims that certain admitted facts show that he had sufficient knowledge to arouse his suspicions, and put him upon inquiry. The first circumstance seized upon by appellant is the fact that the grantor and grantee were brothers-in-law. But the fact that the vendee and vendor are relatives should not, in our judgment, raise any presumption of fraud in the transaction, and this is the holding of the courts. *Blish* v. *Collins*, 68 Mich. 542, 36 N. W. Rep. 731; *Fraser* v. *Passage*, 63 Mich. 551, 30 N. W. Rep. 334; *Tompkins* v. *Nicols*, 53 Ala. 197; *Steele* v. *Ward*, 25 Iowa, 535; *Cooper* v. *Martin Brown Co.*, 78 Tex. 219, 14 S. W. Rep. 577. It is true that it is held in some jurisdictions that, where a husband conveys to a wife, and the transfer is attacked by creditors, the burden of proof shifts, and the wife is held to show the bona fides of the transaction, (*Hooser* v. *Hunt*, 65 Wis. 71, 26 N. W. Rep. 442, *Reese* v. *Shell*, 95 Ga. 749, 22 S. E. Rep. 580) and in one case—*Satterwhite* v. *Hicks*, 57 Am. Dec. 577—this rule was applied when the parties were brothers-in-law. The application of this rule would, however, make no difference in our decision of this case.

It also appears that after the *lis pendens* in this case was filed, but before the service of summons upon him, Froemke transferred the land to William Henschel, a brother to Frank Henschel. This was nearly a year after Froemke purchased; but we see nothing in this fact that throws any light upon the question of Froemke's knowledge at the time he purchased. This last transfer seems to have been in the usual course of business. Froemke bought the land on speculation, and sold it at an advance of $500. He testifies that at the time he sold it he knew nothing of the *lis pendens*, or of the commencement of this action.

Another circumstance upon which appellant places much

reliance is the fact that there was a discrepancy between the date of the notes and the deed on one hand and the acknowledgment of the deed on the other, while the evidence clearly shows that the papers were all drawn, acknowledged, delivered, and the cash payment made at the same time and place. The original action upon which plaintiff obtained judgment against Henschel was commenced on Monday, February 24, 1896. On that date the summons was served upon Henschel by leaving the same at his residence. The evidence shows that on February 23d Henschel and his wife had driven from their home across the country, about 30 miles, to Mrs. Henschel's father's home. This was in the immediate vicincity of Froemke's residence. On Wednesday, the 26th day of February, Froemke and the Henschels went to an attorney's office, where the notes were drawn and executed, and the deeds drawn and acknowledged, and the cash payment made. The notes and deeds were dated February 24th, while the acknowledgment was dated February 26th. It is the theory of appellant that Henschel had learned in some manner of the commencement of the action, and that he had the papers dated back in order that they might appear to antedate the binging of the suit. We think it a sufficient answer to this to state that there is no evidence whatever to show that Henschel had any such knowledge. He swears he had not. The deed did not in fact antedate the action, while it might just as well have done so had there been any ulterior purpose in the matter. All the parties testify that nothing was delivered, and no cash paid, until the 26th; and the mere fact of antedating the deed would be a subterfuge so useless that we cannot presume the most ignorant would have recourse to it. Moreover, it is established that this transfer had been arranged weeks before, and everything settled except the amount of the cash payment. On February 14th, Froemke wrote Henschel, saying, in effect, that he found that he could make the cash payment larger than he thought when they talked, and requesting Henschel to come over soon, as he was anxious to close the matter up. This letter was

introduced in evidence, and the envelope in which it was mailed. Under these circumstances, even if Froemke knew of the discrepancy,—which is very doubtful under the testimony,—we do not think the fact is of such a suspicious character that any duty of inquiry was thrown upon the grantee. We are therefore of the opinion that this finding of fact was fully warranted under the evidence, and should not be disturbed.

But upon another point we are constrained to reverse the judgment of the trial court. It is undisputed in this case (Froemke himself so testifies) that the promissory note of $800, given by Froemke to Henschel as a part of the purchase price of said land, was paid by Froemke, the grantee, to Henschel, the grantor, after this action had been commenced by service of summons on all the defendants, and before the maturity of the note. No finding of fact was made upon this matter in the lower court, nor was any such finding asked. The point does not seem to have been called to the attention of the court, but it is urged here, and, as we try the case *de novo*, we cannot ignore it. However innocent of all knowledge of Henschel's intent to defraud Froemke may have been prior to the service of such summons upon him, after such service he was, in law, chargeable with such knowledge. Thenceforth he was bound to make no further payments to his grantor, because whatever might be owing to the grantor belonged in justice and equity to the creditors whom he had defrauded. A grantee who, before full payment; receives knowledge that the transfer was fraudulent on the part of his grantor, makes further payments to his grantor at his peril. As to such payments he is regarded as a participant in the fraud, and the conveyance may be set aside *pro tanto*. *Crawford* v. *Kirksey*, 28 Am. Rep. 704; *Rhodes* v. *Green*, 36 Ind. 7; *Perkins* v. *Swank*, 43 Miss. 349; *Hedrick* v. *Strauss*, (Neb.) 60 N. W. Rep. 928; *Davis* v. *Ward*, 109 Cal. 186, 41 Pac. Rep. 1010; *Jewett* v. *Palmer*, 7 Johns. Ch. 65; *Frost* v. *Beekman*, 1 Johns. Ch. 298; *Arnholt* v. *Hartwig*, 73 Mo. 487. The grantee's conveyance will protect him to the extent of all payments innocently made, in ignorance of the fraud

of his grantor; and where a decree is entered directing the sale of the land to satisfy a judgment against the grantor, the decree should provide that from the proceeds of the sale the grantee be first reimbursed in full for all payments made by him prior to his knowledge of his grantor's fraud. It is only as to the excess over such payments that the rights of the grantor's creditors are superior to the rights of the grantee. See cases cited *supra*, and also *Kitteridge* v. *Chapman*, 36 Iowa, 348; *Green* v. *Green*, (Kan. Sup.) 21 Pac. Rep. 586, 16 Am. & Eng. Enc. Law, 838, note; *Clements* v. *Moore*, 6 Wall. 299; *Sargent* v. *Apparatus Co.*, 46 Hun. 19.

But it is urged in this case that the grantee had executed and delivered to the grantor his negotiable promissory note for the unpaid balance; and that, since the grantor might at any time transfer such note to an innocent purchaser, in whose hands the grantee would be compelled to pay it, therefore he had the right to protect himself against the note by payment to the grantor at any time before maturity, and that it would be unjust to him to require him to pay it again, or, in default, have his deed set aside. But, if he suffer any hardship, he has brought it upon himself. In this case the grantor was a party to the action; he was before the court. If he had the note in his possession or under his control he could be compelled to surrender it for cancellation. No injustice could have been done to the grantee. This the grantee must have known. He also knew that the grantor still held the note. To sanction a payment, such as was made in this case and in anticipation of a transfer of the note, would open a palpable door for fraud. The authorities are practically uniform in holding that the execution and delivery of negotiable paper for the purchase price, or any part thereof, does not constitute payment as between the grantor and grantee so long as such paper remains in the hands of the grantor. *Freeman* v. *Deming*, 3 Sandf. Ch. 327; *Partridge* v. *Chapman*, 81 Ill. 137; *Baldwin* v. *Sager*, 70 Ill. 503; *Rush* v. *Mitchell*, 71 Iowa, 333, 32 N. W. Rep. 367; *Paul* v. *Fulton*, 25 Mo. 163; *Dixon* v. *Hill*, 5 Mich. 404; *Davis* v. *Ward*, *supra*; *Kittridge* v. *Chapman*, *supra*; *Arnholt* v. *Hartwig*,

supra. Following these authorities as applied to undisputed facts in this case, justice required a different decree from that ordered by the trial court. Of course no decree can be rendered, as the case now stands, affecting the rights of the defendant Crozier, who held the prior mortgage on the land in controversy, the validity of which is in no manner questioned. The District Court of Cass County is directed, on application, to set aside the decree heretofore ordered in this case, and order a decree setting aside and canceling the deed made by the defendants Frank Henschel and wife to the defendant Froemke, and hereinbefore more particularly described, as against the plaintiff, William Fluegel, and establishing a lien upon the land in said deed described in favor of the defendant Froemke for the sum of $400, being the amount of the cash payment made at the time of the delivery of said deed, and the further sum of $500, paid by Froemke to Henschel on the purchase price of said land, prior to any notice to Froemke of the intent to defraud on the part of his grantor, and which said lien so established shall be prior and superior to the lien of the judgment of the plaintiff, Fluegel, against the defendant Frank Henschel. The plaintiff will recover his costs and disbursements in both courts.

Reversed. All concur.

(74 N. W. Rep. 996.)

AXEL JOHNSON *vs.* THE GREAT NORTHERN RAILWAY CO.

Opinion filed April 9th, 1898.

Negligence a Jury Question.

Held, that questions of negligence and contributory negligence were properly submitted to the jury.

Lookout at Crossings.

Bishop v. *Railway Co.*, 4 N. D. 536, followed as to obligation of railroad company to keep a lookout for persons and property at public crossings.

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

Action by Axel Johnson against the Great Northern Railway Company. Plaintiff had judgment, and defendant appeals.

Affirmed.

B. D. Townsend, for appellant.

James Johnson, for respondent.

CORLISS, C. J. Plaintiff has recovered a judgment for the value of his wagon, with its load of coal, which it is undisputed, were destroyed by one of the defendant's freight trains at a railroad crossing. In answering the first point made by counsel for the defendant, that the highway had not been legally established, it is only necessary to refer to a few facts in the case, and, in connection therewith, cite the previous decisions of this court. It is not denied that the crossing had been used by the public, as part of a public highway, for at least eight years before the accident. One of the witnesses testified that he had used it for a period of 14 years. The defendant had placed there the usual planking, and the jury were justified in finding that it had erected there a sign warning travelers upon the highway that there was a railroad crossing at that place. So far as the duty of the defendant to the public was concerned, the crossing was as much a public crossing as though the highway had been laid out in strict accordance with law. *Coulter* v. *Railway Co.*, 5 N. D. 568, 67 N. W. Rep. 1046. See, also, *Bishop* v. *Railway Co.*, 4 N. D. 540, 62 N. W. Rep. 605.

It is urged that the property was placed in the position of peril which it was in at the time of the collision through the plaintiff's own carelessness, and that, therefore, he cannot recover. He was drawing coal from his coal mine, a few miles west of Minot, in this state, to that city, and was compelled to cross the railroad track at this point in order to reach the market for his fuel. While driving over the track, the axle of one of the wheels broke; and, before he was able to remove the wagon from the place of danger, it was struck by one of defendant's engines, and completely destroyed, it appears that the planks between the

rails at this crossing had all been taken out, except one or two in the center. This was done that there might be room for the flangers on the engine to operate inside of the rails; it being necessary to use the flangers for the purpose of keeping the snow away from the rails. But it appears that the flangers were only six inches wide, and yet the space between the inside of the rail on each side and the plank in the center of the track was considerably more than six inches. One witness said that the space was more than ten inches wide. But we need not dwell on this matter. We will assume, for the purposes of this case that what the defendant did about removing the planking for the winter season was not a negligent act. Such act was not the proximate cause of the injury. The proximate cause was the negligence of the defendant's employes in charge of the engine drawing the freight train, in failing to discover the fact that the plaintiff's property was in a situation of peril on a public crossing in time to prevent a collision therewith. It is urged that plaintiff's wagon would not have broken down upon the track, and thus been placed in a situation where it could be struck by a passing train, had plaintiff not been careless, in attempting to drive over the track at this point with a loaded wagon. But there was no other crossing he could use, and it would be an extraordinary doctrine if a railroad company could, in effect, close up a highway, by making it dangerous at the point of intersection with its track; holding over the head of each traveler the penalty of being himself chargeable with responsibility for injuries occasioned by a condition of the highway created by itself. We do not think that plaintiff was, as a matter of law, guilty or contributory negligence in essaying to cross over the track with his loaded wagon. The question was for the jury, and their verdict was in his favor on this point. It matters not, however, whether plaintiff was placed in this predicament without any fault on his part, or because of his own carelessness. In either view of the case, it would be true that defendant owed him the duty of using reasonable care in keeping a lookout for persons and property near or

upon this public crossing. Just such an accident as had occurred was one which might be anticipated by a reasonably prudent man. The defendant itself had, by removing the planking, thus leaving the rails four inches higher than the ground, created a condition at this very crossing which was likely to cause heavily loaded wagons to be stalled or broken down at that point. Could it nevertheless run its trains oblivious to such danger, and then escape the charge of negligence? We think not. There was evidence that those in charge of the engine could have seen the danger to plaintiff's wagon when the train was half a mile away. While it was still this distance from the crossing, a man who had been sent up the track by the plaintiff to signal the train to stop made efforts, by waiving his hands and his hat, to warn the engineer and fireman of the danger. And yet, nothwithstanding this fact, there is evidence that no whistle for brakes was sounded until the train was within about 250 feet of the crossing. It is true that there was evidence that the train could not have been stopped without running at least 1,600 feet. But it does not appear that if reasonable diligence had been used by the men in charge of the locomotive, in keeping a watch for obstructions at this crossing, they could not have discovered the peril to the wagon when more than 1,600 feet from the crossing, and therefore have discovered it in time to stop the train before it could reach the crossing. The law relating to the subject of the duties of railroads on approaching crossings was stated by this court in *Bishop* v. *Railroad Co.*, 4 N. D. 536, 62 N. W. Rep. 605, in the following language: "It follows that the trainmen, in approaching the crossing, were not at liberty to assume in advance that animals would not be upon its tracks at the crossing. On the contrary, the fact that they were approaching a crossing devolved upon the men in charge of the train the duty of keeping a special lookout to avoid a collision with persons or animals that might be lawfully upon such crossing. The care should be commensurate with the danger to be reasonably apprehended. This general rule imposes upon railroads the duty of exercising

exceptional care at all crossings, because upon a crossing there is greater reason than at other places to apprehend danger from collisions with persons and domestic animals." Applying this rule to the facts of this case, there can be no doubt about the duty of the court to submit the case to the jury, as it did. We have considered all the arguments and points made by counsel for the defendant, but do not deem them of sufficient importance to warrant a discussion of them in this opinion.

Finding no error, the judgment of the District Court is affirmed. All concur.

(75 N. W. Rep. 250.)

WM. DEERING & CO. *vs.* HANS HANSON, *et al.*

Opinion filed April 9th, 1898.

Chattel Mortgage—Failure to Refile.

Failure to refile a chattel mortgage, as required by Ch. 41 of the Laws of 1890, does not render it void as against the mortgagor himself.

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

Replevin by William Deering & Co. against Hans Hanson and another. Defendants had judgment, and plaintiff appeals.

Reversed.

George A. Bangs, for appellant.

H. N. Morphy, for respondents.

CORLISS, C. J. Only a single question is here involved, on undisputed facts. Plaintiffs, as mortgagees, instituted an action in replevin to recover possession of property on which the defendants had executed and delivered to them a chattel mortgage. The sole defense was that the mortgage had ceased to be valid, even as against the mortgagors themselves, because the mortgagees had failed to refile the same, as required by chapter 41 of the Laws of 1890. The District Court having sustained this

defense, and rendered judgment in favor of the defendants, the plaintiffs appeal. Our decision, therefore, will turn on the true construction of this statute. It is as follows:

"A mortgage of personal property shall, unless duly renewed as provided in section 2 of this act, cease to be valid as against the original mortgagee or mortgagor, his heirs or assigns, and against any attaching or execution creditor of the mortgagor or any subsequent purchaser or mortgagor of the property, in good faith, whether the title of such purchaser shall vest, or the lien of such creditor or mortgagee shall attach, prior or subsequent to the expiration of the three year period or periods in section 2 of this act mentioned.

"Sec. 2. In order to preserve and continue its priority of lien, every chattel mortgage must, not less than ten or more than thirty days immediately preceding the expiration of three years from the date of the filing thereof, be renewed by the filing in the office of the register of deeds of the proper county, of a copy of such mortgage, together with a statement of the amount or balance of the mortgage debt for which a lien is still claimed, duly subscribed and sworn to by the then owner of the mortgage, his agent or attorney; and in like manner the copy and statement of debt must be again filed every three years, or the mortgage shall cease to be valid as against the parties in section 1 of this act mentioned.

Sec. 3. That there exists a difference of opinion and a doubt as to the meaning and interpretation of the existing laws relating to the renewal of chattel mortgages; therefore, this act shall take effect and be in force from and after its passage and approval."

The last section is quoted in this opinion, not because it throws any light upon the question of interpretation, but as showing how completely the legislature succeeded in thwarting the declared purpose of this amendment of the law. The avowed object was immediately to clear up all ambiguity on the subject, while the actual result of the legislation was to involve the law in

greater obscurity than before. By this enactment confusion was worse confounded. It is obvious that some of the words of this law are absolutely meaningless. A mortgage cannot cease to be valid as against the mortgagee himself. Neither is it proper use of language to speak of a subsequent mortgagor of the mortgaged property. When it is once ascertained that a careless use of language characterizes the act,—that some language therein is senseless,—it is not difficult to reach the conclusion that the word "mortgagor," as found in the clause "cease to be valid as against the mortgagee and mortgagor," shall be treated as having no meaning in the law, as having been inserted therein through a blunder, just as the word "mortgagee," immediately preceding it in the same clause, was inserted therein through mistake. No registration or recording law declaring a mortgage void as to the mortgagor himself has ever been enacted, and we cannot assume, in view of the palpable errors in this statute, that a departure in this respect was intended to be made in this state. The keynote of this act is the provision found in section 2, which declares that the refiling of a chattel mortgage is required "in order to preserve and continue its priority of lien." We consider that the purpose of this statute was to clear up the meaning of the existing statute with respect to the effect as to third parties of the failure of the mortgagee to refile a chattel mortgage. Under section 4383, which it amended, it was doubtful whether the subsequent purchaser or incumbrancer, who had purchased or secured a lien before the time for refiling had arrived, could claim priority of lien notwithstanding the fact that the mortgagee thereafter failed properly to refile it. The act of 1890 settles this mooted question by an explicit provision, and therefore the purpose disclosed by section 3 of the act to remove a doubtful construction is to this extent realized. This we believe to have been the object of the amendment. But the unfortunate use of other language in the statute, introduced on other points new ambiguities, and thus it has happened that, while in one sense the end of the lawmakers was attained, yet in a broad sense the evils

of uncertainty remain. It is significant that the failure to refile does not render the mortgage void as to all subsequent purchasers and incumbrancers, but only as to those who are such "in good faith." How can it be possible that the legislature meant to keep a mortgage alive as to a class of subsequent mortgagees and purchasers, and at the same time declare it void even as against the very party who exccuted it? The construction contended for by counsel for defendants would lead to this absurd result: that an unfiled mortgage would remain valid despite the flight of time, while one that was filed would cease to be good unless refiled at the end of three years. We do not believe that the legislature intended to place the mortgagee who files his security in a worse position than one who does not.

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

(75 N. W. Rep. 249.)

LOUISA KIRSCHNER *vs.* JOSEPH KIRSCHNER.

Opinion filed April 11th, 1898.

Default—Affidavit of Merits.

To warrant a court in setting aside a decree entered on the default of defendant on the ground of his mistake, inadvertence, or excusable neglect, an affidavit of merits must be made a part of the application.

What Affidavit of Merits Should Contain.

Such affidavit, to be sufficient, if made by the party, must state that he has fully and fairly stated all the facts in the case to his attorney, and is advised by his attorney that he has a good defense on the merits.

Affidavit by Attorney—Contents.

An attorney cannot make such affidavit unless some reasonable excuse be given for the failure of the party to make it; and when made by the attorney it should be based upon his own knowledge, or knowledge obtained from the records.

Appeal from District Court, Cavalier County; *Sauter*, J.

Suit by Louisa Kirschner against Joseph Kirschner for a

divorce. There was a decree for plaintiff, and from an order setting it aside she appeals.

Reversed.

J. C. Monnet, for appellant.

H. B. Doughty, for respondent.

BARTHOLOMEW, J. This is an appeal from an order setting aside a decree of divorce entered after defendant's default. The order was made pursuant to motion supported by affidavits, wherein the defendant labored to show that the decree against him was rendered through his mistake, inadvertence, or excusable neglect, under section 5298, Revised Codes. We do not overlook the fact that in his brief counsel for respondent contends that the application was also based upon fraud upon defendant; but we search the moving papers in vain for any allegation of fraud. It is true that the affidavit states that the evidence upon which the decree was based was false; but that is a risk that inheres in all testimony, and is not the legal fraud that enables a party to demand as a legal right that a decree against him be set aside. On the contrary, we must treat this application, under the papers, as an appeal to the favor of the court only. So regarding the application, it should have been denied, for the reason that it contained no sufficient affidavit of merits. The law upon that point is clearly stated by Corliss, J., in his concurring opinion in *Sargent* v. *Kindred*, 5 N. D. 8–19, 63 N. W. Rep. 151. There is an attempt to supply this requirement in the affidavit of the respondent, and also that of his attorney. In the former it is said "that he had a good and valid defense against the claims of plaintiff as he is advised by his counsel, as will more fully appear from his proposed answer hereto attached." But that statement does not answer the requirement, or constitute an affidavit of merits under the Kindred case and the unquestioned line of authorities there cited. All that is stated may be true, and yet defendant may have, in fact, no defense on the merits. He should state that he had fully and fairly stated all the facts in the case to his counsel, and that upon such statement his counsel had advised him that he had a good

defense on the merits. That is the least that is required. 1 Enc. Pl. & Prac. 360, and notes. An attorney is permitted to make an affidavit of merits only when an excuse is shown for the failure of the party to make it. But in this case no such excuse is shown, or could be shown, because in fact the party attempted to make the affidavit. Hence we ought not to consider the statement of the attorney. But, should we consider it, we would find no aid for respondent. It states "that the defendant has fully and fairly stated his case to this deponent, and, after a full investigation of the facts in the premises, advised defendant that he has a good and valid defense to said action, as will more fully appear by the answer of defendant, made a part of this motion." From the very nature of things, the attorney cannot know that his client has fully and fairly stated all the facts in the case. Nor is he permitted to make the affidavit on that basis. He must make the affidavit from his own knowledge of the facts. 1 Black. Judgm. § 347. Nor does the attorney say that the defendant has a good defense, or that he believes he has a good defense, but only that he so advised. That is clearly insufficient under the authorities cited. Nor did he even advise that the defendant had a good defense on the merits. Decrees will not ordinarily be opened to let in technical defenses. The defense must go to the merits. 1 Enc. Pl. & Prac. 363, and note. We reach the conclusion that, because there was no sufficient affidavit of merits, the court erred in setting aside the decree; and we reach this conclu sion the more willingly because we think the respondent's showing of mistake, inadvertence, or excusable neglect was very weak. But, as we reverse on the other ground, we need not discuss this point.

Reversed. All concur.

(75 N. W. Rep. 251.)

THE STATE OF NORTH DAKOTA *vs.* JOHN TOMLINSON.

Opinion filed April 12th, 1898.

Power of District Judge Outside His District.

A District Judge who has been regularly called into a district, other than his own, to try a criminal case, may, after the issue of fact is disposed of by the jury, hear and decide any motion or other matter connected with such case; and such hearing or decision may be had in either of the two districts in question.

Polling Jury—Juror Explaining Verdict.

When the jury was being polled, one juror, who had been asked, "Is this your verdict?" stated that he desired to make an explanation, but did not disclose the nature or the purpose of the proposed explanation. The trial court refused to allow the explanation to be made at that time, and required a direct answer, whereupon the juror answer, "Yes." *Held*, that the ruling on this point was not error.

Competency of Juror.

The defendant was charged with keeping intoxicating liquors for sale as a beverage. Upon the trial a juror was challenged for actual bias, and the challenge was overruled, and the defendant excepted to the ruling. It appeared upon the juror's examination that he was a Prohibitionist in sentiment, and strongly opposed to the unlawful traffic in intoxicating liquors, and, further, that he had no bias or prejudice for or against the accused, personally, and and would decide the case impartially upon the law and testimony offered in court. *Held*, such ruling was not error.

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

John Tomlinson was convicted of keeping intoxicating liquor for unlawful sale as a beverage, and appeals.

Affirmed.

M. A. Hildreth, for appellant.

Appellant was denied his statutory right of challenging peremptorily six jurors. This was error. *Peo.* v. *O'Neil*, 61 Cal. 433; *Peo.* v. *Harris*, 61 Cal. 136; *U. S.* v. *Dunn*, 3 Mackey, 151; *Peo.* v. *Comstock*, 55 Mich. 405, 21 N. W. Rep. 384; *Schumaker* v. *State*, 5 Wis. 324; 1 Thomp. Tr. 44. The juror Johnson was disqualified because of actual bias. 1 Thomp. Tr. 75, n. 4; Abbotts Crim. Brief, 144. The verdict was not a fair expression of the opinion

of the jury and should not be permitted to stand. *Weeks* v. *Hart*, 24 Hun. 181; *State* v. *Austin*, 6 Wis. 205; *Rothbauer* v. *State*, 22 Wis. 447. Defendants general objection to the verdict sufficiently saves his point. *Crawford* v. *State*, 24 Am. Dec. 467; *Elledge* v. *Todd*, 34 Am. Dec. 616.

George Murray, *State's Atty.*, for the state.

His examination disclosed that the juror Johnson had a prejudice against crime, this does not disqualify. *State* v. *Spies*, 12 N. E. Rep. 989; *Ter.* v. *Pratt*, 6 Dak. 483; *U. S.* v. *Noelker*, 1 Fed. Rep. 426; *U. S.* v. *Duff*, 6 Fed. Rep. 45; *U. S.* v. *Broger*, 7 Fed. Rep. 193. The object in polling the jury is not to learn how the verdict was reached or the reason for agreement, but whether the verdict as announced by the foreman is the verdict of each juror. *Bean* v. *State*, 17 Tex. App. 60. *Wilson* v. *State*, 76 Ala. 42. Affidavits of jurors cannot be used to impeach the verdict. *Ter.* v. *King*, 6 Dak. 131; *Ter.* v. *Taylor*, 1 Dak. 459; 2 Thomp. Tr. 2618.

WALLIN, J. In this case the record shows that after a jury trial the defendant was found guilty, and afterwards sentenced for the offense of keeping intoxicating liquor for sale as a beverage. Upon a statement of the case a motion for a new trial was made and denied. The defendant, having appealed the case, now assigns certain errors in this court. We have carefully examined the several assignments of errors, and consider them all untenable. We are satisfied that the evidence was sufficient to justify the verdict, and that the charge of the court below, as made to the jury, was full, fair, and impartial. We shall, however, in this opinion, discuss only three of the assignments of error; these being most strenuously urged upon our attention by the defendant's couusel:

First, it appears that the action was tried in the County of Traill, in the Third Judicial District, in which the Honorable Charles A. Pollock is the duly elected and qualified Judge of the District Court. It further appears that upon the written request of Judge Pollock, the Honorable W. S. Lauder, of the Fourth

Judicial District, was called into the case, and presided at the trial, and during all the subsequent proceedings had in the action. The further fact is disclosed that the statement of the case, as originally settled by Judge Lauder, embodied an erroneous statement of fact. To correct this statement, of fact, the state's attorney, on notice to defendant's counsel, went before Judge Lauder, at his residence, in the Fourth District, and there moved for and obtained the desired correction of the record. Defendant's counsel did not appear before Judge Lauder to oppose the motion, nor did he subsequently move in the District Court to vacate the order amending the record. In this court defendant moves to strike out the amendment in question. The motion raises the question whether Judge Lauder, under the circumstances narrated, had jurisdiction, while out of the district where the action was pending, and within his own district, to exercise the powers of the District Court, for the purpose of deciding the motion to amend the record. We think he did possess such power. The statute seems to have conferred plenary power upon the several Judges of the District Courts of this state to act officially throughout the state, without reference to geographical considerations. The only exception to the broad grant of power, with reference to the place of its exercise, is that trials of issues of fact can only be had in the localities indicated by express statutory provisions. Section 5178, Revised Codes, declares that "the several Judges of the District Court shall have jurisdiction throughout the state to exercise all the powers conferred by law upon the District Court or judges thereof subject to the limitations in this article provided." The limitations referred to are found in subdivisions 1 and 2 of the same section, and relate wholly to the mode of calling in an outside judge to sit in a case not pending in his district, and have no reference whatever to the particular locality within which the functions of the court or judge shall be exercised. The statute seems to be explicit, and no reason is suggested by counsel why the same should be declared to be unconstitutional. We regard the statute, as it reads, as one of

great practical convenience to courts and counsel, and are not disposed to limit its provisions by a narrow and restricted interpretation.

Another assignment of error is based upon the following record: "The jury, having reported an agreement, came into court, and the following proceedings were had: 'Mr. Robinson: The defendant requests that the juror Mr. Reed be allowed to make the explanation which he attempted to make on being asked if this was his verdict. The court: The foreman of the jury announced the verdict as recorded. The verdict as recorded was read to the jury, and the court asked the jury if that was their verdict, and they all said it was. Subsequently the jury was polled, and each juror, for himself, declared that the verdict, as announced, recorded, and read, was his individual verdict. The court is of opinion, therefore, that there is no explanation necessary. Mr. Robinson: Will your honor please record the fact that juror Reed, before making answer, stated that he wished to make an explanation? The Court: Yes sir; the court stating that he must answer directly whether the verdict, as announced by the foreman, and recorded and read, was his verdict, and being interrogated, he said that it was." We notice first that this record fails to state what the juror Reed said when "he attempted to make an explanation on being asked if this was his verdict." In other words the nature of the explanation was not made known to the court until the jury had collectively and individually agreed to the verdict, and had been discharged as jurors. But, to further develop the point, the affidavits of Reed and other jurors were used on the motion for a new trial, and were to the effect that such jurors at the time the verdict of guilty was returned into court did not think the accused was guilty of the offense charged, and that they had assented to the verdict because they were tired out by their long confinement as jurors, and because they thought that an explanation to the court, made when they came into court with the verdict, would insure a sentence less onerous to the defendant than the burden of a second

trial would be. It is obvious that the reasons given in the affidavits for assenting to the verdict are improper and insufficient in law to warrant a verdict of guilty, but it is well settled that a verdict cannot be impeached by affidavits of jurors setting forth the grounds or considerations upon which it was found. In fact, if we correctly apprehend counsel, his contention is that the affidavits are to be considered only to show that Reed and certain other jurors never at any time assented to, or in their minds agreed to, a verdict of guilty, and would have so stated if permitted to explain. In its last analysis, the point seems to be that while it did not appear to the court, from anything said or done by the juror Reed when the jury was being polled, that Reed did not assent to the verdict of guilty, the court erred in not allowing Reed to make an explanation at that time upon his request so to do. Counsel cites the following cases as supporting his contention: *State* v. *Austin*, 6 Wis. 205; *Rothbauer* v. *State*, 22 Wis. 468. We do not regard these authorities as being in point. In both of the cases the fact of the juror's dissent from the verdict was clearly stated to the trial court when the juror was being polled. The case at bar is widely different. Nothing was said by the juror Reed indicating to the court that he did not agree to a verdict of guilty. On the contrary, he did, in the most direct and personal way, state then and there that the verdict, as read and recorded, was his individual verdict. We are strongly of the opinion that the trial court ruled properly, and with sound judicial discretion, in not permitting the juror Reed, in response to the direct question as to whether the recorded verdict was his personal verdict, to enter upon some explanation, the nature and object of which were not then made known to the court. The trial at that stage had reached a point where conclusions were wanted, and where debate and explanations were irrelevant and out of order. A contrary rule would, in our judgment, directly lead to confusion and vexatious delays in the administratoin of justice by means of trials by jury. *Bean* v. *State*, 17 Tex. App. 60; *Winslow* v. *State*, 76 Ala. 42, reported in 5 Am. Cr. R. 43.

We shall discuss but one further assignment of error. It appears that one or more of the jurors who were challenged for actual bias were sworn and acted as jurors in the case against the objections of the defendant. Upon being examined touching their qualifications to sit as jurors, these jurors stated, in substance, that they should render a verdict upon the evidence offered in court, and that they had no prejudice whatever against the defendant. They further stated that they were prohibitionists in sentiment, and had a very strong prejudice against the unlawful traffic in intoxicating liquors, and that they would gladly render a verdict against any one shown by the evidence to be guilty of violating the liquor laws of the state. In this we discover no attitude of mind that could disqualify a citizen to sit as a juror in a liquor case. It would be an anomaly to hold that, because a citizen was in favor of enforcing the criminal laws of the state, he would be unfit to sit in a criminal case for that reason. The challenge on this ground was, we think, properly overruled. Our conclusion is that the judgment must be affirmed. All concur.

(74 N. W. Rep. 995.)

THE STATE OF NORTH DAKOTA *vs.* TAYLOR CRUM.

Opinion filed April 15th, 1898.

Criminal Contempt—Evidence—Procedure.

An order of conviction for a criminal contempt committed in open court examined, and the order, procedure, and conviction sustained.

Not a Criminal Prosecution.

Held, further, that such a proceeding is highly summary in character, and is not a prosecution, within the meaning of § 97, Art. 4, of the Constitution of the State.

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

Taylor Crum was convicted of criminal contempt, and appeals. Affirmed.

J. E. Robinson, *S. G. Roberts*, *Ida M. Crum*, and *Taylor Crum*, for appellants.

This proceeding was a criminal prosecution within the meaning of section 97, article 4 constitution, and should be carried on in the name and by the authorty of the State of North Dakota. *State* v. *Hazledahl*, 2 N. D. 521; *Cox* v. *State*, 8 Tex. App. 254, 34 Am. Rep. 746; *Lemons* v. *Peo.*, 6 Am. Rep. 293; *Nicholas* v. *State*, 35 Wis. 308; *Williams* v. *State*, 27 Wis. 402; *Lopez* v. *Peo.*, 19 Mo. 244. The court proceeded against appellant without making the order required by section 5935, Revised Codes, and was therefore without jurisdiction to pronounce judgment. *State* v. *Root*, 6 N. D. 494. Penal statutes are strictly construed in favor of the accused. Suth. on St. Cr. 208; Black on Int. 295; 1 Bish. New. Cr. Pr. § 89. The attempt to correct the proceedings and sentence *nunc pro tunc* after appeal taken were without authority of law. *Witte's Estate* v. *Ledarer*, 73 N. W. Rep. 664. The judge had no right to order appellant to leave the court room and not to further participate in the trial of the case in which he was engaged. *State* v. *Root*, 5 N. D. 505; *State* v. *Goode*, 44 Pac. Rep. 640; *Ex parte Gardner*, 39 Pac. Rep. 570; *Bird* v. *Gilbert*, 19 Pac. Rep. 924. It is not contempt to disobey an order which the judge has no jurisdiction to make. *State* v. *Davis*, 2 N. D. 472; *State* v. *Milligan*, 28 Pac. Rep. 370; *Ex parte Gardner*, 39 Pac. Rep. 570; *In re Kowalsky*, 35 Pac. Rep. 77; *Lester* v. *Peo.*, 23 N. E. Rep. 387; *Ex parte Fisk*, 113 U. S. 713; *In re Ayres*, 123 U. S. 443; *In re Sawyer*, 124 U. S. 200; *Brennan* v. *Gaston*, 17 Cal. 375; *Peo.* v. *O'Neill*, 47 Cal. 109; *Ex parte Rickleton*, 51 Cal. 316. It has been the rule for courts to deal gently with counsel who have uttered hasty and disrespectful remarks under excitement and without premeditation, when a prompt retraction of his acts and words accompanied by a proper apology are duly tendered by the offender. *St. Clair* v. *Pratt-Wright*, (Ohio,) 532; *In re Brown*, 4 Pac. Rep. 1085; *Peo.* v. *Green*, 3 Pac. Rep. 65, 3 Pac. Rep. 374; *Peo.* v. *Green*, 13 Pac. Rep. 514–528; *In re Lambuth*, 51 Pac. Rep. 1071; *Ex parte Bradley*, 7 Wall. 364; *Bradley* v. *Fisher*, 13 Wall. 335.

Fred B. Morrill, for respondent.

It is the duty of the court to maintain order and decorum in the court room, and it has the power so to do even to the extent of ordering a person from the court room. *In re Naegle*, 5 L. R. A. 79; *Beloin* v. *Richmond*, 1 L. R. A. 807; *State ex rel Leftwich* v. *District Court*, 42 N. W. Rep. 598; *Smith* v. *Waalkes*, 66 N. W. Rep. 679; 3 Am. and Eng. Enc. L. 799. One guilty of contempt in the presence of the court may be forthwith condemned without process of any kind. *Langdon* v. *Judges*, 43 N. W. Rep. 310; *State* v. *Henthorn*, 47 Kan. 771; *Middlebrook* v. *State*, 43 Conn. 257; *Bates Case*, 55 N. H. 325; *In re Terry*, 128 U. S. 289; 32 L. Ed. 405; *In re Savin*, 131 U. S. 267; 33 L. Ed. 150; *Baker* v. *State*, 4 L. R. A. 128; *In re Cartwright*, 114 Mass. 230; 4 Enc. Pl. and Pr. 775. Court had power to amend the title of the case *nunc pro tunc*. *Freeman* v. *City*, 66 N. W. Rep. 928; *State* v. *Knight*, 54 N. W. Rep. 412; *State v. Mitchell*, 52 N. W. Rep. 1052; 4 Enc. Pl. and Pr. 772–3.

WALLIN, J. The record in this case shows that on the 5th day of November, A. D. 1897, in a summary proceeding the defendant was adjudged guilty of a criminal contempt committed in open court, and was sentenced to pay a fine, and be imprisoned in the county jail. From the order of the District Court imposing this sentence, the defendant has appealed to this court.

On November 6, 1897, and while the defendant was in jail pursuant to such conviction and sentence, his attorney appeared before said District Court, and upon certain affidavits made in that behalf moved in that court for an order remitting said fine and discharging the defendant from custody, and further asked that, if defendant was not then and there discharged and exonerated, he be accorded a reconsideration of the subject matter of the contempt. This application was denied, and from the order denying the same the defendant, by his notice of appeal, has attempted to bring such order into this court for review. On said November 6th an appeal to this court was perfected, and subsequent thereto,

and on Decenber 23, 1897, and before the record was transmitted to this court, the District Court made a certain order, which we find in the record, which reads: "It appearing that the papers heretofore filed in the above case by accident omitted the word 'the' from the title, it is now ordered that the said title be amended throughout, *nunc pro tunc*, as of date December 5, 1897, so that the same shall read as follows: '*The State of North Dakota, Plaintiff*, vs. *Taylor Crum, Defendant.*'" To this order defendant excepted, and the same is assigned as error here. A statement of the case was settled, and the proceeding is now before this court for its final disposition. From the recitals found in the record, we can readily gather the facts which must control our decision of the case, and these may be condensed as follows: Ida M. Crum, an attorney-at-law, and the wife of the defendant, had been appointed by the District Court to defend a party accused of a crime. This occurred on November 2, 1897. At her request, the hearing was continued until the 4th of November. When the case was called for trial, the court, at the request of Ida M. Crum, permitted the defendant, Taylor Crum, to come into the case as an assistant counsel for the accused. The trial proceeded, and in the afternoon Taylor Crum in the course of the trial, called a certain witness a "crook." For applying this epithet to the witness the District Court then and there fined Taylor Crum the sum of five dollars as for a contempt of court, and at the time said fine was imposed the court plainly said to the defendant "that he could not have anything more to do with that case, and directed that Mrs. Crum be called, and assume charge of the case." The further hearing of said criminal action was postponed until 2 o'clock P. M. of the 5th day of November, at which hour Ida M. Crum appeared, and made her summing up argument to the jury, and at the same time "the said Taylor Crum appeared, and took his seat at the trial table." Soon after, —quoting from the record,—"said Taylor Crum began to interrupt the proceedings of the court, and directed that certain things be done in reference to the case, and the court thereupon

at once suggested to counsel that he had forgotten the order of the day previous, to which suggestion the counselor remarked that he had not forgotten it, and immediately thereafter the counselor again interrupted the proceedings of the court, and the court then directed that the counselor remain quiet, at which time the counselor began his proceedings in contempt in the way of talking back to the court, and assuming certain positions of defiance to the court upon the court room floor; whereupon the court directed Mr. Crum to leave the room. The order being disobeyed, the sheriff was ordered to remove him from the room; at which time, while in the custody of the sheriff, in being removed from the room, the especial contempt, namely, calling the court a "contemptible cur," and stating that he "had the court where he wanted him, and that he would settle with him outside," occurred. It appears that the District Court took immediate notice of said language and defiant conduct of the defendant,—the same having occurred in open court, and in the presence and hearing of the court while sitting to try said criminal action,—and then and there orally required said Taylor Crum to give any reasons he might desire to give why the judgment of the court should not then and there be pronounced against him for the contempt of court involved in said conduct and language, and the court then reiterated to the defendant in terms what particular conduct and language the court referred to. Responding to this suggestion of the trial court, the defendant at once made a statement in *extenso*, which statement covers six pages of the settled case. We deem it unnecessary to set out this statement at length, and shall simply say that in the statement the accused fully admits the fact of using the contemptuous language we have set out above, and nowhere attempts to deny the facts of the occurrence which we have extracted from the settled case, and quoted in this opinion. The defendant, in terms, apologized to the court for so much of the alleged contempt as consisted of the language used in court, and the epithets applied to the presiding judge of the court, but did not offer any apology for his

disobedience of the orders of the court, nor for his resistance and defiant attitude when ordered to leave the court room. The statement, as a whole, was an argument wherein the defendant sought to demonstrate that the court was without jurisdiction or lawful authority to direct the defendant to sever his relation with the criminal case on trial, as was done, or to order him to leave the court room when he assumed, in defiance of such order, to take an active part as an attorney in the case, and, finally, was without lawful authority, when he (defendant) defiantly assumed that he would not obey such order, to direct the sheriff to remove him from the court room. It appears, therefore, that this case is not embarrassed by any controverted facts. It follows, therefore, if the facts as stated (when said and done in open court, and in its immediate view and presence) constitute a criminal contempt, our duty is to affirm the order of conviction.

We have no difficulty in reaching the conclusion that the record shows that the defendant was guilty of such contempt. If we were to concede that it was an unwise exercise of judicial discretion on the part of the District Court, under the facts of this case, to direct the accused to sever his relations with the criminal case, and later to enforce obedience to such order when the defendant, by his demeanor and conduct, undertook to defy the same, our conclusion would be the same. It is unnecessary to determine in such a case as this whether the undoubted discretion vested in the trial court was or was not wisely exercised. The crucial question is one of power, and there can be no doubt that a trial court possesses the power to maintain order and require the observance of decorum during the trial of a case. In the case at bar the court below, as we are bound to presume, was endeavoring faithfully to discharge this duty. To accomplish these purposes, the court made the several orders which were made; and, having made the orders, and brought them home to the knowledge of the defendant, it at once became the duty of the defendant as an attorney-at-law, to respectfully conform to such orders, and to abstain wholly from violating the same. It was neither time nor

place then and there in open court, and in the presence of the jury and spectators, to quibble and wage a personal controversy with the court, and determine then and there a nice point perhaps concerning the propriety of exercising an undeniable judicial discretion vested in all courts. The order was of such a direct character that it left but one proper course open to the defendant. His plain duty was to obey it in respectful silence. His actual attitude was that of defiance carried to the extreme of resisting an officer, and accompanied by language addressed to the presid ing judge which was grossly offesive and contemptuous in the extreme. In a case like this we are not at liberty to nicely weigh and criticise the several orders of the District Court, the enforcement of which was made the occasion for the commission of a flagrant contempt of court. The propriety of such orders was a matter to be determined by the District Court in the light of the practical situation as it appeared to that court at the time. In this court, in this class of cases, we can consider only the broad question of power. That the power exists to make the orders in question, no enlightened court can question. Such power is indispensable to the administration of the law, and the exercise of such power was contemplated by the people when, by their constitution, they created courts, and conferred upon them general jurisdiction in both law and equity. The law governing this case is neither new nor novel. On the contrary, it is very elementary law, and we need cite no authority to sustain the views we have advanced. In the cases cited below, the nature of a court's authority to punish contempts, and the circumstances under which it may be exercised to preserve order and decorum in court, are fully illustrated. *Langdon* v. *Judges*, (Mich.) 43 N. W. Rep. 310; *Middlebrook* v. *State*, 43 Conn. 257; *Bates' Case*, 55 N. H. 625; *In re Terry*, 128 U. S. 289, 9 Sup. Ct. 77. See collection of cases in *Baker* v. *State*, (Ga.) 4 Lawy. Rep. Ann. 128 (s. c. 9 S. E. Rep. 743.)

Regarding questions of procedure which are called to our

attention, we need say but little. First, we are clear that the statute allowing an appeal in this class of cases to defendant's only does not give an appeal from any order whatsoever, made in the court below, save only the order of conviction and sentence. See Revised Codes, § 5954; also *Myrick* v. *McCabe*, 5 N. D. 422, 67 N. W. Rep. 143. Under this ruling we cannot review the order refusing to grant a reconsideration from which the defendant has sought to appeal to this court. It was argued here that the affidavits upon which the motion for a reconsideration was based embraced one affidavit made by the defendant, in which he has fully apologized to the District Court for his obnoxious conduct, and upon which apology the offense should have been condoned by the trial court. Concerning this we need only say that an apology, when it is full and sincere, may sometimes operate, when made to the court against whose authority the offense was committed, to cause that court to modify or remit its penalties. But whether an apology shall so operate in a given case is a question addressed solely to the clemency of the court in which the offense was committed, and it is never the province of a court of review to re-examine and pass upon the sufficiency of any such apology.

It appears that the title of the proceeding in the court below, so far as it was entitled, lacked the definite article "The" as a prefix to the words "State of North Dakota." This was sought to be amended by an order of the District Court, made after the appeal had been perfected. This order is criticized and denounced as error. We think the point is immaterial in any aspect. In the first place, the title of the action before it was sought to be amended sufficiently indicated that the matter was being carried on in the name and by the authority of the state. The omission of the word "The" from the title is a matter which goes entirely to the form, and is not substantial. But we hold further that the brief mode of punishing a criminal contempt when committed in *facie curiæ*, as laid down in the statute, or as it existed at common law, is not a criminal prosecution of a

character which is contemplated in section 97 of article 4 of the state constitution. True, a summary contempt proceeding is, speaking generally, of a *quasi* criminal character; but when the offense is committed under the immediate observation of the court, while sitting in the discharge of judicial functions, it is not punished through the medium of a criminal action or prosecution. There is in such cases no process whereby the accused is arrested and brought into court, for he is already in court, nor is there any criminal accusation in writing to which he is required to plead; nor is there any issue joined to be supported by evidence. The only record needed or which should be made in offenses of this class is the order which contains the conviction and sentence, which order must embrace a statement of the facts constituting the offense, and reciting that the same occurred in the immediate view and presence of the court; and such order must further set out the punishment which the court inflicts for the offense. See Rev. Codes, § 5935; *State* v. *Root*, 5 N. D. 487, 67 N. W. Rep. 590. It is obvious that the procedure in this class of cases differs widely from all cases, criminal or *quasi* criminal, in which there is an issue formed, and evidence offered. *State* v. *Mitchell*, 3 S. D. 223, 52 N. W. Rep. 1052. See, also, upon the point that the mere title in contempt proceeding is unimportant, 4 Enc. Pl. and Prac. pp. 772, 774. Finding no substantial error in the record, our conclusion is that the order of conviction herein must be affirmed. All the judges concurring.

(74 N. W. Rep. 992.)

In re CARL A. KAEPPLER.

Opinion filed April 16th, 1898.

Court Will Not Decide Abstract Questions.

An appellate court will not decide abstract questions, the decision of which cannot possibly benefit either party to the litigation on the merits, but will dismiss an appeal whenever it appears that no decision which it can render will aid the appellant on the merits.

When Court Will Not Decide Merits.

Nor will the court pass on the merits merely for the purpose of relieving the appellant from a judgment for costs, as costs are merely an incident of a litigation.

Review of Bill of Costs.

But it will even in such a case review the question as to proper items in a bill of costs when such question is properly raised, or the right of the successful suitor to costs at all, as such questions are in no manner connected with the merits.

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

Insolvency proceedings by the Red River Valley National Bank against Carl A. Kaeppler. Defendant had judgment, from which plaintiff appeals subsequent to a judgment rendered on defendant's voluntary petition in insolvency adjudging him insolvent.

Dismissed.

Ball, Watson & Maclay, for appellant.

Morrill & Engerud, and *H. R. Turner*, for respondent.

CORLISS, C. J. The motion to dismiss this appeal must be granted. There is before the court only an abstract question, the decision of which, though it should be in favor of the appellant, cannot possibly be of any advantage to him so far as the merits of the controversy are concerned. Appellant instituted, under the statute, involuntary insolvency proceedings against the respondent, who contested them. The court having found in favor of the respondent upon the trial of the issues therein, judgment was rendered dismissing the appellant's petition with costs. Thereupon the respondent himself filed his voluntary petition in insolvency proceedings, and was adjudged an insolvent under the statute. After this adjudication, the appellant took this appeal from the adverse judgment in the involuntary proceedings. It is obvious that the appellant can secure in the voluntary proceedings everything to which it would be entitled should we reverse the judgment appealed from, and direct the District Court to render judgment in its favor. Whichever form the insolvency

proceedings take, the rights of the creditors are precisely the same. The appellant at this moment stands in a position as advantageous as it would occupy should we hold that the lower court ought to have sustained its application. It is therefore prosecuting this appeal not to secure any decision which can be of any benefit to it on the merits. The case is strictly analogous to those cases in which there is no longer any practical controversy between the parties; as, for instance, where, pending an appeal in an action to recover possession of a public office, the term for which the plaintiff was elected has expired. In such cases and in all similar cases the appellate court will dismiss the appeal on the ground that the judicial tribunals are not organized for the purpose of rendering decisions which can be of no possible advantage to the parties to the litigation. *State* v. *Wickersham*, (Wash.) 47 Pac. Rep. 421; *Hice* v. *Orr*, (Wash.) 47 Pac. Rep. 424; *Little* v. *Bowers*, 134 U. S. 547, 10 Sup. Ct. 620; *Foster* v. *Smith*, (Cal.) 47 Pac. Rep. 591; *Peo.* v. *City of Troy*, 82 N. Y. 575; *In re Manning*, 139 N. Y. 446, 34 N. E. Rep. 931; *Miller* v. *Green*, 159 U. S. 651, 16 Sup. Ct. 132; *Washington Market Co.* v. *District of Columbia*, 137 U. S. 62, 11 Sup. Ct. 4; *Hunter* v. *Dickinson*, (Colo. App.) 33 Pac. Rep. 932; *Cutcomp* v. *Utt*, 60 Iowa, 156, 14 N. W. Rep. 214; *State* v. *Porter*, 58 Iowa, 19, 11 N. W. Rep. 715; *Edgerton* v. *State*, (Neb.) 69 N. W. Rep. 302; *Thornton* v. *Investment Co.*, (Ga.) 22 S. E. Rep. 987; *State* v. *Board of Sup'rs of Election*, (La.) 21 South. 731. The case before us is even stronger than those which are above cited, for here it was obvious before the appeal was taken that the appellant could secure no benefit from a favorable decision, whereas in the cases cited that condition arose after the appeal had been perfected.

But it is urged that the appellant has the right to have the merits reviewed for the sole purpose of obtaining, if possible, a reversal of the judgment requiring it to pay costs. In not one of the cases which have already been referred to in this opinion did the court consider the fact that there was a judgment for costs below as at all affecting the question of dismissal. In all these

cases the broad doctrine was enunciated that the appellate court will not investigate the merits for any purpose where there is no longer any merits left to investigate. Costs are only an incident of an action. They in no manner relate to the merits. The question of costs does not arise until after the merits have been passed upon. It is only after there has ceased to be any question of merits left to be determined that the court can reach the incidental matter of costs. Then for the first time do they become a factor in the case. The court awards them, under the statute, to the successful suitor; and, so long as he remains the successful suitor, the judgment for costs must stand. And, because the appellate court will not investigate the case on the merits after the merits have disappeared, the consequence is that the incidental adjudication as to costs cannot be disturbed. If the element of costs is to affect the rule that appellate courts will not decide questions which have become moot questions merely, then in practically every case such questions must be decided; for it is seldom that a judgment appealed from does not award costs against the defeated litigant. Not only does the broad statement of the rule as it appears in the decisions support our ruling, but in all these cases the court had before it a judgment giving costs to the unsuccessful party; and yet, notwithstanding this fact, the appeal was dismissed. Moreover, there are express rulings on the point that the fact that the effect may be to compel the appellant to pay costs as a consequence of an erroneous decision does not take the case out of the rule. *Russell* v. *Campbell*, 112 N. C. 404, 17 S. E. Rep. 149; *Pritchard* v. *Baxter*, 108 N. C. 129, 12 S. E. Rep. 906; *State* v. *Byrd*, 93 N. C. 627; *May* v. *Darden*, 83 N. C. 237; *Hasty* v. *Funderburk*, 89 N. C. 93; *State* v. *Richmond & D. R. Co.*, 74 N. C. 287. As the amount of costs is generally insignificant as compared with the merits of a legal controversy, and as the percentage of decisions found to be erroneous is not large, the practical working of this rule will not lead to any very serious hardship. But, even if the contrary were the case, no different doctrine could be sustained consistently with legal

principles. The question of costs is distinct from the question as to the merits, and, in considering whether the merits shall be passed upon, the appellate court is governed solely by the answer to the inquiry whether there are any actual merits left in the case.

We, of course, do not wish to be understood as confounding matters that are widely dissimilar. While the defeated suitor cannot in a case like this have the merits determined solely for the purpose of escaping a judgment for costs, he may, as in other cases, attack the items of the bill of costs or the right of the successful litigant to costs at all. When he challenges the items or the respondent's right to recover any costs whatsoever, he is making no assault upon the decision of the court on the merits, but, on the contrary, is proceeding on the theory that that decision is in all respects correct. In such a case the appellate court will hear him because there is an actual controversy between the parties in no manner connected with the merits of the litigation; *i. e.* the controversy as to the amount of costs the respondent can claim on the assumption that the decision on the merits is correct, or as to the right of the respondent to costs at all on that assumption. Were the appellant before us assailing a portion of the bill of costs after having taken the proper steps to entitle it to be heard here on that point, or had it appealed from the judgment in so far as it awarded costs at all, and was now insisting that no costs should be allowed in such a proceeding, then we would refuse to grant the motion. But such is not its position. It does not question the items of the bill or the right of the respondent to costs, if the judgment in his favor on the merits be correct, but seeks by this appeal to have the merits reviewed; and this, we are clear, it cannot do under the undisputed facts. Not only is it clear from the statute that the appellant can secure the same rights in the voluntary insolvency proceedings which it could obtain should the judgment be reversed and the prayer of its petition in the involuntary insolvency proceedings be granted, but it is uncontroverted that it actually has secured in the voluntary proceedings, so far as they have progressed, all the advan-

tages which it would have secured had the decision below been favorable to it. It has joined in the election of an assignee, and obtained the very assignee it desired. It has sold its collateral security under the order of the court, and has proved its claim. It has contested the right of the debtor to exemptions, and has appealed to this court from an adverse decision on this point. All the property which would have passed to the assignee had its original petition been sustained is in the possession of the assignee appointed in the voluntary proceedings. It even secured the benefits of its seizure of the property, under section 6013, Revised Codes, because the debtor consented that the property, might remain in the possession of the sheriff until after the respondent had filed his voluntary petition, and that thereafter the court might appoint a custodian thereof until the assignee should be chosen by the creditors; and this was done.

The appeal is dismissed. All concur.

(75 N. W. Rep. 253.

THE FIRST NATIONAL BANK OF MANDAN, N. D. *vs.* LEVEGA S. SCOTT.

Opinion filed April 19th, 1898.

Agister's Lien—Priority.

The lien of an agister, under § 5486, Comp. Laws, is inferior to that of the holder of a mortgage executed and filed before the lien of the agister attached.

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

Action in claim and delivery by the First National Bank of Mandan, N. D., against Levega S. Scott, to recover possession of a band of sheep. Plaintiff claimed the right to possession as the owner of a note and chattel mortgage thereon given to secure the purchase price of the sheep. The defendant who was in possession of the sheep refused to surrender possession thereof upon demand of plaintiff and after default in the terms and

conditions in its mortgage entitling it to possession as against the mortgagor, defendant claiming a superior lien by virtue of his contract of agistment for feeding and herding the sheep.

James G. Campbell, for appellant.

E. C. Rice, for respondent.

CORLISS, C. J. The contest we are to settle is a strife between an agister and a chattel mortgagee for priority of lien. The plaintiff holds a mortgage upon a flock of sheep executed and filed November 19, 1892. The defendant claims a lien thereon under section 5486, Comp. Laws. That he is entitled to such lien is undisputed. But plaintiff denies that it is prior to the lien of the mortgage held by it. At the time defendant took the sheep into his possession as an agister the mortgage had been executed and was on record. He was therefore chargeable with knowledge thereof. Hence his claim to priority must rest either upon the provision of the statute or upon the proposition that the plaintiff has by its conduct waived its priority of lien. The statute declares that "any farmer, ranchman or herder of cattle, tavern keeper, or livery stable keeper, to whom any horses, mules, cattle or sheep shall be entrusted for the purpose of feeding, herding, pasturing or ranching, shall have a lien upon said horses, mules, cattle or sheep, for the amount that may be due for such feeding, herding, pasturing or ranching, and shall be authorized to retain possession of such horses, mules, cattle or sheep until the said amount is paid; provided, that these provisions shall not be construed to apply to stolen stock." As it is thought that section 5487 throws light upon the meaning of the previous section, we quote that also: "The provisions of this act shall not be construed to give any farmer, ranchman or herder of cattle, tavern keeper or livery stable keeper, any lien upon horses, mules, cattle or sheep, put into their keeping for the purposes mentioned in the previous section; when said property was not owned by the person entrusting the same at the time of delivering them into the possession of said farmer, ranchman, herder, tavern keeper or livery stable keeper."

Without an extended discussion of the question, we are satisfied that it was not the purpose of the legislature to displace an existing lien created by a chattel mortgage duly filed in favor of a subsequent lien springing from a contract of agistment. Such a view of the law would seriously impair the value of a class of securities in very common use in this state, and on the basis of which much of the business of our people is carried on. We cannot, on a mere conjecture hold that a policy so unwise was in the legislative mind when it enacted the statute in question. The chief value of this kind of security is that it leaves the owner in the enjoyment of his property. If the right to retain possession is to involve the right of the owner to create prior liens thereon to the destruction of the lien he has previously created, because he has failed to discharge his implied duty to the mortgagee, *i. e.* the duty of properly caring for the property, then it will follow that money cannot be obtained on such security. Those who have it to loan will not incur so great a hazard. Had the legislature intended to give the agister's lien priority over that of an existing mortgage, we are satisfied that it would have so declared, as it has done with respect to other liens. See Comp. Laws, § 5491; Rev. Codes, § § 4815, 4818, 4822, 4825; Laws 1890, Ch. 88. And see *Garr* v. *Clements*, 4 N. D. 559, 62 N. W. Rep. 640. It is somewhat significant that when sections 5486, 5487, Comp. Laws, were re-enacted in the form of sections 4813 and 4814, Revised Codes, there was added a section expressly giving to the agister priority of lien. Revised Codes, § 4815. This right of priority, however, is not absolute. It is secured only by giving timely notice to the holder of the existing lien. This qualified right to priority is unobjectionable. But the absolute right thereto contended for by counsel for appellant would be highly injurious to the best interests of the state, and we are unwilling to believe that such statemanship lies behind the statute we are construing. The able opinion of Judge Kellam in *Wright* v. *Sherman*, 3 S. D. 290, 52 N. W. Rep. 1093, leaves nothing to be said on the subject. We refer to it, and to the

decisions therein cited, in support of our ruling on the question of the true interpretation of the statutes which govern the case.

It is urged that the mortgagee has tacitly agreed to postpone the lien of its mortgage to that of the agister. This contention rests upon a clause in the mortgage itself. At the time it was given the bank was informed of the fact that the sheep would be wintered by the defendant, and there was inserted in the instrument the following words: "To be wintered by L. Scott, about two miles west of Taylor." We discover in this recital in the mortgage nothing more than a recognition of the fact that during the winter the sheep were to be in the possession of defendant as agister. For convenience of locating the property on which the bank held the mortgage, such a recital would be very valuable. But it is impossible to spell from it any agreement on the part of the bank that the agister shall have any greater lien than the statute itself gave him. It merely shows that the bank knew that some one was to care for the sheep for a season, and might obtain a lien thereon for his charges. Every mortgagor knows that this is possible, but this knowledge will not be construed as a consent that such lien shall take precedence of his own lien. Nor will knowledge on his part that it is not merely possible, but certain, that another will, at some time in the future, obtain a lien thereon for caring for them, be tantamount to an agreement to waive his own priority of lien in favor of the lien which subsequently accrues. Had the mortgagee itself placed the property with the agister, there might be room for the claim that it had tacitly agreed that its lien should be inferior to that of the agister. But no such case is before us. There is no evidence in the record tending to show that the contract of agistment was made before the mortgage was given and filed. On the contrary, the evidence establishes the fact that both the agreement, and the delivery of the sheep thereunder, were subsequent to the execution and filing thereof.

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

(75 N. W. Rep. 254.)

In re TAYLOR CRUM.

Opinion filed April 21st, 1898.

Revocation of Attorneys License Not a Criminal Prosecution.

A proceeding to revoke and cancel the license of an attorney is not a criminal prosecution, and need not be brought or entitled in the name of the state.

Laches in Prosecution Not Available as a Defense.

Laches in prosecution in such a proceeding cannot be available as a defense, when the matter was, with reasonable diligence, tried and submitted to the court, and the delay was occasioned by the failure of the court to render a decision.

Retrial—Supplementary Charges.

Where, in such a proceeding, the matter was submitted to the court, and the presiding judge, after holding the same for between four and five years, went out of office without having rendered any decision thereon, such fact did not amount to an acquittal of the accused of the charges made, and it was proper to retry such charges before the succeeding presiding judge of said court; and upon such retrial it was proper to allow supplemental charges to be filed and heard, covering matters that had occurred since the filing of the original accusations.

Review Upon Appeal—Disbarment.

While upon appeal in such a proceeding the accused is entitled, under § 437, Rev. Codes, to the judgment of this court upon the facts, yet, on full consideration of all the testimony received or offered in the case, the judgment of the District Court is affirmed.

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

Taylor Crum was disbarred from further practicing as an attorney-at-law, and appeals.

Affirmed.

J. E. Robinson, *S. G. Roberts*, and *Ida M. Crum*, (*Taylor Crum in pro per*,) for appellants.

The prosecution is defective not being carried on in the name and by the authority of the State of North Dakota as required by the constitution. Section 97, Art. 4, Const.; *State* v. *Hazledahl*, 2 N. D. 521; *Cox* v. *State*, 8 Tex. App. 254; *Lemons* v. *Peo.*, 6 Am. Rep. 293; *Nicholas* v. *State*, 35 Wis. 308; *Williams*

v. *State*, 27 Wis. 402; *Lopez* v. *State*, 19 Mo. 244. It was error to allow supplementary charges to be filed on rehearing had more than five years after trial and upon matters alleged to have occurred more than five years ago. *In the Matter of*————————Gent. 2 Barn. & Adol. 766; *Garry* v. *Wilkes*, 2 Dowl. Pr. 649; *Ex parte Shipden*, Gent. One, etc., 6 Dowl & Ryland, 339; *People ex rel Noyes* v. *Allison*, 68 Ill. 151; *Burke* v. *Western Land Ass'n*, 42 N. W. Rep. 379. Laches may consist in negligently instituting a suit, and also in negligently prosecuting it after its commencement. *Hagerman* v. *Bates*, 49 Pac. Rep. 142; *Sullivan* v. *Railroad Co.*, 94 U. S. 806; *Johnson* v. *Mining Co.*, 148 U. S. 360; *Brown* v. *County*, 95 U. S. 423; *Sample* v. *Barnes*, 14 How. 75. Appellant refers to his brief in *State* v. *Crum*, (Ante page 299,) submitted at this term upon matters involving his contempt.

B. F. Spalding, *W. H. Barnett*, and *J. W. Tilly*, committee of Cass County Bar Association for the proceedings.

The proceeding by which Mr. Crum was brought to answer is not "process" within the meaning of the constitution. *In re Kirby*, 73 N. W. Rep. 92. If process it was amendable. *State* v. *Hazledahl*, 2 N. D. 528. Laches has been the defendants, the hearing was postponed for his convenience and he cannot profit by its having been granted him. *Daggers* v. *Van Dyck*, 37 N. J. Eq. 130, 12 A. and E. Enc. L. 544. Appellants answer in the contempt proceeding, and his pretended apology contained therein, taken as a whole was an additional insult to the court. He cites Macauley's History of England, Chapter V, to point his invective, thus comparing the trial judge to Lord Jeffrey. He was properly disbarred. *In re Wall*, 13 Fed. Rep. 814, S. C. 107 U. S. 265; *Ex parte Cole*, 1 McCrary, 405, 6 Fed. Cases, 2973; *In re Brown*, 4 Pac. Rep. 1085; *Bradley* v. *Fisher*, 13 Wall. 335; *Peo.* v. *Green*, 3 Pac. Rep. 65; *Peo.* v. *Green*, 3 Pac. Rep. 374; *In re Philbrook*, 45 Am. St. Rep. 59 and note; *Delanos Case*, note 42 Am. Rep. 560; *State* v. *Kirke*, 95 Am. Dec. 514; *Burns* v. *Allen*, 2 Am. St. Rep.

860, note. The entire evidence shows moral turpitude. *Ex parte Mason*, 54 Am. St. Rep. 772.

BARTHOLOMEW, J. This is a disbarment proceeding brought in the District Court against Taylor Crum, a member of the bar of this court, resident in Cass County. A trial resulted in an order canceling the license of said attorney, and disbarring him from further practicing as an attorney-at-law. From such order the accused appeals to this court.

Section 437 of the Revised Codes reads as follows: "An appeal lies to the Supreme Court from all orders of the District Court revoking or suspending the license of an attorney and counselor at law; and upon an appeal being taken from such order all the original papers, together with the transcript of the record and proceedings therein, shall thereupon be transferred to the Supreme Court to be there tried and determined as the law and the evidence shall warrant. A judgment of acquittal by the District Court is final." The provisions of this section have been followed in this instance, and, by a proper statement of the case, the entire record, with the proceedings and evidence received or offered, is before us; and the accused is, under the statute, entitled to the judgment of this court both upon the law and the facts.

Among the duties of an attorney, as set forth in section 427, 428, Revised Codes, are the following: (1) To maintain due respect to the courts of justice and judicial officers; (3) to never seek to mislead the judges by any artifice or false statement; (5) to abstain from all offensive personalities. Section 433, *Id.* provides that an attorney's license may be revoked or suspended for a willful disobedience or violation of any order of the court requiring him to do or forbear any act connected with, or in the course of, his profession, or for a willful violation of any of the duties of an attorney as prescribed in the foregoing sections, or for the commission of any misdemeanor involving moral turpitude; and section 7022, *Id.*, makes it a misdemeanor for an attorney to be guilty of any deceit or collusion with intent to deceive the court or a party.

Stated somewhat in chronological order, the history of this proceeding is as follows: On July 20, 1892, a communication from the Cass County Bar Association was presented to the District Court of that county, wherein charges of conduct unbecoming in an attorney, and contrary to his sworn obligations as an attorney, were made against Mr. Crum. At that time the Honorable William B. McConnell was judge of said court, and he so continued until January 1, 1897. Upon the presentation of such communication, the court appointed a committee of three from the members of such bar association, and instructed them to promulgate, and present to the court, specifice charges against the accused. This was subsequently done, and on September 10, 1892, the court, by order, cited the accused to appear and plead to such charges and accusations on October 17, 1892. Thereafter various proceedings were had in the matter, and, in December following, evidence was heard by the court. There is a conflict in the testimony now offered (to be referred to again herein) as to whether or not the matter was ever finally submitted to Judge McConnell. It is conceded, however, that no findings or final order in the matter were ever made by him. On November 16, 1897, said bar association, through a committee of its members duly appointed by the association, made another communication to the said court. The Honorable Charles A. Pollock was then, and is now, the presiding judge thereof. In this second communication the making of the former charges against Mr. Crum was recited, and it was alleged that such charges were still pending and undetermined in said court; and it was further alleged that since the making of such charges said Crum had been guilty of further and gross violations of his duty as an attorney, and the court was requested to direct that such further acts be investigated. The committee appointed by Judge McConnell was, on its own application, released from further service in the matter, as some of its members could no longer serve. Another committee was appointed, additional charges were formulated and presented, and the accused was cited to appear and show cause

on November 22, 1897, why such additional charges should not be made supplemental to the original charges, and the whole tried together. When the accused appeared, he filed an affidavit of prejudice against the judge, and asked that another judge be called in to try the case. This was refused at that time, and subsequently various motions and a demurrer interposed by the accused were overruled, and exceptions saved. Subsequently the court reconsidered its order refusing to call another judge, and set the same aside, and set aside all subsequent orders in the case. And Hon. S. L. Glaspell, Judge of the Fifth District, was called in to hear the case. Of course, this rendered all rulings, on motions and demurrers when Judge Pollock was presiding immaterial, as we can only consider the points made before Judge Glaspell, as renewed here. The matter came on for hearing December 11, 1897, both parties being represented by counsel. The counsel for the accused objected to proceeding upon all the counts named in the accusations, for the reasons that the old charges "were submitted in the fall of 1892 to Hon. Wm. B. McConnell, and that his failure to decide the case against Mr. Crum, and his allowing Mr. Crum to continue in practice before him for five years, was in fact a decision in favor of Mr. Crum." This objection was not tenable. As stated, whether or not there had ever been a submission of the matter to Judge McConnell was a disputed question; but, granting that there had been such submission, the objection, in effect, admits that no formal decision had ever been rendered by Judge McConnell. Hence, when that judge went out of office the matter stood just as any case would stand that had been submitted to the court, but not determined. No rights were lost or obligations released. They could be enforced, however, only by another hearing before another judge. Nor do we think there is any force in the contention that the prosecution had been guilty of such laches in the prosecution of the original charges that it ought not at this late day to be permitted to press them. We recognize the doctrine that laches in prosecuting a civil action, where property rights have been

affected, may be good ground for refusing relief. *Johnston* v. *Mining Co.*, 148 U. S. 360, 13 Sup. Ct. 585. But no such case is made here. On the theory of the accused, the prosecution had been diligent up to the point of submission. If thereafter there was delay, the prosecution was not responsible for it. The accused could just as rightfully and just as effectually insist upon a decision, as the prosecution. Since the prosecution was entitled to insist upon the former charges, it follows that it was proper to treat the new charges as supplemental to the old, and dispose of them all in one hearing. The accused then demurred to the charges, raising the points (1) that there is a defect of parties, or, rather, that there is no party plaintiff; (2) that the charges do not state facts sufficient to constitute a cause of action; (3) that the proceeding is not in the name or by the authority of the State of North Dakota; and (4) that the charges are, on their face, barred by the statutes of limitations. It would be proper to dispose of this demurrer with the single remark that it was not interposed until after the accused had pleaded to the facts, and no leave was given or asked to withdraw that plea. It is plain that, so far as the demurrer applies to the original proceedings, it cannot be considered now. But, treating the second and fourth grounds as applying to the supplemental charges, it will appear at a glance, when we discuss the allegations in connection with the testimony, that the charges are sufficient in substance. Nor do we know of any statute of limitations in this state that is applicable to this proceeding. Should we hold, following the suggestion of the Supreme Court of Illinois in *People* v. *Allison*, 68 Ill. 151, that the analogies of the law require that these charges should be barred within the same time that misdemeanors are barred still it would not appear affirmatively that any of the charges, original or supplemental, were barred when proceedings thereon were commenced. In response to the demurrer, however, the attorneys for the prosecution asked leave to amend the title to the proceedings, and such leave was granted,

and complaint is made of such ruling. The ruling was harmless in any event. No amendment of the title was necessary, nor was any ever in fact made. This is not a criminal proceeding. *In re Eaton*, 7 N. D. 269, 74 N. W. Rep. 870. It need not run in the name of the state. *In re Kirby*, (S. D.) 73 N. W. Rep. 92. The title is good as it stands.

We come now to the substance of the charges and the evidence. Of the original charges, only three were pressed upon the hearing. In the first it was alleged that in a certain case pending in the District Court of Cass County, and in which Mr. Crum was attorney for the plaintiff, a motion was made by the defendant to strike the case from the trial calendar, and that on the hearing of the motion, and in opposition thereto, and for the purpose of deceiving the court, Mr. Crum made and presented an affidavit containing matters which were false, and so known by him to be false. On the hearing of this matter there was a direct conflict in the testimony as to whether or not the allegations in such affidavit were in fact false. After a very careful study of the evidence, we are of opinion that such allegations were false, but we are not clear that Mr. Crum knew them to be false. No good purpose would be served by reproducing the testimony. We need only say that, considering the grave nature of the accusation, the stigma that would ever be left upon the character of the accused, should we find that the accused knowingly swore falsely, it would be contrary to our duty to so find, unless such fact be unquestionably proven. See *In re Houghton*, 67 Cal. 511, 8 Pac. Rep. 52. The second charge alleged that in an action in Justice's Court, Mr. Crum, as plaintiff, obtained a judgment against a woman for a balance due him for fees and professional services, and that subsequently he filled up an execution on said judgment, and presented it to the justice for his signature, and that it was duly signed, and placed by said Crum in the hands of an officer; that in filling up said execution said Crum inserted therein that said judgment was for "labor and services," and said execution was levied upon property that was exempt from seizure. The point

to the charge lies in the fact that our statute then in force allowed but very limited exemptions as against a judgment for "laborers' or mechanics' wages," and, by the insertion of the words "labor and services" in the execution, the officer was induced to seize property that would have been exempt from seizure upon an ordinary judgment, but was not exempt as a against a judgment for laborers' or mechanic's wages. It is urged that Mr. Crum inserted the words in the execution for the purpose of procuring what he knew to be an unlawful and oppressive advantage to himself. Mr. Crum admits in his testimony the insertion of the words, but seems to claim that, in a general way they expressed the truth. But it is too clear to admit of question that he had some purpose to serve in placing those words in the execution. He suggests no reason whatever for so doing, and we can conceive of none, except that above stated. The evidence shows that it did in fact accomplish that purpose, and that Mr. Crum knew it. The justice testifies, in effect, that when he signed the execution he did not know that the inserted words were there; that he would not have signed it, had he so known; that knowing Mr. Crum to be an attorney, he supposed, of course, the execution was properly drawn, and signed it without reading. It cannot be doubted that Mr. Crum intended and expected that the justice would so treat it. He deceived the court. This was a clear violation of his sworn duty as an attorney. He also, by subterfuge, obtained an unlawful and oppressive advantage. This involved moral turpitude intolerable in a member of the bar, and brings the case within the provison of section 7022, Revised Codes. The remaining one of the old charges consists in the use by Mr. Crum of violent and abusive language to a juror who had been a member of a jury that had just returned a verdict against one of Mr. Crum's clients. The language was highly unbecoming in an attorney, and its use is clearly shown. Of the supplemental charges, the first to the fifth, inclusive, relate exclusively to the facts set forth in the contempt proceedings. *State* v. *Crum*, 7 N. D. 299, 74 N. W. Rep. 992. As the undisputed

facts are there fully stated, we need not repeat them here. Nor can it be doubted that the facts, as there set forth, clearly show a willful disobedience by Mr. Crum of an order of the court, and a failure on his part to maintain the respect due to a court of justice. Concerning the remaining six accusations contained in the supplemental charges, we do not care to speak in detail. One charges disrespectful language to the District Court, and one to the Justice's Court; but in neither instances was the language used so flagrantly disrespectful as that used upon the occasion mentioned in the contempt proceedings, but both are fully sustained by the evidence. The other charges show manifestations on the part of Mr. Crum of a violent temper, and the use of disrespectful and abusive language to opposing counsel in the trial of cases. The evidence shows plain violation of that provision of law which requires an attorney to abstain from all offensive personalities. That, under the charges and the testimony, the accused is a proper subject for discipline, there can be no doubt. Of the 14 charges pressed against him on the hearing, 13 are so clearly proven that we must regard them as established. We cannot, then, as in a less aggravated case we might, permit our judgment to be influenced by the personal consequences to the accused.

The judgment of the District Court must be affirmed. All concur.

(75 N. W. Rep. 257.)

NOTE—Mr. Crum's application to the Supreme Court of Minnesota, for admission as an attorney denied, because of the disbarment. *In re Crum*, 75 N. W. Rep. 385.

DANIEL C. MCALLISTER *vs.* ADELAIDE V. MCALLISTER.

Opinion filed April 21st, 1898.

Evidence Sustains Findings.

Evidence in this case *held*, on examination, to support the findings of the trial court.

Divorce—Evidence—Extreme Cruelty.

In a case where a husband brings action for divorce against his wife on the ground of extreme cruelty and such cruelty consists in false charges of marital infidelity, made by the wife against the husband, although such charges have destroyed the domestic happiness of the parties, and caused the plaintiff mental suffering, yet, if facts and circumstances for which the husband was largely directly responsible were such as to give the wife grave reason for believing that the charges made by her were true, no divorce should be granted the husband solely on the ground that such charges were made.

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

Action by Daniel C. McAllister against Adelaide V. McAllister, for divorce upon the grounds of extreme cruelty. Defendant had judgment and plaintiff appeals.

Affirmed.

W. P. Miller, for appellant.

Extreme cruelty is the infliction by one party of grievous mental suffering upon the other. Section 2739, Rev. Codes; *Barnes* v. *Barnes*, 95 Cal. 71, overruling *Waldron* v. *Waldron*, 85 Cal. 251; *Smith* v. *Smith*, 48 Pac. Rep. 730; 1 Bish. M. D. & S. § 1550; *Robinson* v. *Robinson*, 15 L. R. A. 121; *Marks* v. *Marks*, 56 N. W. Rep. 65; *Carpenter* v. *Carpenter*, 2 Pac. Rep. 122; *Gibbs* v. *Gibbs*, 18 Kan. 419; *Goodman* v. *Goodman*, 26 Mich. 417; *Bennet* v. *Bennet*, 24 Mich. 482; *Palmer* v. *Palmer*, 7 N. W. Rep. 760; *Whetmore* v. *Whetmore*, 13 N. W. Rep. 800; *Caruthers* v. *Caruthers*, 13 Ia. 266; *Wheeler* v. *Wheeler*, 53 Ia. 511; *Powelson* v. *Powelson*, 22 Cal. 358; *Smith* v. *Smith*, 8 Oreg. 100; *Kennedy* v. *Kennedy*, 73 N. Y. 369; *Black* v. *Black*, 30 N. J. Eq. 215; *Beyer* v. *Beyer*, 50 Wis. 254; *May* v. *May*, 62 Pa. St. 206. Appellants acts of indiscretion are not sufficient to justify respondents accusations of adultery or to deprive such accusations of the element of malice. *Williams* v. *Williams*, 2 S. W. Rep. 823; *Eggerth* v. *Eggerth*, 16 Pac. Rep. 650; *Wagner* v. *Wagner*, 36 Minn. 239; *Powelson* v. *Powelson*, 22 Cal. 358; *Sylvis* v. *Sylvis*, 17 Pac. Rep. 912. A single charge of adultery is sufficient to constitute extreme cruelty. *Jones* v. *Jones*, 60 Texas, 457; *Bahn* v. *Bahn*, 62 Texas, 518; *Whetmore* v. *Whetmore*, 13 N. W. Rep. 800; *Rosenfield* v. *Rosenfield*, 49 Pac. Rep.

49. Mental anguish and wounded feelings constantly agravated by repeated insults and neglect are as bad as actual bruises to the person and that which produces the one is not more cruel than that which causes the other. *Glass* v. *Wynn*, 76 Ga. 319; *Kelly* v. *Kelly*, 18 Nev. 49, 1 Pac. Rep. 194; *Gholston* v. *Gholston*, 31 Ga. 625; *Kempf.* v. *Kempf.*, 34 Mo. 211; *Small* v. *Small*, 57 Ind. 568.

Wm. J. Clapp, for respondent.

The cruelty contemplated by the law must operate upon the husband or wife while living in the relation of husband and wife. *Beach* v. *Beach*, 46 Pac. Rep. 514. The charges made by respondent against her husband were either true, or if any, were not true, she believed them to be true when made and had good grounds for so believing. Her accusations under such circumstances do not amount to cruelty. *Jones* v. *Jones*, 41 S. W. Rep. 413; 1 Bish. M. D. & S. § 1544; *Ashton* v. *Grucker*, 20 So. Rep. 738.

BARTHOLOMEW, J. The plaintiff and appellant brought an action in the District Court of Cass County for the purpose of securing an absolute divorce from his wife, the defendant and respondent. The action was commenced in 1895, and was based upon allegations of extreme cruelty, as defined by section 2561, Comp. Laws. The answer in its material effect, denied that defendant had been guilty of any extreme cruelty towards plaintiff, and pleaded certain facts by way of excuse for certain admitted conduct on the part of the defendant. A trial resulted in a denial of the divorce, and plaintiff brings the case to this court for trial *de novo*. There is no question of law raised in the case. The controversy is purely one of fact, and the facts must be culled from about 300 printed pages of testimony. The members of this court have given this testimony full and critical examination, and we reach conclusions which affirm the judgment of the trial court. No detailed analysis of the testimony could serve any good purpose, but a few general statements may be due to the parties, and serviceable in similar cases arising hereafter.

It has never been claimed in this case that defendant inflicted upon plaintiff any "grievous bodily injury." His whole complaint in his testimony is for "grievous mental suffering." This is sufficient under the statute cited, but we think it should clearly appear in the testimony. The mental suffering of which complaint is made arose in part from the fact (and we think it is a fact) that defendant stated to their children (grown to years of understanding) and to relatives of the plaintiff, and to a gentleman who did business in the same rooms with plaintiff in Chicago, and perhaps to others, that plaintiff was unduly intimate with other women. It is due plaintiff to say that this charge is without sufficient support in the testimony. There is nothing in the record to justify the conclusion that any such fact ever existed. But it is clear to us that the charge, as thus made to outside parties, could not reasonably have been the cause of any grievous mental suffering to plaintiff. If he did not know it, he could not suffer from it, and in the instances where he did know it the parties had such confidence in plaintiff that they did not credit it. Hence it brought no reproach on him, and could cause him no great suffering.

It is urged, however, that his mental sufferings were more particularly caused from the fact that for some years before the parties separated (which was in December, 1894,) and certainly at all times after they removed to Chicago (which was in 1889,) defendant constantly charged plaintiff to his face with such intimacy, and continuously upbraided him therefor, and by reason of her jealous and implacable disposition in this behalf she destroyed their domestic happiness, reduced plaintiff to desperation, and caused him to seriously contemplate suicide as a relief. Defendant denies making these charges as broadly or frequently as claimed. But, considering the testimony of both parties, and their son and daughter, aged respectfully 23 years and 20 years when they testified, we are convinced that the broad charge was sometimes made, and that the domestic life of plaintiff and defendant was at times very unpleasant. A brief review

of some of the facts in their marital life will fix the responsibility for this condition. They were married in Michigan, in 1871. They were only fairly out of the nursery at the time, he being 17 and she 16 years of age. Three children were born to them during the first four years of their marriage. The husband, at the time of the marriage, had some local reputation as a singer. A very few months after the marriage the young wife objected to her husband singing so much with certain young ladies. If we agree with plaintiff that this was a manifestation of jealousy on her part, yet we could hardly call it exceptional, or, if we did, we must also say that the husband was thus early apprised of its existence, and it became his duty ever afterwards to avoid, by all reasonable means, exciting this jealously in her disposition. In the early years of their marital life the husband supported his family by manual labor and teaching singing schools. This latter kept him much from home, especially at night. While the young wife, without a servant, lived alone with her babes, the husband was away, engaged in congenial employment, surrounded with company, and especially with ladies. If, occasionally, the wife felt lonely and neglected and irritable, it was only natural. Later the husband devoted his entire time to music; gave lessons, organized and conducted choirs, rendered cantatas, etc. All this took him away from his family, and constantly brought him in contact with ladies. The wife objected at various times and in various ways. Once she peremptorily objected to his singing certain parts in a cantata with a certain lady, and he was obliged to forego them. He regarded these objections as unwarranted, and caused by unreasonable jealously. The consequence was that his affecttions were withdrawn from his wife. Outwardly, he maintained affectionate attentions, but perfunctory attentions could not deceive an intelligent woman. The fact that her husband's affections were being withdrawn only gave her added ground for jealously and distrust. But their domestic life was fairly successful until they moved to Chicago. There plaintiff established a studio, where he gave private lessons in vocal

music. Of course, his pupils were principally ladies. He was also a member of a professional quartette, which usually had engagements two or three nights in the week, and he conducted a large choir in a fashionable church. It was his custom to be absent from home all day, and from 10 until 2 o'clock at night, Sundays included. The latter hour was by no means infrequent. The testimony shows him to be a professed Christian, and strictly temperate man; and, while there is nothing to show that he was improperly employed during these late hours, neither is there anything to suggest any necessity for his absence from home and his wife at all such times. Moreover, he testified that he did not escape the feminine admiration usually bestowed upon public singers and actors. He testifies that he has often received letters from women. One his wife discovered and read. Its contents were exceedingly suggestive, if not incriminating. Again, his wife found certain entries that he had made in his diary, and while they were, perhaps, only the foolish gushings of a supersensitive nature, yet to a wife inclined to be jealous it would be impossible to explain them on any theory of perfect innocence. Further, among the women with whom he was thrown in contact in a professional way were some with whose reputations rumor had trifled, and another of whom he spoke in terms which led his wife to believe that his interest in her was more than professional. His wife objected to his association with these parties. He protested his unwillingness to change conditions, and refused to change. The record shows that on several occasions his conduct was such as he must have known would severely test his wife's belief in his fidelity as a husband. From all these facts we conclude that, while defendant charged marital infelicity against plaintiff that did no exist, and while such charges tended to destroy the domestic happiness of these parties, and may have caused plaintiff mental suffering, yet facts and circumstances for which plaintiff was to a large extent directly responsible so far justified the defendant in making such charges that it does not now lie in plaintiff's mouth to accuse her of extreme cruelty for so doing.

Affirmed. All concur.

(75 N. W. Rep. 256.)

E. F. WILSON *vs.* JOHN RUSTAD.

Opinion filed April 21st, 1898.

Chattel Mortgage Good Where Made is Good Here.

Where a mortgage is executed in another state on property therein situated, the mortgagor and mortgagee being domiciled therein, and such mortgage is filed in accordance with the laws of such state, the mortgagee can claim the protection of such laws in another state to which the property is removed without refiling the mortgage in such state, unless the statutes thereof expressly require it to be there refiled.

Only Person Interested Can Raise Question of Insufficient Description.

The question of the sufficiency of the description of the property in a chattel mortgage is a question of law. When the description is good as between the parties, no one can raise the question of the sufficiency thereof, except some one who claims the protection of the law requiring chattel mortgages to be filed.

Description Held Sufficient.

Description set forth in opinion *held* sufficient not only between the parties, but also as to purchasers, incumbrancers, and creditors.

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

Action in claim and delivery prosecuted by E. F. Wilson against John Rustad to recover the possession of a span of mules, wagon, and a harness. Plaintiff based his right to possession upon a note and chattel mortgage given by Charles Vail and Thomas T. Jones, of Day County, South Dakota, to him to secure the purchase price of this property. Defendant claimed to be an innocent purchaser without notice. Defendant had judgment upon a verdict in his favor, and plaintiff appealed.

Reversed.

B. J. Howland, and *McCumber & Bogart*, for appellant.

The defendant purchased the property from Hurb Vail, a person without title or right to possession; therefore, the question of defendants good faith, or the inaccuracy of the discription in plaintiff's mortgage or the question as to whether or not it was properly recorded, cannot enter into the case. *Eddy* v. *Caldwell*, 7 Minn. 225; *Brooks* v. *Aldrich*, 17 N. H. 443; *Mills* v.

Kansas Lumber Co., 26 Kan. 574; *Smith* v. *McLean*, 24 Ia. 322; *Lawrence* v. *Evarts*, 7 Ohio St. 194; *Lee* v. *Cole*, 17 Oreg. 559; *Osborne* v. *McAllister*, 15 Neb. 428; *Stephens* v. *Tucker*, 14 N. J. L. 600; *Dodge* v. *Potter*, 18 Barb. 103; *Conkling* v. *Shelley*, 28 N. Y. 360; *Wade* v. *Strachan*, 71 Mich. 459; *Champin* v. *Cram*, 40 Me. 561; *Everett* v. *Brown*, 64 Ia. 420; *Harding* v. *Coburn*, 12 Metc. 333; 5 A. and E. Enc. L. 964.

W. E. Purcell, and *H. C. N. Myhra*, for respondent.

Appellant asserts for the first time in this court that defendants vendor came by this property unlawfully and without right of disposition. This case was tried upon the theory that it involved two questions only, viz: "Are the mules in question the same mules sold by Wilson to Chas. Vail?" and "Has plaintiff a mortgage upon them?" Questions not raised on the trial are not reviewable on appeal. *Pielke* v. *C. M. & St. P. Ry. Co.*, 6 Dak. 444; *Braithwaite* v. *Power*, 1 N. D. 455; *Little* v. *Little*, 2 N. D. 175; *Purcell* v. *Ins. Co.*, 5 N. D. 100, 4 Waits, Pr. 230. Appellate courts can not reverse because of an omission to charge upon a question which might have been raised, but was not on the trial, even although the same was fairly within the issue. *Doty* v. *Gillett*, 43 Mich. 203. A party cannot try his case on one theory and take chances of a verdict under it and then change his theory on appeal. *Burroughs* v. *Morse*, 48 Mich. 520; 1 Elliots Pr. 140. Asking instructions upon one theory precludes the party from availing himself of a different one. *Louisville, etc., Co.* v. *Wood*, 14 N. E. Rep. 572; *Doty* v. *Gillett*, 43 Mich. 202.

CORLISS, C. J. Plaintiff is seeking to recover possession of certain personal property by virtue of a mortgage executed thereon by the owners thereof. The mortgage was executed in South Dakota, where the property was then situated. Both the mortgagors and the mortgagee were at that time domiciled in that state. The instrument was filed in the proper office under the laws of that state. Subsequently the mortgaged chattels were brought to this state, and they were found in the possession

of the defendant, Rustad, at the time this action was commenced. There appears to have been a controversy on the question of fact whether the property taken from defendant, Rustad, in this action was the property described in the mortgage, but, inasmuch as there was another question which we think was erroneously submitted to the jury, it is impossible to determine from the verdict whether the jury found the issue as to identity against the plaintiff, or whether the jury did not base their verdict altogether on the question which should not, under the evidence, have been submitted to them. For the purpose of deciding this appeal, we must assume that the jury have found in plaintiff's favor on the question of identity, but have found against him on the other point. While there is some authority contrary to the doctrine, yet the great majority of the decisions hold that a chattel mortgage, under circumstances similar to those which exist in this case, continues to be a lien as to the whole world, although the property is taken to a foreign jurisdiction, and there disposed of. Jones, Chat. Mortg. § § 299, 301, 303; *Cobb* v. *Buswell*, 37 Vt. 337; *Jones* v. *Taylor*, 30 Vt. 42; *Taylor* v. *Boardman*, 25 Vt. 581; *Norris* v. *Sowles*, 57 Vt. 360; *Bank* v. *Lee*, 13 Pet. 107; *Mumford* v. *Canty*, 50 Ill. 370; *Hornthall* v. *Burwell*, (N. C.) 13 S. E. Rep. 721; *Keenan* v. *Stimson*, 32 Minn. 377, 20 N. W. Rep. 364; *Ferguson* v. *Clifford*, 37 N. H. 86; *Kanaga* v. *Taylor*, 7 Ohio St. 134; *Wilson* v. *Carson*, 12 Md. 54; *Smith* v. *McLean*, 24 Iowa, 322; *Martin* v. *Hill*, 12 Barb. 631; *Bank* v. *Danforth*, 14 Gray, 123; *Langworthy* v. *Little*, 12 Cush. 109; *Feurt* v. *Rowell*, 62 Mo. 524; *Simms* v. *McKee*, 25 Iowa, 341; *Ballard* v. *Winter*, 39 Conn. 179; *Cool* v. *Roche*, 20 Neb. 550, 31 N. W. Rep. 367; *Beall* v. *Williamson*, 14 Ala. 55; *Iron Works* v. *Warren*, 76 Ind. 512; *Barrows* v. *Turner*, 50 Me. 127; *Handley* v. *Harris*, (Kan. Sup.) 29 Pac. Rep. 1145; *Offutt* v. *Flagg*, 10 N. H. 47; *Hall* v. *Pillow*, 31 Ark. 32. If, therefore, it appeared in this action that the defendant was a bona fide purchaser from the mortgagors, or from some one to whom they had sold the property, still he would be chargeable with notice of the mortgage thereon, provided such property was therein described with

a sufficient accuracy. It is on the theory that he was such a purchaser that the District Court charged the jury that, if they found the description of the property in the mortgage so faulty and defective that such description would not enable a third party, aided by such inquiries as the mortgage itself would suggest, to identify the property, it would be void as to defendant. No such accuracy in description is required as between the parties. And an utter stranger to the title of the mortgagor certainly cannot be in a better position than is the mortgagor himself. If one without shadow of right as against the mortgagor takes possession of the property, he cannot be heard to object that the description is insufficient, so long as it is sufficient as between the parties. We are clear that the description in the mortgage in question was good at least as against the mortgagors themselves, and this is conceded by counsel for defendant. The defendant therefore cannot raise the point of insufficiency unless he purchased the property in good faith from the mortgagors, or some one to whom they had sold it. The law sends one who is about to buy chattels to the public records to ascertain if they are incumbered. If he finds there no mortgage, it cannot be set up as against his title. So, if he finds a mortgage with a faulty description, he is protected, because the record fails to give him notice of the lien. It does not point out with sufficient accuracy the particular property which the mortgage embraces. But the public record of a mortgage is not made for the benefit of one who in no manner connects himself with the title of the mortgagor as purchaser, incumbrancer, or attaching or execution creditor. The mortgage is good as to such a one without filing, and it is likewise good as to him though the description be defective. See Cobbey, Chat. Mortg. § 186. In this case we are unable to discover any evidence tending to show that defendant purchased the property from the mortgagor, or from one to whom they had sold it. When the plaintiff had shown the ownership of the property by the mortgagors, and their execution of the mortgage thereon to him, he had made out a case. It was then incumbent

on defendant to show that such mortgage was void as to him. All the evidence on that point in this record is that the property was in the possession of one Herb Vail, who sold it to defendant. Whether Vail had bought it from the mortgagors, or had authority from them to sell it, does not appear. Defendant is in no better position than Vail himself would have been had the action been brought against him before he had sold to defendant, and the only evidence in the case was that Vail had possession of the property. Such evidence would not overcome the case made by plaintiff, as it would have no tendency to show that Vail was an innocent purchaser of the property, and entitled as such to question the sufficiency of the description. The only question which should have been submitted to the jury was the question of identity. Indeed, even if we should assume that defendant was an innocent purchaser, we are unable to discover anything in the description of the property which would warrant a court in leaving the question of sufficiency of description to the jury as a question of fact. The property is described in the mortgage as follows: "One horse mule, three years old, color bay, weight about 950 pounds, named Jack; one mare mule, three years old, color brown or mouse, weight about 1,000 pounds, named Jennie; one mare mule, five years old, color mouse, weight about 800 pounds, named Maud,—all this day purchasd from the said E. F. Wilson, with all increase of same; all the said property being now in the possession of the said mortgagor in the County of Day and State of South Dakota." Such a description is good as against third persons. See Cobbey, Chat. Mortg. § § 170, 171, 178; *Bank* v. *Oium*, 3 N. D. 193, 54 N. W. Rep. 1034. See, also, cases cited in note to *Barrett* v. *Fisch*, (Iowa) 14 Am. St. Rep. 238, (s. c. 41 N. W. Rep. 310.) Whether a description is sufficient is a question of law, and not of fact. *Austin* v. *French*, 36 Mich. 199; *Bank* v. *Oium*, 3 N. D. 199, 54 N. W. Rep. 1034. This is assumed to be the law in every case. See the decisions reviewed in note to *Barrett* v. *Fisch*, (Iowa) 14 Am. St. Rep. 238, (s. c. 41 N. W. Rep. 310.)

The judgment is reversed, and a new trial is ordered.

WALLIN AND BARTHOLOMEW, J. J., concur in a reversal of this cause on the ground that the sufficiency of the description was a question for the court, and it was error to submit it to the jury, and express no views on other points discussed in the opinion.

(75 N. W. Rep. 260.)

V

JAY F. RUSSELL *vs.* CHRISTOPHER MEYER, *et al.*

Opinion filed April 28th, 1898.

Action for Trespass—Complaint.

Complaint examined, and *held* to state a cause of action for trespass on realty, and not for the conversion of personalty.

Owner of Unoccupied Land May Sue.

The owner of unoccupied land may sue for trespass.

Damage to Reversionary Interest.

Where a tenant is in possession, the owner may sue in trespass on the case for the damage to his reversionary interest.

Owner of Equitable Title May Sue.

One who has the equitable title and full right to call for the legal title may, as against a trespasser, maintain the same action as one who has the entire ownership of land, legal and equitable.

Special Verdict Defined.

A special verdict is one which determines specifically the ultimate facts which are in issue, and not one which determines evidential facts on which such ultimate facts rest.

Destruction of Deed Does Not Divest Title.

Where the grantee in an unrecorded deed sells the land to another, and for the purpose of putting the title in the purchaser without the expense of having the old deed recorded destroys such deed, and procures to be executed to the purchaser a deed directly from the original grantor to the purchaser, no legal title vests in such purchaser, but only an equitable interest, the grantor in such deed having no legal title to convey. A court of of equity, however, will compel the holder of the legal title to convey it to such purchaser.

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

Action by Jay F. Russell against Christopher Meyer, August Meyer and William Dunham to recover damages against the defendants, for unlawfully and forcibly entering upon the premises of plaintiff and injuring them by the destruction and asportation of a frame barn. Trial by jury and a verdict for plaintiff for $50.00, a new trial denied, defendants appeal.

Reversed.

McCumber & Bogart, for appellants.

Plaintiff should have been required to elect as to the character of his action. If an action for conversion the measure of damage is the value of the property at the time of the conversion, with interest. Section 5,000, Revised Codes. The taking down of the barn converted it into a chattel, and the rule of damage is the same as for the conversion of a chattel. *Bennett* v. *Thompson*, 13 Ired. 146; *Yarborough* v. *Nettles*, 7 La. 238; 26 A. and E. Enc. L. 676. The rule of damages for trespass is the amount which will compensate for all the detriment proximately caused thereby. Section 4997, Revised Codes. If the action is in trespass, plaintiff must plead and prove possession at the time of the act complained of. 26 A. and E. Enc. L. 581. The owner may without possession maintain action for carrying away the fixtures. *McClain* v. *Todd*, 22 Am. Dec. 37. If the action was merely to recover value of the building, it was not necessary for plaintiff to show either title or possession. *Kline* v. *Mann*, 29 Ia. 112. Defendant, therefore, had a right to force an election before the trial progressed. The plaintiff relying upon title, should have shown chain of title from the government. *Henrichs* v. *Terrell*, 65 Ia. 25, and that he has repossessed himself of the land. *Rowland* v. *Rowland*, 8 Ohio, 40. An estate in real property can be transferred only by an instrument in writing, subscribed by the party disposing of it. The cancellation of a deed will not divest property which has once vested. Section 3531, Revised Codes; *Lewis* v. *Payne*, 8 Cow. 71; *Holbrook* v. *Terrill*, 9 Pick. 105; *Hatch* v. *Hatch*, 9 Mass. 311; *Marshall* v. *Fisk*, 6 Mass. 32; *Jack-*

son v. *Chase*, 2 John. 84; *Roe* v. *Archbishop*, 6 East. 86; *Bottsford* v. *Moorhouse*, 4 Conn. 550; *Gilbert* v. *Buckley*, 5 Conn. 262; 2 A. and E. Enc. L. 719. An oral sale of a standing building upon the land of the owner but to be severed from it and taken away is valid. *Shaw* v. *Carberry*, 13 Allen, 462; *Long* v. *White*, 42 Ohio, St. 459; 8 A. and E. Enc. L. 698.

W. E. Purcell, for respondent.

The statement of the case does not contain all the evidence, therefore no question as to the sufficiency of the evidence to justify the verdict can be considered on this appeal. *Becker* v. *Simons*, 50 N. W. Rep. 1129; *Barnes* v. *Michigan Air Line*, 20 N. W. Rep. 36; *Chamberlain* v. *Brown*, 41 N. W. Rep. 284; *Ward Snook*, 16 N. W. Rep. 745. Plaintiff was in possession and could maintain the action upon this fact and the presumption it carried. *Parker* v. *Wallis*, 60 Ind. 15; *Stratton* v. *Lyons*, 53 Vt. 641; *Douglas* v. *Dickson*, 31 Kan. 310; *Wellington* v. *State*, 52 Ark. 266. The grantor of lands may maintain trespass after his conveyance for injuries done before such conveyance. Section 3371, Rev. Codes; *Arneson* v. *Spawn*, 49 N. W. Rep. 1066.

CORLISS, C. J. Defendants have appealed from a judgment based upon the verdict of a jury. One of the errors assigned is that the District Court should have compelled the plaintiff to elect whether he would treat the action as an action for trespass to real estate or for the conversion of personal property. The averments of the complaint were that plaintiff was the owner of certain real estate, and that defendants forcibly entered the same, and tore down and removed a barn erected thereon. While it is possible that the pleading was vulnerable to attack by motion to render it more definite, we are clear that it states only one cause of action, *i. e.* an action for trespass to real property. It is true that the plaintiff does not allege that he was in the actual possession of the premises, but actual possession is not necessary. Constructive possession, resting upon title is sufficient where there is

no adverse possession. 26 Am. and Eng. Enc. Law, 585, and cases cited. When a part of the realty is severed therefrom by a wrongdoer, the owner may sue for the trespass, or he may elect to treat the act of severance as unlawful, and sue for the conversion of the property as a chattel, it having been rendered personalty by the act of the tort feasor. But if he decides to sue in conversion, all the legal consequence of his election must follow. When he insists that his interest in a chattel has been destroyed, it is as a wrong to such chattel that he must prosecute his action; and he can only recover the value of such chattel after it became such, and not the damage which the severance and removal thereof from the realty has caused. It is obvious, from the allegations of the complaint herein and the prayer for relief, that plaintiff has not elected to sue in conversion, but for damages to the realty resulting from a trespass. He avers that the barn was worth $230, and this is the sum which he seeks to recover. Assuming that there was no damage to the premises aside from the demolition and carrying away of this structure, it is clear that the damage to plaintiff's realty would be the exact amount of the value of such structure. But such value would not form the proper measure of damages, on the theory of an action in conversion; for, after this erection had become a chattel property by severing it from the land, it would no longer possess value as a barn, but only as so much lumber, much less valuable, because an important element of value, *i. e.* the cost of construction, would then have disappeared.

It is claimed that the court erred in refusing a request of defendants' counsel to direct the jury to render a special verdict. But in our opinion what counsel for the defendants asked was not that the jury be requested to return a special verdict, but to answer certain questions framed by counsel, which went more into details on the issues in the case than a jury are required to go, even when they are directed to render a special verdict. The court was requested to propound to them the following questions, among others: "How many loads of lumber were taken down and carried away

by the defendants?" "About how many feet of lumber in all did the defendants take away from the lot?" "What was the value of the lumber taken by said defendants?" "What was that building that was taken by the defendants worth on the day it was taken, but before it was taken down by the defendants?" "What was the lot on which the building was situated, with the building thereon, worth on the day, but just before the building was torn down?" "What was the lot worth, exclusive of the building, on the day the building was torn down?" "What was the building in question worth, as it stood on the lot just prior to the time it was taken down?" By a special verdict, a jury set forth their findings on each point in issue, but they are not to find anything except the ultimate facts in controversy. If there are, for instance, three questions of fact in a case which should be submitted to the jury, either party may ask that the jury be required to answer categorically each one of these questions in the form of a special verdict. But the jury cannot be further requested to answer in addition any number of special interrogatories which the ingenuity of counsel may frame. What the court is commanded by the statute to do, when so requested by either party, is to direct the jury to find a special verdict. Revised Codes, section 5445. Section 5444 clearly shows what a special verdict shall embrace. It must contain only the conclusions of fact, and not the evidence to prove them. One of the issues of fact in this case was concerning the damage to plaintiff's realty caused by this trespass. Three of the questions framed by counsel for defendants related to the evidence bearing on such issues, and not to the ultimate fact. The court was requested to ask the jury to say how many loads of lumber were carried away by defendants, how many feet of lumber were removed by them, and what the value of such lumber was. What the jury were to determine in the case was not the evidential facts, but, in the light of them, the ultimate fact as to the damage to the land which the trespass of the defendants had caused the plaintiff. The true rule is stated by Mr. Thompson in his work on trials: "Another leading

rule in regard to special verdicts is that they should find the ultimate or constitutive facts which are necessary to support the judgment of the court, and should not find those matters which are merely evidentiary in their nature, and which merely tend to show the existence of the ultimate facts." Section 2652.

It is urged that, inasmuch, as the plaintiff was not in actual possession of the land at the time of the trespass, he cannot recover because he has failed to show that he was at such time the owner of the legal title thereto. It appears that a time anterior to the trespass the premises were owned by Jay Russell, the plaintiff, and W. H. Davenport, under a deed to them which was duly recorded, each owning one-half. They conveyed through different grantees their respective interests, and finally the fee was vested in A. G. Divet. Divet sold the property to the plaintiff. However, instead of executing a deed to the plaintiff, he destroyed all the intermediate deeds, which had not been recorded, and caused a deed to be executed by Davenport to the plaintiff. Thus, upon the public records, when the latter deed should be recorded, it would appear that plaintiff was the owner of the entire lot, the deed to himself and Davenport vesting a one-half interest in him, and the deed from Davenport to himself transferring to him the other half. It is obvious, however, that Divet did not by the destruction of such deeds devest himself of his legal title to the premises. 2 Jones, Real Prop. § 1259, and cases cited; Rev. Codes, § 3519. There is, however, authority for the proposition that the effect of a voluntary destruction of a deed is to revest the legal title in the grantor if that is the purpose of the party, the ground of such holding being an equitable estoppel. He who has deliberately put it out of his power to prove his title by the best evidence shall not be permitted to produce secondary evidence to sustain it, and therefore, he can never establish such title in a court of justice. It follows that he has in law no title, because he is powerless to assert it. So runs the reasoning of these cases: *Holbrook* v. *Tirrell*, 9 Pick. 105; *Barrett* v. *Thorndike*, 1 Me. 73; *Com.* v. *Dudley*, 10 Mass. 403;

Trull v. *Skinner*, 17 Pick. 213; *Tomson* v. *Ward*, 1 N. H. 9; *Stanley* v. *Efferson*, 45 Tex. 645; *Farrar* v. *Farrar*, 4 N. H. 191. We do not deem these decisions sound, and our statute is decisive. Revised Codes, section 3519. See 2 Jones, Real Prop. § 1259. But, although no legal title passed from Divet to plaintiff, still he has an equitable title to the land in question. Divet, the owner of the legal title, has sold the land to him, and has presumably received his pay; for he testified on the trial that he destroyed these deeds, and had Davenport convey to plaintiff for the purpose of carrying out his agreement to sell the premises to plaintiff. A court of equity would treat him as a mere trustee, and require him to convey the land to the plaintiff should the latter seek such relief. As against the defendants who are wrongdoers,—who failed to establish any interest in the land,—the plaintiff's equitable title is sufficient to sustain this action for trespass. *Irvin* v. *Patchin*, (Pa. Sup.) 30 Atl. 436; *Inderlied* v. *Whaley*, (Sup.) 20 N. Y. Supp. 183; *Miller* v. *Zufall*, 113 Pa. St. 317–325, 6 Atl. 350; *McFeters* v. *Pierson*, 15 Colo. 201, 24 Pac. Rep. 1076; 2 Jag. Torts. 673. Even as against Divet, who held the valid legal title, the plaintiff was entitled to possession. While the right to sue in trespass rests upon possession, yet ownership draws after it constructive possession when no one else is in the adverse possession of the land. In such a case the owner may sue. 26 Am. and Eng. Enc. Law, 585, and cases in note 2. Nor does it clearly appear that plaintiff was not in possession at the time of the trespass. But assuming the view most favorable to defendants, that a tenant was in possession, still the plaintiff could maintain the action of trespass on the case for the injury, which was clearly an injury to the reversion. *Bailey* v. *Gas-Fixture Co.*, 54 Mo. App. 50; *Starr* v. *Jackson*, 11 Mass. 519; *Hastings* v. *Livermore*, 7 Gray, 194; *French* v. *Fuller*, 23 Pick. 106; *Ridge* v. *Transfer Co.*, 56 Mo. App. 133; *Hersey* v. *Chapin*, (Mass.) 38 N. E. Rep. 442; *Parker* v. *Shackelford*, 61 Mo. 68; *Austin* v. *Mining Co.*, 72 Mo. 535; 2 Jag. Torts, 666. As all forms of action are abolished in this state, the only inquiry is whether,

under such circumstances, the owner can sue the wrongdoes for the damages he has caused him, the owner. Whether the action was at common law known as an action of trespass or as an action of trespass on the case is unimportant, when once it is ascertained that the law gives the owner a remedy in some form of action.

On one point, however, we think the learned trial judge erred. He charged the jury that, as a matter of law, the plaintiff was entitled to recover damages on the theory that plaintiff was the owner of the building, and that the only question for them to determine was the amount of plaintiff's damages. So far as this instruction rested upon plaintiff's title to the land, we think the court was correct. But there is some evidence in the case tending to show that the ownership of the barn had been transferred to one who was not the owner of the land, and that at the time that Divet sold to plaintiff he (Divet) was not the owner of such structure. Of course, it was competent for the owner of the land to sever the building therefrom (considering the mode of its annexation thereto) by a sale thereof separate from the land. Such a sale would pass the title to the building as personal property. *Shaw* v. *Carbrey*, 13 Allen, 462; *Long* v. *White*, 42 Ohio St. 59. True it is that an innocent purchaser of the land would have a right to assume that the building was a part of the realty, and would, on putting his deed on record, be in a position to defeat the prior sale of the building by his grantor, he having no notice thereof. 2 Jones, Real Prop. § 1736. But no claim is made here under the recording act. Counsel for plaintiff merely argues that the alleged oral transfer of the building was void under the statute of frauds. And it is obvious from the record that the case was not litigated in the court below on the theory that plaintiff was entitled to protection on the ground that he was a bona fide purchaser under our recording law.

We think that there was a question of fact as to the ownership of the building which should have been submitted to the jury. It is true that the trespass upon the land was not justified, because

the defendants failed to show that they had any interest in either the land or the building. But, while a technical trespass was made out, plaintiff established no claim to more than nominal damages, except on the theory that he was the owner of the barn at the time of the trespass. If he was not such owner, the verdict is excessive, and it was for the jury to say whether he was such owner. Because this question was not submitted to the jury, the order denying the motion for a new trial is reversed, and a new trial is ordered. All concur.

(75 N. W. Rep. 262.)

THOMAS C. KELLY *vs.* CARGILL ELEVATOR CO.

Opinion filed April 23rd, 1898.

Evidence—Best and Secondary.

It is competent in an action for the conversion of wheat by defendant to prove the contents of entries showing amount of grain purchased, the grade, the price, and persons from whom purchased, made by the agent of the defendant at the time of the transaction in the stubs of wheat tickets kept by defendant for that purpose, such entries being the ones from which the agent made up his report to the home office, it appearing that the original entries themselves have been destroyed by defendant.

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

Action by Thomas C. Kelley against the Cargill Elevator Company to recover for the conversion of five hundred and forty-eight bushels of wheat. Verdict and judgment for plaintiff and defendant appeals.

Affirmed.

Benton & Bradley, for appellants.

The stub book kept by denfendants agent was not primary evidence. In the case of a check, the check would be the best and primary evidence and the stub secondary evidence only. The stubs are not admissible because they are not entitled to be regarded as books of account, and therefore, not original or

primary evidence. *Wilson* v. *Gooding*, Wright, 219. The copy of a copy of a destroyed or lost document is not receivable in evidence, even though the absence of the first copy has been satisfactorily explained. Best on Evidence, § 483; *Reeve* v. *Long*, Holt, 286; *Leibman* v. *Pooley*, 1 Stark. 167; *Everingham* v. *Roundell*, 2 M. & R. 138; *Winn* v. *Patterson*, 9 Peters, 663; *Carey* v. *Fulmer*, 21 So. Rep. 752.

Carmody & Leslie, for respondent.

The stubs were primary evidence and original entries. *Anglo American P. & P. Co.* v. *Com.*, 31 Fed. Rep. 313; *Weaver* v. *Shipley*, 27 N. E. Rep. 146; *Gardner* v. *Eberhart*, 82 Ill. 310; 7 A. and E. Enc. L. 85. The stubs were in the nature of an admission against the defendant made by its authorized agent of a fact which was against the interest of the defendant at the time it was made. 1 Greenl. Ev. 115; *Butler* v. *Cornell*, 35 N. E. Rep. 766. The evidence of the entries on the stubs was competent as part of the *res gestæ*. *Chicago, etc. R. R. Co.* v. *Ingersoll*, 65 Ill. 399; *Rodgers* v. *Broadnox*, 27 Texas, 238; *Merrill* v. *Down*, 41 N. H. 72. A copy of a copy cannot be introduced until the original and copy are shown to be lost. *Joslyn* v. *Brockwell*, 13 N. Y. Supp. 311; *Williams* v. *Conger*, 8 Sup. Ct. Rep. 933; *Conner* v. *Conner*, 11 N. E. Rep. 848.

CORLISS, C. J. Defendant seeks to reverse the judgment against it on the ground that incompetent evidence was admitted over its objection. The action is for the conversion of wheat sold to defendant by one Russell. Plaintiff recovered judgment. The wheat was the property of the plaintiff, but was stolen by Russell from his granary, and taken to defendant's elevator at Hatton, in this state. That some wheat was purchased by defendant of Russell is undisputed, but the exact number of bushels and the grade thereof is not proved unless the evidence which defendant attacks as incompetent is in fact legal evidence as against the defendant. The agent of the defendant, who was the one who purchased this grain, testified as follows as to the custom of the defen-

dant in making entries on the delivery of grain at its elevators: "It was my custom, at the time this wheat was bought, to make out in some sort of a little book a wheat ticket and stub attached to it; then tear it in two, and deliver the wheat ticket, or cancel it if the wheat was sold, and leave the stub in the book. These are both made at the same time, and one is practically a copy of the other; and when the wheat is stored I deliver the part called the ticket to the one storing the wheat, and the other part, called the stub, I keep. If the wheat is sold, the ticket is destroyed, and marked 'Paid,' and the stub is still left there. These stubs and wheat tickets were made each day as fast as wheat was received. This was the first and original memorandum made by me in each case, and kept on file until the close of the season's work. Do not know whether these particular ones were in my handwriting. Some may have been made by the second man. When I was away for any reason he would receive the wheat, and mark the stubs for it. These stubs show the grade of wheat, the price, the number of bushels, and from whom purchased. What is called the stub is a part of the check book, and the stub is used as a memorandum to make the reports from after the day's business. These reports include the amount of the business done during the day, and the amount of wheat received and stored. When a ticket was issued, we always made out the stub first. We kept the stub, and delivered the ticket to the person who delivered the wheat. The stubs were used afterwards to make the entries, and to keep a record as to the purchase of wheat." Entries relating to the transaction with Russell were made by defendant's agent in the usual course of business in the stubs and in the wheat tickets, showing the number of bushels, the grade, the person from whom purchased, and the price. A few days after the wheat was delivered at the elevator, plaintiff, who had learned of the theft, called on defendant's agent at Hatton,—the one to whom the grain had been delivered,—and inquired about the same. It is uncontroverted that the agent examined the stubs kept by him as agent, and plaintiff testified under objection that

he looked at the entries in the stubs, and that they showed that Russell had sold to defendant 548 bushels of No. 1 Northern wheat for 80 cents a bushel. It is conceded that, if this evidence was competent, the judgment must be affirmed. We cannot see how it can be said to be incompetent. The contention is that the wheat tickets were the best evidence, and that the stubs were only secondary evidence, and that plaintiff was permitted to prove by parol the contents of these papers, which themselves were only secondary evidence. But plaintiff notified the defendant to produce on the trial its books and entries relating to this transaction, and the defendant stated in the form of an affidavit that they had all been destroyed in the course of business. Conceding all that defendant's counsel claims, it is still true that the evidence was admissible. The best evidence on his theory, *i. e.* the wheat tickets, could not be produced, and this on account of the act of the defendant itself; and the secondary evidence on his theory, *i. e.* the stubs, were gone, and this, too owing to its own deliberate act of destruction thereof. What rule of law then prevented proof of the contents of the stubs, the best evidence which, under the circumstances, could be obtained? If a deed is lost, and the only copy thereof is also lost, evidence of the contents of such copy by one who has seen it is certainly the best evidence of which the case is susceptible. See *Joslyn* v. *Brockwell*, (Sup.) 13 N. Y. Supp. 311.

The cases cited by counsel for defendant are not in point. All they hold is that a copy taken from a copy is not competent when the original is in existence. The language of Judge Story in *Winn* v. *Patterson*, 9 Pet. 663–677, directly supports our view of the law: "We admit that the rule that a copy of a copy is not admissible evidence is correct in itself when properly understood, and limited to its true sense. The rule properly applies to cases where the copy is taken from a copy, the original still being in existence, and capable of being compared with it, for then it is a second remove from the original; or where it is a copy of a copy of a record, the record being in existence, * * * for then it

is also a second remove from a record. But it is quite a different question whether it applies to cases of secondary evidence where the original is lost, or the record of it is not, in law, deemed as high evidence as the original, or where the copy of a copy is the highest proof in existence." Moreover, it is evident from the testimony of the agent that the wheat tickets and stubs were practically duplicate entries, and each therefore, was an original entry.

Again it appears that the entries in the stubs were first made out, and that the wheat ticket was copied from it, and that the stubs were the memoranda from which the agent made up his report to the officers of the defendant at the home office. The other entries on the ticket were not properly entries made by defendant in its books at all. A wheat ticket embodies a contract between the warehouseman and the depositor of the grain, and is not an ordinary book entry, made by the depositary for its own convenience. Besides, the evidence was competent because it proved, after the loss of the entries themselves, a written declaration made by the defendant against its own interest, so far as plaintiff was concerned. Counsel for defendant concedes that the stubs themselves would be competent evidence against defendant, the tickets having been destroyed. The entries having been made by the agent in the ordinary course of business in relation to a transaction within the scope of his powers as agent, and at the very time the transaction took place, it was competent evidence as against the defendant because it was a part of the *res gestæ*, and not the narration by him of a past occurrence. The case is, therefore, the same as the case of a written declaration against interest made by an individual. That the contents of such a written declaration can be proved as against the individual after it is shown that the declaration itself has been destroyed can admit of no doubt. Certainly this should be the rule when the one making it has himself destroyed it. And in this case we have the additional circumstance that the defendant destroyed the written evidence which was prejudicial

to it after it knew that plaintiff was claiming that the wheat to which such evidence related was his, and that it would, therefore, be called on to pay him for it.

The judgment appealed from is affirmed. All concur.

(75 N. W. Rep. 264.)

GEORGE MONTGOMERY *vs.* GEORGE FRITZ.

Opinion filed April 23rd, 1898.

Account Stated—Correction—Burden of Proof.

An account stated can be opened for correction only upon the ground of fraud, mistake, accident, omission, or undue advantage, and the burden rests upon the party seeking to open the account.

Evidence Insufficient to Impeach Stated Account.

Evidence in this case *held*, on full consideration, insufficient to overcome the the strong *prima facie* case arising from an account stated.

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

Suit by George Montgomery against George Fritz. There was a decree for plaintiff, and defendant appeals.

Affirmed.

Geo. W. Freerks and *McCumber & Bogart*, for appellant.

Philetus Smith, for respondent.

BARTHOLOMEW, J. This was a foreclosure action. The indebtness secured was a promissory note of $1,400, given by the defendant and appellant to the plaintiff and respondent. The execution of the note and security was admitted, and defendant pleaded as a defense that the note was given for an alleged balance due from defendant to plaintiff upon an account stated between them, covering various monetary transactions theretofore had between said parties; that plaintiff had kept the books of accounts covering such transactions, and that he (plaintiff) stated to defendant that said balance was due from defendant to plaintiff by reason of said transactions; and that defendant,

believing and relying upon such statement, was induced to give, and did give, his note for such balance, but that in truth and in fact said representations and statements concerning said account so made by plaintiff were false and fraudulent, and that nothing was due or owing from defendant to plaintiff by reason of said transactions, and said note was wholly without consideration. The trial resulted in findings and decree in favor of plaintiff, and the case comes to this court upon the full record.

A number of errors are assigned upon the admission and rejection of testimony. Of course, in cases of this character, that come to this court strictly for trial *de novo*, under section 5630, Revised Codes, the trial court has no discretion in the matter of admitting evidence. All the evidence offered must be received. But a party may object to any evidence offered, and thereby bring the matter to the attention of the trial court, and he may have his objections entered of record, so that he may again bring the matter to the attention of this court. It would be absurd to suppose that the trial court, in reaching its conclusions, considers any evidence that it thinks improperly in the record. Nor is this court required, as in cases tried before a jury, to make any ruling for the guidance of the trial court upon a retrial of the particular case because final judgment is ordered by this court. Hence in these cases we may well omit all discussion of any question of evidence, where the point raised requires only the application of well known rules of evidence to the particular facts, and we find nothing more in this case. We make this remark in order that counsel may not conclude that the points raised have been overlooked in this class of cases.

Having admitted that the account in this case was settled and stated at the amount of the note, defendant accepts the legal proposition that it can be opened or corrected only on the ground of fraud, mistake, omission, accident, or undue advantage, and that the burden is upon him to establish the fraud upon which he bases his defense. Plaintiff concedes the right to open and correct the account for the reasons and in the manner stated, and,

as the parties are thus agreed upon the law that controls the case, it only remains to consider the evidence on the single question of fraud, as that is the only defense here pleaded. As no itemized account was ever presented, it is not possible for defendant to assign fraud upon any one item or transaction, nor does he seek so to do. He claims the right to investigate all the prior transactions between the parties, and this right is apparently conceded. The first transaction between these parties was upon February 11, 1893, and consisted in the purchase by defendant from plaintiff of a half interest in a stock of merchandise, and the building and lots where the same was kept, in the Villaage of Lidgerwood, in Richland County. The parties do not agree as to the contract price, there being a difference between them of about $200. Defendant paid no money on the purchase, but executed to plaintiff his promissory notes for $3,025. Plaintiff claims that another note for $175 was given a few days later. In April following, defendant purchased the other half of the real estate. The parties are not in accord as to the amount paid therefor, nor as to whether it was paid in property or notes. On May 27th following, defendant bought the other half interest in the stock. There is a difference between the parties, as shown by the testimony, as to the price thereof. There was no money paid, but notes were given. From February 11th to May 27th the parties were partners. On the last mentioned date the partnership was dissolved, defendant to have all outstanding accounts and pay all firm indebtednesss. Plaintiff also claims that he was to receive $200 extra for his services during such partnership. There were also some transfers of accounts back and forth, the exact nature or purpose of which we cannot fully comprehend from the evidence. During the summer the plaintiff opened a store in another town, and defendant shipped him certain goods from the store in Lidgerwood. Defendant says these goods amounted to $1,059. Plaintiff says they amounted to $800. On August 18, 1893, plaintiff purchased back the entire Lidgerwood stock. It was at that time that the account was stated. The price at which

the stock was figured in the settlement was $2,500, with an agreement that the same should subsequently be invoiced, and, if the invoice exceeded that sum, the amount was to be credited on the note then given for the balance due to plaintiff. At the time the stock was repurchased by plaintiff he paid therefor by delivering to defendant certain of defendant's notes that then amounted to over $4,200. Defendant gave a receipt for the notes thus returned. That receipt covered notes for $2,400, with interest, given on February 11, 1893, and notes for $1,597, with accrued interest, given on May 27th. These notes, we infer, drew 12 per cent. interest. Plaintiff, prior to that time, had received from defendant another note for $1,000, which was given to take up a note for $625, given February 11, 1893, and for certain transferred accounts. Defendant claims that when he gave the note of $1,400, in settlement, he supposed that this note for $1,000 was included among the notes delivered to him. Plaintiff testifies that such note was not to be delivered, and was not reckoned in the settlement. That note was secured by mortgage on the store building and ground. The case shows the defendant to be an intelligent business man. He is competent to conduct a store or keep a set of books. We cannot conceive how he could have given a receipt for the notes returned, wherein each note was particularly described, and yet claim that he thought the note for $1,000 was returned. Intelligent men, in a deal involving no larger amount, could hardly make a mistake of $1,000. Certainly, we would require the most positive proof to support such a mistake. But even a proven mistake would not answer, under the pleadings. The defense is fraud, and nowhere in his testimony does defendant claim that plaintiff told him, directly or indirectly, that the $1,000 note was or would be returned. We have not given the details of the transactions between these parties, but we have given enough to show that there was a large aggregate difference between them. The evidence shows that when the balance was first announced defendant questioned it. He thought it was too large. But he testifies that he was not hurried; that

no threats or inducements were used; that he took all the time that he wanted, and then deliberately signed the note and the receipt. He had free access to the books, and was, so far as the evidence shows, just as competent to arrive at a correct balance as was plaintiff. We do not believe fraud was ever predicated upon such a state of facts. That defendant lost money in the transaction may be true, but that does not prove fraud. We can see several reasons for his losing money. We will mention only one. When he purchased the goods the invoice price was "lumped" at $3,500. To that was added 10 per cent. for freight. As we read the testimony, while he owned the stock he increased it by purchases as much or more than he decreased it by sales. When he sold he sold for $2,500, with an agreement that an invoice should be taken and he credited on his note for the excess over $2,500. The stock invoiced $2,613, and defendant testifies that he expected that it would invoice at least $1,000 more, as it must have done had not the original "lump" estimate been excessive. We find nothing connected with this case, either in the attendant circumstances or the evidence, that shows any such fraud as is required to overcome the strong *prima facie* case that arises on an account stated. All concur.

Affirmed.

(75 N. W. Rep. 266.)

THE STATE OF NORTH DAKOTA *vs.* JOHN B. HAYNES.

Opinion filed May 10th, 1898.

Instructions—Corroboration of Accomplice.

The defendant was charged with burglary. At the close of the evidence defendant's counsel requested the trial court to charge the jury in direct terms that one R., a witness who had testified in behalf of the state, was an accomplice in the burglary, and hence that his evidence, without corroboration, would not sustain a conviction. The request was refused. Under the evidence, *held*, that the refusal was not error.

Failure to Instruct When no Request Made is Not Prejudicial Error.

There was direct evidence from both sides that R. was not an accomplice in the burglary, yet the evidence as a whole tended in some degree to cast suspicion upon R. as an accomplice. The theory of the defendant's counsel was that the testimony showed that R. was a participant in the crime. Under such circumstances it would have been correct practice to have requested the trial court to submit the question of R.'s connection with the crime to the jury, with proper instructions as to the law governing the testimony of an accomplice. No such request was made; hence no error can be predicated upon the failure of the court to so instruct the jury. Mere failure to instruct when not requested to do so is not prejudicial error.

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

John B. Haynes was convicted of burglary, and appeals. Affirmed.

M. A. Hildreth, for appellant.

In view of the courts charge that there was no direct testimony but the testimony of the witness Reams, he should have instructed that Reams was an accomplice and the refusal of the court to give defendant's request on this subject was prejudicial error. *Knowlan* v. *State*, 19 Ohio Rep. 13; 10 Crim. L. Mag. 172; *Peo.* v. *Ames*, 39 Cal. 403; *Peo.* v. *Thompson*, 50 Cal. 480, Abb. Tr. Cl. Bf. 452. When the testimony against the defendant is that of an accomplice, failure of the court to instruct the jury on the law upon that phase of the case is error. *Brown* v. *State*, 20 S. W. Rep. 924; *State* v. *Coudotte*, 7 N. D. 109, 72 N. W. Rep. 913; 2 Thompson on Trials, § 2427; *Peo.* v. *Elliot*, 106 N. Y. 292. If the jury had been instructed upon the point in question, they might have found that the evidence was insufficient to corroborate Reams. *Peo.* v. *Maine*, 114 Cal. 634; *Peo.* v. *Smith*, 98 Cal 218; *State* v. *Kent*, 4 N. D. 577; 2 A. and E. Enc. L. 393. The court should have charged the language of the statute as to accomplice and the necessity for his corroboration. *Owens* v. *State*, 20 S. W. Rep. 558; *Peo.* v. *O'Neil*, 109 N. Y. 267; *Com.* v. *Holmes*, 127 Mass. 424; *State* v. *Maney*, 54 Conn. 178; 9 Cr. L. Mag. 32.

Fred B. Morrill, State's Atty., for respondent.

The question as to whether or not Reams was an accomplice, was for the jury and not for the court to determine. *State* v. *Lawler*, 9 N. W. Rep. 702; *Peo* v. *Sansome*, 33 Pac. Rep. 202; *Peo.* v. *Bollinger*, 11 Pac. Rep. 799; *Com.* v. *Clover*, 111 Mass. 395; *Dill* v. *State*, 28 S. W. Rep. 950; *Williams* v. *State*, 25 S. W. Rep. 629; 1 A. and E. Enc. L. 2nd Ed. 393. The omission of the trial judge to charge the jury upon a particular point is not error, unless the court is asked to do so at the trial by a proper request. *State* v. *Lawler*, 9 N. W. Rep. 702, 28 Minn. 216.

WALLIN, J. The defendant was accused jointly with one Thomas McKenzie of the crime of burglary in the third degree, and after a verdict of guilty was sentenced to a term in the penitentiary. Upon a statement of the case, embracing only such evidence as bears upon the specific errors assigned upon the record, a motion for a new trial was made and denied. All errors assigned in this court have reference to the instructions to the jury as given, or as requested to be given by counsel and refused. No question as to the sufficiency of the evidence to sustain the verdict arises upon the record. The information charges, and the evidence tends to show, that a burglary was committed on the 16th day of November, 1896, at Hunter, in Cass County, by breaking into the Great Northern depot, and blowing open a safe therein. The fact of the commission of the crime was established by evidence beyond question, and was not controverted by evidence. To connect the defendant with the commission of the offense, the state, among others, introduced one James Ream as a witness, who testified, in substance, that he met both defendants (Haynes and McKenzie) at Mayville, N. D., on or about November 10, 1896, and kept in their company until they reached Moorhead, Minn., on the second day after the burglary. He said further that he was in company with the defendants when they reached the village of Hunter, in the evening preceding the burglary, and that all of them lay down and went to sleep that

evening in the school house at Hunter. He further testified that when he awoke about 3 A. M. the next morning the defendants had just returned from the town, and that he heard them talk about the burglary in the depot. He stated further that all of them quitted Hunter together about 3:30 that morning, and did not part company until they reached Moorhead. This witness testified also that he was not present at the time the safe was blown open, but, on the contrary, was asleep in the school house, and did not know of the burglary until his companions returned, and talked of the matter in his presence. On cross-examination he admitted, in effect, that he had heard enough from his companions before reaching Hunter to satisfy him that some burglary was being contemplated; just where he did not know; he admitted that he was willing to participate in it, but also states that he did not do so as a matter of fact. The defendant McKenzie pleaded guilty to this charge, and was sent to the penitentiary. While there, his deposition was taken, and the same was put in evidence by the defendant. McKenzie testified squarely that the defendant Haynes was not present when the burglary was committed at Hunter, and that he did not participate at all in the burglary. He further testified that "there were two concerned in that burglary, and I was one of them; the other one was Conlin." Referring to the witness James Ream, McKenzie testified that Ream was in company with himself and Conlin for some days previous to the burglary; was at Hunter when the crime was committed, and continued with them until the three reached Moorhead together the second day after the commission of the offense. This witness did not testify in terms that Ream actually participated either in the criminal act or in planning the same.

At the close of the testimony the defendant, by his connsel, requested the court to instruct the jury as follows: "That the witness Ream is an accomplice in this case, and before you can convict the defendant upon the testimony of Ream you must find that he is corroborated by evidence independent from said accomplice tending to connect the defendant with the commis-

sion of the crime" This request was refused, and the ruling is alleged as error in this court. We are clear that the instruction was properly refused. The evidence in our judgment, tended to show that Ream did not actually commit the offense, or aid in its commission. If he did not, then it would have been manifestly improper to have charged the jury that Ream was an accomplice, and that, consequently, his evidence would require corroboration before a conviction could be had thereon. The theory of the defense is that Ream was an accomplice, and the fact that he was in company with the guilty parties, both before and after the burglary, and the further fact that he admits that he was willing to participate in a burglary if an opportunity offered to do so, lends color to this theory. Upon the evidence we think it would have been proper to request the court to submit to the jury the question of Ream's relations to the crime, with instructions that, if they found that he was an accomplice, his testimony must be corroborated to sustain a conviction. But no such request was made, and under the direct evidence in the case we think the court properly refused to charge in terms that Ream was an accomplice. *State* v. *Lawlor*, (Minn.) 9 N. W. Rep. 698. When not requested to instruct, failure to do so is not reversible error.

The court instructed the jury as follows: "You are further instructed in this case that there is no positive and direct testimony of the defendant's guilt except as to the evidence of the witness Ream. The evidence against him is largely what is termed in law circumstantial evidence." Error is assigned upon this instruction, and counsel contends that the evidence of both McKenzie and Haynes is direct and positive in character, and that both testified pointedly that the defendant Haynes did not participate in the burglary. We fail to see the force of this criticism of the instruction. The record shows that Ream was the only witness who testified directly as to facts tending to show that Haynes was guilty. All other evidence in support of the charge was of a circumstantial character. The fact that both McKenzie and Haynes contradicted Ream does not have any tendency to show

that the court was not entirely correct in saying to the jury that Ream was the only witness who gave positive and direct testimony of the defendant's guilt.

Error is also assigned upon the following instruction: "I charge you further that in weighing the testimony of a witness you should take into consideration his general character, what his business is and has been, who he is, where he comes from, and what his antecedents are, if the same have been proven. These are all circumstances which it is proper for you to consider in determining for yourself just what weight should be given to the testimony of any particular witness, either for the state or for the defendant, who has testified in the case." We fail to see wherein this instruction is faulty. It is purely cautionary, and is fair and impartial as between the witnesses for the state and those of the defendant. It appears that the circumstances of the case warranted some instructions concerning the relative weight of the testimony. The witness Ream, as he admitted on the stand, had been placed in a reform school for bad conduct at the instance of his father, and had escaped therefrom, and was found in company of criminals. The witness McKenzie had pleaded guilty to this burglary, and was in the state's prison when he gave his deposition. These facts would warrant the court in its cautionary observations to the jury to which counsel have excepted. We have carefully read the charge of the court, and are fully satisfied that it embraces a fair and impartial exposition of the law applicable to the evidence and facts of the case, and are satisfied that no substantial right of the defendant has been prejudiced either by the court's instructions to the jury or by its refusal to give instructions requested by counsel. The case turns wholly upon well established principles of law, and therefore we deem it unnecessary to cite further authority to sustain the views we have expressed in this opinion.

The order and judgment will be affirmed. All the judges concurring.

(75 N. W. Rep. 267.)

NOTE—For opinion upon first appeal in this case see *State* v. *Haynes*, Ante 70.

THE MERCHANTS NATIONAL BANK OF BISMARCK, N. D. *vs.* WM. BRAITHWAITE, *et al.*

Opinion filed May 12th, 1898.

State District Court Successor of Territorial District Court.

On the admission of North Dakota into the federal union, the State District Court became the successor of the Territorial District Court as to all actions no longer pending, and the judgments of such Territorial District Court passed under the jurisdiction of the State District Court. Such State District Court has power to issue executions thereon, and the judges thereof have authority to institute supplementary proceedings based upon such judgment, as in the case of a judgment rendered in the State District Court.

Execution Upon Judgment—Limitation.

A judgment ceases to be valid after the expiration of 10 years from the recovery thereof, unless suit is brought thereon within 10 years, and in even that case the judgment is dead for all purposes except that of supporting such action.

Supplementary Proceedings Fall When Judgment Barred.

Thereafter supplementary proceedings, though instituted while the judgment was alive, fall to the ground, and the defendant may move to have them set aside on the ground that the judgment has ceased to be valid. Such proceedings are not an action on the judgment, but are in the nature of a creditors' suit to enforce the collection thereof. Hence their pendency is no more effectual to keep alive the judgment than such a suit or an execution would be.

Shortening Statute of Limitations.

The legislature may lessen the statutory period within which actions must be brought even as to existing causes of action, provided the suitor has a reasonable time in which to sue after the statute making the change is passed.

Computation of Time Under Statute Shortening Limitation.

When the statute is not to go into effect until a day subsequent to that on which it is passed, the reasonable time is computed from the day of its passage and not from the day on which it becomes effective.

Statute Need Not Fix Limit as to Existing Causes of Action.

It is not necessary to the validity of a law which lessens the time in which an action may be brought that it should as to existing causes of action fix a particular period after the enactment of the law within which, in any event, such causes of action may be enforced.

Court Will Determine What is a Reasonable Time.

In the absence of such a provision, 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.

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

The plaintiff on the 15th day of April, 1886, recovered a judgment in the District Court of Burleigh County, Dakota Territory, against the defendants John A. McLean, and William Braithwaite for the sum of $973.35. The judgment was based upon a note on which Braithwaite was surety for McLean. Execution issued April 17th, 1890 and was returned wholly unsatisfied May 25th, 1891. On the 10th day of January, 1894, the Judge of the District Court made an order for the examination of Braithwaite in supplementary proceedings, and restraining him from disposing of any property. After disclosure made and on January 16th, 1895, an order was made appointing a receiver of Braithwaite's property. On the first day of February, 1896, the Judge of the District Court made an order discharging the receiver and cancelling his bond, and continuing the restraining order against Braithwaite. On the 3rd day of February, 1896, the court of its own motion made an order to show cause why a receiver should not be appointed in place of the one discharged, to which Braithwaite made answer on the 21st day of February, 1896. Nothing further was done in the matter until April 1st, 1897, when Braithwaite obtained an order to show cause why said proceedings should not be dismissed, because as he averred the Judge of the District Court of Burleigh County, State of North Dakota, before whom the supplementary proceedings were instituted is not and never was the judge of the court in which the judgment was recovered, nor is he the successor of said judge. That since the institution of the supplementary proceedings, the judgment and all rights to enforce the same by action or otherwise have become barred by the statute of limitations. On May 17th, 1897, the order to show cause was discharged and defendants motion to dismiss the proceeding denied; A certificate of deposit placed in the hands of the clerk prior thereto upon direction of the court as a condition to the vacation of the the restraining order, was ordered endorsed and delivered to plaintiff in satisfaction of its judgment. Defendant Braithwaite appealed. Reversed.

Newton & Patterson, for appellant.

The jurisdiction and procedure in supplementary proceedings are entirely a creation of the statute. *Clark* v. *Bengenthal*, 8 N. W. Rep. 865. The proceedings are commenced by an order from the judge of the court. Section 5174, Compiled Laws, section 5562, Revised Codes. The "judge of the court" clearly indicates the judge of the court where the judgment was rendered. *Second Ward Bank* v. *Upmann*, 12 Wis. 555; *Miller* v. *Rossman*, 15 How. Pr. 10; *Biting* v. *Vanderberg*, 17 How. Pr. 80. It is not a proceeding in court. *Biting* v. *Venderberg*, 17 How. Pr. 80; 2 Freeman Executions, § 397. The court in which the judgment in question was rendered viz: the Territorial District Court ceased to do business and went out of existence in November, 1889, two years after the rendition of this judgment. In the nature of things there could be no judge of a court that did not exist when the proceedings were commenced. By the provision of the constitution, section 85, all judicial power and jurisdiction in matters of judicial cognizance is vested exclusively in the courts and section 5174, Comp. Laws, in so far as it confers jurisdiction upon the judge of the court is repealed or abrogated. This provision of statute is embraced within the implied exception of section 2 of the schedule, and was not continued in force as a law of the state. *Spencer Creek Water Co.* v. *Vallejo*, 48 Cal. 70; *Risser* v. *Hoyt*, 18 N. W. Rep. 611. All causes pending in the territorial courts were transferred to the Federal or State Courts. Enab. Act. § 23; § § 567, 568, and 704, Rev. St. U. S. The judgment in question was not a cause pending at statehood. All records and papers of the territorial courts were subject to disposition by the United States. *Benner* v. *Porter*, 9 How. 235; 13 L. Ed. 119–124. Even if it should be held that the record of this judgment passed into the jurisdiction and possession of the State District Court, because of section 6 of the schedule,—it did not become a judgment or record of the state court. *Hunt* v. *Palao*, 4 How. 589; 11 L. Ed. 1115; *Benner* v. *Porter*, 9 How. 235. The statute of limitations when this judgment was rendered was twenty years.

Sections 37, 52, and 53, Code Civ. Pro. 1878. By the Revised Codes which took effect January 1st, 1896, the right to commence an action upon a judgment is limited to ten years. Sections 5199, 5200, Revised Codes. This code was approved by the governor March 2nd, 1895, ten months before the code went into effect and thirteenth and one-half months before the time limited therein, as a bar had elapsed since the rendition of the judgment. The limitation of subdivision 1, section 5200, Revised Codes, embraces domestic judgments. *Mason* v. *Cronise*, 20 Cal. 212. Statutes of limitation relate to the remedy, and the remedy is governed by the *lex fori*. *McClung* v. *Silliman*, 3 Pet. 270, 7 L. Ed. 676; *Bank* v. *Donnelly*, 8 Peters, 361; 8 L. Ed. 974; *McElmoyle* v. *Cohen*, 13 Pet. 312; 10 L. Ed. 177; *Townsend* v. *Jemison*, 13 L. Ed. 194; *Bigelow* v. *Bigelow*, 12 Metc. 268; *Lincoln* v. *Battelle*, 6 Wend. 475; 3 Am. and Eng. Enc. L. 583. The question of the period of limitation is one of policy or expediency on the part of the legislature. *Falconer* v. *Dorman*, 7 Wis. 338; *Horbach* v. *Miller*, 4 Neb. 31; *O'Brien* v. *Gaslin*, 30 N. W. Rep. 274; *Hawkins* v. *Barney*, 5 Pet. 457. This is true of causes of action already accrued, provided a reasonable time is allowed. *Howell* v. *Howell*, 15 Wis. 60; *Koshkonong* v. *Burton*, 14 Otto, 668; *Bigelow* v. *Bemis*, 2 Allen 496; *Dale* v. *Frisby*, 59 Ind. 520; *Mitchell* v. *Clark*, 110 U. S. 633; *Terry* v. *Anderson*, 5 Otto, 628 *Holcombe* v. *Tracy*, 2 Minn. 201; *Smith* v. *Packard*, 12 Wis. 412; *Hyman* v. *Boyne*, 83 Ill. 256; *Barron* v. *Wayne*, 37 Mich. 287; *Sampson* v. *Sampson*, 63 Me. 328; *Dyer* v. *Gill*, 32 Ark. 410; *Gullotel* v. *Mayor*, 55 How. Pr. 114; *Parker* v. *Kane*, 4 Wis. 1; *Von Baumbach* v. *Bade*, 9 Wis. 510; *Eaton* v. *Supervisors*, 40 Wis. 668; *Baker* v. *Supervisors*, 39 Wis. 444. In determining what is a reasonable time, account must be taken of the time between the passage of the limitation statute and the date of its taking effect. *Holcombe* v. *Tracy*, 2 Minn. 201; *Stine* v. *Bennett*, 13 Minn. 138; *Hayward* v. *Judd*, 4 Minn. 483; *Smith* v. *Morrison*, 22 Pick. 430; *Hedger* v. *Rennaker*, 3 Metc. (Ky.) 258; *Burwell* v. *Tullis*, 12 Minn. 578. This act took effect thirty days after the governors proclamation.

In re Henricks, 5 N. D. 114. The ten year limitation did not expire until four and one-half months after the governors proclamation. This was a reasonable time. *Auld* v. *Butcher*, 2 Kan. 135; *State* v. *Jones*, 21 Md. 432; *Stevens* v. *St. Louis*, 43 Mo. 385; *Adamson* v. *Davis*, 47 Mo. 286; *Kenyon* v. *Stewart*, 44 Pa. St. 179; *Koon* v. *Brown*, 64 Pa. St. 55; *O'Bannon* v. *Louisville*, 8 Bush. 348; *Lockhart* v. *Yuser*, 2 Bush. 231; *Smith* v. *Morrison*, 22 Pick. 430; *Bigelow* v. *Bemis*, 2 Allan, 496. Supplementary proceedings after execution returned are entirely ancillary. *Barker* v. *Dayton*, 28 Wis. 367; *Bank* v. *Spencer*, 15 How. Pr. 415; *Dresser* v. *Van Pelt*, 15 How. Pr. 19. The remedy by execution though not named in the statute falls within the statutory bar to a remedy by action. *Barron* v. *Wayne*, 37 Mich. 287; *White* v. *Moore*, 38 S. W. Rep. 505; *Peters* v. *Vawter*, 10 Mont. 201. The same is true in regard to supplementary proceedings. *Newell* v. *Dart*, 9 N. W. Rep. 732; *Dole* v. *Wilson*, 40 N. W. Rep. 161; *Young* v. *Bemer*, 4 Barb. 442; *Jerome* v. *Williams*, 13 Mich. 521; *P. & C. R. Co.* v. *Byers*, 32 Pa. St. 22; *Milber* v. *Bartlett*, 106 Mo. 381; *Isaac* v. *Swift*, 10 Cal. 71. The order appointing receiver not having been recorded as required was abortive. Section 5599, Rev. Codes; *Dubois* v. *Cassidy*, 75 N. Y. 298; *Manning* v. *Evens*, 19 Hun. 500; *Wing* v. *Disse*, 15 Hun. 190; *Hayes* v. *Buckley*, 53 How. Pr. 173–187. The order of court directing the payment of the certificate of deposit to plaintiff was without authority of law. *Pattee* v. *Low*, 16 How. Pr. 549; *Christenson* v. *Tostevin*, 53 N. W. Rep. 461.

Boucher & Philbrick, (*Cochrane & Feetham*, of counsel,) for respondent.

Statutes limiting the time within which proceedings may be commenced cannot affect proceedings already begun. *Driggs* v. *Williams*, 15 Abb. Pr. 477; *Ludeman* v. *Hirth*, 55 N. W. Rep. 449; *Palen* v. *Bushnell*, 4 N. Y. Supp. 63. A supplementary proceeding is not an action upon a judgment within the meaning of the statute limiting to ten years, the time within which an action upon a judgment may be commenced. Section 5200, Rev. Codes,

Rose v. *Henry*, 37 Hun. 397; *Kincaid* v. *Richardson*, 25 Hun. 237; 9 Abb. New Cases, 315; *Bolt* v. *Hauser*, 10 N. Y. Supp. 397; *Green* v. *Hauser*, 9 N. Y. Supp. 622; *Palen* v. *Bushnell*, 4 N. Y. Supp. 63; *Wintermire* v. *Westover*, 14 N. Y. 16; *Miller* v. *Rossman*, 15 How. Pr. 10; *Owen* v. *Dubignac*; 9 Abb. Pr. 184; *Bolt* v. *Hauser*, 11 N. Y. Supp. 366; 57 Hun. 567; *Johnson* v. *Ry. Co.*, 54 N. Y. 416; *Herder* v. *Collier*, 6 N. Y. Supp. 513; *Campbell* v. *Ebben*, 2 N. Y. 615; *Woodward* v. *Hall*, 75 Wis. 406, 44 N. W. Rep. 114.

CORLISS, C. J. This appeal is from two orders. One is an order denying defendant's motion to set aside certain orders in proceedings supplementary to execution, and granting to the plaintiff certain relief, not necessary to be now specified. The other order required defendant to deposit in court a sum of money as a condition of vacating a restraining order issued in such proceedings. The sweeping assertion is made by counsel for defendant that the proceedings and all orders therein are void for want of jurisdiction in the judge by whose order such proceedings were instituted and by whom the different orders therein have been made. The judgment on which such proceedings were based was recovered in the District Court of the Territory of Dakota in 1886, three years before statehood. The statute authorizing supplementary proceedings, which was then in force, was section 5174 of the Compiled Laws. This section declared that the order to examine the judgment debtor might be issued by the Judge of the District Court, and that all subsequent orders must be made by the same judge. The language of the statute is that the judge of the court having power to issue execution on the judgment, and out of which the execution was in fact issued, shall possess the power to make the order for the examination of the debtor and all subsequent orders. It is obvious that, as these proceedings are purely statutory in character, no other judge has any jurisdiction in the matter, because no other judge is named in the statute. It is urged that as the judgment is a judgment of a territorial court, and as that court has ceased to exist, no state court has any power to issue process to enforce such judgment

by execution. Hence it is insisted that the execution, which was in fact issued by the state court in 1890, is void, and that the proceedings based thereon must necessarily fall to the ground for want of foundation. Moreover, it is claimed that, as the state court was not the court which could issue execution on the judgment, the judge thereof is not the judge who is authorized by § 5174, Comp. Laws, (which was continued in force by the state constitution,) to grant the order made in this case to examine the judgment debtor in supplementary proceedings. We cannot agree with counsel for plaintiff in this contention. The question is one of jurisdiction after statehood over the records and judgments obtained in actions brought in a territorial court. The jurisdiction which formerly was vested in the territorial court over such records and judgments, congress must have intended to be transferred to some other tribunal. We cannot believe that it was the purpose of that body to take from a great mass of judgments in the various courts of the different territories mentioned in the enabling act all force save that of a conclusive adjudication, and compel the plaintiffs therein to go through the formality of bringing suit upon them in the courts of the different states to be admitted into the Union, the same as upon a foreign judgment or the judgment of a sister state. The old courts having jurisdiction over cases in which judgments had been ordered were to be swept away. New courts were to take their place possessing similar jurisdiction. Those judgments were judgments rendered within the same territory to be embraced within the new states. Why, under such circumstances, congress should withhold its consent that the judgments should become the judgments of the state courts which should succeed to the same general jurisdiction as that of the territorial tribunals in which such judgments were rendered is inexplicable. That it did not withhold such consent is clear; and, even if we were in doubt on the point, our duty would be plain. It has been settled by an authority to which we must defer. In *Glaspell* v. *Railroad Co.*, 144 U. S. 211, 12 Sup. Ct. 593, the Federal Supreme Court held

that as to an action not pending at the time of the admission of North Dakota into the Union, but in which a judgment had been rendered in the Territorial District Court, there was no jurisdiction whatever in the Federal Court, but that exclusive jurisdiction of such a case was vested in the State District Court, which was the successor of such territorial court. The case was remanded to the State District Court, the Federal Supreme Court holding that jurisdiction over the judgment in that action rendered by the Territorial District Court had been by the enabling act transferred to the state court. The action in which the judgment was rendered on which are founded the supplementary proceedings, the validity of which are controverted, was not a pending action, within the meaning either of our statute or of the enabling act. The time to appeal therefrom had expired when the state was admitted, and, even if it had not yet expired, still the suit was not pending, because no proceedings looking to a new trial were then pending, nor has any step to review the judgment on appeal ever been taken in the case. In construing the enabling act, the court in the Glaspell case said that that act had transferred pending cases in which the United States was a party to the Federal Court, and pending cases over which a Federal Court would have no jurisdiction to the state courts, and that the jurisdiction over all cases which were no longer pending, and over the records and judgments therein, was vested in the state courts, without reference to the question whether such cases must have been brought in a state or a Federal Court, had the territory been a state at the time such actions were commenced. The enabling act, by its express provisions and the implications thereof, divided all actions, so far as the jurisdiction thereof was concerned, into two great classes,—those which were pending and those which were not pending at the time of statehood. It declared that as to pending actions jurisdiction over all actions to which the United States was a party should vest absolutely in the new Federal Courts created in such new states; that as to all suits over which the Federal Courts would have had no jurisdiction had the

territory been a state at the time they were brought, the jurisdiction thereof should pass to the proper state courts; and that with regard to the middle class of cases, *i. e.* those in which the state and Federal Courts would have had concurrent jurisdiction had the territory then been a state, either of the parties to the proceedings might determine whether he would continue the litigation in the state or in the Federal Court. Until the necessary steps should be taken to transfer such cases, the enabling act contemplated that the proper court for them to be carried on in was the state court, and not the Federal Court. It was only after an application for a transfer had been made that the state court was to lose jurisdiction. Until then the jurisdiction over the case was lodged in the state, and not in the Federal Court; and, unless the application for such transfer should be made in time, the jurisdiction of the state court over the case would become absolute. Section 23, Enabling Act; *State* v. *Barnes*, 5 N. D. 350, 65 N. W. Rep. 688. Congress declared that, with respect to all pending actions save those belonging to a single class, the jurisdiction thereover should vest in the state courts temporarily at least, and with regard to some of them permanently; and that, even in those cases in which it was in the power of either party to divest the state court of jurisdiction, the state court should retain jurisdiction if neither party should make a timely application for that purpose. As to actions which were no longer pending, there was no reason for providing that jurisdiction over such cases should be transferred to the federal courts, whether with or without the application of either of the parties. In such cases the merits would no longer remain open to investigation, and therefore there would be no reason for taking jurisdiction of those cases away from the state courts. No prejudicial, hostile state action could be apprehended. What was more natural and reasonable than to vest jurisdiction over such cases in the state courts? Considering the provisions of the enabling act, in connection with the failure of congress to vest jurisdiction over territorial judgments in the Federal Courts, and the fact that congress in passing that act must

have contemplated that the state constitution would create state courts having jurisdiction similar to that possessed by the territorial courts, and that these would be the courts better fitted to enforce judgments throughout the different counties in the state, we must infer an implied assent by congress that jurisdiction over cases not pending should vest in state courts exclusively. Otherwise we must assume that those cases were to be left without any court possessing jurisdiction over them for any purpose whatever, for it is clear that no jurisdiction over them is vested by the enabling act in the Federal Courts. Said the court in *Glaspell* v. *Railroad Co.*, 144 U. S. 211, 12 Sup. Ct. 596: "The record of cases of exclusive federal jurisdiction which have gone to judgment should, indeed, be transmitted to the circuit court, and the judgments there enforced; but, where final judgment has been rendered in cases of concurrent jurisdiction, no reason can be assigned for, nor do the terms of the act of congress contemplate such a transfer." If it be said that the assent of the people of the state was requisite to vest jurisdiction in the state courts over cases which had ceased to be pending at the time the state was admitted because they had theretofore terminated in judgment, we find this assent in the constitution. Section 6 of the schedule provides: "Whenever the Judge of the District Court of any district elected under the provisions of this constitution shall have qualified in his office, the several causes then pending in the District Court of the territory within any county in such district, and the records, papers and proceedings of said District Court, and the seal and other property pertaining thereto, shall pass into the jurisdiction and possession of the District Court of the state for such county, except as provided in the enabling act of congress." This section transferred all records, papers, and proceedings of the Territorial District Court to the jurisdiction of the State District Court, without reference to the question whether the case was or was not pending. By this section the people, speaking through their fundamental law, have, with the assent of congress, vested jurisdiction over judgments of the Territorial District Courts, in

the proper State District Court, and the judgments were thereafter as much judgments of the State District Court as though they had been rendered by such courts. That is the court which must issue execution upon such judgment, and therefore it is the court which must furnish the judge who is authorized to make all orders in supplementary proceedings based thereon. The opinion of the Federal Supreme Court in *Benner* v. *Porter*, 9 How. 235, appears to us to support our ruling on this point: "We have said that the assent of congress was essential to the authorized transfer of the records of the territorial courts, in suits pending at the time of the change of government, to the custody of state tribunals. It is proper to add, to avoid misconstruction, that we do not mean thereby to imply or express any opinion of the question whether or not, without such assent, the state judicatures would acquire jurisdiction. That is altogether a different question. And, besides, the acts of congress that have been passed, in several instances, on the admission of a state, providing for the transfer of the federal causes to the District Court, as in the case of the admission of Florida, already referred to, and saying nothing at the time in respect to those belonging to state authority, may very well imply an assent to the tranfer of them by the state to the appropriate tribunal. Even the omission on the part of congress to interfere at all in the matter may be subject to a like implication."

We see no force in the contention of counsel for defendant that under the constitution a judge no longer has power to perform any judicial act, but that the same must be performed by the court, and that, therefore, a judge cannot make an order in supplementary proceedings. It is entirely competent for the legislature, under our constitution, to authorize a judge to exercise judicial functions when not sitting as a court, and territorial laws of this character, such as section 5174, Comp. Laws, were not affected thereby. In Minnesota, as in this state, the judicial power is vested in the courts named, and not in judges. (Const. Minn. Art. 6, section 1;) and yet section 5486 of the General

Statutes of 1894 authorizes the District Judge to make orders in supplementary proceedings, and his power to do so has never been questioned in that state.

It is insisted that the proceedings are all irregular because the execution issued upon the judgment was not returned within the statutory time. But there is nothing in the statute which makes it indispensable that this should be done to sustain these proceedings. All that is required is that the execution shall be issued and returned unsatisfied. This was done. Moreover, it was rather late, after submitting to examination and after the appointment of a receiver without moving to dismiss on this ground, to raise the point for the first time on a motion to dismiss all the proceedings and set aside all the orders made therein. *Baker* v. *Herkimer*, 43 Hun. 86; *Ammidon* v. *Walcott*, 15 Abb. Prac. 314.

It appears to be urged as one of the reasons why defendant's motion should have been granted that his examination disclosed legal assets upon which execution could be levied. This might furnish a sufficient reason why a District Judge should, in his discretion, refuse to appoint a receiver or withhold the appointment of one until such legal assets had been exhausted. But, even in such a case, we could not disturb an order appointing a receiver. The discretion is one with the exercise of which we would not interfere. Receivers in such proceedings are appointed even when no property is found on the examination. The receiver may be able to discover some. There is nothing to show that these alleged legal assets are sufficient to pay the plaintiff's judgment. Moreover, the order appointing the receiver was not appealed from, and the point cannot be raised on an appeal from an order refusing to dismiss the proceedings and all orders thereunder. The proper time to present reasons why a receiver should not be appointed is when the application for his appointment is made. If the objection to such appointment is overruled, the defendant must review the decision by an appeal from the order appointing the receiver. If he suffers the time to appeal from such order to pass, he cannot thereafter raise the point.

After the receiver had been appointed, he applied to the court for a discharge on the ground that he was about to leave the state, and desired to be relieved from the further discharge of the duties of the receivership. His application was granted, but in the same order the restraining order was continued, and subsequently an order to show cause why another receiver should not be appointed to fill the vacancy was issued by the District Judge. What disposition has ever been made of this motion does not appear. The motion appears to be still pending. Defendant then moved that the proceedings be dismissed, and also that the restraining order be vacated. The motion to dismiss was denied. The motion to vacate the restraining order was granted on condition. The order is in the following words: "Ordered, that the said restraining order heretofore existing and now in force in such matter be, and the same is hereby, dissolved upon condition, and when the said William Braithwaite shall deposit the sum of nineteen hundred and twenty-five dollars with the Bismarck Bank, of Bismarck, at 5 per cent. interest per annum, upon certificate of special deposit, and payable to Walter Skelton, clerk of this court, upon the order of the court, after a final determination of this proceeding, or as may be finally determined in this proceeding, in whatever court it may be finally decided, and that said certificate be deposited immediately with the clerk of this court, and to be disposed of as hereinbefore stated; and that the plaintiff give a good and sufficient undertaking, with sureties to be approved by the court, in the sum of five hundred dollars, conditioned that the plaintiff will pay the said William Braithwaite, in case he prevails, his costs and disbursements of this proceeding, and all loss of interest upon the amount of said special deposit, not exceeding the legal rate of seven per cent. per annum, less the rate collected on said special deposit; and that the said undertaking and a copy thereof served upon the said Braithwaite's attorneys, and the original filed with the clerk of this court, on or before the end of fifteen days from the date hereof, or said sum so deposited to be immediately returned to

said William Braithwaite and released from this order." When the motion to dismiss the proceedings was denied the order then entered contained the following directions: "Ordered, that the certificate of deposit heretofore placed in the hands of the clerk of this court for the sum of $1,925 be indorsed and delivered by said clerk to the plaintiff herein in accordance with the order heretofore made in this proceeding, and dated the 3d day of April, 1897, which said order is hereby referred to and made a part hereof; and that the money represented by and so received by the plaintiff upon said certificate be applied upon the judgment in this action and the costs and disbursements incurred in said supplementary proceedings."

It is urged that the motion to dismiss the proceedings should have been granted, and that, therefore, the order denying defendant's motion to dismiss should be reversed. This claim of defendant is based on the postulate that the judgment at the time the motion was made had ceased to have any vitality. More than 10 years had at that time elapsed since its recovery. It is true that at the time the judgment was rendered the law permitted an action thereon to be brought within twenty years from the date of its rendition. Comp. Laws, sections 4848, 4849. But on January 1, 1896, when the Revised Codes went into effect, the limitation period was reduced to 10 years. Rev. Codes, sections 5199, 5200. The judgment having been recovered April 15, 1886, the plaintiff then still had after January 1, 1896 (3½ months,) in which to commence an action thereon, and secure a new judgment, which would be good for another period of 10 years. It is claimed by counsel for defendant that the plaintiff had a reasonable time in which to sue, under the new limitation law, and that, therefore, it will not impair the obligation of any contract right of the plaintiff to hold that the new statute, which in terms embraces past as well as future judgments, controls its rights. It is well settled that the time in which to commence an action may be lessened as to existing causes of action, provided the suitor has still a reasonable time after the new law is passed in

which to commence his suit. *Howell* v. *Howell*, 15 Wis. 60; *Koshkonong* v. *Burton*, 104 U. S. 668, and cases cited; *Bigelow* v. *Bemis*, 2 Allen, 496; *Dale* v. *Frisbie*, 59 Ind. 530; *Mitchell* v. *Clark*, 110 U. S. 633, 4 Sup. Ct. 170, 312; *Terry* v. *Anderson*, 95 U. S. 628; *Holcombe* v. *Tracy*, 2 Minn. 241, (Gil. 201;) *Smith* v. *Packard*, 12 Wis. 412; *Hyman* v. *Bayne*, 83 Ill. 256; *Parsons* v. *Wayne, Circuit Judge*, 37 Mich. 287; *Sampson* v. *Sampson*, 63 Me. 328; *Dyer* v. *Gill*, 32 Ark. 410; *Parker* v. *Kane*, 4 Wis. 1, and Vilas & Bryant's notes; *Von Baumbach* v. *Bade*, 9 Wis. 559; *Eaton* v. *Supervisors*, 40 Wis. 668; *Baker* v. *Supervisors*, 39 Wis. 444; *Guillotel* v. *Mayor, etc.*, 55 How. Prac. 114.

That 3½ months is a reasonable time might perhaps admit of doubt. On that point we express no opinion. But it is evident that plaintiff was notified as early as March 2, 1895, when the Revised Codes were approved by the governor, that as soon as the new limitation statute went into effect its time would be cut down to 10 years. From March 2, 1895, to January 1, 1896, the plaintiff received daily notice that after the new codes went into operation it could no longer wait 20 years to sue upon the judgment. That the reasonable time is to be computed from the day when the new law is passed, and not from the time when it takes effect, is well settled. *State* v. *Jones*, 21 Md. 432; *Smith* v. *Morrison*, 22 Pick. 430; *Stine* v. *Bennett*, 13 Minn. 153, (Gil. 138;) *Hedger* v. *Rennaker*, 3 Metc. (Ky.) 258; *Bigelow* v. *Bemis*, 2 Allen, 496. Counting from the day when the 10 year statute was approved by the governor, the plaintiff had over 13 months in which to bring an action upon his judgment. This was a reasonable time, under all the authorities. *Holcombe* v. *Tracy*, 2 Minn. 241, (Gil. 201;) *Stine* v. *Bennett*, 13 Minn. 153, (Gil. 138;) *Smith* v. *Packard*, 12 Wis. 412; *Bigelow* v. *Bemis*, 2 Allen, 496; *Korn* v. *Browne*, 64 Pa. St. 55; *State* v. *Jones*, 21 Md. 432.

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 had 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. In the following cases no fixed period was given by the new law in which subsisting rights of action might be enforced, but all cases were brought within the provisions of the statute as fully as if it had existed when the existing causes of action arose, and yet in none of these decisions do we find any intimation that for this reason the law was unconstitutional as to causes of action which had already accrued, the plaintiff having in each of these cases a reasonable time to sue as a matter of fact: *Bigelow* v. *Bemis*, 2 Allen, 496; *State* v. *Jones*, 21 Md. 432; *Burke* v. *Association*, 40 Minn. 506, 42 N. W. Rep. 479. If in the particular case the time is not reasonable, the court must either declare that the statute does not embrace such a case, or that with respect thereto it is unconstitutional because it impairs the obligation of a contract.

The question then, for decision, is whether, under the Revised Codes, a judgment is, after 10 years, so utterly extinguished by the statute that proceedings to enforce the same fall to the ground, though instituted while the judgment was still alive. No action on a judgment can be brought after 10 years. Revised Codes, §§ 5199, 5200. No execution thereon can be issued after 10 years. Section 5500. At the expiration of that period it ceases to be a lien on real estate. Section 5490. It is true that the statute declares that supplementary proceedings may be instituted thereon at any time after execution is returned unsatisfied. Section 5562. But this section was not passed for the purpose of giving the judgment creditor an unlimited period beyond 10 years in which to enforce a judgment which could not be enforced by execution, which was no longer a lien on real property, and on which no action would lie. This section fixes the time when the right to institute such proceedings accrues, but it does not attempt to regulate the question of limitation at all. That question is left to other provisions of the code. If, as we

think, the other sections of the code clearly show the legislative purpose to destroy the judgment after 10 years, then it was unnecessary to prescribe in terms any period after which supplementary proceedings could not be instituted or carried on. Such proceedings are analogous to proceedings under an execution. They are a statutory substitute for the old mode of reaching equitable assets by a creditor's bill. 3 Rum. Prac. 398, 399. They are not an action on the judgment. See *Newell* v. *Dart*, 28 Minn. 248, 9 N. W. Rep. 732. They are prosecuted for the same purpose for which an execution is employed, *i. e.* as a means of enforcing a valid subsisting judgment. When once it is ascertained that for any reason there is no longer any judgment, the proceedings to enforce it must fall to the ground. It is immaterial whether the judgment has been paid or has ceased to possess life owing to the lapse of time. In either case, there is no longer any judgment left to support the steps taken to enforce it. A strange condition of the law would it be if, after the lien of the judgment on real estate had been lost, and after the plaintiff was powerless to enforce it by execution, and despite the fact that he could no longer give it new life by a suit upon it resulting in the recovery of a new judgment, he could nevertheless, through a receiver in supplementary proceedings, reach and sell the debtor's lands, and subject all his assets, legal and equitable, to the payment of the very same outlawed judgment. We were at first much influenced in our views by certain decisions in the State of New York. Without attempting to analyze them, we cite them, that it may be seen whether the ground on which we distinguish them from the case at bar is sound: *Townsend* v. *Tollhurst*, (Sup.) 10 N. Y. Supp. 378; *Bolt* v. *Hauser*, (Erie Co. Ct.) 10 N. Y. Supp. 397; *Rose* v. *Henry*, 37 Hun. 397; *Waltermire* v. *Westover*, 14 N. Y. 16; *Herder* v. *Collyer*, (Com. Pl.) 6 N. Y. Supp. 513; *Kincaid* v. *Richardson*, 25 Hun. 237; *Bolt* v. *Hauser*, (Sup.) 11 N. Y. Supp. 366. It is apparent that in New York the statute was leveled at only a particular remedy, and therefore the courts rightly held that all other remedies remained unimpaired. But our statutes, when con-

strued together, clearly evince a legislative purpose to wipe out a judgment after 10 years, unless suit thereon is brought within that period, and, even in that event, to keep it alive solely as the foundation for such suit, and not for general purposes. See *Ross* v. *Duval*, 13 Pet. 45, where Mr. Justice McLean says: "It cannot be supposed that the legislature would bar an action on the judgment, and still authorize an execution on it." The judgment was therefore extinguished at the time defendant made his motion to set aside the supplementary proceedings. The fact that such proceedings had been commenced in time upon a perfectly valid judgment is no answer to the motion to set them aside after the judgment had ceased to be valid. *Newell* v. *Dart*, 28 Minn. 248, 9 N. W. Rep. 732; *McAleer* v. *Clay Co.*, 42 Fed. Rep. 665. In the case first cited a creditors' suit had been brought on a valid judgment, but during its pendency the judgment became outlawed. The court held that the action must be dismissed, saying: "Hence, before the final trial and decision of this case, and before judgment rendered therein, plaintiff's judgment had ceased to exist either as a cause of action or a lien, unless kept alive by the commencement and pendency of this action beyond the statutory period of ten years. We do not think the pendency of this action had any such effect. It is not in any proper sense, as before remarked, an action brought upon the judgment as a cause of action, in order to obtain a new judgment, but simply an action ancillary to, and for the purpose of obtaining satisfaction of, an existing judgment. * * * We fail to see any distinction in principle between a case where, for the purpose of enforcing his judgment, a party resorts to execution to reach property liable to such process, and a case where, for the same purpose, he proceeds by creditors' bill or supplementary proceedings to reach assets not subject to execution. In both cases the object is the same,—to reach property of the debtor in order to satisfy an existing judgment,—and there is no more reason why a creditors' bill or supplementary proceeding (which is a statutory substitute for the former) should continue

the life of a judgment beyond the statutory period in the one case than that a levy under an execution should do so in the other. We are therefore of opinion that plaintiff's judgment became barred and ceased to exist, either as a cause of action or as a lien, during the pendency of this action." That it was proper to raise the question by motion is evident, for in no other way could it be raised under the circumstances, the proceedings being originally valid, and having become assailable only after all other modes of attacking them were gone. *Leo* v. *Joseph*, (Sup.) 9 N. Y. Supp. 612; *Smith* v. *Paul*, 20 How. Prac. 97; *World Co.* v. *Brooks*, 7 Abb. Prac. (N. S.) 212.

For the reasons stated the motion of defendant to set aside the supplementary proceedings should have been granted. It follows that the order denying that motion must be reversed. The District Court will enter an order granting such motion. The defendant will be entitled to have a provision inserted in such order directing the return to him of the certificate of deposit mentioned in the order vacating the restraining order. All concur.

(75 N. W. Rep. 244.)

JAMES M. WOODS *vs.* GEORGE H. WALSH, *et al.*

Opinion filed April 22nd, 1898.

Implied Waiver by Acts of Attorney.

In this court, on a notice of motion served personally by respondents' counsel upon the attorney whose signature was affixed as attorney for plaintiff to the notice of appeal, a motion was made to dismiss the appeal upon various grounds, none of which had reference to the attorney for the appellant, nor in anywise challenged the right of the appellant's attorney to act as such. The motion to dismiss the appeal was granted without prejudice to another appeal. Upon a second appeal to this court a motion to dismiss was made upon various grounds, among others upon the ground that the attorney whose name was affixed to both of the notices of appeal was not the attorney of the appellant. *Held*, that the objection came too late, and had been waived by the voluntary action of respondents' attorney in recognizing the attorney of the plaintiff in

the former appeal. *Held*, further, that an attorney of a suitor may authorize another person to affix his (the attorney's) signature to a notice of appeal, and such signature is valid when so authorized and affixed.

Motion to Strike Out Stated Case.

Motion to strike out the statement of the case denied for reasons set out in the opinion.

Champerty—When Not Available as a Defense.

In this action the plaintiff was seeking to foreclose a mortgage given to secure certain promissory notes made and delivered by the defendants. Said defendants made default, and did not answer the complaint. On motion of the defendants' attorney, the trial court entered judgment dismissing the action with prejudice. This was done upon certain affidavits filed by the defendants (and which were denied,) showing that the plaintiff in the action had entered into an agreement with his attorney whereby the attorney agreed to prosecute the action at his own costs and expense, and was to be compensated, if at all, out of any proceeds derived from the prosecution of the action. *Held*, that it is questionable whether such an agreement is champertous in this state, but, conceding that it is champertous, *held*, further, that the plaintiff's right to prosecute the action rested upon independent obligations, and in no wise depended upon the alleged champertous agreement; therefore such agreement was not available to the defendants as a defense to the action, or as a ground for dismissal thereof.

Champerty Not Available to Defeat a Just Debt.

There can be no sound reason or just principle in a rule of law which would allow a party to defeat a just cause of action because the opposite party has made a contract with his attorney which is entirely void, and which, therefore, cannot be enforced by either of the contracting parties,

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

Action by James M. Woods against George H. Walsh and Laura M. Walsh to foreclose a mortgage. From a judgment dismissing the action, plaintiff appeals.

Reversed.

James B. Eaton, (*R. A. Eaton*, of counsel,) for appellant.

Champerty and maintenance are not recognized under the New York practice from which our code and practice are taken. *Sedgwick* v. *Stanton*, 14 N. Y. 280; *Voorhees* v. *Dorr*, 51 Barb. 580; *Fowler* v. *Callan*, 102 N. Y. 395, 7 N. E. Rep. 169; Rev. Codes, §§ 7001, 7009. Neither in California or other states. *Mathewson* v. *Fitch*, 22 Cal. 94; *Hoffman* v. *Vallejo*, 45 Cal. 564; *Reece* v.

Kyle, 49 Ohio St. 475, 31 N. E. Rep. 747; *Brown* v. *Bigne*, 28 Pac. Rep. 11; *Kutcher* v. *Love*, 36 Pac. Rep. 152; *Newkirk* v. *Cone*, 18 Ill. 449; *Fetrow* v. *Merriwether*, 53 Ill. 275; *Wright* v. *Tibbitts*, 91 U. S. 252; *Roberts* v. *Cooper*, 20 How. 483; *Taylor* v. *Bemis*, 110 U. S. 42, 3 S. C. Rep. 441; *Courtright* v. *Burnes*, 13 Fed. Rep. 317; *Schomp* v. *Schneck*, 40 N. J. L. 195; *Richardson* v. *Rowland*, 40 Conn. 565; *Danforth* v. *Streeter*, 28 Vt. 490. In cases where champerty is a proper defense, it must be pleaded and proved. *McMullen* v. *Guest*, 6 Tex. 275; *Brumback* v. *Oldham*, 1 Idaho, 710; *Moore* v. *Ringo*, 82 Mo. 468; *Allison* v. *Railroad*, 42 Ia. 280. An agreement to be champertous must have been made before the suit was commenced, and be the moving cause of it. *Moody* v. *Harper*, 38 Miss. 599. The Federal Court in Tennessee declines to follow the state statute against champerty. *Byrrie* v. *Ry. Co.*, 55 Fed. Rep. 44.

J. B. Wineman, for respondents.

When the fact appears that an action is being prosecuted upon a champertous agreement the action will be dismissed. *Barker* v. *Barker*, 14 Wis. 131; *Kelly* v. *Kelly*, 56 N. W. Rep. 637; *Douglas* v. *Wood*, 1 Swan. (Tenn.) 395; *Hunter* v. *Lyle*, 8 Yerg. (Tenn.) 142; *Greenman* v. *Cohie*, 61 Ind. 201; *Board* v. *Jameson*, 86 Ind. 154; 4 Enc. Pl. and Pr. 368; *Peck* v. *Henrick*, 17 S. C. Rep. 927; *McPherson* v. *Cox*, 96 U. S. 404; *Stanton* v. *Haskin*, 1 MacArthur, 558; *Belding* v. *Smythe*, 138 Mass. 530; *Huber* v. *Johnson*, 70 N. W. Rep. 806.

WALLIN, J. This action was brought to forelose a mortgage upon real estate, which mortgage was made and delivered by the defendants, George H. Walsh and his wife, to secure the payment of certain promissory notes executed and delivered by said defendants to one E. P. Gates, and afterwards sold, indorsed, and assigned to the plaintiff, together with said mortgage. The action has met with more than the usual number of vicissitudes. It was commenced in 1885, John M. Cochrane, Esq., then being plaintiff's attorney. On November 11, 1893, a paper signed by

John M. Cochrane was filed with the Clerk of the District Court, reciting, in substance, that the firm of Eaton & Higbee (lawyers then in practice at Grand Forks) were substituted in the place and stead of Cochrane as attorneys for plaintiff, but no order of court was ever made pursuant to said document, or at all, substituting said firm as plaintiff's attorneys in the action. Said defendants never having answered or appeared in the action, a default judgment was entered against them in the action on November 11, 1893. On a notice of motion served by the defendants' attorney, J. B. Wineman, upon said law firm of Eaton & Higbee, as the attorneys for the plaintiff, said judgment by default was set aside and vacated by an order of the District Court made in May, 1894. Again, on a notice of motion served by said J. B. Wineman, as defendants' attorney, upon said firm of Eaton & Higbee, as plaintiff's attorneys, the District Court, by an order filed October 14, 1895, directed that the action be dismissed with prejudice; said order being predicated upon certain affidavits made and filed in the District Court, wherein and whereby it was charged, or sought to be charged, that the action was being prosecuted upon a champertous agreement made and entered into between the plaintiff and R. A. Eaton, who was a member of said firm of Eaton & Higbee; the alleged champertous agreement as embodied in said affidavits being, in substance, this: That said R. A. Eaton agreed with the plaintiff to prosecute said action at his own cost and expense, and as compensation therefor the said Eaton should receive one-half of the amount recovered by means of the proposed litigation. Upon the affidavits which were filed in a certain motion made in the action the District Court found as follows: "This action is prosecuted on a champertous agreement," and the court by its order, thereupon directed the action to be "dismissed with prejudice." Upon the hearing of the last mentioned motion the plaintiff was represented by said R. A. Eaton and the defendants by said Wineman. From this order, and prior to the entry of any judgment thereon, plaintiff attempted to appeal to this court, and this court, by its

order made at the October term, 1897, dismissed said appeal. The notice of said appeal was apparently signed by J. B. Eaton, Esq., an attorney-at-law residing in this state, said R. A. Eaton, who had before the appeal removed out of the state, signing said notice as counsel only. The motion to dismiss said attempted appeal was made by the defendants' said attorney, J. B. Wineman, and notice of said motion was served by Wineman on said J. B. Eaton. Said notice was not based upon the ground that the said notice of appeal was improper in form, or was not properly signed; nor was it stated in the notice that said J. B. Eaton was not, when he affixed his signature to such notice, the attorney of the plaintiff for the purposes of the appeal; but, on the contrary, an affidavit filed in the case and made by said J. B. Wineman states that he (Wineman) served the notice to dismiss the appeal, together with his printed brief in the action, "upon James B. Eaton, one of the attorneys for the appellant." The appeal was dismissed upon the ground that the mere order for judgment from which an appeal was attempted to be taken to this court was a nonappealable order. A judgment having been entered in the District Court, the case is again before us on appeal from said judgment.

Defendants, by their said counsel, now move to dismiss this appeal upon the ground, among others, that said J. B. Eaton, whose name is signed to the notice of appeal, was not and is not the attorney of the plaintiff, and that his name was signed by R. A. Eaton without authority. In opposition to the motion the affidavits of both J. B. and R. A. Eaton are filed, and they set out in substance that said J. B. Eaton is, and was when said notice was signed, plaintiff's attorney for the purpose of prosecuting this appeal, and that R. A. Eaton was authorized by him to sign the notice of appeal as it was signed, viz. with the signature of J. B. Eaton. We think the notice of appeal was sufficiently signed. There can be no doubt that an attorney of a party to an action can authorize another to sign his (the attorney's) name to a paper in the action. This, under the showing made (and it is not contra-

dicted,) is precisely what was done in this case. We think, too, that defendants' counsel has fully recognized J. B. Eaton as plaintiff's attorney in the action by serving upon him without reservation his brief and notice to dismiss the former appeal, thereby waiving any objection he may have had with respect to the right of J. B. Eaton to appear as plaintiff's attorney in the action.

Defendants' counsel further contends that said firm of Eaton & Higbee were never legally substituted as plaintiff's attorneys, and consequently that John M. Cochrane is still the attorney for the plaintiff. This position is untenable. While it is true, upon the facts stated, that Cochrane's connection with the action was never severed by any formal order of court, yet it is likewise true that Cochrane, in writing, consented to such severance, and turned over the files of the case to Messrs. Eaton & Higbee; and the further fact appears that the attorney of the defendants thereafter repeatedly recognized Eaton & Higbee as plaintiff's attorneys, and never attempted to divest them of their apparent authority to act for the plaintiff. We are clear that the irregularity of the appointment of Eaton & Higbee has been fully waived by counsel for the defendants, and that under the facts disclosed in the record said John M. Cochrane ceased to be the attorney of the plaintiff long prior to the date of the order of the District Court dismissing this action. It appears, therefore (both members of the firm of Eaton & Higbee having removed from the state,) that it was certainly competent for the plaintiff to employ other counsel, and the uncontradicted evidence is that plaintiff has done so, and that such counsel is J. B. Eaton, an attorney of this state, who now prosecutes this appeal.

The undertaking upon the appeal is objected to as informal, the appellant has, however, procured another undertaking, which is regular in form. We have directed the new undertaking to be filed, and this objection is therefore overruled, and we shall, without further comment, deny respondent's motion to dismiss the appeal.

Defendant's counsel further moves in this court to strike out the statement of the case. The statement was settled by the Honorable Charles F. Templeton on March 4, 1897, he having presided when the order of dismissal was filed. Judge Templeton retired from office on January 1, 1897, his term having expired at that time. Defendants' counsel appeared before Judge Templeton at the time the statement was settled, and objected to the settlement upon the following grounds, viz.: "For the reason that said statement of the case had not been presented to said Charles F. Templeton for settlement within the time allowed by law, and that no cause has been shown why said time should be extended; that said Templeton has no power or authority to act in the premises, or to extend the time allowed by law for the settlement of the case." These objections were overruled, and the case was settled by Judge Templeton, but in the order of settlement he states as follows: "The undersigned, in signing this statement of the case does not in any manner intend to enlarge or extend the time in which such statement should have been presented for settlement, for the reason that no cause was shown why said time should have been extended; nor is it the intention of the undersigned to in any manner prejudice any rights which may have accrued to the defendants by reason of the failure of the plaintiff to present such statement within the time prescribed by law." An extension of time, against objection, properly made, within which to settle a statement of the case, cannot be lawfully made by the trial court in the entire absence of any showing of cause for such extension. See *Moe* v. *Railroad Co.*, 2 N. D. 282, 50 N. W. Rep. 715. The objection to the settlement of the statement made in this case would have been fatal, therefore, if any extension of the statutory time had been made in fact. But the time was not extended, nor had the statutory period for settling a statement in this case expired when the statement was settled. When the statement was settled, it would seem that counsel and court alike labored under the impression that judgment had been entered long prior to that

date. Such was not the fact, however, for it now appears that no judgment had been entered in the judgment book at that time. Under the statute, 30 days are allowed after judgment within which a party may prepare and serve a proposed statement. Revised Codes, section 5467. The objection must be overruled. Under the statute, Judge Templeton had authority to act. *Id.* Section 5470.

Certain other preliminary objections were urged in this court upon the motions. We have considered and overruled the same, but shall not discuss them in this opinion.

Turning to the merits, we are called upon to decide whether the order and judgment of dismissal with prejudice, as made and entered in the District Court, can be sustained. We are satisfied that they cannot be sustained. It is true that champertous agreements have been held obnoxious from a very early period in the history of the common law. The statute in this state has singled out certain agreements which were champertous at common law, and declared that the same are misdemeanors. See Revised Codes, sections 7008–7013. The case at bar reveals no features which bring it within either of the sections we have cited. There is no pretense that the plaintiff in the action has ever sold or attempted to sell the claim in suit—*i. e.* two promissory notes—to his attorneys. Much less is it claimed that any transfer of the notes has ever been made to plaintiff's attorneys, or agreed to be made to them. Put in its strongest terms, the affidavits filed in defendants' behalf show that plaintiff agreed with one of his attorneys to pay the attorney one-half of the amount which should be recovered in the action, on condition that the attorney would take up and prosecute the case at the attorney's own cost and expense. We question whether such an agreement is champertous in this state. It certainly is not an act which the statute of this state punishes as a misdemeanor. We think that under the laws of this state an attorney may lawfully contract for a contingent fee to be measured by the amount recovered by an action. Rev. Codes, § 5574. To purchase a claim

for the purpose of suing the same is a misdemeanor in an attorney under the statute. *Id.* section 7008. But there is a line of separation between a purchase of a claim for the express purpose of suing the same, and a mere agreement for compensation, such as is claimed existed here. On this point, see *Dahms* v. *Sears*, 13 Or. 47, 11 Pac. Rep. 891. But for the purposes of this decision we will assume that the agreement as set out in the affidavits of the defendants was actually made, and that the same is champertous. Upon this assumption the question arises whether the action should have been dismissed before trial, and under the circumstances of this case. The record shows that the plaintiff is the owner of the notes and mortgage upon which the action is founded, and, further, that the defendants who signed and delivered the notes and mortgage have made default, and never answered in the action. Under such circumstances, should the defendants be permitted, on account of any unlawful agreement made between plaintiff and his counsel, which in no wise prejudices the defendants, to evade the payment of the claim by procuring a dismissal of the action? We think such a rule would be obviously unjust. It is, however, undeniable that it has the support of some authority. Some courts have held that as soon as the fact is made to appear in any proper manner that an action is being prosecuted under a champertous agreement; it becomes the duty of the court to dismiss the action at once. A line of cases decided by the Supreme Court of Tennessee, and cited on page 832 of 5 Am. and Eng. Enc. Law (2d Ed.,) which was based upon a mandatory statute of that state, has been followed—perhaps mistakenly—in some other states. See *Barker* v. *Barker*, 14 Wis. 142, and *Kelley* v. *Kelley*, 86 Wis. 170, 56 N. W. Rep. 637. See, also, *Greenman* v. *Cohee*, 61 Ind. 201. But the decided weight of authority is clearly against the proposition that a suitor whose cause of action in no wise depends upon any champertous agreement, but is meritorious, can be cast in his suit by a mere showing that the same is being prosecuted under an unlawful agreement between the plaintiff and his attorney. Such an agree-

ment can in no wise prejudice the defendant, and the better authorities hold that no sound considerations of public policy can be invoked in support of the rule. The later cases in Indiana distinctly repudiate the doctrine announced in *Greenman* v. *Cohee*, *supra*. *Allen* v. *Frazee*, 85 Ind. 283; *Zeigler* v. *Mize*, 132 Ind. 403, 31 N. E. Rep. 945. See, also, *Railway Co.* v. *Davis*, 10 Ind. App. 343, 36 N. E. Rep. 778, and 37 N. E. Rep. 1069. This is certainly the later holding in the State of Iowa. *Small* v. *Railroad Co.*, 55 Iowa, 582, 8 N. W. Rep. 437. In the case last cited the court say: "It seems to us that there is no sound reason nor just principle in a rule which would allow a party to defeat a just cause of action because the opposite party has made a contract with his attorney which is entirely void, and which, therefore, cannot be enforced by either of the contracting parties." This authority voices the English rule. *Hilton* v. *Woods*, L. R. 4 Eq. 432. Also the rule of the Federal Courts. *Courtright* v. *Burnes*, 13 Fed. Rep. 317; *Byrrie* v. *Railroad Co.*, 55 Fed. Rep. 44; *Keiper* v. *Miller*, 68 Fed. Rep. 627, construing *Burns* v. *Scott*, 117 U. S. 589, 6 Sup. Ct. 865. In some states it is held that the common law relating to champertous agreements no longer exists, and that such an agreement is valid unless it contravenes some statute. See *Sedgwick* v. *Stanton*, 14 N. Y. 289, and cases cited on page 320 of 13 Fed. Rep. In the case at bar, however, we are not disposed to go further than to declare that under the facts of this case the defendants, upon the assumption that they have shown a champertous agreement between plaintiff and his attorney, are not in a position to take advantage thereof. Such agreement, if it existed, could in no respect prejudice any of the defendants' rights. This action is based upon independent contract obligations entered into by said defendants, which obligations are in no wise affected by the alleged champertous agreement. Under the authorities cited, which, in our opinion, rest upon plain principles of right and justice, the judgment of the court below dismissing this action must be reversed, and the action reinstated. It will be so ordered. All the judges concurring.

ON PETITION FOR REHEARING.

The petition for a rehearing of this case must be denied. The rehearing is asked upon two grounds, viz.: First, that the notice of appeal was signed, not by the attorney of the appellant, but by another, who signed the same at the instance and request of the appellant's attorney. This point was considered in the opinion, and overruled, upon the ground, among others, that any defects in such notice had been waived by the conduct of the respondents' counsel. We will add, however, that the point would be overruled by this court on its merits. The question, in our opinion, is covered by the principle announced in the following cases, which state the later and better rule of construction: *Hotchkiss* v. *Cutting*, 14 Minn. 537 (Gil. 408;) *Herrick* v. *Morrill*, (Minn.) 33 N. W. Rep. 849. Counsel cites section 7023, Revised Codes, and states in his petition that he "relies upon it entirely." That section has reference to a case where an attorney at law who is not an attorney in an action nevertheless permits his name to be used by another as an attorney in the action. It has no reference to a case like this, where an attorney who is in fact the appellant's attorney authorizes another person to sign his name to a process or notice in the action. The citation has no pertinency to the point raised by the petition.

The remaining ground of the petition relates to the statement of the case. It is contended that the statement should have been stricken from the record, because the same was irregularly settled, for certain reasons stated in the petition, and for the further reason that Judge Templeton, who retired from office before he settled the statement, was without authority to do so, not then being a judicial officer. We are of the opinion that the questions raised by this feature of the petition need not necessarily be considered in disposing of this case, for the reason that an examination of the judgment from which the appeal was taken shows that the only question raised on the merits is presented on the face of the judgment itself, unaided by other facts brought upon the record by the statement of the case. The judgment

recites as follows: "Having heard the arguments of counsel, and after due consideration having found in fact that this action is prosecuted on a champertous agreement, therefore it is hereby ordered * * * that this action be, and the same is hereby, dismissed with prejudice." The record shows also that the defendants, who signed the notes sued upon, have made default, and have never answered the complaint, and hence have confessed that the obligations in suit are valid and subsisting obligations against them, upon which the plaintiff is entitled to recover a judgment. These defendants procured a dismissal of the action without a trial, and upon a mere motion, and the grounds of such dismissal are that the action is being prosecuted upon a champertous agreement. The authorities which have controlled this court in deciding this case, and which are cited in the opinion, go to the extent of holding that a champertous agreement made between the plaintiff and another person, which agreement is independent of the contract sued upon, can never operate to defeat an action which is based upon a valid claim which is not tainted with the stigma of champerty. The record in this case, aside from the special facts embraced in the statement, shows that this action is based upon the defendants' promissory notes, and in no wise rests upon a champertous agreement. If a champertous agreement is the cause and incentive for the prosecution of this action, such agreement exists independently of the defendants' written obligations; and under the better modern rule such an agreement cannot be resorted to as a means of defense to an action in a case like the case at bar.

(75 N. W. Rep. 767.)

B. E. INGWALDSON *as Trustee vs.* J. I. SKRIVSETH, *et al.*

Opinion filed April 28th, 1898.

Valid Consideration for Mortgage Must be Proven.

Where a party holds a conveyance as security, he has no standing in a court of equity to ask that a subsequent deed made by his grantor be set aside as a fraud upon his rights, until he shows the existence of some valid claim for which his conveyance stands as security.

Father Can Maintain Action for Seduction of Minor Child.

In this state the father has a cause of action for the seduction of his minor daughter, and this is true when such daughter lives in the family of a third person, and receives and controls her own wages; it not appearing that the father has ever relinquished his legal right to demand her services.

Unmarried Woman Has No Action for Her Own Seduction.

An unmarried female has, in this state, no cause of action for her own seduction, but she has a cause of action against the father of her bastard child to compel him to contribute to the support of such child, and this claim she can settle and adjust so far as she herself is concerned.

Proof of Fraud Insufficient.

The evidence to support the allegations of fraud and undue influence in procuring such settlement examined, and *held* insufficient.

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

Action by B. E. Ingwaldson, as trustee for Paul Olson and Ovedia Olson, against J. L. Skrivseth and Bertha Skrivseth, to set aside a deed. Defendants had judgment, and plaintiff appeals. Affirmed.

M. A. Hildreth and *B. E. Ingwaldson*, for appellant.

Carmody & Leslie, for respondents.

BARTHOLOMEW, J. The plaintiff, Ingwaldson, as trustee for Paul and Ovedia Olson, brings this action to set aside a deed executed by the defendant J. L. Skrivseth to the defendant Bertha Skrivseth, covering certain property in the City of Hillsboro, in Traill County. The defendants are husband and wife. Paul Olson is the father of Ovedia Olson. The very voluminous pleadings in this case may be thus summarized: The complaint alleges that on September 30, 1896, a cause of action had accrued

in favor of Paul Olson against J. L. Skrivseth, and on the same date a cause of action had accrued and was accruing in favor of Ovedia Olson against the same party. That plaintiff, Ingwaldson, was the attorney for both Paul and Ovedia Olson. That the action in favor of Paul Olson was actually commenced on that day by service of summons upon said J. L. Skrivseth. Both of said causes of action were based upon the fact that said Ovedia Olson had been seduced by said J. L. Skrivseth and was then pregnant by said party. On said September 30th, said Ingwaldson, as attorney for said parties, entered into an agreement with said J. L. Skrivseth for the settlement of all claims growing out of such seduction, on the part of both father and daughter. That the total amount of damages accruing to said parties, was fixed at the sum of $2,500, and that said J. L. Skrivseth executed to said Ingwaldson, as trustee for said Olsons, a conveyance, in form a warranty deed, of the property in controversy, which deed was to be held by said trustee as security for the payment of said amount; and said complaint continued: "In case of nonpayment thereof, or attempt by the said defendant, J. L. Skriveth, or any one for him, to avoid such payment thereof, such warranty deed was to be placed of record, and should then and was to guaranty the payment of such sum or sums as the said Paul Olson and Ovedia Olson might be found entitled to in said several causes of action against defendant, J. L. Skrivseth." The ownership of said property by J. L. Skrivseth was alleged, and it was declared that it was expressly agreed and understood that, in case said Skrivseth attempted to avoid such settlement or hinder or delay such payment, then such deed should become an absolute conveyance for the benefit of said Paul and Ovedia, "and be applied in payment of any recovery they might be found entitled to therein." It is further alleged that five days thereafter said J. L. Skrivseth executed a deed of said premises to the defendant Bertha Skrivseth, but that said deed was without consideration, and was taken with full knowledge of the prior deed to Ingwaldson as trustee, and that it was given and received for the sole purpose

of defeating the claims of the said Paul and Ovedia Olson. It may be here stated that the deed to Bertha was filed for record prior to the filing of the deed to Ingwaldson. It also appears from the complaint and the evidence that the action brought by Paul Olson was speedily pressed to judgment. No appearance was made by the defendant. The evidence was submitted on November 4, 1896, and judgment for plaintiff rendered November 20, 1896, for the sum of $700, and costs, and that judgment had been fully paid before this action was tried. Bertha Skrivseth alone answers. She denies the existence of any claims on the part of Paul or Ovedia Olson against J. L. Skrivseth, but admits the making of the deed to Ingwaldson as trustee, and claims that such deed was obtained by fraud and duress, and was void. She admits the execution of the deed to her, and alleges that it was given for valuable consideration, and was received by her without any knowledge of the prior deed to Ingwaldson, and without any knowledge that Paul Olson had brought an action against J. L. Skrivseth, and without any intent to hinder, delay, or defraud any creditor. Further, she alleges that on the 15th day of October, 1896, while not admitting the existence of any valid claim, yet, to avoid all scandal and litigation, she settled with Ovedia Olson for all claims of every name and nature, growing out of said alleged seduction, for the sum of $650, then paid by her to said Ovedia Olson, and as evidence of said settlement and payment the said Ovedia then and there executed and delivered to her a receipt and release in the following language: "Hillsboro, N. D., Oct. 15th, 1896. For $650.00 paid by Mrs. Bertha Skrivseth this day, I hereby acknowledge payment in full of all damages to me growing out of J. L. Skrivseth being the father of my unborn child. And I for said consideration agree to care for and support said child, if born, releasing said J. L. Skrivseth from all liabilities to me or any one else; and I hereby agree that said money shall be put in the hands of H. J. Nyhus, as trustee, to be paid out to me for the support of myself and child, according to the judgment of said Nyhus. Ovedia Olson.

Signed: H. J. Nyhus. J. Lonne. I have received the sum above mentioned. 10–15, 96. [Signed] H. J. Nyhus, Trustee." That at the time such payment was made said Ovedia executed and delivered to said defendant a quit-claim deed for said premises, and promised that the plaintiff, Ingwaldson, should also execute to said defendant a quit-claim deed. That at the time said payment was made said defendant did not know of the pendency of the action in favor of Paul Olson against J. L. Skrivseth, but supposed that such payment covered all claims arising from the alleged seduction. The answer also sets forth the recovery of the judgment by Paul Olson and its payment. There was a reply to this answer, admitting the payment of the Paul Olson judgment, and admitting the execution by Ovedia Olson of the receipt and release set forth in the answer, but claiming that the same was procured by fraud and undue influence exercised over her by Rev. J. Lonne and one H. J. Nyhus, both of whom were at the time, but unknown to said Ovedia, acting as the agents of Bertha Skrivseth; that the same was procured without the knowledge of the plaintiff, Ingwaldson, the attorney for said Ovedia Olson; and that as soon as he obtained knowledge of the same, and on December 22, 1896, the said Ovedia Olson gave notice of a rescission of said agreement, pursuant to section 3932, Revised Codes, and offered to return everything of value that she had received under such settlement. It was also alleged that Ovedia had never received any of the money so left with Nyhus as her trustee.

In the view that we take of this case, there are some questions raised on the record that it will not be necessary to discuss. The legality of the transfer from J. L. Skrivseth to Bertha Skrivseth becomes material only after the plaintiffs have shown that there exists some claim in their favor, or in favor of one of them, that ought to be enforced against the property as the property of J. L. Skrivseth. Concerning the conveyance of September 30, 1896, made by J. L. Skrivseth to Ingwaldson as trustee, we have to say that we regard it as security only, although in form a deed

absolute. The trial court expressly so found, and, taking the complaint and testimony together, we think the finding correct, except upon a single contingency, and that was this: In case the grantee should sell the property to a third party, and pay the grantor Skrivseth $1,500 (Ingwaldson says $1,200,) then the conveyance should be placed upon record and become absolute. The property was valued by the witnesses from $2,500 to $4,000. But no such sale was ever made. Treating the conveyance, then, as security only, we must ascertain for what it stood as security. No note was given or other evidence of indebtedness. If all damages arising from the seduction were liquidated at $2,500, and Skrivseth promised absolutely to pay that sum, we do not understand why the attorney did not take some evidence of indebtedness, because the original claim arising from the seduction was merged in the settlement, and thereafter the only cause of action left was the express promise to pay, and it was a violation of the terms of the settlement for Paul Olson to press to judgment his action based upon the original seduction, wherein he claimed damages to the extent of $10,000. These considerations force us to believe that the conveyance stood as security for such amounts as Paul Olson and Ovedia Olson might recover against said Skrivseth by reason of any matters growing out of such seduction. Of course, in case of a sale of the property, as already indicated, it would not have been necessary to establish their claims in court. But we are clear that it was not the intention to abandon the original cause of action until the actual payment of the damages thereon was received. Have those damages been adjusted and paid? If so, plaintiff's have no further interest in the property.

The evidence shows that Ovedia Olson attained her majority on May 31, 1896, and she was seduced and became pregnant at some prior time during that month. She was living in the family of the defendants, and had been so living for six or eight years. At the time she was receiving regular wages from the defendants as an assistant in a photograph gallery. But she was not of age, and there is nothing in the case to show that her father had ever

parted with his legal right to demand her services. Hence he could maintain an action for the seduction, and recover full damages not merely for the loss of services, but for the dishonor, disgrace, and mental suffering brought upon the household. *Hudkins* v. *Haskins*, 22 W. Va. 645; *Simpson* v. *Grayson*, 54 Ark. 404, 16 S. W. Rep. 4; *Bartly* v. *Richtmyer*, 53 Am. Dec. 338; *Ellington* v. *Ellington*, 47 Miss. 329; *Kennedy* v. *Shea*, 110 Mass. 147; *Clinton* v. *York*, 26 Me. 167; *White* v. *Murtland*, 71 Ill. 250. At common law, the female seduced has no cause of action for her own seduction. *Watson* v. *Watson*, 49 Mich. 540, 14 N. W. Rep. 489; *Woodward* v. *Anderson*, 9 Bush. 624; *Hamilton* v. *Lomax*, 26 Barb. 615; *Paul* v. *Frazier*, 3 Mass. 71. Nor have we in this state any statute giving the woman a right of action in such cases.

The father, Paul Olson, having prosecuted his cause of action to judgment, and such judgment having been fully paid, there no longer exists any claim for the seduction proper in favor of either of the plaintiffs. What claim, if any, existed in favor of Ovedia Olson? That her seducer was under a moral obligation to her to support the child which was the fruit of such seduction cannot be doubted, and any express promise to pay a liquidated amount based upon such moral obligation would be enforced by a court. But as we have stated, in our judgment, there was no promise to pay any specific amount. However, should we adopt the view urged by plaintiff's, that there was a specific promise to pay the sum of $2,500, in settlement of all claims growing out of such seduction, that fact would not aid plaintiffs' case at this stage, because, in any event, that was an aggregate sum that should satisfy all claims, and was not a specified amount for any one claim; and as Paul Olson, one of the parties for whose benefit the promise was made, if it was made, refused to stand upon such promise as to his cause of action, it is self-evident that the other party beneficially interested can claim nothing under such promise. But under our bastardy act (Ch. 5, Code Cr. Proc.) an unmarried female may enter complaint against the father of her

bastard child, and obtain a judgment against him for such sum as may be necessary, with the assistance of the mother, to support such child until it reaches an age to support itself. This statute gave Ovedia Olson a legal enforceable claim against J. L. Skrivseth,—a claim that she might prosecute to judgment or might amicably adjust. It may be true that she could make no adjustment that would bind the county commissioners in case such child became a public charge, yet she could adjust and settle all claims upon J. L. Skrivseth so far as she was concerned. It was precisely this claim that she did adjust, as shown by the terms of the receipt and release executed by her to Bertha Skrivseth; and this brings us to the last question in the case, and that is, was that receipt and release procured by fraud or undue influence?

We have all carefully studied the evidence upon this point, and we are clear and unanimous in the opinion that it was not. The circumstances leading up to the execution of that instrument may be briefly stated: Rev. J. Lonne was the pastor of the church at Hillsboro, of which J. L. Skrivseth and wife, Paul Olson and wife, and Ovedia Olson were all members. That he should desire to suppress, so far as he reasonably might, a scandal in his own church, and shield its members from unnecessary public disgrace, was at once natural and laudable, and he deserves commendation for his efforts in that line, rather than the aspersions heaped upon him by counsel. It seems that rumors of the scandal became rife at Hillsboro early in October, 1896. A few weeks prior thereto the Skrivseths had leased their property at that place, and moved to Fargo. On October 4th, Mrs. Skrivseth received a letter from Mrs. Lonne, in which reference was made to the rumors afloat. On October 5th, Rev. Lonne, went to Fargo, and talked first with Mrs. Skrivseth, and afterwards with Mr. Skrivseth, concerning the reports. He swears that at that time he knew nothing of the conveyance to Ingwaldson. Bertha Skrivseth swears that she knew nothing about it. By reason of the charges made against her husband, Mrs. Skrivseth demanded

that he deed to her the Hillsboro property, in which she already claimed a one-half interest. The deed was executed, and the next day Skrivseth left Fargo, and went to the Pacific coast, leaving Mrs. Skrivseth and their three children in Fargo. As already stated, very soon after the deed to Mrs. Skrivseth was filed for record, Ingwaldson filed the conveyance to him, and of course its existence then became a matter of public notoriety. On October 12th, Rev. Lonne visited Ovedia Olson at her father's house. He saw her alone. It is claimed by plaintiff that he went as the agent of Bertha Skrivseth. There is no warrant for the claim in the testimony. He evidently went as the friend and pastor of Ovedia, and with a desire to avoid public scandal that must reflect upon his church. He had a full talk with Ovedia. He testifies that he then learned for the first time that Ingwaldson was acting as attorney for her father in the matter, but did not learn and did not know that he was also acting as attorney for Ovedia. In that conversation he pointed out the disgrace and notoriety that would attend a public trial. Ovedia declared that she would never go into court with the matter. He also told her, according to her testimony, that the Ingwaldson deed was worthless. This statement was perhaps scarcely warranted, but he spoke as the ordinary layman. It is clear from the evidence that in his view Bertha Skrivseth was a purchaser for value, without any knowledge of the existence of the deed to Ingwaldson, and her deed was first of record. There can be no doubt the statement was innocently made and in good faith, and plaintiff has so far been unsuccessful in showing that it was not strictly true. It cannot be doubted that the influence of Mr. Lonne over Ovedia was great, owing to the fact that he had been her pastor from her childhood. But we cannot say that this influence was not used in good faith, for her benefit, nor can we say that the advice given was not in fact for her best interests. In that conversation he urged that the matter be settled up, and finally suggested the sum of $500 as the amount to be paid, saying to her that he thought he could get that sum, and that he would try to get

more. He testifies that Ovedia said she would be well satisfied with such sum. She says that she said she would take that if she could not get more. It is certain that Mr. Lonne left her with the understanding on the part of both that she would release all claims and settle everything, so far as she was concerned, for $500, the money to be placed with H. J. Nyhus as trustee for Ovedia. Mr. Lonne then went to Fargo, and saw Mrs. Skrivseth, and prevailed upon her to pay Ovedia $650. The receipt was drawn by an attorney in Fargo. The money as we understand the record, was raised by placing a mortgage on the Hillsboro property. On October 15th, Mr. Lonne again called upon Ovedia, and asked her where she would go to sign the receipt and execute a quit-claim deed of the property to Bertha Skrivseth. After several places were suggested, she agreed to go to the house of Mr. Lonne. In the evening Mr. Lonne got H. J. Nyhus, who was a notary public, to go to the house and take the acknowledgment. Mr. Nyhus, who is a banker and apparently a very intelligent business man, testifies that at the time he fully and carefully explained to Ovedia the exact nature of the papers that she was signing, and that she expressed herself as well satisfied with the arrangement. It is impossible, on this state of facts, to hold that in making this settlement any such undue influence was exercised over Ovedia Olson as will enable her to avoid the settlement. We have in this state a statutory definition of "undue influence." Section 3851, Revised Codes, reads: "Undue influence consists: (1) In the use, by one in whom a confidence is reposed by another or who holds a real or apparent authority over him, of such confidence or authority for the purpose of obtaining an unfair advantage over him. (2) In taking an unfair advantage of another's weakness of mind; or, (3) in taking a grossly oppressive and unfair advantage of another's necessities or distress." By no unprejudiced construction of the testimony can the facts of this case be brought under any subdivision of said section. The payment of the sum of $650 to the trustee selected by Ovedia Olson, and for her use, and benefit,

extinguished all claims that she had against J. L. Skrivseth resulting from her seduction. As neither plaintiff has shown any claim against J. L. Skrivseth that could be satisfied from the real estate in controversy, if the same stood upon the record in the name of J. L. Skrivseth, it follows that the legality or illegality of the deed to Bertha Skrivseth becomes entirely immaterial.

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

(75 N. W. Rep. 772.)

H. W. COWAN *vs.* M. B. FARRELL, *et al.*

Opinion filed April 27th, 1898.

Justice of the Peace—Jurisdiction.

A justice of the peace having called a case—the summons therein having been served and the same having been thereafter filed with the justice, with proof of service—the defendants demanded that the papers be produced. The counsel for the plaintiff had them in his possession, and the justice allowed him time to send to his office to procure them, whereupon defendants withdrew from the case. *Held*, that the justice did not lose jurisdiction, and that his judgment subsequently rendered was valid.

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

Action by H. W. Cowan against Michael B. Farrell and James Farrell. From a judgment of the District Court reversing a judgment of the justice of the peace in his favor, plaintiff appeals.

Reversed, and judgment of the justice affirmed.

S. E. Ellsworth, for appellant.

Fredrus Baldwin, for respondents.

CORLISS, C. J. The appeal is from a judgment of the District Court reversing a judgment of a Justice's Court. The appeal to the District Court was taken on questions of law alone. The ground on which that court decided the case appears to be that, up to the time of the expiration of one hour after the summons was returnable, the summons, with proof of service, had not been filed with him. The record shows the contrary. The following

entry appears in the justice's docket: "Summons issued in the above case on the 4th day of October, 1895, returnable on the 11th day of October, 1895, at one o'clock, P. M., and returned on the 4th day of October, 1895, personally served on Michael B. Farrell and James Farrell, defendants, by J. J. Eddy, sheriff." There is authority for the proposition that the mere fact that the return of the summons, with proof of service, has not been made at the time the case is called, is not fatal to the jurisdiction of the court. It would seem that it is the service of the process which confers jurisdiction, and it is undisputed that such service had been duly made. See *Lawrence* v. *Howell*, (Iowa) 2 N. W. Rep. 617.

Counsel for defendants seeks to sustain the judgment below on the ground that the justice lost jurisdiction because he refused, on demand of such counsel at the expiration of the hour, to call the case for trial. The record does not sustain his position. It shows that the case was called, and that, after it was called, defendants withdrew from the case, claiming that the justice had lost jurisdiction. It appears that the summons, complaint, and proof of service were in the possession of counsel for the plaintiff. As soon as they were called for by counsel for defendants, plaintiff's counsel sent to his office for them. It was at this time that defendants withdrew from the case. They did so at their peril. The case had been called. They were in court in person, and by their attorney. The summons had been duly served upon them. All they could complain of was the fact that the justice granted the plaintiff a short delay in which to procure and produce the necessary papers, which he thought he had inadvertently left at his office, but which in fact he had in his pocket at the time, though he did not discover the fact until a little later. It is clear that the justice had acquired, and that he never lost, jurisdiction, and the judgment is therefore valid. The judgment of the District Court is reversed, and that court is directed to enter a judgment in favor of the plaintiff and against the defendants for the amount of the judgment of the justice's court, with

interest, together with costs in this court, and in the District Court also. All concur.

(75 N. W. Rep. 771.)

N. N. BETTS *vs.* SOPHIA SIGNOR.

Opinion filed April 28th, 1898.

Counter Claim—Quieting Title.

In an action to quiet title, under § 5904, Revised Codes, the defendant sets up a counterclaim when he alleges that he is the owner of the land, and prays that title may be quieted in him.

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

Action by N. N. Betts against Sophia Signor. From an order sustaining plaintiff's demurrer to defendant's counterclaim, defendant appeals.

Reversed.

J. E. Robinson, for appellant.

Benton & Bradley, for respondent.

CORLISS, C. J. This case is governed by the decision of the court in *Power* v. *Bowdle*, 3 N. D. 107, 54 N. W. Rep. 404. The action was brought to quiet title under section 5904, Revised Codes, (formerly section 5449, Compiled Laws.) The defendant, by way of counterclaim, set forth in his answer his own ownership of the property, and prayed that his own title might be quieted. The pleading therefore discloses a counterclaim calling for a reply. We so held in the case just cited. It follows that the District Court erred in sustaining the demurrer to such counterclaim.

The order sustaining the demurrer is therefore reversed. All concur.

(75 N. W. Rep. 781.)

THE HILLSBORO NATIONAL BANK *vs.* JAMES E. HYDE.

Opinion filed April 28th, 1898.

Contracts—Construction—National Banks.

Judgment for the defendant sustained on the ground that plaintiff failed to establish the cause of action set forth in the complaint.

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

Action by the Hillsboro National Bank against James E. Hyde, to recover on an alleged contract. The bank alleged that the respondent James E. Hyde was elected its cashier on the 14th day of January, 1891, upon a salary of $1500 a year in consideration of which he agreed to give his entire time and earnings to the bank. The evidence upon the trial disclosed that during the year 1891, respondent transacted an extensive business in selling real estate on commission out of which he realized five hundred and sixty dollars in notes, and $896 in money, none of which was accounted for to the bank. The correspondence concerning many of his transactions was written upon the letter heads of the bank, and some letters were signed by respondent with the words "cashier" or "Ca" after his signature, many of the land transactions were conducted outside of banking hours. The respondent put in issue the special contract, declared upon, admitted the earning of large commissions in the sale of real estate, but averred that the same was earned outside of banking hours. Verdict and judgment for defendant, and plaintiff appeals.

Affirmed.

W. P. Miller, *F. W. Ames*, and *Cochrane & Feetham*, for appellant.

Carmody & Leslie, and *Ball, Watson & Maclay*, for respondent.

CORLISS, C. J. The theory of this action presupposes the existence of the most extraordinary contract which has ever fallen under our observation. We question whether it can be paralleled in the history of Anglo-Saxon jurisprudence. The

defendant is alleged to have sold to plaintiff, a national bank, not only his time for a year, but every farthing of his earnings during that period, from whatever source. Previous to the day when this agreement is claimed to have been made, he was cashier of the plaintiff, at a salary of $1,500 per year. When the question of his retention in that office was discussed at the annual meeting of the board of directors, the board favored a reduction of his salary to $1,200. It is then that it is contended that this astonishing agreement was entered into. In consideration of receiving his old salary of $1,500, it is said that defendant agreed not only to devote all his time to the business of the bank, but also to account to it for all his earnings, in whatsoever way they might be acquired. No matter what the character of such work might be, or how large his earnings in these hours of extra toil in his own behalf, all the fruits thereof were to go to swell the profits of the bank. When such an unprecedented contract, creating, while it continued in existence, a condition akin to human slavery, is claimed to have been made, we must exact very clear proof thereof. The case falls far short of meeting this requirement. We think that the alleged agreement, so far from being shown by the evidence, is actually disproved. The witnesses who claim to have made it as directors negative its existence. They purport to give the whole agreement in their testimony, and yet not a word is said by them about earnings. The utmost scope of the contract, as they swear to it, is that defendant was to give all of his time to the bank. Such an agreement is widely different from that which plaintiff has set forth in its complaint. A contract to give all of one's time to the employer does not mean that outside earnings of the employe are to belong to the employer. The servant cannot devote himself to his own business at the expense of his master without violating his contract. But his personal earnings are his own. There is no evidence in the case that the defendant neglected his duties as cashier, in the performance of the work in which

such outside earnings were made. The work performed by him was such as a banking corporation is not authorized to engage in. It consisted principally of the sale of lands by defendant as agent for third persons. A national bank has no right to engage in such a business. The liability of the defendant to the plaintiff, if any, must rest upon the special agreement set forth in the complaint. The allegation is "that it was, in and by the terms of said contract, provided that the defendant should give all his working time to the service of the plaintiff, and all the defendant's earnings, renumerations, revenues, and profits earned or secured in any occupation, employment, business, transaction, and transactions, during said period of service, other than the compensation agreed in said contract to be paid to the defendant by the plaintiff on account of his said services so to be rendered to the plaintiff, should be the property of the said bank." And it is then averred that defendant himself earned certain moneys from third persons, which he has not turned over to defendant in accordance with the terms of such express agreement: "The plaintiff, alleges, upon information and belief, that, during the time the said defendant was in the service and employ of the plaintiff under and pursuant to said contract, the defendant earned and secured, at divers times, from persons other than the plaintiff, certain sums of money, which were paid to, taken and received by, him, for and on account of services rendered to such persons during the time when said defendant was so in the employ and service of the plaintiff; that the money so paid to, taken and received by, the defendant, aggregated a large sum of money, to-wit, the sum of one thousand dollars." As before stated, the very persons who claim to have made this contract failed to testify to it, though they apparently swear to the entire agreement. Mr. Plummer, the president of the bank, appears to have done all the talking for the directors; and we cannot find in his evidence any hint that, if the defendant should earn money on his own account in lines of work foreign to the business of a national bank, such money should be the property of the bank.

Under the contract, as testified to by Mr. Plummer, defendant could not engage in a banking business, over plaintiff's counter, for his own profit. The earnings of such work would belong to the plaintiff, not by reason of any special contract for earnings, but because they would be the earnings of the bank itself; the defendant being under obligations, through his contract, to give the bank all his time,—not to set himself up as a rival banker while actually engaged in the plaintiff's work. But such a case is not before us. Defendant, without neglecting his duties as cashier, acted as agent for others in the sale of real estate,—a business foreign to that of banking,—and in this way earned certain sums of money, which he is entitled to retain, unless it appears that he sold them in advance to the plaintiff. The evidence of only one witness comes near to establishing the alleged contract. In view of the fact that the evidence of the other witnesses for plaintiff—one of them plaintiff's president, and the very man who appears to have done the talking at the meeting of the board of directors—negatives the existence of the contract set forth in the complaint, we are satisfied, considering the extraordinary nature of such an agreement, that the only witness who spoke of "earnings" used the word in the same sense as the word "time." What his testimony means is that defendant was to give the bank the benefit of his whole time in and about the legitimate business of the bank. We do not think that he intended to say that it was understood that if defendant, in spare moments, wrote a book, or taught a night school, or sang in a church choir, the fruits of his extra toil on his own behalf should be swept into the tills of the bank. Taking all the evidence together, and construing it fairly in the light of known business usages, we think that it amounts to no more than this: That defendant should have no right to complain if plaintiff exacted of him exceptional labors in its banking business; that he would give the defendant all his time and energies in the endeavor to make profit for the plaintiff, however long might be the hours of work required, and without reference to the fact that the demands on

him might be unreasonable, in view of the work required of their cashiers by other banks.

As we have reached the conclusion that there was no evidence to support a verdict in favor of the plaintiff, it is obvious that we cannot reverse the judgment, based on a verdict in favor of the defendant, because of errors in the admission of immaterial evidence. Such errors could not possibly have been prejudicial to plaintiff. In any view of the case, it was the duty of the court to direct a verdict for the defendant. Plaintiff cannot complain that the jury have done voluntarily that which they could have been compelled to do under the evidence in the case.

The judgment is affirmed. All concur.

(75 N. W. Rep. 781.)

CHARLES H. SMITH *vs.* MALVINA W. SMITH.

Opinion filed April 29th, 1898.

Divorce—Jurisdiction—Domicile—Evidence.

It appears that plaintiff was born in the State of New York, and that his relatives live there, and that plaintiff resided there until he came to Jamestown, N. D., about October 1, 1895. Plaintiff remained at Jamestown, at an hotel, for seven days, and no longer, and then he departed from the state, and went to the City of Washington, and was employed there continuously until July 30, 1896, at which date he came into the state to attend the trial of this action and for no other purpose, and after its trial returned to Washington to resume his work in that city. During his visit to the state in October, 1895, plaintiff did not engage in any business or calling, or seek to do so, but while here consulted with an attorney with reference to commencing an action for a divorce, which action was commenced in March, 1896. Before leaving New York plaintiff informed a relative that he was coming to this state to obtain a divorce, and as a witness stated at the trial that one object he had in view in coming to this state was to obtain a divorce from the defendant. He also stated that he had other objects in view, but, on being pressed to do so on cross-examination, plaintiff failed to state any other reason or motive for coming into the state. Plaintiff testified that he was a resident of the state in good faith, and had been since October 1, 1895. The trial court entered judgment granting the plaintiff a total divorce. *Held*, that the judgment must be reversed, and the action dismissed, on the ground that the trial court failed to obtain jurisdiction of the subject of the action, for the reason that the evidence showed that the plaintiff

never acquired a residence, *i. e.* a domicile, in this state at any time prior to bringing the action.

Residence and Domicile the Same.

Held, further, that under § 2755, Revised Codes, the word "residence" must be construed to mean the same as the word "domicile."

Good Faith Residence Required.

Held, further, that it is the duty of trial courts to scrutinize with great care the evidence of domicile of parties coming into this state from other states who commence actions for divorce as soon as the time limit expires, and especially so where such parties ask a divorce upon grounds which are unavailable to them under the laws of the state from whence they came. No court has a right to grant a divorce to a mere transient comer, who enters the state with no honest purpose of establishing a domicile in the state, and who cherishes the purpose of quitting the state as soon as the divorce case is decided.

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

Action by Charles H. Smith againt Malvina W. Smith for a divorce. From a decree granting plaintiff an absolute divorce, defendant appeals.

Reversed.

S. E. Ellsworth, for appellant.

Respondent came from New York where he had been a resident all his life and unless a change is shown by clear and positive proof he will be presumed a resident of New York. *Mitchell* v. *United States*, 21 Wall. 350. The only evidence of his intention to make this state his home is his own uncorroborated statement, unaccompanied by proof of any act indicating such intention. Such declarations are entitled to little weight. *Gourlay* v. *Gourlay*, 10 At. Rep. 592; *Pickering* v. *City*, 144 Mass. 244, 10 N. E. Rep, 827. Acts are stronger than words in proof of residence. *Firth* v. *Firth*, 24 At. Rep. 916. Plaintiffs evidence in divorce cases should not alone be relied on to prove residence. *McShane* v. *McShane*, 19 At. Rep. 465. The statute requires an actual residence of 90 days as a jurisdictional prerequisite in divorce matters. Section 2755, Rev. Codes; *Beach* v. *Beach*, 46 Pac. Rep. 528. A temporary sojourn for divorce purposes, without fixed abode and permanent business connection is not residence. *Gardner* v. *Board*, 5 Dak 259–264; *Bennett* v. *Bennett*, 28 Cal. 600;

Hall v. *Hall*, 25 Wis. 600; *Way* v. *Way*, 64 Ill. 413. A change of residence actuated by the declared intention of procuring a divorce within the jurisdiction removed to is regarded with suspicion, and the evidence relating to such change will be subjected to the closest scrutiny. *Winship* v. *Winship*, 16 N. J. Eq. 107; *Beach* v. *Beach*, 46 Pac. Rep. 528; *Smith* v. *Smith*, 4 Green, (Ia.) 226; *Whitcomb* v. *Whitcomb*, 46 Ia. 437; *Dutcher* v. *Dutcher*, 39 Wis. 651; *Reed* v. *Reed*, 51 Mich. 117; *Sewall* v. *Sewell*, 122 Mass. 156; *Smith* v. *Smith*, 13 Gray, 209; *Com.* v. *Kendall*, 38 N. E. Rep. 504; *Hall* v. *Hall*, 25 Wis. 600; *Dunham* v. *Dunham*, 44 N. E. Rep. 841; *Dickinson* v. *Dickinson*, 45 N. E. Rep. 1091; *Munson* v. *Munson*, 14 N. Y. Supp. 692; *Chapman* v. *Chapman*, 21 N. E. Rep. 806. A former adjudication of the issues in this case by the courts of the District of Columbia is plead in bar. In that action by Mrs. Smith against respondent permanent alimony was awarded her, and every material point presented in this case was there decided adversely to respondent. Such decree must stand until reversed by a proper proceeding and is a bar to this. *Tadlock* v. *Eccles*, 73 Am. Dec. 213; *Slater* v. *Skirving*, 70 N. W. Rep. 493; *Kilheffer* v. *Heir*, 17 Am. Dec. 658. *Fischel* v. *Fischel*, 12 Am. Dec. 257; *Smith* v. *Smith*, 37 At. Rep. 49. While the parties lived apart by agreement, no charge of desertion can be sustained. *Franklin* v. *Franklin*, 28 N. E. Rep. 581.

Fredrus Baldwin, for respondent.

The motive which prompted respondent to change his residence to this state is immaterial if he has a permanent home here. *Robertson* v. *Cease*, 97 U. S. 646; *Shelton* v. *Tiffen*, 6 How. 163. The fact that the liberal divorce laws led to his residence here, does not preclude him from the rights of an inhabitant of the state. *Fasdick* v. *Fasdick*, 15 R. I. 130, 23 At. Rep. 140; *Colburn* v. *Colburn*, 70 Mich. 647; *Alber* v. *Alber*, 141 Ill. 550, 31 N. E. Rep. 153, The words actual resident as used in the divorce statute means residence with the same attributes as are intended when the word domicile is used. *Carpenter* v. *Carpenter*, 30 Kan. 715, 2 Pac.

Rep. 122. The law of the place of the actual bona fide domicile of the parties gives jurisdiction to decree a divorce for any cause allowed by local law. Story Confl. L. 230; Whart. Confl. L. 856; 2 Bish. M. D. & S. 141. The trial court found that defendant was guilty of extreme cruelty. Grevious mental suffering inflicted upon another is extreme cruelty within the meaning of the statute. *Carpenter* v. *Carpenter*, 30 Kan. 712, 2 Pac. Rep. 122; *Whitmore* v. *Whitmore*, 49 Mich. 417; *Avery* v. *Avery*, 33 Kan. 1; *Barnes* v. *Barnes*, 30 Pac. Rep. 298; *Fleming* v. *Fleming*, 30 Pac. Rep. 566. Plaintiff need not prove injury to the health to obtain a divorce because of mental suffering. *Robinson* v. *Robinson*, (N. H.) 49 Am. St. Rep. 632; *Poor* v. *Poor*, 29 Am. Dec. 674; *Morris* v. *Morris*, 73 Am. Dec. 619; Myers Appeal, 12 Am. St. Rep. 877; *Sharp* v. *Sharp*, 6 N. W. Rep. 15; *Kelley* v. *Kelly*, 1 Pac. Rep. 194; *Cole* v. *Cole*, 23 Ia. 433. A judgment is conclusive as an estoppel only as to facts without the existence and proof or admission of which it could not have been rendered. *Leonard* v. *Whitney*, 109 Mass. 265; *Palmer* v. *Hussy*, 87 N. Y. 303; *Burlen* v. *Shannon*, 14 Gray, 433; *McIntyre* v. *Story*, 80 Ill. 127.

WALLIN, J. This action was brought to obtain a divorce from the bonds of matrimony. In the court below the plaintiff prevailed, and obtained a judgment decreeing a total divorce between the parties on the grounds of the defendant's cruelty and desertion. The record transmitted to this court embraces all the evidence, and the case is now before the court for trial anew on the merits, under section 5630, Rev. Codes.

In the view which we have taken of the questions presented by the record, it becomes unnecessary, if not improper, in disposing of the case, to do more than to discuss a single feature thereof, viz. that which bears upon plaintiff's domicile in the state, as affecting the jurisdiction of the trial court over the subject matter of the action. We are convinced, after a careful review of the evidence,—all of which upon this point came from the plaintiff's side of the case,—that the plaintiff was not domiciled in this state any time prior to the commencement of this action

or before its trial. The complaint alleges that the plaintiff now is and has been for more than 90 days last past an actual resident and inhabitant of this state, and that the defendant resides in New York state, at or near Worcester, in Otsego County. The answer, after admitting that the defendant is a resident of the State of New York, denies that the plaintiff ever resided in this state, and alleges that he is now, and for more than 20 years has been, an inhabitant and resident of the State of New York. The action was commenced on March 25, 1896, and was tried August 4, 1896. Among other findings of fact the court below found as follows: "That plaintiff and defendant, on the 7th day of December, 1863, in Otsego County, State of New York, intermarried; that plaintiff is a clerk by occupation, and since March 21, 1871, has been employed in the treasury department of the United States; that at the time of such appointment he was living in East Worcester, Otsego County, State of New York, and has been, since 1865, at his residence thereat with his wife, this defendant, and that the plaintiff ever since his appointment as clerk, as aforesaid, voted at East Worcester, Otsego County, New York, down to the year 1895, and claimed that East Worcester, New York, was his home; that his official duties were to be performed and were performed at Washington, D. C., and at the United States treasury department, and that he was in the civil service of the United States; that he was compelled to spend his time at said City of Washington, D. C., during all his time, except one month each year which he was allowed for absence, and that during all these years, except when at East Worcester, Otsego County, N. Y., he boarded, lodged, and had his washing done at Washington, D. C.; that in October, 1895, or about that time, he left the City of Washington, and went to Worcester, Otsego County, N. Y., and from there about October 1, 1895, came to Jamestown, N. D., for the purpose of making North Dakota his home, in good faith, and that about October 5, 1895, reached Jamestown, Stutsman County, N. D., and established a domicile thereat, and since that time has had no other

residence or domicile; that after establishing his domicile thereat, and after a few days, he returned to the treasury department, at Washington, D. C., aforesaid, and did not return again to Jamestown, N. D., until about July 30, 1896."

The defendant controverts the finding which declares, in effect, that the plaintiff in good faith established his residence and domicile in North Dakota about October 1, 1895, and since that time has had no other residence or domicile, and by a proper exception raises the question in this court as to the sufficiency of the evidence to sustain such finding. The testimony bearing upon this question is not voluminous and is undisputed. It appears that the plaintiff was very seriously wounded at the battle of Gettysburg, and that by reason thereof, through the intervention of friends, a position was secured for him, in 1871, in the treasury department at Washington, and that he has held that position continuously ever since his appointment. Each year the plaintiff is granted a leave of absence for the period of 30 days, and no longer, and during which it has been his habit to spend his time in Otsego County, N. Y., and plaintiff has voted there up to the time when he claims to have changed his residence from New York to North Dakota. Plaintiff's relatives live in New York, and there he was born and lived and owned a residence after his marriage. None of his kindred are shown to have ever lived in this state. He left Washington about October 1, 1895, and visited relatives in Otsego County for a day or two, and then informed his relatives that he was coming to North Dakota to "procure a divorce," and also said "he was going to Jamestown, N. D., to take up his residence." Plaintiff arrived in Jamestown, N. D., in the early part of October, 1895, and remained there about seven days, stopping at an hotel. He then left for Washington, and remained in that city in his said employment continuously until July 30, 1896, on which date he reached Jamestown, N. D., and came there to attend on the trial of this action, and for no other purpose. His counsel admits on the argument in this court that plaintiff returned to his work in

Washington at once after the trial of his case was completed. During his seven days' sojourn at Jamestown, in October, 1895, the plaintiff engaged in no business occupation whatever, and did not enter into any negotiations there with a view to entering into any particular business or occupation in North Dakota. He brought with him no effects other than the usual baggage of a transient traveler, and, so far as appears, neither purchased nor rented property anywhere in the state. He was not called into the state on any business errand, nor did he come here to engage in any business, calling, or occupation whatever. He testified that one of his objects in coming to North Dakota was to obtain a divorce, and, when pressed to do so, gave no other specific object or motive as an inducemant operating to bring him within the state. He admitted that one object he had in coming to this state was to establish a residence in order to apply for a divorce, but stated that such object was not the only consideration in his mind; yet, being urged to mention any other motive, failed to do so otherwise than to say, in general terms, that he was prospecting, looking around, etc. In answer to a direct question put by his counsel, the plaintiff stated, as a witness, in substance, that he was a resident in good faith of Jamestown, N. D., and that he became a resident there about the 1st of October, 1895. If this testimony is true, the plaintiff was in a position to institute his action in March, 1896, when it was commenced. The court below has found that the plaintiff was a resident and was domiciled in the state in good faith from and after October 1, 1895. After carefully weighing this evidence, this court has been unable to reach the same conclusion, but has, on the contrary, reached the opposite conclusion. The evidence, viewed as a whole and considered in the light thrown upon it by the surrounding circumstances of the case, irresistibly leads us to conclude that the plaintiff came into this state in October, 1895, for a temporary purpose only, *i. e.* of obtaining a nominal and technical status as a resident, with a view to instituting an action for a divorce, and for no other purpose whatever. We think this purpose stands

out clearly and unmistakably. The only business which the plaintiff transacted during the few days in which he was in the state was to consult with his attorney, with whom he had previously corresponded, with reference to the commencement of an action for divorce, which action was subsequently commenced. It is apparent that the nature of plaintiff's business was such that it required his personal attention at Washington, and, in the entire absence of any evidence showing a purpose or expectation on plaintiff's part of quitting his employment at Washington to take up another business in this state, we are, as we think, warranted in the conclusion that plaintiff did not intend at any time to do so. Had he cherished any such purpose, he would certainly have revealed it in his testimony, when pressed by counsel to do so, under the circumstances of this case.

The record is replete with evidence that the conjugal infelicities of the plaintiff and defendant were of many years' standing, and had been attended with peculiarly exasperating incidents and much mortifying publicity. Suits of both a civil and criminal nature had been prosecuted by the defendant against the plaintiff prior to the commencement of this action, and these attacks upon the plaintiff by the defendant had, as the evidence shows, engendered in the mind of the plaintiff a deep resentment against the defendant, culminating in an inflexible purpose to obtain a legal separation from her if possible. In paying his brief visit to this state in October, 1895, we can discover in the record no trace of any object whatever other than that of availing himself of our liberal laws upon divorce. The plaintiff's grounds of divorce—cruelty and desertion—constitute no grounds in the State of New York for a total divorce from the bonds of matrimony. Under our more liberal laws, these grounds are sufficient, and the plaintiff himself testifies that one motive for coming here was that he might obtain a divorce by coming. We think further comment upon the evidence is unnecessary, and shall only add that we realize the fact that the plaintiff was under constraint by reason of the fact that his occupation required him to remain

constantly out of the state, and at Washington, D. C., except for the brief period of 30 days in each year in which he had leave of absence. This may be plaintiff's misfortune, but it cannot alter the fact that, upon this issue, the plaintiff is bound to show to the satisfaction of the court, by competent evidence, that he was domiciled in the state for a period of 90 days before his action was commenced. In this the plaintiff has, in our opinion, signally failed and come short. We are convinced, from all the circumstances of the case, that the plaintiff at all times cherished the purpose to leave the state, and not reside therein, after he had secured his divorce. We do not wish to be understood that the fact that the plaintiff came to the state with a view of obtaining a divorce should militate against the bona fides of his domicile; provided, always, that he in good faith intended to reside here, and did not, while prosecuting the action for a divorce, harbor a purpose of quitting the state as soon as that object was attained.

The motive of taking up a residence is usually immaterial, except so far as it may throw light upon the bona fides of the domicile. *Fosdick* v. *Fosdick*, (R. I.) 23 Atl. 140; *Colburn* v. *Colburn*, 70 Mich. 647, 38 N. W. Rep. 607. The statute (Revised Codes, section 2755) declares: "A divorce must not be granted unless the plaintiff has in good faith been a resident of the state ninety days next preceding the commencement of the action." In our opinion, this language implies something more than the mere inhabiting or mere residence in the state by the plaintiff for the prescribed period. Residence in good faith includes the attributes of domicile. *Carpenter* v. *Carpenter*, 30 Kan. 712, 2 Pac. Rep. 122. For the purposes of a divorce, no matter how long a residence in a particular place may be, it does not confer domicile unless there be an intention to remain in such place permanently. See Whart. Confl. Laws, § 223. The test is domicile, and it is a right test, since it assumes, not merely residence, but an intention to remain permanently in the territory of the state asserting jurisdiction. "There must be a real domicile; that is to say, the domicile must be adopted as a permanency."

Id. In divorce law, the word "residence" in statutes giving jurisdiction is interpreted to mean the same thing as "domicile." 2 Bish. Mar. & Div. § 111. In fact, a divorce granted to a mere inhabitant or mere resident, not domiciled in the state granting the divorce, would be a purely local affair, and without binding force in other jurisdictions. *Id.* section 10. As to what constitutes domicile as distinguished from residence, see Nels. Div. sections 40, 41. The statute requiring residence, which means domicile, for a period of 90 days, as preliminary to starting an action for a divorce, is jurisdictional to the subject matter. Until this preliminary proof is made, the trial court obtains no authority to move in the action. Until this prerequisite is met, no lawful service of a summons can be made. The court itself is in duty bound to see that its own jurisdiction exists, and for that purpose it should scrutinize the proof offered on this question with painstaking fidelity. In a divorce case the sovereign state is always present as a party in the action, not technically, but actually and potentially, a party. The state represented by the court is there to see to it that no mere transient inhabitant, whose domicile is elsewhere, shall call upon the courts of the state to adjudicate upon the marital relations of citizens of other states or nations. To do so would not only be without results, except as a purely local affair, but would be a gross violation of the comity of states, and one directly calculated to lead to much social and domestic discord and unhappiness to the innocent parties directly concerned in the action. The proof of jurisdictional facts should be clear and convincing. In the case at bar it falls far short of this. The court below, not having acquired jurisdiction of the subject-matter, was without authority to enter judgment. For this reason the judgment must be reversed and the action dismissed. It will be so ordered. All the judges concurring.

(75 N. W. Rep. 783.)

DAVID A. BLACK *vs.* THOMAS M. WALKER, *et al.*

Opinion filed May 10th, 1898.

Sufficiency of the Evidence.

The verdict for plaintiff in this case cannot be disturbed as not being supported by the evidence, although two witnesses for the defendant testified positively to a state of facts different from what the jury must have found, and their testimony was not directly contradicted, but the testimony of plaintiff tended to establish other facts that could not co-exist with the facts testified to by such witnesses for the defense.

Government Survey—Location of Corner.

Where the contest was over the location of the original corner as established by government survey, and two different points, and only two, were claimed and testified to as being such corner, it was not error for the court to ask the jury whether such corner was at one point or the other, instead of submitting the general question of where such corner was.

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

Action by David A. Black against Thomas M. Walker and Agnes C. Walker to determine the ownership of land. Judgment for plaintiff, and defendants appeal.

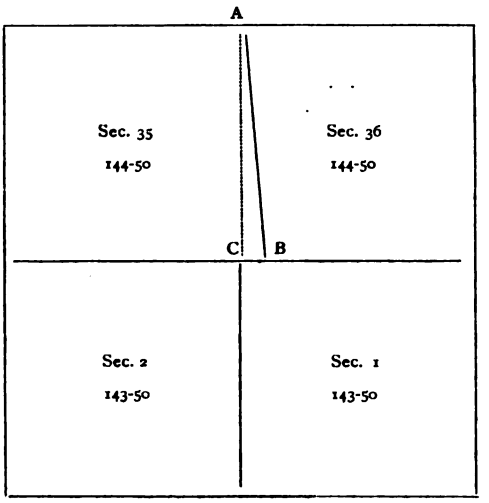
Affirmed.

W. C. Resser, for appellants.

Carmody & Leslie, for respondent.

BARTHOLOMEW, J. This action was brought to determine whether or not a certain triangular tract of land formed a portion of section 36, township 144, range 50, in Traill County, or a portion of section 35, same township. If the former, it belongs to plaintiff; if the latter, it belongs to defendant Agnes C. Walker. A trial to a jury resulted in a verdict for plaintiff. A motion for a new trial was denied, and judgment rendered on the verdict. There was an alleged irregularity about the motion for a new trial, which appellant seems to fear will prevent a review of the evidence in this court. But respondent makes no such claim. On the contrary, by his course he concedes that the evidence is before us. We need not, therefore, further notice the

irregularity, if any there be, connected with the motion for a new trial. The claims of the respective parties will be more readily comprehended by a diagram:



Sections 36 and 35 are, of course, on the south line of the township. It happens also, in this instance, that they are on the south line of the county; sections 1 and 2 directly south being in Cass County. It is conceded that point A is the original corner between said two sections on their North line, established by government survey. The contention is over the location of the original corner on their south line, both parties conceding that the original corner must govern. Plaintiff, who owns the west half of section 36, claims that the corner is at point C, while defendant Agnes C. Walker, who owns section 35, claims that it is point B. Defendants have occupied and cultivated the land up to line A—B, while plaintiff claims to the line A—C. The distance from B to C is 7¾ rods. The contest is over the triangular tract bounded by those lines.

Some errors are assigned upon the admission of testimony, but the rulings were clearly right, and the points raised involve nothing of general interest. The chief reliance of appellant is

upon the assignment which raises the question of the sufficiency of the evidence to support the verdict. The controlling points in the evidence may be stated very briefly: Several parties testified that they had at different times assisted in measuring the distance along the south side of said section 36, commencing at the southeast corner (about the location of which there is no dispute,) and that the distance to point C was 320 rods, and that the south line of section 35, measuring from point B to west line, was 7¾ rods more than a mile. The original field notes of the government survey were introduced, showing the survey between townships 143 and 144 north, range 50 west, and from which it appears that, commencing at the point where the line between townships 143 and 144 intersects the line between ranges 50 and 49 (which would be the southeast corner of said section 36) the surveyor then ran west "on the true line between sections one and thirty-six" 80 chains (320 rods,) and "drove charred stake, and set post in mound, for corner to sections 1, 2, 35, and 36," and continuing west on line between sections 2 and 34, at the distance of 80 chains further, a like corner was established between sections 2, 3, 34, and 35. It was also shown that the highway which should be on the section line between sections 35 and 36 ran just east of the line A—B, but when it reached the south line of section 36 it turned directly west, and followed the east and west road to point C, and then ran south on the line between sections 1 and 2, but that there was no such offset at the township line in the highways on the section lines east or west. This was the testimony upon which the plaintiff relied. For the defense the appellant Thomas M. Walker testified that when he took possession of section 35, in 1880, the corner stakes were standing, and clearly visible, and were at point B; that in breaking up the land he established a straight line by means of intermediate stakes between the original government stakes at the southeast and northeast corners of said section 36, and broke the land, and has since occupied it with his co-defendant only up to the line so established. Another witness for the defense (Mr. Kenyon)

testified that at one time he owned the northeast quarter of said section 2; that he took possession of it in 1878, and at that time the section corner stake at the northeast corner of his land (which would be the southeast corner of defendants' land) was standing; that it remained standing for some years, and was at point B: that the east line of his cultivated land was practically identical with the east line of the defendants' land. The witness also testified that in 1882 he was digging a ditch along there. The stake had at that time been burned away by a prairie fire, but the mound was still there, and to preserve the corner he buried some stones where the mound was, marking one with a cross. Plaintiff admitted that under the instructions of this witness he had uncovered the stones at the point where witness said he had buried them. Appellants insist that, as no witness went upon the stand to contradict either Mr. Walker or Mr. Kenyon, and as they each swore positively that the original corner was at point B, that any finding of a jury to the contrary must be set aside as without support in the testimony. But that is by no means true. The most direct and positive testimony may be completely demolished by circumstancial evidence, or overcome in the minds of a jury or the mind of a court by the establishment of other facts inconsistent therewith. This case is a good illustration. If the jury believed that it was only 320 rods from the southeast corner of section 36 to point C (and a number of witnesses so testify, and no one assumes to contradict it,) and if the jury also believed that the original section corner between said sections 1, 2, 35, and 36, was located 320 rods west from the southeast corner of 36 (and the original field notes so declare, and no one assumed to dispute the recital,) then the jury were bound to believe that the original stake had been moved after the corner was established (the survey was made more than 10 years before either witness claimed to have seen the stake,) or that the witnesses mistook something else for the original stake and mound. The two states of facts could not co-exist. There was

strong evidence of the existence of each. It was the province of the jury to say which did in fact exist, and their finding cannot be disturbed.

The court submitted two questions to the jury: (1) Was the original corner stake at point B? (2) Was the original corner stake at point C? Error is assigned in thus limiting the jury to those two points. It is urged that the jury should have been permitted to say where the original stake was. But it was not claimed by any one that it was at any point other than B or C. True, there was a slight discrepancy as to the exact location of point C, but it was too slight for the law's notice. Had the jury found that the corner was at a point other than B. or C, their finding could not have stood.

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

(75 N. W. Rep. 787.)

WILLIAM A. COLER *et al. vs.* ALFRED COPPIN, *et al.*

Opinion filed May 10th, 1898.

School Township—Enforcement of Judgment.

When a judgment is obtained against a school township organized under chapter 44 of the Laws of 1893, on an indebtedness of a school district for whose indebtedness such school township became liable under section 144 of such statute, the judgment creditor may proceed to enforce such judgment, the same as any other judgment against such school township.

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

Application by William N. Coler and W. N. Coler, Jr., co-partners as W. N. Coler & Co., for a peremptory writ of mandamus to compel the payment of a judgment held by plaintiffs against Alfred Coppin and others, as directors of Dwight School Township, Richland County. From a final judgment denying the writ, plaintiffs appeal.

Dismissed.

John L. Pyle and *McCumber & Bogart*, for appellants.

W. E. Purcell, for respondents.

CORLISS, C. J. On the threshold of this case, we feel it our duty frankly to admit that the criticism of the learned counsel for the respondents on our opinion in the case of *Coler* v. *School Tp.*, 3 N. D. 249, 55 N. W. Rep. 587, is fully justified. On reflection, we are satisfied that we were in error in the views therein expressed, that the defendant therein could be held liable without showing that the steps mentiond in sections 137 to 141 of chapter 44 of the Laws of 1883 had all been taken. But the decision of that case was right on the facts before us, though our reasoning in the opinion cannot be sustained. We had before us the question whether the facts showed that the new school township, which was the defendant in that action, had become liable upon the bonds issued by School District No. 22. We must concede that, under the provisions of section 136 of the statute, the organization of the school township therein referred to could not be complete until all the steps therein specified had been taken, including the equalization of taxes under sections 137 to 139. Until such new organization should be complete, the old districts were to remain unaffected by any proceedings in the direction of a change in the school system which might be taken under that law. On the theory that the taxes had not been equalized under that statute, our former decision was wrong. But it was unnecessary for the decision of that case that we should have taken such extreme ground. The District Court found as a fact in that action that the new school township, which was the defendant in that case (*i. e.* Dwight School Township,) had been duly organized, and that School District No. 22, by which the bonds had been issued, was in part included within Dwight School Township, and that the school house and furniture of such district were situated in Dwight School Township, and were received into such township, and were owned thereby. The finding of fact showing the complete organization of Dwight School Township is as follows: "May 28, 1883, the commissioners of said county proceeded to establish school and civil townships under the provisions of an act of the legislative assembly entitled 'An act to

establish and provide for the maintenance of a general and uniform system of common schools'; and on June 30, 1883, Dwight School Township was duly organized as a school township, and its officers were duly elected and qualified; and since such time said Dwight School Township has been, and still is, a duly organized school township, under the name of 'Dwight School Township of Richland County, Territory of Dakota,' and now State of North Dakota, and as such has since said time conducted schools in its corporate limits." This finding was not challenged on the appeal, and therefore it conclusively appeared on such appeal that the organization of Dwight School Township was complete. This finding necessarily included a finding that all the preliminary steps mentioned in section 136 had been taken to complete the organization of Dwight School Township, including the equalization of taxes under sections 137 to 140. The finding is explicit "that on June 30, 1883, Dwight School Township was duly organized as a school township." The finding could not be true, except on the theory that all necessary steps had been taken to complete the organization of such township. It was therefore our clear duty, upon the record before us, to hold the defendant liable on the bonds of School District No. 22, because the statute declares, without qualification, that the school township organized thereunder should be liable for the debts of every school district, the school house and furniture of which were received into, and included within, such school township, and owned thereby. Section 144. It therefore appears that our former decision was right, although the reasoning on which it was placed was not sound.

The appeal in this case is assumed by the parties to be an appeal from a final judgment denying an application for a peremptory writ of mandamus, made by the judgment creditor whose judgment we affirmed on that appeal, to compel the officers of Dwight School Township now (Dwight School District,) against which such judgment was rendered, to levy a tax to pay such judgment. The learned District Judge, in refusing to

order the issuance of the writ prayed for, was misled by the language of this court into believing that the judgment creditor could not compel the levy of a tax by the officers of the defendant until he had secured an equalization of taxes under the statute. The responsibility for this error is not his. It rests upon this court alone. Originally we thought that this was the proper construction of the statute, but we now see that that view is not tenable. We held that the judgment obtained by the relator herein must be enforced, subject to the provisions of sections 136 to 141 of that act. This provision in the judgment is without force; for, on turning to those sections, we now see that they in no manner relate to the enforcement of such judgment as should be obtained against the new school townships for debts of the old school districts. An equalization of taxes was, under the statute, a condition precedent to the organization of the new school township. And the findings of the court in the action brought to obtain a judgment against Dwight School Township settled, as a matter of fact, that this had been done. Therefore the holder of the bonds there sued upon had a right to recover a judgment against Dwight School Township, and enforce it as any other judgments against such township. The sections of the statute subject to which we said that the judgment must be enforced, have no relevancy whatever to the question of enforcement of such judgment, and the clause inserted in our judgment was mere idle surplusage. It was as though we had declared that the judgment must be enforced subject to the provisions of the usury law. Section 144 treats the bonds issued by a school district the same as though they had been issued by the new school township itself: "Every school township shall be liable for and shall assume and pay fully, according to their legal tenor, effect and obligation, all the outstanding bonds and the interest thereon, of every school district, the school house and furniture of which are received and included within the school township and owned thereby, the same as if said bonds had been issued by said school township; and the law which authorized the school

district to issue bonds shall apply to the school township the same as if it had originally been authorized to issue, and had issued the said bonds. The bonds shall be deemed in law the bonds of the school township, with the same validity for securing and enforcing the payment of principal and interest that they would have against the district that issued them." Laws 1883, chapter 44, section 144. It follows that all judgments obtained against Dwight School Township for old debts of the school districts will be enforced, the same as any other judgment against such school township. We stated that it appeared to be assumed by the parties that the appeal is from a final judgment denying relator's application for a peremptory writ. But, on investigating the record, we discover that no final judgment has ever been entered. The learned District Judge on the hearing decided to hold the matter in abeyance, and expressly provided in his order that the case could be taken up at some future time on notice. Doubtless his view of the matter (a view for which we were wholly responsible) was that the relator could not obtain a peremptory writ on the showing made. But, as a matter of fact, no order for judgment that the application be denied has ever been made, nor has any judgment finally disposing of the case ever been entered. As the cause is still pending in the District Court, undecided, we must dismiss this appeal for want of jurisdiction. All concur.

(75 N. W. Rep. 795.)

THOMAS H. HEALD *vs.* ERIK YUMISKO, *et al.*

Opinion filed May 10th, 1898.

Reference—Consent of Parties.

While, under our statute, in all cases except where a court may on its own motion refer a cause, the written consent of the parties is required, to authorize the court to send a case to a referee, yet where the order of reference recites that both parties in open court consented to the same, and the correctness of such recital is not questioned, no further or other written consent is is required.

Reference to Take and Report the Evidence.

Where, under a reference so made by consent of parties, the order also recites that the case is sent to the referee to take and report the evidence, the parties cannot afterwards be heard to say that this reference was a nullity because it was not a full reference under the statute.

Public Lands—Boundaries and Subdivisions.

Section 2396, Revised St. U. S., which declares that "each section or subdivision of section the contents of which have been returned by the surveyor general shall be held and considered as containing the exact quantity expressed in such return," fixes the quantity at which the government must dispose of the tract, but does not control the area in contracts between private parties.

Boundary of Lands on a Stream.

When an irregular tract or lot of land abuts upon a stream of water, and a meander line is run ostensibly along this shore line for the purpose of fixing the area of such tract, the real boundary of the tract is the shore line, and not the meander line.

Representations as to Value of Land—Fraud.

Where, upon the sale of a tract of land, the vendor states the value thereof at a sum greater than its true value, but such statement is made under circumstances that show it to be simply the opinion of the vendor, and where the vendee, though ignorant of the value of the land himself, is unrestricted in his opportunities to learn its true value, no fraud can be credited upon the vendor's statement.

Evidence Sustains Findings.

Upon the evidence as presented in the abstract, this court is not warranted in reducing the amount of the recovery in this case.

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

Action by Thomas H. Heald against Erik Yumisko and Ina Yumisko to foreclose a mortgage. Decree for plaintiff, and defendants appeal.

Affirmed.

George W. Parks, for appellants.

Stevens & Cassels, for respondent.

BARTHOLOMEW, J. This was an action to foreclose a mortgage on real estate, given to secure the notes that represented the purchase price of such real estate. The defense was fraud and misrepresentation in the sale of the real estate, and payment. There was a decree for plaintiff, and defendants appeal.

At the outset a point is thrust upon us which involves the jurisdiction of the District Court, as well as the jurisdiction of this court, to adjudicate upon the matter. The case was sent to a referee to take and report the testimony, and it is upon the testimony so taken that the judgment is based. Section 5455, Rev. Codes, reads, "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." It is urged that the referee was without power to act in this case, as no written consent to the reference was given. The order of reference reads as follows (omitting the title:) "The above entitled cause coming on to be heard in open court this 29th day of May, 1896, the plaintiff, by his counsel, moved the court for leave to amend his complaint, which motion was granted upon condition that the plaintiff would consent to a reference of the cause to a referee to take the testimony offered by the respective parties, and report the same to this court, which condition was by the plaintiff consented to, and which reference was also consented to by the defendants. It is therefore now ordered," etc. There is no evidence in the record to show that this recital was not strictly true, and it shows that defendants, in open court, consented to the reference. It has been repeatedly ruled that this consent in open court entered in the order was a waiver of any other written consent, and rendered the order of reference made in pursuance thereof strictly legal and binding on the parties. *Keator* v. *Plank Road Co.*, 7 How. Prac. 41; *Leaycroft* v. *Fowler*, *Id.* 259; *Bucklin* v. *Chapin*, 35 How. Prac. 155; *Bonner* v. *McPhail*, 31 Barb. 106; *Smith* v. *Hicks*, 108 N. C. 268, 12 S. E. Rep. 1035. Moreover, the reference to which the parties consented was a reference "to take the testimony offered by the respective parties, and report the same to this court." Can the defendants now be heard to say that the reference was nugatory because the referee was not required to make findings of fact and conclusions of law? We think not. We are not deciding what a court might do where a consent was simply to a reference of the case. Here

the particular purpose of the reference was assented to. In *Keator* v. *Plank Road Co.*, *supra*, the court said: "The agreements of parties, in the presence of the court, in respect to the proceedings in a pending suit, have always been held binding. It will, indeed, be a sad condition of things when it shall be otherwise." This disposes of all the assignments in which the reference is directly or indirectly attacked.

The respondent insists that the assignment of errors in this case so far fails to comply with the rules of this court that we cannot, under the assignment, investigate any question of fact. We would be warranted, under the rule, in declining such investigation. But we have a discretion in the matter, and in this instance we choose to disregard the defects, and to decide the points that appellants have endeavored to raise.

The main point wherein it was claimed there had been fraud and misrepresentation was as the quantity of land conveyed. The plaintiff represented to the defendants when he sold said land that the tract contained about 140 acres, and the land was purchased at so much per acre on that basis. The trial court found that the representations as to quantity were substantially true. Appellants contend, on the other hand, that the tract contends but 86 acres and a fraction. In the patent received from the government by plaintiff, the land is thus described: "Lots five and six and the southeast quarter of the southwest quarter of section twenty-six, township one hundred and twenty-nine north, of range sixty west of fifth principal meridian in North Dakota, containing eighty-six and forty-hundredths acres, according to the official plat of said land returned to the general land office by the surveyor general." Appellants claim that the amount named in the patent is conclusive. The evidence shows that lots 5 and 6 are irregular tracks, —made so by the James river. When the government survey was made, a meander line was run along such river, from which, of course, its area was estimated. If these lots are bounded by the meandor line, they contain only 46 acres and a fraction; but, if

they extend to the shore line of the river, they contain about 100 acres. It becomes important, then to establish the true boundary. The appellants rely upon section 2396, Rev. St. U. S., which declares that "each section or subdivision of section the contents of which have been returned by the surveyor general shall be held and considered as containing the exact quantity expressed in such return." But we are not to presume from that language that the federal government intended to regulate contracts between private parties, and to declare that every surveyed tract of land must, regardless of mistakes and inaccuracies, however pronounced, be forever held and considered, in conveyances between private parties, to contain the exact quantity specified in the government survey. Rather, it was the purpose to fix by that statute the exact quantity at which the general government should dispose of the tract. See cases hereafter cited. Appellants also cite *Lammers* v. *Nissen*, 4 Neb. 245, approved in 25 Lawy. Co-op. Ed. U. S. 562, and *Bissel* v. *Fletcher*, 19 Neb. 725, 28 N. W. Rep. 303. In each of those cases the plaintiff owned a tract of land which by government survey was bounded on the side nearest the water (in one case the Missouri river, and in the other the Republican river) by a meander line; and plaintiff in each instance sought to hold the land to the shore line, but in each case the government had surveyed and sold other tracts lying between such meander line and a shore line. Each case announces the principle that "in the surveys of the public lands of the United States the meander lines are generally considered as following the windings of streams; but the question whether they do so or not is a question of fact, to be determined by evidence *aliunde*." And in each case it was held that, where the meander line did not in fact follow the shore line, the fact that it was designated on the map as a meander line was not conclusive on the government, and did not estop it from claiming the land between such pretended meander line and the shore line. We think those cases were correctly decided, under their facts. They concede the rule to be well settled that a meandered line border-

ing on the bank of a stream is not to be considered as the boundary of the tract, but simply as defining the sinuosities of the bank of the stream, and as a means of ascertaining the quantity of land in the fraction subject to sale. In the case before us there is nothing in the record to show that the government claims, or has ever claimed, any land between the meander line and the shore line. On the contrary, it appears that, on their purchase, defendants went into possession up to the shore line, and have ever since and are now holding such possession. The trial court found expressly "that said lots 5 and 6 lie adjacent to, and abut upon, the James river, and said line is the eternal western boundary of said lots; that the meander line showing the place of said water course, and its sinuosities, courses, and distances, was run along said river in the government survey thereof." As appellants attack this finding, we are bound to presume that they have given us in the abstract the evidence, if any there be, upon which they base their contention, and yet we search the abstract in vain for any evidence whatever upon which such finding can be disturbed. True it is that the finding shows the tract to be much larger if bounded by the shore line than if bounded by the meander line. But what causes this difference, we are left to conjecture. Whether it arise from accretion proper, or from the failure of the surveyor to accurately follow all the horseshoe bends and windings of an exceedingly tortuous stream, we cannot say. In *Hardin* v. *Jordan*, 140 U. S. 371, 11 Sup. Ct. 808, 838, it is said: "The meander line runs along or near the margins of such waters are run for the purpose of ascertaining the exact quantity of the upland to be charged for, and not for the purpose of limiting the title of the grantee to such meander lines. It has frequently been held, both by the Federal and State courts, that such meander lines are intended for the purpose of bounding and abutting the lands granted upon the waters whose margins are thus meandered, and that the waters themselves constitute the real boundary." Again, in *Railroad Co.* v. *Schurmeir*, 7 Wall. 272, the court say: "Meander lines are run, in surveying fractional portions of the

public land bordering upon navigable rivers, not as boundaries of the tract, but for the purpose of defining the sinuosities of the banks of a stream, and as means of ascertaining the quantity of land in the fraction subject to sale, and which is to be paid for by the purchaser. In preparing the official plat from its field notes, the meander line is represented as the border line of the stream, and shows to a demonstration that the water course, and not the meander line as actually run on the land is the boundary." And to same effect are *Kraut* v. *Crawford*, 18 Iowa, 549; *Broom Co.* v. *Adams*, 44 Mich. 403, 6 N. W. Rep. 857; *Clute* v. *Fisher*, 65 Mich. 48, 31 N. W. Rep. 614; *Boorman* v. *Sunnuchs*, 42 Wis. 233; *Ridgway* v. *Ludlow*, 58 Ind. 248; *Houck* v. *Yates*, 82 Ill. 179; *Fuller* v. *Dauphin*, 124 Ill. 542, 16 N. E. Rep. 917; *Ex parte Davidson*, 57 Fed. Rep. 883. In this last case this language is used: "Whatever ledges or spits or tongues or points of land project out beyond the meander line are included as a part of the fractions conveyed by the patent." Under these decisions, as the evidence stands in this case, it is too clear for question that defendants took to the shore line, under their deed.

There is also complaint by appellants as to misrepresentations in the value of the land. There is no doubt but that, pending the negotiations for the sale, plaintiff stated that the land was of a higher value than that placed upon it by witnesses. But, while the defendant says that he knew but little or nothing about the value of land, he had with him a friend,—a countryman of his,—who was present expressly to aid defendant in making a purchase, and he could have gotten the opinion of that friend as to the value. He could have gotten the opinion ot any of the neighbors. He was bound to know that plaintiff, at most, was only expressing an opinion as to the value of property that he was trying to sell. This was so clear a case of "dealer's talk," or "puffing," that no authorities need to be cited to show that no legal fraud can be predicated thereon.

The remaining ground of complaint by appellants is the alleged failure of the trial court to give credit for all payments

made. The evidence in the abstract is not in narrative form, as required by law and the rules of court. It is in the form of questions and answers, but so entirely disconnected and fragmentary that we are not always certain that we understand it. We have given it the best examination its condition will admit. We know, in a general way, that for a year or two there were various dealings between the parties. In these dealings there were balances due from defendant to plaintiff, which were paid out of the moneys paid by defendant to plaintiff. But we cannot tell what these balances were, and there is so much controversy over time of payments that it is not possible to tell how much interest was paid. Plaintiff states with some definiteness the amounts received by him. Defendant does not admit the correctness of plaintiff's figures, but we are not able to tell from his testimony how much he claims he paid. The greater portion of his payments was made by delivering wheat to the elevators, and permitting plaintiff to receive the proceeds. But he does not give the price received, or the number of bushels delivered; and for the totals he depends upon the statements of the elevator agents, which, of course, are incompetent. We reach the conclusion that we cannot change the amount of this recovery. Indeed we would have been satisfied with it, had it been some dollars larger.

There are some purely technical points raised in appellants' brief that we have not noticed. Some of them are disposed of in the general discussion, but none of them merit further attention.

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

(75 N. W. Rep. 807.)

FRANK HICKS *vs.* F. O. BESUCHET.

Opinion filed May 10th, 1898.

Special Appearance—Jurisdictional Objections.

This action originated in a Justice's Court of Barnes county, and the summons therein was personally served upon the defendant within the County of

Barnes. Upon the return day, the defendant, appearing specially for the purpose, moved to dismiss the action on the ground of an irregular service of the summons upon the defendant. It appeared by the affidavits filed in support of the motion that the defendant, at the time the summons was served upon him, was a resident of the County of Ransom, in this state, and that on the day of such service the defendant came into Barnes County in the capacity of a witness, and also as a party, in good faith, to attend the trial of an action then pending in the District Court for the County of Barnes, and in which the defendant, prior to the service of the summons, but on the same day, testified as a witness. The motion to dismiss the action was denied. *Held*, that such ruling was erroneous. The immunity from service of a civil process which is awarded to a suitor or a witness who resides in another state, and who in good faith comes into this state to attend court as a witness or a party, is extended to non-residents of the county in which the same is made. The same considerations and grounds of public policy apply equally to both classes of non-residents.

Non-Residents Exempt from Process While Attending Court.

The common-law rule which protected suitors from arrest on civil writs while in attendance upon judicial proceedings has been enlarged by modern authority, and will now afford full protection to suitors and witnesses who are non-residents of the state or county from all forms of process of a civil nature during their attendance before any judicial tribunal, and for a reasonable time in going and returning.

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

Action by Frank Hicks against F. O. Besuchet. Plaintiff had judgment in the Justice Court, and defendant appeals from a judgment of the District Court affirming the judgment of the Justice Court.

Reversed.

Morrill & Engerud, for appellant.

Young & Burke, for respondent.

WALLIN, J. The facts which will control the decision of this case in this court, as disclosed by the record, may be briefly stated: The action originated in a Justice's Court of Barnes County, and the summons therein was personally served on the defendant in said county on the 19th day of June, A. D. 1897. On the return day, and before any other action was had in the case, the defendant, by his attorney, made a special appearance, and moved to dismiss the action upon the ground of an irregular

service of the summons upon the defendant. The motion was based upon an affidavit made by the defendant's attorney and filed with the justice. A counter affidavit was filed by the attorney for the plaintiff. There is no material conflict in the statement of facts embraced in the two affidavits. It clearly appears that at the time the summons was served on the defendant he was a resident of the County of Ransom. This fact is stated explicitly in both of the affidavits, and is not anywhere attempted to be denied. Defendant's affidavit states that the defendant, at the request of his attorney, left his home in Ransom County, and came to the City of Valley City, in said County of Barnes, on the day the summons was served upon him, and that the defendant came to Valley City on said day for the sole purpose of being present as a suitor and as a witness in his own behalf in certain civil actions then pending in the District Court for Barnes County, in which actions certain parties were respectively plaintiffs and this defendant was defendant; and at least one of said actions was tried in the District Court at Valley City on that day, and the defendant herein was sworn and examined as a witness therein. After said trial, and on the same day, this defendant was served with the summons herein at Valley City, and thereafter took the first regular train for his home in Ransom County. None of these facts are denied by any affidavit or showing made before the justice. The motion was denied, and, after saving an exception to the ruling, the defendant filed an answer, and thereafter cross-examined the plaintiff's witnesses. Judgment was entered by the justice in favor of the plaintiff in the sum of $24.25. From such judgment the defendant appealed to the District Court for Barnes County upon questions of law alone, specifying in his notice of appeal as errors of law the refusual of the justice to grant defendant's motion to dismisss the action; also that the evidence offered before the justice did not establish a *prima facie* case. The latter ground of the appeal seems to have been ignored in the District Court, and we regard the same as untenable under the existing practice. The action of the

District Court in the case is evidenced by an order as follows: "The court is constrained to place upon the affidavits the same decision as that made by the justice. There is not satisfactory evidence that Besuchet did not reside in Barnes County on the day these actions were brought, or that he was induced to come into the jurisdiction of the court by an artifice, or that he was served while in attendance upon the District Court. The affidavit further shows that, if such was true, that he waived his privilege, if any he had, by express consent. The appeals are accordingly dismissed, and judgment is ordered to be entered accordingly, with costs to be taxed according to law." No judgment was entered dismissing the appeal, but, on the contrary, the District Court entered judgment affirming the judgment entered on the merits by the justice of the peace, with costs in the District Court added. From such judgment defendant has appealed to this court.

The point that the judgment entered in the District Court does not conform to the order for judgment is not raised by counsel, and we shall therefore pass it over, especially as it appears from the order itself that the District Court considered only the merits of the question arising upon the motion to dismiss the action as made before the justice.

Reverting to the order of the District Court above set out, the same seems to have been inadvertently made. It is true that the defendant was not induced to come into the County of Barnes by any artifice. There is no such claim made by the defendant. As has been seen, it conclusively appears that the defendant at the request of his counsel, came to Valley City from his home in Ransom County on the day he was served with the summons for the purpose of attending upon a trial or trials of certain actions in which he was a party, pending in the District Court therein, one of which was actually tried on that day in Valley City, and defendant testified therein as a witness; after which, on the same day, he was served with the summons in this action, said service being made before the first regular train started from

Valley City upon which defendant could return to Ransom County. Nor can we understand upon what ground the statement is made in the order that defendant had waived his privilege, *i. e.* his immunity from service of process while in Valley City. The only foundation for such finding is contained in the affidavit of plaintiff's counsel, which was filed with the justice in opposition to the motion to dismiss the action. Upon this feature of the case the affidavit is as follows: "E. T. Burke, being duly sworn, deposes and says that he is one of the attorneys for the plaintiff herein, and has read the affidavit of Edward Engerud relating to the appearance of F. O. Besuchet at the trial of three certain actions in the District Court in Barnes County, N. D., at the time of the service of the summons in this action. Affiant further states that Edward Engerud came into the office of Young & Burke in the afternoon of the 19th day of June, 1897, and was talking with affiant regarding the settlement of the claims in suit in District Court, in which this affiant is one of the attorneys for plaintiff. At that time said Edward Engerud stated that he would find F. O. Besuchet, and bring him into the office; and that, if we could not reach a settlement, that we might serve 'any papers' on him which we pleased. On the same day, and a few minutes afterwards, the said Besuchet was in the office of affiant, and then and there admitted service of a summons and complaint in District Court in the case of *Straw & Ellsworth Mfg. Co.* v. *F. O. Besuchet.* Affiant further states that he is well acquainted with the residence of F. O. Besuchet, and that said Besuchet, during the year 1896, resided at Leal, Barnes County, N. D., until November 3, 1896, on or about which date he removed to Lisbon, Ransom County, N. D., where he has since resided and now resides." As we read this affidavit, counsel for the respective parties to certain District Court actions, three in number, were negotiating for a compromise and settlement of "the claims in suit in the District Court." It does not appear that any other claims or actions were mentioned at that interview. It is certain that the case at

bar was not then commenced, nor does it appear that the grounds of this action were mentioned in the negotiations of counsel, nor that the defendant had at that time employed counsel to defend him in the case at bar or in any action then begun or contemplated in any Justice's Court. Besides this, it appears that the papers which were then and there served were in a certain action in the District Court, the service of the summons in this case not being then made, nor made until later in the day. In this affidavit we discover no agreement on the part of any one to waive any legal right or privilege which defendant had with respect to this action. It is not pretended that the defendant personally waived any rights in this action, and it does not appear that any person was authorized to represent him. At most, the alleged waiver was a mere oral stipulation, which, if made by counsel regularly retained in the case, would not bind the defendant where the same is repudiated, as is done here. Revised Codes, section 429, subsection 2. It seems clear, therefore, that said order of the District Court was made under a misapprehension of the facts. Upon the merits of the motion made before the justice of the peace to dismiss the action, the defendant was clearly right. The action should have been dismissed then and there upon the grounds set out in both affidavits. The later authorities are explicit that the immunity from the service of process upon the state, is enjoyed equally with a nonresident of the state who in good faith comes within the state to attend upon the trial of an action, whether such non-resident is a litigant or a witness. In this case the defendant, at the time he was served with process, was in the County of Barnes in both capacities. *Letherby* v. *Shaver*, 73 Mich. 500, 41 N. W. Rep. 677; *Wilson* v. *Donaldson*, 117 Ind. 356, 20 N. E. Rep. 250; *Palmer* v. *Rowan*, 21 Neb. 452, 32 N. W. Rep. 210; *Bank* v. *Ames*, 39 Minn. 179, 39 N. W. Rep. 308; *Andrews* v. *Lembeck*, 46 Ohio St. 38, 18 N. E. Rep. 483. In *Palmer* v. *Rowan*, *supra*, the court say: "At common law, parties and witnesses attending in good faith any legal tribunal were priviledged from arrest on civil process during their attend-

ance, and for a reasonable time in going and returning." In *Wilson* v. *Donaldson*, *supra*, the grounds of these decisions are succinctly stated by Chief Justice Elliott as follows: "It is his privilege, under our laws, to testify in his own behalf; and this privilege should not be burdened with the hazard of defending other actions in our forums. Our own citizens will often derive a substantial benefit from the personal appearance of a nonresident defendant, since it may enable them to obtain a personal judgment which else were impossible. If citizens of other states are allowed to come into our jurisdiction to attend courts as parties or witnesses, and to freely depart from it, the administration of justice will be best promoted, since a defendant's personal presence is often essential to enable his counsel to justly conduct his defense. The principal of state comity, too, demands that a citizen of another state, who submits to the jurisdiction of our courts, and here wages his forensic contest, should not be compelled to do so under the limitation and obligation of submitting to the jurisdiction of our courts in every case that may be brought against him. While coming and departing, as well as while actually in necessary attendance at court, he should be free from the hazard of being compelled to answer in other actions." It follows, under the rule of law applied by these authorities, that the justice of the peace erred in denying defendants motion to dismiss the action, and the District Court erred in entering judgment for the plaintiff on the merits. Such judgment will be vacated, and judgment entered below dismissing the action, with costs to the defendant. All the judges concurring.

(75 N. W. Rep. 793.)

In re CARL A. KAEPPLER.

Opinion filed May 10th, 1898.

Insolvency—Exemptions.

In proceedings under the insolvency law of this state, the insolvent, if the head of a family, is entitled to the exemptions allowed by law, even as against

a creditor whose claim is for property obtained by the false pretenses of the insolvent.

Insolvency Discharge Not Operative Against Debt Contracted Under False Pretenses.

Such a claim is not discharged by the insolvency proceedings. The creditor can share in the dividends, and bring an action against the debtor to recover the balance, and on the judgment so obtained he can exhaust the debtor's exemptions.

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

Claim for exemptions as against a creditor by one Carl A. Kaeppler, an insolvent debtor. From a ruling in favor of the insolvent, the creditor appeals.

Affirmed.

Ball, Watson & Maclay, for appellant.

It has been questioned in this state whether exemptions should be allowed in case of insolvency and assignments. *Red River Valley Nat. Bank* v. *Freeman*, 1 N. D. 196, 46 N. W. Rep. 36 and § 6046, Revised Codes, was enacted to cure this defect in the law. The homestead claimant must be the head of a family. Section 208, constitution. His qualifications as a homestead claimant are further defined by § 3605, Revised Codes. The amount and quantity of exemptions is determined by article 2, chapter 11, Revised Codes. Section 6046 of the insolvent law simply provides the mode and machinery for the selection of exemptions in the particular case of insolvency. It gives no other or different exemptions than those provided by general law. By sections 6037, 6046, 6004 and 6036, Revised Codes, the debtor is permitted to select the exemptions allowed by law—and the exemptions consist only of property exempt from execution. In case of judgment for a fine or upon a bond given in criminal proceedings, the additional exemptions are not allowed. Could the debtor successfully evade this law by going into voluntary insolvency? In the face of § § 5526, 5527, can the fraudulent debtor who has obtained his whole property by false pretenses evade the statute by going into insolvency, where he has property

beyond exemptions? The exemptions are granted when the court is "satisfied that the insolvent is entitled thereto." The court may restrict the right to exemptions or deny them in case of manifest fraud. *Naumberg* v. *Hyatt*, 24 Fed. Rep. 898; *Strouse* v. *Becker*, 38 Pa. St. 190; *Appeal of Inhoff*, 13 At. Rep. 279; *McNally* v. *Mulherin*, 79 Ga. 617; *Bruff* v. *Stern*, 81 N. C. 183. The fraudulent representations and false pretenses whereby the insolvent obtained possession of the property of the objecting creditor, are sufficient to impress the funds in the hands of the assignee with a trust in favor of the creditor. Storys Eq. § 1259: *Bent* v. *Barnes*, 64 N. W. Rep. 428; *Holmes* v. *Gilman*, 34 N. E. Rep. 205.

Morrill & Engerud, (*H. R. Turner*, of counsel,) for respondent.

The facts alleged as objections by appellant are stated merely on information and belief. This is not sufficient. *DeLong* v. *Briggs*, 11 N. W. Rep. 412; *Sheridan* v. *Briggs*, 19 N. W. Rep. 189; *Marble* v. *Curran*, 29 N. W. Rep. 725. If respondent had property which he had omitted from his schedule, he would not be deprived of the specific property selected as exemptions. *Wagner* v. *Olson*, 3 N. D. 69, 54 N. W. Rep. 286. The institution of insolvency proceedings is equivalent to a levy for the benefit of all creditors. 16 Fed. Cases, 8789; 13 Am. L. Reg. (N. S.) 697; 6 Biss. 111. The power to grant or withhold exemptions is exclusively political. The courts have nothing to do with it. Nor can fraud be predicated upon a debtors selection of exemptions. *O'Donnell* v. *Segar*, 25 Mich. 367; *Jacoby* v. *Distilling Co.*, 41 Minn. 227; *Culver* v. *Rogers*, 28 Cal. 145; *Palmer* v. *Hawes*, 50 N. W. Rep. 341; *In re Hinkle*, 2 Saw. 305; 11 Fed. Cases, 6362; *McFarland* v. *Goodman*, 6 Biss. 111, 16 Fed. Cases, 8789.

BARTHOLOMEW, J. The sole question here involved relates to the right of a party who has been declared an insolvent on his own petition to claim his exemptions as against a creditor who claims that his debt was incurred under false pretenses and by the use of false representations on the part of such insolvent. The

trial court ruled in favor of the insolvent, and the creditor appeals.

We shall not discuss the point made by respondent that, under section 208 of our constitution, no head of a family can be deprived of the benefits of the exemption laws, as we think the ruling of the court was clearly right upon other grounds. Our insolvency law provides (sections 6037, Revised Codes) as follows: "The debtor shall be allowed such exemptions as are provided for by law and shall be permitted to use and occupy his homestead, household furniture, and absolute exemptions until his homestead and exemptions shall have been selected in the manner hereinafter prescribed." Section 6046, Revised Codes, provides for the selection of the homestead and exemptions up to the full amount allowed by law, at the value determined by the appraisement; and provides, further, that, when such exemptions have been selected, an inventory of the same shall be presented to the court, and, if satisfied that the debtor is entitled thereto, the court shall make an order setting the same apart. Thereafter the assignee has nothing to do with such exempt property. There are no exceptions to the rule whatever, so far as the insolvent law is concerned. There are no claims mentioned against which a debtor is not entitled to his full exemptions. But, under the chapter treating of executions in civil actions, it is declared, by section 5526, Revised Codes: "No personal property except absolute exemptions shall be exempt from execution or attachment in an action for * * * a debt incurred for property obtained under false pretenses." The creditor here urges that, inasmuch as the debtor could have claimed only absolute exemptions as against this claim if it was being enforced by attachment or execution, it is not the policy of the law to allow him any greater rights under the insolvency law. This conclusion does not necessarily follow. It is now almost universally conceded that statutes granting exemptions to heads of families are highly beneficial in their character, and should have a liberal construction, in furtherance of the accomplishment of

their beneficient purposes. It may be that, in the absence of all indications of legislative intent, we would not be warranted in reading into an exemption statute a limitation that did not come within its letter. But certainly we are not warranted in so doing where, as in this case, upon full consideration of all the statutes bearing upon the subject, an opposite legislative intent clearly appears.

If this creditor has any claim to special favor at the hands of the assignee, it must be because he is a preferred creditor. But preferred creditors are specially classified by section 6070, and this claim falls within neither class. All other claims must, under the statute, be treated in the same manner by the assignee. All funds paid out by him must be paid *pro rata* on such claims. He has no power to sell property for the benefit of one unpreferred creditor. It would, we think, be a matter unheard of in practice, if a court should make an order setting apart property which should be exempt as to some creditors and not exempt as to others. Such a course would be repugnant to the main policy of insolvency and bankruptcy laws. It is the policy of such laws to force all creditors to share alike in that proceeding, unless for special reasons the law places them in a preferred class. Whatever property vests in the assignee by virtue of the insolvency proceedings vests in him for the benefit of all creditors. No property can vest in him for the exclusive benefit of one creditor. Such a claim would be repugnant to every section of the act. By setting apart to the insolvent his exemptions, this creditor is deprived of no rights. Section 6086 declares that no debt created by the fraud of the debtor shall be discharged by the insolvency proceedings. This creditor can share in such proceedings, he can receive his proper dividends, and then if his claim rests upon the debtor's fraud, he can sue for the balance, and exhaust the debtor's exemptions. In that proceeding he can contest the debtor's claim for exemptions. We are clear that such was the legislative purpose. It is true the statute provides that, when the inventory of exemptions is presented to the court,

the court, "if satisfied that the debtor is entitled thereto," shall make an order, etc., (section 6046.) But we think the only matter before the court is whether or not the debtor belongs to the class of persons to whom the law allows exemptions.

Affirmed. All concur.

(75 N. W. Rep. 789.)

THE MASSACHUSETTS LOAN & TRUST COMPANY *vs.* TREADWELL TWICHELL, *et al.*

Opinion filed May 10th, 1898.

Bills and Notes—Bona Fide Holders—Evidence.

This action is upon a negotiable note, and plaintiff claims to be a good-faith purchaser thereof, for value, in due course, before maturity. Under the issues the plaintiff had the burden of showing that it was such. At the trial the note was put in evidence, and the same purported to be indorsed by the payee, by an attorney in fact of the payee. But no evidence was offered tending to show that the payee ever had an attorney in fact, or that the note was actually indorsed either by the purported attorney in fact, or by the payee, or at all. *Held*, that the note was not shown to have been indorsed by the payee at the time it was transferred to the plaintiff's vendor, or at any time, and, consequently, that the note came to the plaintiff as nonnegotiable paper, and as such subject to equities between the original parties. In view of the evidence, the plaintiff received the paper as unindorsed paper.

Breach of Warranty and Failure of Consideration.

The action was against the makers of the note, and by their answer they pleaded failure of consideration, and also claimed damages for an alleged breach of warranty. Against objection, the trial court admitted testimony to sustain the defense set up in the answer. *Held*, that the evidence was properly admitted.

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

Action by the Massachusetts Loan & Trust Company against Treadwell Twichell and E. E. Redmon on a promissory note. Defendants had judgment, and plaintiff appeals.

Affirmed.

Ball, Watson & Maclay, for appellant.

Newman & Spalding, for respondents.

WALLIN, J. This action is founded upon a promissory note. As a defense to the action, the answer alleges that the note was given without consideration, and that the defendants had suffered damages by the breach of a certain contract of warranty set out in the answer. Against plaintiff's objection, the defendants were permitted to introduce evidence at the trial tending to support the defense pleaded in the answer. The defendant's evidence was not contradicted by any evidence offered in plaintiff's behalf on the merits, and the result was that a judgment in favor of the defendants, dismissing the action, was entered in the court below.

The action is here for trial anew, and the principal question before this court is whether the evidence offered in support of the defense alleged in the answer is admissible under the rules of evidence. It is admitted that defendants executed the note in question, and delivered the same to the payee. The note is made payable to the order of one E. S. Brown, as receiver of the Northwestern Manufacturing & Car Company, a corporation organized under the laws of the State of Minnesota. The complaint alleges that before the maturity of the note, said note, for a valuable consideration, was duly "sold, assigned, transferred, and set over" to another corporation organized under the laws of said state, viz. to the Minnesota Thresher Manufacturing Company. The plaintiff is a corporation organized under the laws of the State of Massachusetts, and the complaint avers that at a date prior to the maturity of the note the said Minnesota Thresher Manufacturing Company assigned, transferred, and set over said note to the plaintiff in trust for certain purposes set out in the complaint. Plaintiff's contention is that under the law merchant it occupies the position of a good faith purchaser of the note, in due course, for value, and consequently that it was entitled to recover upon the note, regardless of the defense pleaded in the answer. For the purposes of the decision, we shall concede what the defendant's attorney strenuously denies,—that the contract between the plaintiff and its immediate vendor was of such a character as would, if the original transfer had been in due course, enable the

plaintiff to occupy the relation of a purchaser in due course. After this concession, we will consider the plaintiff's legal status with reference to the original transfer of the note from the payee thereof to the first purchaser.

The answer, after referring to the allegation of the complaint which states that the said note was "sold, assigned transferred, and set over" to the first indorsee, viz. the Minnesota Thresher Manufacting Company, proceeds to state that the "defendants have no information sufficient to form a belief, and therefore deny the same." This form of denial is not authorized by any provision of the Code, and hence does not operate as a denial. It fails to negative both knowledge and information, and hence does not conform to the statutory denial. Revised Codes, § 5273; *Russell & Co* v. *Amundson*, 4 N. D. 112, 59 N. W. Rep. 477; Phil. Code Pl. § 364, and authorities cited; *Id.* p. 366, note 1; 5 Enc. Pl. & Prac. p. 809. But issue is joined as to the transfer from the payee to the first indorsee in another part of the answer, which incorporates a general denial of all averments contained in the complaint not specifically admitted. This particular averment as to the first transfer of the note not being specifically admitted, the same stands as denied. The answer further alleges that, if the alleged first assignment of the note was ever made in fact, "it was not so assigned in good faith, and for a valuable consideration, or in due course of business." It appears, therefore, that the averments in the answer, considered together, squarely raise the issue, and apprise the plaintiff that it must assume the burden of showing at some stage of the trial that it received the note in good faith, for value, and in due course of business. At the trial of the action the plaintiff produced the note, and it was received in evidence. Indorsed upon the note were the following words: "Pay Minn. Thresher Mfg. Co. or order, without recourse. E. S. Brown, Receiver, per C. N. Stuart, Atty. in Fact." With respect to this indorsement the court below has certified as follows: "There was no evidence offered upon the trial of this case tending to show that the above indorsement, purporting to

be the indorsement of E. S. Brown, receiver, per C. N. Stuart, attorney in fact, was in fact the indorsement of said E. S. Brown, receiver, or that the note was ever indorsed by him in person, or by an attorney in fact, or at all." Upon this state of facts, the question is presented whether the original transfer of the note was actually made, for any purpose, and particularly whether such transfer was made in due course in accordance with the custom of merchants, or, on the other hand, whether the first purchaser of the note received the same as a mere chose in action, and not as a negotiable instrument free from all equities between original parties. The evidence shows the plaintiff produced the note at the trial, and also that plaintiff received the transfer and actual delivery of the note from the first purchaser. This evidence establishes, *prima facie*, that the title to the note had vested in the plaintiff prior to the commencement of the action, and, therefore, that the plaintiff was entitled to sue upon the note. The mere production of the note, coupled with the fact of offering the same in evidence, is some evidence of ownership. But the record shows conclusively that no evidence was offered at the trial tending to show that the payee, or his attorney in fact, if any he had, ever indorsed the note at any time, as a matter of fact. As has been seen, the plaintiff, in view of the defense established, had the burden of showing that he received the note in due course of business, free and clear of equities between original parties. This showing included, as an essential element, the indorsement of the note by the payee at the time it was transferred by him to the first purchaser. The writing on the back of the note purports to have been made by the attorney in fact of the payee, and yet there is no evidence in the case tending to show either that the payee had an attorney in fact, or that the note was indorsed by the attorney who purports to be such attorney in fact, or at all. This failure in the proof was fatal upon the vital point of the original transfer of the note in due course by the payee. For the purposes of the case, the note in plaintiff's hands is a purely nonnegotiable instrument, and of course, as

such, has none of the immunities peculiar to negotiable paper. It was therefore received by the plaintiff subject to equities between original parties. *Weber* v. *Orten*, 91 Mo. 677, 4 S. W. Rep. 271; *Blakely* v. *Grant*, 6 Mass. 385; *Spicer* v. *Smith*, 23 Mich. 96; *Keith* v. *Champer*, 69 Ind. 477; Rand. Com. Paper, § § 774, 775, 988, 989. See Daniel, Neg. Inst. § 664a. This precise question was before this court in *Vickery* v. *Burton*, 6 N. D. 245, 69 N. W. Rep. 193, which case is authority against the plaintiff in this action. We held in that case, as we must hold in this, that the plaintiff who claimed to be a good-faith purchaser in due course failed to show that he was such because his proof was not sufficient to show that the notes there in suit were indorsed by the payee at the time of their transfer to the plaintiff. Our conclusion is that under the issues and the evidence in this case the judgment entered in favor of the defendant herein was proper, and it will therefore be affirmed. All the judges concurring.

(75 N. W. Rep. 786.)

THE STATE OF NORTH DAKOTA *vs.* JOHN MCKNIGHT.

Opinion filed May 10th, 1898.

Bastardy—Appeal—Dismissal—Grounds—Review.

Held, that a motion to dismiss an appeal taken from the District Court to this court cannot be sustained upon either or all of the following grounds: (1) On the ground that the specifications incorporated with the statement of the case are insufficient in form or are omitted entirely; (2) on the ground that no assignments of error are made in the appellant's brief or that an attempted assignment therein is insufficient; (3) on the ground that the statute under which the action is commenced is unconstitutional.

Complaint—Probable Cause.

Section 7840, Revised Codes, examined. *Held*, that said section is not repugnant to section 18 of the state constitution. When, under said statute, a complaint in writing on oath, which is sufficient in both form and substance, is filed with the justice of the peace, such complaint constitutes a sufficient showing of probable cause to justify the issue of the warrant, without having recourse to other or extraneous evidence of probable cause.

Evidence Sustains Findings.

Evidence examined and findings sustained. *Held* that, this court being in doubt as to the preponderance of the evidence, the same, being in equilibrio, will turn the scale in favor of the holding of the trial court, who saw the witnesses and heard them testify.

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

Bastardy proceedings against John McKnight. Defendant had judgment, and the state appeals.

Affirmed.

P. H. Rourke, and *C. W. Buttz*, for the state.

Morrill & Engerud, for respondent.

WALLIN, J. This action was instituted under the provisions of the statute regulating bastardy proceedings. See Revised Codes, sections 7839–7856. The complaint and warrant are framed in conformity to the requirements of the statute, nor does the defendant contend that either the complaint or warrant is insufficient in substance or form.

After his arrest upon the warrant, the defendant gave bail for his appearance at the next ensuing term of the District Court, and thereafter all proceedings in the action, prior to its appeal, were had in the District Court. Issue was joined by answer to the complaint, which denied all of its material allegations. A jury trial was expressly waived, and the action was tried to the court as a civil action. As facts, the court found that the child of the complainant, when born, was fully developed, and that the defendant was not the father of such child. A statement of the case, embracing the evidence and proceedings had at the trial, was settled below, and the whole case is before this court for trial anew.

In this court the respondent has filed a motion to dismiss the appeal, which motion was submitted by counsel in connection with the entire case on the merits. The grounds of the motion may be condensed as follows: First, that the statement does not contain a sufficient specification showing wherein the evidence is insufficient to justify the particular findings of fact which are

assailed; second, that the assignments of error, as contained in the brief of the appellant, fail to conform, in certain respects pointed out, to the requirements of the rule of this court regulating assignments of error.

These two grounds are wholly untenable, and furnish no basis for a motion to dismiss an appeal from the District Court to this court. The entire absence of any specifications of error in a statement of the case, or of any assignments of error in the brief of the appellant, would furnish no ground whatever for dismissing an appeal to this court. Such defects in procedure have reference only to the questions which may be raised upon the record after the case reaches this court. The appeal is taken and perfected by the notice and undertaking as prescribed in the statute governing appeals. An appeal to this court will not be dismissed, and never has been, on the ground of any irregularities or defects which the record discloses in the preparation of the statement of the case or the abstracts or briefs filed in this court. It is true that rule 29 of the amended rules of this court (6 N. D. XXVII, 74 N. W. Rep. XI.) authorizes the court, at its discretion, to dismiss an appeal for a noncompliance with the rules of court within the "time prescribed." Under this rule, a motion to dismiss an appeal will lie for dilatoriness in serving abstracts and briefs, but does not lie for imperfections in either.

One further ground of the motion is urged, viz. that the law under which the action was instituted is unconstitutional, and hence that all proceedings had under it are null and void. We are of the opinion that this ground of the motion to dismiss is likewise untenable. It is quite true that an action based upon a statute which is wholly unconstitutional will be dismissed whenever the fact is so determined. It is, however, in many cases, very difficult to determine whether a statute is or is not in violation of organic law. The question is strictly one going to the merits, whereas a motion to dismiss an appeal is purely preliminary, and goes upon the theory that for some reason the court is without jurisdiction to determine the merits. *Hall* v. *Superior*

Court, 68 Cal. 24, 8 Pac. Rep. 509; *Carlson* v. *Superior Court*, 70 Cal. 628, 11 Pac. Rep. 788. But the question of the constitutionality of the act is one going to the foundation of the action, and we deem it proper, therefore, to pass upon it in disposing of the case upon the merits. The contention of counsel is based entirely upon that feature of section 7840 of the statute which declares that "upon the filing of the complaint the magistrate shall issue a warrant." Counsel's position is that, inasmuch as this statute is mandatory, it violates sections 13 and 18 of the state constitution, which sections, taken together, secure to the suitor due process of law and immunity from arrest, except upon warrants issued upon probable cause. We are unable to see wherein this statute deprives the defendant of "due process of law," which in this connection means the usual protection of the law of the land. Under this statute, the court must proceed according to the ordinary rules of judicial inquiry, and certainly judgment can be rendered in this class of cases only after a trial had in due course. All proceedings governing trials and appeals in civil actions in the District Court, including the right of trial by jury, are expressly secured to the litigants by the very terms of the act. We see nothing in this feature of the defendant's contention worthy of further attention.

But counsel lays greatest stress upon the point that the justice, as he claims, is arbitrarily required by the statute to issue a warrant, and is not permitted to enter into any inquiry as to probable cause for issuing the same before its issue. This argument ignores certain important requirements of the law. The warrant does not issue upon the mere arbitrary will of the magistrate. There are certain definite prerequisites to its issue under the statute: First, there must be a complaint in writing, under oath, filed with the magistrate; second, such complaint is required to be in a prescribed form; third, the averment of the facts necessary to constitute the cause of action must be positive, and not made on information and belief, and must be made by the female who has or will give birth to the child. Until such complaint is

filed, the justice is without authority to proceed, and, when such complaint has been filed, we think a showing of probable cause of some degree of strength has been made. If the affidavit is true as to its substantial averments, it is manifest that a warrant should issue, and the case be investigated by a court having jurisdiction to hear the merits. There is certainly no presumption that such an affidavit will be false, but, on the contrary, the affidavit, until it is otherwise shown, must, in theory at least, be presumed to be true. If true, probable cause will be shown by its terms for issuing the warrant. Under the statute, the District Court alone can inquire into and decide the merits of the case. Nor can a justice of the peace act, even as a committing magistrate, in this class of cases. The justice can only initiate the action by the issue of a warrant, and thereafter he can do nothing in the case except certain purely incidental and formal matters, as he may be called upon to do in connection with giving bail or with returning the papers to the District Court. In fact, it is the obvious purpose of the statute to require the accused to give bail for his appearance before the District Court, as is done in other civil actions based upon wrongs. The justice has no connection whatever with the case after bail is given, or, failing in that, after the accused is committed to await the trial. The policy of the statute is to divorce the magistrate who issues the warrant from all connection with the merits of the case, not even allowing him to conduct a hearing of the merits for the purposes of a preliminary examination, with a view to commit or discharge. We think this class of cases comes clearly within the principle of the tort cases enumerated in section 5304 of the Revised Codes, and wherein, at the inception of the action, an order of arrest may be made by a Judge of the District Court. *Id.* sections 5305, 5306. In these cases there is no inquiry as to probable cause for an arrest of the defendant other than that involved in a mere inspection of the affidavit which is presented as a basis for the order. The order is issued as of course, if it appears from the affidavit that a sufficient cause of action exists, and that it

arises under section 5304 of the Code. In such cases an affidavit upon information and belief will furnish a sufficient basis for the order, if the facts upon which the belief is founded are set out. This goes further than the statute with which we are dealing in this case, inasmuch as no arrest can be made under the bastardy act without an affidavit which is positive in its affirmation of the controlling facts. It is true that, under the arrest and bail statutes, a motion may be made to vacate the order of arrest for certain reasons; but, so far as we have examined, no case has been found in which the order of arrest has been vacated for the reason that the judge who made the order did so upon a naked affidavit, and without any extraneous inquiry touching the matter of probable cause. We think no such authority can be found. Nor does counsel claim that the fact that the statute in question does not provide for a preliminary examination before trial render it repugnant to any provision of the constitution. In fact, no such right is guarantied by the constitution. In brief, we have found no authority—and counsel has certainly cited none—sustaining the appellant's contention upon this feature of the case. We think no well considered case can be produced holding that a fuller showing of probable cause is necessary to meet the constitutional requirement than was actually made upon the face of the complaint in this case, which was filed before the warrant issued. Our conclusion is that the warrant issued upon probable cause supported by an oath. This is all the constitution requires. Constitution section 18. Whether it would be expedient to amend section 7840 of the bastardy act, so as to permit a further examination of the question of probable cause before a warrant issues, is purely a question of legislative discretion. Such an amendment would in a degree mitigate the somewhat drastic features of the enactment, but, in our opinion, this section is constitutional as it stands. This brings us to the merits. We find that the specifications in the statement, as applied to the findings of fact, are sufficient to authorize the

court to re-examine such findings, with a view of ascertaining whether the same are justified by the evidence. We shall not attempt to detail the evidence, for the reason that to do so is unnecessary, and would perhaps be improper in a case like this. The evidence of the defendant and the complaining witness is squarely in conflict upon the principal question of fact in issue, viz. the question of the defendant's paternity of the child. We do not care to enter into the somewhat doubtful question, which some courts have discussed, touching the relative credibility of the defendant and the complaining witness, considered with respect to their respective interests in the result of the litigation. It is certain that both have grave interests at stake, but how far such interest would affect credibility we would prefer, without announcing any inflexible rule, to relegate to the court or jury which saw and heard the witness as they gave their testimony at the trial. In this case some light is cast upon the main contention of fact by evidence not coming from the parties chiefly concerned in the result. The amended answer charges that the complainant was carnally intimate with one K. in the months of July, August, September, October and November, 1896. K. was not present at the trial, but, to avoid a continuance, defendant admitted that if he were present he would testify that he never had sexual intercourse with the complainant, but, on the contrary, that he had witnessed an act of sexual intercourse between the defendant and the complainant. There is considerable evidence that the complaining witness and said K. were frequently in company with each other during the summer and fall of 1896, and that they seemed to be quite familiar, if not lovers. They were often together, and once, as the testimony shows, were seen reclining together upon a bed in the bedroom of the complainant, in the daytime, his arm then and there being around the neck of the complainant. This intimacy and evidently strong liking for another than the defendant, during the period covering the period of the conception of the child, certainly militates somewhat against the theory of the defendant's paternity of the child. It would seem

quite unnatural that the complainant would forsake the embrace of her lover who was her social equal, in order to bestow unlawful favors upon the defendant, with whom it is not claimed that any such relation existed. The complainant nowhere pretends that the defendant, a son of her employer, ever was her lover, or ever courted her in any honorable way. The child, when born, was normally developed, and the birth occurred June 3, 1897. The complaint alleged that it was conceived on or about October 25, 1896, which would be seven months and nine days prior to the date of birth. At the trial she adhered to October 10th as the date of the conception and the first intercourse, but it appears that the defendant left the neighborhood on the morning of the 10th, and it was thereupon agreed that the plaintiff, who had testified, but was then too ill to come into court, would testify, if in court, that she had had intercourse with defendant on two occasions before he left the neighborhood, and on or about the 7th, 8th, 9th, or 10th of October, 1896. These discrepancies further weaken the testimony of the complainant.

As we have stated, the case comes before us for a trial *de novo*, under the constraint of the statute which does not permit us to grant a new trial on the ground of the insufficiency of the evidence. We are compelled, therefore, to either affirm the judgment of the court below, or, on the other hand, reverse the same, and direct the entry of a judgment against the defendant, and thereby adjudge that he is the father of the child. With this alternative before us, while we have some doubts as to the preponderance of the evidence, we conceive it to be our duty to resolve our doubts in favor of that view of the evidence which was taken by the court below, where the witnesses appeared in court, and where their demeanor could be more carefully weighed and considered than it is possible in this court to do.

Our conclusion is that the judgment of the District Court must be affirmed. All the judges concurring.

(75 N. W. Rep. 790.)

E. S. KNEELAND *vs.* THE GREAT WESTERN ELEVATOR CO.

Opinion filed May 10th, 1898.

Witnesses—Examination—Depositions.

Where a witness whose deposition has been taken answers a question by saying, "For answer to that question I refer to the answer of A. B.," it is error for the court to tell the jury that as a matter of law he has thereby made the answer of A. B. his own answer.

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

Action by E. S. Kneeland against the Great Western Elevator Company. Judgment for plaintiff, and defendant appeals.

Reversed.

Cochrane & Feetham, for appellant.

Carmody & Leslie, for respondent.

CORLISS, C. J. The complaint embraces two causes of action,—one to recover the value of a specified number of bushels of flax, and the other the difference between the value of 930 bushels No. 1 and 930 bushels No. 2 Northern wheat. Defendant received at its elevator in Blanchard, in this state, under a contract of storage, certain wheat and flax, and issued its warehouse receipts or tickets for the delivery to the depositor on demand of the same number of bushels of flax, and also of the same number of bushels of wheat of a like grade to that delivered. The plaintiff purchased such tickets, and on demand received from defendant a certain amount of wheat and flax; but it is claimed by plaintiff, although denied by defendant, that the flax delivered was short 89 bushels, and that the grade of wheat was No. 2 instead of No. 1 Northern. The flax and wheat were shipped to Duluth. In making out his case plaintiff took several depositions of persons in that city, who weighed and inspected the flax and wheat, and who examined the cars in which they were transported. It is claimed by plaintiff that the defendant did not allow him sufficient dockage for dirt in the flax delivered; but, even on plaintiff's own theory as to the true percentage of dockage for

dirt thus received, still, if the evidence of defendant's agent as to the number of pounds of flax gross weight delivered be true, a large proportion of this shortage of 89 bushels is to be accounted for in some other way. The jury must have believed that defendant's agent testified falsely, for the plaintiff was allowed the value for the full 89 bushels. It is obvious, however, that the jury might have found that the evidence of the agent was true, and also that the Duluth witnesses testified correctly, and yet have concluded that the flax had leaked out of the car in transportion. These preliminary observations bring us to what we regard as a fatal error in the case.

Plaintiff took the depositions of a Mr. Milne and a Mr. Gray. The former weighed the flax, and the latter inspected it in the car. Mr. Gray, in answer to several interrogatories, testified that the cars, as near as he could tell, had no leaks in them, and that the seals thereon had not been broken. When Mr. Milne was asked regarding the condition of the cars as to the possibility of leakage, and whether the seals on the cars had been broken he answered as follows: "I refer to the answer of Mr. Gray." On the trial counsel for the defendant objected to this answer; whereupon the court overruled the objection, directed that the testimony of Mr. Gray in answer to the same interrogatories he read, and instructed the jury that these answers of Mr. Gray should be considered the answers of Mr. Milne, as though the latter had incorporated in his answer the very same words used by Mr. Gray in answering the question. That this was error cannot admit of doubt. It cannot be said that a witness by such a general reference to the evidence of some other witness has thereby made the testimony of the latter his own. The most natural construction to place upon such an answer is that the witness disclaims any knowledge of the matter, and refers the counsel who is asking the question to a reliable source of information. Especially is this so when, as in this case, the witness was called upon to answer in some manner a series of interrogatories framed by counsel. A witness who has been giving definite

answers to inquiries clearly means, when he refuses to answer specifically a particular question and refers the counsel to another witness who knows the fact, that he cannot and will not testify on that point. But, in any view of the matter, it was for the jury to say what the witness meant by this answer, which did not purport to give his personal knowledge of the facts inquired about. The jury could have received no other impression than that they were bound, as a matter of law, to consider that Milne had testified to the same facts that Gray had testified to, though it is obvious that he intended nothing of the kind, and though it appears that he had no knowledge of such facts. It is urged that counsel for the defendant should, on it subsequently appearing that Milne knew nothing about these matters, have moved to strike out his answers. But these answers were not objectionable in themselves. They merely embodied a statement that the witness knew nothing about such facts, and referred the counsel to the witness Gray for information. The objectionable and prejudicial feature of the case was the statement of the court that by these words Milne had testified to what Gray had sworn to. This statement was just as erroneous when made as afterwards. No new developments in the case could make it more erroneous or more prejudicial. Though this record should show that Milne knew the facts, still it would have been error for the court to have told the jury that as a matter of law he had given the same answers as Gray. The case is not analogous to that in which evidence apparently competent when received is subsequently shown to be incompetent. In such a case, there being no original error, the party must, if he desires to get rid of the testimony, move to have it stricken out or ask the court to instruct the jury to disregard it. But here was an original error, whatever was the condition of the record at that time as to the knowledge of the witness Milne with respect to the facts to which Gray had testified, but to which he (Milne) distinctly refused to testify.

The error was prejudicial. It may have turned the scale in the mind of the jury as to the loss of the flax by leakage. Defend-

ant's agent having sworn that a certain number of pounds of flax had been put in the cars, and the weigher at Duluth having testified that there was a less number of pounds therein when the cars reached Duluth, even on defendant's own theory of dockage for dirt, the jury had before them some evidence warranting a finding that the flax was lost en route. Had not the court told them positively that they must add to the weight of the evidence of the witness Gray the weight of that of the witness Milne, though he did not testify on these points at all, they might have found that both defendant's agent and the weigher in Duluth had told the truth, and that the flax had leaked from the car on the way. Of course, under such a finding, the defendant would not be liable in this action, for the ground of liability here insisted on is the failure to deliver the flax called for by the tickets. The direct effect of this error of the court was to lessen the chances that the jury would give any credence to the testimony of defendant's agent; and, if the jury believed that he had deliberately sworn to a falsehood as to the flax, they would naturally conclude that he had likewise given false evidence as to the grade of the wheat. We therefore cannot, under the circumstances, separate the two causes of action, but must reverse the judgment in toto, and order a new trial. All concur.

(75 N. W. Rep. 907.)

C. T. CLEVELAND *vs.* S. A. MCCANNA.

Opinion filed May 10th, 1898.

De Facto Officers—Collateral Attack.

The official acts of a *de facto* officer cannot be collaterally attacked.

Mutual Judgments—Exemptions—Set-off.

Mutual judgments cannot be set-off one against the other in such a manner as to defeat the exemption laws; and when, on an application of a judgment debtor to have a judgment owned by him and against his creditor set-off against the judgment owned by such creditor, and against him, such judgment creditor

files a verified schedule of his personal property, showing that the whole thereof, including such judgment, is less in value than the amount allowed by law as exempt, such set-off should be refused.

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

Action by C. T. Cleveland against S. A. McCanna. A motion by defendant to set-off a judgment held by him against plaintiff against the judgment rendered in this action was sustained, and plaintiff appeals.

Reversed.

Burke Corbet, for appellant.

Bangs & Fisk, *Cochrane & Feetham*, and *O. A. Wilcox*, for respondent.

BARTHOLOMEW, J. In March, 1894, the respondent, McCanna, obtained a judgment against the appellant, Cleveland, before the City Justice of the City of Larmore, in Grand Forks County, for the sum of $200 and costs, amounting in all to $235. An abstract of said judgment was duly filed in the office of the Clerk of the District Court of said county, and the judgment was properly entered and docketed in that court, and is still in force and entirely unpaid. On April 24th following, appellant commenced the action against respondent in which this proceeding is entitled, and sought to recover $3,000, actual and exemplary damages, for the alleged wrongful and unlawful seizure and conversion by respondent of certain enumerated personal property belonging to appellant, which it was claimed constituted appellant's absolute and alternative exemptions. On the trial of this action, the jury found the value of such personal property to be $367.25, and a general verdict was returned for appellant for $717; and subsequently judgment was entered thereon, which, with costs and interest, amounted to $849.90. This judgment was subsequently reduced by the court to $620.74. for which sum it is still in force and unpaid. An execution was issued thereon in January, 1897. Thereupon the respondent applied for and obtained an order on appellant to show cause why the judgment in respondent's favor,

and against appellant, should not be set-off *pro tanto*, against the judgment in favor of appellant, and against respondent. The application for the order was supported by an affidavit setting forth the rendition of the judgments as herein stated. On the return day, the respondent, in support of his motion, introduced the pleadings in both cases and the affidavit on which the order was issued. Appellant introduced testimony showing that the property for the conversion of which he recovered judgment was property that was exempt from seizure or sale under legal process, and also a verified schedule of his property showing that the value of the whole thereof, including the judgment against respondent, was less than the amount exempted by law, and claimed to hold such judgment as exempt from application on his own debts. The court, after a full hearing, granted the motion to set-off, and made the proper order therefor. The appeal is from such order.

It is first urged that the judgment rendered by the City Justice of the City of Larimore against appellant was and is a nullity, for the reason that no such officer as a City Justice of the Peace is known or authorized under our constitution and laws. The office of the Justice of the Peace is recognized, and as such, the officer was claiming to act. This contention cannot prevail. It is conceded that such justice was a *de facto* officer, performing all the functions of a Justice of the Peace. This attack is purely collateral. It is well settled that the validity of the acts of a *de facto* officer cannot be attacked in a collateral proceeding.

But the second point raised is of more importance. Our statute declares (Revised Codes, section 5499:) "Mutual final judgments may be set-off *pro tanto* the one against the other by the court upon proper application and notice." Such was the rule in equity, independent of any statute. 22 Am. and Eng. Enc. Law, 446, and cases in note 3. The power is no broader under the statute. But this power will never be exercised where the set-off would deprive a party of his legal rights. *Id.* 448, note 3. It is claimed that the allowance of the set-off in this case would

deprive appellant of his legal right to his exemptions. There is a special reason alleged in this case why appellant's judgment against respondent should be protected from such set-off. It is urged that this judgment was obtained for the wrongful conversion of exempt property, and for that reason it stands in lieu of the property, and is equally exempt; and the cases so hold. *Crawford* v. *Carroll*, 93 Tenn. 661, 27 S. W. Rep. 1010; *Kaiser* v. *Seaton*, 62 Iowa, 463, 17 N. W. Rep. 664; *Cullen* v. *Harris*, (Mich.) 69 N. W. Rep. 78. But we think that holding more applicable in states where certain specific articles are exempt by statute, as is the case in the states from whence these authorities are cited. In this state, we think, the ruling should be placed upon a broader ground. Our constitution provides, (section 208:) "The right of the debtor to enjoy the comforts and necessaries of life shall be recognized by wholesome laws exempting from forced sale to all heads of families a homestead, the value of which shall be limited and defined by law, and a reasonable amount of personal property; the kind and value shall be fixed by law." In pursuance of this constitutional requirement, our legislature has declared by sections 5516, *et seq.*, Revised Codes, that to each head of a family there shall be exempt from seizure certain articles which the statute terms "absolute exemptions," and which include all wearing apparel of the debtor and his family, and provisions and fuel for one year. The statute then provides that, in addition to these absolute exemptions, the debtor may select from any personal property that he possesses other property not to exceed $1,500 in value. To effect this, the debtor must present to the officer holding the process a verified schedule of all his personalty. The law then provides for an appraisement. If the appraised value exceeds $1,500, the debtor may select from the list any property he desires, but not exceeding in value $1,500, according to the appraisal. If the appraisal be $1,500 or less, of course the debtor takes it all. It follows logically that, if we are to give full effect to the exemption law, a debtor has an absolute right to select as a part of his exemptions a judgment that he

may own, and it is entirely immaterial upon what the judgment may be based. It is property in his hands, and it rests exclusively with himself to say what property, within the limit, he will elect to hold as exempt. Likewise, he might, before his claim was reduced to judgment, have elected to hold that claim as a part of his exemptions. Hence the judgment simply represents exempt property in another form, and all the authorities hold that a judgment that represents the proceeds of exempt property cannot be set-off on a judgment against such judgment creditor. The case of *Butner* v. *Bowser*, 104 Ind. 255, 3 N. E. Rep. 889, was decided under a statute the same in character as ours, and is exactly in point; and the general principle is sustained by the authorities cited *supra*, and by Freem. Ex'ns, § 235, and cases there cited. And see *Ellis* v. *Pratt City*, 111 Ala. 629, 20 South. 649; *Duff* v. *Wells*, 7 Heisk. 17; *Reynolds* v. *Haynes*, 83 Iowa, 342, 49 N. W. Rep. 851; *Millington* v. *Laurer*, 89 Iowa, 322, 56 N. W. Rep. 533; *Howard* v. *Tanby*, 79 Tex. 450, 15 S. W. Rep. 578; *Below* v. *Robbins*, 76 Wis. 600, 45 N. W. Rep. 416. The only cases that we have found holding a contrary doctrine are *Mallory* v. *Norton*, 21 Barb. 424, *Temple* v. *Scott*, 3 Minn. 419, (Gil. 306,) and *Knabb* v. *Drake*, 23 Pa. St. 489. The case in 21 Barb. is entirely destroyed by *Tillotson* v. *Wolcott*, 48 N. Y. 188. The cases from Minnesota and Pennsylvania are based upon the alleged principle that exemption laws, being in derogation of the common law, must be strictly construed,—a principle now almost universally discarded.

It is true that the procedure under our exemption statute refers more particularly to seizures under attachments and executions, but that is because it is by means of those writs that property is usually seized. But it would be an exceedingly narrow view of the law that would deny exemptions where it was sought to take property by other means. This court is unqualifiedly committed to a liberal construction of exemption statutes. *Bank* v. *Freeman*, 1 N. D. 196, 46 N. W. Rep. 36. In that case we expressly held that the fact that the machinery of the law did

not contemplate the exact case there under consideration could not defeat a claim for exemptions. We must make the same ruling here. In response to the order to show cause, the appellant presented a verified schedule of all his personal property, and claimed his judgment against respondent as exempt. His entire personalty outside of that judgment amounted, according to the schedule, to $27. If there was a doubt as to the correctness of that schedule, the court had full power to investigate the matter. But its correctness was not questioned, and the claim for exemptions should have been allowed.

The order appealed from is reversed. All concur.

(75 N. W. Rep. 908.)

THE WELLS-STONE MERCANTILE CO. *vs.* G. A. GROVER, *et al.*

Opinion filed May 10th, 1898.

Mercantile Trusts—Liability of Beneficiaries and Trustee for Goods Sold.

An insolvent debtor made a deed of trust, in which his creditors joined. By the terms of the deed, the trustee was to continue the business of the debtor as long as he should deem it for the interests of the creditors so to do. The entire management and control of the business were intrusted to him. Whenever the trustee deemed it best to discontinue the business, the property was to be sold, and the claims of all the creditors signing the deed were to be paid from the proceeds; the surplus, if any, to go to the debtor. *Held*, that the creditors signing the deed did not thereby render themselves the real proprietors of the business, and, therefore, that they were not liable to creditors of whom the trustee had purchased goods in the prosecution of such business. The relation created by the instrument was that of trustee and beneficiary, and not that of principal and agent.

Liability of Trustee Upon His Own Contracts.

Ordinarily a trustee is himself personally liable on all contracts made by him as trustee.

Charging Liability Upon the Trust Fund.

In exceptional cases he may, by express contract, prevent his becoming personally responsible; charging the liability on the trust fund itself.

Following Trust Property.

Even when this has not been done the creditor may, under peculiar circum-

stances, proceed against the trust property, either in the hands of the trustee, or of the beneficiary himself.

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

Action by the Wells-Stone Mercantile Company against G. A. Grover and others. Judgment for defendants, and plaintiff appeals.

Affirmed.

Newman, Spalding & Stambaugh, for appellant.

Morrill & Engerud, Newton & Smith, and *John E. Greene*, for respondents.

CORLISS, C. J. The defendants are sought to be held liable for goods sold to the trustee under an instrument creating a trust. The theory of plaintiff's counsel is that in the purchase of such goods the trustee was the mere agent of the defendants, who themselves were the real traders on whose behalf the business was being carried on. It is therefore obvious that the decision on this appeal will turn upon the construction of the writing in which such trust is expressed. G. A. Grover,—a merchant doing business in this state,—becoming embarrassed, transferred to Albert E. Jones, as trustee, all his property, for the benefit of his creditors; to be converted by such trustee into cash, for the purpose of paying his debts. All his creditors executed the trust instrument; they being named therein as parties. The trustee was authorized by the writing to make new purchases, and carry on the business, should he deem this course wise. It is on this portion of the instrument that plaintiff rests its claim that in making such purchases the trustee acted as agent for the creditors. This action is against such creditors, to recover the value of goods purchased of the plaintiff by the trustee in the exercise of the discretion vested in him by the trust deed to continue the business. As it is indispensable to the correct understanding of the case, we quote in full that part of the instrument which relates to the future prosecution of the business by the trustee: "The said party of the second part shall have power to

continue said general merchandise business, and to sell the stock of general merchandise at private sale and in the usual course of trade, and to replenish said stock of merchandise with such articles of staple goods as may be necessary to successfully continue business; and such power shall continue so long as said party of the second part shall be of the opinion that the interests of said creditors will be best subserved by that method of executing said trust. Said parties of the third part, in consideration of said provisions herein made for the payment of their respective demands against said party of the first part, have agreed to, and do hereby, grant to him an extension of eighteen months' time from the date hereof, within which to pay his debts; and no attempt shall be made by them, or either of them to enforce payment of any of said debts by any legal proceedings during the period of such extension. And the said above mentioned 'secured creditor' hereby agree, immediately upon the execution and delivery of this deed of trust, to surrender to said party of the second part all securities which they hold for their said claims; and such of said 'secured creditors' as have liens upon the real or personal property of said party of the first part by virtue of any mortgages or execution levies thereon agree to forthwith, and upon the delivery of this deed of trust, release their liens and the levies of their executions upon said property. Said party of the first part shall and will do all he reasonably can to assist said trustee in realizing the amount of said debts as fast as practicable: provided, however, that all things done by said party of the first part with reference to said business and the management thereof shall be under the supervision and direction of said trustee, and that for such services as said first party shall render with reference thereto he shall make no charge, other than for actual necessary living expenses. Said trustee shall operate and manage said business in the ordinary way of retail trade, unless and until he shall become satisfied that the interests of said creditors will be best subserved by closing out said business, and by disposing of said property, both real and personal, at forced

sale. If at any time said trustee shall conclude that more money can be realized from said property, or from any portion or class thereof, by public sale, than by sales in the ordinary way of retail trade, then and in that event he is hereby authorized and empowered to, and may, close out said trust in the manner usual under the ordinary assignment for the benefit of the creditors under the laws of the State of North Dakota."

At the outset we desire to answer the argument of counsel for plaintiff, that unless this action will lie the plaintiff is without redress. We are of the contrary opinion. If the trust is valid,—and that point does not seem to be controverted,—then the trustee became personally liable on every contract made by him in the discharge of the trust. He is to-day liable to the plaintiff for the value of the very goods, the value of which it is seeking to recover in this action. In dealing with the business world, a trustee cannot escape personal liability unless he lawfully restricts his liability in the contract itself. He is not in the position of a mere agent, and therefore knowledge on the part of the creditor that the trustee is acting only as such will not enable the latter to insist that such creditor shall look to only the trust estate for his pay. It is true that the trustee may claim reimbursement from the funds in his hands for any proper expenditure made by him in the execution of the trust; and this equity is the foundation of the right of the creditor, under peculiar circumstances, to proceed directly against the trust property itself. See *Hewitt* v. *Phelps*, 105 U. S. 393; *Clopton* v. *Gholson*, 53 Miss. 466; *Norton* v. *Phelps*, 54 Miss. 471; *In re Johnson*, 15 Ch. Div. 548; *Dowse* v. *Gorton*, 42 Ch. Div. 536; *Mason* v. *Pomeroy*, 151 Mass. 164, 167, 24 N. E. Rep. 202. That the trustee is himself personally liable is well settled; and the general rule is that the creditor cannot claim any lien on, or equitable right in, the trust estate, but must look entirely to the trustee and his individual property for his pay. *Hewitt* v. *Phelps*, 105 U. S. 393; *Clopton* v. *Gholson*, 53 Miss. 466; *Norton* v. *Phelps*, 54 Miss. 471; *Kedian* v. *Hoyt*, 33 Hun. 145; *New* v. *Nicoll*, 73 N. Y. 127; *Austin* v. *Munro*, 47 N. Y.

360; *People* v. *Abbott*, 107 N. Y. 225, 13 N. E. Rep. 779; *Hackman* v. *Maguire*, 20 Mo. App. 286; *Mayo* v. *Moritz*, 151 Mass. 481, 24 N. E. Rep. 1083; *Association* v. *McAllister*, 153 Mass. 292, 26 N. E. Rep. 862; *Mason* v. *Pomeroy*, 151 Mass. 164, 167, 24 N. E. Rep. 202; *Gill* v. *Carmine*, 55 Md. 339; *Burt* v. *Bull*, [1895] 1 Q. B. 276. Of course, the parties may agree that the trustee shall not be held personally on the contract, but that only the true estate itself shall be chargeable with the debt. In such a case, if the instrument creating the trust authorizes this to be done, or even when it does not give such authority, if the circumstances are peculiar, the trustee is not bound, but the fund is. *New* v. *Nicol*, 73 N. Y. 127; *Gill* v. *Carmine*, 55 Md. 339, 342, 343. These considerations make it plain that plaintiff is not without remedy in case we hold that these defendants are not liable. As they have themselves consented that the property which otherwise would have gone to pay their demands should be left in the hands of the trustee for a season, subject to all the risks of trade, they cannot complain if the venture proves a failure, and, instead of resulting in an increase of their dividends, actually leads to the diminution, or even the total loss, thereof. They are not entitled to any portion of the property until all proper expenditures made by the trustee have been repaid to him. And if he should distribute the estate, leaving unpaid any of the debts incurred by him in the execution of the trust, we have no doubt that a court of chancery would subrogate the creditors to his equity, and allow them to follow, in the hands of those who had received the property, the portion of the assets which had been paid to them by the trustee. And even while the trust property is still in the hands of the trustee, those who had dealt with the trustee as such might, under special circumstances, obtain a decree impressing upon such property an equitable lien in their behalf. See cases first above cited.

We now turn to the crucial point in the case. What relation did the creditors who signed the trust deed thereafter sustain to the business carried on thereunder? Were they themselves the

proprietors of such business? We think not. It is true that they had an interest therein. But such interest did not differ from the interest of any creditor in the successful prosecution of a business by his debtor. While this property was still under the control of the debtor all of these creditors were interested in its being so managed by such debtor as to produce profit. In this way the ability of the debtor to pay would be increased. But such interest would not make them liable as the proprietors of such business. Suppose these same creditors had refused to grant the debtor an extension of time except on condition of his giving them security that he would not transfer any of his property, or create any liens thereon, but would pay them from time to time the profits of his business, as dividends on their claims; and suppose that the debtor had given such security, and had been left in control of the business. Would it be seriously urged that such an arrangement had rendered the creditors liable, as principal traders, on all the contracts of such debtor made in the prosecution of such business? We believe that it would not. What was done by all the parties was substantially the same thing. Instead of taking security in the form of a bond, they took it in the form of a trust. They were no more interested in the business under the management of the trustee than they would have been had it been left in the hands of the debtor himself. Their interest was neither greater nor different. It was in all respects precisely the same. They acquired, however, by the transfer made by the trustee, an equitable interest in the property so transferred. But they held this interest not as proprietors of the business. It was merely as security for the collection of their claims. Both parties had made the trustee the proprietor, with an ultimate obligation on his part to account to the creditors first, and then to the debtor, for any surplus remaining after all claims had been extinguished. Had the debtor sold the property to the creditors in payment of their demands, and had they, as owners of such property, intrusted it to the trustee

to manage in their interest, it might well be claimed that they were themselves the proprietors of the business carried on by the trustee, and liable as such, on the theory that he was a mere agent in the prosecution thereof. Such a case, however, is not before us. In the supposed case the creditors would, as proprietors of the business, be entitled to all the profits thereof, without reference to the amounts of their several claims respectively. But in this case they have no such interest in the business at all. They have only the incidental interest which all creditors have in the profitable management of the affairs of their common debtor. They are interested indirectly, as creditors, and not directly, as proprietors. As the demands of these creditors were not extinguished by the transfer to the trustee, the person who was most directly interested in the business was the debtor himself. Every dollar of profit would go to him. True, he would, because of the trust, have to turn over such profits in payment of his debts, until they had all been satisfied; but they would be turned over as his property, and he would secure the full benefit thereof, and then, after all his obligations had been discharged, every dollar of profit would flow into his own pocket. Certain it is that none of the creditors who executed this trust deed ever deemed that they would become responsible for the debts contracted by the trustee in the operation of the business, in any other sense than that their dividends might be lessened, or even destroyed, by the failure of the venture. It would astonish any creditor holding a small claim to discover that he had become liable for all the debts incurred by the trustee in carrying on the business. This, of course, should not control us. But in settling a question of this character we should have some regard to the understanding and convenience of the business world. Jurisprudence should rest, not on a mere logic, but on the actual condition of men in society, and their practical relations to each other in business life. Transactions of this character, are, we believe, quite common, and they are certainly very beneficial to both the debtor and his creditors. We should not, therefore, throw in the way of those

who wish to enter into them such serious obstacles as will deter them from making such advantageous arrangements, unless we are compelled to do so by some settled legal principal, or some consideration of justice or policy. This argument was given much weight by Lord Cranworth in *Cox* v. *Hickman*, 9 C. B. (N. S.) 47, —a case which, as we shall see, is directly in point. He says at page 94: "I have on these grounds come to the conclusion that the creditors did not by executing this deed make themselves partners in the Stanton Iron Company, and I must add that a contrary decision would be much to be deprecated. Deeds of arrangement like that now before us are, I believe, of frequent occurrence: and it is impossible to imagine that creditors who execute them have any notion that by so doing they are making themselves liable as partners. This would be no reason for holding them not to be liable, if, on strict principles of mercantile law, they are so. But the very fact that such deeds are so common, and that no such liability is supposed to attach to them, affords some argument in favor of the appellant. The deed now before us was executed by above a hundred joint creditors, and a mere glance at their names is sufficient to show that there was no intention on their part of doing anything which should involve them in the obligations of a partnership. I do not rely on this, but at least it shows the general opinion of the mercantile world on the subject. I may remark that one of the creditors, I see, is the Midland Railway Company, who are creditors for a sum only of £39, and to suppose that they could imagine that they were making themselves partners is absurd."

All that the creditors intended by signing this trust deed was o consent to the continuance of the business by the trustee at his option; thus barring the right of any one to assail the transfer as a fraud upon creditors, on the ground that it operated to hinder and delay them in the collection of their demands. In the absence of such consent by them, it is obvious that they could have attacked the deed as fraudulent. A debtor cannot devest himself of all interest in his property, and yet create a

trust relating thereto, to continue indefinitely. If such a trust were valid, creditors could never reach the assigned estate, in the enforcement of their claims, unless the trustee, in the kindness of his heart, should see fit to wind up the trust and distribute the property among them. *Jones* v. *Syer*, 52 Md. 211; *Lumber Co.* v. *Hoyt*, 71 Miss. 106, 14 South. 464, *Catt* v. *Manufacturing Co.*, 93 Va. 741, 26 S. E. Rep. 246; *Webb* v. *Armistead*, 26 Fed. Rep. 70; *Renton* v. *Kelly*, 49 Barb. 536; *Bank* v. *Martin*, 96 Tenn. 3, 33 S. W. Rep. 565; *De Wolf* v. *Manufacturing Co.*, 49 Conn. 282; *Bank* v. *Inloes*, 7 Md. 380; *Gardner* v. *Bank*, 13 R. I. 155; *Gardner* v. *Bank*, 95 Ill. 298. But any reasonable authority given to the trustee to manage the business under the direction of the court, and subject to the right of creditors to control the discretion of the trustee, is not necessarliy fraudulent as to creditors. *Robbins* v. *Butcher*, 104 N. Y. 575; 11 N. E. Rep. 272; *De Wolf* v. *Manufacturing Co.*, 49 Conn. 326; *Stoneburner* v. *Jeffreys*, 116 N. C. 78, 21 S. E. Rep. 29; *Ravisies* v. *Alston*, 5 Ala. 297; *Woodward* v. *Marshall*, 22 Pick. 468; *De Forest* v. *Bacon*, 2 Conn. 633; *Kendall* v. *Carpet Co.*, 13 Conn. 383; *Foster* v. *Manufacting Co.*, 12 Pick. 451; *Hitchcock* v. *Cadmus*, 2 Barb. 381; *Insurance Co.* v. *Foster*, 58 Ala. 502. But the provision in the deed in question was of such a character that it vested such absolute power in the trustee, as to the continuance of the business, that the deed could not have been sustained, as against the creditors of the debtor, had it not been signed by them. This undoubtedly furnishes the explanation of their joining in the execution of the instrument. They intended to estop themselves by their signatures from claiming that the transfer was fraudulent as to them, so that no creditor would be in a position more advantageous than the others, but not to become themselves the actual owners of the property, and the real proprietors of the business carried on therewith.

The precise question before us has been elaborately discussed in England, in a very celebrated case,—*Cox* v. *Hickman*. The single question there involved was whether certain creditors, who had signed a similar trust deed, had thereby become the proprie-

tors of the business which the trustees were authorized by the terms thereof to carry on; so that debts contracted by them in the conducting of such business were debts of the creditors, on the theory that the trustees were acting in the capacity of agents for them, as real owners, and not as trustees for them, as mere beneficiaries. The substance of the trust deed in that case, so far as its provisions bore upon the question before the court, is accurately stated by Lord Wensleydale as follows: "The deed is an arrangement by the Smiths, who had become insolvent, with their creditors who subscribed the deed, for assigning all their property to trustees, in trust to convert part, not necessary to conduct the business (and leaving £4,000 for that purpose,) and divide the proceeds among the creditors, and then to continue to carry on, in the name of the Stanton Iron Company, the business lately carried on by the Smiths, and for that purpose to manage the works as they thought fit, with various powers,—to renew leases, insure, erect buildings and machinery, appoint managers and agents, enter into and execute all contracts and instruments in carrying on the business (and that provision would certainly authorize the making or accepting bills of exchange,) and to divide the net income amongst the creditors in ratable proportions,—provided that, in distributing such income, it shall be deemed and taken to be the property of the Smiths, with power for the majority in value of the joint creditors, at a meeting, to alter the trust, and make rules as to the discontinuance of the business and the management of it; and ultimately, after paying the debts incurred in the business so carried, to divide the residue of the moneys in ratable proportions amongst the creditors, with the same provision that the moneys are to be taken to be the property of the Smiths. The creditors are to receive the provisions of the deed in full discharge of their debts. They covenant not to sue; and the deed is to be void unless executed by six-sevenths of the creditors, in number and value." 9 C. B. (N. S.) 98. The case was tried before Jervis, C. J., and a verdict rendered for the defendants. Subsequently a rule to show cause why a

verdict should not be entered for the plaintiff was made absolute by the common pleas (Jervis, C. J., and Willes and Williams, JJ.) The decision was founded upon prior decisions which the judges erroneously considered as controlling. 18 C. B. 617, 638. On appeal to the exchequer chamber the judges were equally divided; Watson, Bramwell, and Martin being in favor of reversal, and Coleridge, Erle, and Crompton, JJ., being in favor of affirmance. 3 C. B. (N. S.) 523. On appeal to the house of lords the judges were requested to give their opinions, and here again they were equally divided; Blackburn, Crompton, and Williams, JJ., agreeing that the defendants were liable, and Channell, B., Pollock, C. B., and Wightman, J., holding that there was no liability. The law lords (Lord Chancellor Campbell and Lords Brougham, Cranworth, Wensleydale, and Chelmsford) then proceeded to render final decision; and they were unanimous in the opinion that the judgments of the exchequer chamber and of the common pleas should be reversed. Out of 19 judges, including the law lords, 8 were in favor of the plaintiff's right to recover, and 11 were opposed to it. Of the 8 who thought that the action would lie, only 5 placed their judgments on independent reasoning; all 3 of the judges in the common pleas having considered themselves bound by prior adjudications. The other five appear to have been much influenced by such adjudications, though confessedly not strictly in point. The 11 judges who were of opinion that the action would not lie discussed the question on principle, and their reasoning seems to us unanswerable. In the house of lords there was no dissent at all. So that the decision in the case is the unanimous judgment of the highest tribunal known to English law. Were we at all in doubt as to the correct view of this matter, the opinion of such a tribunal, promulgated after such exhaustive consideration of the question by many great judges, would suffice to turn the scale. Lord Wensleydale said at page 100: "If a creditor were to agree with his debtor to give him time to pay his debt till he got money enough out of his trade to pay it, I think no one could reasonably contend that he thereby made him

his agent to contract debts in the course of his trade; nor do I think that it would make any difference that he stipulated that the debtor would pay the debt out of the profits of the trade. The deed in this case is merely an arrangement by the Smiths to pay their debts, partly out of their existing funds, partly out of the profits of their trade; and all their effects are placed in the hands of the trustees, as middlemen between them and their creditors, to effect the object of the deed,—the payment of their debts. It is placed in the hands of the trustees, as the property of the Smiths, to be employed as the deed directs, and to be returned to them when the trusts are satisfied. I think it is impossible to say that the agreeement to receive this debt so secured, partly out of their existing assets, partly out of the trade, is such a participation in profits as to constitute the relation of principal and agent between the creditor and the trustees. The trustees are certainly liable, because they actually contract by their undoubted agent; but the creditors are not, because the trustees are not their agents." Lord Cranworth said at page 91: "I do not propose to consider in detail all the provisions of the deed. I think it sufficient to state them generally. In the first place, there is an assignment by Messrs. Smith, to certain trustees, of the mines, and all the engines and machinery used for working them, together with all the stock in trade, and in fact all their property, upon trust to carry on the business, and, after paying its expenses, to divide the net income ratably amongst the creditors of Messrs. Smith as often as there shall be funds in hand sufficient to pay one shilling in the pound; and, after all the creditors are satisfied, then in trust for Messrs. Smith. Up to this point, the creditors, though they executed the deed, are merely passive; and the first question is, what would have been the consequence to them of their executing the deed, if the trusts had ended there? Would they have become partners in the concern carried on by the trustees merely because they passively assented to its being carried on upon the terms that the net income (*i. e.* the net profits) should be applied in discharge of their demands?

I think not." Channell, B., said at page 70: "I think that no new trade or concern was carried on. It seems to me that it was the old concern, though carried on under the management of trustees, and under a new name; that it was to be carried on by parties in whom the Smiths, on the one hand, and the general body of creditors on the other hand, placed confidence (that is to say, by the trustees,) but that it was the business of the Smiths; that the creditors who had rights against the Smiths, which they might have enforced by legal proceedings, in effect, in consideration of the arrangement that the trade for the future should be carried on by the trustees, and not under the management of the Smiths, agreed to forego their ordinary rights as creditors against their debtors, and to receive a sum equivalent to what was the amount of their debts, when the net profits (that is, as I understand, profits made after satisfying all new debts) should enable the trustees to pay the parties of the third part such equivalent sum. The business was, I think, the business of the Smiths, carried on with a view to their ultimate benefit; and the fact that the creditors had power to put an end to the management by the trustees, and to discontinue the business, and to require the property—the capital—to be sold and divided amongst them in satisfaction or part satisfaction of moneys which, according to my understanding of the deed, and by virtue of the deed of arrangement, became a charge upon the property of Messrs. Smith, does not vary the case so as to constitute the creditors of the third part partners in the business. The creditors of the third part had no power, I think, by virtue of the deed, to take upon themselves the management of the business." Pollock, C. B., said at page 84: "If a firm were in difficulties, and a person proposed to assist them by a loan of money, engaging to receive payment out of the profits only, and to make no claim in the event of there being no profits, but stipulating that one-half of the profits should be applied as they arose in payment of his debt, and that he should have power to see that this was done, would he thereby become a partner, and liable for all debts con-

tracted subsequently to this arrangement? On this very simple state of facts there may possibly arise a difference of opinion, but I think a large majority of all lawyers and commercial men would decide at once that assistance so offered and so accepted would not make the lender of the money a partner as to third persons. * * * The effect of the deed appears to me to continue the old concern, rather than to create a new one, but to put it under the management of the trustees, who are a sort of guaranty or security that the real contract shall be carried into effect, who are to protect the interests of Messrs. Smith, on the one hand, from whom all their authority emanates, and of the creditors, on the other, so that the creditors who give up their claim on the capital, provided they are paid out of the profits, shall have the profits so applied, if any there be. The debts of the creditors are not extinguished altogether; for, if the concern is unprofitable, the creditors may require it to be given up, and the property to be sold and divided among them. The trustees act under a power of attorney from Messrs. Smith, and they are to continue to carry on the same business, to pay all rent and charges, but they are to apply the net income (of course, after satisfying all new creditors) in payment of the claims of the old creditors." See, also, *Owen* v. *Cronk*, [1895] 1 Q. B. 265.

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

ON REHEARING.

Counsel for appellant call our attention to a fact not referred to on the argument of this case; *i. e.* that the assignor himself is made a party defendant, and has demurred to the complaint. As the court below overruled the demurrer as to him also, we must, to sustain its action, hold that he, as well as his creditors, is not liable for the property sold the trustee while such trustee was administering the trust. Such is our view. The instrument created a trust which placed the control of the property and the business entirely beyond the assignor so long as the trust should continue. The trustee doubtless was accountable in equity for the faithful discharge of his duties as such trustee, and a court of

equity might in a proper case interfere. But while the business was being managed by the trustee he was absolute master thereof, —as much as though he himself had a beneficial interest therein. The assignor could not dictate how the trustee should conduct it, what purchases or sales he should make, or have the slightest voice in its affairs. It was the business of the trustee, so long as the trust continued; the assignor having only an indirect interest in the successful management thereof. He was not the proprietor of the business, and the trustee was not his agent. It is always the case that the trustee has no interest in the management of the affairs confided to him by the trust instrument, and that the *cestui que* trust is the only person beneficially interested therein. And yet it has never been held or even supposed that the beneficiary is liable for debts contracted by the trustee in so handling the trust property as to create an income for such beneficiary. The assignor by the trust deed parted with the ownership of the property, and all control over the business he had been carrying on. While that instrument remained in force he was in precisely the same position, with respect to the fund and the business which the trustee was conducting therewith, as if a third person had created the trust, and had provided that, after the trustee had paid thereout certain debts of the defendant, the trustee should transfer all the property to defendant. In the supposed case he would be interested in the success of the business, and yet it would not be his business. He would have no control over it, and therefore would not be liable for debts incurred in the prosecution thereof. There is no analogy between an instrument which establishes an agency and one which creates a trust. Where an agency exists, the principal may at any moment interfere; and at all times he is, in legal contemplation, in full control of the business. Not so when a party has parted with the title to his property, and has created a trust which vests in such trustee the right to manage the business as the proprietor thereof, he being accountable to the beneficiary, not as his principal, but as a mere *cestui que* trust under the terms of the trust

instrument. There is no hardship in the doctrine that the beneficiary is not liable in such a case. The person with whom the creditor deals (*i. e.* the trustee) is himself personally liable. If such creditor is unwilling to trust him, such creditor can refuse to sell him on credit. And in a proper case the creditor may resort to the trust estate itself for his pay. It would indeed be an anomaly in the law if one could be held responsible for goods that he had not purchased or agreed to pay for, and which were not sold to his agent, but were purchased by a third person to use in a business carried on by such third person; the defendant having no control thereover. We hold that the assignor himself is not liable, and therefore the judgment heretofore rendered will not be disturbed.

(75 N. W. Rep. 914.)

MARIA ARNEGAARD *vs.* KNUDT O. ARNEGAARD, *et al.*

Opinion filed May 11th, 1898.

Husband and Wife—Secret Ante Nuptial Deeds.

After engagement, and on the eve of his marriage to a second wife, the prospective husband deeded to his son by a former wife his homestead. The transfer was kept secret. The deed was not recorded, and the wife was ignorant thereof. The purpose of the grantor was to prevent the homestead right of the wife in the land from vesting in her on their marriage. As an inducement to the women to marry him, he proposed to build on the homestead a substantial dwelling. *Held*, that the deed was fraudulent, in law and in fact, as to her homestead right, and therefore void as to it. But the deed is not void in toto.

Fraudulent Transfer of Homestead.

The fact that the husband could, after marriage, have destroyed her homestead right in the property by changing his place of residence is no reason for taking the case out of the rule that a secret antenuptial transfer by the husband is void as to the wife; for after marriage the husband's control over the homestead would have been not absolute, but limited,—a husband having no power to devest the wife of her homestead right by deed or will, but only by removal from the premises. The consideration that the wife's homestead right is more fragile than that of her dower right at common law affords a strong reason why the courts should guard more jealously her interests, against the secret devices of her husband to defraud her of such right.

reserves the right to recall or retake the deed, there is no delivery. *Stinson* v. *Anderson*, 96 Ill. 373; *Porter* v. *Woodhouse*, 59 Conn. 568; *Weisinger* v. *Cock*, 67 Miss. 511; *Wilson* v. *Wilson*, 158 Ill. 567; *Tyler* v. *Hall*, 106 Mo. 313; *Bury* v. *Young*, 98 Ill. 446; *Schuffert* v. *Grote*, 88 Mich. 650; *Bovee* v. *Hinde*, 135 Ill. 137; *Fain* v. *Smith*, 14 Or. 82; *Lang* v. *Smith*, 37 W. Va. 725. The deed in controversy was in possession of the deceased at his death, this puts the burden of proving delivery upon the grantee. *Tyler* v. *Hall*, 106 Mo. 313. The presumption is that the deed was placed in Hyde's possession as the agent for the grantor. *Hale* v *Joslin*, 134 Mass. 310; *Ball* v. *Foreman*, 37 Ohio St. 132. The deed to Knudt O. Arnegaard of the homestead was fraudulent as to the homestead rights of the plaintiff. Such transfers after the agreement to marry without the consent of the prospective husband or wife are void. *Petty* v. *Petty*, 4 B. Monroe, 215; *Swaine* v. *Perine*, 5 Johns. Ch. 482; *Cranson* v. *Cranson*, 4 Mich. 230; *Pomeroy* v. *Pomeroy*, 54 How. Pr. 228; *Killinger* v. *Reidenhauer*, 6 Serg. and R. 534; *Green* v. *Green*, 34 Kan. 740; *Hall* v. *Carmichael*, 8 Baxt. 211; *Freeman* v. *Hartman*, 45 Ill. 57; *Posten* v. *Gillispie*, 5 Jones, Eq. 258; *Tucker* v. *Anderson*, 13 Me. 124; *Baker* v. *Jordan*, 73 N. C. 145.

Carmody & Leslie, and *Cochrane & Feetham*, for respondents.

The delivery of the deed to Mr. Hyde passed the title, and the fact that the grantor in his life time regained possession of the deed does not defeat the title already passed. *Bury* v. *Young*, 33 Pac. Rep. 339; *Whittenbrock* v. *Cass*, 42 Pac. Rep. 300; *Crabtree* v. *Crabtree*, 42 N. E. Rep. 487; *Brown* v. *Westerfield*, 66 N. W. Rep. 439; *Denzler* v. *Reckholl*, 66 N. W. Rep. 147; *Trask* v. *Trask*, 57 N. W. Rep. 841; *Gish* v. *Brown*, 33 At. Rep. 60; *Crooks* v. *Crooks*, 34 Ohio St. 610; *Hatch* v. *Hatch*, 6 Am. Dec. 67; *Wallace* v. *Harris*, 32 Mich. 481; *Hatheway* v. *Payne*, 34 N. Y. 92; *Brown* v. *Brown*, 4 Fed. Cases, No. 1994. At common law a voluntary conveyance by either party to a marriage contract of his or her entire property, without the knowledge of the other and just

prior to the marriage was a fraud, this is not the law today. *Butler* v. *Butler*, 21 Kan. 521, 30 Am. Rep. 441; *Green* v. *Green*, 10 Pac. Rep. 156; *Hamilton* v. *Smith*, 10 N. Y. 276; *Small* v. *Small*, 42 Pac. Rep. 327.

CORLISS, C. J. Plaintiff is seeking a decree adjudging void as to her a certain deed of real property executed by Ole O. Arnegaard to his son Knudt O. Arnegaard without any other consideration than the natural love of a father for his own offspring. The validity of the deed is assailed on two grounds: Plaintiff claims that it was never delivered, and that it was in fraud of her rights as the propective wife of the grantor. At the time this conveyance was executed, the grantor, who was a widower with a large family of children, was engaged to the plaintiff, and their marriage took place a couple of months later. The grantee in the deed is one of the grantor's children by his former wife. Assuming, for the purpose of discussing the question of fraud, that there was in fact a delivery of the deed, we are confronted with the inquiry whether there is anything in the circumstances of this case which takes it out of the general rule that the owner of property can make an honest disposition thereof to whomsoever he pleases. As before stated, it is urged by counsel for the plaintiff that the transfer of the land to the son was a fraud upon her rights, and that the deed is void in his hands because he is not a purchaser for value, but merely the object of his father's bounty. The basis of this claim is that upon marrying the grantor she would have secured a homestead right in this land, had it not been conveyed to the son before her marriage with the grantor, and that this conveyance made after her engagement to the grantor (the fact of such conveyance being concealed from her) must consequently be deemed to have been made for the purpose of defeating her rights, and therefore, in law, a fraudulent conveyance, with respect to her homestead right.

It must be admitted that there has grown up a peculiar doctrine with reference to transfers of property by husband or wife after engagement. In its original form, this doctrine was not

obnoxious to criticism. But it has, in its late developments, seriously encroached upon settled legal principles. It was not anomalous for a court to hold that a secret transfer by the wife before marriage was, in law, a fraud upon the husband's rights, because by marriage he was compelled to shoulder the burden of her debts. He might well insist that the wife, who had unloaded upon him the weight of her obligations, should not be permitted by a secret transfer to devest herself of the property out of which such debts ought in fairness to be paid. An agreement for marriage at common law was, in effect, an agreement for a sale by the prospective wife to the prospective husband of all her personal property, and the transfer to him of her right to possession of all her real estate, on condition of the assumption by him of all her debts. Liability for her debts being unescapable, it was rightly deemed fraudulent for the woman, after engagement, secretly to devest herself of the very property which should pass to the husband as an equivalent for the obligations he was forced to assume. See *Chandler* v. *Hollingsworth*, 3 Del. Ch. 99. The chancellor says, at page 106: "Let us consider the first question. The English court of chancery has, from the earliest times, protected the marital rights of the husband against a fraudulent settlement by the wife pending a treaty of marriage. It is considered that he becomes a purchaser of the wife's property, in consideration of the charge he assumes, of her maintenance and the payment of her debts; that this is a right upon which fraud may be committed, and which ought to be protected. Lord Thurlow, in *Strathmore* v. *Bowes*, 1 Ves. Jr. 27. This view has commanded universal consent from the beginning." In *Butler* v. *Butler*, 21 Kan. 521, Judge Brewer says: "Now, at common law, the husband, by marriage, assumed responsibility for all his wife's debts, became also the owner of her personal property, and entitled to the use, rents, and profits of her real estate. Marriage therefore contemplated, on his part, both the assumption of responsibility and the acquisition of property." In *Strathmore* v. *Bowes*, 1 Ves. Jr. 28, Lord Thurlow says: "The law conveys the

marital rights to the husband, because it charges him with all the burdens which are the consideration he pays for them; and therefore it is a right upon which fraud may be committed, and out of this right arises the rule of law that the husband shall not be cheated on account of his consideration." But when this rule was made applicable to the case of a conveyance of land by the man contemplating marriage, without any reference to the question of actual fraud, the courts appear to have taken a somewhat radical step. It is obvious, however, that the peculiar favor with which the right of dower was regarded by the common law accounts for this extension of the doctrine. Of course, we are not now considering the case of an actual fraud upon the wife, as when she is induced to marry, relying upon the husband's representation that he is the owner of particular property, which he has in fact conveyed to another. Under such circumstances a case of actual fraud would be established. We are dealing with the broad doctrine that, without any reference to the knowledge of the wife that the husband was the owner of the property conveyed, she can overthrow his deed thereof (the grantee not having paid value) by showing that it was made after their engagement, and that she was ignorant thereof at the time of the marriage. Whatever view may have formerly been held, it has become settled law in these later days that the purpose to deceive and defraud the other prospective spouse is imputed to the one who makes the antenuptial transfer, and conceals the fact until after marriage. Originally it was doubted whether, even in the case of a transfer by the woman, the husband could question the transaction without showing actual fraud. In *Chandler* v. *Hollingsworth*, 3 Del. Ch. 99, the chancellor said: "But until a recent date the doubt has been as to what circumstances should be held to render the settlement fraudulent; whether there must have been some misrepresentation or deception practiced upon the husband, such as amounts to actual fraud, or whether mere nondisclosure was sufficient, as a fraud in law, to invalidate the

settlement; especially whether mere nondisclosure should be fatal where the husband was at the time of the marriage ignorant as well of his wife's having held the property, as of its having been disposed of away from him." But ever since the decision of the court in *Goddard* v. *Snow*, 1 Russ. 485, decided by the master of the rolls in 1826, it has been the rule that a secret transfer of property by a prospective wife, is as a matter of law, fraudulent and void, without any reference to the husband's knowledge that the woman was the owner of the property. *Chandler* v. *Hollingsworth*, 3 Del. Ch. 99; *Tucker* v. *Andrews*, 13 Me. 124; *Logan* v. *Simmons*, 38 N. C. 487; *Spencer* v. *Spencer*, 56 N. C. 404, 409; *Poston* v. *Gillespie*, 58 N. C. 258; *Ramsay* v. *Joyce*, 1 McMul. Eq. 236; *Manes* v. *Durant*, 2 Rich. Eq. 404; *Taylor* v. *Pugh*, 1 Hare, 608; *Linker* v. *Smith*, 15 Fed. Cas. 561; *Duncan's Appeal*, 43 Pa. St. 67. See, also, *Freeman* v. *Hartman*, 45 Ill. 57.

How the doctrine which in the beginning related exclusively to transfers by the wife came to be extended in all its breadth to cases of transfer by the husband, it is difficult to determine, if principle is to be our guide. It is a significant fact that in England, where the doctrine had its origin, the wife's right of dower has never been successfully asserted as against an antenuptial conveyance by her husband. The question does not appear to have been directly decided in that country. In *Chandler* v. *Hollingsworth*, 3 Del. Ch. 99, the chancellor says, at pages 114 to 116: "It was argued by the defendant's counsel that in England dower is not protected, as a marital right, against a conveyance by the husband before the marriage, even though made on the eve of marriage, and expressly to exclude the wife; that under the English decisions the husband and wife, in this respect, stand on a different footing. There is no decision upon the precise question, but the weight of opinion is in favor of the position taken. Prior to the statute of uses, estates were largely held in trust; and it was, from the beginning, considered that dower did not attach to a use, even when it was one reserved to the husband under a conveyance made by himself. Whether a conveyance with a use

reserved to himself by the husband, made on the eve of marriage, and with the express purpose of barring dower, was at that period held to be effectual, does not appear by any decided case. The case *Ex parte Bell*, 1 Glyn & J. 282, cited in 1 Rop. Husb. & Wife, (32 Law Lib.) 354, note, that a voluntary settlement made by the husband, though set aside as fraudulent against creditors, prevents his wife's right of dower, cannot be taken as a decision upon the question, since it does not appear whether the settlement was made pending a marriage treaty. The dicta on this point are conflicting. Lord Chief Baron Gilbert is reported to have said that such a conveyance would be fraudulent as to the wife. 4 Cruise, Dig. 416; 1 Rop. Husb. & Wife, (32 Law Lib.) 354, note. In 1 Cruise, Dig. 411, and in 4 Cruise, Dig. 416, it is laid down that a secret conveyance by the husband, in trust, before marriage, to defeat dower, is void; and the whole doctrine as to antenuptial settlements by the wife is expressly applied to conveyances by the husband made under like circumstances. On the other hand, Lord Hardwicke, in *Swannock* v. *Lyford*, Amb. 6; *Id.*, Co. Litt. 208a. note 1, also reported fully in Park, Dower, 382, treats it as admitted 'that if a man, before marriage, conveys his estate privately, without the knowledge of his wife, to trustees, in trust for himself and his heirs in fee, that will prevent dower.' Upon this authority, Park, Dower, 236, so lays down the rule. So, also, does 1 Washb. Real Prop. 161. After the statute of uses, which converted all uses into legal estates, and so admitted dower to attach to them, another mode of avoiding the inconveniences of dower was resorted to, by the practice of settling jointures in lieu of dower. By a statute of 27 Hen. VIII., which was passed to remedy the inconvenient effect of the statute of uses as to dower, the husband was authorized to settle upon his intended wife, before the marriage, a jointure, which, if reasonable, was held effectual as an equivalent for dower, and barred it, even though made without the wife's privity; the courts of equity reserving the power to relieve the wife against a jointure unfair or merely illusory. Such, after much controversy,

was the construction finally given to this statute in *Earl of Buckingham* v. *Drury*, 3 Brown, Parl. Cas. 492, cited in 1 Rop. Husb. & Wife, 477. The effect was that dower, under the English system, became a precarious, and, in the case of large estates, an infrequent, mode of provision for the wife; and hence its value as a marital right, and the importance of protecting it, was the less appreciated. Marriage was not presumed to have been contracted in expectation of it, unless upon representations to the wife that she would become entitled to it. This may account for what otherwise must appear as an unjust discrimination made by the English courts of equity, in withholding from the wife such protection as is given to the husband against secret antenuptial settlements. Such a reason is suggested in the note to 1 Rop. Husb. & Wife, 354."

Whatever may be the law in the mother country, the decisions are practically unanimous on this side of the water that the mere fact that a secret transfer was made after engagement is, with an exception to be hereafter referred to, conclusive on the question of fraud, so far as the right of dower is concerned. It is true that in some of the cases the element of actual fraud was shown to have existed, and some of the rulings are placed upon that ground. *Kelley* v. *McGrath*, 70 Ala. 75; *Jones* v. *Jones*, 64 Wis. 301, 25 N. W. Rep. 218; *Brown* v. *Bronson*, 35 Mich. 415; *Smith* v. *Smith*, 6 N. J. Eq. 515; *Green* v. *Green*, 34 Kan. 740, 10 Pac. Rep. 156; *Petty* v. *Petty*, 4 B. Mon. 215; *Jenny* v. *Jenny*, 24 Vt. 324. But in the great majority of the cases the broad rule is enunciated that a man owes to the woman to whom he is betrothed the utmost good faith, and that he cannot, consistently with that sacred obligation, secretly devest himself of property in which she would by the marriage secure rights which would thereafter be beyond his control. On the proposition that a secret transfer of his real property is, except under special circumstances, fraudulent as a matter of law, as to her dower right, we cite the following cases: *Davis* v. *Davis*, 5 Mo. 183; *Swaine* v. *Perine*, Johns. Ch. 482; *Chandler* v. *Hollingsworth*, 3 Del. Ch. 995 ; *Youngs*

v. *Carter*, 50 How. Prac. 410, affirmed on appeal in 10 Hun. 194; *Cranson* v. *Cranson*, 4 Mich. 230; *Pomeroy* v. *Pomeroy*, 54 How. Prac. 228. See *Gainor* v. *Gainor*, 26 Iowa, 337; *Thayer* v. *Thayer*, 14 Vt. 107. Many of the cases which make an exception in favor of a reasonable provision for children treat of the transaction as fraudulent in all other cases, without reference to the intention of the party who makes the transfer.

While the extension of the earlier rule to cases involving dower grew, in a measure, out of the peculiar regard which the common law paid to that right, yet the foundation of these decisions is the violation of the husbands duty to act with the utmost good faith towards his prospective bride, in dealing with his property after the marriage engagement. It therefore follows that the fact that dower has been abolished in this state is not in itself decisive against the right of this plaintiff to assail as fraudulent the conveyance of the homestead to the defendant Knudt O. Arnegaard. The inquiry still remains whether she, upon becoming the wife of the grantor, would have secured such an interest in the land, on which he lived, and on which he continued to reside up to the time of his death, as should be protected against a secret transfer after engagement, and before marriage. If the statute did not give a surviving widow a homestead right in the land of her deceased husband which formed their homestead at the time of his death, we could not on sound principle, hold that the secret transfer of this land would in any manner constitute a fraud upon the plaintiff. In this state dower and curtesy are abolished. Neither husband nor wife has any interest in the property of the other. Each has the absolute power of disposition, whether by transfer during life, or by will at death, subject only to the homestead right of the survivor. Were it not for such homestead right, the plaintiff would have no ground for complaint. Surely it would not be fraudulent for the husband to do secretly before marriage that which he could do either openly or secretly after marriage. Could he by deed or will devest himself of all his property after marriage without the consent of his

wife, the law would not treat as fraudulent his disposition thereof before marriage, though done after engagement, and for the express purpose of preventing his prospective wife obtaining a share of his estate at the time of his death. The authorities are unanimous on this point. *Small* v. *Small*, (Kan. Sup.) 42 Pac. Rep. 323; *Padfield* v. *Padfield*, 78 Ill. 16; *Holmes* v. *Holmes*, 3 Paige, 363; *Dunnock* v. *Dunnock*, 3 Md. Ch. 140; *Cameron* v. *Cameron*, 10 Smedes & M. 394; *Lightfoot* v. *Colgin*, 5 Munf. 42; *Lines* v. *Lines*, 142 Pa. St. 149, 21 Atl. 809; *Pringle* v. *Pringle*, 59 Pa. St. 281; *Smith* v. *Hines*, 10 Fla. 258; *Richards* v. *Richards*, 11 Humph. 429; *Sanborn* v. *Goodhue*, 8 Fost. (N. H.) 48; *Ford* v. *Ford*, 4 Ala. 142, 146; *Williams* v. *Williams*, 40 Fed. Rep. 521; *Stone* v. *Stone*, 18 Mo. 390. Of course, the transfer must be actual, and not colorable. See *Rabbitt* v. *Gaither*, 67 Md. 94, 8 Atl. 744; *Smith* v. *Smith*, (Colo. Sup.) 46 Pac. Rep. 128. The only ground, therefore, on which we can sustain the plaintiff's charge of legal fraud, is that she would have secured by marriage such a contingent right to a homstead interest in the land in question, had it not been deeded away before marriage, that the law will deem the disappointment, through the act of her husband, of her just expectation that she should enjoy such right, as a wrongful act on his part, which it will set aside, as against those who are not innocent purchasers, to the extent necessary to protect her homestead interest. If the contingent interest were absolutely at the control of her husband, we would have no hesitation in saying that she could have no redress. Were it the law in this state that the husband, even after marriage, could devest the homestead right of the wife by transfer during his life, or by devise on his death, or by mere removal from the premises, we would be clear that the conveyance to the defendant was a perfectly legitimate transaction. The authorities are clear on this point. See cases last above cited. If, therefore, we decide against the legality of this deed in so far as it affects plaintiff's homestead interest, it must be on the ground that, although the husband can devest the wife's interest in the home-

stead by a bona fide change of residence, yet in the absence of such a change her homstead right is as much fixed by marriage as was the wife's right of dower at common law. So long as the premises continue to be the home of the parties, the husband is as powerless to affect his wife's right to hold them as a home after his death as he is powerless to cut off by deed or will her dower right in a state where dower still exists. Revised Codes, sections 3608, 3626.

We think that the fact the husband has a qualified right to defeat the wife's homestead interest does not take the case out of the category of rights which a court of equity will protect, as against a secret transfer before marriage to defeat the same. The husband may know in advance that it is his purpose to reside on that particular parcel of land for the remainder of his days. If this is his determination, it is obvious that he must know that after marriage he cannot defeat his wife's homestead right. With this thought, in mind, and conscious of the fact that therefore he must make an antenuptial transfer if he would prevent the homestead interest of his prospective wife from attaching beyond his power to control it, he secretly deeds away the land without valuable consideration. How can such an act be characterized, except as a fraud? What purpose could he have had, except the wrongful one to defeat his wife's just expectations by a secret device? From the standpoint occupied by him, the case is in no manner different from what it would have been had he possessed no power, even by change of residence, to defeat the wife's homestead rights. That it was in the mind of the grantor at the time he made this transfer that his home would remain upon this land until his death, is evidenced by the fact that, as an inducement to the plaintiff to marry him, he promised to erect thereon a substantial dwelling, in place of the old building in which he was living. This structure was in fact built, and he continued to reside therein with plaintiff up to the day of his death. Not only had he decided to make that his home, but the plaintiff was fully justified in the belief, which she doubtless entertained, that

this was to be their homestead, and that after his death she could continue to live there, under the law, as his widow. There was considerable disparity in their ages; he being 46, and she only 23, at the time of their engagement and marriage. She could not have failed to anticipate that in all probability she would survive him. She must have inferred, from his promise to build a new house, in which they were to dwell, on his homestead, that he was to continue the owner of the property, and thus give to her the homestead rights of a wife and widow. He must have known that she looked forward to the possibility of outliving him. He could not help realizing that she would infer from his promise to build a new dwelling that he would in good faith give her such a home there as the law would entitle her, as widow, to hold for life after his death. The fact that he kept from her all knowledge of this conveyance to his son, not only before marriage, but thereafter as well, is convincing proof that he well knew that she was counting on having this homestead, should she outlive him. He undoubtedly feared, and well might fear, that she would not marry him if she knew that at the end of their married life, herself perhaps a woman advanced in years, she might be turned out upon the world without a home. Considering the difference in their ages, we may well believe that it was not so much sentiment and affection, as a desire to secure for herself a home for life, that prompted her to become his wife; and he could not have failed to realize that such a motive, if not the sole, was yet the controlling, motive which influenced her course. The undisputed evidence in the case—evidence which comes from one of defendants' own witnesses (the evidence of a son of the grantor, who narrates a conversation with the father) shows that the very purpose of making this secret conveyance was to defraud the woman he was about to marry of her homestead right. The testimony referred to is as follows: "Q. Did you at any time hear your father make any statements with reference to his sister, Mrs. Ingebretson, and her marriage? A. Yes. Q. In that connection did you at any time hear your father

make any statements as to what provision he had made for his children prior to his marriage; and, if so, what statements, and when were they made? A. He referred to that affair very often, occasionally when he got to talking about the disposition of the estate; and he thought it was too bad that Mr. Ingebretson didn't know enough to dispose of some of his property before he married the second wife, because, under the law, she would own the homestead, etc.; and he expressed the opinion that it was very foolish for a person to do such things, and not fix up some things when they remarried the second time." We are not without express authority in support of our view that the case is not taken out of the rule by the fact that the right of the wife in the property would not have been entirely beyond the husband's control had the antenuptial conveyance not been made. In *Thayer* v. *Thayer*, 14 Vt. 107, it appeared that the wife's right of dower could be barred by the husband's transfer during life. At common law this, of course, was not the rule. But in that state a statute had introduced a change placing the wife's dower right at the mercy of the husband, provided he saw fit to convey the land during life. The deed was made to a child of the husband just before his death, but subsequently to the marriage. The court held that it was fraudulent and void as to the dower interest of the wife. At page 122 the court said: "The chancellor supposes that the wife and the children both stand upon the same ground, and that neither have any such rights, in the lifetime of the ancestor, as to be the subject of fraud. But there is a manifest difference. The ancestor may by will exclude entirely the children from all participation in his estate; not so the wife." To same effect are *Davis* v. *Davis*, 5 Mo. 183; *Smith* v. *Smith*, (Colo. Sup.) 46 Pac. Rep. 128; *Manikee* v. *Beard*, (Ky.) 2 S. W. Rep. 545. There is reasoning to be found in some of the cases, which, on a casual reading, appears to militate against the doctrine that a secret transfer is fraudulent. But, when these decisions are examined, it will be found that the law of the jurisdiction where the question arose gave the husband an unfettered

control over his property, conferring upon him the right to select the time and mode of the transfer thereof, free from all claims of his wife thereon; giving her no interest therein, save as successor or distributee in case of intestacy. The opinion of Judge Brewer in *Butler* v. *Butler*, 21 Kan. 251, proceeds on the basis of such a state of the law. Mr. Pomeroy has in mind such a condition of the law when he declares that, in view of the state of the law in some sections of this country, the old doctrine of equity jurisprudence is there obselete. See 2 Pom. Eq. Jur. § 920, and 3 Pom. Eq. Jur. § 1113.

We now come to another branch of the question under consideration. It is urged that the transfer is valid because it is no more than a reasonable provision in favor of the husband's own child by a former marriage, and that at the time it was made the husband retained the title to 320 acres of land, and was the owner of personal property of the value of about $40,000. At the time of his death this personal estate was inventoried at something over $48,000. As he left no will, the widow will receive one-third of this property after paying expenses of administration. But we are not to judge of the legality of this transaction by the sequel. If originally fraudulent, it cannot be validated by the fact that her husband has failed to bequeath away from her, or give away in his lifetime, his personal property. He might have done so, and, in determining whether the deed in question was valid, we must take this fact into consideration. The only ground, therefore, on which counsel for defendants can sustain the conveyance, is that it was a reasonable provision for his son, the grantee, and that a secret transfer can be made, even when it seriously affects the wife, provided the object of the husband's bounty is a child, and the gift is not extravagant, considering his estate. The husband had living, at the time he conveyed the land in question to the defendant, nine children by his former wife. Some of these were of age, and some were not. He deeded four farms of land, aggregating 550 acres, to those of his children who had attained their majority; one of these conveyances being

that which is here assailed. It is established that his object was that all his children should share in this property conveyed; he trusting to the honor of the grantees to see that their younger brothers and sisters received fair treatment. In view of the number of children, and the large amount of real and personal property which he still retained, we cannot say that the provisions which he made for his offspring by his former marriage was unreasonable. But it is not enough to take the sting out of a secret transfer on the eve of marriage that it was for the benefit of worthy objects of the husband's bounty, when the effect of such transfer is seriously to prejudice the rights of the prospective wife. Can the husband, who owns real and personal property, secretly deed all the land to his children, and then claim that the transaction was not a fraud upon the wife's right of dower, because the property conveyed constituted only a reasonable provision for his own progeny? In discharging his duty to his children, he must not be recreant to his equally binding duty to his future bride. He should select property in which she will have no right, and not take the only property in which the law gives her any interest. He cannot deed away the homestead, and then shelter himself under the plea that he has honestly performed a duty to his own blood. If he wishes to give his child the homestad, then he must apprise his prospective wife of the fact, and let her decide whether, under such circumstances, she desires to marry him or not. In *England* v. *Downs*, 2 Beav. 522, Lord Langdale said: "In the execution of this settlement, so far as it made provision for her children, she was performing a moral duty. In the circumstances in which she was placed, it was clearly her duty, before she placed herself and her property in the power of her second husband, to secure a provision for her children by her first husband, from whom her property was derived. But, in performing a duty towards her children, she had no right to act fraudulently towards her second husband." And again he says: "It is not doubted that proof of direct misrepresentations or of willful concealment, with intent to deceive

the husband, would entitle him to relief; but it is said that mere concealment is not in such a case any evidence of fraud, and that if a man, without making any inquiry as to a woman's affairs and property, thinks fit to marry her, he must take her and her property as he finds them, and has no right to complain if, in the absence of any care on his part, she has taken care of herself and her children without his knowledge. This proposition, however, cannot be admitted as stated; and clearly a woman, in such circumstances, can only reconcile all her moral duties by making a proper settlement on herself and her children with the knowledge of her intended husband." In *Williams* v. *Carle*, 10 N. J. Eq. 543, the court said: "The counsel of the defendants further insisted that, the disposition which is alleged to have been made of the property being for the benefit of the children of the proposed marriage, the trust was a meritorious one, and such as a court of equity will not disturb. The cases of *Hunt* v. *Matthews*, 1 Vern. 408, and of *Rex* v. *Cotton*, 2 P. Wms. 674, were cited as sustaining the rule that a settlement by a widow upon her children by a former marriage, even if made during the treaty for a second marriage, without the consent or knowledge of her intended husband, is valid. It was argued that a settlement for the benefit of children of the contemplated marriage is equally meritorious. But I cannot understand upon what just principle a trust in either case can be declared valid by a court of equity. In *Hunt* v. *Matthews* the court is reported to have said, or rather thought,—for that is the word used,—that a widow might, with a good conscience, before she put herself under the power of a second husband, provide for the children she had by the first. Now, there may be no difference of opinion as to the propriety of her making such a provision for her children, and in some cases she would be conscientiously and morally bound to do so; but the question remains, could she conscientiously do it without the knowledge of her husband? Could she contract with him upon the assumption that upon its execution the property was to be his, and yet clandestinely place the property beyond his control?

The settlement, though a meritorious one, would not be less a fraud upon the husband, and the court interferes with it because it is done in a manner which makes it a fraud upon his marital rights." We do not mean to say that under no circumstances could the husband or wife make a secret conveyance which would be valid. The question has always been whether the transfer was reasonable in view of all the surrounding facts. When the husband was by the marriage rendered liable for his wife's debts, there was much force in the rule which precluded the wife from making any secret antenuptial disposition of property, although her children by a former marriage were the objects of her bounty. His rights might well be deemed superior to theirs because he was, in effect, a purchaser of all her estate for a valuable consideration; *i. e.* the liability he incurred for her debts. But the wife's claim to dower stood upon a somewhat different footing. And the decisions are quite numerous that she cannot complain where, in good faith, only a reasonable provision is made for children, although she is ignorant of the transaction, and the effect of it is to decrease the value of the dower right she secures by the marriage. *Murray* v. *Murray*, (Ky.) 13 S. W. Rep. 244; *Dudley* v. *Dudley*, (Wis.) 45 N. W. Rep. 602; *Goodman* v. *Malcom*, (Kan. App.) 48 Pac. Rep. 439; *Hamilton* v. *Smith*, (Iowa,) 10 N. W. Rep. 276; *Alkire* v. *Alkire*, (Ind. Sup.) 32 N. E. Rep. 571. See, also, *Butler* v. *Butler*, 21 Kan. 521; *Tucker* v. *Andrews*, 13 Me. 124, 128; 2 Kent, Comm. 175; Story, Eq. Jur. § 273; *Gregory* v. *Winston's Adm'r*, 23 Grat. 102, 123; *Chandler* v. *Hollingsworth*, 3 Del. Ch. 99, 110, 113.

But these decisions are not opposed to our ruling in this case. They all recognize the principle that the effect of the transaction must not be utterly to keep from the wife all the interest in his property which would after marriage be beyond her husband's absolute control. To give his children a portion of his real property, leaving other real estate still standing in his name, is widely different from the transfer of all his lands to them thus precluding the possibility of any dower right vesting in the wife. In the

case before us the secret conveyance related to the only property in which the wife could expect to secure by her marriage any interest beyond the full control of her husband after marriage. If such a transaction can be sustained on the ground that a reasonable provision was thereby made for children, it is obvious that nothing is left in this jurisdiction of the rule so widely recognized, and founded in sound policy as well as upon principle of natural justice. Of course, the husband, acting in good faith, can, after marriage, destroy his wife's interest in the homestead, by changing his place of residence. She is bound to know that her expectation that he will not do so may be disappointed. But she certainly is justified in assuming that, if he does not in this manner devest her of her homestead interest in the land, she shall not be surprised at his death by a secret antenuptial conveyance of the homestead, made to defeat her rights. The very fact that the homestead right is less secure than that of dower at common law is of itself a strong reason why the courts should be even more watchful to protect it against destruction by the secret devices of one who is bound in morals to divulge to his betrothed any transaction which will effect her rights as his wife. We hold that the deed in question was fraudulent and void, as to plaintiff, both because the transaction was fraudulent in law, and because the purpose of the husband was secretly to deprive her of her homestead right. The conveyance will not, however, be set aside, except as to her homestead interest, unless we find that it was never in fact delivered by the grantor. That the deed is not entirely void as to the wife is too clear to admit of doubt. See *Chandler* v. *Hollingsworth*, 3 Del. Ch. 99; *Dudley* v. *Dudley*, 76 Wis. 567, 45 N. W. Rep. 602. In none of the cases has she been protected, except as to the right which after marriage the husband could not fully control. The husband of the plaintiff had a perfect right to prevent her succeeding to any of his real property as heir, and, in so far as the deed to the son defeats her claim upon this land as heir, it must stand, unless we find that the deed was never in fact delivered.

This brings us to the second branch of the case. The deed was not delivered by the grantor to the defendant, but was handed to a third person, on the condition that it was not to be delivered to the grantee until the grantor's death. If, however, there was in fact a delivery of the deed to such third person, it is immaterial that the ultimate delivery to the grantee was not to take place until the death of the grantor. However open to criticism from the standpoint of legal principles the doctrine may be, it is now a thoroughly established rule that, if the grantor parts with all control over the deed at the time of its delivery to the third person, the delivery is good, and the title passes to the grantee, although the delivery to him is not to take place until after the grantor's death. The transaction does not vest in the grantee a fee in possession, but only a fee in remainder after the life estate of the grantor which by implication is carved out of the fee, has terminated. Some of the cases proceed on the theory that the fee does not pass to the grantee until the delivery of the deed to him, and that then his title relates back to the original delivery. But the better rule is that the deed is immediately operative as against the grantor, and that the condition that the delivery to the grantee shall not be made until after the grantor's death is equivalent to the reservation of a life estate in his favor in the land itself. The distinction, however, is not important for the purposes of this case. The grantor has died, and the deed has been delivered. The cases holding that a deed delivered to take effect on the death of the grantor is valid, are collected by Mr. Jones in his work on real property. See volume 2, section 1234, and cases cited. To same effect are *Burry* v. *Young*, (Cal.) 33 Pac. Rep. 338; *Wittenbrock* v. *Cass*, (Cal.) 42 Pac. Rep. 300; *Baker* v. *Baker*, (Ill.) 42 N. E. Rep. 867; *Brown* v. *Westerfield*, (Neb.) 66 N. W. Rep. 439; *Denzler* v. *Rieckhoff*, (Iowa,) 66 N. W. Rep. 147; *Haeg* v. *Haeg*, 53 Minn. 33, 55 N. W. Rep. 1114. There are authorities which uphold such transfers even though the grantor reserves a right to recall the deed at any time before his death, provided he does

not do so. But we regard these adjudications as indefensible on principle. Such a transaction is nothing more than a testamentary disposition of property. Unless, therefore, we are able to discover from this record that the grantor absolutely parted with all control over the deed, and intended it to operate as a present conveyance, subject to his life interest, we must adjudge the instrument void for want of delivery. See 2 Jones, Real Prop. section 1236. The learned District Judge found in favor of an actual delivery, and as he had before him the witnesses on whose testimony his finding is based, we will not disturb it unless it appears to be clearly erroneous. The deed was delivered to a Mr. Hyde. His evidence relating to the delivery is as follows: "I was formerly cashier of the Hillsboro Banking Company, of Hillsboro. I severed my connection with the Hillsboro Banking Company, and went to Fargo, in January, 1896. While cashier of the Hillsboro Banking Company, I was acquainted with Ole Arnegaard, deceased. I had known him since 1881. Exhibit A is in my handwriting. I remember the occasion of drawing that deed. It was drawn, at the request of Ole O. Arnegaard, at the date it appears to be dated at the top. It was afterwards signed and acknowledged in my presence by Mr. Arnegaard, before me as notary public, on the day that the acknowledgement appears dated. The instrument was prepared prior to the actual acknowledgment of it. Q. On the day that you prepared this deed for Mr. Arnegaard, will you state what his instructions were to you, or what conversation was between you with reference to it? A. We had considerable talk about this matter before I prepared the paper for him. Mr. Arnegaard came into the bank, and asked me if I would draw up some deeds for him, and I told him I would. I had been in the habit of making papers for him from time to time as he needed them, and he said that he wanted to deed this property that is mentioned in this deed to his son, and gave me the description, which I noted down on paper. The matter of consideration came up, and I advised Mr. Arnegaard to insert in the deed one dollar and other

valuable consideration. He told me that he preferred to have the consideration written as it appears in the deed. He said that he desired the boys to have this property, and he wished to deed it to them. In the conversation, I asked him why he didn't make a will; and he told me he didn't know anything about wills, but he did know something about deeds and mortgages, and he preferred to have it deeded. I prepared this instrument, and, I think, two others; and they were signed by him as shown. He delivered them over to me, requesting me to take these instruments, and hold them, and, in case of his death, to put them on record, and requested me to say nothing to any parties about his having deeded this property." When Mr. Hyde removed from Hillsboro to the City of Fargo, he failed to take with him these deeds. They were left in the bank vault at Hillsboro. It appears that thereafter the grantor called at the bank for some papers. Whether he asked for these deeds, including the deed to the defendant, or for some other papers belonging to him, is not settled by the evidence. The only witness who can testify to this fact is in doubt about it. But it is undisputed that, along with other papers of his, these deeds were handed to him, and that he kept them in his possession until his death. We do not attach much importance to this fact, considering the circumstances. Indeed, if the deeds were once delivered to Hyde for the benefit of the grantees, it was beyond the power of the grantor to devest the title of the grantees by regaining possession thereof, or even by destruction of the same. A delivery passes title, and such title is thereafter as much beyond the control of the grantor as though he had never owned the land. *Conrad* v. *Colgan*, 55 Iowa, 538, 8 N. W. Rep. 351; *Siebel* v. *Rapp*, 85 Va. 28, 6 S. E. Rep. 478; *Douglas* v. *West*, 140 Ill. 455, 31 N. E. Rep. 403. For this reason it has been held that the declarations of the grantor subsequent to an alleged delivery are not competent to impeach it. If he has in fact transferred the title, he cannot, by his unsworn declarations made in his own interest, in effect lay

the foundation for securing a restoration of the title without the act or even consent of the grantee. See *Bury* v. *Young*, (Cal.) 33 Pac. Rep. 338; *Blight* v. *Schenck*, 51 Am. Dec. 481; *Squires* v. *Summers*, 85 Ind. 252; *Souverbye* v. *Arden*, 1 Johns. Ch. 240. Without setting forth in detail all the evidence, we find much in the case to confirm the theory that the grantor intended to part with all control over the deed. We think that the motive which prompted the execution of these conveyances is strong evidence that he intended to devest himself of the title at once. It is apparent that his object was to prevent the interest of his second wife attaching to the land. He was, of course, wrong in supposing that any other than a homestead interest would vest in her on their marriage; but, in determining what he thought, we must treat him as a layman, and not as a skilled lawyer. He evidently believed that, if he owned this land when the second marriage took place, the plaintiff could obtain some control over his future disposition of the property. Such being his thought, and it being apparent that he wished to preclude the possibility of such control, we are impelled to the conclusion that he meant that the deed should immediately transfer his title, subject only to the condition that the enjoyment of the possession was to be postponed. We must not lose sight of the fact that the conveyance was to his own children; and courts have gone very far in sustaining such transactions,—sometimes apparently holding that in such cases no delivery is necessary. *Souverbye* v. *Arden*, 1 Johns, Ch. 240; *Wallace* v. *Berdell*, 97 N. Y. 13; 2 Jones, Real Prop. § 1277; *Scrughan* v. *Wood*, 15 Wend. 545. That the declarations of the grantor himself, though subsequent to the alleged delivery, are competent evidence of intent, in support of the deed, is well settled. Such declarations are against the interest of the only party who is interested in defeating the deed at the time they are made. The defendant was sworn as a witness in the case, and testified as follows with reference to a conversation had with his father: "He spoke to me several times. One time he spoke to me about the deeds. He told me

that he had deeded the east quarter (what they usually called it) to Martin, and that he wished me to tell Martin that he expected him to come home soon and take that quarter, and he would move the school house over there and fix it up, and he could farm it. That is the only time he used the word 'deed.' He several times spoke to me about disposing of the land, and he always used the word 'papers.'" It is true that this evidence does not relate to the deed in question, but all these deeds were executed and delivered at the same time, and, if the grantor intended to deliver any of them, he intended to deliver them all. There was only a single transaction with reference to them. There is evidence equally strong but the great length of this opinion forbids a more specific reference to it.

The question of acceptance remains. Acceptance by the grantee is an essential part of a delivery. But it is well settled that the grantee may, in case of delivery to a stranger, on subsequently learning of such delivery accept the conveyance, and such acceptance relates back to the time of such delivery. "If a deed be delivered absolutely, and beyond the grantor's control and right of dominion, for the grantee's use, to a person not at the time authorized by him to receive it, and the grantee afterwards accepts it, or authorizes the custodian to accept it, the deed is effectual from the time it was placed in the hands of such person." 2 Jones, Real Prop. section 1241. Our statute embodies this rule. Rev. Codes, section 3520. The acceptance by the grantee has been shown. But it was not necessary to prove such acceptance, the grant being beneficial to the grantee; *i. e.* an unconditional gift to him. The law presumes an acceptance. "The fact that a conveyance is beneficial to the grantee, and imposes no burdens on him is in numerous cases the ground for asserting the general proposition that an acceptance of such a deed may always be inferred. The rule is stated to be that, if a deed is delivered to a third person for the grantee, neither the presence of the grantee, nor his previous authority, nor his subsequent express assent, is necessary to make the delivery valid.

If the deed is beneficial to the grantee, his assent will be presumed, in the absence of proof of his dissent." 2 Jones, Real Prop. section 1282. It is true that there appears to be a division of authority on the point, but our statute clearly recognizes the doctrine we have stated. A delivery is declared to be good when made to a stranger, not only on showing the assent of the grantee, but also when his assent may be presumed. Rev. Codes, section 3520. There is evidence in the case from which an acceptance by the grantee during the life of the grantor may be inferred. He appears to have known of the deed, and did not refuse to accept its highly beneficial provisions.

The case of *Hibbard* v. *Smith*, (Cal.) 4 Pac. Rep. 473, is not in point; for here no rights of third persons intervened between the delivery and acceptance, as in that case. The court there expressly recognized the principle of relation as between the parties, saying: "As between grantor and grantee, or those claiming under them, when the right of a third person is not involved, it may be rightly held that an acceptance or assent by the grantee to a deed delivered to a stranger for the use of the grantee, made after such tradition to a stranger, constitutes a full and complete delivery. It may be so held under the doctrine of relation. The subsequent assent or acceptance relates back to the time of such delivery to the stranger, and makes such acts contemporaneous; *i. e.* makes such tradition to a stranger, and the subsequent assent, contemporaneous." From a careful examination of the record, we are thoroughly satisfied that there was a delivery of the deed by the grantor; and such deed must therefore stand, except in so far as it affects plaintiff's homestead right. Had the purposes of the grantor been to leave these deeds with Hyde, to take effect only on his death, the grantor reserving to himself control thereover, they would have been testamentary in character, and therefore void as deeds, for want of delivery during the grantor's life. Every fact in the case indicates that this was not his purpose. He delivered them without reserving any control thereover. He expressly refused

to make the disposition by will, though this was suggested to him by Hyde. His purpose was to devest himself of ownership before the marriage which was soon to take place, that his second wife should not acquire any interest in the land. He repeatedly said that he had deeded the land to the boys. To sustain them is to give effect to them as deeds. To refuse to sustain them is to construe them as wills, in the face of the fact that they do not purport to be testamentary in character. And, finally, to uphold them is to do that which courts have gone to great lengths to accomplish, namely, sustain a provision made by the parent in his lifetime for his children.

We have hitherto refrained from referring to a point made by counsel for defendants. In view of the disposition made of the case, we might perhaps, ignore it; but we have decided to pass upon it, as it goes to our right to investigate at all the question of delivery. Counsel for defendants contends that all the questions here raised were settled adversely to the widow by the order of the county court of Traill County, which on appeal to the District Court was affirmed. Such prior adjudication is set up in the answer, and there is evidence in the case supporting such alleged defense. It appears that in a proceeding instituted by the widow in the county court having jurisdiction of the estate of Ole O. Arnegaard, to compel the administrator to place upon the inventory the real estate here involved, the judgment of such court was that the land did not belong to the estate of Ole O. Arnegaard; and on appeal to the District Court this judgment was affirmed. But we are clear that such adjudication can have no effect upon the question of title of one claiming in hostility to the estate. The county court has no power to try the question of title, as between the representative and persons claiming adversely to the estate. If the decedent has in fact conveyed his land before his death, that court cannot, by any order or judgment it may make, settle one way or the other the question whether the decedent owned the land at the time of his death. The fact that the grantee in such a conveyance may happen to

be a person interested in the estate does not alter the rule. As to such property, he is in the same position as an entire stranger. The court in which the estates of deceased persons are administered has no jurisdiction of a proceeding to determine whether the decedent has or has not transferred the property to another. Such a controversy must be settled in the District Court, and it can make no difference that the question is fully contested in the county court, for the parties cannot by consent confer jurisdiction over the subject matter. Had the decision in the county court relied on by counsel for defendants been in favor of the widow, she could not have availed herself of it in this action, because that court had no power to determine whether the grantees in these deeds were or were not the owners of this land. And for the same reason an adverse decision can work her no prejudice. As the county court had no power to try the question of title, it follows that, the District Court, on appeal from the order of the county court, had no such power. The questions here discussed are all treated in *Stewart* v. *Lohr*, 1 Wash. St. 341, 25 Pac. Rep. 457, which is an express authority in support of our ruling on this branch of the case. The county court may undoubtedly determine in a tentative way what property should be placed on the inventory as the property of the decedent. But any decision made by it would be controlled by the final result of an action brought in a proper court to try the question of title. Should the administrator be ordered to place certain lands upon his inventory, and should it subsequenty be decided, in a proper action, that the property in fact belonged to another, the administrator would not be chargeable therewith. The object of the proceeding to compel an administrator to place particular property upon the inventory is not to settle any question of title, as between those interested in the estate and persons who claim in hostility thereto. Nor has the county court any jurisdiction to adjudicate upon such title. We therefore hold that the judgment set forth in the answer does not constitute a former adjudication of the question of the title of this defendant to the land in controversy, or of the

widow's right to a homestead. The judgment will be modified by the District Court in accordance with the views herein expressed, the appellant recovering costs in both courts. All concur.

(75 N. W. Rep. 797.)

THOMAS J. BUXTON *vs.* HOMER E. SARGENT.

Opinion filed May 14th, 1898.

Lis Pendens—Purchaser Pendente Lite.

A purchaser *pendente lite* from one who is not named as a party defendant in a notice of *lis pendens* is not affected by the final judgment in the case.

Purchaser With Knowledge.

But if the person from whom he buys is in fact a party to the suit, and the purchaser knows of such action against him at the time of the purchase, he takes the property which is involved in the action subject to the final judgment therein.

Presumption is Against Notice.

But the presumption is that he did not have such notice when he bought.

Owner Must be Named in Lis Pendens.

Under the system of numerical indexing in this state, the rule remains unchanged that the purchaser *pendente lite* is not bound by the judgment unless the person from whom he buys is named in the notice of *lis pendens* as a party defendant.

Action to Quiet Title—What May be Litigated.

In an action to quiet title, only estates and interests in land can be litigated. A mere lien thereon cannot be investigated against the wishes of either party.

Liens.

But, if both parties try such a question, the court will pass upon it the same as the question of title.

Amending Pleading to Correspond With Proof.

The rule that the pleadings will be amended to conform to the proof does not apply when the evidence which it is claimed tends incidentally to establish a fact outside of the issues was competent and relevant on the actual issues in the case. Unless the record shows that such evidence was offered, to the knowledge of both parties, to prove the fact foreign to the issues as well as the one embraced within such issues, the law will presume that it was introduced for the only purpose for which it was, under the pleadings proper.

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

Action by Thomas J. Buxton against Homer E. Sargent to quiet title to certain lands. Plaintiff had judgment, and defendant appeals.

Affirmed.

Ball, Watson & Maclay, for appellant.

A vendor's lien by statute is subject to the rights of those purchasers only who have bought in good faith and for value. Sections 4830, 4832, Rev. Codes. The action to determine adverse claims to land is equitable in its nature. 3 Pom. Eq. Jr. 1396; *Book* v. *Mining Co.*, 58 Fed. Rep. 827. The burden was on plaintiff to show that he or some one of his predecessors in title purchased the property in good faith for value. *Simpson* v. *Del Hoyo*, 94 N. Y. 189; *Seymour* v. *McKinstry*, 12 N. E. Rep. 348; *Seymour* v. *McKinstry*, 14 N. E. Rep. 94; *Weaver* v. *Borden*, 49 N. Y. 286–298; *Bowman* v. *Griffith*, 53 N. W. Rep. 140; *Shotwell* v. *Harrison*, 22 Mich. 410. The reason of the rule as to the burden of proof in the case of negotiable paper where the paper has its inception in fraud applies equally to such cases as the one at bar. *Seymour* v. *McKinstry*, 12 N. E. Rep. 348; *Morris* v. *Daniels*, 35 Ohio St. 406; *Rush* v. *Mitchell*, 32 N. W. Rep. 367; *Vosburgh* v. *Diefendorf*, 23 N. E. Rep. 801. The recital in the deed is not evidence of payment of consideration. 2 Devon Deeds, 821; *Lake* v. *Hancock*, 20 So. Rep. 811; *Shotwell* v. *Harrison*, 22 Mich. 410; *Morris* v. *Daniels*, 35 O. St. 406; *Houston* v. *Blackman*, 66 Ala. 559; *Halland* v. *Allen*, 59 Ala. 283; *Sillyman* v. *King*, 36 Ia. 207; *Galland* v. *Jackman*, 26 Cal. 79; *Bolton* v. *Johns*, 47 Am. Dec. 404.

John W. Gilger, and *Winterer & Winterer*, for respondent.

Plaintiffs title came through Sarah E. Kindred and she was not a party to the action of *Paine* v. *C. F. Kindred*, and *H. E. Sargent*, neither was she mentioned in the notice of *lis pendens*. When the *lis pendens* was filed, Sarah E. Kindred owned legal title to the lands. *Jorgenson* v. *M. & St. L. R. Co.*, 25 Minn. 209; *Leitch* v. *Wells*, 48 N. Y. 609; Bennett on *Lis Pendens*, 371–2;

§ 5251, Rev. Codes. To affect a purchaser who comes in *pendente lite* under the holder of the legal title, with constructive notice of the equity claimed against it, the holder of the legal title must have been impleaded at the time of the purchase. Should he be brought in subsequent to the purchase the *lis pendens* would not take effect by relation so as to charge the purchaser with notice. *Parsons* v. *Hoyt*, 25 Ia. 157; *Bailey* v. *McGregor*, 46 Ia. 669; *Carr* v. *Callaghan*, 3 Littell, 371; *Marcey* v. *Fenwick*, 9 Dana, 199; *Fenwick* v. *Marcey*, 2 B. Mon. 470; Wade on Notice, 355; Bennett on *Lis Pendens*, 162–446; 13 Am. and Eng. Enc. L. 882 and n. Only those are charged with notice whose purchase might render ineffective the decrees of the court. *French* v. *The Loyal Co.*, 5 Leigh, 627; *Miller* v. *Sherry*, 2 Wall. 250; *Hunt* v. *Haven*, 52 N. H. 162. Recitals in a deed may in a proper case be and become *prima facie* evidence of the payment of a consideration. *Hoyte* v. *Jones*, 31 Wis. 404. Opinion of Campbell, J., in *Shotwell* v. *Harrison*, 22 Mich. 423; *Lacustrine Fer. Co.* v. *L. G. & Fer. Co.*, 82 N. Y. 483; *Wood* v. *Chapin*, 3 Keyes, 509; *Jackson* v. *McClusky*, 2 Cow. 360; § § 3880, 3881, Rev. Codes.

CORLISS, C. J. The ownership of certain real estate is involved in this cause. The action was brought to quiet the plaintiff's title to the property. Defendant denied that plaintiff was the owner of the fee, and set up that he was himself the owner thereof. The prayer of his answer was that his own title might be quieted as against plaintiff's claim. To this counterclaim plaintiff interposed a reply, alleging anew the fact that he was the fee owner, and denying that defendant had any interest in the land. Plaintiff was successful below. Defendant brings the case here for trial anew.

It is undisputed that Charles F. Kindred was the owner of the premises in question in fee simple on the 10th day of July, 1885, when he conveyed the same to Frank B. Thompson, who in turn transferred them to Sarah E. Kindred on July 15, 1885. Both of these deeds were recorded, the former July 13, 1885, and the

latter February 19, 1886. On the 13th of August 1888, Sarah E. Kindred conveyed a portion of the property to the plaintiff, and the remainder thereof to the plaintiff and Charles McReeve. McReeve, on the 2d of July, 1890, deeded his one-half interest to the plaintiff, who thus became the owner of the entire property. All of these deeds were recorded prior to February 12, 1890. This brief recital of facts makes it evident that plaintiff is the owner of the property in fee simple unless his rights have been destroyed by the judicial proceedings under which the defendant claims, and to which reference will now be made. Charles F. Kindred, who it is conceded is the common source of title, purchased the land from Mark Paine, and on the 7th day of July, 1889, Paine commenced an action to enforce a vendor's lien on the land by the issuance of a summons, and the filing of a complaint and a notice of *lis pendens*. The parties defendant to this action were Charles F. Kindred and Homer E. Sargent, although at this time the title to the land had been transferred to Sarah E. Kindred by deeds which were then on record. Nothing appears to have been done with this action except to procure the return of the sheriff that the defendants could not be found for service, until the 12th of February, 1890, when an alleged amended summons and complaint were filed in the clerk's office. In these papers the two original defendants were named as defendants, and also Frank B. Thompson, Sarah E. Kindred, and Edgar W. Wylien. At the time the amended summons and complaint were filed the title to the land had, as appeared by the public records, been transferred to the plaintiff herein, and yet he was not made a party defendant. Nor was any new notice of *lis pendens* filed, or attempt made to amend the old notice. It is impossible to discover any sound principle which will justify a decision that plaintiff is bound by the final judgment in the action to establish and foreclose the vendor's lien. Judgment having been rendered in such action adjudging that the plaintiff therein was entitled to a lien on the land, and directing a sale thereof to satisfy such lien, the defendant's grantor purchased the property

on the sale under such judgment, and thereafter conveyed the land to defendant. It is obvious that defendant cannot successfully contest the plaintiff's title to the property except on the ground that the judgment in the action to enforce the vendor's lien is binding on plaintiff, although he was not a party to the action. The basis of the defendant's claim that the plaintiff is bound by this judgment is that he is a purchaser of the subject of the litigation *pendente lite*. But this is not enough to make the judgment conclusive against him. The plaintiff must have bought from a party, or from some one who had himself purchased from a party. The common law did not declare that, after bill filed and subpœna served, all persons who might deal with the property in litigation should be concluded by the judgment, but only those who succeeded to the interest of a party to the suit. So far as that particular interest was concerned, the law, for obvious reasons, would not suffer any interference therewith *pendente lite* to affect the binding force of the final decree. It charged all persons with knowledge of the proceeding, and announced to them that they became interlopers at their peril. But those who purchased of strangers to the litigation were not affected by the final judgment, but could, despite such judgment, assert all rights which they had by such purchase secured. A purchaser *pendente lite* must know whether his grantor's rights are involved in litigation, but he need not inquire whether strangers are struggling among themselves about the same property. 13 Am. and Eng. Enc. Law, 882, and cases cited; Benn. *Lis Pend.* 162. In this state the filing of the bill or complaint is no longer sufficient to give subsequent purchasers constructive notice of the pendency of the action. The plaintiff, if he would secure a judgment which will bind such purchasers, must file in the proper office a notice of *lis pendens* containing the statements specified in the statute. Revised Codes, section 5251. It is true that the plaintiff in the action to enforce the vendor's lien did, in fact, file a notice of *lis pendens*. But this notice was not sufficient to affect the plaintiff, because it did not contain as a party

defendant the name of the person from whom plaintiff purchased, and who was, when the notice was filed, the owner of the property according to the public records and in fact. Moreover, there was no action pending at that time against Sarah E. Kindred, from whom plaintiff bought. Both the complaint on file in the action which was then pending, and the notice of *lis pendens* filed therein, informed the plaintiff that no effort was being made to affect the interest of Sarah E. Kindred, who apparently and in fact was the only person who had any interest in the land, but that the plaintiff was proceeding against a third person, who was a stranger to the title, to obtain a decree. Should we regard the new summons and complaint which were filed three years later without any order of the court authorizing an amendment of the original summons and complaint as a legal amendment thereof, still the defendant can claim nothing from this concession, as the plaintiff was already the owner of the land when the new summons and complaint were filed. His deeds were then on record. And, even if these papers had been filed anterior to his purchase, still he would not be affected by the judgment rendered in that action, for the reason that no new notice of *lis pendens* was ever filed, nor was the old one ever amended. When plaintiff bought the land, there was on file no summons or complaint or *lis pendens* which informed him that any action had ever been brought against the person from whom he bought; neither was there anything on file which informed him that his grantor had notice, through the filing of a notice of *lis pendens*, at the time she purchased, that there was any action pending against her grantor, Thompson, or his grantor, Charles F. Kindred. When Charles F. Kindred conveyed to Frank B. Thompson and Frank B. Thompson conveyed to Sarah E. Kindred, no action had been commenced at all. When Sarah E. Kindred sold to plaintiff, there was on file a complaint and notice of *lis pendens*, which informed the world that the plaintiff therein was seeking to enforce a vendors lien, not against Sarah E. Kindred, from whom plaintiff bought, but against an entire

stranger to the title. It would, indeed, be a novel doctrine if, under these circumstances, the plaintiff was chargeable with notice of a different action against different parties, *i. e.* one against the person from whom he obtained his title.

But it is urged that under our system of numerical indexing (sections 1954, 1955, Revised Codes) the mere filing of a notice of *lis pendens* describing the land constitutes constructive notice to all purchasers, though they deal with one who is not named as a party defendant either in the notice or in the complaint. The fallacy of this contention lies in the assumption that all actions affecting property are proceedings strictly *in rem*. In such a proceeding it is true that no particular person is named as defendant, for all interests in the *res* are attacked thereby, and it would follow that a purchaser could not complain that the person from whom he bought was not a formal party to the action, for he is bound to know that everyone who has any interest in the *res* is a party. Indeed, in proceedings strictly *in rem* no notice of *lis pendens* is ordinarily necessary, for the court, by seizing the property, renders it impossible for any one to buy *pendente lite*, and yet claim to be a good faith purchaser. Our statute providing for the filing of such a notice does not apply to proceedings strictly *in rem* at all, for it contemplates that there will be personal defendants to the suit. In proceedings *in rem* there are no personal defendants. The thing itself is the defendant on the record from the beginning to the end of the case. Our law regulating the filing of the notice is framed on the theory that in actions whose object is to affect the interests of particular persons in real property such persons shall be made parties defendant, and shall be named in the notice, to the end that by a bare inspection thereof the purchaser can ascertain whether there is an action pending which can possibly affect, not the land itself, but the interest in the land of the particular person from whom he intends to buy. We therefore conclude that one who contemplates dealing with a particular person with respect to land need not inquire about any suits affecting such land to which the

person with whom he intends to deal is not a party. Had the complaint on file itself contained the names of the real owners at the time plaintiff bought, a different case might be presented. But this was not the fact. Neither the pleading nor the notice informed plaintiff of any suit which could possibly affect the interest of the person from whom he was about to buy. The amended complaint, which did contain the name of the real owner, was not filed until after plaintiff had bought, and had placed his deeds on record. It follows from what we have said that the plaintiff is in no manner bound by the judgment in the action, and hence as to him such judgment and the sale thereunder are ineffectual to vest any title in the defendant. It is true that the action was pending against his grantor at the time he bought, and if the complaint therein and a proper notice of *lis pendens*, had at that time been on file he would have been constructively a party to the suit, and as such concluded by the final judgment rendered therein. Nor would it be necessary, to make such judgment binding on him, that these steps should have been taken. If the plaintiff had actually known of the pendency of the action, he would have been in no better position with respect to such judgment. But we cannot presume that he had such notice. When the suitor neglects to avail himself of the protection of the statute, he must prove that the purchaser in fact knew of the action, if he would establish the proposition that the judgment therein binds the purchaser the same as those who were actually parties to the suit. There is no presumption that the purchaser has been guilty of an attempt consciously to defeat the jurisdiction of the court. To impute such a purpose to him is to impute to him a fraudulent intent,—a deliberate design to render abortive all that the court has done and will thereafter do in the action. The law, so far from presuming this, presumes exactly the contrary. The plaintiff in the action has no occasion to complain, because the law will not assume that the purchaser knew of the pending suit. Let the plaintiff proceed against the proper parties, and file a proper notice of *lis pendens*, and he will have no occasion to show that the

purchaser knew of the action, for then the judgment will bind such purchaser without respect to the question of actual knowledge. Neither can the one who buys at the sale under the judgment complain that the law casts upon him the burden of proving that the purchaser *pendente lite* had knowledge of the litigation. Let him refuse to buy unless the public records inform him that he can, as a matter of right, use the judgment as conclusive against all who buy from the real owners of the property pending the action.

The question of the burden of proof is important under the facts of this case. If the burden were on the plaintiff to show that he did not know of the action against his grantor at the time he bought, he would fail, as there is no evidence at all in this record on the subject of his knowledge of that action at that time. The judgment would be conclusive against him, because he would be presumed to have knowledge of the action when he took his deeds. It would follow that the sale under such judgment would devest the title of the plaintiff under the conveyance the same as such sale would devest the title of a party to the suit. But the presumption is against the plaintiff having notice of the action, and, there being no evidence to rebut it, we must find that he bought in good faith without notice. As against such a purchaser the judgment is without force, and the consequence is that the plaintiff's title to the land is unaffected thereby, or the sale thereunder.

Defendant has in this court sought to sustain a vendor's lien as against the plaintiff. But in view of the statute, and the state of the pleadings, and also of what took place on the trial in the court below, we are unable to pass on this point. If he has such a lien, and if it can be enforced as against the plaintiff, he must assert his rights thereunder in some other proceeding. This is an action to quiet title under section 5904, Revised Codes. In such an action no question of lien can be litigated by either party against the wishes of the other. Estates and interests in land may be contested in such a suit, but not the right to a mere lien

thereon. *Bidwell* v. *Webb*, 10 Minn. 59, (Gil. 41;) *Power* v. *Bowdle*, 3 N. D. 111, 54 N. W. Rep. 404. Our statute in terms confines the parties to the litigation of estates and interests in land. "An action may be maintained by any person having an estate or interest in real property against another who claims an estate or interest therein adverse to him for the purpose of determining such adverse claim." Rev. Codes, § 5904. It is true, that, when both of the litigants actually try in such an action a question of lien, the courts will not refuse to pass upon that question, but will, on the contrary, render judgment thereon the same as if it had been a proper issue in the case. *Power* v. *Bowdle*, 3 N. D. 112, 54 N. W. Rep. 404. But in the case at bar there is nothing to show that the parties intended to or did try in the lower court the question whether defendant held a vendor's lien on the land which he could enforce as against the plaintiff. The only issue presented by all the pleadings, the complaint, answer, and reply, was as to the ownership of the land in fee simple, each party insisting that he was such owner. On the trial not a particle of evidence relevent to the question of lien was offered by either party. The only evidence which, by any stretch of the imagination, could be held to have any bearing on the question of lien, is the judgment itself. But we must assume that this was offered on the issue of title, the only issue before the court, and therefore the only issue which the parties are presumed to have intended to try. On that question it was competent and relevant; nay; it was indispensable. Defendant derived his title from the sale under the judgment, and it was, therefore, necessary that he should prove such judgment. Of the fact that such a judgment had been rendered the judgment itself was the best, and therefore the only competent, evidence. Defendant was compelled to introduce it on the question of title, the only question which, according to his answer, was being litigated; and plaintiff had a right to assume that defendant did not offer it for any other purpose. Certainly the plaintiff was not bound to assume that the defendant offered it on an issue which the pleadings did not

disclose. The case is not analogous to a case where parties without objection introduce evidence on points not embraced within the issues. In such a case the pleadings will be amended to correspond to the proof. But this rule must not be applied when it would work a surprise to one of the parties to the suit. It rests upon the acquiescence of both of the parties. But no such acquiescence is established when evidence competent, relevant, and even indispensable under the issues which the pleadings create, may incidentally tend to prove another fact not within the issues in the case. The learned District Judge himself made no finding of fact with reference to a vendor's lien, nor is there any mention of the subject either in the conclusions of law or the judgment in the case. Everything in the court below from the answer to final judgment shows that the only matter litigated was the ownership of the land in question. The judgment in this case will therefore not affect the vendor's lien, if any such exists; but the defendant, as equitable assignee thereof under the purchase of the property on the sale under the judgment (assuming but not deciding that such a lien can be assigned,) will be entitled, despite this judgment, to proceed to enforce the same, subject, of course, to all the defenses which can be interposed thereto.

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

(75 N. W. Rep. 811.)

E. I. DONOVAN *vs.* ST. ANTHONY & DAKOTA ELEVATOR CO.

Opinion filed May 16th, 1898.

Conversion—Sufficiency of Complaint.

The averments contained in the complaint analyzed in the opinion. *Held*, that the complaint states facts sufficient to constitute a cause of action.

Mortgage of Unplanted Crops.

Under section 4680, Revised Codes, a valid mortgage may be made upon an

unplanted crop, and will attach thereto as a lien as soon as the same comes into existence by the agency of the mortgagor. Following other cases cited in the opinion.

Mortgagee May Maintain Conversion.

A mortgagee of chattels, having a present right of possession, may maintain an action against a wrongdoer for the conversion of the property embraced in the mortgage.

BARTHOLOMEW, J., dissenting.

Appeal from District Court, Cavalier County; *Sauter*, J.

Action by E. I. Donovan against the St. Anthony & Dakota Elevator Company to recover damages for the conversion of certain grain alleged to belong to plaintiff by virtue of a chattel mortgage. From an order overruling a demurrer to the complaint, defendant appeals.

Affirmed.

Cochrane & Feetham, for appellant.

The complaint does not aver that at the time the mortgage was executed, the chattels mortgaged belonged to the mortgagor. 2 Cobby Chat. Morts. section 957. The mortgage alone is no evidence of title or possession. Jones on Chat. Morts. § 116; *Eams* v. *Snell*, 143 Mass. 166; *Gibbs* v. *Childs*, 143 Mass. 104; *Caffee* v. *Blaisdell*, 142 Mass. 541; *Warner* v. *Wilson*, 36 N. W. Rep. 719; *Everett* v. *Brown*, 20 N. W. Rep. 743. The pleading avers the execution of a chattel mortgage, but no other description or statement of the contract or terms or conditions of the mortgage is set out. This is not good pleading. *North* v. *Kizer*, 72 Ill. 172; *Joseph* v. *Holt*, 37 Cal. 253; *Stoddard* v. *Treadwell*, 26 Cal. 294; *Love* v. *Co.*, 32 Cal. 649; *Robinson & C. Co.* v. *Johnson*, 22 Pac. Rep. 459; *Lambert* v. *Haskill*, 22 Pac. Rep. 328; *White* v. *Soto*, 23 Pac. Rep. 210. The terms and conditions of the mortgage should be alleged. *Madison Nat. Bank* v. *Farmer*, 5 Dak. 285; 40 N. W. Rep. 345; *Bank* v. *Navarro*, 22 Fla. 474; 2 Cobby Ch. Mts. 957. The crops for 1896 could not have been sown in 1894, the alleged date of the mortgage. Unless plaintiff's mortgagor had possession or some right to the possession of this land he

could not mortgage future crops to be grown thereon because as to him the crops had no potential existence. Sections 4704, 3511, Revised Codes; *Hutchinson* v. *Ford*, 15 Am. Rep. 712; *Wilson* v. *Seibert*, 8 Am. L. Reg. (N. S.) 608; *Low* v. *Pew*, 108 Mass. 350; *Van Hoozer* v. *Cary*, 34 Barb. 12; 2 Kents Com. 641, note a; 1 Cobby Ch. Mts. 384; *Padden* v. *Bellinger*, 6 So. Rep. 351; *Thrall* v. *Hill*, 110 Mass. 330; *Orcutt* v. *Moore*, 134 Mass. 48; *Otis* v. *Sill*, 8 Barb. 112; *Conderman* v. *Smith*, 41 Barb. 407; *Brunswick Collendar Co.* v. *Stevenson*, 4 N. Y. Supp. 123; *Farmers L. & T. Co.* v. *Long Beach Imp. Co.*, 27 Hun. 91; *Minnesota L. S. O. Co.* v. *McGinnis*, 32 Minn. 195; *Apperson* v. *Moore*, 30 Ark. 57; *Arques* v. *Wasson*, 51 Cal. 622; *Shaw* v. *Gilmore*, 17 At. Rep. 314; *Morrill* v. *Noyes*, 56 Me. 468; *Everman* v. *Robb*, 24 Am. Rep. 682; *Russell* v. *Stephens*, 12 So. Rep. 830; *McCown* v. *Mayer*, 5 So. Rep. 98; *Stadeker* v. *Loeb*, 6 So. Rep. 687; *Fonville* v. *Casey*, 4 Am. Dec. 559; *Wyatt* v. *Watkins*, 16 Alb. L. Jr. 205; *Kimball* v. *Scottley*, 55 Vt. 285; *Mayer* v. *Taylor*, 47 Am. Rep. 522; *Moore* v. *Byrum*, 30 Am. Rep. 58; *Mayer* v. *Taylor*, 44 Am. Rep. 523. The theory upon which crops to be grown can be mortgaged is that they have a potential existence and that the mortgagor being in possession of the land upon which they are to be grown, that is, the agent of their production, he has a present vested right to have the crops when they come into actual existence. *Miller* v. *McCormick & Co.*, 35 Minn. 400; *Wood Machine Co.* v. *M. & N. Elevator Co.*, 48 Minn. 404. In former cases before this court the complaint contained an averment that the mortgagor was the owner and in possession of the land and grew a crop thereon. *Grand Forks Nat. Bank* v. *Elevator Co.*, 6 Dak. 357; *Hostetter* v. *Brooks Elevator Co.*, 4 N. D. 357. The complaint avers no facts showing plaintiff is entitled to possession on default. *Black* v. *M. & N. Elev. Co.*, 73 N. W. Rep. 90, 7 N. D. 129; *Madison Nat. Bank* v. *Farmer*, 5 Dak. 285, 40 N. W. Rep. 345; *First Nat. Bank* v. *North*, 2 N. D. 484. There is no averment in the complaint that the chattel mortgage was ever filed, neither that it was executed in good faith without intent to

defraud creditors. Section 4733, Rev. Codes; *Phyle* v. *Warren*, 2 Neb. 252; *Marsh* v. *Burleigh*, 13 N. W. Rep. 279; *Severance* v. *Levitt*, 20 N. W. Rep. 273; *Marks* v. *Miller*, 28 Pac. Rep. 14; *McCulley* v. *Swackhamer*, 6 Oreg. 439; *Whittleshoeffer* v. *Strauss*, 3 So. Rep. 524.

J. C. Monnet, for respondent.

Right to possession of the property is sufficient to support the action, neither ownership nor prior possession is required. *Parker* v. *Bank*, 3 N. D. 87; *Sanford* v. *Elevator Co.*, 2 N. D. 6. The doctrine of potential existence is abrogated in this state. Section 4680, Revised Codes; *Grand Forks Nat. Bank* v. *Elevator Co.*, 6 Dak. 357; *Merchants Nat. Bank* v. *Mann*, 2 N. D. 456; *Hostetter* v. *Elevator Co.*, 4 N. D. 357. It is sufficient to plead the legal effect of the mortgage. *Brown* v. *Champlin*, 66 N. Y. 214; Stephens Pl. 391. As against demurrer, an allegation of an ultimate fact or conclusion is sufficient. *Curtis* v. *Livingston*, 31 N. W. Rep. 357; *McClane* v. *White*, 5 Minn. 178; *Wells* v. *Masterson*, 6 Minn. 566; *Buckholz* v. *Grant*, 15 Minn. 406; *Penney* v. *Fridley*, 9 Minn. 34; *Webb* v. *Bidwell*, 15 Minn. 479. The complaint in trover need not notify defendant of the nature of plaintiffs title, or what are the evidences of it. *Warren* v. *Dyer*, 51 N. W. Rep. 1062; *Harvey* v. *McAdams*, 32 Mich. 472; *Myers* v. *Yaple*, 60 Mich. 339; *Beebe* v. *Krapp*, 28 Mich. 53; *Hutchison* v. *Whitmore*, 90 Mich. 255. A general allegation that defendant wrongfully or unlawfully converted the property is sufficient. *Cortelyon* v. *Hiatt*, 54 N. W. Rep. 964; *Sanford* v. *Jensen*, 69 N. W. Rep. 108; *Smith* v. *Thompson*, 54 N. W. Rep. 168; *Humpfur* v. *Osborne & Co.*, 50 N. W. Rep. 88; *Swift* v. *James*, 7 N. W. Rep. 656; *First Nat. Bank* v. *Boom Co.*, 42 N. W. Rep. 861. The mortgage was effectual between the mortgagor and mortgagee, and if defendant would defeat the *prima facie* title of the mortgagee, it is incumbent upon him to show that he is a subsequent purchaser in good faith. *McNeil* v. *Finnigan*, 23 N. W. Rep. 540; *Sanford* v. *Jensen*, 69 N. W. Rep. 108; *Bank* v. *Farmington*, 15 N. W. Rep. 243;

McCarthy v. *Grace*, 23 Minn. 182; *Nolan* v. *Grant*, 53 Ia. 392; *Shotwell* v. *Harrison*, 22 Mich. 419; *Smith* v. *Acker*, 23 Wend. 679; *Bassett* v. *Nasworthy*, 2 Lead Cases, Eq. 99; *Baskins* v. *Shannon*, 3 N. Y. 311; *Wallwyn* v. *Lee*, 9 Ves. 32; *Black Hills Mer. Co.* v. *Gardner*, 58 N. W. Rep. 557. Want of notice is an essential element of good faith. *Tolbert* v. *Horton*, 18 N. W. Rep. 647. It devolves on defendant to show want of notice. *Ransom* v. *Schmeld*, 12 N. W. Rep. 926; *Wright* v. *Larson*, 53 N. W. Rep. 712; *Holdsworth* v. *Shannon*, 113 Mo. 508; *Weaver* v. *Borden*, 49 N. Y. 286.

WALLIN, J. In this action a general demurrer was interposed to the complaint, and the same was overruled by an order of the trial court. Defendant appeals from the order.

In the disposition of the case in this court the parts of the complaint necessary to be discussed are as follows: "That on or about the 16th of October, A. D. 1894, James Doyle and others made, executed, and delivered to the plaintiff a certain promissory note for $896, due October 16, 1895, with interest at 12 per cent., and made, executed, and delivered to secure the same a chattel mortgage, also to the said plaintiff, upon all grain and crops, of every name, nature, and description, to be grown or harvested during the seasons of 1895, 1896, and each and every succeeding year thereafter, until said debt should be fully paid, upon the southwest quarter of section 14, and the northeast quarter of section twenty-three, all in township one hundred and sixty, range sixty, (S. W. ¼ of Sec. 14, and N. E. ¼ of Sec. 23, all in Tp. 160, range 60,) in Cavalier County, North Dakota; that on or about October 16 and 17, 1896, default had been made in the terms and conditions of said mortgage, by failure to pay the debt, or any part thereof, which the same secured at its maturity, by reason whereof the said plaintiff, E. I. Donovan, was entitled, under the conditions of said mortgage, to the immediate, exclusive, and absolute possession of all wheat grown during the season of 1896 by said James Doyle upon the said S. W. ¼ of Sec. 14, and said N. E. ¼ of 23, all in Tp. 160, range 60, in

Cavalier County, North Dakota; that on or about the 16th and 17th of October 1896, and while the plaintiff was entitled to the possession of said grain, the full amount of said note for $896 being due and owing to the plaintiff, the defendant unlawfully appropriated and converted to its own use about 600 bushels of the said wheat grown by the said Doyle upon said premises during the year 1896, which wheat was of the actual value of 75 cents per bushel at that time; that the plaintiff has demanded and caused to be demanded from the said defendant the possession of the said grain, but that said demand has been wholly refused." These allegations of the complaint were followed by the usual claim for damages, and prayer for judgment. It is superfluous to state that the complaint is not a model of good pleading. Its mode of setting out facts is inartificial, and often much involved; but it is the undoubted duty of all the courts of this state, under the provisions of the statute (section 5283, Revised Codes,) to construe all pleadings "liberally," with a view of substantial justice between the parties. So construed, we think the complaint states facts sufficient to constitute a cause of action.

Counsel for the appellant claims that the complaint contains no allegation that the mortgagor ever owned the property covered by the mortgage. This criticism, we think, is found upon a misapprehension of the meaning and effect of the language employed in the complaint. The property in queston, and embraced in the mortgage, is a certain crop grown by James Doyle, one of the mortgagors, in the year 1896, upon the land described in the mortgage. With respect to such crop the complaint avers that "the defendant unlawfully appropriated and converted to its own use about 600 bushels of said wheat grown by the said Doyle upon said premises during the year 1896." The statement of fact that the grain was "grown by said Doyle" is certainly broad enough to allow proof of the several acts done and performed by Doyle in growing the grain, such a planting, cutting, etc. We think that these words fairly import that the grain was produced by agencies set in motion by the mortgagor, and also

fairly imply that the mortgagor had possession of the land upon which the agencies operated in growing the crop in question. We are further of the opinion that these words, as ordinarily used, mean that the person who grew the crop was the owner thereof, and not a mere servant having no property interest in the crop. However, if the pleading is ambiguous, and this word "grown" is interchangeable, and may properly be applied either to an owner or a mere employe, this would be a defect in pleading which could be reached only by motion. A demurrer will not raise the point. Bliss, Code Pl. section 314.

The complaint is further criticised because—quoting from the brief of counsel—it "fails to aver that at the time the mortgage was executed the chattels mortgaged were the property of the mortgagor." If this objection to the complaint is valid, it follows that no mortgage of a crop not yet sown will operate to create a lien on a future crop, when the same comes into existence by the agency of the mortgagor. It is clear that a crop not planted when a mortgage thereon is executed is property not in existence at that time, and hence cannot then be the property of the mortgagor. It seems hardly necessary to say that in this state a wide departure has been made, by virtue of statutory provisions, from the common law rule that a mortgage cannot be made upon property which is not owned by the mortgagor, and which is not in *esse*, when the mortgage is executed. The exact opposite is the rule in North Dakota. Revised Codes, section 4680, reads as follows: "An agreement may be made to create a lien upon property not yet acquired by the party agreeing to give the lien, or not yet in existence. In such case the lien agreed for attaches from the time when the party agreeing to give it acquires an interest in the thing to the extent of such interest." This statute incorporates a rule in equity, and is plain and unambiguous in its terms, and clearly gives its sanction to mortgages made upon property which never comes into existence until a date subsequent to the execution of the mortgage. The Supreme Court of the Territory of Dakota so construed the statute and upheld such

a mortgage. *Grand Forks Nat. Bank* v. *Minneapolis & N. Elev. Co.*, 6 Dak. 357, 43 N. W. Rep. 807. And see *McCaffrey* v. *Woodin*, 65 N. Y. 459. This precise question has been considered by this court in at least two cases, and the views of the territorial court have been expressly indorsed by this court. *Bank* v. *Mann*, 2 N. D. 456, 51 N. W. Rep. 946; *Hostetter* v. *Elevator Co.*, 4 N. D. 357, 61 N. W. Rep. 49. The point must therefore be regarded as settled in this state adversely to the views of the appellant's counsel. At present this court is not disposed to reopen a discussion of the general law of the land relating to chattel mortgages. Nor do we deem the authorities cited by counsel from jursdictions where no such statute as that cited was ever enacted are in point upon this branch of the case.

A further contention is that the complaint fails to state, except by mere recital, which is bad pleading, that by the terms of the mortgage the plaintiff was authorized to take possession of the mortgaged property upon default made in paying the debt. The complaint is somewhat obscure in this respect, in view of the inartificial forms of expression adopted by the pleader. No copy of the instrument is annexed to the complaint, and the plaintiff has elected, as he had a right to do under established rules of pleading, to plead its legal effect. See *Brown* v. *Champlin*, 66 N. Y. 214. In attempting to set out the feature of the mortgage we are here considering according to its legal effect, the pleader, after setting out the fact of the mortgagor's default in paying the note secured by the mortgage, proceeds as follows: "By reason whereof the said plaintiff, E. I. Donovan, was entitled, under the conditions of said mortgage, to the immediate, exclusive, and absolute possession of all wheat grown during the season of 1896 upon the said," etc. (describing the land.) This averment, when liberally construed, is, in our opinion, neither a mere conclusion of law, nor the mere conclusion of the pleader, as to the effect of the stipulation written in the mortgage. We regard the language, while it is inapt, as an affirmation of a fact; *i. e.* as a statement of the true legal effect of the language used in the mortgage.

We think the words, "was entitled, under the conditions of said mortgage," are equivalent in meaning to the words, "was entitled, under the express stipulations contained in the mortgage," etc. Assuming that we are correct in this construction of the language, we shall hold that the complaint, in substance, charges that the mortgage, by its terms, authorized the plaintiff to take possession of the crop of 1896 raised by Doyle, in the event of a default of the payment of the debt secured by the mortgage, and that such default had occurred prior to the date of the alleged conversion of the grain by the defendant. It follows from these averments, as a legal result, that the plaintiff is in a position to sue for and recover such damages as he may have suffered by the unlawful appropriation of the wheat by the defendant as stated in the complaint. Such conversion of the mortgaged property as is charged would constitute an invasion of plaintiff's existing right of immediate possession of the grain for purposes of foreclosure. A right to the possession in the plaintiff is sufficient, and actual possession need not be shown. *Sandager* v. *Elevator Co.*, 2 N. D. 3, 48 N. W. Rep. 438; *Sanford* v. *Elevator Co.*, 2 N. D. 6, 48 N. W. Rep. 434; *Parker* v. *Bank*, 3 N. D. 87, 54 N. W. Rep. 313.

Counsel contends further that the complaint is vulnerable for the reason that it omits to allege that the mortgage was ever filed for record, or that the defendant had notice or knowledge of its existence at any time. In view of the averment that the defendant, as a matter of fact, unlawfully converted the grain and appropriated it to its own use, we think the omission is not fatal. These allegations charge a tortious act,—a distinctly wrongful and illegal act. The demurrer admits this charge to be true, and, if it is true, the plaintiff should recover in the action. Whether or not the charge is true is a question of fact, which can be investigated upon issue joined; and for this purpose defendant, on application therefor, should be permitted to serve an answer traversing the averments of the complaint. Upon such issue, if it is made, the trial court must determine which side has the burden of proof. No such question is now before this court.

The order overruling the demurrer will be affirmed.

CORLISS, J., concurs. BARTHOLOMEW, J., dissents, on the ground that in his judgment the complaint does not state facts sufficient to constitute a cause of action.

(75 N. W. Rep. 809.)

THE STATE OF NORTH DAKOTA *vs.* IRA WELTNER.

Opinion filed May 27th, 1898.

Preliminary Examination—Affidavit of Bias—Jurisdiction.

Held, where a justice of the peace conducted the preliminary examination of the defendant, and held him to bail, after the defendant had in due time filed a proper affidavit for a transfer of the action to another justice, that such examination was void, and inoperative as a preliminary examination of the defendant.

Information Filed Before Legal Preliminary Examination—Quashed on Motion.

Held, further, in such case, that an information against the defendant, filed by the state's attorney, was irregular and voidable, and the District Court erred, to defendant's prejudice, in overruling defendant's motion to set aside the same.

Statement of Case in Criminal Actions—Judge's Certificate—Court Rules Specifications.

Held, further, in a criminal action, that a statement of the case, under the statute and rules of this court, is not required to embody specifications of error, as required in civil cases by rule 10 of the rules of this court, nor need such statement be authenticated by the judge's certificate of identification, as required in civil cases by rule 9.

Assignments of Error—Court Rules.

Held, further, in criminal cases, that assignments of error are governed by rule 12, except that no reference can be made therein to any specifications of error in the abstract. No such specifications being required in the statement or abstract, the rule is satisfied by a proper reference in the assignment of error to the page or pages of the abstract relating to the error assigned.

Appeal from District Court, Pembina County; *Sauter*, J.

Ira Weltner was convicted of grand larceny, and appeals from the judgment of conviction.

Reversed.

John D. Stack, for appellant.

The information depends for its legal existence upon a preliminary examination of the offender. Section 7982, Revised Codes; *White* v. *State*, 44 N. W. Rep. 445; *State* v. *Sorenson*, 53 N. W. Rep. 1124; *State* v. *Barnes*, 3 N. D. 131, 134. Defendant moved to quash the information in proper time in the court below. Subd. 1, § 8082, Rev. Codes. Defendant was entitled to a judicial examination before an impartial magistrate. *State* v. *Brett*, 40 Pac. Rep. 873; *Packwood* v. *State*, 33 Pac. Rep. 674; *State* v *Barnes*, 3 N. D. 131; *State* v. *Kent*, 4 N. D. 577; *State* v. *Henning*, 3 S. D. 492, 54 N. W. Rep. 536; *State* v. *Evans*, 33 Pac. Rep. 1010. The demand for the removal of the case to another magistrate was in time before the taking of testimony had actually commenced. *State* v. *Evans*, 33 Pac. Rep. 1010; *State* v. *Hazledahl*, 2 N. D. 521; *State* v. *Kent*, 5 N. D. 516–531. When made the justice lost jurisdiction to proceed further. *City* v. *Snyder*, 43 Pac. Rep. 635; *Hellriegel* v. *Truman*, 19 N. W. Rep. 79; *Jenkins* v. *Morning*, 38 Wis. 197; *State* v. *Sorenson*, 53 N. W. Rep. 1124.

A. L. Miller, (*J. H. Bosard*, of counsel,) for respondent. No brief filed.

WALLIN, J. This record discloses that the defendant was convicted of the crime of grand larceny, and from the judgment of conviction the defendant has appealed to this court. The single point of error assigned in this court by the defendant rests upon the following facts: The defendant was arrested on a criminal warrant charging him with the commission of said offense, and was brought by the officer who made the arrest before Grant S. Hager, Esq., a justice of the peace of said county, who issued the warrant. As to what occurred in the Justice's Court, the entries in the docket of the justice will best disclose. Said entries are as follows: "On the 27th day of November, 1897, at 3 o'clock P. M. the defendant, Ira Weltner, being present in court, in custody of James A. Little, said deputy sheriff, I fully advised said defendant of the aforesaid accusation, by reading said complaint to

him; and at the same time I advised the said defendant of his right to obtain counsel before entering his plea to said accusation of grand larceny. The said defendant, Ira Weltner, thereupon asked time to procure counsel, whereupon it was ordered by this court that said case be adjourned until the 30th day of November, 1897, at 10 o'clock A. M. Court opened at 11 A. M. of November 30, 1897, pursuant to adjournment. Defendant was present, in custody of deputy sheriff; John D. Stack, Esq., appearing for him. State was represented by O. M. Corwin, deputy state's attorney. Defendant's counsel John D. Stack, Esq., filed the necessary affidavit of prejudice and bias prescribed by law, and moved for a change of the place of trial to the next nearest justice of the peace. Court overruled the motion on the ground that the defendant had been informed of his rights when first brought before it, and had specifically waived at that time his right to a change of venue and to waive examination; only asking for an adjournment to procure witnesses, which adjournment was duly granted by the court. Defendant's attorney asked for a more full statement of the specific manner defendant waived his right for a change of venue. There having been no stenographer at court at the time of said act, and no request being made that the testimony in the case, or other facts of the court, be taken in writing, it becomes necessary for the court to rely on his memory entirely for the record, which is as follows: That the complaint was first read to the defendant in full, and at the same time the court informed the defendant that he had a right to waive examination and give bonds to appear at the District Court; that he had the further right to change of venue, which right was explained in language to apprise the defendant that he could have another justice hear this examination, if for any reason he believed that the court was unfair or biased. Defendant was further advised of his right to a reasonable adjournment to procure counsel. Defendant was asked if he wished to avail himself of any of said rights, and he said he only desired such adjournment as would give time for him to procure as a witness his brother, Earnest

Weltner, who was at Thief River Falls, Minn., and who had, the previous evening, broken his arm by being thrown from a wagon; that he desired an adjournment until Thursday, the 2d day of December, 1897. The court made inquiries which brought out the information that the witness could reach the place of trial by train on Tuesday, November 30, 1897, by 10 A. M., to which time the trial was adjourned. The defendant gave no intimation to the court that he desired a change of venue, but, on the contrary, seemed, by all actions, willing to consent to the jurisdiction of this court. Defendant's counsel excepts to the ruling of the court, demanding a change of venue in this case." The examination proceeded before said justice of the peace, and resulted in holding the defendant to bail to answer for said offense before the District Court. No other examination was ever had of the accused, and it is not claimed that this case comes within the exceptions named in the statute in which an examination is unnecessary. The state's attorney of Pembina County filed an information in the District Court, charging the defendant with said offense; and, upon being arraigned thereon, the defendant's counsel, before pleading, moved to quash said information upon the ground that the defendant had never had a preliminary examination before any magistrate authorized by law to conduct an examination. The facts were not controverted; the motion being based upon the record of said examination before said justice, which record was then on file with the Clerk of the District Court. The motion to quash was denied, and defendant excepted to the ruling. The defendant refused to plead to the information, whereupon the court directed a plea of not guilty to be entered for him. The defendant was found guilty and sentenced, as before stated.

In this court, defendant contends that the trial court erred in overruling defendant's motion to quash the information. In our judgment, this contention is valid, and must be sustained. The statute expressly authorizes a defendant, upon being arraigned upon an information, to raise the point made here by a motion to

quash or set aside the information. Revised Codes, section 8082. The sufficiency of the affidavit filed by the defendant in the Justice's Court, upon which his motion for a transfer of the action was based, is not questioned. Neither is it claimed on behalf of the state that the examination had commenced at any time prior to the filing of such affidavit. Upon the filing of a proper affidavit, it was the duty of the justice to transfer the action to another justice of the peace. The statute is mandatory in its terms, and leaves no discretion with the justice. Revised Codes, section 7953. It is perfectly clear that after an affidavit is filed, which under the statute, is sufficient in substance, the magistrate has no power or authority to proceed with the preliminary examination of the defendant, and can lawfully do nothing further in the action except to transfer the same, and the papers therein, to another justice. It is evident that the entries incorporated in the docket by the justice on November 27th do not show, in terms, that the defendant then waived his right to have the action transferred; and we are of the opinion that the entries made on the adjourned day (November 30th,) giving another and somewhat different version of what occurred on the 27th, are inadmissible to show that the right to a transfer had been waived on the 27th. Entries in a justice's docket of past events are not to be favored. Besides the statute is imperative in its terms, and allows the affidavit for transfer to be filed "at any time before such examination is commenced." We think this statute should receive a liberal interpretation, and be so construed as to preserve the right to a transfer until an actual examination of the charge against the accused has been commenced. In this case the affidavit was filed as soon as counsel could file the same after the court convened on the adjourned day, and prior to the commencement of any examination of the charge against the accused as stated in the complaint. The right to an examination is of great importance to the citizen, and should, in cases where no indictment is found by a grand jury, be carefully guarded by the trial courts. For a discussion on this

point, see *State* v. *Barnes*, 3 N. D. 131, 54 N. W. Rep. 541. It would seem that this vital error in the proceedings had in the trial court is conceded to exist. At least, we so conclude, in view of the fact that no brief has been filed in behalf of the state, and no point is made in opposition to it on the part of the counsel for the state who argued the case in this court. We think the assignment of error is fully sustained by the undisputed facts in the record, and that the error is fatal to the conviction.

A matter of practice remains to be considered. The statement of the case, as settled by the court below, is certified in this court by the Clerk of the District Court, but is not authenticated by the trial judge's certificate of identification of papers, as required by rule 9 of the rules of this court. Nor does the statement embody specifications of error, as required by rule 10. A motion based on these alleged defects in the record was made, in behalf of the state, to strike out the statement and affirm the judgment. This motion must be denied. Rule 9, by its terms, relates only to civil actions and special proceedings. Rule 10, in so far as it relates to specifications in a statement of errors of law and of fact, voices the provisions of the statute governing the preparation of a statement of the case in civil cases only. Without regard to such rule, a statement in a civil case would be radically defective, under the statute, if it embraced no specifications of error. It is true that rule 10 cites, among others, section 8268 of the Revised Codes, which section, together with sections 8258, 8264, 8265, 8266, and 8267, regulates and defines a statement of the case in criminal actions. But the statutes governing in criminal cases do not anywhere, in terms, require a statement of the case to contain specifications of error, and hence a reference in the rule to section 8268 cannot be construed as a requirement on the part of this court that specifications must form a part of a statement in a criminal case. Such a construction of the rule is not warranted by its language, and would amount to superadding a requirement not contemplated by the legislature in a criminal case. We think this should not be done. It follows that in a

criminal case an abstract of the statement of the case need not, and cannot legitimately, embrace specifications of error. Under existing statutes, no assignment of errors in a criminal case need be made in this court, other than such as are required by rule 12 of the rules of this court to be subjoined to the appellant's brief; and in this, of course, no reference can be made to any specifications of error in the statement. Such assignment should, however, refer to the pages of the abstract, in pointing out the error assigned.

The motion to affirm is denied, and the judgment is reversed. All the judges concurring.

(75 N. W. Rep. 779.)

CASS COUNTY, N. D. *vs.* THE SECURITY IMPROVEMENT CO., *et al.*

Opinion filed May 27th, 1898.

Delinquent Tax List—Publication—Designation of Newspaper by Improper Name.

Construing chapter 67, Laws 1897. Before the tax list and notice were published, the county auditor filed with the Clerk of the District Court a certified copy of a certain action taken by the county commissioners of Cass County, as follows: "This is to certify that at a meeting of the county commissioners held in the court house, March 3rd, 1897, the following proceedings were had, as appears on record, page 260: Bids for the printing of the delinquent tax list, according to House Bill No. 42 of 1897, were opened. The Fargo Argus offered to print them for 15 cents per description, and the Fargo Forum offered to print said list for 12 cents per description. On motion the bid of the Forum was accepted, and the bond required to be given was filed in the sum of $1,000, subject to the approval of the county commissioners. Further, it appears from the said commissioners' record of date March 6th, 1897, on page 266, the following: "The Fargo Forum presented the bond for publication of the delinquent tax list in the sum of one thousand dollars. On motion said bond was approved and filed, all members voting aye. Witness my hand and official seal, this 28th day of June, 1897." It appearing that no newspaper was published in Cass County at that time named the Fargo Forum, and further appearing at that time two newspapers were published at Fargo, in said county, one named the Fargo Forum and Weekly Republican, and one named the Fargo Forum and Daily Republican, *held*, following *Russell* v. *Gilson*, 31 N. W. Rep. 692, 36 Minn. 366, that the board by its said action did not designate a newspaper in which the tax list should be published, and

said action did not, therefore, authorize the publication of such list in any newspaper whatever.

Filing Certified Copy of Resolution with the Clerk of Court.

It appears that on the 6th day of March, 1897, the board of county commissioners, by a separate resolution, duly adopted, did specifically designate the Fargo Forum and Daily Republican (a newspaper published at Fargo) as the newspaper in which the tax list in question should be published. A copy of such resolutions, duly certified by the county auditor, was filed in the office of the Clerk of the District Court; but such filing did not occur until the publication of the list in said newspaper had been completed. *Held*, that the omission to file the certified copy with the Clerk of the District Court before the fact of publication was fatal, and the court acquired no jurisdiction to proceed, following *Merriman* v. *Knight*, 45 N. W. Rep. 1098, 43 Minn. 493. "The filing of a certified copy of the resolution with the Clerk of the Court is just as imperatively required by the statute as is the adoption of the resolution itself. Both are equally prerequisites to the publication of the list." *Id.* *Held*, further, that this is a proper case for the application of the general rule that where a statute is taken from another state, and adopted without change, the same is taken with the construction placed upon it by the court of last resort of the state from whence the statute came. *Held*, further, under section 1 of said statute, the tax list need not embrace a separate statement of the penalty and interest. These should be stated in one lump sum with the original tax.

Certified questions from District Court, Cass County; *Pollock*, J,

Action by Cass County against certain lands of the Security Improvement Company, Matilda M. Roberts, Mary M. Fisher, C. W. Darling and others, to enforce the payment of taxes delinquent in and prior to the year 1895. Upon petition of defendants the questions mentioned in the opinion were certified to the Supreme Court pursuant to section 10, chapter 67, Laws 1897.

J. E. Robinson, for petitioners.

Section 4, chapter 67, Laws 1897 is a copy of the Minnesota statute upon the same subject. Section 1581, Stat. of Minn. This statute has been construed. *Merriam* v. *Knight*, 43 Minn. 493, 45 N. W. Rep. 1098. A tax judgment is void unless the paper in which the delinquent tax list shall be published is designated as required by law and unless a certified copy of the resolution designating the newspaper is filed in the office of the

Clerk of Court before the publication of the tax list. *Banning* v. *McManus*, 51 Minn. 289, 53 N. W. Rep. 635; *Russell* v. *Gilson*, 36 Minn. 367, 31 N. W. Rep. 692. Defendants properly raised these questions by special appearance and a motion to dismiss. *Houston County* v. *Jessup*, 22 Minn. 552.

Fred B. Morrill, *State's Atty.*, for respondent.

The statute of this state differs from that of Minnesota in this it is here provided that "no omission of anything required by an officer or officers to be done prior to the filing of the list with the clerk shall be a defense or objection to the taxes appearing on any piece or parcel of land unless it be made to appear to the court that such omission resulted to the prejudice of the party objecting." Section 9, Ch. 67, Laws 1897; *Russell* v. *Gilson*, 36 Minn. 367, has been modified. *Fairchild* v. *City of St. Paul*, 46 Minn. 540, 49 N. W. Rep. 327.

WALLIN, J. In this action, which arises under chapter 67 of the Laws of 1897, the District Court, Hon. Charles A. Pollock presiding, has made a statement of facts and propounded certain questions thereon to this court, pursuant to section 10 of said chapter. The questions certified to this court are as follows: "(1) Was it necessary to the jurisdiction of the court that a certified copy of a resolution of the county commissioners designating a newspaper for the publication of the delinquent tax list should be filed in the office of the Clerk of the District Court prior to the filing or prior to the publication of such tax list, and, if so, then was the resolution, a copy of which is hereto annexed as 'Exhibit A,' a sufficient compliance with the statutes? (2) Should the tax list, as filed, and as published, contain a discription of each piece of land, and opposite such description the amount of the tax in one column, and in a separate column the amount of the interest and penalty? In other words, should the tax be stated in one column and the interest and penalty in another column, or so stated as to show the amount of the tax and the amount of the interest and penalty for each year?" As explanatory of these

questions, a statement of facts as found in the record becomes necessary. On March 4, 1897, at a meeting of the county commissioners of Cass County, certain newspapers, viz. the Fargo Argus and the Fargo Forum, respectively, made bids for the publication of the delinquent tax list of lands becoming delinquent in Cass County in 1895 and prior years. The record shows that the bid of the Fargo Forum was accepted by the board, and that newspaper was directed to furnish a bond in the sum of $1,000 for the faithful publication of the list. Later, and on March 6, 1897, the bond of the Fargo Forum was approved by the board. It further appears that on March 6, 1897, the county board, in due form, and by a separate resolution, designated the Fargo Forum and Daily Republican as the newspaper in which the said tax list and notice should be published. It likewise appears that said last named newspaper is a daily newspaper published at Fargo, in Cass County, and that another newspaper, named the Fargo Forum and Weekly Republican, is a weekly paper, also published at the same place. The action taken by the county board on March 3d and 6th, respectively, viz. the acts of accepting the bid of the Fargo Forum, and approving its bond, are evidenced by resolutions entered in the official record of the proceedings of the board, and dated March 3d and 6th, respectively. A certified copy of the record of said proceedings, made by the county auditor, and dated on June 28, 1897, was filed in the office of the Clerk of the District Court on June 28, 1897. It further appears that said separate resolution of March 6th, 1897, which formally designated the Fargo Forum and Daily Republican as the newspaper in which said tax list and notice should be published, was copied and certified to in due form by the county auditor of Cass County on August 28, 1897, and on the same day said certified copy was filed with the Clerk of the District Court for Cass County. The notice and list was actually published in the Fargo Forum and Daily Republican three times in the month of July, 1897, and due proof thereof appears in the record. The delinquent tax list was filed by the county treasurer with the

Clerk of the District Court on July 1st, 1897. It further appears that the tax list as published embraces a description of the several parcels of land in question, and opposite each description there is for each year an amount stated in dollars and cents in one lump sum. The list does not contain a separate statement of either interest or penalty.

Answering the questions propounded by the District Court in their inverse order, we find little difficulty in reaching the conclusion that said statute does not require, either expressly or by any fair implication from its language, that a statement of the interest and penalty which go to swell the aggregate amount of the tax published in the list shall be separately stated. We think section 1 of the act is substantially complied with if the amount of the tax for each year, including penalty and interest, is stated in the aggregate. If the landowner has any defense or objection to the total tax appearing on the list, he is permitted, under section 5 of the statute, to set out the same by answer. Upon an issue thus formed the court would be authorized to investigate all questions touching the legality of any interest or penalty or costs which may have entered into the total tax appearing on the published list. The fact should not be overlooked that the judicial proceeding authorized by this statute is not a proceeding to set aside or establish a tax title, nor to assess or levy a tax. Its sole purpose is to obtain a judgment for an alleged existing delinquent tax, and in doing so, the taxpayer is given his day in a court of competent jurisdiction, and is unrestricted with respect to any objection or defense which he may desire to urge against the validity of the tax, subject only to the limitations contained in section 9 of the act. The list as published is only *prima facie* evidence. *Id.*

The first question propounded by the District Court is one directly involving the jurisdiction of that court to proceed to enter judgment against the lands described in the published list, and is, therefore, of a very serious nature. The proceeding is strictly *in rem.* It is true, the District Court does not lay hold

of the land by its process. It obtains jurisdiction over the land not by the service of a summons on its owner, but by means of statutory instrumentalities including, in addition to the action of the county commissioners, a published notice which embraces a description of the land against which the county proposes to take a judgment for the delinquent tax thereon. The steps whereby the lands are subjected to the jurisdiction of the court are clearly laid down in the statute, and are as follows: (1) A verified tax list embracing certain specified lands is required to be filed with the Clerk of the District Court by the county treasurer of each county. Such list is made to do duty as a complaint in an action by the county against each tract of land described in the list. This list is not required to be filed with the Clerk of the District Court until 10 days have elapsed after the county board shall have by resolution designated the newspaper in which said list is required to be published. Section 4. (2) Section 4 embraces the following provisions: "The newspaper in which such publication shall be made shall be designated by a resolution of the board of county commissioners of the county in which the taxes are laid, at least ten days before the filing of such list; a copy of which resolution, certified by the county auditor, shall be filed in the office of the Clerk of the District Court." In the case at bar it appears that the list was filed by the treasurer with the Clerk of the District Court on July 1, 1897, and that a newspaper in which such list was to be published had been expressly and formally designated by the county commissioners long prior thereto, to-wit, on March 6, 1897. The fundamental defect in the proceeding, if any there is, consists in the fact that the clerk of the District Court was not officially apprised of the action of the commissioners whereby the newspaper was designated, until after the publication was completed, and not until August 28, 1897. The list itself was officially published for the prescribed period of time, and was so published in the newspaper which had been designated for that purpose by the commissioners. Reverting to the action of the county board in the premises, it appears that

all of said action occurred on the 3d and 6th days of March 1897. The action of the board is all evidenced by a record entered in the record book of its proceedings. It appears that the county auditor made two certified copies of the record of such proceedings. One of them was made and filed with the Clerk of the District Court on June 28, 1897. It is found in this record as Exhibit A, and is as follows: "This is to certify that at a meeting of the county commissioners held in the court house March 3rd, 1897, the following proceedings were had, as appears of record, page 260: Bids for the printing of the delinquent tax list, according to house bill No. 42 of 1897, were opened. The Fargo Argus offered to print them for 15 cents per description, and the Fargo Forum offered to print said list for 12 cents per description. On motion the bid of the Forum was accepted, and the bond required to be given was filed in the sum of $1,000, subject to the approval of the county commissioners. Further, it appears from the said commissioners' record of date March 6, 1897, on page 266, the following: The Fargo Forum presented the bond for publication of the delinquent tax list in the sum of one thousand dollars. On motion said bond was approved and filed, all members voting aye. Witness my hand and official seal, this 28th day of June, 1897. O. J. Olson, County Auditor. [Official Seal."] "Filed in the office of the Clerk of the District Court, June 28th, 1897." The other certified copy, known in the record as "Exhibit B," was made and filed with the Clerk of the Court on August 28, 1897, and is as follows: "The bid of the Fargo Forum and Daily Republican for the publication of the delinquent tax list having been accepted by the board, and good and sufficient bond having been filed: Now, therefore, be it resolved, that the Fargo Forum and Daily Republican be, and the same is hereby, designated as the newspaper in which the notice and delinquent tax list shall be published in Cass County, North Dakota, as required by house bill No. 42, approved July 20, 1897, being an act to enforce the payment of taxes which became delinquent in and prior to the year 1895; said Fargo Forum and Daily Republican being a

newspaper published in Cass County, North Dakota. [Signed] W. G. Newton, Chair. Attest: O. J. Olson, County Auditor. [Official Seal."] "I hereby certify that the foregoing is a correct copy of the resolution adopted by the county commissioners designating the Fargo Forum and Daily Republican as the newspaper in which to publish the delinquent tax list, which resolution is now on file in the office of the county auditor. Dated August 28th, 1897. [Signed] O. J. Olson." Indorsed as follows: "Filed in the office of the Clerk of District Court, Cass County, N. D., August 28, 1897. E. M. Patton, Clerk, by W. A. Brown, Deputy."

Considering the action of the board with respect to the list as a whole, it is apparent from our standpoint that the board did not, by its action as embodied in Exhibit A, intend to designate any particular newspaper as that in which the list should be published. In that action it accepted the bid, and approved the bond of the Fargo Forum. It appears that the words "Fargo Forum" constitute a part of the descriptive name applied indiscriminately to two newspapers published at Fargo, viz. the Fargo Forum and Weekly Republican and the Fargo Forum and Daily Republican. Neither of said newspapers were referred to expressly in the action of the board embraced in Exhibit A, nor was the Fargo Forum in terms designated as the paper which should publish the list. In fact, there is, strictly speaking, no newspaper published at Fargo which bears the name of Fargo Forum. But if the board had intended—as it clearly did not do—to designate the paper by its action, evidenced by Exhibit A, in which the tax list should be published, it failed to do so, in that it made reference to two newspapers then published at Fargo, without pointing out which of the two papers should publish the list. The statute governing this proceeding is taken literally from the laws of Minnesota, and the point we are here discussing was expressly passed upon by the Supreme Court of that state in *Russell* v. *Gilson*, 36 Minn. 366, 31 N. W. Rep. 692. In that case the board designated the Minneapolis Tribune as the

paper to publish the list. In the headnote to the case the court say: "The Minneapolis Tribune Company published two newspapers one called the Minneapolis Daily Tribune and the other the Minneapolis Weekly Tribune. The county board designated the Minneapolis Tribune as the paper in which the delinquent list and notice should be published. The publication was made in the Minneapolis Weekly Tribune. Held, that there was no sufficient designation of the newspaper, and no legal publication of the list and notice." This case is authority which is decisive of the point. Exhibit A did no embrace any action whereby a newspaper was designated by the commissioners, and hence its filing with the Clerk of the Court was not notice of any designation. Exhibit B, as certified by the auditor, embraces action whereby the commissioners did designate a newspaper in which the list should be published, viz. the Fargo Forum and Daily Republican. This exhibit did not reach the office of the Clerk of the District Court until long after the tax list had been published. The contention of defendant's counsel is that it was filed too late, and consequently that the tax was publised by the clerk without authority of law. This point has also been expressly ruled by the court of last resort in the state from which the statute originally came. In *Merriman* v. *Knight*, 43 Minn. 493, 45 N. W. Rep. 1098, the court in an opinion formulated by Judge Mitchell, says: "Gen. St. 1878, chapter 11, section 72, [Gen. St. 1894, section 1581,] provides that the newspaper in which the publication of the delinquent tax list shall be made 'shall be designated by resolution of the board of county commissioners, * * * a copy of which resolution, certified by the county auditor, shall be filed in the office of the Clerk of the Court.' In *Eastman* v. *Linn*, 26 Minn. 215, 2 N. W. Rep. 693, it was held that 'the publication operates as a constructive service of the notice and list upon the party whose property is to be affected by the proceeding, and, to be effectual for any purpose, the mode of making it pointed out by the statute must be strictly complied with.' This was followed in *Russell* v. *Gilson*, 36 Minn.

366, 31 N. W. Rep. 692, in which it was also said that the purpose of the resolution designating the paper is not merely to direct how the notice and list should be served, but was intended as notice to the taxpayer, so that by examining it he might be able to ascertain with certainty in what newspaper to look in order to see whether any proceedings had been commenced against his land. In both these cases the board had failed to pass any resolution properly designating the paper. In the present case a proper resolution had been passed by the board, but no copy of it was filed in the office of the Clerk of the Court, as required by the statute. But we can see no distinction in principle between the cases. The filing of a certified copy of the resolution with the Clerk of the Court is just as imperatively required by the statute as is the adoption of the resolution itself. Both are equally prerequisites to the publication of the list, and the one can no more be dispensed with or disregarded than the other. Both are designed, in part at least, for the benefit of the taxpayer by giving him notice of what paper he shall look to to see whether proceedings have been commenced against his land. It is no answer to this to say that he may get this information by searching for the resolution in the records of the proceedings of the board as kept by their clerk. The statute requires it to be filed with the Clerk of the Court, and the taxpayer has a right to look there for it." The reasoning of the court in the cases cited appears to us to be intrinsically sound, and in harmony with the strict rule of construction governing in cases where a statutory or substituted service is provided in lieu of the personal service of a notice upon the defendant of the pendency of the action. We think, too, that this case is one in which the general rule should be applied that a statute taken from another state is adopted together with the construction put upon it by the court of last resort in the state from whence it came.

The state's attorney cites section 9 of chapter 67, and makes the point that, inasmuch as the defendant has failed to show that the omission to file a copy of the resolution of the board with the

clerk has operated to his prejudice, under the provisions of said section the defendant cannot avail himself of such omission as a ground for an attack upon the jurisdiction of the court to proceed to enter judgment for the taxes. We think the citation is not in point. The omissions of officers referred to in that section are declared not to be a defense or objection to the taxes appearing on the list, and the language has reference merely to the validity or invalidity of such taxes as appear upon the list returned by the county treasurer. That section does not attempt to deal with the question of the jurisdiction of the District Court to consider and decide upon the question of the legality of taxes returned as delinquent. Other provisions of the statute to which we have referred regulate the matter of jurisdiction, and point out the only mode by which the District Court may acquire the right to proceed against the land. Our conclusion is that the District Court in this case never acquired jurisdiction to enter a judgment against the lands of the defendant. The publication actually made was inoperative because of the failure to file a certified copy of the resolution with the clerk at any time prior to the act of publication.

The proper order will be entered, and certified to the court below. All the judges concurring.

(75 N. W. Rep. 775.)

HIRAM S. DARLING *vs.* JOHN C. TAYLOR.

Opinion filed June 3rd, 1898.

Constitutional Debt Limit—Anticipating Taxes Levied.

Warrants on a county treasurer issued by the county auditor for the current expenses of the county, such as sheriff's fees, after the constitutional limit of indebtedness has been reached, but in anticipation of the collection of a tax already levied, are valid to the extent of taxes levied. Such warrants do not augment the existing indebtedness of the county, within the meaning of the constitution of the state. Construing sections 183, 187, State Constitution.

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

Proceeding by Hiram S. Darling against John C. Taylor, auditor of Kidder County, for a mandamus to compel the issuance of a county warrant. From an order allowing the mandamus, defendant appeals.

Affirmed.

Edward S. Allen, for appellant.

The amount of bonds and warrants of Kidder County outstanding and unpaid exceeds five per centum of the assessed value of the taxable property therein. Therefore further indebtedness cannot be contracted. Article 12, § 183, Const., § 187, Const.; *Lake County* v. *Rollins*, 130 U. S. 662; *Doon Tp.* v. *Cumming*, 142 U. S. 366; *Litchfield* v. *Ballou*, 114 U. S. 190; *Law* v. *Peo.*, 87 Ill. 385; *Fuller* v. *Chicago*, 89 Ill. 282; *Peo.* v. *May*, 10 Pac. Rep. 641; *Soule* v. *City*, 33 Pac. Rep. 384; *Sackett* v. *City*, 88 Ind. 473; *McPherson* v. *Foster Bros.*, 43 Ia. 48; *Scott* v. *Davenport*, 34 Ia. 208; *Spilman* v. *Parkesburg*, 35 W. Va. 605; *Birkholz* v. *Dinnie*, 6 N. D. 511, 72 N. W. Rep. 931.

Charles H. Stanley, for respondent.

A tax has been levied to create the fund against which this warrant is to issue. This does not constitute a debt within the meaning of the constitution. *In re* State Warrants, 6 S. D. 518, 62 N. W. Rep. 101. So long as the warrants issued are within the amounts lawfully levied, they do not create an additional debt. To render such warrants invalid it must appear affirmatively that no tax had been provided for their payment, when the warrants were issued. *Western Town Lot Co.* v. *Lane*, 62 N. W. Rep. 982; *Shannon* v. *City of Huron*, 69 N. W. Rep. 598; *Lawrence County* v. *Mead Co.*, 72 N. W. Rep. 405; *Ranch* v. *Chapman*, 16 Wash. 568.

WALLIN, J. The record in this proceeding embraces the following facts: That plaintiff is the sheriff of Kidder County, and defendant is the auditor of said county. On the 7th day of February, 1898, the County of Kidder was indebted to the plaintiff in the aggregate sum of $87.25, on account of fees for official

services rendered within a period of 90 days next preceeding said date. On said date the plaintiff in due form presented a bill containing an itemized statement of said fees and services to the commissioners of said county for allowance; whereupon said commissioners examined, audited, and allowed said bill, and the whole thereof, and directed the defendant to draw a warrant upon the county treasurer of said county for the amount of said bill. Subsequently, and before the commencement of this proceeding, the plaintiff duly demanded of the defendant that he (the defendant) should make out a county warrant in the usual form of county warrants, for the amount of said bill, in favor of the plaintiff, and deliver the same to the plaintiff; which demand was refused, and the defendant still refuses to comply with said demand. The plaintiff instituted this proceeding in the District Court. The facts, as above narrated, were expressly admitted to be true by the defendant's answer to the complaint. The only defense set out in the answer consists of the affirmative statement that "the amount of bonds and warrants of said county now outstanding and unpaid is equal to and exceeds five per centum of the assessed value of the taxable property of said county as fixed by the state board of equalization in the year 1897." This statement in the answer is conceded to be true, and the only question presented to the trial court or to this court is whether, upon this state of facts, the refusal of the defendant to issue and certify to said warrant is legally justifiable.

It is expressly admitted that the annual tax levy for Kidder County was regularly made on the 7th day of July, 1897, and that the amount of said warrant, if drawn, would not, with other warrants drawn since said date, equal the amount of such levy. A solution of the question we are required to determine involves the construction of certain provisions of the state constitution. Section 183 provides that the debt of a county shall never exceed "five per centum of the assessed value of the taxable property therein;" and section 187 provides that "no bond or evidence of debt of any county * * * shall be valid unless

the same have indorsed thereon a certificate signed by the county auditor, or other officer authorized by law to sign such certificate, stating that said bond or evidence of debt, is issued pursuant to law and is within the debt limit."

In the application of these provisions of the organic law to the facts in this record we are confronted with two questions, namely:

First. Has the indebtedness of the county already reached and passed the constitutional limit? Second. Would the warrant in question, if issued, augment the indebtedness of the county, within the meaning of the constitutional inhibition?

The first of these questions is answered in the affirmative by the conceded facts in the record. The limit of indebtedness has been already reached in Kidder County.

Referring to the remaining question, it would seem at first blush that, if the county auditor should issue an additional warrant upon the treasurer, the same would necessarily augment the outstanding indebtedness of the county. But would this conclusion be true, within the meaning of the constitutional restriction upon county indebtedness? There is considerable authority, at least, which requires this query to be answered in the negative. The Supreme Court of Iowa has said: "This right to thus apply the current revenues to the defraying of ordinary expenses is grounded upon the fact that such a course is absolutely necessary to the life of the municipality and the successful accomplishment of the purposes of its creation. * * * And, if the appropriation was made in advance of the receipt of the revenues, the action would be just as legitimate, because that the revenues will be received is a legal certainty." The court further says: "The right of the city to thus apply its revenues nothwithstanding its indebtedness is a part of the well settled and expressly adjudicated law of the state." *Grant* v. *City of Davenport*, 36 Iowa, 396, and cases cited. In *Spilman* v. *City of Parksburg*, 35 W. Va. 605, 14 S. E. Rep. 279, referring to a constitutional restriction upon municipal indebtedness similar to that of this state, the court uses this language: "If it is an item of

current expenses or anything else for the payment of which provision has already been made by levy laid, then it needs no other provision for its payment, and is not within the letter of the constitution. Neither is it within its true meaning, for a draft on a fund already in hand, or by levy already made and provided, meets it and discharges it, so that no indebtedness arises." The precise question presented in this case has been repeatedly decided in South Dakota in harmony with the principle laid down in the cases cited. In *Lawrence Co.* v. *Meade Co.*, (S. D.) 72 N. W. Rep. 405, referring to an act of congress which placed a restriction upon the indebtedness of territorial counties, the court say: "Nor did it prevent a county, whose indebtedness exceeded the four per cent. limit when such an act was approved, from levying such taxes as it was authorized by law to levy, and issuing its warrants within the limits of such levy, in anticipation of their collection. If the warrants issued were within the amounts lawfully levied, they did not increase the municipal indebtedness, within the meaning of such act. Unless it affirmatively appears that the warrants issued in any year exceed in amount the levy for such year, they must be regarded as lawful claims against the county." This language was used by the court with respect to county warrants which were issued after the county had reached the legal maximum of county indebtedness, and said warrants were declared to be valid nevertheless. The court cites in support of its views *Shannon* v. *City of Huron*, (S. D.) 69 N. W. Rep. 598. *In re* State Warrants, (S. D.) 62 N. W. Rep. 101, the court announces the same rule of construction in its opinion touching the constitutionality of a statute of South Dakota whereby certain state officials were expressly authorized to issue and sell state warrants to be drawn upon the assessed but uncollected revenues of the state, and the proceeds of which were to be applied to the discharge of necessary current expenses of the state. In the course of its opinion in the case last cited the court uses this language: "It being once established, as we think it is, by the authorities already cited, that the revenues of

the state assessed, and in process of collection, may be considered as constructively in the treasury, they may be appropriated and treated as though actually and physically there; and an appropriation of them by the legislature does not constitute the incurring of an indebtedness, within the meaning of Constitution, Article 13, Section 2." This case cites *State* v. *Parkinson*, 5 Nev. 15. We are aware that a different and more rigid rule of construction has been adopted in some of the adjudicated cases. See *Prince* v. *City of Quincy*, 105 Ill. 138. We fully appreciate the fact that the more liberal rule adopted in the line of cases first above cited, in its practical operation, may be attended by some embarrassments; but, if no more warrants are ever drawn against an existing tax levy than the aggregate amount of such levy, the corporate indebtedness will not be increased by issuing such warrants, except in cases of a partial or total failure to collect the taxes actually levied. In legal theory, this failure never occurs, and if in fact there should, in an exceptional instance, be a deficit occasioned by such failure, the same could lawfully be met and extinguished by an additional levy of taxes for that purpose. The constitutional limit does not at all abridge the right to levy taxes. Under the rule of construction which we have concluded to adopt as controlling this case, the indebtedness of Kidder County will not be augmented by issuing the warrant in question, and thereby anticipating the collection of existing tax levies to the amount of such warrant.

The order appealed from will therefore be affirmed. All the judges concurring.

(75 N. W. Rep. 766.)

HEDWIG LUTHER *vs.* WILLIAM T. HUNTER.

Opinion filed May 16th, 1898.

Purchase of Claims by Surety of Administrator.

A surety on an administrator's bond is not precluded from purchasing claims against the estate, but when the estate is insolvent, and pays only a percentage of the claims against it, and when this percentage was received by such bondsman on a claim which he undertook to purchase, but did not in fact own, and an action is brought against him by the true owner for money had and received, the recovery must be limited to the amount actually received.

Assignment of Administrator's Fees—Delivery of Written Assignment.

When the administrator of an estate desires to donate his fees for services as such to a third party, the execution and delivery of a written assignment thereof is a delivery of the property itself.

Gift Inter Vivos.

In order to constitute a valid gift of personal property *inter vivos*, the delivery of the property must clearly appear, and the donee must lose all control over the same. *Held*, that forwarding an assignment of a claim to administrator's fees to the judge of the probate court, without any instructions or directions to deliver the same to the party named therein as assignee, did not constitute a delivery of the property.

Witness—Competency.

A party to a written contract is a competent witness for a third party in no manner connected with such contract, to contradict the terms of the contract.

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

Action by Hedwig Luther against William T. Hunter. Judgment for defendant, and plaintiff appeals.

Reversed.

Morrill & Engerud, for appellant.

The proof and defendants answer shows that he received the money from the administrator for the payment of Luther's administration fees of which plaintiff holds an assignment executed before defendant received the money and that defendant received it with knowledge of plaintiffs claim. Hence, unless defendants show good title to the money as against plaintiff, he is liable for money had and received. Revised Codes, § 4263; 3 Blackstone,

162; *New York Life Ins. Co.* v. *Roulet*, 24 Wend. 505; *Roberts* v. *Ely*, 20 N. E. Rep. 605; *Hathaway* v. *Cincinnatus*, 62 N. Y. 434; *Gorely* v. *Butler*, 16 N. E. Rep. 734; *Sterling* v. *Ryan*, 37 N. W. Rep. 572; *Brand* v. *Williams*, 13 N. W. Rep. 42; *McMintz* v. *Ry. Co.*, 1 S. W. Rep. 815. The mere existence of a written assignment without proof of delivery is not evidence of a transfer by gift. *Young* v. *Young*, 36 Am. Rep. 634; *Gammon, etc.* v. *Robbins*, 12 L. R. A. 806; *Payne* v. *Powell*, 5 Bush. 248; *Buckman* v. *Buckman*, 33 N. J. Eq. 354; *Leonard* v. *Kebler*, 34 N. E. Rep. 659; *Flander* v. *Blandy*, 12 N. E. Rep. 32; *Wadd* v. *Hazleton*, 21 L. R. A. 693 and n. An assignment of his fees by an administrator before his accounting is against public policy. *In re Worthington*, 23 L. R. A. 97; *In re Kings Estate*, 68 N. W. Rep. 154. Hunter as surety on the administrators bond was liable with Griffin for the payment of claims. Griffin was short in his accounts. The court ordered Griffin to pay these preferred claims. If Griffin did not do so Hunter was liable for them. Meanwhile Hunter purchased the claims to protect himself and induced the administrator to pay him all the money on hand. Hunter's purchases are in law payment of the respective claims, because as surety on the bond, he was deemed to be in privity with his principal, and he could enforce the claims as against other creditors only for the amount actually paid. Revised Codes, § 6488; *Diebald* v. *Opperman*, 111 N. Y. 531; *Harrah* v. *Jacobs*, 39 N. W. Rep. 187; *Reed* v. *Norris*, 2 M. & C. 361. Parole evidence is competent to contradict or vary the terms of a written receipt. *Prairie School Tp.* v. *Haselieu*, 3 N. D. 328; Underhill on Ev., § 211.

Benton & Bradley, for respondent.

Both plaintiff and defendant moved for a directed verdict—every fact therefore which is supported by evidence on the part of defendant stands as if it had behind it the verdict of a jury. *Thompson* v. *Simpson*, 128 N. Y. 284; *Bentell* v. *Magone*, 157 U. S.

154; *Stanford* v. *McGill*, 6 N. D. 536, 72 N. W. Rep. 938. The property of Luther at the time he executed the assignment was a claim against an estate, an obligation of the estate to pay the fees prescribed by law. This claim was assignable. Section 3782, Revised Codes; Pomeroy's Rem. and Rem. Rights, §§ 146–147. The outgoing administrator is entitled upon the settlement of his account to commission for that portion of the estate fully administered by him. *Estate of Barton*, 55 Cal. 87; *Drake* v. *Drake*, 82 N. C. 443; *In re Crawford*, 5 L. R. A. 73 and n.; *Walker's Estate*, 9 S. & R. (Pa.) 223. In New York because of an express statute on the subject, an administrator cannot deduct commissions until awarded by the surrogate. 2 R. S. N. Y. 93, § 58; *Wheelright* v. *Wheelright*, 2 Redf. 501; *In re Harris*, 4 Den. 463; *In re Butler*, 9 N. Y. Supp. 642; *Matter of Hayden*, 54 Hun. 197. It is not against public policy for officers to assign fees and salaries already earned, the doctrine contended for by appellant is limited in its application to fees and salaries to be earned *in futuro*. *State* v. *Williamson*, 21 L. R. A. 837; *Bangs* v. *Dunn*. 4 Pac. Rep. 936; *Bank* v. *Wilson*, 25 N. E. Rep. 855; *Schwenk* v. *Wychoff*, 9 L. R. A. 221. An order on a part of a fund will be recognized as an assignment in a common law action. *Grain* v. *Aldrich*, 38 Cal. 514; *Bank* v. *Spratlen*, 43 Pac. Rep. 1048; *Lauer* v. *Dunn*, 115 N. Y. 406. Parole evidence cannot be introduced to contradict the settled legal construction of an instrument. *Godkin* v. *Monahan*, 83 Fed. Rep. 116.

BARTHOLOMEW, J. Plaintiff and defendant each claim the ownership, by assignment, of the fees that were due one Herman M. Luther, as administrator of the estate of August Luther late of Cass County, in this state, deceased. The estate proved to be insolvent, and did not pay even the preferred claims in full, but defendant received the *pro rata* per cent. that the estate paid on account of such fees, and plaintiff brings this action to recover from him, and, by reason of certain facts hereafter stated, seeks to recover the full amount of such claim. There was a trial to a jury, and a verdict for defendant. Judg-

ment on the verdict, and plaintiff appeals direct from the judgment. At the close of the testimony each party moved for a directed verdict in his favor. Plaintiff's motion was denied, and defendant's granted. Plaintiff did not request to have any question of fact submitted to the jury after his motion was denied. He is therefore in the position of having requested the court to find the facts, and hence the facts necessary to support a judgment for defendant must be treated by us as having the support of the verdict of a jury. In other words, if there be any evidence reasonably tending to support such facts, we cannot disturb the verdict. *Stanford* v. *McGill*, 6 N. D. 536, 72 N. W. Rep. 938, and cases cited.

Upon the point, however, which we think must rule this case, there is no conflict in the testimony. It is purely a question of law, on undisputed facts. In 1894, Herman M. Luther resigned his position as administrator. Subsequently there were two administrators *de bonis non*, the second one being one Griffin. The defendant, Hunter, was on Griffin's bond as such administrator. Griffin was short in his accounts, and the defendant Hunter, fearing that a liability might arise on the bond, sought to purchase the outstanding preferred claims against the estate; and in pursuance of this desire he purchased, or attempted to purchase, the claim of Herman M. Luther for fees as administrator. Having received the dividend on the claim, plaintiff, claiming to be the owner thereof, brings suit against Hunter for money had and received, but demands judgment for the full amount of the claim, on the theory that defendant's position as surety on the administrators bond debarred him from purchasing claims against the estate at a discount, and that having done so, and received the *pro rata* payment thereon, and the estate having been exhausted, he must account to the true owner for the full amount of the claim. There are two sufficient answers to this contention: The action is for money had and received, and is not based upon the bond, directly or indirectly; and, second, defendant's position as surety on the bond placed him in no fiduciary relation to the

estate. An administrator is not permitted to purchase claims against the estate of which he is administrator, but we know of no law that extends the prohibition to a surety on his bond.

But if the claim was in fact the property of plaintiff, and defendant wrongfully received the money thereon, he can be required to account to plaintiff for the money received. It is conceded that plaintiff holds an assignment from Herman M. Luther, duly executed and delivered, of his entire claim for fees as the administrator of the August Luther estate. This assignment was dated May 30, 1896. If it conveyed anything, it was purely a gift *inter vivos*, as plaintiff paid nothing therefor. While, of course, a gift of personal property must be accompanied by delivery, in order to be of any validity, yet the authorities are now unanimous in holding that the delivery of the evidence of the debt—which is the real thing—is a delivery of the debt itself, that being the only delivery of which the property in its nature is susceptible. 5 Am. and Eng. Enc. Law, 521a, and cases cited.

It is urged, however, that at the date of said assignment Herman M. Luther had no interest in his fees, as he had previously assigned the claim. On August 7, 1893, there was placed on file in the County Court of Cass County a writing signed by Herman M. Luther, which in terms assigned all his claim for such fees up to that date to one Henry Krogh, who had been the attorney for such administrator, and had a claim for attorney's fees against the estate amounting to $300. On February 1, 1896, Krogh assigned his claim for attorney's fees, and also the claim of Herman M. Luther for administrator's fees, to the defendant, Hunter. If there was any legal delivery of the assignment from Luther to Krogh then defendant has the better title to the claim; otherwise not. As stated, this assignment was placed on file in the County Court on August 7, 1893. It was dated at Great Falls, Montana, August 4, 1893. How it reached the County Court of Cass County no one seems to know. The official who was then and is now the judge of said court testified that the assignment "was filed by Henry Krogh, or received by mail from

Herman M. Luther. I do not know from which of the two I received it." Mr. Krogh testified as follows: "I reside in Fargo. My name is Henry Krogh, but I do not know whether I am the person mentioned in Exhibit A or not. That instrument [Exhibit A] was never delivered to me. I never had any knowledge of its existence until a protest was filed against Mr. Griffin as administrator. The first time I knew of its existence was when a protest was filed against Mr Griffin's report as administrator. At that time Mr. Olson was clerking in the County Court, and he told me one day, 'Henry, I think there is something of interest to you.' I asked what it was. He replied, 'The assignment of some money due Mr. Luther.' I asked to see it. He could not find it, and then showed me the book where it was recorded. That was the first I knew of it. That was in 1895, about the latter part of November. I never saw the original instrument until now. This is the first time I have had it in my possession. I never gave Herman Luther any consideration for that assignment. I did not know it was made out." This is all the evidence contained in the record touching the delivery. As Krogh did not file the document in the County Court, it must have been received by mail; but what instructions were sent with it, or for what purpose it was sent, or whether it was placed beyond the recall of the sender, we are not informed. No reason is suggested why it was not sent directly to the attorney, if intended for his benefit. It is clear that if it was so intended it was a gift,—purely a gift *inter vivos*,—and of which the donee remained in total ignorance for more than two years after it was made, and then learned of its existence incidentally, and a gift which never came to the manual possession of the donee until the time of the trial of this action. As we have stated, such gifts must be accompanied by delivery. The donor must lose all power of control over the thing donated. The law can indulge no presumptions in this case. While the record shows that Herman Luther is the uncle of plaintiff, yet it does not show that he is in any manner related to Krogh. He was under no obligation, legal or moral, to make

provision for him, and why he wished to make the attorney a present of nearly a thousand dollars is something that is in no manner explained.

Respondent urges that delivery is shown because Krogh, after he learned of the instrument on file, said to one witness that he controlled Luther's claim for fees, and to another that he owned the claim, and he in fact assumed to transfer it to defendant. All these acts might strongly indicate acceptance on Krogh's part, but they have no bearing whatever on the question of delivery by Luther. If there be any evidence of such delivery it must be found in the one fact that an instrument, in form an assignment, was forwarded to the County Court. In cases of gift of real estate, a delivery of the deed to the donee has sometimes been presumed from the fact that the donor filed the deed in the office of the register of deeds. But deeds are placed in that office only for the purpose of being recorded, and it is to the records thus made that the public must go in order to ascertain the condition of the title to any given tract of land. The grantor may not place the deed of record, and yet deny the title of the grantee. That would be to give the grantee a false credit, and enable him to defraud the public. The grantor, having placed the deed upon the records, cannot recall the same. As he has apparently invested another with the title, he is presumed to have devested himself thereof. But the office of the County Court performs no such service. It keeps no record of transfer of property. It is never consulted for that purpose. At the time this instrument was filed, the Compiled Laws of 1887 were in force. Under the provisions of the Probate Code therein contained, claims against an estate were not filed with the court. They were presented, with proofs of their validity, to the administrator, and if allowed by him, and this allowance confirmed by the court, they were then filed in the court for the sole purpose of showing the liabilities of the estate. But in no event was this so called "assignment" the presentation of any claim against the estate of August Luther, and there was no provision of law requiring that it be

filed or recorded in that office. Placing it of record gave it no more force and effect as a delivery to Krogh than would its delivery to the judge of probate as an individual, and no case can be found where the delivery of personal property to a third person, without instructions or statements, has ever been held a sufficient delivery to pass a gift *inter vivos*. The following cases will illustrate the strictness of the rule in cases of this character: *Flanders* v. *Blandy*, 45 Ohio St. 108, 12 N. E. Rep. 321; *Wadd* v. *Hazelton*, 137 N. Y. 215, 33 N. E. Rep. 143; *Gray* v. *Barton*, 55 N. Y. 68; *Young* v. *Young*, 36 Am. Rep. 634; *Bond* v. *Bunting*, 78 Pa. St. 210; *Buckman* v. *Buckman*, 33 N. J. Eq. 354; *Leonard* v. *Kebler's Adm'r*, (Ohio Sup.) 34 N. E. Rep. 659.

As there was in this case no competent evidence of a delivery of the assignment from Herman M. Luther to Henry Krogh, there must be a new trial. There is one error assigned upon the ruling of the court in excluding evidence, and as the same question may arise again it is proper to notice it. When Krogh was on the witness stand plaintiff offered to prove by him that when he made the assignment to defendant of his claim for attorney's fees and the Luther claim for administrator's fees (both of which were assigned by one instrument, and for the aggregate consideration of $175,) it was specially understood and agreed that the assignment of the administrator's fees was simply for the purpose of enabling the estate to be cleared up; that it should never be presented as a claim against the estate; and that defendant paid no consideration whatever therefor. This testimony was refused, apparently on the ground that Krogh could not, by parol, contradict the written assignment. But this was a misapplication of a rule which applies only to the parties to a written contract and their privies. Krogh as a party, or in his own interest, could not contradict the writing. But plaintiff was in no manner concluded by it. He was free to contradict it as he might, and Kreogh was a competent witness for the purpose. The evidence should have been received.

Reversed, and new trial ordered. All concur.

(75 N. W. Rep. 916.)

SCOTTISH AMERICAN MORTGAGE CO. *vs.* HARRIETT E. REEVE, *et al.*

Opinion filed May 27th, 1898.

Second Appeal—Res Judicata.

Where a judgment has been affirmed on appeal to this court, it cannot afterwards be set aside for any alleged infirmity that existed prior to the former appeal, and that might have been raised and determined on that appeal.

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

Action by the Scottish-American Mortgage Company, Limited, against Harriett E. Reeve and others. Motion by defendants to set aside the judgment was denied, and they appeal.

Affirmed.

Benton & Bradley, for appellants.

The first judgment herein was rendered October 31st, 1896, during the June term of court. This was set aside and a new judgment entered at a subsequent term, and without notice to defendants. All judgments become final at the end of the term. Proceedings taken after that time to set aside a judgment must be upon notice to all parties affected. Freeman on Judgments, §§ 96, 103; *Loomis* v. *Rice*, 37 Wis. 262, *Aetna Life Ins. Co.* v. *McCormick*, 20 Wis. 279; *Symns* v. *Noxon*, 45 N. W. Rep. 680; *Bronson* v. *Schulten*, 104 U. S. 410. A motion to vacate a judgment founded upon grounds referring solely to the jurisdiction of the court to render judgment is a special appearance, and will not cure any defect in jurisdiction. A party thus urging his legal right should not be deemed to have conferred jurisdiction retrospectively. *Godfrey* v. *Valentine*, 39 Minn. 338; *Gray* v. *Hawes*, 8 Cal. 562; *Shaw* v. *Rowland*, 32 Kans. 154; *Briggs* v. *Sneghan*, 45 Ind. 14. No act of defendant subsequent to the entry of judgment can confer jurisdiction. *Meherbuch* v. *Partridge*, 39 N. Y. Supp. 681. A general appearance after the entry of judgment will not validate a judgment void for want of jurisdiction over the person of defendant. *Yorke* v. *Yorke*, 3 N. D.

343, 55 N. W. Rep. 1096; *Carlyle* v. *Weston*, 21 Pick. 536; *Gage* v. *Ganette*, 10 Mass. 176; *Osgood* v. *Thurston*, 23 Pick. 110; *Kanne* v. *Minnesota, etc., R. Co.*, 33 Minn. 419; *Martin* v. *Cobb*, 75 Tex. 544; *Osborn* v. *Cloud*, 21 Ia. 238; *Merryfield* v. *Burt*, 44 Ia. 194; *Briggs* v. *Sneghan*, 45 Ind. 15; *Etheridge* v. *Woodley*, 83 N. C. 12; *Marsden* v. *Soper*, 11 Ohio St. 503.

Newman, Spalding & Stambaugh, for respondent.

The question now sought to be raised was presented by the record on the former appeal and the validity of the judgment was considered. 7 N. D. 99; 72 N. W. Rep. 1088. The validity of the judgment sought to be vacated is *res judicata*. Van Fleet, § 678, 1320; *Pollock* v. *Cohen*, 32 Ohio St. 514; *Crockett* v. *Gray*, 31 Kan. 346, 2 Pac. Rep. 809; *Davis* v. *McCoakle*, 77 Ky. 746; *Damon* v. *Debar*, 94 Mich. 594, 54 N. W. Rep. 300; *St. Croix Lumber Co.* v. *Mitchell*, 57 N. W. Rep. 236.

BARTHOLOMEW, J. This case was before us at our October term, 1897. See 7 N. D. 99. We then affirmed the judgment appealed from. After the remittitur was sent down, the defendants moved in the District Court to set the judgment aside on the ground that the judgment was void, and the court without jurisdiction to enter the same. The judgment thus attacked was dated April 17, 1897, and the ground of the attack, briefly stated, was the fact that on October 31, 1896, the court entered judgment in the case against these defendants; said defendants having entered no appearance and served no answer in the case. That subsequently, and after the expiration of the term at which such judgment was entered, and without notice to defendants, and on application of plaintiff, such judgment was set aside and canceled, and subsequently another judgment was entered; that being the judgment from which the former appeal was taken, and which the former appeal was taken, and which was affirmed by this court. The infirmity in this judgment, if any there was, existed prior to the former appeal, and appeared in the record that was brought to this court, because the record was substantially the

same in that case as in this; but no objection such as is now urged was taken either in the trial court or on appeal, and, the judgment having been affirmed in this court, that is an end of all matters that were or might have been litigated in the case. All such matters become *res adjudicata* for the purposes of that case. *Pollock* v. *Cohen*, 32 Ohio St. 514; *Zimmerman* v. *Turner*, 24 Wis. 483; *Crockett* v. *Gray*, 31 Kan. 346, 2 Pac. 809; *Damon* v. *De Bar*, 94 Mich. 594, 54 N. W. Rep. 300. In holding on the former appeal that the judgment appealed from was a valid and proper judgment, we necessarily held that the court had jurisdiction to enter it. The question is no longer open in this case. We must not be understood as admitting that, if the points here urged had been urged on the former appeal, our decision would have been any different from what it was.

Respondent urges that this is a proper case for the addition by this court of a penaly to the judgment as punishment for purposely delaying the execution of the judgment. That is a matter resting in sound discretion. In this case the record shows that the property covered by the mortgage is ample security for the debt, and there is also an approved supersedeas bond in the case. Plaintiff cannot suffer. We are not warranted in adding any penalty.

The order appealed from is in all things affirmed. All concur.

(75 N. W. Rep. 910.)

JOSEPH J. O'LEARY *vs.* BROOKS ELEVATOR COMPANY.

Opinion filed May 27th, 1898.

Negligence—Use of Private Premises.

Every man has the absolute right to use his own property for any of the purposes to which such property is usually applied, and in such manner as he sees proper, provided he exercises proper care and skill to avoid unnecessary injury to others up to the point where such use becomes a nuisance.

Trespassing Children.

A landowner owes no duty of protection to a trespasser upon his land when such trespass is unknown to the landowner, and where it is in no manner induced by any negligence on his part.

Negligence Defined.

Actionable negligence is a failure to observe a legal duty existing in favor of the person bringing the action. Where there is no duty, there can be no actionable negligence.

Child Responsible for Its Own Torts.

A child is responsible for its own torts although committed by the direction of another; and a child is no less a trespasser because the trespass was committed under the control or coercion of a parent or guardian.

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

Action by Joseph J. O'Leary, by J. D. O'Leary, his guardian, against the Brooks Elevator Company. From a judgment entered on a verdict directed for defendant, plaintiff appeals.

Affirmed.

Carmody & Leslie, and *J. P. Galbraith*, for appellant.

The claim that a man can do as he pleases on or within his own premises is not correct. A technical trespass by plaintiff does not bar a recovery. *Fisher* v. *Clark*, 41 Barb. 329; *Radcliffe* v. *Mayor*, 4 N. Y. 195, 53 Am. Dec. 357; *Brinkley Car Works, etc. Co.* v. *Cooper*, 31 S. W. Rep. 154; *Railroad* v. *Stoupe*, 21 L. Ed. 745; *Keffee* v. *Ry. Co.*, 21 Minn. 207; *Nagel* v. *Ry.*, 75 Mo. 652; *O'Malley* v. *Ry.*, 45 N. W. Rep. 441; *Union Pac. R. Co.* v. *McDonald*, 152 U. S. 212, 14 S. E. Rep. 619; *Hydraulic Works Co.* v. *Orr*, 83 Pa. St. 332; *Powers* v. *Harlow*, 19 N. W. Rep. 257; *Harriman* v. *Ry. Co.*, 12 N. E. Rep. 451; *Penso* v. *McCormick*, 25 N. E. Rep. 156; *Kenchlow* v. *Elevator Co.*, 46 Pac. Rep. 703; *Mallay* v. *Society*, 21 Pac. Rep. 525; *Lowe* v. *City*, 44 Pac. Rep. 1050; *Brinkley, etc. Co.* v. *Cooper*, 31 S. W. Rep. 154; *Daily* v. *Ry. Co.*, 68 Am. Dec. 413; *Kansas City Ry. Co.* v. *Fitzsimmons*, 22 Kan. 686, 31 Am. Repts. 203; *Lane* v. *Atlantic Works*, 107 Mass. 104; *Berge* v. *Gardner*, 19 Conn. 507, 50 Am. Dec. 261; *C. B. & Q. Ry. Co.* v. *Grablin*, 56 N. W. Rep. 796. The question of negligence

should have been submitted to the jury. *Kenchlow* v. *Elevator Co.*, 46 Pac. Rep. 703; *Ry. Co.* v. *Rollins*, 5 Kan. 167; *Caulkins* v. *Mathews*, 5 Kan. 191; *Ry. Co.* v. *Richardson*, 47 Kan. 517, 28 Pac. Rep. 183. The exposure of dangerous implements or machinery unguarded and in such a position as to be attractive to trespassing children has frequently been the sole ground of liability for injuries to them. *Ry. Co.* v. *Fitzsimmons*, 22 Kan. 686; *Ry. Co.* v. *Dunden*, 37 Kan. 1, 14 Pac. Rep. 501; *Osage City* v. *Larkin*, 40 Kan. 206, 19 Pac. Rep. 658. And where traps or pitfalls are maintained on one's premises unguarded, and in such position that others are liable to injury, liability follows injury. *Penso* v. *McCormick*, 125 Ind. 116, 25 N. E. Rep. 156; *Bennett* v. *Ry. Co.*, 102 U. S. 577; *Branson* v. *Labrot*, 81 Ky. 638; *Schilling* v. *Abernethy*, 3 At. Rep. 792; *Ry. Co.* v. *McDonald*, 152 U. S. 262, 14 S. C. Rep. 619.

Swenson & Norman, (*F. W. Root*, of counsel,) for respondent.

A minor is answerable for a trespass committed by him, although he acts by command of his father. *Scott* v. *Watson*, 46 Me. 362; *Humphrey* v. *Douglas*, 10 Vt. 71; *Kilpatrick* v. *Hall*, 67 Me. 543; *Smith* v. *Kron*, 96 N. C. 392; *Guilbert* v. *Strom*, 23 Car. 1, B. R. 72; *Mitchell* v. *Harmony*, 13 How. U. S. 115. The owner or occupant of premises owes no duty to a trespasser thereon, except to do him no wilful or wanton injury. *City* v. *Emmelman*, 108 Ind. 53, 9 N. E. Rep. 155; Cooley on Torts, 659–660; *Akers* v. *Ry. Co.*, 58 Minn. 544; *Sweeny* v. *Old Colony Ry. Co.*, 92 Mass. 368. The land owner is no more bound to keep his premises safe for children who are trespassers or bare licensees not invited or enticed by him, than to keep them safe for adults. *Morrisey* v. *Eastern Ry. Co.*, 126 Mass. 377; *Gillespie* v. *McGowan*, 100 Pa. St. 144; *Emerson* v. *Petuler*, 35 Minn. 481; *Ratte* v. *Dawson*, 50 Minn. 450; *B. etc. Ry. Co.* v. *Schwingling*, 101 Pa. St. 258; *Klix* v. *Nieman*, 68 Wis. 271; *Holbrook* v. *Aldrich*, 46 N. E. Rep. 115; *Richards* v. *Connell*, 63 N. W. Rep. 915; *Witte* v. *Stifel*, 28 S. W. Rep. 891; *Murphy* v. *City*, 118 N. Y. 575; *Hargreaves* v. *Deacon*, 25 Mich. 1; *Clark* v. *Manchester*, 62 N. H. 577; *Dobbins* v. *Mo. Ry.*

Co., 41 S. W. Rep. 62; *Daneck* v. *Ry. Co.*, 37 At. Rep. 59; *McEachern* v. *Ry. Co.*, 150 Mass. 515; *Ry. Co.* v. *Edwards*, 36 S. W. Rep. 430; *Trask* v. *Shotwell*, 41 Minn. 66; *Mathews* v. *Bensel*, 51 N. J. L. 30. Plaintiff failed to bring himself within the rule in the turntable cases by failing to prove: 1st. That it was known to defendant that children were in the habit of coming upon the premises to play with or upon the machinery. 2d. That the injured child was upon the premises because attracted there by the very object which caused the injury. *Keffe* v. *Ry. Co.*, 21 Minn. 207; *Nagel* v. *Ry. Co.*, 75 Mo. 652. The doctrine of the turntable cases has been repudiated by leading courts in recent decision. *Daniels* v. *Ry. Co.*, 154 Mass. 349; *Walsh* v. *Ry. Co.*, 145 N. Y. 301; *Frost* v. *Ry. Co.*, 64 N. H. 220; *Ry. Co.* v. *Clark*, 41 Ill. App. 343.

BARTHOLOMEW, J. Action for damages for a personal injury caused by the alleged negligence of defendant. When the evidence was closed, the court, on defendant's motion, directed a verdict in its favor. The facts admitted, and which plaintiff's evidence tended to establish, are as follows: The plaintiff, Joseph J. O'Leary, is a minor, and was 11 years old at the time of the trial, which was in January, 1897. J. D. O'Leary is plaintiff's duly appointed guardian. The defendant is a corporation, and at the time of the injury complained of, and for several years prior thereto, owned and operated a grain elevator at the City of Hillsboro, in this state. The railroad track passes through the city, running north and south. Main street is west of the railroad track, and runs parallel therewith, the east line of the street being identical with the west line of the right of way. Fifth avenue, running east and west, crosses Main street and the railroad track at right angles. The defendant's elevator property stands in the northeast corner formed by the intersection of Main street and Fifth avenue. The building nearest the corner was the engine house. This was a brick building between 8 and 9 feet wide, and 28 feet long, the front end facing west on Main street, but back from the street 8 or 10 feet. North from the north line of the

engine house, 20 feet distant, was the elevator proper. Starting in front of the engine house, and extending to and along the front of the elevator, was an elevated driveway for hauling grain to the elevator. This driveway was not more than 2 feet high where it left the engine house, and raised to about 5 feet in height at the elevator. There was a railing on the driveway, and on the inside or east side it was boarded up from the ground to the driveway, but there were boards off, so a man could pass through. The elevator at the south end was 30 feet wide. The south side of the engine house ran back along the walk on the north side of Fifth avenue. The first side track of the railroad was 8 or 10 feet east of the east end of the engine house. The machinery in the elevator was connected with the engine by means of a shaft or tumbling rod extending across the space between the two buildings about 15 inches from the ground, and 6 or 8 feet from the driveway. About the middle of this shaft was a knuckle connecting two separate pieces of the shaft. This knuckle was bolted over the ends of the shaft, and by means of slots in the knuckle and in the shaft, into which iron wedges were fitted, a solid connection was made. These wedges would sometimes work loose, and, to void that, a wire, about the size of a large fence wire or telegraph wire, had been used to wind around the shaft and the knuckle in such a manner as to hold the wedges in place. The end of this wire was left standing out about six inches from the knuckle. Neither the shaft nor the knuckle was in any manner boxed or covered. When the shaft was in motion, the protruding end of the wire could not be seen, or, if seen at all, only as a dim outline. The shaft had been used by defendant in this uncovered conditioned for a number of years. Just how long the wire had been used does not appear. In the summer time, boys at play sometimes went upon this space between the engine house and the elevator, and over and around this shaft. The object that seems to have been attractive to children was an escape pipe that came out of the engine house a few feet distant fom the shaft. The spot would seem also to have been something

of a resort for tramps, as the evidence shows them to have been there on several occasions. These facts were all known to the defendant.

Late in the evening of July 19, 1896, the plaintiff, in company with one Riordan, reached Hillsboro. This man Riordan was plaintiff's uncle, and was at that time his gurdian. His sight was defective. He could see sufficiently well for all purposes of locomotion, but he represented himself as blind, and was going through the country soliciting charity. Ostensibly, he was cared for by plaintiff, who led him withersoever he went. Plaintiff was completely under Riordan's control. They stopped at an hotel that night, on Main street, and nearly opposite the elevator. The next morning, after breakfast, Riordan directed plaintiff to take him to some box cars that stood on the track, where he would smoke. They crossed over Main street on the north side of Fifth avenue, and followed the sidewalk going east until they had passed beyond the east end of the engine house far enough to permit Riordan to look into the space between the engine house and the elevator. There he saw a ladder lying on its side, and leaning against the boards that extended from the ground up to the driveway. He indicated that he would use that as his smoking place, and accordingly they passed into the space, crossed over the shaft, and sat down on the ladder. As they sat down, Riordan dropped his cane in such a manner that it passed under the shaft. The shaft was in motion, and was revolving about 160 times per minute. After Riordan had finished smoking, he directed plaintiff to get his cane. In endeavoring to get the cane, plaintiff's clothes were caught by the protruding and practically invisible end of the wire, and he was instantly whirled around with the revolving shaft and knuckle. The outcry caused the man in charge of the elevator to stop the engine as speedily as he could. The plaintiff was frightfully injured, but ultimately recovered, with the loss of one leg at the knee. The sole proposition involved in the case is whether or not defendant is liable, under the facts stated, in damages, for the injury to plaintiff.

The precise principles of law that should measure the liability of the landowner to persons injured upon his lands are difficult of ascertainment. This arises in part from the inherent intricacies of the subject, and in a greater degree from the cirumstances that the facts in nearly every case are so clearly differentiated from the facts in every other case that it has not been possible for courts to establish many general rules governing such cases. More particularly has this been true when, as in this case, the injured person was a child; and, as capacity and responsibility on the part of the injured person are elements that always enter into the consideration of contributory negligence, it follows that with children the age and mental development make it still more difficult to establish general rules. In cases of this class, where the defendant has been held liable, the case of *Lynch* v. *Nurdin*, 1 Q. B. 29, is quite generally cited as an authority in favor of a recovery. On the other hand, and in the interests of landowner defendants, it has been urged that this case is not such an authority, because the injury in that case occurred in the public street, where the injured child had a legal right to go. In that case a horse and cart were left unhitched and unattended in the street, and the plaintiff, a lad seven years of age, climbing upon the cart; another boy led the horse away; and the plaintiff, in attempting to get down, was run over and injured. The owner of the horse and cart was held liable, on the ground of negligence in leaving the horse and cart unhitched, and with no person to take care of it, in a street where children were playing. While it is true that plaintiff was not a trespasser by being in the street, yet he was a trespasser when he climbed upon the cart. In *Railroad Co.* v. *Stout*, 17 Wall. 657, the Supreme Court of the United States, in speaking of *Lynch* v. *Nurdin*, say: "The child was clearly a trespasser in climbing upon the cart, but was allowed to recover." We think that case is a clear authority in favor of allowing a technical trespasser to recover by reason of the negligence of defendant. The case of *Railroad Co.* v. *Stout*, *supra*, was the first of a series of cases now known as the "Turn-

table Cases," wherein railroad companies have been held liable for injuries received by children while playing upon or around turntables by reason of the fact that the turntables were left unfastened and unguarded. Among these cases may be mentioned *Keffe* v. *Railroad Co.*, 21 Minn. 207; *O'Malley* v. *Railway Co.*, 43 Minn. 289, 45 N. W. Rep. 440; *Barrett* v. *Southern Pac. Co.*, 91 Cal. 296, 27 Pac. Rep. 666; *Railway Co.* v. *Measles*, 81 Tex. 474, 17 S. W. Rep. 124; *Railway Co.* v. *Fitzsimmons*, 22 Kan. 686; *Railway Co.* v. *Dunden*, 37 Kan. 1, 14 Pac. 501; *Nagel* v. *Railway Co.*, 75 Mo. 653; *Navigation Co.* v. *Hedrick*, 1 Wash. St. 446, 25 Pac. Rep. 335. All of these cases practically, and some of them expressly, treat the plaintiff as a technical trespasser; and they establish the principle that such a trespasser may recover, although there be no willful act or gross negligence on the part of the defendant. But these cases are *sui generis*. They have for their foundation the assumption that a defendant landowner must know that children will follow their childish instincts and inclinations, and that they are without capacity to clearly discriminate between things that are dangerous and things that are not dangerous; and therefore, if he leave upon his premises a dangerous piece of machinery unguarded and fully exposed, and in a position where it will probably be seen by children, and of a character that would naturally attract and entice children, he must anticipate that children will go around and upon it; and he is therefore bound to use ordinary care to protect these unconscious trespassers from being unnecessarily injured by such dangerous machinery. Nor has the application of this principle been confined to this one line of cases. It was applied in *Birge* v. *Gardner*, 19 Conn. 506, where the injury was produced by a gate; in *Car Co.* v. *Cooper*, 60 Ark. 545, 31 S. W. Rep. 154, where the child was scalded in a pool of hot water; in *Harriman* v. *Railway Co.*, 45 Ohio St. 11, 12 N. E. Rep. 451, where the dangerous object was a signal torpedo; in *Mullaney* v. *Spence*, 15 Abb. Prac. (N. S.) 319, an elevator worked by steam; in *City of Pekin* v. *McMahon*,

154 Ill. 141, 39 N. E. Rep. 484, a deep pit filled with water and floating materials; in *Powers* v. *Harlow*, 53 Mich. 507, 19 N. W. Rep. 257, where the injury was caused by a dynamite cartridge, but there was a question of license in the case also; in *Whirley* v. *Whiteman*, 1 Head, 610, cog wheels outside of a paper mill, but operated by a shaft from within; in *Bransom's Adm'r* v. *Labrot*, 81 Ky. 638, lumber pile; in *Mackey* v. *City of Vicksburg*, 64 Miss. 777, 2 South. 178, where the injury was caused by falling into an excavation made by the city. Many other cases might be cited, but these are sufficient to show the wide diversity of facts to which this principle has been applied. These cases bear upon the case under consideration only in the fact that they establish the principle that a trespasser on land, and who is injured thereon, may, under some circumstances, recover therefor from the landowner, on the ground of the negligence of the latter. But the general ground upon which these recoveries were allowed exclude this case from the operation of the principle. In each case cited, it was held that the landowner placed or created upon his premises a dangerous object or condition, which was attractive to children, and which he had reason to believe would attract children, and which did in fact draw the injured child to it. While the plaintiff in this case is a child, and doubtless subject to the instincts and inclinations of children, and while the evidence tends to show that the place where he was injured was attractive to children, yet it clearly appears that plaintiff was not in fact attracted to the spot, and was not induced to go there by reason of his childish instincts and inclinations. There is another well recognized line of authority under which a trespasser has been permitted to recover. It covers the cases where, after the trespass is known and the danger perceived, the landowner fails to use ordinary diligence to protect the trespasser from injury. See cases cited in note 7, § 1253, Elliott, R. R.; also, *Railroad Co.* v. *Coleman's Adm'r*, 86 Ky. 556, 6 S. W. Rep. 438, and 8 S. W. Rep. 875; *Railway Co.* v. *Wood*, 86 Ala. 164, 5 South. 463; *Bostwick* v. *Railway Co.*, 2 N. D. 440, 51 N. W. Rep. 781. But the

facts in this case likewise exclude it from that line of authority. A trespasser may also recover for injuries inflicted upon him by the wanton or willful acts of the defendant. This is elementary. These classes, generally speaking cover all the conditions under which a trespasser, whether knowingly and willfully such or only technically such, is permitted to recover from the land owner.

It is a fundamental principle of law that "the absolute right of every man to use his own property as he pleases for all purposes to which such property is usually applied, provided he exercises proper care and skill to prevent any unnecessary injury to others, is unlimited and unqualified up to the point where the particular use becomes a nuisance." *Fisher* v. *Clark*, 41 Barb. 329. It is equally true that a landowner owes no duty of protection to a trespasser, at least up to the time when the trespass is known. In other words, he is under no legal duty to keep his premises in such condition that they may be trespassed upon with safety to the trespasser, provided their condition does not unnecessarily invite injury. We think that it is under this proviso that the turntable cases and others of that class must be placed where no question of license is involved. They cannot be placed upon the ground of implied invitation because the attractive object that allured the child, and wrought the injury, was not placed on the premises for the purpose of alluring children, but it was placed there or left there, unfastened or unguarded, with knowledge that it would allure children. We are aware that able courts have very recently refused to follow the principle of the turntable cases. *Frost* v. *Railroad*, 64 N. H. 220, 9 Atl. 790; *Daniels* v. *Railroad Co.*, 154 Mass. 349, 28 N. E. Rep. 283; *Walsh* v. *Railroad Co.*, 145 N. Y. 301, 39 N. E. Rep. 1068.

In this case we neither adopt nor reject the principle of the turntable cases, our object being to show that in no event do they apply to the case at bar. But it is urged that in their general scope they do apply to this case; that the shaft and knuckle could have been boxed or covered at small expense; that exposed they were dangerous, as the accident in this case proves; and

that, as children and tramps were attracted to the spot, defendant was bound to anticipate such an accident, and its failure to guard against it was actionable negligence. But actionable negligence is simply a failure to exercise that diligence and skill that was imposed by some legal duty. In *City of Indianapolis* v. *Emmelman*, 108 Ind. 530, 9 N. E. Rep. 155, it is said: "The first requisite in establishing negligence is to show the existence of the duty which it is supposed has not been performed." And Judge Mitchell says, in *Akers* v. *Railway Co.*, 58 Minn. 544, 60 N. W. Rep. 670: "Actionable negligence is a failure to discharge a legal duty to the person injured. If there is no duty, there is no negligence. Even if the defendant owes a duty to some one else, but does not owe it to the person injured, no action will lie. The duty must be due to the person injured." What duty did this defendant owe to this plaintiff? Let us concede (and no decided case has gone so far) that children *non sui juris* were attracted, not by the dangerous machinery, but by the escape pipe, and that defendant knew they were so attracted, and that the proximity of the escape pipe to the knuckle was such as to endanger the safety of children so drawn to the escape pipe, and as to them defendant owed the duty of covering the knuckle; yet such duty extended only to such children as were drawn to or enticed upon the premises by the dangerous attraction that the defendant had placed or suffered thereon. As to persons who went upon the premises solely for their own convenience, and to subserve their own ends and purposes, no such duty could exist. Defendant had no reasonable cause to anticipate or apprehend that its premises would be thus used by trespassers; and, if defendant owed no duty of protection to such persons, no actionable negligence can be predicated upon its failure to furnish such protection.

That the plaintiff was placed in the dangerous situation by one under whose control he was is his misfortune,—and a most deplorable misfortune it is in this case,—but that fact does not change the defendant's legal duty. Children are liable for their

torts even when committed under the express orders of their parents or guardians. *Scott* v. *Watson*, 46 Me. 362; *Kilpatrick* v. *Hall*, 67 Me. 543; *Smith* v. *Kron*, 96 N. C. 392, 2 S. E. Rep. 533; *Chandler* v. *Deaton*, 37 Tex. 406; *Huchting* v. *Engel*, 17 Wis. 230; *School Dist.* v. *Bragdon*, 23 N. H. 507. The directions of Riordan did not make plaintiff less a trespasser. It does not appear, and is not claimed, that his trespass was known to defendant, or that maintaining the shaft and knuckle in the condition in which they were, in the locality in which they were, was an act of wanton or willful negligence, that manifests an indifference to consequences, or disregard for the property or persons of others. The question of contributory negligence does not enter into this case. None can properly be attributed to plaintiff, nor can actionable negligence be attributed to defendant. The plaintiff's misfortune—and it is indeed a sad one—resulted from one of those accidents for which the law can cast the blame upon no one.

Several errors were assigned upon the rulings upon the evidence. The view of the law as herein expressed renders them all immaterial.

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

(75 N. W. Rep. 919.)

WILLIAM THUET, *et al. vs.* ELMER E. STRONG, *et al.*

Opinion filed May 27th, 1898.

Appeal—Statement of Case Necessary.

No statement of the case ever having been settled in this action, there cannot be any review in this court of findings of fact, with a view to determine whether such findings are sustained by the evidence.

Court Rules—Abstract of Evidence.

Plaintiff's counsel filed in this court a printed volume, labeled "Abstract," which volume embraces more than seventy-five pages of matter which appears to be a mere rescript or translation of stenographic minutes taken at the trial, without an attempt at condensation, as required by a rule of this court. *Held*, that said volume is not an abstract, within the meaning of rule 13 of the amended rules of this court (74 N. W. Rep. VIII., 6 N. D. XX.)

Form of Abstract—Object.

Held, further, that the statute and rule of court which respectively regulate and prescribe the form of a statement of the case, and of the abstract thereof, to be filed in this court, are primarily designed to assist this court in sifting out and deciding the issues in causes brought to this court for review.

Counsel Cannot Waive Statute.

Held, further, that the action of this court with respect to a review of a case cannot be controlled by counsel who, in a given case, see fit to ignore the statute and rules of court governing the settlement of statements of the case and the preparation of abstracts.

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

Action by William Thuet and others against Elmer E. Strong and others. Judgment for plaintiffs, and defendants appeal.

Affirmed.

Fredus Baldwin, for appellants.

S. E. Ellsworth, for respondents.

WALLIN, J. This action is brought to recover upon a promissory note made payable to the plaintiffs, and executed and delivered to the plaintiffs by the defendants. The action was tried to the court without a jury in the month of July, 1897, and is consequently governed, with respect to its procedure, by section 5630 of the Revised Codes, as amended by chapter 5 of the Session Laws of 1897. The trial court made numerous findings of fact, and, as a conclusion of law thereon, found that a certain sum was due plaintiffs from defendants on said note, and directed that a judgment be entered therefor, whereupon the court entered judgment pursuant to such findings. From said judgment defendants appeal to this court.

An inspection of the record certified to this court by the Clerk of the District Court demonstrates that no statement of the case in this action was ever settled, allowed, or signed by the trial court. Neither does the printed book, labeled "Abstract," filed in this court by the appellants' attorney, embrace a suggestion that a statement was ever settled below. It must follow, in this condition of the record, that there is not, and cannot be, any

specification in the record pointing out wherein any of the findings of fact are not justified by the evidence; nor is there found in the record transmitted to this court any evidence or testimony whatsoever which has been officially certified to by the court below as the evidence or testimony introduced at the trial of the action. The amended statute regulating the procedure recognizes and preserves the provision of section 5630, Revised Codes, requiring the appellant to cause a statement of the case to be settled as prescribed by article 8 of chapter 10, sections 5462–5470, of the Revised Codes. To be available to the appellant for the purpose of reviewing the evidence, such statement must, of course, embody a specification of the questions of fact which the appellant desires the Supreme Court to review. An examination of the findings of fact discloses that the conclusion of law, and the judgment based thereon, are fully justified by the findings. The printed volume, labeled "Abstract," which has been already mentioned, consists of upwards of 75 pages of matter which appears to be a rescript of the stenographer's notes taken at the trial of the action; including all proceedings had at the trial, and embracing questions of counsel addressed to witnesses, the testimony, the rulings of the court, and exceptions thereto. Much of the matter so printed is wholly worthless, and irrelevant to any issue in the case; and no attempt whatever has been made, in printing this volume, to eliminate useless matter, or to condense that which is pertinent by reducing the same to a narrative form. It is obvious that there can properly be no abstract of a statement made in an action in which no statement was ever settled. The former presupposes the existence of the latter. But, aside from this fundamental objection to the printed volume filed in this court in the case at bar, there are other reasons why said volume cannot be considered in this court. When regarded as an abstract, it flagrantly violates both the statute and rule of court which taken together regulate and prescibe the form in which the proceedings had and evidence taken at a trial shall be preserved and presented to this court. Referring to the preparation of a

statement of the case, the statute declares, "Only the substance of the reporter's notes of the evidence shall be stated." Revised Codes, § 5467. With respect to abstracts of the statement of the case, a rule of this court declares, "A stenographic report of the trial if settled and allowed does not constitute a bill of exceptions or a statement of the case within the meaning of the law and will not be so regarded by this court." Rule 13, Amended Rules of the Supreme Court, 6 N. D. xx., 74 N. W. Rep. viii. The primary object of the court rule which requires the preparation and filing of an abstract in a prescribed form is to aid this court in sifting out the true issues involved in a controvery. Counsel will not be permitted to defeat the purpose of the rule by amicable arrangements between themselves. Counsel have no more right to stipulate that the matter preserved by the stenographer shall not be condensed in the statement or abstract than they have to agree that neither a statement nor an abstract shall be used in a particular case. Serious consequences highly detrimental to public interests would certainly result from such a slipshod practice. In the case at bar counsel for respondents has ignored the fact that neither a statement nor an abstract exists in the record of the case which is presented to this court for its examination. This case therefore affords an opportunity to say that statements and abstracts thereof are chiefly designed to aid this court in the investigation of causes brought before it for review, and that counsel will not be permitted to set aside these valuable provisions at their discretion. This case will be disposed of upon the grounds already stated, but we are glad that we are able to make the further statement that a perusal of the printed volume above referred to has sufficed to satisfy us that the case was properly decided by the trial court.

The judgment will be affirmed. All the judges concurring.

(75 N. W. Rep. 922.)

Q. W. LOVERIN-BROWNE CO. *vs.* BANK OF BUFFALO.

Opinion filed May 27th, 1898.

Agency Not Proved by Declarations of Agent.

An agency cannot be established by proof of any statements or acts of the alleged agent, unless the same were brought to the knowledge of the alleged principal, and not repudiated by him.

Incompetent Proof of Agency.

The testimony by which defendant sought to establish agency in this case examined, and *held* to present no competent evidence of agency.

Amendment of Pleadings—Discretionary.

The allowance or rejection of amendments to pleadings is a matter resting largely in the discretion of the trial court, and its action should not be reviewed by an appellate court except in clear cases of abuse of discretion.

Excessive Verdict—Excess Remitted.

Where by inadvertence a verdict has been directed for a few dollars more than was proper, the appellant cannot raise the point for the first time in this court. But, where the respondent voluntarily offers to remit the excess, such remittance will be ordered, and the judgment modified and affirmed, at the cost of the appellant.

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

Action by the Q. W. Loverin-Browne Company against the Bank of Buffalo. From a judgment entered on a verdict directed for plaintiff, defendant appeals.

Affirmed.

J. W. Tilly and *S. G. More*, for appellant.

Morrill & Engerud, for respondent.

BARTHOLOMEW, J. Defendant bank appeals to this court from a directed verdict against it. The plaintiff corporation is a wholesale dealer in groceries at Chicago. On February 20, 1896, defendant received from plaintiff a telegram which read: "We guaranty payment of fifty dollars to C. E. Birdsall." The next communication between the parties was a letter from plaintiff to the defendant dated April 6, 1896, which reads as follows: "At the request of Mr. Birsdall, who says he has arranged with you,

we hand you herewith a bill for collection: C. E. Birdsall, Enderlin, No. Dak., $969.79, net. Mr. Birdsall will settle with you for your charges for collection. The delivery is at Enderlin, Apr. 10th; and we suppose Mr. B. has explained that the goods are sold to different farmers around Enderlin, who will come in and get goods and pay at depot on above date. You can send a man over there, and have him collect from Birdsall, who will deliver goods to customers and collect for them." Four days later plaintiff sent another letter to defendant, which reads: "We herewith inclose a bill for collection: C. E. Birdsall, Davenport, N. Dak., $844.18, net. This delivery is at Davenport, Apr. 15th. Mr. Birdsall will settle for collecting the same as on previous collection to Enderlin." These collections were promptly made and remitted, and their receipt in full is acknowledged by plaintiff on April 21st. Other similar collections followed, including one for goods to be delivered at Ada, Minn. In remitting for that collection the defendant wrote plaintiff as follows: "Inclosed, we send you N. Y. draft for $194.43. We furnished your Mr. Birdsall team, harness, buggy, and money to the amount of $330. He told us that his livery bill was so high that his expenses run up so that he was unable to make anything, and that you would be perfectly satisfied with the deal, and I think myself that it will be a good thing for him; for in harvest time, through this country, it is almost impossible to get a livery rig at any reasonable figure. Our collector received from the Ada collection $524.43; our bill against Mr. Birdsall, $330; draft to balance, $194.43. Trusting this will be satisfactory to you, as we understand from Mr. Birdsall it will, and also from telegrams we have received from you, we are, very truly, yours." On same date defendant wrote to Mr. Birdsall as follows: "I have today sent Loverin & Browne Co., a draft for $194.43. When Mr. Casey returned, and told me that you had got rid of the team I sold you, I thought it better to square up the account, as no doubt you would wish it yourself, and rather deal directly with the house than to have the matter stand open between the three of us. I

charged you $50 for the Lee mare; $200 for the rig that you took away; $24 for Casey; $20 cash; $36 in note,—making in all $330. I inclose you copy of letter sent to the house." The plaintiff promptly responded, denying all agency on the part of Birdsall, and all liability for any property purchased by him or accounts made by him in the capacity of agent, and demanded a remittance of the balance collected. Defendant refused to account for such balance, except as by its letter of June 5th, and plaintiff brought this action in November following to recover the balance in defendant's hands. In its answer, defendant alleges, on information and belief, that said Birdsall was the agent of plaintiff engaged in soliciting orders and selling goods for plaintiff, and was generally authorized by plaintiff to attend to its business in that line, and do all things for and in plaintiff's name in furtherance of that agency, and then declares that in May, 1896, at the solicitation and request of Birdsall, defendant sold and delivered to him a team, harness and buggy, and advanced him certain moneys, for and on behalf of plaintiff, with which to prosecute and attend to plaintiff's said business, in all of the value of $330; that said team was purchased by Birdsall on account of plaintiff, and as its agent, and procured said advances for plaintiff as its agent duly authorized, "and then and there agreed that plaintiff should and would pay defendant therefor; and the said Birdsall then and there further agreed to pay defendant said sum of $330 therefor out of the first moneys realized and received by him from the sale of plaintiff's said goods." On the trial plaintiff's general manager and plaintiff's bookkeeper testified, in substance, that Birdsall never was the agent for plaintiff, or authorized to act for it in any way; that plaintiff sent him a price list at which it would furnish goods to him; that he sold the goods at such prices as he saw proper; that when he had taken orders for goods he would send them to plaintiff, and plaintiff would fill the orders, and send the goods to such point as he might direct, when he would deliver the same to his customers, being responsible to plaintiff only for the price-list price thereof. Defendant sought

to prove certain statements and acts of Mr. Birdsall as showing agency. This evidence was excluded on objection, and as it was not shown that such statements or acts were ever brought home to, or in any manner adopted by, plaintiff, the ruling was clearly right, on plain principles. Likewise the fact, if it were a fact, that plaintiff paid a certain livery bill incurred by Birdsall, was incompetent to establish agency. Defendant relies upon the telegram of February 20th, and the letters of plaintiff of April 6th and 10th, as sufficient to warrant it in regarding Birdsall as plaintiff's agent. By what process of reasoning it could have been supposed that such documents recognized him as an agent authorized to purchase a team, buggy, and harness, we cannot understand. As a matter of fact, they did not recognize him as an agent for any purpose. By the telegram the plaintiff made itself guarantor for Birdsall. That presupposed a primary liability on Birdsall's part, and notified the bank that it must deal with Birdsall as a principal, and with plaintiff as a guarantor, so far as the matter stated in the telegram was concerned. The statement in the letters specially relied upon is the declaration that Birdsall would settle with defendant for its collection charges. It is claimed that this was a notification to defendant that plaintiff had arranged with Birdsall to pay such charges for it. On the contrary, it was a notification to defendant that it must look to Birdsall alone for the payment of such charges, and that plaintiff would not be liable therefor. The collections sent to defendant were stated at so many dollars, "net." Plaintiff did not concern itself about the amount of collection fees. It demanded so much money, net. That this was fully understood and acted upon by the defendant is shown by the fact that the exact amount of the Enderlin and Davenport collections was collected and remitted.

Near the close of the trial the defendant made an offer of testimony, the main features of which were as follows: That during February and March, 1896, Birdsall was hiring livery teams from one Buckley with which to prosecute the business of

selling groceries for plaintiff, and that plaintiff authorized Buckley to deal with Birdsall, and guarantied the bills, and further that, after the Ada delivery of goods, Birdsall telegraphed plaintiff for money with which to pay his other expenses and prosecute his business, and that plaintiff telegraphed $50 to Birdsall for that purpose; that during all the time that Birdsall was dealing with defendant he claimed to be the general agent for plaintiff, and that he had a right to purchase the team; that plaintiff was behind him, and would make good any transaction that he entered into on that behalf; that, at the time defendant sold said team to Birdsall for his principal, he assured defendant that plaintiff would pay for the property, and that, if they did not do so, he would, and that defendant should receive its money out of what money he collected at Ada; that after Birdsall collected the money at Ada he paid defendant $330 on the property and money advanced, and gave defendant $194.43 to be sent to plaintiff; that all the goods shipped to the various points were shipped direct to Birdsall; and that he received and receipted for the same, and delivered the goods and collected the money therefor, and delivered such part thereof as he saw fit to defendant, to be forwarded to plaintiff. This offer was objected to, so far as it is sought to establish agency, because incompetent, and so far as it sought to show payment to defendant by Birdsall, because not admissible under the answer. These objections were sustained, and defendant then asked leave to amend its answer to correspond with the proof offered. This was refused, and defendant earnestly urges in this court that such refusal was reversible error. We think not. The allowance of amendments, particularly at that stage of the case, and raising practically a new issue, rests largely in the discretion of the trial court,—a discretion which an appellate court should never control, except in clear cases of abuse. 1 Enc. Pl. & Prac. 524, *et seq.* It would be doubtful practice in any case to allow an amendment to correspond with proofs offered and rejected. In this case no amendment was presented, and the offered proof was squarely

contradictory in itself. A portion of it sought to establish Birdsall's agency, and hold plaintiff on its contract by such agent. A portion of it sought to establish that Birdsall paid defendant $330 out of the Ada collection from his own money, in payment of his own debt contracted in his own behalf, and that he only paid defendant $194.43 for plaintiff. Counsel urges that inasmuch as plaintiff's testimony tends to show that no agency existed, and that Birdsall was acting for himself, defendant had a right to plead and prove that the Ada collection was turned over to and received by it, not as the money of plaintiff, but in payment of Birdsall's debt. Undoubtedly that might have been pleaded at the proper time if such were the fact. But it came too late, and there was no excuse for the delay. At once, when the disposition made of the Ada collection was reported, plaintiff repudiated it, and denied Birdsall's agency; and in a somewhat extended correspondence that followed, all of which is in evidence, Birdall's relations to plaintiff were clearly explained. The case had been at issue for more than a year on the old pleadings. All of plaintiff's testimony had been taken by deposition, and had been on file in the case for more than six months. Birdsall, the only party could contradict the statement, was not present. There was nothing in the issues as they had stood for more than a year to require his presence. Moreover, the letter written by the bank to Birdsall on June 5, 1896, and hereinbefore set out, is utterly inconsistent with the theory that Birdsall paid defendant any money from the Ada collection on his own account. Further in its letter to plaintiff of same date the bank expressly states, "Our collector received from the Ada collection $524.43," which plaintiff could only understand to mean that the bank had received on the collection sent it for the goods shipped to Ada the sum named. There was no abuse of discretion in refusing to allow the amendment.

The court directed a verdict for $337.15, with interest at 7 per cent. from June 5, 1896, amounting to $372.50. The direction should have been for a verdict of $330, with interest at 7 per cent.

from June 5, 1896, amounting to $364.85. Respondent concedes this to be true, and offers to remit the sum of $7.65. The general rule is that where a remittitur is entered on appeal the judgment will be affirmed, but at the costs of the party entering the remittitur. Elliott, App. Proc. § 573. But it is there stated that the rule has its exceptions, and we think this should be one. So far as the record discloses, this discrepancy was never called to the attention of the trial court, or of respondent's counsel. True, appellant excepted to the ruling of the court in directing a verdict, but the exception was not based upon the amount of the verdict. It was simply upon the general ground that under the evidence the defendant has a right to go to the jury. Certainly, in the absence of any showing of any effort to correct the error below, we cannot assume that appellant was forced to come to this court to correct such error. Indeed, upon authority, he could not, as a matter of right, have it corrected in this court. In *Morris* v. *Peck*, 73 Wis. 482, 41 N. W. Rep. 623, and *Mahon* v. *Kennedy*, 87 Wis. 50, 57 N. W. Rep. 1108, it was ruled that in case of an inadvertent mistake of this kind the point could not be raised for the first time in the appellate court. But, as respondent voluntarily offers to remit, a formal remittitur will be filed in the District Court for the sum of $7.65, as of the date of the verdict in the case. We must not be understood as holding that this court has the power, in any case submitted to a jury for a general verdict, to order absolutely that the respondent remit any portion thereof, where either party objects to such remittitur. That question is not involved in our ruling. With the modification herein directed, the judgment of the District Court is affirmed, with costs of this appeal to plaintiff. All concur.

(75 N. W. Rep. 923.)

WILLIAM DEERING & CO. *vs.* JOSEPH VENNE.

Opinion filed May 27th, 1898.

Justice's Court—Waiver of Service of Summons.

Where counsel for defendant in an action pending in a Justice's Court, who does not appear specially, appears on the return day, and in open court stipulates orally with counsel for the plaintiff for an adjournment of the hearing of the case to a time agreed upon between counsel, and thereupon the court enters in its docket an order embracing the stipulation and adjourning the case to the time agreed upon, *held*, that such action constitutes a voluntary appearance in the action on the part of the defendant, and operates as a waiver of any defects in the summons or its service.

General Appearance Gives Jurisdiction.

Section 6635, Revised Codes, construed. *Held*, where an action has been commenced by issuing a summons and is pending, the defendant named in the summons may appear generally in such action, and by such appearance will give the court jurisdiction of his person, and this without pleadings being filed by either party.

Action May be Commenced Without Service of Summons.

Held, further, that said section authorizes an action to be commenced before a justice of the peace by the mere appearance and pleading of the parties without the issue of a summons.

Invoking Jurisdiction is a Submission Thereto—Appeal—Effect.

Revised Codes, sections 6771, 6779, construed. Said sections do not authorize an appeal from a Justice's Court to the District Court to be taken upon questions of law alone. Section 6779 provides "that the action shall be tried anew in the District Court in the same manner as actions originally commenced therein." Accordingly *held*, where a defendant seeking to dismiss an action upon the ground of nonservice of the summons upon him appeals to the District Court, and states in his notice that the appeal is taken on questions of "law alone," that defendant, by such appeal, invokes the authority of the District Conrt to hear and determine the merits, and thereby submits himself to the jurisdiction of the District Court.

When District Court May Acquire Jurisdiction by Appeal.

Held, further, on such appeal, that it is error in the District Court to dismiss the action upon the ground that the justice before whom the action originated never acquired jurisdiction of the person of the defendant. In such case the District Court would acquire jurisdiction independently and by virtue of the appeal, whether the justice did or did not have jurisdiction.

Appeal from District Court, Pembina County; *Sauter*, J.

Action by William Deering & Co., against Joseph B. Venne.

Judgment for plaintiff in the Justice Court was reversed on appeal to the District Court, and judgment entered for defendant. Plaintiff appeals.

Reversed.

Lewis T. Hamilton and *H. C. Preston*, for appellant.

An appearance for any other purpose than to question the jurisdiction of the court is general and gives the court jurisdiction of the person. Section 6635, Revised Codes; *St. Louis Car Co.* v. *Stillwater Street Ry. Co.*, 54 N. W. Rep. 1064. Any step which invokes the action of a justice in his official capacity by either party, is an appearance such as will waive any objection to jurisdiction over the person of the moving party. *Hawkins* v. *Taylor*, 35 Am. St. Rep. 82; *Stevens* v. *Harris*, 58 N. W. Rep. 230; *Norberg* v. *Heinnan*, 26 N. W. Rep. 481; *Thompson* v. *M. M. B. Association*, 18 N. W. Rep. 249; *Railroad Co.* v. *R. Co.*, 63 N. Y. 176; *Handy* v. *Ins. Co.*, 37 Ohio St. 366; *Jones* v. *Andrews*, 10 Wall. 332; 1 A. and E. Enc. L. 182. A continuance by agreement, waives the question of jurisdiction. *Baisley* v. *Baisley*, 21 S. W. Rep. 29; *Ashpach* v. *Ferguson*, 32 N. W. Rep. 249; *Von Hesse* v. *Mackaye*, 8 N. Y. Supp. 894; *Waldron* v. *Palmer*, 62 N. W. Rep. 731; *Facey* v. *Fuller*, 13 Mich. 527; *Hercules Iron Works* v. *Ry. Co.*, 30 N. E. Rep. 1050; *Layne* v. *Ry. Co.*, 14 S. E. Rep. 123; *Mahaney* v. *Kephart*, 15 W. Va. 619. An appearance to quash a summons because of a defect in the service, must be limited to that purpose alone, otherwise it is general. *Bucklin* v. *Strickler*, 49 N. W. Rep. 371; *Crowell* v. *Galloway*, 3 Neb. 215. The rule is that when a party seeks to take advantage for want of jurisdiction he must object on that ground alone, and keep out of court for every other purpose. Where the moving party asks relief upon the hypothesis that the court has jurisdiction of the cause and person, this is a submission to the jurisdiction. *Blackburn* v. *Sweet*, 38 Wis. 580. His appeal from the whole of the judgment that embraced the merits of the action, constituted a general appearance. *Dikeman* v. *Mortek*, 45 N. W. Rep. 118.

John D. Stack, for respondent.

It is apparent that the adjournment taken was for the purpose of reducing to writing defendant's objections under his special appearance, this was not a waiver of the point. *Nelson* v. *Campbell*, 24 Pac. Rep. 539; *Downing* v. *Grow*, 36 Pac. Rep. 335.

WALLIN, J. This action originated in a Justice's Court. A summons issued on the 11th day of February, 1896, returnable on the 15th day of the same month, and was delivered to a constable for service. It was returned without being served upon the defendant, with an indorsement thereon to the effect that the defendant was absent from said county. On the return day the justice issued a second summons for publication, under the authority conferred by section 6443 of the Revised Codes. On the return day named in the second summons certain proceedings were had in the action the nature of which are best explained by the entries made in the justice's docket, which are as follows: "This is an action brought to recover sixty-four dollars and seventy-one cents and interest on a promissory note. Summons issued this 11th day of February, 1896. Affidavit for attachment and undertaking filed this 11th day of February, 1896, and warrant of attachment issued, summons returnable February 15th, 1896, at 10 o'clock A. M. February 15, 1896, at 10 o'clock A. M., the time set for trial, plaintiff appears by counsel, D. J. Laxdal, who files complaint and affidavit for second summons for publication; the returns of the officer showing that the defendant cannot, after diligent search and inquiry, be found in the County of Pembina, North Dakota. A second summons is accordingly issued directing the defendant to appear at 10 o'clock A. M., March 14, 1896. March 14, 1896, the hour set for trial, J. D. Stack appearing for defendant and D. J. Laxdal for plaintiff, and by consent of parties case adjourned until 1 o'clock P. M., this date. One o'clock P. M., the hour adjourned to, case opened, J. D. Stack appears specially, and files special objections to the jurisdiction of the court herein. Complaint in this case presented this 14th

day of March, 1896, by D. J. Laxdal. To my knowledge, said complaint has not before this time been among the papers in this case, and I cannot say whether I have ever seen the same or a copy thereof. The docket showing complaint filed in action and a verification of a complaint appearing among the papers herein filed, the court is of the opinion that a complaint was filed herein on February 15, 1896. Second summons and affidavit of publication filed. Special objections made by J. D. Stack overruled by this court, no answer being filed, and plaintiff having filed the note sued upon in this action (as Exhibit B;) and upon motion of D. J. Laxdal, attorney for plaintiff, it is hereby ordered and adjudged that plaintiff have and recover judgment against the defendant, J. B. Venne, for the sum of eighty-six dollars and seventy-one cents, debt and damages, and the costs and disbursements of this action, amounting to twenty-six dollars and eighty-five cents, making a total judgment of one hundred and thirteen dollars and fifty-six cents, and that the proceeds of the property herein attached be applied on this judgment as prayed for in the complaint. March 14, 1896. H. E. Pratt, Justice of the Peace."

The special objections to the jurisdiction of the court filed by defendant's counsel, and referred to in the docket entry, consisted of a series of objections to the jurisdiction of the justice over the person of the defendant, based upon alleged defects in the proceedings had to obtain service of process. The objections were overruled by the justice. In the view we have taken of the case, it will be unnecessary to determine whether the grounds of the objections filed with the justice were or were not valid. From the judgment as entered by the justice the defendant appealed to the District Court, and in his notice of appeal stated "that the said appeal is taken upon questions of law alone, and from the whole of said judgment, and appellant relies upon errors of law as disclosed by the records." In the District Court a motion was made in plaintiff's behalf for a judgment in its favor on the pleadings, upon the ground that the defendant had filed no answer or demurrer in the action. This motion was

denied. Whereupon defendant's counsel made a motion to dismiss the action, concerning which the record is as follows: "The defendant, J. B. Venne, appears specially by his counsel, J. D. Stack, for the purpose of urging the special objection and and exceptions to the jurisdiction of the court as shown by the records of the justice of the peace before whom the case was tried, and said counsel especially limits his appearance to said objections and exceptions and the matter therein stated, and appears herein for no other purpose whatever. J. D. Stack, Attorney for Defendant." This motion was granted, and, pursuant to the order of the District Court, a judgment was entered dismissing the action, with costs in favor of the defendant. From this judgment, plaintiff has appealed to this court.

In this court the discussion of counsel centers upon a single inquiry, namely, whether jurisdiction of the person of the defendant was acquired by the justice of the peace. It is nevertheless obvious that if the District Court had, in any manner, acquired such jurisdiction before it entered its judgment of dismissal for want of jurisdiction, such judgment was erroneous, and must be reversed. We are clearly of the opinion that such jurisdiction existed in the District Court. In our opinion, this view may be sustained upon either of two independent grounds, *i. e.*: Upon the ground of a voluntary general appearance of the defendant in the action by counsel in the Justice's Court; secondly, upon the ground that the action was removed to the District Court by an appeal to that court under the provisions of the Revised Codes. It is a well established rule of practice that a voluntary appearance by a defendant entered in an action pending in a court of original jurisdiction, unless such appearance is made specially for the purpose of attacking jurisdiction, is in itself a confession that the court has jurisdiction of the person of the defendant. This rule has been recognized by the legislature and especially made applicable to Justices' Courts. Revised Codes, section 6635, reads: "An appearance for any purpose (except to interpose or maintain an objection to the jurisdiction assumed

under the process) is a voluntary appearance." Counsel for respondent contends that the first sentence of this section shows that, unless the parties plead in the action as well as appear therein, no action can be commenced. Hence, as he argues, no appearance can be made in any such action. This position would be correct in a case where no action is commenced by the issue or service of a summons. Under the statute in such case, in lieu of any summons, the legislature has permitted litigants to institute an action by a voluntary appearance before the magistrate, followed by pleadings interposed on both sides.

But in the case at bar there was an existing action which had been commenced in the usual and statutory mode of commencing actions, viz. by the issue of a summons. Rev. Codes, section 6635. The action being instituted, and then pending, the defendant, by his counsel, made a voluntary appearance therein, and such appearance was not made specially for the purpose of assailing the jurisdiction of the justice. Counsel, being before the court on the return day, orally entered into a stipulation with respect to the matter of adjourning the hearing of the case to a time which was mutually satisfactory to counsel. Upon this stipulation proceedings were taken by the court by ordering an adjournment of the hearing of the case to said time, and thereupon the court, in due form entered in its docket such order, embracing the stipulation upon which it was based. This was a voluntary appearance of the defendant in the action, unguarded by a special appearance, and operated, under the rule of practice we have mentioned, as a concession of jurisdiction over the person of the defendant. After such appearance the special appearance attempted to be made by defendant's counsel came too late. The attitude assumed by the attempted special appearance was that of a stranger to the action seeking to deny that he was a party to the action. This attitude was entirely inconsistent with his former relation to the action in which the defendant had obtained a privilege which is accorded only to a party, viz. that of entering into a stipulation with opposite counsel, and procur-

ing an order of court in the action, which order subserved the convenience of the defendant with respect to a subsequent proceeding in the action. The privileges of a party in an action cannot be accorded to a mere stranger who has never acquired the status of a party. The act of entering into a stipulation with the opposite counsel, and procuring an order of adjournment or other order of the court affecting the proceedings in the action, without qualifying the act by a special appearance, has uniformly been held to constitute a voluntary appearance. See *Waldron* v. *Palmer*, (Mich.) 62 N. W. Rep. 731; *Auspach* v. *Ferguson*, (Iowa) 32 N. W. Rep. 249; *Blackburn* v. *Sweet*, 38 Wis. 579; *St. Louis Car Co.* v. *Stillwater St. Ry. Co.*, (Minn.) 54 N. W. Rep. 1064; *Mahany* v. *Kephart*, 15 W. Va. 609; *Hercules Iron Works* v. *Elgin, J. & E. Ry. Co.*, (Ill. Sup.) 30 N. E. Rep. 1050; *Baisley* v. *Baisley*, (Mo. Sup.) 21 S. W. Rep. 29. Mere technical objections, which tend to defeat rights, are not to be encouraged. *Bucklin* v. *Strickler*, (Neb.) 49 N. W. Rep. 371.

The appeal to the District Court was taken under the provisions of Revised Codes, section 6771, *et seq.* Section 6771 provides that "the appeal is taken by serving the notice of appeal on the adverse party or his attorney," etc. It will be observed that this section does not prescribe the form of the notice, nor in any way indicate the questions which are to be presented to the appellate court. These omissions of the statute are significant in construing the same, in view of the fact that the former statute regulating appeals, and which was superseded by the Revised Codes, did prescribe in terms the character and functions of a notice of appeal. The former statute was mandatory, and required the appellant to state in his notice whether the appeal was taken on questions of law or fact, or both. Compiled Laws, section 6129. Under *Id.* section 6131, the appellant had an election either to demand or not demand a new trial in the District Court, and the character of the trial in the appellate court was determined by the terms of the notice of appeal. All of these provisions were swept away by the revisors of the codes.

The law in force when the appeal was taken in the case at bar not only did not, in terms, permit an appeal to be taken to the District Court on questions of law alone, but it stated in plain terms that the action should be "tried anew in the District Court in the same manner as actions commenced therein." Revised Codes, section 6779. When construed with reference to the pre-existing law regulating appeals, the conclusion is irresistible that the Revised Codes did not authorize or allow an appeal to the District Court upon questions of law alone. The appellant is chargeable with notice of the provisions of the statutes which were in force when the appeal was taken, and hence will be presumed to have known when he took the appeal that the action would be tried anew in the District Court, and could not be otherwise tried in that court. Under such circumstances, the defendant, by the appeal, must be held to have invoked a trial anew upon the merits of the case. By so doing, the defendant necessarily submitted to the jurisdiction of that court over his person, and thereafter could not be heard to deny that he was a party to the action. In this case the appeal was from the whole judgment. See *Dikeman* v. *Mrotek*, (Wis.) 45 N. W. Rep. 118.

Upon these considerations it follows that the District Court was in a position to try the action on the merits, and hence it was error to dismiss the same. 2 Enc. Pl. & Prac. 614, note 2. The right of appeal is a statutory right, and being such, it is competent for the legislature, not only to regulate the matter of appeals, but to deny the right for some purposes, and confer it for others. With the expediency of any such legislation the courts have nothing to do. A party is not, however, remediless in a case where no appeal is allowed. A judgment entered without jurisdiction may be attacked in various ways. The most usual mode is to resort to the writ of *certiorari*. This writ will be available in a case where no appeal is allowed, and where the law affords no other plain, speedy, and adequate remedy. Revised Codes, section 6098.

we are powerless to do so because of the fact that the plaintiffs waived findings of fact, and have brought the case before us on the original judgment roll, without settling a statement of the case. We do not consider that section 5630, Revised Codes, applies to this case at all. The plaintiffs do not seek to have retried an issue of fact, but merely to obtain that judgment which, upon the face of the pleadings, they are entitled to, and which the District Court should have rendered in their favor. The statute referred to proceeds on the theory that there are issues to be relitigated in the appellate court. But in this case there is no issue. Whatever other averments the answer may contain, the fact remains that it admits that the tax was originally void, or, at least, was extinguished, before the proceedings were taken to enforce it. The defendants concede by their pleadings that plaintiffs are entitled to the relief they ask. Of what use to us in making final disposition of such a case would findings of fact or evidence be? But it is suggested that the answer may have been amended. If so, the record would disclose the fact. No amended answer appears in the judgment roll, nor is there found therein any order allowing an amendment of the answer. It is the business of a suitor who has amended his answer, if he wishes to sustain a judgment in his favor, to show that a fatal admission in his original answer has been withdrawn; and that he can show only by incorporating in the judgment roll the amended answer, or at least, the order which authorized the amendment, showing the nature thereof. The case is not different from what it would be were findings of fact and a statement of the case before us, the statement showing the same admissions of fact which are contained in the answer. Under the pleadings, there was no issue of fact to be tried, under section 5630, in the District Court, and there is no such issue to be tried thereunder in this court. It is merely a case in which the defendants have by their answer deliberately asserted that there is no issue of fact which they desire to try. Of what avail, then, is it for them to insist that the case cannot be tried anew in this court? The District

Court will modify its judgment by striking therefrom that portion which orders a judgment to be entered against the plaintiffs for the taxes and interest, and as modified it will be affirmed. All concur.

(75 N. W. Rep. 903.)

GRAND FORKS LUMBER & COAL CO. *vs.* E. C. TOURTELOT.

Opinion filed June 1st, 1898.

Written Contracts—Statute of Frauds.

The rule that a written contract supersedes all prior and contemporaneous negotiations and stipulations between the parties applies only to the specific matter embraced in the contract.

Documentary Evidence of Partially Performed Oral Contract.

When the making of a parol contract was in issue, and on plaintiff's theory the contract had been made and partly performed, documentary evidence of such partial performance was relevant as tending to show the making of the contract.

Original Promise to Pay the Debt of Another.

The promise of one party to pay a second party for goods delivered by such second party to a third party is an original promise, and not within the statute of frauds. Parting with the goods, furnished the consideration to support the promise.

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

Action by the Grand Forks Lumber & Coal Company against E. C. Tourtelot. Judgment for plaintiff, and defendant appeals. Affirmed.

Burke Corbet, for appellant.

Bosard & Bosard, for respondent.

BARTHOLOMEW, J. We find no reversible error in this case. The action was for a balance due for fuel delivered by plaintiff to the Dual City Gas Company, but for which it was alleged that the defendant promised and agreed to pay. There was no contest over the delivery of the fuel, but defendant denied any promise

to pay. The jury found against him, and, a new trial being refused, he appeals to this court. The case shows that the defendant was receiver of an insolvent bank, to which the Dual City Gas Company was indebted. It appears that the gas company had reached a point where it found it difficult, if not impossible, to continue business, by reason of its inability to meet its running expenses. In August, 1896, defendant had a conversation with Mr. Twamley, who was the president of the gas company, relative to its expenses. The gas company was then, and had been, purchasing fuel from plaintiff, but plaintiff had refused to deliver any more fuel unless satisfactory arrangements as to payment were made. The gas company at that time also required a car load of naphtha. After their matters had been talked over, a written contract was drawn up by which the gas company agreed at the end of each month to turn over to defendant its bills due from its customers for gas, and defendant agreed to pay for a car load of naphtha. Nothing was said in such written contract about procuring or paying for fuel. The naphtha was delivered, and defendant paid for the same.

Errors are assigned and argued upon the rulings relating to testimony. It was urged that no parol contract or agreement on the part of defendant to pay for the fuel could be shown, because after the conversation between defendant and the president of the gas company a written contract was signed wherein defendant agreed to pay only for the naphtha, and did not agree to pay for the fuel. It is sought to apply the familiar rule that all prior parol statements and negotiations are superseded by the written contract, which is conclusively presumed to express the entire contract between the parties. But this is true only as to the particular matter contained in the contract. Revised Codes, section 3888. That defendant agreed in writing to pay for naphtha furnished to the gas company by an entirely distinct party certainly did not preclude plaintiff from proving that defendant at the same time agreed by parol to pay it for fuel furnished to such gas company. The two transactions were entirely

separate. When the objection was taken at the trial the court stated that he would allow plaintiff to prove, if it could, an independent parol agreement, and certainly that was plaintiff's right. 17 Am. and Eng. Enc. Law, 443, and notes. It was claimed that this parole agreement was made about the last of August, 1896, and it is undisputed that the defendant paid the bills for fuel furnished to the gas company by plaintiff for the months of September and October following. It is also undisputed that defendant refused to pay for the fuel furnished from November 1st to December 19th. On this latter date the manager of plaintiff had a conversation with defendant, wherein he agreed to pay for the fuel that he might order from time to time, and thereafter he paid the bills for fuel as furnished on presentation. The action was to recover for fuel furnished from November 1 to December 19, 1896, except one load subsequently furnished, and inadvertently charged to the wrong party. When the manager of plaintiff was on the stand he was permitted to identify the bills for September and October, and they were introduced in evidence. There was no error in this. It was not an effort to prove a disconnected, and therefore irrelevant, fact of a similar nature. The principal issue in the case was whether or not defendant did agree to pay the bills for fuel furnised. Plaintiff claimed that he did so agree late in August, 1896, and that no other agreement was made until December 19, 1896, and the fact that he paid the bills for September and October certainly had a tendency to establish such a contract, because parties do not generally pay for goods furnished to third parties unless under some contractual obligation to do so. The matters sought to be shown were in no sense collateral. But the manager was also permitted to identify the bills rendered and paid after December 19th. This certainly had no tendency to establish the prior parol contract, as both the manager of plaintiff and the defendant testified to the contract of December 19th, and that all bills paid thereafter were paid under such contract. That being the case, it is too clear for question that defendant could not have

been prejudiced by the identification and introduction of such bills.

There is but one other point raised on the testimony that we shall notice. It is urged that it was sought to establish a parol promise to pay the debt of another in violation of the statute of frauds. This is a misapprehension. It is entirely competent that the promise to pay should be an original promise, although the goods were furnished to a third person. The delivery of the goods on the strength of the promise being a detriment to the promisee furnishes the consideration. But circumstances may be such as to make the delivery to the third person a direct benefit to the promissor. Such was the case here. The gas company was largely indebted to the bank of which defendant was receiver. It had contracted to deliver to him its bills at the end of each month. But unless it continued to furnish gas it would have no bills to deliver, and it could furnish no gas unless its running expenses were provided for. Hence it was clearly to defendant's interest, or to the interest of the corporation which he represented, that these expenses should be paid, and the gas plant kept running. The promise, if made, was an original promise.

The instructions are attacked, but the attack is hypercritical. The instructions might with propriety have been fuller upon the point that the jurors were the exclusive judges of the credibility of the witnesses, but that information was contained in a general way, and there was not a word in the instructions tending to limit or restrict the jury in that direction. The court was entirely right in not leaving the jury to struggle with the law question as to whether or not certain testimony, if true, established an independent parol contract, and certain other testimony, if true, showed an original promise not within the statute of frauds. The court left the jury entirely free to say whether or not such testimony was true, but directed them that, if they found such testimony to be true, they must find for the plaintiff. This was no encroachment upon the province of the jury. They were also told that if they found the testimony of defendant controverting these points

to be true, then they must find for defendant. The charge was brief, but plain and explicit. In a general way it covered the entire case, and contained no misstatement of the law. The only instruction requested by defendant was for a directed verdict, and to that he was not entitled.

The judgment appealed from is affirmed. All concur.

(75 N. W. Rep. 901.)

THE TRIBUNE PRINTING & BINDING CO. *vs.* O. G. BARNES, *et al.*

Opinion filed May 31st, 1898.

County Printing—Must be Done Within the State.

Construing section 1807, Revised Codes, which reads, "All county printing shall be done in the state, and if practicable in the county ordering the same," *held*, that the words "all county printing" include, in addition to legal notices published by or in behalf of the county, all supplies of printed matter necessarily used by county officials in discharging their official duties.

Mandamus When Denied.

Held, further, that the purpose of said section is to prohibit counties from letting contracts to print and furnish county supplies of printed matter to parties who will not perform the work within the state. Hence it is *held* that mandamus will not lie to compel the county commissioners to recognize and consider a bid for county printing made by parties who will do the work of printing outside the limits of the state if awarded the contract for which the bid is made.

Constitution—Regulation of Commerce.

Held, further, that said section is not repugnant to section 8 of article 1 of the federal constitution, regulating commerce among the states, for the reason that a sovereign state, like an individual, may lawfully elect not to purchase its necessary supplies from those who do not manufacture or produce the same within the state so purchasing the same.

Legislative Question.

Held, further, that the expediency of such a statute is a consideration outside of judicial cognizance, and one lying wholly within domain of legislative discretion.

Statute—Single Subject.

Revised Codes, section 1807 (upon authority cited in the opinion,) *held* not

to be repugnant to section 61 of article 2 of the state constitution, providing "that no bill shall embrace more than one subject," etc.

Demurrer Relates Back to First Defective Pleading.

The rule that a demurrer searches the record, and relates back to the first defective pleading, followed and applied to the pleadings herein; and *held*, that a demurrer to the answer required the court below to search the complaint, and, because the complaint was demurable, it was proper to dismiss the application for the writ.

Order Properly Made But Upon Untenable Reasons.

Held, that the order appealed from was properly made, and will not be reversed despite the facts that the reasons given by the District Court for the order are untenable in the law.

Discrimination.

Held, further, that section 1807, Revised Codes, does not discriminate either against nonresidents or those whose places of business are situated in another state. The sole requirement of the section is that county printing shall be done within the state.

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

Application for writ of mandamus by S. F. Knight and H. Crawford, doing business as the Tribune Printing & Binding Company, against O. G. Barnes and others, as board of county commissioners of Cass County. Application dismissed, and plaintiffs appeal.

Affirmed.

J. W. Tilly, for appellants.

Fred B. Morrill, State's Atty., for respondents.

WALLIN, J. In this proceeding, the plaintiffs applied to the District Court for peremptory writ of mandamus, commanding the defendants, who are the commissioners of Cass County, to recognize and consider a certain bid for county supplies, which was made by the plaintiffs in response to a published proposal for bids theretofore made by the defendants. Said proposal for bids, so far as the same is material, was as follows: "Proposal for Supplies. Office of the County Auditor, Fargo, Cass County, N. D. Sealed proposals will be received at this office until 12 o'clock noon, May 3, 1898, for furnishing Cass County with * * * blank books

and bindery work, printed blanks, and printed stationery. No bids from binderies or printing offices whose main offices are outside the State of North Dakota will be entertained. * * * The right to reject any or all bids is reserved by said board." Responding to this published notice, the plaintiffs filed with the county auditor their bid, which is entitled "Bid of Tribune Printing & Binding Co.," and which embraces a list of articles which are generally known as county records and office supplies of printing matter, including bank records, printed records, assessor's books, tax lists, etc. These articles are chiefly, if not wholly, of a kind such as are produced in printing offices, and can only be made by the use of printing machinery. No point is made either in the record, or in the arguments of counsel, to the effect that the bid of the plaintiffs embraces any article which is not the product of the printer's art. The plaintiff's bid was neither considered nor recognized by the defendants, whereupon the plaintiff's made application for the writ of mandamus. The affidavit, which is the basis of the appeal, states that said firm of S. F. Knight and H. Crawford as co-partners, as the Tribune Printing & Binding Company, and have their principal place of business in Minneapolis, State of Minnesota; that their business is that of making and selling legal blanks, blank books, and other county supplies and stationery, and making contracts with counties to furnish and sell them such blanks, blank books, stationery, and supplies as they may require under the law. The affidavit further alleged, in substance, that the defendants, pursuant to the requirement contained in section 1925 of the Revised Codes, published said proposal for bids for county supplies, and that in response thereto, the plaintiffs, in due time and in the proper manner, made and filed its said bid with the county auditor for said county, and that "on the 5th day of May, 1898, they proceeded to, and did, open and consider certain bids, made and filed by other persons and firms, for the furnishing of said articles, goods, and supplies named in said notice, but refused to recognize and consider

complainants' (the plaintiffs herein) bid, although affiant then and there openly demanded of said commissioners that they recognize and consider his firm's bid; that affiant verily believes that his firm's bid was and is the lowest bid filed, and affiant says that his said firm is wholly responsible, and could and would give to said Cass County a good and sufficient bond to fulfill the contract if let to them on their bid"; and that plaintiffs have complied with all the requirements of the law in making and filing said bid. Upon the return of an order to show cause, which order was based on said affidavit, the defendants filed their answer to said affidavit, which answer among other things, stated as follows: "That said complainants have their principal place of business in the City of Minneapolis and State of Minnesota, and said S. F. Knight so stated to these defendants, the board of county commissioners, at the time of the opening of said bids, that if said bid of complainants was accepted, and the contract for the work specified therein was awarded to complainants, said work would be done outside of the State of North Dakota, and not within the State of North Dakota; that the bid as called for and the contract to be awarded under said bid is for county printing, and cannot, under the laws of this state, to-wit, under section 1807 of the Revised Codes of 1895, be done out of the State of North Dakota; that for that reason said bid was rejected and refused to be considered by defendants as a board of county commissioners, and the certified check attached to said bid was returned to complainants, and all other bids as called for under the notice were rejected; that the bid of the complainants was rejected by defendants, as county commissioners of Cass County, for the sole and only reason that the said bid did not comply with the requirements of the notice, in that the complainants are not within the state, and the contract could not, under the law of the state, be awarded to complainants, as said contract would be for county printing for the ensuing year, and, if the contract was awarded to complainants under their bid, the county printing would not be done within the State of North Dakota."

Plaintiffs interposed a demurrer to this answer, upon the ground that the same does not state facts sufficient to constitute a defense. After hearing counsel upon the issues raised by the demurrer, the trial court ordered "that the demurrer be, and the same is, overruled; and said plaintiffs' application for a writ of mandamus herein, directing defendants to recognize and consider plaintiffs' said bid, is refused and denied, and their application dismissed, on the ground that plaintiffs, being nonresidents of this state, and their principal place of business being in the State of Minnesota, the defendants could not recognize and consider said bid under the law." From this order plaintiffs appeal to this court, and contend here that the trial court erred in overruling the demurrer to the answer, and in denying the application for the writ, and in dismissing the application for the writ.

The principal question is raised by the following averments in the answer, viz.: "That if said bid of complainants was accepted, and the contract for the work specified therein was awarded to complainants, said work would be done outside of the State of North Dakota, and not within the State of North Dakota." The answer shows that the defendants regarded section 1807 of the Revised Codes as containing an inhibition against awarding the plaintiffs the contract for the supplies, as stated in their bid, and this upon the ground that the work was to be done outside of this state. Said section reads: "All county printing shall be done in the state, and if practicable in the county ordering the same." As has been seen, the articles enumerated in the bid of the plaintiffs were county supplies for Cass County, and were also printed matter of a miscellaneous character. These facts would seem to bring the bid of the plaintiffs squarely within the prohibition of the statute, inasmuch as the demurrer admits that the averments in the answer are true, for the purposes of the demurrer. By the demurrer, the plaintiffs admit that the work necessary to the furnishing of the supplies in question would be done outside of the state. This is precisely what the statute declares shall not be done, in its declaration "that all county

printing shall be done in the state." We think the language of this statute is unambiguous, and its meaning entirely clear. Counsel claims that section 1925 is controlling, and cites the provision therein "that the lowest responsible bid must in all cases be accepted." Our conclusion upon this feature is that the language last quoted must be construed with reference to the requirement embraced in section 1807, Revised Codes, and therefore that the competitive bidding must be restricted to those who can and will do the work within the state. The last mentioned section became a law later in point of time, and, by its terms, necessarily modifies the earlier enactment.

Another contention made by appellants' counsel is that section 1807 is intended to cover only such legal notices as the county is required by law to print and publish, and cites sections 1804, 1805, and 1806, Revised Codes in support of this contention. We do not see wherein the sections cited bear upon the point involved in this case. Those sections relate to newspapers published within the state, and declare, in effect, that only such newspapers as are of the character defined in these statutes shall be "entitled" either to publish legal notices, "or to do any public printing for the state or for any county, city, or other municipality within the state." These sections of the law nowhere attempt to limit the county officials with respect to the place of printing either legal notices or other public printing, their purpose being to define the kind of newspapers within the state qualified to do such printing. Only such newspapers as are described in these sections are qualified to do the printing mentioned. It follows from these provisions that, if such printing is done in the state only, the qualified newspapers could lawfully do the work. This, certainly, has no tendency to show that a newspaper or other business concern located out of the state could lawfully do such work out of the state. But the plaintiffs do not publish or represent any newspaper within the state, and hence the rights of the plaintiffs are not affected by the sections of the code to which we are cited, unless such sections are to be construed as meaning that

only such newspapers can lawfully be employed to do any kind of public printing. If so construed, the result would be that the plaintiffs would not be competent bidders. But the question we are called upon to decide is not what class of newspapers within the state may lawfully publish legal notices and do public printing. We are to decide only the single question of whether any such work may lawfully be performed outside the state boundaries. This question, as we have already said in effect, is settled in the negative by section 1807, *supra*, which section was, in our judgment, enacted to set at rest the precise question we are to decide, and for no other purpose whatever.

Again, it is argued that if section 1807, *supra*, is construed to prohibit county officials from procuring county supplies of printed matter from those who manufacture such supplies at places without the state, it would operate to violate section 8 of article 1 of the federal constitution, relating to commerce among the states. No authority is cited in support of this contention by counsel, and we are unaware of the existence of any such authority. Viewed as a question of principle, we are unable to see why the state is forbidden to do what an individual certainly may do with impunity, viz. elect from whom it will purchase supplies needed in the discharge of its corporate functions. If such election may lawfully be made, it certainly is competent for the state to direct its officials by a mandatory statute to procure their office supplies from those who produce the same within its own limits, it having elected to purchase none others either for the use of the state, as such, or for the use of subordinate political bodies within the state. See Revised Codes, sections 50, 1807.

Counsel also argues that section 1807 is void because repugnant to section 61 of article 2 of the state constitution, which declares that "no bill shall embrace more than one subject." The statute under consideration, like all others embraced within the Political Code of this state, has no other title than the general title to the Political Code, as set out in section 1 of the Revised Codes. The Political Code, while it embraces many provisions,

is an entirety, a complete system of cognate law. The point raised by counsel was elaborately discussed in *Johnson* v. *Harrison*, 47 Minn. 575, 50 N. W. Rep. 923, and a similar provision of the constitution of the state of Minnesota considered with reference to the Probate Code of that state, which contained many dissimilar features, but was adopted as a whole. The views expressed in the opinion of Judge Mitchell in that case commend themselves to our judgment, and we shall therefore overrule this contention of the plaintiffs' counsel without further elaboration, and upon the authority of the case cited.

Counsel strenuously contends that it is the duty of the courts, if possible, to so construe the several statutes bearing upon the point in controversy as to permit competitive bidding by all the world, and thereby, as he argues, relieve the taxpayers from the burden of a monopoly of the bidders who will do the work within the state. There might be some force in this contention if the statute which controls the question were susceptible of more than one interpretation. We do not think that it is. In our judgment, section 1807 would be wholly superfluous and meaningless, unless its purpose is to require county printing to be done within the state. With the expediency of a statute the courts can have nothing to do.

Counsel calls attention to and criticises the language of the order appealed from, wherein the trial court states, after overruling the demurrer to the answer, that plaintiffs' application for a mandamus is "dismissed on the ground that, plaintiffs being nonresidents of this state, and their principal place of business being in the State of Minnesota, the defendants could not recognize and consider said bid under the law." We think with counsel that the grounds or reasons above given for overruling the demurrer and dismissing the proceeding are wholly untenable. The statute does not discriminate against nonresident bidders, nor against those whose principal or other places of business are located outside of the state. The single requirement of section 1807 is that county printing shall be done within the state. If

the enactment discriminated against nonresident bidders, a more difficult question might possibly be presented, but it does not do so. However, where the ruling of the court below is legally correct, the reasons for it will be disregarded in a court of review.

Counsel further argues that, conceding the demurrer to have been properly overruled, it was nevertheless error to dismiss the application for the writ, because, as he contends, plaintiffs should have been accorded the privilege of withdrawing the demurrer, and offering evidence to disprove the statements of fact contained in the answer. This point might be answered by the statement that the record does not show that the privilege of withdrawing the demurrer was asked for by plaintiffs' counsel. See 6 Enc. Pl. and Prac. p. 362. But we prefer to place our ruling upon another point. Under a well established rule, the general demurrer to the anwer would search the record, and relate back to the complaint. *Id.* p. 326. In this case we are of the opinion that the complaint was demurrable because it failed to state that the plaintiffs would do the work within the state if their bid had been accepted by the defendants. For this reason, we think the application for the writ was properly dismissed.

Finding no error in the record, the order appealed from will be affirmed. All the judges concurring.

(75 N. W. Rep. 904.)

CASS COUNTY *vs.* CERTAIN LANDS OF DARLING.

Opinion filed May 27th, 1898.

Action by Cass County against certain lands of C. W. Darling. The District Court certified certain questions for decision.

Fred B. Morrill, *State's Atty.*, for plaintiff.

J. E. Robinson, for defendant.

PER CURIAM. This case is decided at the same time, and is

identical in its facts, with the case of *This Plaintiff* v. *Certain Lands of Security Imp. Co.*, 7 N. D. 528, 75 N. W. Rep. 775, and is therefore governed by the decision in that case.

(75 N. W. Rep. 1135.)

CASS COUNTY *vs.* CERTAIN LANDS OF FISHER.

Opinion filed May 27th, 1898.

Action by Cass County against certain lands of Mary M. Fisher. The District Court certified certain questions for decision.

Fred B. Morrill, State's Atty., for plaintiff.

J. E. Robinson, for defendant.

PER CURIAM. This case is decided at the same time, and is identical in its facts, with the case of *This Plaintiff* v. *Certain Lands of Security Imp. Co.*, 7 N. D. 528, 75 N. W. Rep. 775, and is therefore governed by the decision in that case.

(75 N. W. Rep. 1135.)

CASS COUNTY *vs.* CERTAIN LANDS OF ROBERTS.

Opinion filed May 27th, 1898.

Action by Cass County against certain lands of Matilda M. Roberts. The District Court certified certain questions for decision.

Fred B. Morrill, State's Atty., for plaintiff.

J. E. Robinson, for defendant.

PER CURIAM. This case is decided at the same time, and is identical in its facts, with the case of *This Plaintiff* v. *Certain Lands of Security Imp. Co.*, 7 N. D. 528, 75 N. W. Rep. 775, and is therefore governed by the decision in that case.

(75 N. W. Rep. 1135.)

FRED HEWITT *vs.* EMIL SCHULTZ, *et al.*

Opinion filed May 27th, 1898.

Public Lands—Indemnity Grants—Withdrawal.

Congress did not take from the land department the power of withdrawal with respect to lands within the indemnity limits of the grant to the Northern Pacific Railroad Company. Accordingly, *held*, that a patent based upon an entry of land within such limits after the withdrawal thereof by the acting commissioner of the general land office was void.

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

Ejectment by Fred Hewitt against Emil Schultz and Friederika Schultz. Plaintiff had judgment, and defendants appeal.

Reversed.

Ball, Watson & Maclay, James B. Kerr, and *J. B. McNamee*, for appellants.

The patent issued to plaintiff is void. The land falls within the exception to section 2258, Rev. Statutes of U. S., it being included in a reservation by proclamation of the president. Where the executive officers of the government attempt to dispose of lands under the pre-emption law which are contained within the terms of the exceptions to Revised Statutes, section 2258, their acts are without jurisdiction and void. *Burfenning* v. *C. St. P. M. & O. Ry. Co.*, 163 U. S. 321, 16 S. C. Rep. 1018. The officers of the land department have authority to withdraw from the operation of the general land laws of the United States lands otherwise open to acquisition under those laws. *Wolcott*, v. *Des Moines Co.*, 5 Wall. 687; *Wolsey* v. *Chapman*, 101 U. S. 755; *Riley* v. *Welles*, 154 U. S. 578, and a patent issued to a pre-emptor for lands which have been so withdrawn is void. *Spencer* v. *McDougal*, 159 U. S. 62; *N. P. R. R. Co.* v. *Musser, etc. Co.*, 19 Sup. Ct. Rep. 205. The land department have authority to withdraw indemnity lands on definite location. *Thompson* v. *N. P. Ry. Co.*, 83 Fed. Rep. 546. The legislative withdrawal under the provisions of section 6 of the act of July 2, 1864, of lands within forty miles of

the line of the N. P. Railroad upon filing the map of general route, was not intended by congress to be exclusive of any authority in the land department to withdraw lands in the indemnity belt after definite location. *Thompson* v. *Ry. Co.*, 83 Fed. Rep. 546. The opinion of the secretary of the interior (19 L. D. 89) that the preliminary withdrawal by congress shows an intention to exclude all subordinate authority is wrong and based upon a misapprehension of the purposes for which the withdrawal on general route was provided. The withdrawal on general route was ample to protect the company until the definite location of its line, when its present grant of place lands took effect and the limits of its indemnity belt became fixed. When this point was reached the function of the withdrawal on general route was fulfilled and at the same time by the terms of the grant the right of selection of indemnity arose, the direction of which was expressly committed to the secretary of the interior. *Wood* v. *Beach*, 156 U. S. 549. The Northern Pacific land grant has been considered and construed. *N. P. Ry. Co.* v. *St. P. M. & M. R. Co.*, 26 Fed. Rep. 551; *Buttz* v. *N. P. R. Co.*, 119 U. S. 55. Plaintiffs patent is voidable, if not absolutely void and the legal title is held in trust for defendants. Where through an erroneous construction of the law, the land department awards to one the patent for lands which another has initiated a prior right, the courts will correct the error and hold the patentee trustee for him who has the better right. *St. P. etc. R. Co.* v. *Winona, etc. R. Co.*, 112 U. S. 720; *Southern Pac. R. Co.* v. *Wiggs*, 43 Fed. Rep. 333; *Ard* v. *Brandon*, 156 U. S. 536; *Johnson* v. *Towsley*, 13 Wall. 72; *Shepley* v. *Cowan*, 91 U. S. 330; *Moore* v. *Robbins*, 96 U. S. 530. The railroad company selected the land before plaintiff acquired any right whatsoever, for the land was reserved when he applied to enter, and after selection made, no adverse claim could attach. *Rudolph Nemitz*, 7 L. D. 80; *St. P. R. Co.* v. *Meyer*, 9 L. D. 250; *N. P. R. Co.* v. *Halvorsen*, 10 L. D. 15; *Lane* v. *St. P. R. Co.*, 10 L. D. 454; *Flippen* v. *S. P. R.*

Co., 14 L. D. 418; *Sawyer* v. *N. P. R. Co.*, 12 L. D. 450; *Sage* v. *Swenson*, 67 N. W. Rep. 544.

Pierce & Austin, for respondent.

The land in question was not granted to the railroad company by its charter, but was land within the indemnity limits named in the charter as to which the company had a contingent right of selection. "The granting act not only did, not authorize a withdrawal of lands in the indemity limits but forbade it." It was explicitly provided that the provisions of the pre-emption and homestead laws should be extended to all other lands on the line of the road when surveyed "excepting those hereby granted to said company." If lands within the indemnity limits are to be regarded as on the line of said road this declaration is prohibitory of any withdrawal for the benefit of the road. *N. P. R. Co.* v. *Miller*, 7 L. D. 100; *N. P. R. Co.* v. *Fugelli*, 10 L. D. 288; *Spicer* v. *Ry. Co.*, 10 L. D. 440; *Davis* v. *Ry. Co.*, 19 L. D. 87; *N. P. R. Co.* v. *Sanders*, 46 Fed. Rep. 250. By section 6 of the act of July 2d, 1864, (13 Stat. 365,) it is provided that when surveyed, the indemnity lands should be immediately liable to selection by the company and that the lands not previously selected should be appropriated to the first legal applicant under the pre-emption and homestead laws. The company made no selection of these lands until five months after the plat of survey thereof had been filed in the local land office. Hewitt settled upon and improved the tract involved six months before the plat of survey was filed, and he filed his declaratory statement four months before the railroad company filed its list of selections. Being prior in time, he is prior in right. *Shepley* v. *Cowan*, 91 U. S. 330; *S. P. R. Co.* v. *Meyer*, 9 L. D. 250. The person first appropriating land has the best title in equity. *Taylor* v. *Brown*, 5 Cranch. 234; *Stark* v. *Starrs*, 6 Wall. 402. It is contrary to the settled policy of congress that indemnity lands should be withdrawn from entry by actual settlers for an indefinite time. *N. P. Ry. Co.* v. *Sanders*, 46 Fed. Rep. 248. The charter of the company

as to all public lands referred to in it gave preference to the pre-emptors and homestead settlers down to the time when "the line of said road was definitely fixed." *Wood* v. *Beach*, 156 U. S. 543. Upon the filing of the map fixing the line of the road, the law withdrew from settlement the granted lands situated within the original grant. *Buttz* v. *N. P. R. Co.*, 119 U. S. 71. Congress intended to give to actual bona fide settlers priority over the railroad company. *Ry. Co.* v. *Greenhalgh*, 26 Fed. Rep. 568. The selection of indemnity lands passed no title to the railroad company until approved by the secretary of the interior. *Grandin* v. *La Bar*, 3 N. D. 446, 57 N. W. Rep. 243. When an official executive act remains to be done before a patent could issue the legal and equitable title remains in the United States. *Wis. Cent. R. Co.* v. *Price Co.*, 133 U. S. 496; *Jackson* v. *LaMoure Co.*, 1 N. D. 239; *Barden* v. *Ry. Co.*, 154 U. S. 321; *Ry. Co.* v. *Ry. Co.*, 112 U. S. 421.

CORLISS, C. J. The plaintiff has brought ejectment to recover from the grantees of the Northern Pacific Railroad Company the possession of a quarter section of land situated within the indemnity belt of the land grant of that corporation. His pre-emption settlement upon the land was made after the same had been withdrawn from entry by the acting commissioner of the general land office. Following certain rulings of the land department that the withdrawal was void, the secretary of the interior, affirming the decision of the commissioner, held that, despite such withdrawal the plaintiff's final proof should be received; and thereafter a patent was issued to him. the defendants attack the validity of this patent, claiming that it is absolutely void, because the entry was made upon lands which were, on account of the withdrawal, no longer open to entry. They predicate this contention upon the proposition that the withdrawal referred to was legal, and operated to place the land in question beyond the reach of private settlement. That the patent is void if the position taken by the defendants be sound would not seem to admit of doubt. Nor is the point seriously contested by counsel for plaintiff. If

the withdrawal was valid, then the land was land included within a reservation by the proclamation of the president, and was therefore not subject to entry. Rev. Statutes, U. S. 1878, section 2258. That a withdrawal by the commissioner of the land office is a withdrawal by proclamation of the president was distinctly held in *Wolsey* v. *Chapman*, 101 U. S. 755. Where the land entered is not subject to entry, the patent is void. *Burfenning* v. *Railroad Co.*, 163 U. S. 321, 16 Sup. Ct. 1018. We are therefore brought face to face with the question—the crucial question in the case—whether, in view of the peculiar provisions of the land grant to the Northern Pacific Railroad Company, the executive branch of the government had any authority to withdraw from entry any of the lands within the indemnity belt of such grant. It is essential to an intelligent discussion of this question that we should quote two sections of this granting act,—sections 3 and 6. Section 3 declares "that there be, and hereby is, granted to the Northern Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific Coast, * * * every alternate section of public land not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, and whenever on the line thereof the United States have full title not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the commissioner of the general land office; and whenever, prior to said time, any of the said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted or otherwise disposed of, other lands shall be selected by the secretary of the interior, in alternate sections and designated by odd numbers not more than ten miles beyond the limits of said alternative sections." Section 6

provides: "That the president of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road, after the general route shall be fixed, and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not be liable to sale or entry, or pre-emption before or after they are surveyed, except by said company as provided in this act; but the provisions of the act of September, eighteen hundred and forty one, granting pre-emption rights, and the acts amendatory thereof, and of the act entitled 'An act to secure homesteads to actual settlers on the public domain,' approved May 20, eighteen hundred and sixty-two, shall be, and the same are hereby, extended to all other lands on the line of said road when surveyed, excepting those hereby granted to said company. And the reserved alternate sections shall not be sold by the government at a less price than two dollars and fifty cents per acre when offered for sale." 13 Stat. 365.

In construing these enactments, we must keep steadily in mind the fact that congress well knew that the power of withdrawal was vested in the executive branch of the government. See *Wolcott* v. *Des Moines Co.*, 5 Wall. 687; *Wolsey Chapman*, 101 U. S. 755; *Riley* v. *Welles*, 154 U. S. 578, 14 Sup. Ct. 1166; *Spencer* v. *McDugal*, 159 U. S. 62, 15 Sup. Ct. 1026; *Northern Pac. R. Co.* v. *Musser-Sauntry Land, Logging & Mfg. Co.*, 18 Sup. Ct. 205. Secretary Vilas, in his opinion in the Miller case, 7 Land Dec. Dep. Int. 100, holds that section 6, both by implication and by express provision, takes from the executive branch of the government the well recognized and frequently exercised power of withdrawal with respect to land within the indemnity limits of the grant contained in the statute. We fail to discover any force in his reasoning upon either point. So far from the first portion of the section creating an implication that no power of withdrawal should ever be exercised by the officers of the land department or by the president, we think that the implication is exactly the reverse. Why did congress embody in that section

the provision that, after the general route should be fixed, the odd sections should not be liable to entry, etc.? The reason is perfectly obvious when we turn back to section 3, and examine its provisions in connection with those of section 6. Two distinct acts were to be performed by the corporation in securing title under this grant. It must first fix its general route. Subsequently it must file its map of definite location. Between these two periods, which might be separated by years of time, settlers would naturally be attracted to the land along such general route, and the company might find, by the time its map of definite location was filed, that so numerous were the settlements upon the lands embraced within the grant that the value of the grant had been seriously impaired. Under section 3, the company must take the land subject to all entries upon the odd sections made prior to the filing of the map of definite location, and therefore subject to all entries intermediate the fixing of the general route and the filing of such map. Congress plainly saw that, unless settlement during this period was prevented, an extraordinary influx of population might so reduce the acreage of the grant that the indemnity land would not suffice as a means of adequate indemnity. There was power, it was true, in the officers of the land department to withdraw from settlement this land within the place limits after the general route had been fixed. But the hazard to the company was deemed too great to leave in a state of uncertainty—to intrust to the discretion of a public official—that which could be easily settled in the law itself; and accordingly, to preclude all possibility of a great tide of immigration ingulfing and sweeping away much of the grant which it was intended the company should enjoy, congress itself erected the dike which was to keep out this anticipated flood. It is strange, indeed, that such a precaution should ever have been thought by a rational mind to indicate by implication a legislative purpose to take from the land department the conceded power of that department to extend to the company within the indemnity limits a similar protection in case of need. The feature of this grant to the Northern

Pacific Railroad Company, which stands out in bold relief, is the purpose of the federal government to give to the company, as an equivalent for the tremendous financial hazard of constructing a great railway system through a vast stretch of unsettled territory, and over almost impassible mountains, a grant of land which, in any event, should equal in area the amount it would receive were every odd section specified in the grant free from claim at the time its map of definite location should be filed. Congress intended that the grant should be, in substance, a grant in quantity; and, to the end that it might keep its word of promise to the hope as well as to the ear, it carefully guarded against the material diminution of the acreage of the grant by settlements intervening between the time when the company should file its map of general route and the time when it should file its map of definite location. We would little expect from such legislation to find the same body, in one and the same branch, taking from the land department the old and often exercised power of withdrawal, when to do so would subject the grantee to the hazard of losing a portion of its grant,—the very hazard from which such body had so carefully guarded the grantee in the preceding sentence. Why in this particular case such power should be withheld it is impossible to discover. If congress intended in good faith to see to it that the full grant should ultimately accrue to the company, it is incredible that it should, without any explicable reason therefor, take from the land department a power so necessary to the accomplishment of that purpose as the power of withdrawal. Even if the statute were not clear in meaning, it would be disgracefully derogatory to the honor of the United States to assume that in a covert way congress intended to impair the value of the grant by enacting, in the disguise of ambiguous language, that the land department should not be permitted to defend the grant by the exercise of the well known power of withdrawal. It is not difficult to ascertain why the last clause of section 6 was passed. In 1862, two years before the grant to the Northern Pacific Railroad Company, congress had extended the pre-

emption rights to unsurveyed lands. 12 Stat. 413. It readily saw that, the moment the general route was fixed a strong current of population might, and probably would, flow in the direction of the adjoining lands within the place and the indemnity limits, practically all of which lands were unsurveyed. Under the act of 1862, these settlements would be good although upon unsurveyed lands, provided they were not made upon odd sections within the place limits. In the indemnity belt they would all be good, without reference to the number of the section. Thus, it might happen that long before the lands could be surveyed, and therefore long before the time could arrive when the company would know what lossess it had sustained by reason of prior settlements and in other ways, and therefore be in position to make selections, this fund of real estate out of which these losses were to be made good would be wrested from the company by prior pre-emption entries. Congress plainly saw that it would be unjust to the company to leave the general provisions of the act of 1862, that a pre-emptor could initiate his rights on unsurveyed land, in force as to the indemnity lands; and hence it declared in terms that those provisions should apply only after the land had been surveyed. Therefore, under ordinary circumstances, the company could protect itself, as it would, as a rule, make its selections before private settlements could be made. But, in the event that a withdrawal should at any time become necessary, the power of withdrawal was, we are clear, to be exercised as in other cases. For other reasons, equally forcible to the mind of the statesman, congress placed all lands (except the odd sections in the place limits which were withdrawn absolutely, whether surveyed or not) in the same category. The odd sections in the indemnity limits were not to be opened to settlement until surveyed, that the company might be protected; and the other sections in both limits were not to be opened to settlement, that the settlers themselves might be protected. It would certainly be an unwise policy to tempt people upon unsurveyed lands, with the inevit-

able risk of finding in many cases, after survey, that they had settled upon property—*i. e.* odd sections within the place limits—belonging to the railroad company, and which, therefore, they could not hold.

When we bring to the interpretation of this law a spirit large enough for the task, and do not spend our ingenuity in an endeavor to force into some hidden meaning, we find no difficulty in discovering that congress never dreamt of taking away the power of withdrawal. We read in every line of the statute an unmistakable purpose to surround the interests of the company with every possible safeguard against the impairment of the grant, on the faith of which it was known that large investments of capital would be risked. Had congress in terms declared that the power of withdrawal should never be exercised as to the indemnity lands, the grant would probably never have been accepted. We do not believe that the capitalists who embarked their money in this enterprise ever believed that this power, whose exercise might become essential to the protection of the integrity of the grant, had been taken away. Where is the language to create such a belief? It is not to be found. Had so radical a change in national policy with respect to public lands been determined upon in this particular case, the phraseology of the act on this point have been explicit. Secretary Vilas has, by ignoring the general spirit of the act and other legislation which throws light upon its interpretation, forced into the law a meaning neither express nor implied,—one which presupposes that congress intended, without any reason for so doing, to depart from an established practice, when there was every reason why it should adhere thereto. Going back in imagination to the time when this law was framed, and taking up our position alongside of the members of the committee whose duty it was to draft it, and bringing to bear upon the question the large views of true statesmanship,—looking to every consideration which should be weighed,—it seems to us, in the light of the language of the statute, that the train of reasoning which passed through the minds of

that committee lies upon the very surface. "We desire that the company shall lose none of its grant. Therefore we will not allow it to be subject to losses in the place limits after the general route is fixed; and therefore we will not permit settlement within the indemnity belt until the lands are surveyed, when the company can for the first time have an opportunity to make selections for losses; and therefore, in conclusion, we will not take away the power of withdrawal as to the indemity lands which power may be found indispensable to the full protection of the grant in all its integrity." Contemporaneous construction of this law by the officers of the land department is in harmony with our views. Down to the time of the decision made by Secretary Vilas, the whole trend of opinion was in the opposite direction. More than 40 withdrawals of indemnity land had at that time been made. The construction of the law by those who are charged with the duty of executing it has often been deemed very persuasive. *U. S.* v. *Moore*, 95 U. S. 763; *U. S.* v. *Pugh*, 99 U. S. 269; *U. S.* v. *McDaniel*, 7 Pet. 1; *Railroad Co.* v. *Barnes*, 2 N. D. 383, 51 N. W. Rep. 386; *U. S.* v. *Johnston*, 124 U. S. 236, 8 Sup. Ct. 446; *U. S.* v. *Philbrick*, 120 U. S. 52, 7 Sup. Ct. 413. The spirit of the law, the letter of the law, long continued contemporaneous construction of the law by the officers of the land department, the failure of congress to check by a specific enactment this constant practice of making such withdrawals, and, finally, the manifest reason and justice of the case, coupled with the impossibility of discovering any ground for taking the land in the indemnity belt of this grant out of the universal rule,—these all combine to make a conclusive case against the decision of Secretary Vilas that the power of withdrawal was taken away. Our conclusion, therefore, is that the withdrawal was legal, and that, therefore, the plaintiff's patent is void. It follows that he cannot maintain this action, as he must recover on the strength of his own title.

The judgment of the District Court is reversed, and that court is directed to dismiss the action. All concur.

(76 N. W. Rep. 230.)

MARTIN P. GJERSTADENGEN *et al. vs.* G. W. VAN DUZEN & CO.

Opinion filed June 2nd, 1898.

Public Lands—Death of Homesteader—Patent.

Before a homesteader has earned a right to a patent, he has no such interest in the land as will make it a part of his estate on his death. The patent thereafter issued to the persons specified in the federal statute is issued to them, not as the heirs of the decedent, who have inherited his title, but as original parties, who are preferred by the federal statute after the rights of the original homesteader have been destroyed by death; they being allowed the benefit of his residence upon the land.

Probate Court is Without Jurisdiction to try Title to Land.

When a probate court orders the sale of the land of a third person to pay the debts of a decedent, such order is void for want of jurisdiction over the property. As such court has no power to sell the lands of another, and no power to pass upon the question of title, the order is void, and would be void although the real owners of the property were parties to the proceeding, and therein contested the question of title. A probate court has no jurisdiction to try such an issue.

Mistake of Law—Estoppel—Sale of Land—Validity.

As all the facts relating to the title of the decedent to the land sold were matters of record, and known to the purchaser at the sale (it appearing from the public records that at the time of his death the homesteader had not yet secured a right to a patent,) such purchaser cannot invoke the doctrine of equitable estoppel, as against the administrator, who petitioned for and made the sale and executed the deed, although he was also one of the persons to whom the patent for the land was issued, and therefore a part owner thereof. The case presents only a mutual mistake of the purchaser and the administrator as to the law; each believing that, under the facts, the land was part of the decedent's estate. No estoppel can be based upon such an error; there being no misstatement or concealment of any fact, and no misrepresentation as to the law.

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

Action by Martin Peterson Gjerstadengen and another against G. W. Van Duzen & Co. Plaintiffs had judgment, and defendants appeal.

Affirmed.

C. E. Pierson, (*Pierce & Austin*, of counsel,) for appellants.

The judgment of the probate court is not open to collateral

attack. Freeman on Void Jud. Sales, § 14; Wells on Jurisdiction, § 274; *Griffith* v. *Bogart*, 18 How. 164; *Grignon* v. *Astor*, 2 How. 340; *McCarthy* v. *Van Der-Mey*, 42 Minn. 192; *Showers* v. *Robinson*, 43 Mich. 510; *Bostwick* v. *Skinner*, 80 Ill. 151; *Woods* v. *Monroe*, 17 Mich. 238; *Griffin* v. *Johnson*, 37 Mich. 92; *Davis* v. *Hudson*, 29 Minn. 34; *Lovett* v. *Mathews*, 24 Pa. St. 332; *Grignon* v. *Astor*, 2 How. 339; *Mousseau's Will*, 30 Minn. 203; Van Fleet on Col. Attack, § 552; *Roderigas* v. *East River*, 63 N. Y. 460. The action of the court in granting an order of sale is an adjudication in favor of its own jurisdiction. *Grignon* v. *Astor*, 2 How. 339; *Wyatt* v. *Steele*, 26 Ala. 650; *Peo.* v. *Gray*, 72 Ill. 347; *Curran* v. *Kuby*, 37 Minn. 331. The fee of a homestead may be sold in probate proceedings, subject to the right of homestead occupancy. *McGowan* v. *Baldwin*, 46 Minn. 477; *McCarthy* v. *Van Der-Mey*, 42 Minn. 189; *Drake* v. *Kinsell*, 38 Mich. 232. The federal homestead law does not prevent or forbid the giving of a mortgage by the homesteader prior to receiving his patent. *Lewis* v. *Wetherell*, 36 Minn. 386; *Lang* v. *Morey*, 40 Minn. 396; *Nycum* v. *McAllister*, 33 Ia. 375. An agreement to make conveyance after patent issues is valid. *Townsend* v. *Fenton*, 30 Minn. 528. Section 2296, R. S. is interpreted so as to protect the homesteader. *Lewis* v. *Wetherell*, 36 Minn. 387. The protection of the statute fairly construed extends only during time of family occupancy. Plaintiffs action is barred by the statute. Section 5856, Comp. Laws; *Streeter* v. *Wilkinson*, 24 Minn. 288.

T. A. Curtis, (*Morrill & Engerud*, of counsel.)

The administrator's deed under which appellants claim title is void. The probate court had no jurisdiction to authorize its issuance. Olia Mikkelson had only a right to possess the land, an incohate right which upon performance of the conditions imposed by federal law would ripen into title. Section 2289, Rev. St. U. S.; Waples on Hd. Ch. 30. In case the entryman dies, his heirs do not take the land by inheritance but upon proof that they have complied with the homestead law. *Michaelis* v.

Michaelis, 44 N. W. Rep. 1149; *Chapman* v. *Price*, 4 Pac. 807; *In re Kavanaugh*, 9 L. D. 268; A federal homestead is not liable to sale for debts contracted before patent. Section 2296, R. S. The probate proceedings are therefore void on their face. *Dawson* v. *Mayall*, 48 N. W. Rep. 12; *Howe* v. *McGivern*, 25 Wis. 525. This exemption of the land from sale incurred before patent does not depend upon the occupancy. *Jau.* v. *Dee*, 32 Pac. Rep. 460; *Miller* v. *Little*, 47 Cal. 348; *Sovills* v. *Seef*, 43 Ark. 451; *Russell* v. *Lowth*, 21 Minn. 107; *Coleman* v. *McCormick*, 33 N. W. Rep. 556. No lapse of time short of that required to acquire title by prescription will cure want of jurisdiction. *Hegar* v. *DeGroat*, 3 N. D. 354; *Pursley* v. *Hayes*, 22 Ia. 11; *Good* v. *Carmichael*, 32 Ia. 475; *Miller* v. *Babcock*, 29 Mich. 526; *Dawson* v. *Helms*, 30 Minn. 107; *Tray* v. *Roberts*, 43 At. Rep. 68.

CORLISS, C. J. The object of this suit is to annul certain proceedings in the probate court in and for Ransom County, which were instituted for the purpose of selling certain land, as the property of Olia Mikkleson, deceased, for the payment of her debts, and also to set aside the administrator's deed executed and delivered under the order of the court in such proceedings. The plaintiffs secured a favorable decision below. That decision meets our full approval. The proceedings were absolutely void, for want of jurisdiction. The land sold did not belong to the estate of Olia Mikkleson, deceased. She filed upon it as a homestead in her lifetime, but she died before the patent was issued, and even before her right to demand a patent had accrued. The law gave her no such interest in the land as could be transmitted by her to her heirs. Upon her death all her rights in the land under her homestead entry ceased, and her heirs became entitled, under the statute, to a patent, not because they had succeeded to her equitable interest, but because the law gave them preference as new homesteaders, allowing to them the benefit of the residence of their ancestor upon the land. It is apparent from the statute (section 2291, Rev. St. U. S.) that congress did not intend to vest in the homesteader an interest which could be inherited

under the laws of the state where the real estate might be situated, the same as other real estate, but to withold from him such interest, and specifically designate the persons who, on his death, should be entitled to secure the right which the original entryman would have obtained, had he survived. What authority there is on the point supports our view. See *Bernier* v. *Bernier*, 147 U. S. 242, 13 Sup. Ct. 244; *Chapman* v. *Price*, (Kan. Sup.) 4 Pac. Rep. 807; *Bernier* v. *Bernier*, 72 Mich. 43, 47; 40 N. W. Rep. 50. In *Bernier* v. *Bernier*, 147 U. S. 242, 13 Sup. Ct. 244, the court say: "The object of the sections in question was, as well observed by counsel, to provide the method of completing the homestead claim and obtaining the patent therefor, and not to establish a line of descent, or rules of distribution of the deceased entryman's estate. They point out the conditions on which the homestead claim may be perfected, and a patent obtained, and these conditions differ with the different positions in which the family of the deceased entryman is left upon his death." As the land did not belong to the estate of the deceased, it is obvious that the court was without jurisdiction to order the sale thereof. When the land directed to be sold is the property of a stranger, the probate court possesses no jurisdiction over such property; nor has it any power to try the question of title in such a proceeding, or at all. Should the owner of the land appear in the proceeding, and set up his title, and be defeated, it would nevertheless be true that the court would be without jurisdiction. For the statutes do not contemplate that a probate court shall hear and determine questions relating to the title to land. It has power to act only when the real estate is in fact the property of the decedent. All that it ever pretends to do in a proceeding of the character of that which is here assailed is to order the sale of whatever interest the decedent may have had in the land at the time of his death. It never assumes to decide whether he was in fact the owner thereof. Nor can it decide such question, even when voluntarily litigated before it. Such a matter is as much beyond the jurisdiction as a suit in equity is beyond the

jurisdiction of a justice of the peace; and it is familiar law that consent will not vest in any tribunal power which has been withheld from it. These principles are elementary, and we have recently had occasion to discuss them in a somewhat similar case. See *Arnegaard* v. *Arnegaard*, 7 N. D. 475, 75 N. W. Rep. 797. We fully agree with counsel for defendants that the federal statute exempting federal homesteads from liability for debts contracted before the issue of patent (section 2296, Rev. St. U. S.) does not take such homestead, after it has once become the property of the homesteader, out of the jurisdiction of the probate court, in proceedings to obtain a sale of a decedent's real estate to pay his debts. When it is established that the land did in fact belong to the decedent, then it is immaterial that it was exempt from sale for the debts for which it was ordered to be sold. The probate court in the supposed case has full jurisdiction over the property, because it forms part of the decedent's estate. Whether it shall be sold for certain debts is a judicial question, to be decided by the court, the same as any other question that arises in the course of the proceedings over which it clearly has jurisdiction. All persons who claim under the decedent, whether as heirs or as devisees, are parties to the proceedings; and they must therein assert the exemption of the land from liability to sale, if they intend to invoke the protection of the law at all. The question before the court is whether that particular land of the decedent shall be sold for debts, and all parties interested must then and there interpose any defense to a sale thereof which they may have, whether it relate to the existence of the alleged debts at all, or, conceding the claims to be valid, asserts that for such debts the land cannot be sold, because of the exemption thereof under the federal statute. It is now too late for the parties, so far as they claim the land as heirs, to insist that the property ought not to have been sold. But inasmuch as they do not in fact claim as heirs, but as independent owners, they may assail the proceedings as utterly void,

for want of jurisdiction in the probate court over the real estate with which that court assumed to deal.

Finally, it is urged that, with respect to the interest of Ole Peterson in the land, an equitable estoppel has been made out. He was one of three heirs to whom the patent was issued. He was also the administrator of the estate of Olia Mikkleson, and petitioned, as such, for the sale of the land in question, and executed the administrator's deed thereof, under which the defendants claim title. After executing such deed, he died, leaving children, who constitute a part of the plaintiffs in this case. It is contended that, so far as their rights in the land are concerned, their ancestor has, by his conduct, estopped them from asserting such rights, against the defendants. It is undoubtedly true that if, in his lifetime, Ole Peterson created, as against himself, in respect to his interest in the land, an estoppel in favor of these defendants, his children are effected thereby. But we are unable to discover in this record anything on which the defendants' contention in this behalf can rest. Ole Peterson was not guilty of a conscious misrepresentation of fact to the purchaser at the sale. There was no concealment of fact, and no misunderstanding with respect to the facts. The facts were all matters of public record. It appeared therefrom that Olia Mikkleson had made a homestead entry on this land, but that she had not received a patent, or earned the right thereto, at the time of her death. Whether, under these circumstances, she had such an interest in the land as would make it a part of her estate on her death, was a pure question of law. Ole Peterson did not make to the purchaser any representations as to the law governing the question of title. He merely proceeded under a misapprehension as to the law, which the purchaser appears to have shared, —that the land did constitute a part of the estate of the decedent, but he did not covenant that this was so. Nor does the law imply against him such a covenant. The exact reverse is the case. The law declares to the purchaser that he must see to it, at his peril, that the proceedings are legal, and that the land does

in fact form part of the decedent's estate. Had Peterson, knowing that he was in fact the owner of the land (if, for instance, he had held an unrecorded deed thereof,) stood by and saw it sold without protest, and certainly if he had actively participated in such sale, then we would have had before us a proper case for the application of the law of estoppel. But no such case is before us. The case merely presents a mutual mistake as to the law, the facts being known to all the parties. If it be said that the purchaser is protected because he did not know the law, then it may also be said that Peterson has done nothing to estop himself, for he has an equal right to plead ignorance of the law. And if, on the other hand, it be urged that Peterson is chargeable with knowledge of the law, and is therefore estopped from asserting his title, it may with equal force be answered that the purchaser is likewise chargeable with knowledge of the law, and therefore he knew that he was getting no title under his purchase, and hence cannot invoke against Peterson the doctrine of estoppel; for he who has not been misled cannot demand that the lips of another shall be sealed against the assertion of a right.

The judgment of the District Court is clearly right, and it is therefore affirmed. All concur.

ON APPLICATION FOR A REHEARING.

In their application for a rehearing, counsel for the defendants do not assail the opinion of the court, but insist that the heirs of Ole Peterson are estopped for reasons not discussed therein. It is insisted that Ole Peterson himself could not, in his lifetime, have been heard to question the title of the defendant, because he received, as creditor of the estate of Olia Mikkleson, all of the proceeds of the sale of the land in controversy, and that inasmuch as he would, if living, be estopped, his heirs are likewise estopped. If defendant's contention had any foundation in the facts of this case, we would strongly incline to the view that the estoppel had been made out. Certainly Ole Peterson could not receive and retain the proceeds of the sale of the land, knowing that they were paid by the purchaser in the belief that he was

securing a perfect title to the land, and yet be heard, in a court of equity, to assail such title. Nor would the capacity in which he might receive such proceeds be material. But unfortunately for the defendants, the record is silent on the vital question of fact, on which rests the whole of this new argument. The record does not disclose the fact that Ole Peterson ever received a dollar of the purchase price of the land, or even that he was a creditor of the estate of Olia Mikkleson. The findings of fact contain no reference to the matter, and counsel for defendants have seen fit not to settle any statement of the case, and thus bring before us the evidence. In such a condition of the record we cannot regard any assertions made by counsel touching facts which are not embodied in the findings of fact, or admitted by the pleadings. From neither source are we able to learn that Ole Peterson has ever derived any benefit from the sale which has been adjudged void.

The petition for a rehearing is therefore denied. All concur.

(76 N. W. Rep. 233.)

THE JAMESTOWN & NORTHERN RAILROAD COMPANY *vs.* THEODORE J. JONES.

Opinion filed June 4th, 1898.

Public Lands—Railroad Grant—Rights of Pre-emptor.

As against settlers, the grant of a right-of-way to a railroad company under the act of congress passed in 1875 attaches only after the profile of the road has been approved by the secretary of the interior, and not from the time the road itself is constructed.

Squatters Rights.

One who settles upon land before such profile is approved, with intent to make a pre-emption filing thereon, secures such a possessory right therein as is required to be condemned by section 3 of the act, although at the time of his settlement the road has been constructed, and is in full operation. The land is, from the time of such settlement, land disposed of, within the implication of section 4; and hence the settler does not take subject to the right of way, which is, under the statute, superior to the title of the settler only as to land disposed of after the approval of the profile.

Effect of Failure to File Declaratory Statement in Time.

Held, further, that the failure of the settler to file his declaratory statement within the time prescribed by the statute will not affect his rights, as against the railroad company's right-of-way.

Failure to Make Final Proof.

Neither will his omission to make final proof within the statutory period destroy his superior rights, when he is prevented by the fact that there is an uncanceled homestead entry against the land.

Abandonment of Entry—Rights of Railroad Company.

The rule that, when public lands have been entered, they are segregated from the public domain, and that thereafter a railroad grant cannot attach to them, despite the fact that such entry is subsequently abandoned or set aside, does not apply to the grant of a right-of-way under the act of congress passed in 1875. As against the United States, the grant attaches at the time of the approval of the profile, even though such land has been already filed upon,—subject, however, to such prior entry. But, if the same is thereafter canceled or abandoned, the grant of the right-of-way becomes absolute.

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

Action by the Jamestown & Northern Railroad Company against Theodore J. Jones. Defendant had judgment, and plaintiff appeals.

Affirmed.

Ball, Watson & Maclay, for appellant.

Prior to the enactment of the general act of 1875, similar grants had been made to other companies. In construing similar acts the Supreme Court has held that they constituted a present grant, and that the title acquired by settlement subsequently made upon land over which the right-of-way was granted, was subject to such grant. *Baldwin* v. *Railroad*, 103 U. S. 426; *Railroad* v. *Dyer*, 1 Sawyer, 641; *Railroad* v. *United States*, 92 U. S. 733; *Railroad* v. *Cook*, 163 U. S. 491; *Railroad* v. *Railroad*, 160 U. S. 77. The rights of a railroad company under the act of 1875, are fixed by the date of filing map of definite location. *Larson* v. *R. Co.*, 23 Pac. Rep. 974; *Hamilton* v. *R. Co.*, 28 Pac. Rep. 408; *Enoch* v. *R. Co.*, 33 Pac. Rep. 966; *Reidt* v. *R. Co.*, 34 Pac. Rep. 150; *Kinion* v. *R. Co.*, 24 S. W. Rep. 636. When plaintiffs map was approved March 13th, defendants

rights had not attached to the land. They could not attach until he made his filing in June. Mere settlement or cultivation was not enough to segregate the tract from the category of public lands. *Railroad* v. *Dunmeyer*, 113 U. S. 629, 5 S. C. Rep. 566; *Railroad* v. *Whitney*, 132 U. S. 357, 10 S. C. Rep. 112; *Campbell* v. *Wade*, 132 U. S. 34, 10 S. C. Rep. 9; *Frisbie* v. *Whitney*, 9 Wall. 187; *Whitney* v. *Taylor*, 158 U. S. 85; *Yosemite Valley Case*, 15 Wall. 77; *Railroad* v. *Colburn*, 164 U. S. 383; *Doran* v. *Railroad*, 24 Cal. 245; *Bybee* v. *Railroad*, 139 U. S. 679; *Hamilton* v. *Railroad*, 28 Pac. Rep 408; *Railroad* v. *Burr*, 24 Pac. Rep. 1032. This land was in actual use for purposes of business and trade in February, 1883, when Jones made entry thereon and consequently was not subject to pre-emption entry. Subd. 3, § 2258, Revised Statutes, U. S.; *Ex parte Davidson*, 57 Fed. Rep. 883. Assuming that defendant lawfully initiated a settlement on February 23rd, 1883, yet he lost the same as against the rights of plaintiff by his failure to file declaratory statement within three months from the date of his settlement. § 2265, U. S. Rev. Stat. By failure to make his final proof within thirty months thereafter, Jones rights became forfeit, plaintiffs rights instantly attached to the land and became paramount. § 2267, U. S. Rev. Stats; *Hamilton* v. *Railroad*, 28 Pac. Rep. 408; *Alexander* v. *Railroad*, 40 S. W. Rep. 104; *Kinion* v. *Railroad*, 24 S. W. Rep. 636; *Sproat* v. *Durland*, 35 Pac. Rep. 682.

S. E. Ellsworth, for respondent.

The act of March 3rd, 1875, does not operate as a present grant. It entitled any company to obtain the right-of-way upon performing certain conditions. *Spokane Falls, etc. R. Co.* v. *Zeigler*, 61 Fed. Rep. 372, 167 U. S. 65; *Red River, etc. R. Co.* v. *Sture*, 20 N. W. Rep. 229. A railroad company cannot acquire rights under the act of March 3, 1875, without full compliance with the terms of the act including the filing of a profile of its road with the register of the proper land office, and the title when acquired dates from the last act necessary to such compliance. *Lilienthal* v. *Ry. Co.*, 56 Fed. Rep. 701; *Larsen* v. *Ry. Co.*,

23 Pac. Rep. 975; *Hamilton* v. *Ry. Co.*, 28 Pac. Rep. 408; *Enoch* v. *Ry. Co.*, 33 Pac. Rep. 966; *Chicago, etc., Ry. Co.* v. *Van Cleave*, 33 Pac. Rep. 472; *Reidt* v. *Ry. Co.*, 34 Pac. Rep. 150; *Kinion* v. *Ry. Co.*, 24 S. W. Rep. 636. The act of March 3, 1875, grants to railroad companies, the right-of-way only over the public lands of the United States. "Lands to which any claims or rights of others have attached do not fall within the designation of public land." *Bardon* v. *Northern Pac. R. Co.*, 145 U. S. 806; *Wilcox* v. *Jackson*, 13 Pet. 516; *Newhall* v. *Savage*, 92 U. S. 76. The pre-emption laws are a means of disposing of public lands, and an entry of record under them, valid on its face is such an appropriation of the tract entered as segregates it from the public domain and precludes it from subsequent grant. *Spokane, etc. R. Co.* v. *Ziegler*, 61 Fed. Rep. 392; *Witherspoon* v. *Duncan*, 71 U. S. 210; *United States* v. *Turner*, 54 Fed. Rep. 228. Such entry prevails against individuals and the government as well. 1 Copps Pub-Land Laws, 387; *Kansas Pac. R. Co.* v. *Dunmeyer*, 113 U. S. 629; *Hastings, etc. Ry. Co.* v. *Whitney*, 132 U. S. 357; *Sturr* v. *Beck*, 133 U. S. 541. One who has settled on public lands with intention to obtain title under the pre-emption laws has a "possessory claim" within the meaning of section 3, of the act. *Washington, etc., R. Co.* v. *Osborn*, 169 U. S. 103; *Spokane, etc. R. Co.* v. *Ziegler*, 167 U. S. 65. Upon such failure of Jones as would forfeit his right the land would revert to the government, but not to the railroad company. The railroad company upon the filing and approval of its map is granted rights upon lands which the government then owned or had not disposed of, but no right is acquired in lands subsequently reverting to the government. *Kansas Pac. Ry. Co.* v. *Dunmeyer*, 113 U. S. 629; *DeLacey* v. *N. P. Ry. Co.*, 72 Fed. Rep. 726; *Johnson* v. *Bridal Veil L. Co.*, 33 Pac. Rep. 528; *Whitney* v. *Taylor*, 158 U. S. 85. Where a claimant is prevented from making proof because land was covered by another entry and the local land officers refused to receive his proof, his entry is not invalidated by the expiration of the time

allowed by law in which to make such proof. *Shepley* v. *Cowan*, 91 U. S. 338; *Weeks* v. *Bridgeman*, 159 U. S. 540.

CORLISS, C. J. Plaintiff claims that it is entitled to a right-of-way over the defendant's land. It is conceded that it has never purchased or condemned such right of way. All the title it has must rest upon the act of congress passed March 3, 1875, entitled "An act granting to railroads the right-of-way through the public lands of the United States." Section 1 of that act declares "that the right-of-way through the public lands of the United States is hereby granted to any railroad company duly organized under the laws of any state or territory, except the District of Columbia, or by the congress of the United States, which shall have filed with the secretary of the interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of one hundred feet on each side of the central line of said road; also the right to take from the public lands adjacent to the line of said road, material, earth, stone and timber necessary for the construction of said railroad; also ground adjacent to such right-of-way for station buildings, depots, machine shops, side-tracks, turn-outs and water stations, not to exceed in amount twenty acres for each station, to the extent of one station for each ten miles of its road." The plaintiff was organized as a railroad corporation on the 17th of September, 1881, under the laws of the then Territory of Dakota. After its organization it surveyed a line of route for its road from a point near the City of Jamestown, in a northwesternly direction, through the County of Stutsman, to the northern boundary thereof. The line ran through the premises in question. The survey was finished October 30, 1881. A map representing the survey was made, and thereafter the plaintiff, by resolution of its board of directors, adopted such survey as the definite route of its line of railroad. In 1882 the road was constructed, and since that time trains have been continuously run thereover by the plaintiff. On the 26th of January, 1883, the plaintiff filed with the secretary of the interior a copy of its

articles of incorporation, and due proofs of its organization under the same. On the 13th of March, 1883, plaintiff's map of definite location was filed with, and approved by, the secretary of the interior. But we find nothing in the case to show that it was ever filed in the office of the register of the land office, as required by section 4, of the act. We will assume, however, that it was in fact filed there, and was thereafter forwarded to the secretary of the interior; it being undisputed that since March 13, 1883, it has been on file in his office. Defendant claims title to the land under a settlement made by him, as a pre-emptor, on the 23rd day of February, 1883,—more than two weeks before the map of definite location was approved by the secretary of the interior. It is undisputed that he is the fee owner of the quarter section of land across which plaintiff claims a right-of-way, he having received a patent therefor. The only contention on the part of the plaintiff is that his right as owner is subject to the plaintiff's rights under the act of 1875. Plaintiff does not claim that it is the fee owner of the strip of land involved, but only that it has an easement therein under the act of congress. Not having condemned or purchased such easement it must, of course, show that it has obtained the same under that act.

Defendant, at the outset, lays down the broad proposition that, when the grant became operative as to the plaintiff, the land in question was no longer public land, because of the fact that there were then outstanding two pre-emption and one homestead filings against it. And in this connection he cites a number of decisions in support of the well established doctrine that in cases of land grants (not, however, for a right-of-way) the character of the land as public land is fixed by its condition at the moment the grant attaches, and that, therefore, if any portion of the grant has been previously segregated from the public domain by entry, it does not fall within the terms of the grant, even though such entry be thereafter abandoned or set aside. *Railroad Co.* v. *Whitney*, 132 U. S. 357, 10 Sup. Ct. 112; *Railway Co.* v. *Dunmeyer*, 113 U. S. 629, 5 Sup. Ct. 566; *Bardon* v. *Railroad*

Co., 145 U. S. 535, 12 Sup. Ct. 856; *Railroad Co.* v. *Colburn*, 164 U. S. 383, 17 Sup. Ct. 98; *Whitney* v. *Taylor*, 158 U. S. 85, 15 Sup. Ct. 796. We do not think that these decisions apply to the act under which plaintiff claims. When the act of 1875 is construed as a whole, we believe that, as against the United States, the right-of-way is transferred, even when the land has been entered at the time the map is approved, and that, if such entry is subsequently abandoned or set aside, the grantee will enjoy an absolute easement in the land. The rights of the railroad company will be subject to all rights which have attached to the land before the filing and approval of the map of definite location. But, as against the United States, the grant is as effective in cases where the land has been entered as where it has not. Under any other view of the statute, the railroad company might be compelled to condemn successive rights of settlers, only to find that all its proceedings were futile, because in each case the settler's rights were, by cancellation or abandonment, destroyed. We think that it was the purpose of congress to make the grant operative as against the government, subject only to existing rights of settlers, and that the question whether a particular piece of land was within the terms of the grant, so far as the government was concerned, was not to depend upon the freedom of that land from settlement at the time the map was approved. Under this view of the statute, a railroad company could never be required to condemn any other than existing rights. When those should once be condemned, the destruction or abandonment thereof, followed by a new entry, would not force the grantee to assume anew the burden of condemning subsequent rights, and meeting with a similar experience, to take up again, perhaps, the Sisyphean task of toiling hopelessly for title, only to find each time that all its efforts had proved abortive. Nor are we without express authority on this point. *Hamilton* v. *Railway Co.*, (Idaho,) 28 Pac. Rep. 408. The decision of the court in that case, accurately stated in the syllabus, is as follows: "One

Wilkins filed declaratory statement November 7th, 1888, and relinquished the same October 5, 1889, on which day Daniel made homestead entry of the same tract, and on April 29, 1890, made cash entry of said tract, and on September 3, 1890, conveyed by warranty deed to Hamilton a portion of said tract. The railroad company claims right-of-way over tract conveyed to Hamilton, by reason of compliance with act of congress of March 3, 1875, and the approval of the plat by the secretary of the interior July 11, 1889. Hamilton claims damages because of company grading its roadbed through said conveyed tract. Held, that Wilkins' pre-emption filing did not exempt said land from the grant of right-of-way to the company, as he relinquished the same before perfecting the title; that there was no privity of estate between said Wilkins and Daniel; that patent to Daniel would take effect, by relation, October 5, 1889, the date of Daniel's homestead entry, and would not antedate the grant to the company." And in *Alexander* v. *Railroad Co.*, (Mo. Sup.) 40 S. W. Rep. 104, the same doctrine was announced and applied.

But it appears that the settlement of the defendant was made before the map of definite location was filed and approved, and defendant's counsel contends that for this reason his rights are superior to those of the plaintiff. He contends that, as against third persons, the decisive moment is the time of the approval of the map. On this point he is supported by authority. *Lilienthal* v. *Railway Co.*, 56 Fed. Rep. 701; *Larsen* v. *Navigation Co.*, 19 Or. 240, 23 Pac. Rep. 974; *Hamilton* v. *Railway Co.*, (Idaho) 28 Pac. Rep. 408; *Enoch* v. *Railway Co.*, 6 Wash. 393, 33 Pac. Rep. 966; *Railway Co.* v. *Van Cleave*, (Kan. Sup.) 33 Pac. Rep. 472; *Reidt* v. *Railway Co.*, (Wash.) 34 Pac. Rep. 150. The clear implication of section 4 is that settlers shall take subject to the right-of-way only when their rights attach after the approval of the map,—or, as the statute speaks of it, the "profile of its road." That section provides "that any railroad company desiring to secure the benefits of this act, shall, within twelve months after the location of any section of twenty miles of its road, if the same

be upon surveyed lands, and, if upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the register of the land office for the district where such land is located a profile of its road; and upon approval thereof by the secretary of the interior the same shall be noted upon the plats in said office; and thereafter all such lands over which such right-of-way shall pass shall be disposed of subject to such right-of-way." Counsel for the plaintiff contends that, in view of the fact that the road had been constructed and was in operation at the time the defendant settled on the land, the grant of the right-of-way attached before the interest of defendant under such settlement; and in this connection they cite the decision of Secretary Vilas in the Downey case, 8 Land Dec. Dep. Int. 115. The reasoning of the secretary seems to us destitute of force. Section 4 was not framed for special cases, as he seems to think, but was intended to apply to every case arising under the law. The implication that only after the approval of the profile of the road should land be disposed of subject to the right-of-way applies to every conceivable case which can arise under the act,—as well those where the road has been constructed as those where it has not. We believe that lands are disposed of, within the meaning of this section, whenever a pre-emption settlement thereon has been made. It is clear, from section 3, that the act contemplates that a settler who has only possessory rights shall be protected as much as one who has made final proof. It declares "that the legislature of the proper territory may provide for the manner in which private lands and possessory claims on the public lands of the United States may be condemned." The land in question was unoffered land, and the statute recognizes the fact that a settler thereon acquires rights by his mere settlement, though no entry thereof has yet been made. Rev. St. U. S. 1878, section 2265. Sections 3 and 4 treat such settler who has made his settlement prior to the approval of the profile of the road (which is nothing more than a map of definite location) as possessing superior rights, which must be considered by the rail-

road company, the same as any other private property. It is obvious that lands are disposed of, within the meaning of section 4, whenever a person has secured thereon such a possessory right as the railroad company is required to condemn under section 3. It has been held by the highest authority that settlement without entry confers upon the settler such a possessory right. *Railroad Co.* v. *Osborn*, 160 U. S. 103, 16 Sup. Ct. 219; *Railroad Co.* v. *Zeigler*, 167 U. S. 65, 17 Sup. Ct. 728. Of course, the right so initiated must follow up by the steps necessary to the acquisition of title.

It is insisted by counsel for plaintiff that the rights so obtained by the defendant were lost by his failure to make his entry within three months after his settlement. But section 2265, Rev. St. U. S., does not declare an absolute forfeiture, but only one in favor of another settler. It is clear from the language of the statute, and from the decisions of the Federal Supreme Court, that a railroad company claiming a right-of-way under the act of 1875 is not within the class of persons who may take advantage of the failure of the settler to proceed with diligence in the filing of his declaratory statement. *Johnson* v. *Towsley*, 13 Wall. 72. Even the government itself cannot insist upon the forfeiture. The settler places himself in the power of a certain class of persons by his default. In all other respects his position is as unassailable as one who has strictly complied with law.

Nor is there anything in the contention of counsel for plaintiff that defendant has lost his priority by his failure to make final proof within 30 months after filing his declaratory statement, though he is required so to do by section 2267, Rev. St. U. S. He offered in time to make final proof, but his offer was rejected, owing to the fact that there was an uncanceled homestead entry against the land. While he was powerless to make final proof he was not in default. *Shepley* v. *Cowan*, 91 U. S. 338; *Weeks* v. *Bridgman*, 159 U. S. 541, 16 Sup. Ct. 72. On the 21st of November, 1892, he procured a relinquishment of the homestead entry, and changed his pre-emption to a homestead entry; and on July

21, 1893, he made final proof under his homestead entry, and thereafter he received his patent. These facts make it apparent that the disposition of the land to the defendant, which antedated the approval by the secretary of the interior of plaintiff's profile of its road, has never been annulled, but that, on the contrary, the initial step has, so far as the plaintiff is concerned, been followed by all the necessary steps to transmute the original possessory right into a perfect legal title, which relates back to the settlement on February 23, 1883, as against the plaintiff's claim to a right-of-way over the land. It is therefore our opinion that the plaintiff has no right-of-way over the defendant's land, and, as this was the decision of the lower court, that decision is, in all respects, affirmed. All concur.

ON APPLICATION FOR A REHEARING.

Counsel for defendant urges with great earnestness that, inasmuch as its road had been constructed over the land in controversy before the defendant had initiated his pre-emption rights by settlement, such rights are subject to plaintiff's title to the right-of-way in question. There is much equity in this contention, and, were it not for the language of the statute, we would be strongly inclined to sustain it. But the implication found in section 4, that the settler takes subject to the right-of-way only when his rights attach after the map of definite location has been filed and approved, when considered in the light of the provisions of section 3, which clearly show that mere possessory rights must be condemned by the railroad company, plainly point to only one conclusion, in our judgment; *i. e.* that when a settler has taken possession of land, with a view to making a pre-emption filing thereon, before the map of definite location of a railroad right-of-way thereover has been filed and approved, the railroad company must condemn the possessory right of the pre-emptor. The cases cited by counsel for defendant on this application are, in our opinion, easily distinguishable from the case before us for decision. In *Washington & I. R. Co.* v. *Cœur D'Alene Ry. & Nav. Co.*, 160 U. S. 77, 16 Sup. Ct. 231, the plaintiff was seeking

to recover possession in ejectment of a right-of-way which it claimed that it had acquired under the provisions of the act of 1875,—the act which we are here construing. It is obvious that, under a familiar rule, the plaintiff, in order to recover, was obliged to establish its title to the right-of-way, as its right to possession depended entirely upon its title. It based its claim upon the fact that it had surveyed and staked the particular portion of the right-of-way in controversy the day before the defendant had surveyed and staked a right-of-way over the same land. But the court held that such previous survey gave the plaintiff no rights whatever, for the reason that at the time it was made the line of plaintiff's railroad, as described in its articles of incorporation, did not cover or include the land in controvery, or any part thereof. Besides, it appeared that the plaintiff had not at that time placed itself in the category of those entitled to the benefit of the act of 1875, as it had not yet filed with the secretary of the interior a certified copy of its articles of incorporation, and proof of its organization thereunder.

It was contended on behalf of the plaintiff that on subsequently amending its articles of incorporation to include a line of railroad over the land in dispute, and thereafter filing its articles of incorporation and proof of organization, it had a right to adopt the previous survey, and that such adoption related back to the date when it was made. But the court refused to take this view of the question; holding, "that, so far, as the conflicting rights of the parties to this controversy are concerned, the status of the plaintiff is the same as if its survey of October 28, 1886, had not been made." This brief review of this case lays bare the fact that the plaintiff therein was defeated in its action of ejectment because the act of survey on which it rested its right to possession was adjudged to be utterly without legal effect, for the reasons stated in the opinion,—reasons which have no bearing on the case at bar.

We have carefully studied the recent decision of the Federal Supreme Court in *Railroad Co.* v. *Smith*, (opinion filed May 31,

1898) 18 Sup. Ct. 794, to which our attention has been called by counsel for the defendant. That case is, in our judgment, so plainly distinguishable from the controversy before us, that we deem it unnecessary to do more than state our conclusion that it is not an authority for the defendant. Nor do we discover in the opinion any reasoning which, when fairly construed, militates in the least against our decision in this cause. The point on which our holding is adverse to the defendant is by no means so clear that we feel the very highest degree of confidence that we are right in our view. And it is therefore a great satisfaction to us to realize that our error, if any, can, and probably will, be corrected by a higher tribunal.

The application for a rehearing is denied. All concur.

76 N. W. Rep. 227.)

HENRY W. K. CUTTER, *et al vs.* JAMES R. POLLOCK, *et al.*

Opinion filed June 3rd, 1898.

Receiver's Expenses—Apportionment.

Plaintiffs instituted an action against defendants to have certain property, on which defendants held liens, declared a trust fund for the benefit of all the creditors of the owner thereof. In this action a receiver of the property was appointed, on the application of the plaintiffs. The plaintffs were unsuccessful, it being held that, as a matter of law, they had no interest in the property, on their own theory of the facts; and the receiver was directed to turn over to the defendants the proceeds of the property, after deducting therefrom his fees and and expenses. *Held*, that it was proper for the court to adjudge that the defendants should recover judgment against the plaintiffs for three-fifths of the amount so deducted for the expenses of the receivership, from the property on which the defendants held liens; it appearing that at the time the receiver was appointed their security was ample, and that, after adding the amount of such judgment in their favor to the sum turned over to them by the receiver, they would still fail to receive the full amount of their claims.

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

Action by Henry W. K. Cutter and another against James R.

Pollock and another. Defendants had judgment, and plaintiffs appeal.

Affirmed.

Newman, Spalding & Stambaugh, for appellants.

Pollock & Scott, (*Smith Stimmel*, of counsel,) for respondents.

CORLISS, C. J. On the former appeal we settled the merits of this action. 4 N. D. 205, 59 N. W. Rep. 1062. On this appeal we have to deal with the fees and expenses of the receiver appointed in the action. There is no controversy touching their amount. The sole inquiry is whether, after the fund on which the defendants held a lien had been depleted by the payment thereout of such fees and expenses, the defendants should be allowed a judgment against the plaintiffs, reimbursing them in part for their loss. The object of the action was to have certain chattel mortgages construed as constituting an assignment for the benefit of creditors, with preferences, and for that reason to have the preferences thereby created adjudged void under the statute, and the property administered as a trust fund for the benefit of all the creditors of the mortgagors. We held that the action would not lie (4 N. D. 205, 59 N. W. Rep. 1062;) and this holding involved the conclusion that the complaint did not state a cause of action, and that the case was one in which a receivership was improper. Certainly no court should appoint a receiver of a defendant's property, in which the plaintiff claims an interest, when the complaint itself shows that the plaintiff has no interest therein, and that his action is without foundation. The District Court held, on the settlement of the receiver's accounts, that the defendants should recover of the plaintiffs judgment for three-fifths of the fees and expenses allowed the receiver out of the property on which alone the defendants held liens, and in which the plaintiffs had no interest whatever. We discover in this no abuse of discretion. Nor are we able to agree with counsel for plaintiffs that the court had no power to so adjust the burden of the expense of the receivership that a portion of it should

ultimately fall on those who, without right, secured the appointment of the receiver, and thereby caused this unnecessary expense. When the protection of the receiver himself is alone involved, the courts will ordinarily pay little heed to the injustice which results to the successful suitor because his own property, which constitutes the fund, is in the first instance charged with the burden of the receiver's fees and expenses. This certainly should be the case when the complaint states a cause of action, and the action is one in which a receiver can be appointed. Neither the court nor the receiver can anticipate that the plaintiff will be defeated upon the merits on the trial of the issues of fact in the case. We intimated when this cause was before us on the merits that we regarded the better rule to be that the receiver should not ordinarily be compelled to run the hazard of the result of the litigation. See page 216 of 4 N. D., and page 1064 of 59 N. W. Rep. See, also, *Heise* v. *Starr*, 44 Ill. App. 406, 409; *Hopfensaek* v. *Hopfensaek*, 61 How. Prac. 498; *Beckwith* v. *Carroll*, 56 Ala. 12; *Cattle Co.* v. *Bindle*, (Tex. Civ. App.) 32 S. W. Rep. 582; *Radford* v. *Folsom*, (Iowa,) 7 N. W. Rep. 604, 609. And while there are cases which hold that he must look for pay and reimbursement to the party at whose instance he was appointed, when his appointment is illegal (see *Couper* v. *Shirley*, 21 C. C. A. 288, 75 Fed. Rep. 168, 171, and cases cited in 4 N. D. 216, 59 N. W. Rep. 1064,) yet even in such a case the defendant should not be allowed to defeat the receiver's right to look to the fund unless such defendant attacks the receivership itself by every remedy which the law affords. If he acquiesces therein, he should not, as against the receiver, be permitted to claim that the fund should be turned back to him undiminished by the receiver's charges, when, after a trial on the merits, he has established his title to such fund as against the plaintiff. But the case is different when the question arises between the parties to the action. The court will take care of its own officers, even when the result is a hardship to one of the parties. But it will not perpetuate this necessary injustice by adjudging that, even between the

parties themselves, the one who is innocent, and who has been compelled to pay the receiver's fees and expenses out of his own property, shall not be permitted to recover from the plaintiff in the action itself the moneys he (the defendant) has been so compelled to disburse by reason of the oppressive and illegal action of his adversary. Counsel for plaintiffs in this case concede that when the order appointing the receiver is illegal (as when, for instance, the case is one in which it is improper to appoint a receiver at all) the court may require the defeated suitor to reimburse his antagonist, whose property has been taken to pay the expenses of the receivership. But they contend that the case is different where the plaintiff is defeated on the merits, provided the suit is one in which a receivership is proper, and the complaint states a good cause of action. The decision of the court in *Ferguson* v. *Dent*, 46 Fed. Rep. 96, leans, quite strongly in favor of this view. But an examination of the opinion discloses the fact that the decision really turned upon the peculiar features of the case, and not upon the general doctrine enunciated in the opinion. The reasoning of the court is shorn of much of its force because of the fact that the court does not seem to discriminate between a case where the receiver is insisting that he shall be protected even at the expense of the innocent suitor, and a case where the defeated litigant is insisting that he also should be protected, to the detriment of the innocent party, upon whose property he has thrown the burden of the expense of a receivership. We do not believe that any case can be found to uphold the palpably unjust rule that one who is shown to have had no right to maintain the action, and no interest whatever in the property which he claims, can require that the defendant, who has paid out of his own pocket the expenses of a receivership, shall not call upon him (the plaintiff in the action) for reimbursement. The case of *City of St. Louis* v. *St. Louis Gaslight Co.*, 11 Mo. App. 237, is directly in point in support of our view of the law. See, also, as tending to support it, *Lockhart* v. *Gee*, 3 Tenn. Ch. 332; *French* v. *Gifford*, 31 Iowa, 428. The best reasoned

case we have found on the subject is *Cattle Co.* v. *Bindle*, (Tex. Civ. App.) 32 S. W. Rep. 582, where the court clearly distinguishes between those cases where the right of the receiver himself is involved, and those in which the sole inquiry is how, on equitable principles, the expenses of the receivership should be adjusted as between the parties to the action. The court, after adopting the rule that in the first instance the receiver should ordinarily be allowed his fees and expenses out of the fund, declares: "In fact, we are of opinion that costs of this kind, in the absence of a statute, should in all cases, as between the parties, be adjudged upon equitable principles. *French* v. *Gifford*, 31 Iowa, 428. In this case, however, the question is not whether the court, after authorizing the receiver to retain his compensation out of the funds, should have gone further, and authorized the defendant [appellant] to recover the sum so retained from the plaintiff; but the question is should the receiver have been authorized to retain his fees out of the fund in the first instance?"

We regard the cases cited by counsel for plaintiffs as distinguishable from the case at bar. This is readily discernible from an examination of their facts, and the grounds on which such decisions were respectively based. See *Radford* v. *Folsom*, 55 Iowa, 265, 7 N. W. Rep. 604; *Jaffray* v. *Raab*, 72 Iowa, 335, 33 N. W. Rep. 337; *Hembree* v. *Dawson*, (Or.) 23 Pac. Rep. 264. In *Heise* v. *Starr*, 44 Ill. App. 406, the court merely held that the receiver could look to the fund for his pay, without reference to the question of the ownership thereof, as between the parties to the suit. What would be the respective rights of the parties as between themselves was expressly left undecided, it not being involved. Were there no other facts in this case, the District Court would have been justified in rendering judgment against the plaintiffs for the full amount of the receiver's fees and expenses which had been taken out of the property on which the defendants held liens. Is there anything peculiar in the circumstances of the case which take it out of the general rule? We must answer this inquiry in the negative. The original order

appointing the receiver directed him to proceed with all reasonable dispatch to convert the property into money. This order was made October 25, 1889. Thereafter the receiver applied to the court for authority to make purchases of goods, that the stock might be kept up so that sales could be made to advantage. The receiver appears to have considered that he was to sell out the property gradually at retail, and it is apparent that the plaintiffs acquiesced in this view for some time. No steps were taken by them to compel the disposition of the goods, but the matter appears to have been left to the discretion of the receiver, supplemented by such directions as the court should from time to time give him in the execution of the trust. In June, 1890, plaintiffs' counsel recognized the fact that the receiver had been carrying on the business in this way, and they did not at that time raise any objection thereto. It is true, they presented to the court an affidavit, and asked for an order that the receiver be required to account; but they did not question the legality of his course, but, on the contrary, tacitly admitted it, by the averments of the affidavit then presented, and the character of the relief they sought. They did not ask that the receiver be required to desist from further pursuing this policy. They did not even assail the legaility of what he had done. They merely insisted that he should be required to account from time to time while the business was being so conducted. The affidavit to which we refer was made by one of plaintiff's counsel, and is. so far as its provisions relate to this question, as follows: "That said receiver has been in possession thereof since his appointment, and has been buying and selling therefrom in the course of trade, and making additions thereto by purchase, from time to time, as deemed best; that he has conducted a large buisness therein, but has never rendered an account to this court of any of his receipts or transactions as such receiver, or of any disposition made of any of the assets which came into his hands in that capacity; that it will be for the best interest of all parties to said action to have said receiver report to this court at once, and as often as once in each

month hereafter, all his transactions as such receiver." The order to show cause, which the plaintiffs obtained, did not require the receiver to show cause why he should not discontinue this mode of managing the estate, but merely that he be required to render monthly accounts; thereby indicating that plaintiffs not only recognized what had been done in the past, but desired that the same policy might be pursued in the future. That order to show cause is as follows: "It is ordered that you, J. C. Gill, the duly appointed receiver of the property and assets of J. R. Pollock, defendant above named, report to this court on or before the 12th day of June, 1890, and show the items and amount of all expenses incurred by you as such receiver in the conduct of the business of such receivership, the amount of all sales of merchandise or other property, the items and amounts of all collections, the amount of all purchases or additions made to said stock, by order of court or otherwise, in your capacity as such receiver, and the value of all cash, stock, and other assets now in your hands as such receiver, and that hereafter you report on the 1st day of each month during the pendency of your said receivership the amount of all sales and purchases, all expenses incurred by you as such receiver, the amount of cash and the estimated value of all stock in your possession as such receiver, during the pendency of such receivership." These facts make it evident that plaintiffs were willing to have the business continue, with all the consequences thereof. They therefore assented to the incurring of all the necessary expenses of the management of the business, including the reasonable compensation of the receiver himself. It follows that they cannot urge that the defendants alone are responsible for such expenses, and hence should pay them. The defendants merely held liens upon the property, and, if the value of the property at the end of the time when the receiver ceased to carry on the business was as much greater than its value at the time he took possession as the expenses of the receivership, it would be obvious that defendants had not suffered any injury by charging up such expenses against the fund. But the facts do

not present such a case. There is no showing that the stock was increased in value by the business which was carried on. It was fairly worth $12,000 when the receiver took possession. And all the receiver ultimately realized therefrom was the sum of $8,172.63, of which $3,088.58 was turned over to the defendants at the end of the litigation, and the balance, $5,084.05, was retained by the receiver for his fees and expenses. It would thus seem that the business had been carried on at a loss. Had there been no receivership, the defendants would certainly have realized their claims out of the property, as such claims did not exceed $6,300, and they were, at the time the receiver took possession, proceeding with the foreclosure of their mortgages. But, after adding to all that was turned over to them by the receiver that proportion of the amount of the expenses of the receivership for which they have been allowed judgment against the plaintiffs, there is still a deficiency on their claims. The money which has been used to pay the expenses of the receivership has directly lessened the sum which they would otherwise have obtained out of their security. In other words, their security has been taken from them, to their prejudice, to discharge the expenses of a receivership for which they are not, but for which the plaintiffs are, responsible,—a receivership which they opposed, and which has been finally adjudged to have been improper. They should therefore be allowed a judgment against the plaintiffs to the full extent that the payment of such expenses out of their security has operated to their detriment, were it not that they themselves appear to have acquiesced in the course pursued by the receiver. This fact affords some reason for apportioning such expenses between the parties, and this was what was done, the plaintiffs being required to pay only three-fifths thereof. We should have been satisfied, however, had the court required the plaintiffs to pay all these expenses. Even then the defendants would fail to to collect their claims,—claims which were amply secured at the time the property was wrested from them by the receivership.

But the defendants appear to be satisfied with the judgment, as they have not appealed.

We are unable to agree with counsel for plaintiffs that the fact that it had been decided by the Territorial Supreme Court (*Straw* v. *Jenks*, 6 Dak. 414, 43 N. W. Rep. 941,) that the action in which the receiver was appointed would lie is at all important. This court held that that decision was not the law, and it is not true that it ever was the law in the State of North Dakota. It was the law when this action was commenced that the plaintiffs had not a particle of interest in the property which they sought to have declared a trust fund for the benefit of all their debtor's creditors otherwise we should have decided the case in their favor. The ground of our decision was that, while there was a decision favorable to the maintenance of the action, yet that decision did not correctly declare the law on that subject. The plaintiffs, without shadow of right, under the law, to any of the property on which defendants held liens, had the same taken from the defendants' possession and put in the custody of a receiver; and the result has been that the defendants have had their security largely decreased in value by the receiver's charges, which have been paid out of the proceeds of such property. While the plaintiffs may have been misled by the erroneous decisions of the Territorial Supreme Court, that is no reason why the defendants, who are equally innocent, and who did not secure, but opposed, the appointment of the receiver, should suffer all the loss resulting from such error. We do not mean that counsel for plaintiffs are in fault. They are not. They relied on a decision directly in point, the same as any other member of the bar might have done under similar circumstances. It was entirely natural that they should take the course which they did, and we cannot but feel that the result is a hardship for the plaintiffs, under the circumstances. But the hardship to the defendants, would be still greater, were we to compel them to bear all this loss. We are not prepared to say that it is not unjust to require them to pay any portion of the receiver's charges. But their

acquiescene in the judgment, which gives them relief to only the extent of three-fifths of the expenses of the receivership, renders it unnecessary for us to express any opinion on this point.

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

(76 N. W. Rep. 235.)

R. T. ROLPH *vs.* CITY OF FARGO, *et al.*

Opinion filed June 4th, 1898.

Local Assessments—Paving.

It is competent for the legislature to direct that all the expense of paving a city street shall be assessed against the abutting property in proportion to frontage.

Amount of Assessment Not Limited by Increase in Value.

In exercising the power of local assessment, the legislature is not limited to the actual increase in value of the property assessed resulting from the local improvement.

Constitutional Limitation.

Section 176 of the state constitution does not relate to local assessments, but only to general taxation.

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

Action by R. T. Rolph against the City of Fargo and A. T. Shotwell as city treasurer of said city, to enjoin the collection of, and to cancel special assessments levied on property of the plaintiff Rolph, in the City of Fargo, for the paving of Eighth street in said city. Plaintiff had judgment, and defendants appeal.

Affirmed.

Ball, Watson & Maclay, for appellants.

The uniformity rule of taxation prescribed by section 176, constitution, does not apply to special assessments. 25 Am. and Eng. Enc. L. 504, n. 1, 495, n. 7. The power of the legislature to provide for taxation and assessments, and to prescribe rules for

their apportionment is paramount and unquestionable, excepting in so far as it is restricted by the constitution. Cooley on Taxation, 32; *Spencer* v. *Merchant*, 3 N. E. Rep. 662; *Spencer* v. *Merchant*, 125 U. S. 345; *Sheley* v. *City*, 8 N. W. Rep. 52; *Winona Ry.* v. *City*, 44 N. W. Rep. 1072; *City* v. *Knowles*, 30 Pac. Rep. 1041; *Speer* v. *City*, 11 S. E. Rep. 802; *Emery* v. *Gas Co.*, 28 Cal. 346; *English* v. *Mayor*, 37 At. Rep. 158. The application of the front foot rule in paving cases has been generally recognized as just and equitable. Cooley's Const. Lim. 507; Cooley on Taxation, 151; 25 Am. and Eng. Enc. L. 524, n. 1; *Beaumont* v. *City*, 21 At. Rep. 888; *Haveland* v. *City*, 34 N. E. Rep. 679; *City* v. *Peace*, 14 S E. Rep. 521; *Davis* v. *City*, 6 S. E. Rep. 230; *Amery* v. *City*, 30 N. W. Rep. 780. Statutes similar to the one complained of in this case, have been enacted and approved in many of the states. *Quinchard* v. *Board*, 45 Pac. Rep. 856; *Gilcrest* v. *Macartney*, 66 N. W. Rep. 103; *City* v. *Hogan*, 32 S. W. Rep. 1014; *City* v. *Farrell*, 17 S. W. Rep. 497; *Rutherford* v. *Hamilton*, 11 S. W. Rep. 249; *City* v. *Bush*, 28 At. Rep. 926; *Hand* v. *Fellows*, 23 At. Rep. 1126; *Bryan* v. *Foley*, 47 N. E. Rep. 351; *Praigg* v. *Co.*, 42 N. E. Rep. 750; *Stuart* v. *City*, 45 Pac. Rep. 110; *State* v. *City*, 45 Pac. Rep. 122; *Board* v. *Murray*, 36 S. W. Rep. 180; Gen. Stats. Minn. 1894, §§ 1116, 1119, 1247. Respondent is estopped from questioning the validity of the assessment. *Tone* v. *Columbus*, 39 Ohio St. 281; *Kellogg* v. *Ely*, 15 Ohio St. 64; *Tash* v. *Adams*, 10 Cush. 252; *Goodin* v. *Canal Co.*, 18 Ohio St. 169; *Ridwell* v. *City*, 85 Pa. St. 412; *Ross* v. *Stackhouse*, 16 N. E. Rep. 501; *Cluggish* v. *Koons*, 43 N. E. Rep. 158. The power to make and levy assessments includes the power to apportion them. Cooley on Taxation, 175; 25 Am. and Eng. Enc. L. 516; *Peo.* v. *Mayor*, 4 N. Y. 419.

Chas. J. Mahnken and *John E. Greene*, for appellants.

The judicial power cannot legitimately question the policy or refuse to sanction the provisions of any law not inconsistent with the fundamental law of the state. 25 Vt. 261; Cooley on Taxa-

tion, 43, 48; *Sheley* v. *Detroit*, 45 Mich. 432; *Cleveland* v. *Tripp*, 13 R. I. 50; *State* v. *Fuller*, 34 N. J. L. 227; *Erskine* v. *Nelson County*, 4 N. D. 72; *Swain* v. *Fulmer*, 34 N. E. Rep. 639; 2 Dillon Mun. Corp. 752. The rule of apportionment provided by section 2280, Revised Codes, instead of being contrary to constitutional direction is clearly a restrictive measure within the purview of article 6. *Bryan* v. *Foley*, 47 N. E. Rep. 351; *Palmer* v. *Stumph*, 29 Ind 329; *Neenan* v. *Smith*, 50 Mo. 525; *State* v. *Reiss*, 38 Minn. 371; Gen. Laws, Minn. 1891, Ch. 146; Statutes of Mo. 1889, § § 1939 1941; Gen. Laws, Ind. (Spec. Sess. 1865,) § § 66–67; Gen. Stat. Kan. § 32, p. 160. Where the legislature has directed that the cost of the improvement be assessed against the abutting property, it will be presumed that it has determined that the cost will not exceed the benefits. *Petition of Roberts*, 81 N. Y. 62; Cooley on Taxation, (2 Ed.) 661. The cost of the entire improvement may be apportioned to and assessed against abutting property. *Sheley* v. *Detroit*, 45 Mich. 431; *State* v. *Fuller*, 34 N. J. L. 227; *Gordon* v. *Coones*, 47 N. Y. 608; *Stone* v. *Cortes*, 38 S. W. Rep. 54; *Swan* v. *Fulmer*, 34 N. E. Rep. 639; *Magee* v. *Pittsburgh*, 46 Pa. St. 358; *Neenan* v. *Smith*, 50 Mo. 525; *Parker* v. *Challis*, 9 Kans. 155; *White* v. *Peo.*, 94 Ill. 604; *Galesburg* v. *Searles*, 114 Ill. 217; *Raleigh* v. *Peace*, 17 L. R. A. 330 and n. A sufficient notice and right of hearing is provided. Section 2279, Rev. Codes; *Hogar* v. *Reclamation Dist.*, 111 U. S. 701; *Tripp* v. *Yankton*, 74 N. W. Rep. 447; *Amery* v. *Keokuk*, 72 Ia. 701; *Clapp* v. *Hartford*, 35 Conn. 66. All doubts should be resolved in favor of the constitutionality of this statute. *Sweet* v. *Syracuse*, 129 N. Y. 316; Cooley's Const. Lim. (6th Ed.) 88.

Newman, Spalding & Stambaugh, for respondents.

The power to levy special assessments for local improvements is recognized but not created by the constitution. *Creighton* v. *Manston*, 27 Cal. 614; *Taylor* v. *Palmer*, 31 Cal. 241; *Peo.* v. *Lynch*, 51 Cal 213; *Peo.* v. *Hurlbert* 24 Mich. 87. The authority of the legislature over the subject extends only to restricting this power.

Constitution Art. 6. The power of levying special assessments must be exercised so as to produce equality and uniformity, and must proceed upon the principle of compensation to the property owner in special benefits in the enhancement of the value of his property by the improvement for which the assessment is laid and must be in proportion to and cannot exceed such benefits. Tiedeman Mun. Corp. § 259; *Peo.* v. *Mayor*, 4 N. Y. 425; *Chicago* v. *Larned*, 34 Ill. 203; *Snow* v. *Fitchbury*, 136 Mass. 183; *Agaway* v. *Hampdon*, 130 Mass. 528; *Seamans Friend Society* v. *Boston*, 116 Mass. 182; *Brayton* v. *Fall River*, 124 Mass. 97; *Downer* v. *Boston*, 7 Cush. 280; *Hascombe* v. *Omaha*, 7 N. W. Rep. 739; *State* v. *Patterson*, 5 At. Rep. 896; *Report of Commissioners*, 10 At. Rep. 363; *Gilmore* v. *Heutig*, 5 Pac. Rep. 781; *Denver* v. *Knowles*, 17 L. R. A. 142; *Creighton* v. *Manson*, 27 Cal. 621; *Taylor* v. *Palmer*, 31 Cal. 254; *Tide Water Co.* v. *Costen*, 90 Am. Dec. 641; *Nichols* v. *Bridgeport*, 23 Conn. 189; *Chamberlain* v. *Cleveland*, 34 Ohio St. 551; *State* v. *District Court*, 29 Minn. 62; *State* v. *Seymour*, 35 N. J. L. 49; *Dyar* v. *Farmington*, 70 Me. 515; *Martin* v. *Tyler*, 4 N. D. 303; *Barnes* v. *Dyar*, 56 Vt. 466; *State* v. *Newark*, 18 Am. Rep. 729; *Seeley* v. *Pittsburg*, 22 Am. Rep. 760; *Hammett* v. *Philadelphia*, 3 Am. Rep. 615; *Violet* v. *Alexandria*, 23 S. E. Rep. 909; *State* v. *District Court*, 33 Minn. 306; *Washington Avenue*, 69 Pa. St. 352, 8 Am. Rep. 255; *Thomas* v. *Gain*, 35 Mich. 155; *McBean* v. *Chandler*, 24 Am. Rep. 308; *Peo.* v. *Lynch*, 51 Cal. 15; *State* v. *Commissioners*, 20 Am. Rep. 380; *Johnson* v. *Milwaukee*, 40 Wis. 315; *In re Mead*, 74 N. Y. 221; *Petition of Roberts*, 81 N. Y. 67. Special assessments cannot be made a charge upon property other than that benefited, because based upon the theory of benefit to the property assessed. *Creighton* v. *Manston*, 27 Cal. 614; *Taylor* v. *Palmer*, 31 Cal. 241; *Neenan* v. *Smith*, 50 Mo. 525; *Crow* v. *Tolans*, 96 Ill. 255; *Wolf* v. *Philadelphia*, 105 Pa. St. 25; *Raleigh* v. *Peace*, 14 S. E. Rep. 525. The rule for apportioning the burden is to determine the value of the property benefited without the improvement and its value after the improvement, the difference is the limit to which such assess-

ment can justly extend. *Peo.* v. *Mayor*, 63 N. Y. 299; *Elwood* v. *Rochester*, 43 Hun. 121; Cooley on Taxation, (2d Ed.) 660. The determination of the value of the property before and after such improvement is in its nature a judicial power which can only proceed upon evidence and investigation of existing facts. If exercised by the legislature it must necessarily be by special legislation with reference to particular facts before that body and cannot be exercised by general legislation applicable to all localities. Dillon Mun. Corp. (4th Ed.) § 761; Cooley on Taxation, (2d Ed.) 661; *Raleigh* v. *Peace*, 14 S. E. Rep. 524; *O'Reilly* v. *Kingston*, 114 N. Y. 448; *Matter of Roberts*, 81 N. Y. 67; *State* v. *District Court*, 29 Minn. 62; *Percy* v. *Supervisors*, 37 Wis. 79. The restriction imposed by article 6, constitution, is in addition to that implied by the word "assessment." *Chamberlain* v. *Cleveland*, 34 Ohio St. 563. The statute is unconstitutional in that it affords no opportunity to be heard upon the question of the amount of benefits conferred or the justice of the assessment. *Stuart* v. *Palmer*, 74 N. Y. 183; *Brown* v. *Denver*, 3 Pac. Rep. 455; *Lent* v. *Tilson*, 14 Pac. Rep. 73; *Scott* v. *Toledo*, 36 Fed. Rep. 385; *Hagar* v. *Reclamation District*, 111 U. S. 707. The legislature must establish some rule within constitutional limits for the apportionment of the assessments on the lands benefited. *State* v. *Commissioners*, 9 Vroom. 193; *Barnes* v. *Dyar*, 56 Vt. 466. The constitutional provision is not self executing. *State* v. *Swan*, 1 N. D. 5. The only estoppel permissible as against an unconstitutional law is the active invocation of the law by the party against whom the estoppel is urged. *Greencastle* v. *Black*, 5 Ind. 559; *Matter of Van Buren*, 17 Hun. 527, 79 N. Y. 384; Fersons Appeal, 96 Pa. St. 140; *Town* v. *Perkins*, 94 U. S. 267; *Langworth* v. *Dubuque*, 13 Ia. 86; *Buell* v. *Ball*, 20 Ia. 289; *Town* v. *Stevenson*, 69 Mo. 379; *State* v. *Moberly*, 74 Mo. 167; *Counterman* v. *Township*, 38 Ohio St. 517.

CORLISS, C. J. The owner of abutting property is by this action attacking the validity of an assessment to pay the expenses of paving a street in the City of Fargo. He grounds his assault

thereon upon the alleged invalidity of the statute under which the assessment was levied. There is no claim made that, on account of irregularities, the tax assessed against his land is illegal. On the contrary, he expressly negatives in his complaint the existence of any defects in the proceedings themselves. It is not contended that the steps taken by the proper authorities were unauthorized by the law. But the broad proposition is laid down by counsel for plaintiff that the statute is void for the reason that it does not limit the total assessment upon property within the special taxing district to the actual benefit accruing to such district from the local improvement for which the tax is to be levied; and, further, that in the apportionment of the burden of this tax an arbitrary rule is to be applied, instead of the rule of actual benefits to each parcel of land assessed. Counsel for plaintiff insists that, as the total expense is to be levied upon the abutting property without reference to the question whether in fact such property is in the aggregate benefited to the full amount of such expense, therefore it is possible that such property may be called upon to pay a larger tax than the amount of benefit it receives from the improvement; and hence that, whatever rule of apportionment is adopted, each parcel of land may, and probably will, be subjected to a burden exceeding the benefit it receives from the work. Certain it is, they claim, that some of the property must inevitably pay more than an equivalent for the benefits received by it; and they therefore contend that, as this result may happen, the law under which such result is possible cannot be sustained. And, in the second place, they insist that, even if the total tax could in no case exceed the total benefits, yet, as the apportionment is not according to benefits, it follows that the taxpayer has no protection against the assessment of his land for a sum in excess of the actual benefit which accrues thereto from the local improvement for which such assessment is made. The statute which is assailed by this process of reasoning is section 2280, Revised Code, and it provides as follows: "Whenever any work or improvement mentioned in the preceding section shall

have been determined upon and the contract let therefor, the city engineer shall forthwith calculate the amount to be assessed for such improvement for each lot or parcel of ground abutting or bounding upon such improvement. And in estimating the assessment he shall take the entire cost of such improvement and divide the same by the number of feet fronting or abutting upon the same, and the quotient shall be the sum to be assessed per front foot so bounding or abutting, and said estimate shall be filed with the city auditor and shall be presented to the city council for its approval at the first meeting held thereafter. The city auditor shall cause said estimate of the city engineer, together with a notice of the time and place when the council will meet to approve of the same, to be published in the official newspaper of the city for at least ten days prior to the meeting of the city couucil to approve the same."

That there is a line of decisions which more or less supports the plaintiff's theory in this action cannot be doubted. They illustrate a tendency of the judicial branch of the government to usurp power for the purpose of preventing injustice or hardship in individual cases. Such a course is indefensible. If the courts are to interfere whenever inequality in taxation is discerned, civil government must cease. What has led some of the tribunals to adjudge illegal the exercise of this peculiarly legislative function, when it has been applied to local assessments has been the greater ease of tracing to the property assessed the benefit of the improvement for which it is assessed. The advantage which will accrue to the citizen from the maintenance of public schools cannot be even approximately measured in money. But, when a street is paved or a sewer constructed, it is possible to discover some peculiar benefit to property in the immediate vicinity. It therefore seems to have been thought that because inequality could be more easily pointed out in such cases, there was some limitation upon the taxing power when exercised in this way which does not exist when it is employed for purposes of general revenue. But it must be obvious that the fact that inequalities

are more readily discernible in one class of cases than in the other furnishes no reason for holding that the general theory of an equivalent in the form of benefits, as the basis of a tax, is any different in the former class of cases from what it is in the latter. When the taxpayer is called upon to contribute for general purposes, he is not permitted to challenge the legality of the tax on the ground that he has not received a pecuniary benefit commensurate with the sum he is required to pay. Whence comes the right of the courts to accord to him this peculiar privilege in cases of local assessment? It is right here that the fallacy of the cases which support the view of counsel for plaintiff lies. They differentiate, but on what principle it is impossible to discover, local assessments from general taxes. They admit that the question of benefits is only one of general theory when taxes are being apportioned for ordinary purposes. But straightway a new doctrine comes in play when the very same taxing power is exercised for an object which is as much public as the expenses of the administration of government. This doctrine has no foundation in reason, and it would never have been enunciated had it not been that it was more easy to discover particular hardships in cases involving local assessments, and had not the courts fancied that unless they intervened the property of the citizen was doomed to confiscation from the abuse of this power. What is it that distinguishes a local assessment from a general tax? Their points of resemblance are numerous. Each is an exercise of the taxing power, pure and simple. The burden is spread over a taxing district, and is apportioned according to some rule. The purpose for which the tax is levied is public. The general theory on which rests, in each case, the imposition of the particular burden upon the particular taxing district, is the benefit derived by the taxpayers therein from the application of the moneys so raised to the public purpose for which the tax is levied. It is because the law presumes a general benefit to the people of a particular district that it permits the tax to be levied upon that district. It is not because each taxpayer is supposed

to receive an exact money equivalent that he is required to pay. But, because the tax is one which pertains to that district, it therefore is levied thereon, to be apportioned in such manner as the constitution points out, if it speaks at all on the subject, or as the legislature directs, in case the fundamental law is silent. So, when a local assessment is levied, the question is not how much, in dollars and cents, each parcel of land has been enhanced in value by the local improvement, but what is the particular district which is, in a general sense, peculiarly benefited by the improvement; and, when this is once ascertained, then there remains only the question of the apportionment of the tax to be made in accordance with the constitution, if it regulates the matter, or as the legislature shall direct, when its discretion has not been limited by the organic law. The only marked point of difference between a tax and a local assessment is that the former is spread over a permanent taxing district, while the latter is to be collected from a special and temporary taxing district, created for that single purpose, because the benefit of the public improvement is so peculiarly local that to require all the taxpayers of the general taxing district to pay for it would be palpably unjust. The same general principles govern an exercise of the power of levying local assessments as apply to the exercise of the taxing power for general purposes. The object must be public. The tax must pertain to the district from which it is to be collected. One county cannot be taxed for erecting the public buildings of another. Nor can property on one street be assessed for the full cost of the improvement of another street. Some uniform rule of apportionment must be adopted, although the constitution may be silent on the point. If, for purposes of general taxation, an occupation is to be taxed, all within that class must bear the burden. If, in cases of local assessments, the front foot rule is to be applied, all in the same class must be treated alike. These are limitations in the exercise of the taxing power which inhere in the very nature of the power itself. When the legislature oversteps these boundaries, it is not exer-

cising the taxing power at all, but is guilty of an attempt arbitrarily to confiscate the property of the citizen. But, when these limitations have not been violated, then the courts must look solely to the constitution for their authority in annulling a statute passed in the exercise of the taxing power, whether such statute relates to a general tax or a local assessment. It is true that the legislature cannot by its fiat make that a local improvement which is not such an improvement in its essential nature. But when it is once ascertained that the improvement is local in character, and that the property in the special taxing district may in a general sense be said to be peculiarly benefited thereby, it is for the legislature to determine how much of the expense of the improvement shall be collected from that district, and where the boundaries of that district shall be drawn, or it may delegate to a board or a public functionary the power to prescribe the extent of such district. We cannot discover any foundation for those decisions which seem to hold that a local improvement may at the same time as to a portion of the expense thereof be not a local, but a general, improvement. A local improvement is an entirety, and therefore cannot be divided. What portion of the expense shall be borne by the special district, and whether all of it shall be collected therein, is a matter of legislative discretion. But the improvement itself is not affected by the decision the legislature may make. It still remains local, although that body orders that a portion thereof shall be collected as a part of general taxes. It is the fact that it is a local improvement which vests in the legislature the power to direct that it shall be paid for out of local property. This power is not merely the power to order such portion to be collected in the special taxing district as shall be the exact equivalent of the enhancement of the value of property therein because of such improvement, but to direct that the expense of the improvement as an entirety be collected in a manner different from that in which ordinary taxes are collected. If there is any power at all in the legislature to prescribe a distinctive mode of collecting the expense of such an improvement, it is

as broad as the purpose for which the tax is to be levied. The courts cannot divide it up, and say at what point the power ceases; cannot declare that as to any particular percentage of the cost the only mode of levying taxes to discharge the same shall be by general taxation. How could the courts ever determine what part should be paid out of the general treasury and what part raised by local assessment? What rule would govern them in investigating such a question? And what right have they to dictate where the line shall be drawn? If, as we believe, the courts cannot require that any portion of the expense shall be collected as ordinary revenues are collected, the whole ground falls from under the postulate that the limit of the power of local assessment is the enhanced value of the particular land assessed. If this be sound law, then it follows that, as cases will arise in which it will be true that the enhanced value of all the land assessed will be less than the cost of the improvement, therefore only a portion of the necessary funds can be raised by local assessment; and yet in a great multitude of cases it has been held that the lawmaking power can decide, subject to no review by the courts, that the total cost shall be collected by local assessments, without any reference to the question of the enhanced value of all the property in the taxing district. In the case of *Spencer* v. *Merchant*, 100 N. Y. 585, 3 N. E. Rep. 682, the legislature declared that the property which had not paid the previous assessment (the same having been adjudged void by the courts) should constitute the taxing district in which the whole unpaid portion of the cost of the local improvement should be collected. It is true that the apportionment was to be according to benefits; but there is a fundamental difference between apportioning according to benefits a tax which exceeds the aggregate benefit, and assessing each parcel of land to the extent of only the enhanced value thereof because of the improvement. The legislation, sustained in that case by both the New York court of appeals and the Federal Supreme Court (125 U. S. 345, 8 Sup. Ct. 921,) was legislation under which it was possible that each parcel of land might

have been assessed for many times the increase in value resulting from the improvement. And such legislation has been upheld with almost tiresome iteration. This theory that the tax can only be commensurate with the enhancement in value finds little support in the authorities, and it certainly rests upon no sound legal principle. It assimilates the power of local assessment to the power of eminent domain. It proceeds on the assumption that the hand which takes must also give back as much as it takes. This is true when the power of eminent domain is put forth. But it is never true, except in a vague sense, when the taxing power is employed. When the sovereign lays its grasp upon private property for a public purpose, the constitution commands it to make him compensation, because what is seized is in addition to his share of the public burdens. But, when it is a question how such public burdens are to be borne, the sovereign is under no obligation to return to him an exact, or even approximately exact, equivalent in money or property. While, in general theory, the citizen receives a benefit equivalent to the tax he is called upon to pay, yet it is common knowledge that this is a mere fiction, which is in conflict with the truth; and, of course, it is elementary law that the doctrine of benefit does not lie at the foundation of the taxing power, and that the citizen cannot escape a tax by showing that he receives no benefit in fact. A multimillionaire may be compelled to pay an ernormous school tax, although he has no child to be educated, and he may be required to bear the weight of heavy taxes for other purposes, although he should happen to be practically denied the protection of the laws by reason of the envy and hatred of which he may be the object because of his great wealth. The taxing power rests upon necessity, and not sentiment. If organized society were to wait for the means to support civil government until an ideally just system of taxation could be devised and put in successful operation, it must wait like the rustic who tarried by the river's bank for the stream to pass by. What is it that so differentiates the power of local assessment from the power of

general taxation that in one case the sovereign must give back in value all that is taken, while in the other it can, if necessary (unless there be constitutional checks,) take from the citizen all his property, without reference to his receiving in return any commensurate advantages or any benefit at all? Until this question is answered in favor of such a distinction, it is idle to talk of the enhanced value of the land assessed as the limit of the power of local assessment. When such an assessment is levied upon property for a particular improvement, a tax is as much collected as when the expense of the work is charged to the general tax levy. The only distinction is that the district is narrower, and the mode of apportionment different. Usually, too, only real property is considered in making the apportionment, and not all property, real and personal. In all other respects the two classes of cases are identical. The same power of taxation is exercised in each instance, and, except with respect to constitutional restrictions or inherent limitations, the legislative discretion is, in both classes of cases absolute. We have already referred to those limitations which inhere in the very nature of the taxing power. None of them affect the question before us. The assessment is for a public purpose. It pertains to the district within which it is to be collected, and it is apportioned according to a uniform rule. When we turn to the constitution for light, we find there no provision which relates to local assessments except the one which directs the legislature to restrict the power to make such assessments when exercised by municipal corporations. Section 130. The overwhelming mass of authority supports the view that the proper construction of the uniformity article in our constitution is that it relates exclusively to general taxation, and has no reference to local assessments. That section (section 176) declares that "laws shall be passed taxing by uniform rule all property according to its true value in money." We cite some of the decisions which hold that such a provision embraces only general taxation: *Hansen* v. *Hammer*, (Wash.) 46 Pac. Rep. 332; *Levee Co.* v. *Hardin*, 27 Mo. 495; *Emery* v. *Gas Co.*, 28 Cal. 345;

Wallace v. *Shelton*, 14 La. Ann. 498; *Goodrich* v. *Turnpike Co.*, 26 Ind. 119; *Edgerton* v. *Mayor, etc.*, 19 Fla. 140; *Motz* v. *City of Detroit*, 18 Mich. 495; *Hines* v. *City of Leavenworth*, 3 Kan. 186; *Daily* v. *Swope*, 47 Miss. 367; *Williams* v. *Cammack*, 27 Miss. 209; *Garrett* v. *City of St. Louis*, 25 Mo. 505; *Cain* v. *Commissioners*, 86 N. C. 8; *Hill* v. *Higdon*, 5 Ohio St. 243; *King* v. *City of Portland*, 2 Or. 140; *Hayden* v. *City of Atlanta*, 70 Ga. 817; *Violett's Heirs* v. *City Council of Alexandria*, (Va.) 23 S. E. Rep. 909; *Hilliard* v. *City of Asheville*, (N. C.) 24 S. E. Rep. 738; *Dorgan* v. *City of Boston*, 12 Allen, 223, 237; *Norfolk City* v. *Ellis*, 26 Grat. 224; *Richmond & A. R. Co.* v. *City of Lynchburg*, 81 Va. 473; *City of Raleigh* v. *Peace*, (N. C.) 14 S. E. Rep. 521. See, also, Cooley, Tax'n, pp. 626–636; 2 Dill. Mun. Corp. § 761.

To exhibit the folly of this rainbow pursuit of an ideal equality in the apportionment of a local assessment, it is only necessary to point to the injustice which it must be conceded the legislature may perpetuate in the collection of the expense of any local improvement. The cost of paving a street may be levied upon an entire city, and the millionaire who has his domicile therein may be compelled to bear a large portion of the burden, though he spends his time in foreign travel, and never even sets his foot upon the street. He may not own any land in the city which can be benfited by the tax, he being taxed there for only his personal property. When contrasted with the gross inequity of his contributing to the expense of improving the street,—an inequity which is constitutionally possible,—how paltry seems the grievance of the plaintiff in this suit, who is asked to pay for an improvement in front of his own lot only the same proportion of the expense thereof that is charged up to other abutting proprietors? We are apt to deceive ourselves by names and generalities. Because, forsooth, taxes must, under the constitution, be apportioned according to the value of property, it is thought that equality is approximated. But this is not true. It does not follow that one who owns ten times as much property as another receives a tenfold benefit from the government which taxes him. His investments may be made

in another jurisdiction, and therefore protected by other laws; and he may be indebted to foreign states, where he spends much of his time, for protection to his life and liberty. As has been hitherto stated, he may be required to pay largely in support of public education without a child to receive any benefit from the money thus expended. The only equality which our constitution attempts to guaranty is that all property owners shall be treated alike in the vaulation of their property. That the result of this system shall be equality in the distribution of the burdens of civil government the constitution does not pretend to say, nor could it truthfully make such a declaration. When the inherent defects of the valuation system as a means of equalizing the weight of taxation, are considered, and then, in addition, we contemplate the practical working of the system—the favoritisms, the errors, and the almost total failure to assess the citizen for his personal property at all,—it is no great stretch of the imagination, to say that more grievous wrongs are constantly perpetrated under that system than under almost any scheme of local assessment that can be devised. As before stated, the postulate that the assessment must not exceed the increased value of the property practically assimilates the power of local assessment to the power of eminent domain. The public must, on this theory, return to the citizen precisely what it takes from him. This is not taxation. Never has such a qualification of the taxing power existed under any form of government. The sovereign does not concern itself with the benefit which accrues to the taxpayer, but only with the necessities of the public treasury. It is true that certain limitations on the power inhere in its very nature. These we have already considered. Other restrictions are frequently found in the organic law. But, aside from these abridgments of the power, none of which affect the legality of the statute we are construing, the question of benefit resulting to any particular parcel of land has no bearing upon the problem whether the power of local assessment has or has not been constitutionally exercised.

There are two settled doctrines which are fatal to the proposi-

tion that the utmost scope of the power of local assessment is the actual increase in value of the property resulting from the improvement. One of these doctrines we have already considered. It has been applied in a great multitude of cases, and has seldom, if ever, been denied. It declares that the legislature may determine what portion of the cost shall be assessed against the local property, and may, if it deems best, direct that the total expense shall be collected in this way. Now, it is obvious that the cost of a local improvement may often exceed the consequent enhancement in value of the property benefited thereby. And it likewise may be the case that the proportion of the burden which the legislature may order to be collected by local assessment will be found to be in excess of the aggregate benefit accruing to the assessed property from the improvement. To sanction the act of the lawmaking power in ordering all or any arbitrary percentage of the expense to be raised by local assessment is necessarily to assert that more money made in this way be raised to pay for the work than the exact amount of pecuniary benefit which the assessed property receives by reason of the improvement.

The other doctrine refered to is that the assessment may be apportioned according to frontage. These decisions (and they are a host) are not sound if the limit of the power is the enhancement in value of the land assessed. It will not do to say that such a method of apportionment will result in approximately the same distribution of the burden as the mode of assessing according to benefits. When constitutional rights are involved, the courts will not suffer a single citizen to be harmed, though a million are fully protected under the system whose legality is challenged. Nor will the insignificant nature of the injury he receives weigh against his assertion of his constitutional rights. It is impossible that in every case the front-foot system should apportion the tax according to actual money benefits. We know that it will not. And yet practically all the courts, including those who indulge in much loose reasoning on this subject, agree that the taxpayer cannot complain when the frontage of his lot

determines the proportion of the total expense he must pay. What, then, becomes of the postulate that the power of local assessment is exhausted when the point of increase in value has been passed? It is not difficult to conceive of a case where the total cost will exceed the aggregate benefits, and where the adoption of the front-foot basis of apportionment will still further augment the disproportion, in individual cases, between the amount of the tax and the actual advantage resulting to the lot from the improvement. And yet in the supposed case the assessment must, under nearly all the adjudications, be sustained. We ask again, with emphasis, what becomes of the doctrine contended for by counsel for the plaintiff under such a conditon of the law? The courts of Pennsylvania have in their reasoning, as well as by the general trend of their decisions, gone further in supporting the notion of actual benefits than the tribunals of any other state; and yet the Supreme Court of that state has held in a recent case that the fact that a lot is not benefited, even when coupled with the further fact that the assessment exceeds the value thereof, will not render the assessment void. *City of Harrisburgh* v. *McCormick*, 129 Pa. St. 213, 18 Atl. 126. In this case the court said: "It may be that the front foot rule is not the best that might be devised for the assessment of street improvements in cities upon abutting property, but for the present it is the only one we have; and, while it has been held that it cannot be applied to farm lands, it has nowhere been decided that it is not applicable to city property. It is perhaps impossible to frame any general rule that would produce exact uniformity and do equal justice in all cases. This arises from the fact that a rule, to be valid must be general; and the further conceded fact that, in the application of all general rules, there will be cases of individual hardship. This would appear to be one of such cases. The lot against which this assessment was filed consists of a long narrow strip, with a front of several hundred feet upon the street, and only 31 feet deep at one end, and narrowing to the other. The lot is said not to be worth the amount of the assessment against it. If

this be so, it does not affect the validity of the law under which the assessment was filed." And in *City of McKeesport* v. *Busch*, (Pa.) 31 Atl. 49, the early reasoning of that court in the *Hammet Case*, 65 Pa. St. 146, the *Washington Avenue Case*, 69 Pa. St. 352, and the *Seeley Case*, 82 Pa. St. 360, is very much broken down. In this case (*i. e. McKeesport Case*,) the court said: "We can discover no good reason for holding that the front-foot rule does not apply. The act of 1867 especially enjoins it, and objections to its application, growing out of inequalities of the surface, which seem to make some cases harder than others, are not fundamental, so as to make the rule inapplicable on that account. It may well be that the improvement is less valuable to some owners than to others and that the burden of payment is more oppressive to some than to others, but that consideration cannot suffice to change the application of the rule."

In *Michener* v. *Philadelphia*, 118 Pa. St. 535, 12 Atl. 174, the court sustained a sewer assessment without reference to the question of benefits. The sewer was laid along the street bounding the side of the lot, the lot being a corner lot running through from one street to the other. There was already a sewer at each end, so that the lot could not possibly have been benefitted by the last improvement. It had been already assessed twice before for similar improvements, and these assessments had been paid. The court said: "The plaintiff alleges, however, that his property is not benefited by the sewer. He may or may not be mistaken in this. We cannot say. But this is a species of taxation, and all taxation is presumed to be for the benefit, directly or indirectly, of the taxpayer or his property. Laid as taxes are, under general laws, there will always be cases of apparent individual hardship. The childless man may claim that the taxes which he is compelled to pay for the education of the children of other persons confers no benefit upon him. The law does not so regard it. Education produces a higher degree of intelligence, the fruits of which are seen in increased good order and dimin-

ished crime. When a man comes to pay his general taxes he cannot be permitted to allege that he derives no benefit therefrom. And it would be intolerable if, in every instance of special taxation, the question of benefits could be thrown into the jury box. It would introduce into municipal government a novel and dangerous feature. It would substitute for the responsibility of councils, limited though it be, the wholly irresponsible and uncertain action of jurors. It is better 'to endure the ills we have, than fly to those we know not of.'"

In the *Madera Irrigation Dist. Case*, 92 Cal. 296, 28 Pac. Rep. 272, 675, the court say, at page 328, 92 Cal., and page 280, 28 Pac. Rep.: "It is not necessary to show that property within the district may be actually benefited by the local improvement, and, even if it positively appear that no benefit is received, such property is not thereby exempted from bearing its portion of the assessment, nor is the act unconstitutional because it provides that such property shall be assessed. Property that is exempt from taxation has always been held subject to the burdens of assessment for local improvements, and property within a district that is not susceptible of receiving any immediate benefit from the improvement is nevertheless so indirectly benefited thereby that it must bear a portion of the burden. If, within the limits of a levee district, a parcel of land should be so situated as not to require the protection of the levee, that would be no reason for excluding it from its share of the expense; or if, within the limits of a drainage district, there should chance to be found a cliff, that would be no reason for exempting it from assessment."

We are referred to the decision of the Michigan Supreme Court in *Thomas* v. *Gain*, 35 Mich. 155. But Judge Cooley expressly limited the decision to the peculiar facts of that case. See page 164. And in his work on taxation, (page 622,) he says: "For this very reason the power to determine when a special assessment shall be made, and on what basis it shall be apportioned, is wisely confided to the legislature, and could not, without the introduction of some new principle in representative

government, be placed elsewhere. We dismiss this topic, therefore, with the single remark, that with the wisdom or unwisdom of special assessments, when ordered in cases in which they are admissible at all, the courts have no concern, unless there is plainly and manifestly such an abuse of power as takes the case beyond the just limits of legislative discretion." All that was held in the case cited was that the legislature had not in fact honestly exercised the discretionary power of apportionment in distributing the burden of the tax. And Judge Cooley declares in the very case relied on (*Thomas* v. *Gain*, 35 Mich. 161:) "It is admitted that the legislature may prescribe the rule for the apportionment of benefits, but it is not conceded that its power in this regard is unlimited. The rule must at least, be one which it is legally possible may be just and equal as between the parties assessed. If it is not conceivable that the rule prescribed is one which will apportion the burden justly, or with such proximate justice as is usually attainable in tax cases, it must fall to the ground, like any other merely arbitrary action which is supported by no principle."

The *Tide-Water Company Case*, 18 N. J. Eq. 518, is cited by counsel for plaintiff, but is plainly distinguishable from the case at bar, and this fact has been pointed out by the courts of that state. See *State* v. *Fuller*, 34 N. J. Law, 227, 230. While there are decisions in that state which favor the contention of plaintiff's counsel, yet in the *Fuller Case*, 34 N. J. Law, 227, language was used which fully supports our views. See pages 229 to 232.

The general theory upon which particular taxes are collected within particular districts is the theory of local benefit. It is precisely the same theory which underlies the law relating to local assessments. As one improvement is of local benefit to a county, and another to a city, and still another to a school district, so other improvements, such as sewers, water mains, and street paving, are of local benefit to a yet more circumscribed area. The taxpayers of a county are required to pay for erecting the public buildings thereof, because such structures are presumed to be for

their peculiar advantage in contradistinction from all other taxpayers within the state. And this is true with respect to the public buildings of a city and the school house of a school district. And, when another class of public works is undertaken, —a class to which street paving belongs,—it is competent for the lawmaking power to declare that these works are especially beneficial to a district smaller than that in which they are established; for instance, a district co-extensive with the abutting property. But when the taxing power is thus exercised no new principle is introduced into the law of taxation. It is only the extension of an old principle to peculiar circumstances. It still remains true that the ground upon which such an exercise of the power rests is the local benefit to the particular district within which the tax is to be collected. The legislature wields as broad a power in the one case as in the other. In each case it can fix the limits of the taxing district, and in each case it can, save as restrained by the constitution, select the subjects of taxation and establish the basis of apportionment. *In re Madera Irr. Dist.*, 92 Cal. 296, 28 Pac. Rep. 272, 675, the court say, at page 326, 92 Cal., and page 279, 28 Pac. Rep.: "It is, however, for the legislature to determine how the apportionment shall be made; and, while it is held that an apportionment of the expenses for a local improvement is to be made according to the benefits received by the property assessed, yet the power to make such apportionment rests upon the general power of taxation, and the apportionment itself does not depend upon the fact of local benefit in any other sense than that all taxes are supposed to be based upon the benefit received by the taxpayer." And in *Lent* v. *Tillson*, 72 Cal. 426, 14 Pac. Rep. 71, the court say at pages 427 to 429, 72 Cal., and page 80, 14 Pac. Rep.: "But the power to assess for local benefits is not based upon the fact of local benefit in any other sense than all taxes are based upon supposed benefit to the taxpayer. The power of taxation is said by Chief Justice Marshall to be vested in the government by all for the benefit of all. 'The state taxes are based upon the theory that all are benefited

by the government which they are designed to support. And so of county and municipal taxation. And the legislature may also organize smaller or different districts than these usual political subdivisions, and place upon such districts the burden of taxation for purposes in which the inhabitants have a special interest, or which will specially benefit the property within the district.' Now, in regard to general taxation, if a case were presented in which we could plainly see that the tax was not for the benefit of the government; but was wholly for the private advantage of an individual, we should not hesitate to declare that it was not an exercise of legislative power, and the levy would be held void. The same rule, and no other, applies to assessments for local improvements. The main practical difference between assessment for a local improvement and general taxation seems to be that in general taxation it is difficult, and generally impossible, for the court to say that the purpose of the tax is not a public purpose, or that no benefit will result to the taxpayers, while in local assessments it is more often easy to see that the improvement will not be a special benefit. Still the benefit is not the source of the power. That is inherent in the government, and is only limited by express or implied limitations found in the constitution, or by its own nature and purposes. Within these limits the legislature is the sole judge of when and to what extent the power shall be used. It may be said that all the cases on this subject are exceptional, and many of them are cases of great hardship and clear extortion, in which the local benefit claimed is only a pretense to cover the unjust exaction, and the courts have often attempted to find some limitation in the nature of the power which would enable them to prevent the injustice. Thus, it has sometimes been said that the power, being based upon the supposed benefit, may be inquired into whenever the attempt is made to enforce the tax; but this, obviously, cannot be so. The legislature must act, after all, in providing for the public good, upon the judgment of its members as to what is expedient or will prove beneficial. The most wisely planned projects often fail to

realize the good expected. And then the benefits need not be immediate. I see no just limitation in this respect, except that the tax will not be upheld when the courts can plainly see that the legislature has not really exercised this judgment at all, or that manifestly and certainly no such benefit can or could reasonably have been expected to result. The judge should not place his mere opinion against that of the legislature."

While it is true that it is not competent for the legislature to compel the taxpayers of one county to pay for the public buildings of another, yet it may indirectly accomplish this result at any time by making the former county a part of the latter. This may be done after the debt has been incurred. And it is likewise true that the limits of the taxing district within which the expense of such structures must be collected may be narrowed by a division of the county into two counties, leaving all the burden of taxation for existing indebtedness to be borne by the fragment in which the buildings stand. *Johnson* v. *City of San Diego*, (Cal.) 42 Pac. Rep. 249, and cases cited; *Petition of Kingman*, 153 Mass. 566, 573, 27 N. E. Rep. 778, and cases cited. Nor does the law so limit the power of the legislature to tax for such an improvement that only those who are in fact benefited thereby can be required to pay. The childless nonresident owner of land in a city, who never beholds the county or city buildings or the school houses therein, must nevertheless contribute to the cost of them all. And so with respect to a work that is still more local in character. When once the boundaries of the special taxing district have been established, it is utterly unimportant that a particular piece of property happens to be so situated that no benefit can accrue to it from such work. Of course, this reasoning would not apply if a distant lot should be capriciously included within the district. But it does apply when all the property is similarly situated with reference to the improvement, as, for instance, when it is all abutting property. When the property belongs to a class that may be benefited, it is no objec-

tion to its being placed within the taxing district that, because of exceptional reasons, it is not benefited in fact.

It is said that practically all the cases which sustain the front-foot basis of apportionment are cases in which the legislature was dealing with a particular city; and it is urged that there is plain distinction between a special law relating to a single city and a general law which embraces all municipalities. We are unable to discover any such distinction. The question is one of power. Can the legislature determine that the abutting property will be benefited to the extent of the cost of paving a street, and that the property shall be assessed according to its frontage? If it can, then it is immaterial whether it establishes such a rule for all cities or for only one. We know of no principle which permits a court to deny to a co-ordinate branch of the government the right to exercise a conceded power because it may surmise that the power has been exercised without due consideration of the facts. Besides it is absurd to assume that the legislature ever takes into consideration the varying topographical conditions and other relevant circumstances when it authorizes a large city to levy local assessments by the front foot rule for local improvements. It is impossible for that body to consider in advance the effect of such improvements upon abutting property under every conceivable circumstance. It often happens that when such laws are passed much territory that is subsequently included within the city limits is not then within its borders. Counsel's argument proves too much. It strikes at the power of the legislature to establish the front-foot rule at all in a large city, or even in any city with respect to territory which may be thereafter annexed. We have thus far refrained from grouping around the several propositions, which support our decision that the limit of the power is not the enhanced value of the particular land assessed, those cases which sustain such propositions. This course has been pursued that the continuity of the argument might not be broken. To recapitulate, we assert that the decisions which recognize the front-foot rule are fatal to the theory that the public can

take in the form of a local assessment only what it has already given in the form of increased value. We cite a few of the numerous decisions: *Seely* v. *City of Pittsburgh*, 82 Pa. St. 360; *Washington Ave. Case*, 69 Pa. St. 352; *Hammet* v. *Philadelphia*, 65 Pa. St. 146; *City of McKeesport* v. *Busch* (Pa.) 31 Atl. Rep. 49; *City of Harrisburg* v. *McCormick*, 129 Pa. St. 213, 18 Atl. Rep. 126; *Witman* v. *City of Reading* (Pa.) 32 Atl. 576; *City of Philadelphia* v. *Tryon*, 35 Pa. St. 401; *Emery* v. *Gas Co.*, 28 Cal. 345; *Hilliard* v. *City of Asheville* (N. C.) 24 S. E. Rep. 738; *Mayor, etc.* v. *Scharf*, 54 Md. 499; *Ulman* v. *Mayor, etc.* (Md.) 20 Atl. Rep. 141, 21 Atl. Rep. 709; *Mayor, etc.* v. *Scharf*, 56 Md. 50; *Alberger* v. *Mayor, etc.*, 64 Md. 1, 20 Atl. Rep. 988; *Mayor, etc. of Baltimore* v. *John Hopkins Hospital*, 56 Md. 1; *Moale* v. *Mayor, etc.*, 61 Md. 224; *Chamberlain* v. *Cleveland*, 34 Ohio St. 551, 558; *Railway Co.* v. *Connelly*, 10 Ohio St. 159; *Rutherford* v. *Hamilton* (Mo.) 11 S. W. Rep. 249; *Palmer* v. *Stumph*, 29 Ind. 329; *Norfolk City* v. *Ellis*, 26 Grat. 224; *Davis* v. *City of Lynchburg* (Va.) 6 S. E. Rep. 230; *City of Raleigh* v. *Peace*, (N. C.) 14 S. E. Rep. 521; *Allen* v. *Drew*, 44 Vt. 174; Cooley, Tax'n, 644.

Again, it is clear that those cases which sustain any other basis of apportionment than that of actual benefits to each parcel of land,—as, for instance, value or area,—are likewise hostile to the narrow rule for which counsel for plaintiff contends. We refer to a few of the authorities which uphold such modes of apportionment: *In re Madera Irr. Dist.*, 92 Cal. 296, 324, 28 Pac. Rep. 272, 675; *Burnett* v. *Mayor, etc.*, 12 Cal. 76; *Creighton* v. *Scott*, 14 Ohio St. 438; *Lockwood* v. *City of St. Louis*, 24 Mo. 20; *Keese* v. *City of Denver*, 10 Colo. 112, 15 Pac. Rep. 825; *Gilmore* v. *Hentig*, 33 Kan. 156, 173, 174, 5 Pac. Rep. 781; *Wright* v. *City of Boston*, 9 Cush. 233; *Downer* v. *City of Boston*, 7 Cush. 277; *Strowbridge* v. *City of Portland*, 8 Or. 67, 82; *Snow* v. *Fitchburg*, 136 Mass. 183; *Williams* v. *Cammack*, 27 Miss. 209; *Levee Co.* v. *Hardin*, 27 Mo. 495; *Wallace* v. *Shelton*, 14 La. Ann. 498; *Daily* v. *Swope*, 47 Miss. 367; *Irrigation Dist.* v. *Bradley*, 164 U. S. 112, 176, 17 Sup. Ct. 56; *Walston* v. *Nevin*, 128 U. S. 578, 9 Sup. Ct. 192; *Cleveland* v. *Tripp*, 13 R. I.

59; *Davidson* v. *New Orleans*, 96 U. S. 106; *Bishop* v. *Tripp*, (R. I.) 8 Atl. 692; *Dorgan* v. *City of Boston*, 12 Allen, 223; *Richmond & A. R. Co.* v. *City of Lynchburg*, 81 Va, 473; *Hagar* v. *Reclamation Dist.*, 111 U. S. 701, 4 Sup. Ct. 663; Cooley, Taxation, 648, 649.

There is another line of adjudications which are inimical to the views of counsel for plaintiff,—those which hold that the legislature may direct that all the expense of the improvement be collected out of the abutting property,—for it may happen that such expense will exceed the aggregate enhanced valuation of the property assessed which results from the local improvement. In this line we find the following decisions: *Lent* v. *Tillison*, 72 Cal. 404, 14 Pac. Rep. 71; *State* v. *Fuller*, 34 N. J. Law, 227; *Spencer* v. *Merchant*, 125 U. S. 345, 8 Sup. Ct. 921; *Bauman* v. *Ross*, 167 U. S. 548, 589, 17 Sup. Ct. 966, and cases cited; *Dorgan* v. *City of Boston*, 12 Allen, 223; *City of Parkersburg* v. *Travenner* (Va.) 26 S. E. Rep. 179. What is true of the foregoing cases is also true of those which assert the power of the legislature to fix the percentage of the cost of the work to be raised by local assessment, for such percentage may double the total increase in value because of the improvement of all the assessed property. We cite a few of those cases: *Bauman* v. *Ross*, 167 U. S. 548, 589, 17 Sup. Ct. 966, and cases cited; *Hilliard* v. *City of Asheville* (N. C.) 24 S. E. Rep. 738; *City of Parkersburg* v. *Travenner* (Va.) 26 S. E. Rep. 179; *Norfolk City* v. *Ellis*, 26 Grat. 224.

Again, those cases which hold that the total cost of the improvement in front of a particular lot may be assessed against it are opposed to the doctrine of actual benefits. *Weeks* v. *City of Milwaukee*, 10 Wis. 258; *Warren* v. *Henly*, 31 Iowa, 31.

In Michigan, the judges were equally divided on the question. See *Woodbridge* v. *Detroit*, 8 Mich. 274. And, while Judge Cooley is opposed to the rule established by the Wisconsin and Iowa courts (See Cooley, Const. Lim. 508), yet Judge Dillon, whose opinion is so much relied upon by counsel for plaintiff in this case, favors that rule. See 2 Dill. Mun. Corp. § 753.

And, finally, we marshal against counsel's theory those decisions

which attach no importance to the fact that the land, so far from being enhanced in value by the improvement, has not been benefited thereby at all. *City of Harrisburg* v. *McCormick*, 129 Pa. St. 213, 18 Atl. Rep. 126; *Michener* v. *Philadelphia*, 118 Pa. St. 535, 12 Atl. Rep. 174; *Dewey* v. *City of Des Moines* (Iowa) 70 N. W. Rep. 605; *Warren* v. *Henley*, 31 Iowa, 31; *McQuiddy* v. *Smith*, 67 Mo. App. 205. In this last case the court said: "To pay for such grading, too, the city is authorized to assess against the abutting real estate the cost thereof. It is true that the basis of this authority to charge the adjacent property is the supposed benefit conferred on this particular property. 'But,' as stated by a well known text writer, 'this compensation received in benefits does not differ in principle from the compensation received, or supposed to be received, for general taxes, and is often a myth in fact, in the one case as in the other.' Lewis, Em. Dom. § 5. So, then, it is no defense to this tax bill that the property of these defendants may, in fact, have been injured rather than benefited by the street grading."

In *Irrigation Dist.* v. *Bradley*, 164 U. S. 112, 17 Sup. Ct. 56, the court say, at pages 176, 177, 164 U. S., and pages 69, 70, 17 Sup. Ct.: "It is insisted that the basis of the assessment upon the lands benefited, for the cost of the construction of the works, is not in accordance with, and proportion to, the benefits conferred by the improvement; and therefore there is a violation of the constitutional amendment referred to, and a taking of the property of the citizen without due process of law. Although there is a marked distinction between an assessment for a local improvement and the levy of a general tax, yet the former is still the exercise of the same power as the latter, both having their source in the sovereign power of taxation. Whatever objections may be urged to this kind of an assessment, as being in violation of the state constitution, yet, as the state court has held them to be without force, we follow its judgment in that case, and our attention must be directed to the question whether any violation of the federal constitution is shown in such an assessment. Can an *ad*

valorem assessment on the land benefited, or, in other words, can such an assessment as is provided for in §§ 18, 20, 21 and 22 of the act, be legally levied in such a case as this? Assumed that the only theory of these assessments for local improvement upon which they can stand is that they are imposed on on account of the benefits received, and that no land ought, in justice, to be assessed for a greater sum than the benefits received by it, yet it is plain that the fact of the amount of benefits is not susceptible of that accurate determination which appertains to a demonstration in geometry. Some means of arriving at this amount must be used, and the same method may be more or less accurate in different cases involving different facts. Some choice is to be made, and, where the fact of some benefit accruing to all the lands has been legally found, can it be that the adoption of an *ad valorem* method of assessing the lands is to be held a violation of the federal constitution? It seems to us clearly not. It is one of those matters of detail in arriving at the proper and fair amount and proportion of the tax that is to be levied on the land, with regard to the benefits it has received, which is open to the discretion of the state legislature, and with which this court ought to have nothing to do. The way of arriving at the amount may be in some instances inequitable and unequal, but that is far from rising to the level of a constitutional problem, and far from a case of taking the property without due process of law."

In *Bauman* v. *Ross*, 167 U. S. 548, 17 Sup. Ct. 966, the court say at page 590, 167 U. S., and page 982, 17 Sup. Ct.: "It was contended by some of the owners of lands that the public improvement proposed was not of a local character, but was for the advantage of the whole country, and should be paid for by the United States, and not by the District of Columbia, or by the owners of the lands affected by the improvement. But it is for the legislature, and not for the judiciary, to determine whether the expense of a public improvement should be borne by the whole state, or by the district or neighborhood immediately benefited. The case in this respect comes within the principle upon

which this court held that the legislature of Alabama might charge the County of Mobile with the whole cost of an extensive improvement of Mobile harbor, and, speaking by Mr. Justice Field, said: 'The objection urged is that it fastens upon one county the expense of an improvement for the benefit of the whole state. Assuming this to be so, it is not an objection which destroys its validity. When any public work is authorized, it rests with the legislature, unless restrained by constitutional provisions, to determine in what manner the means to defray its cost shall be raised. It may apportion the burden ratably among all the counties or other particular subdivisions of the state, or lay the greater share or the whole upon that county or portion of the state specially and immediately benefited by the expenditure.' *Mobile Co.* v. *Kimball*, 102 U. S. 691, 703, 704. The legislature, in the exercise of the right of taxation, has the authority to direct the whole, or such part as it may prescribe, of the expense of a public improvement, such as the establishing, the widening, the grading, or the repair of a street, to be assessed upon the owners of lands benefited thereby. *Davidson* v. *New Orleans*, 96 U. S. 97; *Hagar* v. *Reclamation Dist.*, 111 U. S. 701, 4 Sup. Ct. 663; *Spencer* v. *Merchant*, 125 U. S. 345, 355, 356, 8 Sup. Ct. 921; *Walston* v. *Nevin*, 128 U. S. 578, 582, 9 Sup. Ct. 192; *Lent* v. *Tillson*, 140 U. S. 316, 328, 11 Sup. Ct. 825; *Illinois Central R. Co.* v. *City of Decatur*, 147 U. S. 190, 198, 199, 13 Sup. Ct. 293; *Paulsen* v. *Portland*, 149 U. S. 30, 13 Sup. Ct. 750. This authority has been repeatedly exercised in the District of Columbia by congress, with the sanction of this court. *Willard* v. *Presbury*, 14 Wall. 676; *Mattingly* v. *District of Columbia*, 97 U. S. 687; *Shoemaker* v. *U. S.*, 147 U. S. 282, 286, 302, 13 Sup. Ct. 361. The class of lands to be assessed for the purpose may be either determined by the legislature itself, by defining a territorial district, or by other designation, or it may be left by the legislature to the determination of commissioners, and be made to consist of such lands, and such only, as the commissioners shall decide to be benefited. *Spencer* v. *Merchant* and *Shoemaker* v. *U. S.*, above cited; *Irrigation Dist.* v. *Bradley*, 164 U.

S. 112, 167, 168, 175, 176, 17 Sup. Ct. 56; *Ulman* v. *Mayor, etc.*, 165 U. S. 719, 17 Sup. Ct. 1001. See, also, the very able opinion of the Court of Appeals of New York, delivered by Judge Ruggles, in *People* v. *Mayor, etc.*, of Brooklyn, 4 N. Y. 419, 430. The rule of apportionment among the parcels of land benefited also rests within the discretion of the legislature, and may be directed to be in proportion to the position, the frontage, the area, or the market value of the lands, or in proportion to the benefits as estimated by commissioners. *Mattingly* v. *District of Columbia*, *Spencer* v. *Merchant*, *Walston* v. *Nevin*, *Shoemaker* v. *U. S.*, *Paulsen* v. *Portland*, and *Irrigation Dist.* v. *Bradley*, above cited."

In *English* v. *Mayor, etc.* (Del. Err. & App.) 37 Atl. 158, the court say: "It is altogether too late in the development, both by legislation and elaborate judicial decisions, in states other than our own, of the general principles controlling local assessments for local improvements, for it to be necessary or proper for me to enter into a more elaborate or detailed review of the multitude of authorities sustaining the general propositions already laid down. It is well settled law (1) that the whole subject of taxing districts belongs to the legislature; (2) that the apportionment between the public and the local owners is within the power of the legislature; (3) that the legislature may fix upon the basis of apportionment between individuals. In fixing upon the basis of apportionment, the two methods between which a choice is commonly made in statutes providing for local assessments are: (1) An assessment made by assessors or commissioners appointed for the purpose under legislative authority, who are to view the estates, and levy the expense in proportion to the benefits which, in their opinion, the estates, respectively, will receive from the work proposed; (2) an assessment by some definite standard fixed upon by the legislature itself, and which is applied to estates by a measurement of length, quantity or value." See, also, the very able opinion of Judge Sawyer in *Emery* v. *Gas Co.*, 28 Cal. 345.

We do not desire to create the impression that under no circumstances can the courts review the exercise of the power of

local assessment. Cases may arise in which it will appear that no honest effort has been made to exercise the discretion which resides in the lawmaking power, but that a purely arbitrary fiat has gone forth to seize the citizen's property under the guise of the exercise of the taxing power. When such a case presents itself, we will not hesitate to protect the citizen against spoliation, whatever mask it may wear. See the reasoning of the court in *Dorgan* v. *City of Boston*, 12 Allen, 223, 237, 238. But against the consequences of the unwise exercise by the legislature of the discretion intrusted to it we are powerless to give relief. Many of the cases cited by counsel for plaintiff proceed on the principle that the courts may interfere when it is apparent that the legislature has not exerciced the taxing power at all, but has acted arbitrarily in determining by whom the burden of the cost of the local improvement shall be borne. See, for instance, *Thomas* v. *Gain*, 35 Mich. 155. That principle we fully recognize. But we do not consider it as applicable to the case at bar. Courts cannot interfere when the legislature has unwisely exercised the taxing power. It is only when it is apparent that no honest effort to exercise that power at all has been made that this can be done. It is our option that the legislature could not have devised a more equitable system than the one here assailed. Manifestly, an apportionment according to value would have been more unjust. And the very rule of apportionment for which counsel for plaintiff contends, while theoretically more fair, is, when we consider the favoritism which is possible under it; the errors in judgment which are inevitable when the quantum of benefit to each parcel of land has to be determined; and that, after all, the figures represent only the rough guesses of men,—in a word, when we look at this rule in its practical workings, we find that it is no more likely, indeed not as much calculated, to produce a just distribution of the burden as the very one the legislature has prescribed.

Much of the fear of disastrous consequences to the taxpayer for an abuse of the power of local assessment is fanciful. Legislators are not destitute of a sense of justice. They are controlled

by an intelligent and active public opinion. The laws they enact affect their own constituents. The governing body of the city is always intrusted with the power to decide whether the local improvement shall be undertaken; and usually (such being the case under the statutes of this state) the majority of the property owners who will be assessed for the work can veto the resolution of the city council directing it to be done. While cases of individual hardship will occur, and this must be expected, in the working of any tax system which can ever be devised, yet it is hardly conceivable that any scheme of local assessment will ever be formulated that in its whole scope will be oppressive and unjust.

The conclusion we have reached as to the legality of the statute, in so far as it requires all the expenses of the improvement to be assessed against the abutting property in proportion to frontage, leads necessarily to the further conclusion that there is no force in the contention of counsel for plaintiff that the taxpayer is not allowed a hearing by the law. It is true that he is given no hearing on the question of benefits. But he is furnished with an opportunity to demonstrate that the assessor in apportioning the tax according to frontage has committed an error by charging up against his land a larger sum than should be assessed against it. Section 2280, Rev. Codes. The right to a hearing at some stage in the proceedings is universally recognized where the apportionment of the tax involves the exercise of an act judicial in character; for instance, an assessment according to benefits. *Ulman* v. *Mayor, etc.* (Md.) 20 Atl. Rep. 141, 21 Atl. Rep. 709; *Mayor, etc.* v. *Ulman*, (Md.) 30 Atl. Rep. 43; *Mayor, etc.* v. *Scharf*, 54 Md. 499; *Spencer* v. *Merchant*, 125 U. S. 345, 8 Sup. Ct. 921; *Lent* v. *Tillson*, 140 U. S. 316, 11 Sup. Ct. 825; *Violett's Heirs* v. *City Council of Alexandria* (Va.) 23 S. E. Rep. 909; *Dietz* v. *City of Neenah* (Wis.) 64 N. W. Rep. 299; *Spencer* v. *Merchant*, 100 N. Y. 585, 3 N. E. Rep. 682; Cooley, Tax'n, 655; *Stuart* v. *Palmer*, 74 N. Y. 183. But there is authority for the proposition that, when the apportionment of the assessment involves only a mathematical calculation, the taxpayer is not entitled to be heard. *English* v. *Mayor, etc.*

(Del. Err. & App.) 37 Atl. Rep. 158; *Cleveland* v. *Tripp*, 13 R. I. 60; *Gillette* v. *City of Denver*, 21 Fed. Rep. 823; *Mayor, etc.* v. *Scharf*, 56 Md. 50; *Mayor, etc., of Baltimore* v. *John Hopkins Hospital*, 56 Md. 1; *Moale* v. *Mayor, etc.*, 61 Md. 224; *Alberger* v. *Mayor, etc.*, 64 Md. 1, 20 Atl. Rep. 988. The Maryland cases have, however, been overruled. See *Ulman* v. *Mayor, etc.*, 72 Md. 587, 20 Atl. Rep. 141, and 21 Atl. Rep. 709.

We are not called upon in this case to determine whether the legislature could have dispensed with a hearing, as it has not done so.

It is no objection to the law that it provides that the assessment shall be based upon an estimate of the cost before the work has been finished. See *English* v. *Mayor, etc.* (Del. Err. & App.) 37 Atl. Rep. 158; *Davidson* v. *New Orleans*, 96 U. S. 97; *Cleveland* v. *Tripp*, 13 R. I. 60.

Our conclusion is that the statute is valid, and we therefore reverse the judgment of the District Court, which is founded upon the contrary view of the law. All concur.

ON APPLICATION FOR A REHEARING.

Despite the length of the original opinion in this case, we deem it due to the able argument made by counsel for the plaintiff in their petition for a rehearing that we should briefly discuss the particular point therein presented. Our apology for our elaborate treatment of the case is that we believed that nothing short of an exhaustive review of the whole subject would enable us to answer the ingenious and powerful presentation of the plaintiff's theory of the case by his counsel, both in their printed brief and their oral arguments. They contend in their petition for a rehearing that the law is unconstitutional because no board or officer is authorized to determine, after due notice to the public, what property will be benefited by the improvement. Their claim, in brief, is that, even conceding that the citizen has no right to be heard as to the quantum of benefit his property derives from the improvement or with respect to the basis of apportionment of the assessment, yet that he has a constitutional right to

be heard on the general question whether his land will be benefited at all by the proposed public work. There certainly is no article of the constitution which in terms gives this right to a hearing; and the want of a hearing is all that the plaintiff can complain of, for it is obvious that, in the case of the law we uphold, a public body has expressly determined what property will in all cases of street paving be peculiarly benefited thereby, *i. e.* the legislature. That body has declared that the abutting property will be specially benefited to the extent of the entire cost of the work. And it is competent for such body to make such a declaration. It is true that the general theory of exceptional benefit to the property in the particular taxing district underlies all local assessments, and, in case of a plain disregard of this general theory, the courts will afford relief. But, unless such a case is presented, the question of benefits is legislative in character, and the decision of the sovereign power on that question is final. To compel the lawmaking power to accord to the citizen a hearing on the question whether his property is benefited at all is to take from that branch of the government the authority to prescribe the limits of a taxing district,—a power concededly legislative, and not judicial, in character. Besides, practically all the adjudications are against this doctrine. In a great number of cases, some of which are cited in the original opinion, it has been held competent for the legislature to establish the front-foot rule of apportionment; and yet this is a legislative determination without notice, and without any right to a hearing (save as the taxpayer is heard through his representative in the legislature), that all the abutting property is benefited to an amount equal to the cost of the work, or a fraction of the cost, as the case may be. If the contention of the counsel for the plaintiff be correct, then all of the decisions sustaining the front-foot rule, when fixed by the legislature, are unsound. We do not so regard them. So long as the legislature is not guilty of a plain disregard of the general theory of special local benefit in enacting an assessment

law, its enactment must be sustained without reference to the question whether a hearing on the question is or is not allowed. In such a case it is competent for that body, in the exercise of its legislative discretion, to determine without any hearing what property shall pay the tax and how the burden shall be apportioned.

While fully appreciating all the force of the arguments advanced by counsel for plaintiff, and while conceding that a remarkably strong presentation of that side of the question has been made by them, we still believe that their vigorous assault upon the constitutionality of the law in question cannot be sustained. The petition for a rehearing is denied. All concur.

(76 N. W. Rep. 242.)

INDEX.

ABSTRACT. See APPEAL AND ERROR, 565.

ACCOMPLICE. See INSTRUCTIONS, 352. CRIMINAL LAW, 352-109. EVIDENCE, 109.

Upon the evidence in this case it would have been proper to request the court to submit to the jury the question of R's. relations to the crime with instructions that if they found that he was an accomplice. his testimony must be corroborated to sustain a conviction. State v. Haynes, 356.

Evidence examined and found not to furnish the corroboration required to warrant a conviction upon the testimony of an accomplice. State v. Coudotte, 109.

Testimony that tends to connect the defendant with the commission of the offense charged only when supplemented by certain testimony of the accomplice is not such corroborating testimony as the statute requires. State v. Coudotte, 109.

ACCOUNT. See ASSIGNMENT OF ACCOUNT, 544.

ACCOUNT STATED.

An account stated can be opened for correction only upon the ground of fraud, mistake, accident, omission, or undue advantage and the burden rests upon the party seeking to open the account. Montgomery v. Fritz, 348.

ACTION. See STATUTES OF LIMITATION, 358.

An action upon a judgment must be brought within ten years. Merchants' National Bank v. Braithwaite, 358.

ACTION ON THE CASE. See TROVER AND CONVERSION, 129.

ACTUAL BIAS. See JURY, 294.

ADMINISTRATORS. See EXECUTORS AND ADMINISTRATORS, 544.

An administrator can assign his fees by a written assignment. Luther v. Hunter, 544.

AFFIDAVIT OF MERITS.

To warrant a court in setting aside a decree entered on the default of defendant on the ground of his mistake, inadvertence, or excusable neglect, an affidavit of merits must be made a part of the application. Kirschner v. Kerschner, 291.

AFFIDAVIT OF MERITS—Continued.

Such affidavit, to be sufficient, if made by the party, must state that he has fully and fairly stated all the facts in the case to his attorney, and is advised by his attorney that he has a good defense on the merits. Kirschner v. Kirschner, 291.

An attorney cannot make such affidavit unless some reasonable excuse be given for the failure of the party to make it; and when made by the attorney it should be based upon his own knowledge, or knowledge obtained from the records. Kirschner v. Kirschner, 291.

AGENCY. See PRINCIPAL AND AGENT, 569. EVIDENCE, 569.

AGISTER'S LIEN.

The lien of an agister, under § 5486, Comp. Laws, is inferior to that of the holder of a mortgage executed and filed before the lien of the agister attached. The First National Bank of Mandan v. Scott, 312.

AMENDMENTS. See PLEADINGS, 569-503. TRIALS, 503.

Where parties without objection introduce evidence on points not embraced within the issues the pleadings may be amended to correspond with the proofs. Buxton v. Sargent, 513.

The rule that the pleadings will be amended to conform to the proof does not apply when the evidence which it is claimed tends incidentally to establish a fact outside of the issues was competent and relevant on the actual issues in the case. Unless the record shows that such evidence was offered, to the knowledge of both parties, to prove the fact foreign to the issues as well as the one embraced within such issues, the law will presume that it was introduced for the only purpose for which it was, under the pleadings proper. Buxton v. Sargent, 503.

The allowance or rejection of amendments to pleadings is a matter resting largely in the discretion of the trial court. Loverin-Browne Co. v. Bank of Buffalo, 569.

ANSWER. See PLEADINGS, 442. DENIAL, 442.

An answer stating that the "defendants have no information sufficient to form a belief, and therefore deny" certain allegations referred to, is insufficient to raise an issue. It fails to negative both knowledge and information and hence does not conform to the statutory denial. Massachusetts L. & T. Co. v. Twitchell, 442.

ANTICIPATING TAX LEVY. See CONSTITUTIONAL LAW, 543.

APPEAL AND ERROR. See PETITION FOR REHEARING, 106 STATEMENT OF CASE, 382; JUSTICE OF THE PEACE, VENUE.

Where a jury follows instructions of the court, limiting them to a particular ground of negligence, their verdict cannot be sustained if there is no evidence to support a finding of that particular negligence, even though there was evidence in the case tending to prove other negligence, and such negligence was set up in the complaint. Roehr v. Great Northern Ry. Co., 95.

Whether in a case where it is clear that the jury have applied the correct

APPEAL AND ERROR—Continued.

rule of law, the verdict will be disturbed as contrary to instructions, not decided. Roehr v. Great Northern Ry. Co., 97.

On appeal from a default judgment, the judgment will be reversed, if the complaint does not state facts sufficient to constitute a cause of action; but the appellant must make out a clear case, to secure a reversal. Scottish Am. Mtge. Co. v. Reeve, 99.

Where a judgment has been affirmed on appeal to this court, it cannot afterwards be set aside for any alleged infirmity that existed prior to the former appeal, and that might have been raised and determined on that appeal. Scottish Am. Mtge. Co. v. Reeve, 552.

In a case tried in the District Court under the provisions of section 5630 of the Revised Codes, and brought to this court on appeal, this court will not retry issues of fact in a case where findings of fact are waived below, and never filed in that court. Said section, in connection with section 5467, Id., requires the settlement of a statement of the case embracing specifications the same as in jury cases. Nichols & Shepard Co. v. Stangler, 102.

Objections to evidence noted in the court below, and preserved in a statement will be reviewed in this court only in connection with a re-trial of the issues of fact, and will not be reviewed as errors merely, as is done in jury cases. Nichols & Shepard Co. v. Stangler 102.

In cases tried under said sections, specifications of error in the statement and assignments of error in this court will be required as in other cases. Nichols & Shepard Co. v. Stangler, 102.

On appeal where evidence was evenly balanced or nearly so, a doubtful scale will always turn in favor of that view adopted by the trial court, following. Jasper v. Hazen, 4, N. D., 1; Nichols & Shepard Co. v. Stangler, 108.

Where in a criminal case the record failed to disclose whether counsel for defendant was present in court when the verdict was received, an assignment of error cannot be sustained upon the point. Error in this regard, if it is error to receive a verdict under such cicumstances, must to be available on appeal affirmatively appear upon the record. State v. Maloney, 122.

The discretion of the trial court in allowing or disallowing amendments to pleadings will not be controlled except in clear cases of abuse. Loverin-Browne Co. v. Bank of Buffalo, 569.

No statement of the case ever having been settled in this action, there cannot be any review in this court of findings of fact, with a view to determine whether such findings are sustained by the evidence. Thuet v. Strong, 565.

Plaintiff's counsel filed in this court a printed volume, labeled "Abstract," which volume embraces more than seventy-five pages of matter which appears to be a mere rescript of translation of stenographic minutes taken at the trial, without an attempt at condensation, as required by a rule of this court. *Held,* that said volume is

APPEAL AND ERROR—Continued.

not an abstract, within the meaning of rule 13 of the amended rules of this court (74 N. W. Rep. VIII., 6 N. D. XX.) Thuet v. Strong. 565.

The statute and rule of court which respectively regulate and prescribe the form of a statement of the case, and of the abstract thereof, to be filed in this court, are primarily designed to assist this court in sifting out and deciding the issues in causes brought to this court for review. Thuet v. Strong, 565.

The action of this court with respect to a review of a case cannot be controlled by counsel who, in a given case, see fit to ignore the statute and rules of court governing the settlement of statements of the case and preparation of abstracts. Thuet v. Strong, 565.

Error to be available as ground for reversal must be made to appear affirmatively. The court cannot in any case presume error for the purpose of reversing a case. State v. Campbell, 64.

An erronious charge to the jury will not operate to reverse the case where no exception was taken. State v. Campbell, 66.

Appellant cannot for the first time on appeal raise the point that the verdict has been directed for a few dollars too much. Loverin-Browne Co. v. Bank of Buffalo, 569.

Upon appeal in a disbarment proceeding the accused is entitled under § 437, Rev. Codes, to the judgment of the supreme court upon the facts, yet in this case judgment is affirmed. In re Crum, 316.

Where the County Court had no jurisdiction to try the question of title of real estate, the District Court obtained none on appeal from the order of the County Court. Arnegaard v. Arnegaard, 475.

An order properly made will not be reversed because the lower courts reasons were erroneous. The Tribune Printing & Binding Co. v. Barnes, 591.

In a criminal action, a statement of the case, under the statute and rules of this court, is not required to embody specifications of error, as required in civil cases by rule 10 of the rules of this court, nor need such statement be authenticated by the judge's certificate of identification, as required in civil cases by rule 9. State v. Weltner, 522.

In criminal cases, assignments of error are governed by rule 12, except that no references can be made therein to any specifications of error in the abstract. No such specifications being required in the statement or abstract, the rule is satisfied by a proper reference in the assignment of error to the page or pages of the abstract relating to the error assigned. State v. Weltner, 522.

Where the question was as to the point at which a stake marking a township line had been set by the government surveyor, and there was much circumstantial evidence that it was set at a certain point, the verdict of the jury finding that it was set at that point will not be disturbed, though two witnesses not directly contradicted gave positive testimony that it was set at a different point. Black v. Walker, 414.

An objection that the attorney whose name is signed to the notice of

APPEAL AND ERROR—Continued.

appeal is not appellant's attorney is waived by the appearance of respondent's attorney to argue a motion to dismiss, in which such objection is not raised. Woods v. Walsh, 376.

The absence of any specifications of error in the statement of the case, and of any assignments of error in the brief of appellant, is no ground for dismissal of the appeal. State v. McKnight, 444.

This court being in doubt as to the preponderance of the evidence, the same, being in equilibrio, will turn the scale in favor of the holding of the trial court, who saw the witnesses and heard them testify. State v. McKnight, 444.

Where a writ of mandamus was refused, but no order for judgment that the application be denied was made, neither any judgment finally disposing of the case ever entered, an appeal was dismissed for want of jurisdiction. Coler v. Coppin, 418.

If objections to the appointment of a receiver are overruled the defendant must review the decision by an appeal from the order appointing the receiver. If he suffers the time to appeal from such order to pass, he cannot thereafter raise the point: Merchants' Nat. Bank v. Braithwaite, 369.

An extenssion of time against objection properly made, within which to settle a statement of the case, cannot be lawfully made by the trial court in the entire absence of any showing of cause for such extension. Woods v. Walsh, 384.

The signature to a notice of appeal is valid when made by another by authority of the attorney. Woods v. Walsh, 376.

Where the answer admits facts showing that plaintiff is entitled to the relief prayed for, it is not necessary for the plaintiff to settle a statement of the case in order to secure a reversal by the Supreme Court of the judgment rendered against him by the District Court. In such a case, there is no issue of fact to be tried, under section 5630, Revised Codes, either in the District Court originally, or de novo in the Supreme Court. McHenry v. Roper, 584.

Appellants failed to have any statement settled or the record transmitted within the time prescribed by satute. Thereupon respondent procured a statement to be settled, and brought up the record. Appellants filed no brief. *Held*, that the case is a proper one, under the discretion lodged in the court by Revised Codes, § 5575, for the infliction of a penalty of 10 per cent., on the ground that the appeal was taken for delay. Phoenix Assur. Co. v. McDermont, 172.

Under the Newman Law, Ch. 82, Laws 1893, as amended by the Revised Codes, the Supreme Court are required to make a final determination of the case upon the record transmitted from the lower court. No new trial can be ordered, neither can further proofs be received. Fargusson v. Talcott, 193.

Where, upon a trial without a jury, under § 5630, Rev. Codes, evidence offered was rejected by the trial court and was not taken down by the stenographer a new trial upon appeal is thereby rendered impossible,

APPEAL AND ERROR—Continued.

but the judgment will be reversed and the record remanded for further proceedings. Otto Gas Engine Works v. Knerr, 195.

A mere order for judgment is nonappealable, it is reviewable upon appeal from the judgment. In re Eaton, 273.

The statute allowing an appeal in contempt cases to defendants only does not give an appeal from any order whatsoever made in the court below, save only the order of conviction and sentence. State v. Crum, 299.

An appellate court will not decide abstract questions, the decision of which cannot possibly benefit either party to the litigation on the merits, but will dismiss an appeal whenever it appears that no decision which it can render will aid the appellant on the merits. In re Kaeppler, 307.

The court will not pass on the merits merely for the purpose of relieving the appellant from a judgment for costs, as costs are merely an incident of a litigation. In re Kaeppler, 307.

The court will review the question as to proper items in a bill of costs when such question is properly raised, or the right of the successful suitor to costs at all, as such questions are in no manner connected with the merits. In re Kaeppler, 307.

APPEARANCE. See JUSTICE OF THE PEACE. VENUE.

An appearance will give the court jurisdiction without service of summons or pleadings. Deering & Co. v. Venne, 576.

A stipulation for continuance on the return day of summons in justices court is a voluntary appearance by defendant. Deering & Co. v. Venne, 576.

Upon the return day of the summons, the defendant appeared specially for the purpose and moved to dismiss the action on the ground of irregular service of the summons. *Held*, that this was not a submission to the jurisdiction. Hicks v. Besuchet, 429.

ARREST. See CRIMINAL LAW, 444.

Section 7840, Revised Codes examined. *Held*, that said section is not repugnant to section 18 of the state constitution. When, under said statute, a complaint in writing on oath, which is sufficient in both form and substance, is filed with the justice of the peace, such complaint constitutes a sufficient showing of probable cause to justify the issue of the warrant, without having recourse to other or extraneous evidence of probable cause. State v. McKnight, 444.

ASSAULT WITH DEADLY WEAPON. See CRIMINAL LAW, 119.

ASSIGNMENTS OF FEES.

When the administrator of an estate desires to donate his fees for services as such to a third party, the execution and delivery of a written assignment thereof is a delivery of the property itself. Luther v. Hunter, 544.

ASSIGNMENT OF ERROR. See APPEAL AND ERROR, 444-425. CRIMINAL LAW, 522.

Assignments of error are required in cases tried under § 5630, Rev. Codes. Nichols & Shepard Co. v. Stangler, 102.

An appeal will not be dismissed because no assignments of error are made in the appellant's brief, or that an attempted assignment therein is insufficient. State v. Mc Knight, 444.

In criminal cases assignments of error are governed by rule 12, except that no reference can be made therein to specifications of error in the abstract. State v. Weltner, 522.

Although the court would be warranted under the rule in refusing to investigate any question of fact because the assignments of error fail to comply with the rules of court, yet to do so is discretionary and in this case the defects are disregarded. Heald v. Yumisko, 425.

ASSESSMENTS. See TAXATION, 246. MUNICIPAL CORPORATIONS, 640.

It is competent for the legislature to direct that all the expense of paving a city street shall be assessed against the abutting property in proportion to frontage Rolph v. City of Fargo, 640.

In exercising the power of local assessments, the legislature is not limited to the actual increase in value of the property assessed resulting from the local improvement. Rolph v. City of Fargo, 640.

Section 176 of the state constitution does not relate to local assessments, but only to general taxation. Rolph v. City of Fargo, 640.

ATTORNEYS. See DISBARMENT, 269-316. CHAMPERTY, 383. COSTS, 269. AFFIDAVIT OF MERITS, 291.

An attorney who had made a false affidavit, had taken an unfair advantage of his office and misled the court, had at various times been disrespectful to the court, had been abusive to one who had been a member of a jury that had returned a verdict against his client, and had frequently used abusive language to those opposing him in a case, was properly disbarred. In re Crum, 316.

BASTARDY.

An unmarried female has cause of action against the father of her bastard child to compel him to contribute to the support of such child, and this claim she can settle and adjust so far as she herself is concerned. Ingwaldson v. Skrivseth, 388.

Where there was evidence that at about the time the child was conceived the complainant was very intimate and loving towards a third person, while there was no such affection shown for defendant, and her testimony as to the time at which the act was committed first fixed the date at a time when defendant was in another neighberhood, and defendant denied the paternity of the child, a verdict for defendant was justified. State v. McKnight, 444.

BIAS. See PRELIMINARY EXAMINATION, 522. CRIMINAL LAW, 522.

BILLS AND NOTES. See NEGOTIABLE INSTRUMENTS, 440.6.

BONA FIDE PURCHASER. See NEGOTIABLE ISTRUMENTS, 440.6. CHATTEL MORTGAGES, 330. NOTICE, 503. FRAUDULENT CONVEYANCES, 280.

BOUNDARIES.

When an irregular tract or lot of land abuts upon a stream of water, and a meander line is run ostensibly along this shore line for the purpose of fixing the area of such tract, the real boundary of the tract is the shore line, and not the meander line. Heald v. Yumisko, 422.

BURDEN OF PROOF. See EVIDENCE, LIENS, 201. DAMAGES, 201. NOTICE, 503-521. NEGOTIABLE INSTRUMENTS, 440. ACCOUNT STATED, 348.

The burden rests upon the party seeking to open an account stated to show fraud, mistake, accident, omission or undue advantage. Montgomery v. Fritz, 348.

Where a transfer is attacked by creditors as fraudulent and the vendee under the transfer is wife of the vendor, the burden of proof is on her to show the bona fides of the transaction. Flugel v. Henschel, 280.

BURGLARY. See EVIDENCE, 79. CRIMINAL LAW, 352.

When evidence of possession of tools which might have been used for a burglarious purpose is competent against one charged with burglary. State v. Haynes, 79.

CASE. See TROVER AND CONVERSION, 129.

CASES CRITICISED, MODIFIED, OVERRULED OR DISTINGUISHED.

Certain reasoning in Coler v. School Tp., 3 N. D. 240, condemned. Coler v. Coppin, 419.

Martin v. Tyler, 4 N. D. 278, distinguished. Redmon v. Chacey, 231.

Power v. Larabee, 3 N. D. 502, distinguished. Wells County v. McHenry, 253.

Jasper v. Hazen, 4 N. D. 1, followed. Nichols & Shepard Co. v. Stangler, 108.

CHALLENGES. See JURY, 294.

CHAMPERTY.

Under the laws of this state an attorney may lawfully contract for a contingent fee to be measured by the amount recovered. Wood v. Walsh. 376.

Where plaintiff's right to prosecute an action rested upon independent written obligations of the defendant's and was in no wise dependent upon an alleged champertous agreement between plaintiff and his counsel, such agreement was not available to defendants as a defense to the action or as ground for dismissal thereof. Wood v. Walsh, 376.

CHANGE OF VENUE. See PRELIMINARY EXAMINATION 522.
CHATTEL MORTGAGES.

Where a mortgage is executed in another state on property therein situated, the mortgagor and mortgagee being domiciled therein, and such mortgage is filed in accordance with the laws of such state, the mortgagee can claim the protection of such laws in another state to which the property is removed without refiling the mortgage in such state, unless the statute thereof expressly require it to be there refiled. Wilson v. Rustad, 330.

The question of the sufficiency of the description of the property in a chattel mortgage is a question of law. When the description is good as between the parties, no one can raise the question of the sufficiency thereof except some one who claims the protection of the law requiring chattel mortgages to be filed. Wilson v. Rustad, 330.

A description of property mortgaged in the following language is sufficient betwen the parties, also as to purchasers, incumbrancers and creditors, to-wit: "One horse mule three years old color bay weight about 950 pounds, named Jack; one mare mule three years old color brown or mouse weight about 1000 pounds, named Jennie; one mare mule five years old color mouse weight about 800 pounds named Maud, all this day purchased from the said E. F. Wilson, with all increase of the same, all the said property being now in the possession of the said mortgagor in the county of Day and state of South Dakota." Wilson v. Rustad, 330.

The lien of an agister is inferior to that of the holder of a mortgage executed and filed before the lien of the agister attached. First National Bank of Mandan v. Scott, 312.

Failure to refile a chattel mortgage, as required by Ch. 41, of the Laws of 1890, does not render it void as against the mortgagor himself, Deering & Co. v. Hanson, 288.

The holder of a second lien cannot recover for the act of a prior chattel mortgagee, whereby the lien is lost, if his lien is also secured by other property of sufficient value to pay it. Union Nat. Bank v. Milburn & Stoddard Co., 201.

One who holds a chattel and also a real estate mortgage to secure a claim (such mortgages being first liens), and who takes possession of the personal property for the purposes of foreclosure while it is in the possession of the sheriff under atachment thereof, creating an inferior lien thereon, must proceed with reasonable diligence to foreclose his mortgage. If he merely holds the property, without taking any steps to foreclose, for an unreasonable time, and in the meantime such property is lost to the holders of both liens, he is liable for the value thereof, less the amount of his prior lien thereon. Union Nat. Bank v. Milburn & Stoddard Co., 201.

The burden is on the holder of a second lien, who claims damages, through the act of a prior chattel mortgagee, whereby the lien was lost, to prove that other property by which his lien is also secured is inadequate. Union Nat. Bank v. Milburn & Stoddard Co., 201.

CHATTEL MORTGAGES—Continued.

Under section 4680, Revised Codes, a valid mortgage may be made upon an unplanted crop, and will attach thereto as a lien as soon as the same comes into existence by the agency of the mortgagor. Following other cases cited in the opinion. Donovan v. St. Anthony & Dakota Elev. Co., 513.

A mortgagee of chattels, having a present right of possession, may maintain an action against a wrongdoer for the conversion of the property embraced in the mortgage. Donovan v. St. Anthony & Dakota Elev. Co., 513.

CHILDREN. See NEGLIGENCE, 554.

CLAIM AND DELIVERY.

The sheriff is protected by his writ only when he takes the property from the possession of the defendant. If he takes it from a third person, who is in fact the owner, he becomes instantly liable for the tort. But replevin will not lie against him even in such a case except upon his failure, after a reasonable time to deliver it to the party to the original action entitled thereto. Weltner v. Jacobson, 32.

Under Revised Codes, § 5341, which provides that "if the property taken is claimed by any other person than the defendant or his agent, and such person shall make affidavit of his title thereto and right to the possession thereof, stating the grounds of such right and title, and serve the same upon the sheriff, the sheriff shall not be bound to keep the property or deliver it to the plaintiff, unless the plaintiff on demand of him or his agent shall indemnify the sheriff against such claim. * * * And no claim to such property by any other person than the defendant or his agent shall be valid against the sheriff, unless made as aforesaid; and notwithstanding such claim, when so made, he may retain the property a reasonable time to demand such indemnity,"—replevin will not lie against the sheriff, who is in possession of the property under a requisition in claim and delivery proceedings in a pending replevin action, unless he fails to deliver the property to the party to the first replevin action entitled thereto, within a reasonable time after it becomes his duty to do so, as the statute was not intended to abrogate the doctrine that property in the custody of the law cannot be replevied. Welter v. Jacobson, 32.

The sheriff is not authorized in any event to deliver the property to the claimant, but must, if he does not keep it, deliver it to either the plaintiff or defendant, as the circumstances may require. Welter v. Jacobson, 32.

The party to a replevin action, who is in possession pendente lite, may sell the property if the other party is claiming only a lien on it, and the purchaser will obtain a clear title without reference to the question of priority of the liens. In such a case the bond takes the place of the property. Union Nat. Bank v. Moline, Milburn & Stoddard Co., 201.

CLAIM AND DELIVERY—Continued.

When the action is between the owner and a lienholder or between two lienholders the money judgment in favor of the lienholder is never for the full value of the property if that exceeds the sum due upon his lien, but only for the amount of his lien. Union Nat. Bank v. Moline M. & S. Co., 219.

COLLATERAL ATTACK.

The official acts of de facto officers cannot be collaterally attacked. Cleveland v. McCanna, 455.

COMPLAINT. See PLEADING, 99-101. BASTARDY, 444.

A complaint in a bastardy proceeding is not sufficient to justify the issuance of a warrant when verified upon information and belief and not positively. State v. McKnight, 444.

CONSTITUTIONAL LAW. See EXEMPTIONS, 458. DRAINAGE, 231.

Warrants on a county treasurer issued by the county auditor for the current expenses of the county, such as sheriff's fees, after the constitutional limit of indebtedness has been reached, but in anticipation of the collection of a tax already levied, are valid to the extent of taxes levied. Such warrants do not augment the existing indebtedness of the county, within the meaning of the constitution of the state. Construing sections 183, 187, State Constitution. Darling v. Taylor, 538.

Section 1807, Revised Codes, does not discriminate either against nonresidents or those whose places of business are situated in another state. The sole requirement of the section is that county printing shall be done within the state. The Tribune P. & B. Co. v. Barnes, 591.

Revised Codes, section 1807 (upon authority cited in the opinion,) *held* not to be repugnant to section 61 of article 2 of the state constitution, providing "that no bill shall embrace more than one subject," etc. The Tribune P. & B. Co. v. Barnes, 591.

Section 1807, Revised Codes, is not repugnant to section 8 of article 1 of the federal constitution, regulating commerce among the states, for the reason that a sovereign state, like an individual, may lawfully elect not to purchase its necessary supplies from those who do not manufacture or produce the same within the state so purchasing the same. The Tribune P. & B. Co. v. Barnes, 591.

Section 176 of the state constitution does not relate to local assessments, but only to general taxation. Rolph v. City of Fargo, 640.

An action based upon a statute which is wholly unconstitutional will be dismissed whenever the fact is so determined. State v. McKnight, 444.

Section 7840, Revised Codes, examined. *Held*, that said section is not repugnant to section 18 of the state constitution. When, under said statute, a complaint in writing on oath, which is sufficient in both form and substance, is filed with the justice of the peace, such complaint constitutes a sufficient showing of probable cause to justify the

CONSTITUTIONAL LAW—Continued.

issue of the warrant, without having recourse to other or extraneous evidence of probable cause. State v. McKnight, 444.

Section 5516 Et. Seq. Rev. Codes, were enacted to carry out the constitutional mandate contained in section 208, Constitution. Cleveland v. McCanna, 458.

Section 18, Const., declares that no search warrant shall issue but upon probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons or things to be seized. *Held*, that a description of the premises as a certain lot, in a certain block, in a certain city, was sufficiently specific, where there was in fact but one building on the lot, and said building was occupied entirely by the defendants in the action. State v. Markuson, 155.

Due process of law is not denied by § 7605, Rev. Codes, requiring the officer making a search "to take and hold possession of all the personal property found on the premises. The property required to be taken is limited to personal property found in the particular tenement or room where intoxicating liquors are kept for sale contrary to law, and does not include property in the same building not used in connection with the prohibited business. State v. Markuson, 155.

The defendant in a search warrant cannot complain that the statute under which the warrant was issued is unconstitutional, as authorizing the property of others to be seized without due process of law, since no one can question the constitutionality of a statute unless he is affected by it. State v. McNulty, 169.

Curative legislation in relation to tax proceedings is constitutional. Wells County v. McHenry, 256.

The issuance of drainage bonds under the provisions of § 31, Ch. 51, Laws 1895, does not amount to a loan of the credit of the county under the provisions of § 185 of our Constitution. Martin v. Tyler, 4, N. D., 278, distinguished. Redmon v. Chacey, 231.

The provision of the drainage law, § 7, Ch. 51, Laws 1895, that the drain commissioners may issue warrants upon the county treasurer payable out of the drainage fund, and negotiate the same for the purpose of raising funds with which to pay damages allowed for right of way for drains, does not authorize the loan of the credit of the county and is not forbidden by § 185, Const. Redmon v. Chacey, 231.

The proceeding for punishing a contempt committed in facie curiae is highly summary in character, and is not a prosecution, within the meaning of Const,, Art. 4, § 97. State v. Crum, 299.

CONSTRUCTION. See STATUTES, 529.

CONSTRUCTIVE NOTICE. See NOTICE, 209. AGISTER'S LIEN, 312.

CONTINGENT FEE. See CHAMPERTY, 383.

CONTEMPT.

To interfere with a sheriff's possession of property by replevin is under some circumstances a contempt of court. Welter v. Jacobson, 32.

CONTEMPT—Continued.

The state examiner has no authority, under Rev. Codes, § 143, giving him power to compel certain persons therein named to appear before him and testify, to compel the attendance of one who has no other connection with or relation to the state institution under investigation than that some years prior thereto he had had some business transaction with the board of trustees, and in connection therewith had been paid a sum of money; and such person, refusing to obey an order of the district court directing him to so appear and testify, cannot be punished for contempt. In re Camp, 69.

What is necessary in pleading a prior conviction for contempt of court under § 7614, Rev. Codes, explained. State v. Markuson, 155.

On a trial for contempt for violation of injunctional order, defendant is not entitled to a jury. State v. Markuson, 155.

An injunctional order in an equity case, pendente lite, issued by a court having full equity powers and complete jurisdiction of the subject-matter, must be obeyed while it remains in force, however irregularly or erroneously it may have issued. State v. Markuson, 155.

An attorney who, by permission of court, was assisting in the defense of a criminal prosecution, was ordered to withdraw from the case, because of calling a witness a "crook." He persisted in remaining in the case, refused to comply with the court's order that he remain quiet, finally refused to retire from the room at the court's request, and when, by order of the court, the sheriff was ejecting him from the court room, he called the court a contemptible cur, and expressed a desire to meet him outside. *Held*, that he was guilty of criminal contempt. State v. Crum, 299.

CONTRACTS. See VENDOR AND PURCHASER, 183. PUBLIC LANDS, 422. TRUSTS, 460.

A contract for the sale of land to be paid for by the delivery of wheat, construed. Farguson v. Talcott, 183.

A contract to give all of one's time to the employer does not mean that outside earnings of the employee are to belong to the employer. Hillsboro Nat. Bank v. Hyde, 400.

Ordinarily a trustee is himself personally liable on all contracts made by him as trustee, he may, however, in exceptional cases by express contract prevent becoming personally liable, charging the liability on the trust fund. Wells-Stone Mercantile Co. v. Grover, 460.

The rule that a written contract supersedes all prior and contemporaneous negotiations and stipulations between the parties applies only to the specific matter embraced in the contract. Grand Forks Lumber & Coal Co. v. Tourelot, 587.

When the making of a parol contract was in issue, and on plaintiff's theory the contract had been made and partly performed, documentary evidence of such partial performance was relevant as tending to show the making of the contract. Grand Forks L. & C. Co. v. Tourtelot, 587.

CONTRACTS-- Continued.

The promise of one party to pay a second party for goods delivered by such second party to a third party is an orignal promise, and not within the statute of frauds. Parting with the goods furnished the consideration to support the promise. Grand Forks L. & C. Co. v. Tourtelot, 587.

A vendor of land under an agreement requiring the purchaser to deliver half of the grain grown on the farm each year in payment of the purchase price, waives a breach of such provision on the part of the vendee for any year by allowing the latter to remain in possession of the land during the next two years and receiving from her at the close of each a large amount of grain raised on the land in payment of the purchase price under the terms of the contract. Plummer v. Kelly, 88.

A building contract between a corporation and a firm provided that the corporation might make changes or alterations during the construction of the building, and the contract should not be violated by such acts; and also provided that "no alterations shall be made in the work shown or described in the drawings and specifications except upon a written order of the architects." *Held*, construing the two provisions together, and in the light of the customs of the business, that the corporation might order changes and alterations, but that such orders must be in writing, and the architects were merely the agents of the corporation in giving such orders. Northern Light Lodge, No. 1, I. O. O. F. v. Kennedy, 146.

A provision inserted into a building contract for the mutual benefit of the owner and contractor, cannot be waived or abrogated by one of them. Northern Light Lodge v. Kennedy, 146.

CONTRIBUTORY NEGLIGENCE. See NEGLIGENCE, 173.

CONVERSION. See TROVER AND CONVERSION, 129-32-45.

CORPORATIONS. See VENDOR AND PURCHASER, 236,

The failure of a foreign corporation to comply with the conditions imposed by the North Dakota statutes, to entitle it to transact business within the state, does not affect its right to maintain a suit on a contract made within the state. Red River Lumber Co. v. Friel, 46.

A corporation vendee of real estate is not chargeable with knowledge of outstanding equities therein, although its managing officer had such knowledge, when it was obtained more than three years before the organization of the corporation, unless such knowledge is shown to be present in the mind of such officer at the time of the transaction. Red River Valley Land & Investment Co. v. Smith, 236.

COSTS. See APPEAL AND ERROR, 307-172.

The Supreme Court will not review a case on the merits merely to relieve a party from a judgment for costs. In re Kaeppler, 307.

In disbarment proceedings under § 434 Rev. Codes, no costs or disbursements can be recovered by either party. In re Eaton, 269.

Costs are in discretion of the Supreme Court in appealed cases. Phoenix Assurance Co. v. McDermont, 172; Farguson v. Talcott, 183.

COUNSEL. See CRIMINAL LAW, 122.

COUNTER CLAIM. See PLEADINGS, 399.

COUNTIES.. See MANDAMUS, 591. DEBT LIMIT, 538.

Warrants issued for the current expenses of the county, after the limit of indebtedness fixed by Const. § 183, has been reached, but in anticition of the collection of a tax already levied, if not in excess of the tax levied, are not invalid as augmenting the existing indebtedness of the county, within the meaning of section 187. Darling v. Taylor, 538.

Construing section 1807, Revised Codes, which reads, "All county printing shall be done in the state, and if practicable in the county ordering the same," *held*, that the words "all county printing" includes, in addition to legal notices published by or in behalf of the county, all supplies or printed matter necessarily used by county officials in discharging their official duties. The Tribune P. & B. Co. v. Barnes, 591.

Section 7 of the drainage law now in force (being Ch. 51, Laws 1895) provides that the county drain commissioners may issue warrants drawn upon the county treasurer and payable out of the drainage fund (which could be raised only by special assessments within a limited district) and negotiate the same, for the purpose of raising funds with which to pay damages allowed for right-of-way for drainage. *Held*, that said warrants would create no geneal liability against the county, and their issuance would not constitute a loan of the credit of the county, within the meaning of § 185 of the state constitution. Redmon v. Chacey, 231.

The drainage act provides that the entire cost of locating and constructing drains shall be paid by special assessments upon the property and municipalities benefited, and in proportion to benefits received; but § 31 of the act provides that, instead of levying this entire cost in one year, the county may issue and negotiate bonds for the amount, running for a series of years, and then collect from the proper taxing district the necessary fractional part of the cost during each year of the life of the bonds, and keep the same as a sinking fund with which to pay the bonds at maturity. The section also declares that no county shall be liable for the payment of such bonds, but that they shall be paid only out of the sinking fund thus created, and the bonds shall recite that they are issued under said act, and are to be paid out of such sinking fund. *Held*, that the issuance of said bonds would not amount to a loan of the credit of the county, under the provisions of § 185 of our constitution. Redmon v. Chacey, 231.

Granting that all special assessments for local improvements in excess of benefits received are, in effect simple taxation, and void, under our constitution, if not uniform, yet the question cannot arise in this case, as under this statute no drain can be constructed where the total cost exceeds the total benefits. Redmon v. Chacey, 231.

COUNTY BOARD OF EQUALIZATION. See TAXATION, 246.

Where the county board of equalization fail to meet at all, it is fatal to the tax unless the law itself gives the taxpayer a hearing in the proceeding to enforce the tax. Power v. Larabee, 3 N. D. 502, followed but distinguished: Wells County v. McHenry, 253.

COUNTY COURT.

A county court with probate jurisdiction has no jurisdiction to try a question of title to property as between the personal representative of a decedent and a person claiming in hostility to the estate. Arnegaard v. Arnegaard, 475.

When a probate court orders the sale of the land of a third person to pay the debts of a decedent, such order is void for want of jurisdiction over the property. As such court has no power to sell the lands of another, and no power to pass upon the question of title, the order is void, and would be void although the real owners of the property were parties to the proceedings, and therein contested the question of title. A probate court has no jurisdiction to try such an issue. Gjerstadengen v. Van Duzen & Co., 612.

COURTS. See JURISDICTION, 418, 612, 475, 358.

COURT RULES. See APPEAL AND ERROR, 565; STATEMENT OF CASE, 522; CRIMINAL LAW, 522.

CRIMINAL LAW. See WITNESS, 352; INSTRUCTIONS, 352; EVIDENCE; STATEMENT OF CASE, 522; ASSIGNMENTS OF ERROR, 522; JURY, 294; TRIAL, 127.

The defendant was charged with burglary. At the close of the evidence defendant's counsel requested the trial court to charge the jury in direct terms that one R., a witness who had testified in behalf of the state, was an accomplice in the burglary, and hence that his evidence, without corroboration, would not sustain a conviction. The request was refused. Under the evidence, *held*, that the refusal was not error. State v. Haynes, 352.

There was direct evidence from both sides that R. was not an accomplice in the burglary, yet the evidence as a whole tended in some degree to cast suspicion upon R. as an accomplice. The theory of the defendant's counsel was that the testimony showed that R. was a participant in the crime. Under such circumstances it would have been correct practice to have requested the trial court to submit the question of R.'s connection with the crime to the jury, with proper instructions as to the law governing the testimony of an accomplice. No such request was made; hence no error can be predicated upon the failure of the court to so instruct the jury. Mere failure to instruct when not requested to do so is not prejudicial error. State v. Haynes, 352.

In this case collateral and irrelevant matter, not adverted to in the examination in chief, was drawn out on cross-examination of the defendant as a witness. In rebuttal, and against objection, the state was permitted to contradict such collateral matter by testimony of

CRIMINAL LAW—Continued.

a damaging nature highly prejudical to the defendant. *Held*, that the ruling was prejudical error, and the judgment must be reversed therefor. State v. Haynes, 70.

Where a justice of the peace conducted the preliminary examination of the defendant, and held him to bail, after the defendant had in due time filed a proper affidavit for a transfer of the action to another justice, such examination was void, and inoperative as a preliminary examination of the defendant. State v. Weltner, 522.

An information against the defendant, filed by the state's attorney, was irregular and voidable, and the District Court erred, to defendant's prejudice, in overruling defendant's motion to set aside the same. State v. Weltner, 522.

A district judge who has been regularly called into a district, other than his own, to try a criminal case, may, after the issue of fact is disposed of by the jury, hear and decide any motion or other matter connected with such case; and such hearing or decision may be had in either of the two districts in question. State v. Tomlinson, 294.

When the jury was being polled, one juror, who had been asked, "Is this your verdict?" stated that he desired to make an explanation, but did not disclose the nature or the purpose of the proposed explanation. The trial court refused to allow the explanation to be made at that time, and required a direct answer, whereupon the juror answered, "Yes." *Held*, that the ruling on this point was not error. State v. Tomlinson, 294.

The defendant was charged with keeping intoxicating liquors for sale as a beverage. Upon the trial a juror was challenged for actual bias, and the challenge was overruled, and the defendant excepted to the ruling. It appeared upon the juror's examination that he was a Prohibitionist in sentiment, and strongly opposed to the unlawful traffic in intoxicating liquors, and further, that he had no bias or prejudice for or against the accused, personally, and would decide the case impartially upon the law and testimony offered in court. *Held*, such ruling was not error. State v. Tomlinson, 294.

The defendant was charged with the crime of burglary in the first degree. At the trial, certain exhibits (blacksmith's tools) were allowed, against objection, to be put in evidence. These tools were found in the building where the burglary was committed, and were shown to have been brought there, without authority, by some one. They were tools such as might have been used in breaking the outside door, which was broken, or endeavoring to open the safe, which safe had been battered as with a punch. *Held*, not error. The exhibits were comcomitants of the crime, and tended to show its commission in fact and the manner of its commission. State v. Campbell, 58.

There was a fresh pursuit of the burglar, and he was tracked through the snow some 3½ miles from the scene of the burglary. The defendant was arrested as the guilty party within two hours after the burglary, and when arrested he had cartridges and a chisel in his

CRIMINAL LAW—Continued.

possession. When arrested he was concealed under the driveway of an elevator, and within 2 or 3 feet of his place of concealment there was found a revolver and a punch. These articles were put in evidence against objection. *Held*, that the ruling is not error. The punch and chisel were such tools as might have been used in the commission of the offense as shown by the evidence. The defendant admitted that the revolver belonged to him, and he explained why it was taken from his person. Under the circumstances it was for the jury to determine what weight should be given this evidence. State v. Campbell, 58.

In charging the jury the trial court read all the definitions of burglary found in the Penal Code. *Held*, under the undisputed evidence and facts of this case, that such reading did not prejudice the substantial rights of the accused. State v. Campbell, 58.

A proceeding to revoke and cancel the license of an attorney is not a criminal prosecution, and need not be brought or entitled in the name of the state. In re Crum, 316.

On trial for contempt for violation of an injunctional order defendant is not entitled to a jury. State v. Markuson, 153.

In pleading a former conviction for contempt of court, in order that a defendant may be adjudged guilty as of a second offense, it is only necessary, under section 7614, Rev. Codes, to allege briefly that such conviction was had. State v. Markuson, 155.

The testimony in this case relied upon by the state as furnishing the corroboration required to warrant a conviction upon the testimony of an accomplice examined, and *held* to furnish no corroboration, under section 8195, Rev. Codes, which declares that "a conviction cannot be had upon the testimony of an accomplice unless he is corroborated by such other evidence as tends to connect the defendant with the commission of the offense, and the corroboration is not sufficient if it merely shows the commission of the offense, or the circumstances thereof." State v. Coudotte, 109.

Testimony that tends to connect the defendant with the commission of the offense charged only when supplemented by certain testimony of the accomplice is not such corroborating testimony as the statute requires. State v. Condotte, 109.

There is no presumption of guilt arising from the fact that a person charged with crime, and while in confinement, and before trial, attempts to commit suicide. State v. Coudotte, 109.

The defendant was charged by an indictment framed under section 7115, Rev. Codes, with the offense of assault and battery with intent to kill, while armed with a deadly weapon, to-wit, a knife. *Held*, construing section 8244, Id., that it was legally competent, under such a charge, for the jury to return a verdict of guilty of an aggravated assault, defined in section 7145, Id. State v. Maloney, 110.

After being charged by the court, the jury retired for deliberation, and later returned into court, and announced that they had agreed upon

CRIMINAL LAW—Continued.

a verdict, and upon the request of the court the foreman of the jury read such verdict, which verdict, (omitting formal parts,) is as follows: "We, the jury, in the above entitled cause, find the defendant, Daniel Maloney, guilty of assault and battery with a sharp and dangerous weapon, with intent to do bodily harm." The court declined to receive said verdict, and it was not recorded. The court, in effect, stated to the jury that a verdict for the offense indicated by the terms of their verdict would be insufficient if it omitted to declare that the offense was committed "without justifiable cause or excuse." Error is assigned upon this instruction, and also upon the action of the court in sending the jury back for further deliberation. *Held*, that both assignments of error are valid, and must be sustained. *Held*, further, under the circumstances, of this case, that such errors did not prejudice the defendant. State v. Maloney, 119.

The jury went out under said instructions, and subsequently returned into court with a verdict which was received and recorded, and upon which the judgment appealed from was entered. Error is assigned upon the last verdict upon the ground that the jury had exhausted their powers in returning their first verdict (which was valid and sufficient), and hence could not return another verdict in the case. The last verdict was identical with the first in all material features except that the words aforesaid—i. e. "without justifiable cause or excuse"—were added in the last verdict. *Held*, that the last verdict was valid. *Held*, further, upon facts stated in the opinion, that this court will not reverse a judgment for errors of mere procedure unless the error appears of record affirmatively. State v. Maloney, 119.

In a prosecution for embezzlement under Rev. Codes, § 7464, where the information alleges in substance that at the time and place stated the defendant was the agent of one Swan Lagerberg, and that as such agent he was intrusted with the funds of said Lagerberg, and that he, the defendant, fraudulently appropriated said money to his own use, not in the execution of his trust, and the evidence fails to show that the defendant was the agent of Lagerberg when he received the money, a conviction cannot be sustained. State v. Wine, 18.

After rendition from a sister state upon a particular charge, the defendant can be tried for any crime whether the one named in the requisition or not, and the defendant cannot urge the objection that he was extradited for another offense. State v. Wine, 30.

CROPS. See CHATTEL MORTGAGES, 513.

CROSSINGS. See RAILROADS, 284.

CURATIVE LEGISLATION.

Curative legislation in relation to tax proceedings is constitutional. Wells County v. McHenry, 256.

DAMAGES.

The burden of proof is upon the holder of a second lien who claims damages through the act of a prior mortgagee whereby his lien was

DAMAGES—Continued.

lost, to prove that other property by which his lien is also secured is inadequate. Union Nat. Bank v. Moline, Milburn & Stoddard Co., 201.

DEBT LIMIT. See CONSTITUTIONAL LAW, 538; COUNTIES, 538.

DECLARATIONS. See EVIDENCE, 475.

DEEDS. See REAL ESTATE, 335; BOUNDARIES, 422; PUBLIC LANDS, 422; TRUSTS, 460.

Where the grantee in an unrecorded deed sells the land to another, and for the purpose of putting the title in the purchaser without the expense of having the old deed recorded destroys such deed, and procures to be executed to the purchaser a deed directly from the original grantor to the purchaser, no legal title vests in such purchaser, but only an equitable interest, the grantor in such deed having no legal title to convey. A court of equity, however, will compel the holder of the legal title to convey it to such purchaser. Russell v. Meyer, 335.

If the grantee, after learning that a deed has been delivered to a stranger for his benefit, accepts the same, such acceptance relates back to the time of the original delivery, if the rights of third persons are not involved. Arnegaard v. Arnegaard, 475.

Where a deed is delivered to a third person, to be delivered to the grantee on the death of the grantor, such delivery transfers the title to the grantee, subject to the life interest of the grantor in the land. Arnegaard v. Arnegaard, 475.

Where one, with the intention of providing for his children, deeded land to them absolutely, and delivered the deed to another, to hold until his death, and to then have recorded, the delivery was complete, though the children were not specifically informed of the existence of the deed. Arnegaard v. Arnegaard, 475.

Where the grantor delivers the deed to a third person, to be delivered to the grantee on the death of the grantor, intending to part with all control over the deed, the grantor, by subsequently acquiring possession of the deed, or by destroying it, does not thereby revest in himself the estate granted. Arnegaard v. Arnegaard, 475.

A trust deed construed and, *held*, that creditors signing the deed did not render themselves personally liable for debts contracted by the trustee. Wells-Stone Mercantile Co. v. Grover, 460.

DEFAULT. See APPEAL, 99.

To warrant a court in setting aside a decree entered on the default of defendant on the ground of his mistake, inadvertence or excusable neglect, an affidavit of merits must be made a part of the application. Kirschner v. Kirschner, 291.

DE FACTO OFFICERS. See COLLATERAL ATTACK, 455.

DELIVERY.

Forwarding an assignment of a claim to administrator's fees to the judge of the probate court, without any instructions to deliver the same to the party named therein as assignee, where the assignee has no knowledge of the assignment, does not constitute a delivery of the property. Luther v. Hunter, 544.

Delivery is necessary to constitute a valid gift of personal property. Luther v. Hunter, 544.

DEMURRER.

A demurrer searches the record and relates back to the first defective pleading. The Tribune Printing & Binding Co. v. Barnes, 591.

The misjoinder of a cause of action upon contract with a cause of action for tort can only be taken advantage of by demurrer. Henney Buggy Co. v. Higham, 45.

DENIAL. See PLEADING, 442.

DEPOSITIONS. See WITNESS, 452.

DISBARMENT.

No costs can be recovered by either party in a disbarment proceeding instituted under § 434, Revised Codes. In re Eaton, 269.

The remedy in court for the disbarment of an attorney is neither a civil nor a criminal action; it is a special proceeding. In re Eaton, 273; In re Crum, 316.

A disbarment proceeding need not be brought in the name and by the authority of the state. In re Crum, 316.

Laches in prosecution in such a proceeding cannot be available as a defense, when the matter was, with reasonable diligence, tried and submitted to the court, and the delay was occasioned by the failure of the court to render a decision. In re Crum, 316.

Where, in such a proceeding, the matter was submitted to the court, and the presiding judge, after holding the same for between four and five years, went out of office without having rendered any decision thereon, such fact did not amount to an acquittal of the accused of the charges made, and it was proper to retry such charges before the succeeding presiding judge of said court; and upon such retrial it was proper to allow supplemental charges to be filed and heard, covering matters that had occurred since the filing of the original accusations. In re Crum, 316.

While upon appeal in such a proceeding the accused is entitled, under section 437, Rev. Codes, to the judgment of this court upon the facts, yet, on full consideration of all the testimony received or offered in this case, the judgment of the District Court is affirmed. In re Crum, 316.

An attorney who had made a false affidavit, had taken an unfair advantage of his office, and misled the court, had at various times been disrespectful to the court, had been abusive to one who had been a member of a jury that had returned a verdict against his client, and had frequently used abusive language to those opposing him in a case, was properly disbarred. In re Crum, 316.

DISTRICT COURT. See JURISDICTION, 528; TAXATION, 528.

DIVORCE. See PRACTICE, 291; AFFIDAVIT OF MERITS, 291.

The mental suffering which the husband alleged as ground for divorce was caused by the wife's frequent false charges of marital infidelity made to him and to his friends. He was an instructor in vocal music, the leader of a choir, and a member of a professional quartette, and was thrown much in the company of ladies, some of whom manifested their interest in him by writing him notes, the contents of which were suggestive, if not incriminating. He was away from home every day, Sunday included; seldom returning before night, and frequently remaining out until 2 o'clock in the morning. *Held*, that he was not entitled to a divorce. McAllister v. McAllister, 324.

Plaintiff resided in New York until October, 1895, when he went to North Dakota, remaining there seven days, when he departed for Washington city, where he was employed until July, 1896, at which time he returned to North Dakota, to prosecute his action for divorce, returning to Washington after the trial. Before going to North Dakota, plaintiff announced that he was going to that state to obtain a divorce, and admitted on the trial that this was one purpose. *Held*, that he had not acquired residence in North Dakota, and the court had no jurisdiction. Smith v. Smith, 404.

The word "residence," as used in Rev. Codes, § 2,755, requiring 90 days' residence before an action can be instituted for divorce, should be construed as though it were "domicile." Smith v. Smith, 404.

A decree entered on the default of defendant will not be set aside on the ground of his mistake or excusable neglect unless the application be accompanied by an affidavit stating that the party has fully and fairly stated all the facts in the case to his attorney, who has advised him that he has a good defense on the merits. Kirschner v. Kirschner, 291.

An attorney cannot make such affidavit unless some reasonable excuse be given for the failure of the party to make it; and when made by the attorney it should be based upon his own knowledge, or knowledge obtained from the records. Kirschner v. Kirschner, 291.

DOMICILE. See DIVORCE, 404.

DRAFTS. See NEGOTIABLE INSTRUMENTS, 6.

DRAINAGE.

Laws 1895, c. 51, provides that the entire cost of locating and constructing drains shall be paid by special assessments on the property and municipalities benefited and in proportion to benefits received; and that the county may issue and negotiate bonds for the amount, running for a series of years, and that no county shall be liable for the payment of such bonds, but that they shall be paid only out of the sinking fund thus created, and the bonds shall recite that they are issued under said act, and are to be paid out of a sinking fund created for the purpose. *Held*, that the issuance of said bonds would

DRAINAGE—Continued.

not amount to a loan of the credit of the county, so as to violate Const. § 185. Redmon v. Chacey, 231.

Laws 1895, c. 51, provides that the county drain commissioners may issue warrants drawn upon the county treasurer and payable only out of the drainage fund (which could be raised only by special assessments within a limited district) and negotiate the same, for the purpose of raising funds with which to pay damages allowed for right of way for drains. *Held*, that said warrants would create no general liability against the county, and their issuance would not constitute a loan of the credit of the county, so as to violate Const. § 185.—Redmon v. Chacey, 231.

DUPLICATE. See NEGOTIABLE INSTRUMENTS, 6.

A duplicate is an original instrument repeated, a document which is the same as another in all essential particulars and differing from a mere copy in having all the validity of an original. Bank v. Farnsworth, 11.

EMBEZZLEMENT. See CRIMINAL LAW, 18.

The defendant was found guilty, under the provisions of § 7464 of the Rev. Codes, of the crime of embezzlement. The information alleges, in substance, that at the time and place stated the defendant, Joseph Miller, was the agent of one Swan Lagerberg, and that as such agent he was intrusted with the funds of said Lagerberg to the amount of $1,145, and that the defendant fraudulently appropriated said money to his own use, "not in the execution of his trust." After an examination of the evidence as set out in the opinion, *held*, that such evidence fails to establish the charge contained in the information, in this; it fails to show that the defendant, Miller, was an agent of Lagerberg when he received the money, or at any time. State v. Wine, 18.

EQUALIZATION. See TAXATION, 246.

ERROR. See APPEAL AND ERROR, 64; CRIMINAL LAW, 121; REQUESTS FOR INSTRUCTIONS, 63; EXCEPTIONS, 58.

ESTOPPEL. See WAIVER, 369.

As all the facts relating to the title of the decedent to the land sold were matters of record, and known to the purchaser at the sale (it appearing from the public records that at the time of his death the homesteader had not yet secured a right to a patent,) such purchaser cannot invoke the doctrine of equitable estoppel, as against the administrator, who petitioned for and made the sale and executed the deed, although he was also one of the persons to whom th patent for the land was issued, and therefore a part owner thereof. The case presents only a mutual mistake of the purchaser and the administrator as to the law; each believing that, under the facts, the land was part of the decedent's estate. No estoppel can be based upon such an error; there being no misstatement or concealment of any fact, and no misrepresentation as to law. Gjerstadengen v. Van Duzen & Co., 612.

EVIDENCE. See DAMAGES, 201; TROVER AND CONVERSION, 343; NEGLIGENCE, 81.

The rule that a written contract supersedes all prior and contemporaneous negotiations and stipulations between the parties applies only to the specific matter embraced in the contract. Grand Forks L. & C. Co. v. Tourtelot, 587.

When the making of a parol contract was in issue, and on plaintiff's theory the contract had been made and partly performed, documentary evidence of such partial performance was relevant as tending to show the making of the contract. Grand Forks L. & C. Co. v. Tourtelot, 587.

The promise of one party to pay a second party for goods delivered by such second party to a third party is an original promise, and not within the statute of frauds. Parting with the goods, furnished the consideration to support the promise. Grand Forks L. &. C. Co. v. Tourtelot, 587.

Acts and declarations of the grantor in a deed subsequent to the delivery thereof, in hostility to the deed are incompetent as against the grantee. But acts and declarations in support thereof are admissible. Arnegaard v. Arnegaard, 475.

A purchaser of land pendente lite from one who is not named as a party defendant in a notice of lis pendens is presumptively a purchaser without notice and not bound by the final judgment in the case. Buxton v. Sargent, 503.

In an action by the mortgagee of crops against an elevator company for the conversion of mortgaged grain, proof of conversion is sufficient without showing actual or constructive notice of the mortgage to defendant. Donovan v. St. Anthony & Dakota Elevator Co., 521.

A party to a written contract is a competent witness for a third party in no manner connected with such contract, to contradict the terms of the contract. Luther v. Hunter, 544.

Where the issue was whether defendant had agreed to pay for material furnished a third person during certain months, bills for material furnished the third person by plaintiff during the months immediately preceding said months in which the bills in controversy accrued are admissible, as tending to show that defendant had made the alleged agreement. Grand Forks Lumber & Coal Co. v. Tourtelot, 587.

An agency cannot be established by proof of any statements or acts of the alleged agent, unless brought to the knowledge of the principal and not repudiated by him. Loverin Browne Co. v. Bank of Buffalo, 569.

It is not competent for a witness testifying by deposition to answer, "For answer to that question I refer to the answer of A. B." Kneeland v. Great Western Elevator Co., 452.

It is competent in an action for the conversion of wheat by defendant to prove the contents of entries showing amount of grain purchased, the grade, the price, and persons from whom purchased, made by

EVIDENCE—Continued.

the agent of the defendant at the time of the transaction in the stubs of wheat tickets kept by defendant for that purpose, such entries being the ones from which the agent made up his report to the home office, it appearing that the original entries themselves have been destroyed by defendant. Kelly v. Cargill Elevator Co., 343.

If a deed is lost, and the only copy thereof is also lost, evidence of the contents of such copy by one who has seen it is the best evidence of which the case is susceptible. Kelly v. Cargill Elevator Co., 346.

The answer of a witness as to collateral and irrelevant matter, cannot be contradicted by the party who asked the question. State v. Haynes, 77.

Evidence of the possession of tools which might have been used for burglarious purposes, found in possession of the defendant, four days after the alleged burglary, *held* incompetent. State v. Haynes, 79.

There is no presumption of guilt arising from the fact that a person charged with crime, and while in confinement and before trial, attempts to commit suicide. State v. Coudotte, 109.

Evidence that defendant, charged with murder, was told beforehand that the murdered persons were to be killed, and was told afterwards that they had been killed, is insufficient to connect him with the commission of the offense. State v. Coudotte, 109.

Testimony examined, and *held* that the evidence of an accomplice was not sufficiently corroborated to sustain a conviction of murder. State v. Coudotte, 109.

Declarations of a party at the time he signed a duplicate draft that he did not thereby intend to add anything to his liability, are competent to be proved as in harmony with his act, and not contradicting it. Bank of Gilby v. Farnsworth, 12.

The defendant was charged with the crime of burglary in the first degree. At the trial, certain exhibits (blacksmith's tools) were allowed, against objection, to be put in evidence. These tools were found in the building where the burglary was committed and were shown to have been brought there, without authority, by some one. They were tools such as might have been used in breaking the outside door, which was broken, or endeavoring to open the safe, which safe had been battered as with a punch. *Held*, not error. The exhibits were concomitants of the crime, and tended to show its commission in fact and the manner of its commission. State v. Campbell, 58.

There was a fresh pursuit of the burglar, and he was tracked through the snow some 3½ miles from the scene of the burglary. The defendant was arrested as the guilty party within two hours after the burglary, and when arrested he had cartridges and a chisel in his possession. When arrested he was concealed under the driveway of an elevator, and within 2 or 3 feet of his place of concealment there was found a revolver and a punch. These articles were put in evidence against objection. *Held*, that the ruling is not error. The punch and chisel were such tools as might have been used in the

EVIDENCE—Continued.

commission of the offense as shown by the evidence. The defendant admitted that the revolver belonged to him, and he explained why it was taken from his person. Under the circumstances it was for the jury to determine what weight should be given to this evidence. State v. Campbell, 58.

EXAMINER. See CONTEMPT, 69.

EXCEPTIONS.

After the trial closed, counsel for the defendant, pursuant to the provisions of § 8178, Rev. Codes, elected to file exceptions with the clerk of the district court to the instructions and refusals to instruct the jury. *Held*, that by so doing the defendant voluntarily limited his exceptions to such exceptions as he saw fit to file with the clerk. State v. Campbell, 58.

No exceptions need be taken to findings of fact made. Nichols & Shepard Co. v. Stangler, 107.

Where an exception is leveled at one of several features in an instruction, other features not pointed out by the exception are not affected by it. State v. Campbell, 66.

Where a charge to the jury embodies several features, one of which is proper, an exception to the entire charge will not be sustained. State v. Campbell, 66.

EXECUTION. See SUPPLEMENTARY PROCEEDINGS, 358; LIMITATION OF ACTIONS, 358; JUDGMENTS, 358.

An execution cannot issue upon a judgment after ten years. The judgment becomes extinct, and the right to execution is thereby destroyed. Bank v. Braithwaite, 358.

It is too late for a debtor to move for the vacation of all proceedings had supplementary to execution, on the ground that the execution had not been returned in sixty days, when he has submitted to an examination, and after the appointment of a receiver in such supplementary proceedings. Bank v. Braithwaite, 369.

EXECUTORS AND ADMINISTRATORS.

A surety on an administrator's bond occupies no fiduciary relation to the estate, and may therefore purchase claims against the estate. Luther v. Hunter, 544.

EXEMPTIONS.

Exemption laws should be liberally construed. Cleveland v. McCanna, 459.

In proceedings under the insolvency law of this state, the insolvent, if the head of a family, is entitled to the exemptions allowed by law, even as against a creditor whose claim is for property obtained by the false pretenses of the insolvent. In re Kaeppler, 435.

Such a claim is not discharged by the insolvency proceedings. The creditor can share in the dividends, and bring an action against the

EXEMPTIONS—Continued.

debtor to recover the balance, and on the judgment so obtained he can exhaust the debtor's exemptions. In re Kaeppler, 435.

Mutual judgments cannot be set-off one against the other in such a manner as to defeat the exemption laws; and when, on an application of a judgment debtor to have a judgment owned by him and against his creditor set-off against the judgment owned by such creditor, and against him, such judgment creditor files a verified schedule of his personal property, showing that the whole thereof, including such judgment, is less in value than the amount allowed by law as exempt, such setoff should be refused. Cleveland v. McCanna, 459.

A judgment obtained for the wrongful conversion of exempt property stands in lieu of the property, and is exempt. Cleveland v. McCanna, 459.

A judgment that represents the proceeds of exempt property cannot be set off on a judgment against such judgment creditor. Cleveland v. McCanna, 459.

EXTRADITION. See CRIMINAL LAW, 30.

FALSE PRETENSES. See EXEMPTIONS, 435.

FINDINGS OF FACT.

Where in a case tried to the court without a jury, findings of fact are waived, the Supreme Court will refuse to retry the case on appeal. Nichols & Shepard Co. v. Stangler, 102.

No exception need be taken on findings of fact made. Nichols & Shepard Co. v. Stangler, 102.

Findings of fact will not be reviewed upon appeal if a statement of the case has not been settled. Thuet v. Strong, 565.

FORCIBLE ENTRY AND DETAINER. See VENDOR AND PURCHASER, 236.

FOREIGN CORPORATIONS. See CORPORATIONS, 46.

FRAUDULENT CONVEYANCES. See HUSBAND AND WIFE, 475.

A secret antenuptial transfer by the husband of homestead property is void as to the wife. Arnegaard v. Arnegaard, 475.

A conveyance to a trustee, with reasonable authority given him to manage the business under the direction of the court, and subject to the right of the creditors to control the discretion of the trustee, is not fraudulent as to creditors. Wells Stone Mercantile Co. v. Grover, 468.

Where a conveyance of real estate is made by a grantor with intent to hinder, delay, and defraud creditors, and the grantee, not being a creditor of the grantor, has knowledge of such fact, the consummation of the transfer is such a participation in the fraud by the grantee as will invalidate the transfer, even where full consideration is paid. Fluegel v. Henschel, 276.

FRAUDULENT CONVEYANCES—Continued.

In such a transfer, knowledge on the part of the grantee of such suspicious facts and circumstances as would put a prudent man on inquiry is equivalent to knowledge of all facts that would have been developed by a reasonable pursuit of such inquiry; but no duty of inquiry whatever devolves upon a grantee unless he has actual knowledge of some suspicious fact or circumstance. Fluegel v. Henschel, 276.

The fact that the parties to a conveyance are relations (in this case brothers-in-law) raises no presumption that such conveyance is fraudulent, but courts will scrutinize such transactions more closely than where no relationship exists. Where a grantee, who is innocent at the time he receives his deed, of any intent on the part of the grantor to defraud creditors, learns of such intent before final payment, he makes further payments to such grantor at his peril; and this is true even when the grantor holds the grantee's negotiable promissory note, not yet due, for such balance. When a grantee makes further payments under such circumstances, his deed will be set aside pro tanto, at the suit of the grantor's creditors, but such conveyance will protect such grantee for all payments innocently made, and his lien on the premises for such payments will be superior to the liens of the judgment creditors of the grantor, whose judgments are junior in time to the conveyance. Fluegel v. Henschel, 276.

Where a party holds a conveyance as security, he has no standing in a court of equity to ask that a subsequent deed made by his grantor be set aside as a fraud upon his rights, until he shows the existence of some valid claim for which his conveyance stands as security. Ingwaldson v. Skrivseth, 388.

FRAUD AND MISTAKE. See ACCOUNT STATED, 348; VENDOR AND PURCHASER, 422.

GIFTS. See HUSBAND AND WIFE, 475; HOMESTEAD, 475.

In order to constitute a valid gift of personal property inter vivos, the delivery of the property must clearly appear, and the donee must lose all control over the same. *Held*, that forwarding an assignment of a claim to administrator's fees to the judge of the probate court, without any instructions or directions to deliver the same to the party named therein as assignee, did not constitute a delivery of the property. Luther v. Hunter, 544.

HIGHWAYS. See MUNICIPAL CORPORATIONS, 173; NEGLIGENCE, 173-284.

Under the statutes in force for the establishment by county commissioners of highways in 1880, and where there was no objection to the highway or the report of the viewers, such highway, if established at all, must be established as located and described by the viewers. Dunstan v. Jamestown, 1.

While the statute provided that the plat and notes of the county surveyor, when a survey had been ordered by the board, should be held as presumptively correct, yet, when such plat differed from the location fixed

HIGHWAYS—Continued.

by the viewers, the latter must prevail. Dunstan v. Jamestown, 1.

When the proceedings under the statute to create a highway are so definite and certain that a competent surveyor, with the records before him can locate the road, they are sufficient. Dunstan v. Jamestown, 1.

Bishop v. Railway Co., 4 N. D. 536, followed as to obligation of railroad company to keep a lookout for persons and property at public crossings. Johnson v. Great Northern Railroad Co., 284.

HIRING. See MASTER AND SERVANT, 400.

HOMESTEAD.

The fact the husband could, after marriage, have destroyed her homestead right in the property by changing his place of residence is no reason for taking the case out of the rule that a secret antenuptial transfer by the husband is void as to the wife; for after marriage the husband's control over the homestead would have been not absolute, but limited,—a husband having no power to devest the wife of her homestead right by deed or will, but only by removal from the premises. The consideration that the wife's homestead right is more fragile than that of her dower right at common law affords a strong reason why the courts should guard more jealously her interests, against the secret devices of her husband to defraud her of such right. Arnegaard v. Arnegaard, 475.

Before a homesteader has earned a right to a patent, he has no such interest in the land as will make it a part of his estate on his death. The patent thereafter issued to the persons specified in the federal statute is issued to them, not as the heirs of the decedent, who have inherited his title, but as original parties, who are preferred by the federal statute after the rights of the original homesteader have been destroyed by death; they being allowed the benefiit of his residence upon the land. Gjerstadengen v. Van Duzen Co., 612.

HUSBAND AND WIFE. See HOMESTEAD.

After engagement, and on the eve of his marriage to a second wife, the prospective husband deeded to his son by a former wife his homestead. The transfer was kept secret. The deed was not recorded, and the wife was ignorant thereof. The purpose of the grantor was to prevent the homestead right of the wife in the land from vesting in her on their marriage. As an inducement to the woman to marry him, he proposed to build on the homestead a substantial dwelling. *Held*, that the deed was fraudulent, in law and in fact, as to her homestead right, and therefore void as to it. But the deed is not void in toto. Arnegaard v. Arengaard, 475.

IN CUSTODIA LEGIS.

Property in custody of law cannot in judicial proceedings be seized by anyone, not even the owner thereof. Weltner v. Jacobson, 35.

INDEMNITY. See CLAIM AND DELIVERY, 38.

INFANTS. See NEGLIGENCE, 554.

A child is responsible for its own torts although committed by the direction of another; and a child is no less a trespasser because the trespass was committed under the control or coercion of a parent or guadian. O'Leary v. Brooks Elevator Company, 554.

INFORMATION. See PRELIMINARY EXAMINATION, 522; CRIMINAL LAW, 522.

INJUNCTION.

A mortgagee of land will be restrained from foreclosing his mortgage on land on which there is to his knowldege a second lien, before exhausting other property on which his mortgage is a lien, and on which there is no second lien. Union National Bank v. Moline, Milburn & Stoddard Co., 201.

An injunctional order in an equity case, pendente lite, issued by a court having full equity powers and complete jurisdiction of the subject-matter, must be obeyed while it remains in force, however irregularly or erroneously it may have issued. State v. Markuson, 155.

INSOLVENCY. See EXEMPTIONS, 435; FALSE PRETENSES, 435.

In proceedings under the insolvency law of this state, the insolvent, if the head of a family, is entitled to the exemptions allowed by law, even as against a creditor whose claim is for property obtained by the false pretenses of the insolvent. In re Kaeppler, 435.

Such a claim is not discharged by the insolvency proceedings. The creditor can share in the dividends, and bring an action against the debtor to recover the balance, and on the judgment so obtained he can exhaust the debtor's exemptions. In re Kaeppler, 435.

INSTRUCTIONS. See EVIDENCE, 452; TRIAL, 95, 454; CRIMINAL LAW, 352; VERDICT, 127- 119.

In charging the jury the trial court read all the definitions of burglary found in the Penal Code. *Held*, under the undisputed evidence and facts of this case, that such reading did not prejudice the substantial rights of the accused. State v. Campbell, 58.

Where the court of its own motion gives the law embodied in a request, error can not be predicated upon the refusal of the court to charge the jury in the exact language requested by counsel. State v. Campbell, 63.

A request cannot be modified by the court without consent of counsel. The statute (section 8176, Rev. Codes) forbids it. State v. Campbell, 63.

Where the record failed to affirmatively show that requests were modified by the court without the consent of counsel, an assignment based upon the change was overruled. State v. Campbell, 64.

The following instruction condemned: "If you find that any witness has sworn falsely with reference to any material fact at issue, you are at liberty to disregard all his evidence, unless you find his testimony is corroborated by other evidence in the case." State v. Campbell, 65.

INSTRUCTIONS—Continued.

The court's instructions become the law of the case, and the jury has no right to disregard them. Roehr v. Great Northen Ry. Co., 97; State v. Maloney, 127.

Mere failure to submit a question of fact affecting the credibility of a witness, when not requested to do so, is not prejudicial error. State v. Haynes, 352.

The defendant was charged with burglary. At the close of the evidence defendant's counsel requested the trial court to charge the jury in direct terms that one R., a witness who had testified in behalf of the state, was an accomplice in the burglary, and hence that his evidence, without corroboration, would not sustain a conviction. The request was refused. Under the evidence, *held*, that the refusal was not error. State v. Haynes, 352.

When the verdict returned by a jury is either informal or invalid, or is deemed to be so by the trial court, it may be required to correct the verdict, so as to make it conform to the views of the court in matter of law. The views of the court in such a case are the law of the case so far as the duty of the jury is concerned. State v. Maloney, 127.

INTOXICATING LIQUOR.

The agent or servant of one engaged in the sale of liquor in violation of law may be punished as a principal, when guilty of an illegal sale in violation of an injunction. State v. O'Grady, 171.

Section 18, Const., declares that no search warrant shall issue but upon probable cause, supported by oath or affirmation, particularly describing the place to be searched, and the persons or things to be seized. *Held*, that a description of the premises as a certain lot, in a certain block, in a certain city, was sufficiently specific, where there was in fact but one building on the lot, and it was occupied entirely by the defendants. State v. Markuson, 155.

Where personal property to be seized under such search warrant is described as "all articles found therein used in or about the carrying on of the business aforesaid," such description being as particular as the circumstances of the case will ordinarily permit, it is sufficient to satisfy the constitutional requirement. State v. Markuson, 155.

Where, in distinct and separate rooms of the same building, two different lines of business are transacted, one lawful and the other unlawful, a statute, or a search warrant issued pursuant thereto, authorizing the seizure of property on the "premises" where the unlawful business is carried on, must be confined to the rooms used in that business. State v. McNulty, 169.

Rev. Codes, § 7605, directing the officer, in case he finds intoxicating liquors on the premises to be searched, to "take and hold possession of all personal property found on such premises," requires the officer to take only the personal property found in the particular tenement

INTOXICATING LIQUOR—Continued.

or room where intoxicating liquors are kept for sale contrary to law. State v. Markuson, 155.

Where a search warrant is issued under the provisions of the prohibitory liquor law directing the search of a building occupied by two or more tenants in separate and distinct tenements, and intoxicating liquors are found in one of such tenements only, the officer must, under the statute, close such tenement, but cannot close the tenements of the other tenants. State v. Markuson, 155.

Under Rev. Codes, § 7605, which provides for the abatement of a liquor nuisance, a defendant in contempt proceedings for the violation of an injunction issued thereunder is not entitled to a jury trial. 64 N. W. 934, 5 N. D. 147 (1895), reaffirmed. State v. Markuson, 155.

JUDGE.

A district judge who has been regularly called into a district, other than his own, to try a criminal case, may, after the issue of fact is disposed of by the jury, hear and decide any motion or other matter connected with such case; and such hearing or decision may be had in either of the two districts in question. State v. Tomlinson, 294.

JUDGMENT. See JURISDICTION, 358-475.

The supreme court will not examine a case on the merits for the purpose of relieving the appellant from a judgment for costs. In re Kaeppler, 307.

A judgment ceases to be valid after the expiration of 10 years from the recovery thereof, unless suit is brought thereon within 10 years, and in even that case the judgment is dead for all purposes except that of supporting such action. Merchants' National Bank v. Braithwaite, 358.

When a judgment is obtained against a school township organized under chapter 44 of the Laws of 1893, on an indebtedness of a school district for whose indebtedness such school township became liable under section 144 of such statute, the judgment creditor may proceed to enforce such judgment, the same as any other judgment against such school township. Coler v. Coppin, 418.

Supplementary proceedings on a judgment, being in the nature of a creditors' suit to enforce the collection thereof, are not effectual to keep the judgment alive, and, though begun while the judgment is alive, must fall to the ground on the expiration of 10 years from the rendition thereof, unless it has been revived. Merchants' Nat. Bank v. Braithwaite, 358.

Where no order for judgment has been signed, and no final judgment entered, the supreme court can get no jurisdiction by appeal. Coler v. Coppin, 418.

Mutual judgments cannot be set off one against the other, in such a manner as to defeat the exemption laws. Cleveland v. McCanna, 455.

JUDGMENT—Continued.

A decree in favor of the purchaser for the specific performance of a land contract which required the purchase price to be paid by the delivery of grain at specified times, should not require the delivery of grain by the purchaser, but should allow him to pay the value of the grain as of the date he offered to perform the contract, and was met by a refusal by the vendor. Fargusson v. Talcott, 183.

JURISDICTION. See JUDGE, 294; COUNTY COURT, 612, 475. JUDGMENTS, DISTRICT COURTS, 528, 576; TAXATION, 528; JUSTICE OF THE PEACE, 576, 397; PRELIMINARY EXAMINATION, 522; COURTS, 358; APPEAL AND ERROR, 418.

A county court, acting as a probate court, has no jurisdiction to try a question of title to property, as between the personal representative of a decedent, and a person claiming in hostility to the estate. Accordingly, *held*, that where a proceeding which was instituted in such court to compel the administrator to place certain lands upon the inventory resulted in a judgment that such lands did not form part of the estate, such judgment constituted no bar to an action brought to have certain deeds of such lands set aside as not having been delivered by the decedent, although the grantees in such deeds were parties to the proceeding in the county court. Arnegaard v. Arnegaard, 475.

As the county court had no jurisdiction to try the question of title, the district court obtained none by an appeal from the order of the county court. Arnegaard v. Arnegaard, 475.

When a probate court orders the sale of the land of a third person to pay the debts of a decedent, such order is void for want of jurisdiction over the property. As such court has no power to sell the lands of another, and no power to pass upon the question of title, the order is void, and would be void although the real owners of the property were parties to the proceeding, and therein contested the question of title. A probate court has no jurisdiction to try such an issue. Gjerstadengen v. Van Duzen & Co., 612.

A justice of the peace loses jurisdiction to examine an offender after he has filed an affidavit of prejudice and bias, and asked for a transfer to another justice. State v. Weltner, 522.

The omission to file in the office of the clerk of the District Court a copy of the resolutions of the board of county commissioners designating the newspaper in which the tax list should be published, and duly certified by the county auditor, before the publication of the list, was fatal, and the court acquired no jurisdiction. Cass County v. Security Improvement Co., 528.

Where counsel for defendant in an action pending in a justice's court, who does not appear specially, appears on the return day, and in open court stipulates orally with counsel for the plaintiff for an adjournment of the hearing of the case to a time agreed upon between

JURISDICTION—Continued.

counsel, and thereupon the court enters in its docket an order embracing the stipulation and adjourning the case to the time agreed upon, *held*, that such action constitutes a voluntary appearance in the action on the part of the defendant, and operates as a waiver of any defects in the summons or its service. Deering & Co. v. Venne, 576.

Section 6635, Revised Codes, construed. *Held*, where an action has been commenced by issuing a summons and is pending, the defendant named in the summons may appear generally in such action, and by such appearance will give the court jurisdiction of his person, and this without pleadings being filed by either party. Deering & Co. v. Venne, 576.

Revised Codes, sections 6771, 6779, construed. Said sections do not authorize an appeal from a Justice's Court to the District Court to be taken upon questions of law alone. Section 6779 provides "that the action shall be tried anew in the District Court in the same manner as actions originally commenced therein." Accordingly *held*, where a defendant seeking to dismiss an action upon the ground of nonservice of the summons upon him appeals to the District Court, and states in his notice that the appeal is taken on questions of "law alone," that defendant, by such appeal, invokes the authority of the District Court to hear and determine the merits, and thereby submits himself to the jurisdiction of the District Court. Deering & Co. v. Venne, 576.

On such appeal, it is error in the District Court to dismiss the action upon the ground that the justice before whom the action originated never acquired jurisdiction of the person of the defendant. In such case the District Court would acquire jurisdiction independently and by virtue of the appeal, whether the justice did or did not have jurisdiction. Deering & Co. v. Venne, 576.

On the admission of North Dakota as a state, the judgments of the territorial district court passed under the jurisdiction of the state district court; and hence the latter court has power to issue executions, and the judges thereof have authority to institute supplementary proceeding, on such judgments. Merchants' Nat. Bank v. Braithwaite, 358.

JURY.

A defendant is not entitled to a jury trial upon charge of contempt for violation of an injunctional order. State v. Markuson, 155.

Negligence is a question for the jury, when reasonable men might reach different conclusions as to whether a given defect renders a street unsafe. Heckman v. Evenson, 173.

A prohibitionist in sentiment opposed to the unlawful traffic in intoxicating liquor, but with no bias or prejudice against the accused personally, *held*, not incompetent to sit as a juror in a case where defendant was accused for violation of the prohibitory liquor law. State v. Tomlinson, 294.

JUSTICE OF THE PEACE. See JURISDICTION, 576, 397; DE FACTO OFFICERS, 455.

A justice of the peace having called a case—the summons therein having been thereafter filed with the justice, with proof of service—the defendants demanded that the papers be produced. The counsel for the plaintiff had them in his possession, and the justice allowed him time to send to his office to procure them, whereupon defendants withdrew from the case. *Held*, that the justice did not lose jurisdiction, and that his judgment subsequently rendered was valid. Cowan v. Farrell, 397.

LACHES. See EXECUTIONS, 369; WAIVER, 369.

Laches in prosecuting a proceeding to revoke and cancel the license of an attorney cannot be availed of as a defense, where the delay was occasioned by the court's failure to decide the matters submitted to him. In re Crum, 316.

LIENS. See SEED LIEN, 129; TROVER AND CONVERSION, 201; TAXES, 135; MECHANICS LIENS, 146; AGISTERS, 312; CHATTEL MORTGAGES, 312; VENDOR AND PURCHASER, 503.

The burden of proof is upon the lienholder in an action for damages to show loss of his lien or impairment of his security. Union Nat. Bank v. Moline, M. & S. Co., 201.

The question of mere liens cannot be investigated in an action to quiet title. Buxton v. Sargent, 503.

LIMITATION OF ACTIONS.

The legislature may lessen the statutory period within which actions must be brought even as to existing causes of action, provided the suitor has a reasonable time in which to sue after the statute making the change is passed. Merchants' Nat. Bank v. Braithwaite, 358.

When a statute lessening the period within which actions must be brought is not to go into effect until a day subsequent to that on which it is passed, the reasonable time within which suits on existing causes of action must be brought is computed from the day of its passage, and not from the day on which it becomes effective. Merchants' Nat. Bank v. Braithwaite, 358.

A statute was passed lessening the period within which actions must be brought. Thirteen months after the passage of the act, a debt contracted under the old law became barred by the new. *Held*, that the creditor had been afforded a reasonable time after the passage of the act within which to have brought the action. Merchants' Nat. Bank v. Braithwaite, 358.

A judgment ceases to be valid after the expiration of 10 years from the recovery thereof, unless suit is brought thereon within 10 years, and in even that case the judgment is dead for all purposes except that of supporting such action. Merchants' Nat. Bank v. Braithwaite, 358.

It is not necessary to the validity of a law which lessens the time in which an action may be brought that it should as to existing causes

LIMITATION OF ACTIONS—Continued.

of action fix a particular period after the enactment of the law within which, in any event, such causes of action may be enforced. Merchants' Nat. Bank v. Braithwaite, 358.

In the absence of such a provision, 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. Merchants' Nat. Bank v. Braithwaite, 358.

LIS PENDENS.

A purchaser pendente lite from one who is not named as a party defendant in a notice of lis pendens is not affected by the final judgment in the case. Buxton v. Sargent, 503.

Under the system of numerical indexing in this state, the rule remains unchanged that the purchaser pendente lite is not bound by the judgment unless the person from whom he buys is named in the notice of lis pendens as a party defendant. Buxton v. Sargent, 503.

MANDAMUS. See APPEAL AND ERROR, 418.

Mandamus will not lie to compel county commissioners to consider a bid for county printing made by parties who will do the work of printing outside the limits of the state if awarded the contract, where there is a statute requiring such printing to be done in the state. The Tribune Printing and Binding Co. v. Barnes, 591.

MARRIED WOMEN. See HOMESTEAD, 475.

MARSHALING SECURITIES.

The holder of a chatttel, and also of a real estate, mortgage, whose negligence in foreclosing the chattel mortgage after taking possession of the chattels for the purpose, with notice of a second lien thereon created by an attachment, causes the loss of such chattels to the holders of both liens, thereby loses his first lien on the land on which the attachment was also a lien, to the extent of the value of the chattels so lost. Union Nat. Bank v. Milburn & S. Co., 201.

One who holds a first mortgage to secure future advances on two pieces of land, on one of which there is a second encumbrance, cannot, after receiving notice thereof, advance more money to the mortgagor and claim the right, as against the holder of the second encumbrance, to apply any part of the proceeds of a foreclosure of the piece of land on which there is no second encumbrance on such subsequent advances, but must first apply them on the debt due when he has learned of the existence of the second encumbrance. Union Nat. Bank v. Milburn & S. Co., 201.

MASTER AND SERVANT. See PRINCIPAL AND AGENT, 400.

Under section 5476, Comp. Laws, a mechanic's lien is valid, although the notice of lien does not state the name of the owner of the land against which the lien is filed. Red River Lumber Co. v. Friel, 46.

MASTER AND SERVANT—Continued.

The statement required to be filed to secure a mechanic's lien may be verified by an agent. Red River Lumber Co. v. Friel, 46.

It is not necessary, under section 5470, Comp. Laws, for the notice of lien required by that section to be filed to set forth all the facts necessary to entitle a party to a lien. All that is required is that such notice shall embody the facts stated in section 5470. Red River Lumber Co. v. Friel, 46.

All that the claimant need do to perfect his lien is to file a just and true account of the demand due him, after allowing all credits, and containing a correct description of the property to be charged with a lien, and verified by his affidavit. Red River Lumber Co. v. Friel, 46.

The failure of the clerk to comply with the provisions of section 5477, Comp. Laws, requiring him to indorse upon every account the date of its filing, and to make an abstract thereof in a book to be kept for that purpose, does not affect the lien, which is perfected by the filing of the verified account under section 5470. Red River Lumber Co. v. Friel, 46.

Where the property was described in the notice as certain lots in B. & E.'s "First Addition" to the city of Grand Forks, when in fact they were in B. & E.'s "Addition," the use of the word "First" did not invalidate the description, there being no "First Addition," and no other property to which the description could apply. Red River Lumber Co. v. Friel, 46.

An owner is not protected against the lien of a subcontractor under the North Dakota statutes by payment to the principal contractor before the filing of the notice of the subcontractor's lien, but within the sixty days allowed for the filing of the same. Red River Lumber Co. v. Friel, 46.

The failure of the principal contractor to complete the building does not defeat the lien of a subcontractor, under the mechanic's lien statutes, for materials which have actually gone into the building under the principal contract. Red River Lumber Co. v. Friel, 46.

The year in which the items specified in an account embodied in a notice of mechanic's lien under the statute is sufficiently indicated by placing it at the head of the bill, the month and the day of the month being placed opposite each item. Red River Lumber Co. v. Friel, 46.

To recover the amount of a mechanic's lien filed against a building, such lien need not be reduced to judgment, provided the amount of the account is duly proven. Northern Light Lodge v. Kennedy, 146.

MERITS. See DEFAULT, 291.

MISJOINDER. See PLEADING, 45.

A misjoinder of causes of action can only be taken advantage of by demurrer. Henney Buggy Co. v. Higham, 45.

MISTAKE. See ESTOPPEL, 612.

MORTGAGES. See PLEADING, 99, 101.

The recording of a second lien does not give the holder of a prior mortgage given for future advances constructive notice of such lien, so as to postpone thereto his claim on account of advances subsequently made. Union Nat. Bank v. Milburn & Stoddard Co., 201.

If a mortgage states that it is given to secure future advances, or if it appears to be a mortgage for a specified sum, and the total amount claimed to be due under it does not exceed such sum, the holder of a second lien on the same property, who has notice of it, takes subject thereto, not only as to all advances made when his lien attached, but also as to all future advances made by the holder of the mortgage before notice of the other lien has attached to the property. Union Nat. Bank v. Milburn & Stoddard Co., 201.

When the holder of a chattel mortgage, who has control of the chattels, negligently allows them to be lost, he loses, to the extent of their value, a first lien which he has on real estate, on which the holder of a second lien on the chattels also has a second lien. Union Nat. Bank v. Milburn & Stoddard Co., 201.

One who holds a first mortgage to secure future advances on two pieces of land, on one of which there is a second incumbrance, of which he has notice, cannot, after such notice, advance more money to the mortgagor, and as against the holder of the other incumbrance, on the foreclosure of the mortgage against the parcel on which he alone holds a lien, apply the proceeds of such foreclosure, either in whole or in part, upon such subsequent advances, but he must first apply them upon the debt due him at the time he learned of the second mortgage upon the other property. Union Nat. Bank v. Milburn & Stoddard Co., 201.

A mortgage to secure future advances is valid both as to the mortgagor and as to third persons. Union Nat. Bank v. Moline, Milburn & Stoddard Co., 201.

The second mortgagee can obtain a restraining order to prevent the first mortgagee from selling under his mortgage land covered by both liens until the first mortgagee has exhausted his other security upon property free from a second encumbrance, provided the first mortgagee has notice of second mortgagee's rights. Union Nat. Bank v. Moline, M. & S. Co., 201.

The judgment in an action to foreclose a mortgage for an instalment due, may, under §§ 5877, 5879 and 5800, Rev. Codes, order a sale of the entire property, and apply the proceeds to payment of the entire indebtedness, although the defendant does not appear. Scottish Am. Mortg. Co. v. Reeves, 99.

MUNICIPAL CORPORATIONS. See COUNTIES, 231; SCHOOL TOWNSHIPS, 418.

A foot passenger in a city has a right to presume that the street is reasonably safe for its entire width, and is not guilty of negligence in

MUNICIPAL CORPORATIONS—Continued.
leaving the sidewalk at such points as suits his convenience, provided he exercises due care in so doing. Heckman v. Evenson, 173.
Where plaintiff, in the darkness, stepped from the sidewalk to the street two feet below, for the purpose of unfastening his team from a ring in the sidewalk, and was injured by a projecting stone placed there by defendant, he was not, as matter of law, guilty of negligence, as he had a right to presume the street was safe. Heckman v. Evenson, 173.
It is competent for the legislature to direct that all the expense of paving a city street shall be assessd against the abutting property in proportion to frontage. Rolph v. City of Fargo, 640.
In exercising the power of local assessment, the legislature is not limited to the actual increase in value of the property assessed resulting from the local improvement. Rolph v. City of Fargo, 640.
Section 176 of the state constitution does not relate to local assessments, but only to general taxation. Rolph v. City of Fargo, 640.
MURDER. See HOMICIDE, CRIMINAL LAW, 109; EVIDENCE, 109.
NEGLIGENCE. See TRIAL, 95.
Negligence is a failure to exercise such care, prudence and forethought as duty requires to be given or exercised under the circumstances. Heckman v. Evenson, 178.
By ordinary care is meant such care as a prudent man would use under the same circumstances. It must be measured by the character and risks of the business. Heckman v. Evenson, 178.
One who has cut hay on public lands can recover for the negligent destruction thereof by fire. Mathews v. Great Northern Ry. Co., 81.
Negligence is presumed from the mere fact that an engine set out a fire, but if plaintiff narrows his averment to a charge of negligence in the operation of the engine, he can recover only for the negligence specified. Mathews v. Great Northern Ry. Co., 81.
Where, in determining whether or not a given obstruction or defect in a street renders such street unsafe, reasonable men might reach different conclusions, the determination of the matter should be left to the jury, and this is true even though there be no dispute whatever as to the character of the defect or obstruction. Heckman v. Evenson, 173.
A foot passenger in a city is not limited to traveling on the sidewalks or crosswalks. He may, while exercising due care in so doing, walk along or across a street, and may leave the sidewalk at such points as suits his convenience; and he has a right to presume, and act upon his presumption, that the street is reasonably safe, and free from dangers to travelers, for its entire with. Heckman v. Evenson, 173.
In determining whether or not a plaintiff has been guilty of such contributory negligence as will defeat a recovery, his actions must be measured by the actions of an ordinarily prudent man, under the same circumstances and in the same position. Heckman v. Evenson, 173.

NEGLIGENCE—Continued.

It is only when but one conclusion can reasonably be drawn from conceded or undisputed facts that the question of negligence becomes purely a question of law. If from such facts reasonable men might draw different conclusions or deductions, then the question of negligence must be left to the jury. Heckman v. Evenson, 173.

Questions of negligence and contributory negligence were properly submitted to the jury. Johnson v. Great Northern Ry. Co., 284.

Bishop v. Railway Co., 4 N. D. 536, followed as to obligation of railroad company to keep a lookout for persons and property at public crossings. Johnson v. Great Northern Ry. Co., 284.,

Where a wagon had broken down on a crossing and the owner had sent a man up the track to warn an approaching train which he did by waiving his arms, and there was evidence that the engineer and his fireman by keeping a lookout could have seen the obstruction in time to have stopped the train before arriving at the crossing, whether the engineer was negligent in failing to make an effort to stop the train until it was within a short distance of the crossing was properly submitted to the jury. Johnson v. Great Northern Ry. Co., 284.

Every man has the absolute right to use his own property for any of the purposes to which such property is usually applied, and in such manner as he sees proper, provided he exercises proper care and skill to avoid unnecessary injury to others up to the point where such use becomes a nuisance. O'Leary v. Brooks Elevator Co., 554.

A landowner owes no duty of protection to a trespasser upon his land when such trespass is unknown to the landowner, and where it is in no manner induced by any negligence on his part. O'Leary v. Brooks Elevator Co., 554.

Actionable negligence is a failure to observe a legal duty existing in favor of the person bringing the action. Where there is no duty there can be no actionable negligence. O'Leary v. Brooks Elevator Co., 554.

NEGOTIABLE INSTRUMENTS. See PAYMENT, 283.

A note that had been indorsed by one as attorney in fact for the payee was assigned to plaintiff. By reason of the maker's allegations of failure of consideration, the burden was cast on the assignee to show that he in good faith acquired the note before maturity and without notice. *Held*, that the failure of the assignee to show that the payee ever had an attorney in fact, or that the note was actually indorsed by the payee or his purported attorney in fact, was fatal to his right to recover. Massachusetts Loan & Trust Co. v. Twitchell, 440.

Allegations by the makers that they "have no information sufficient to form a belief, and therefore deny" plaintiff's allegations as to ownership of the note, not being in the form authorized by the Code, do not operate as a denial. Massachusetts Loan & Trust Co. v. Twitchell, 440.

NEGOTIABLE INSTRUMENTS—Continued.

In action against the makers of a note by the indorsee the defense of failure of consideration, and claim for damages for breach of warranty, *held*, properly admitted. Massachusetts Loan & Trust Co. v. Twitchell, 440.

A draft drawn by defendant to the order of the plaintiff was lost in transmission by mail from the city where the plaintiff was engaged in business to the city where the drawee resided, to be there presented for payment by the plaintiff's correspondent. Plaintiff failed to discover such loss for nearly six months, although it had in its possession a report from its correspondent which disclosed the fact that the draft had never reached such correspondent. *Held*, that the drawer was discharged from liability. Bank of Gilby v. Farnsworth, 6.

When a drawer who has been discharged because of the failure to take the necessary steps to charge him, promises to pay the draft or recognizes his liability thereon, with full knowledge of the facts releasing him from liability, he thereby waives his right to insist that he has been released. Bank of Gilby v. Farnsworth, 6.

The giving by the drawer of a duplicate of the lost draft does not necessarily evince a purpose to waive such defense. Such duplicate does not, as a matter of law, import a promise to pay the draft. Therefore it is competent to show by parole evidence that the drawer informed the payee that he did not intend by the giving thereof to waive his rights, but merely to accommodate the payee by putting in his hands a paper which would enable him to collect the money from the drawee. Bank of Gilby v. Farnsworth, 6.

Such evidence does not contradict or vary the terms of the written contract between the parties, for there is only one contract between them,—i. e. the original draft,—the duplicate adding nothing to the liability of the drawer, and not constituting a new or additional concontract. Bank of Gilby v. Farnsworth, 6.

The loss of a bill or note is no excuse for want of demand protest or notice because it does not change the contract of the parties. Bank v. Farnsworth, 6.

If a bill of exchange payable at sight or on demand without interest is not duly presented for payment within ten days after the time in which it could with reasonable diligence be transmitted to the proper place for such presentment the drawer and indorsers are exonerated, unless such presentment is excused. Bank v. Farnsworth, 6.

NEWMAN LAW. See APPEAL AND ERROR, 584.

Under the Newman Law, Ch. 82, Laws 1893, as originally passed and as amended by the Revised Codes, the Supreme Court cannot send a case back for a new trial, nor can they take or authorize the taking of further testimony, but must finally determine the case upon the record transmitted from the lower court. Fargusson v. Talcott, 192.

NEWMAN LAW—Continued.

In actions tried under the Newman Law, all evidence offered must be preserved and brought upon the record. Otto Gas Engine Works v. Knerr, 195.

NEWSPAPERS. See TAXATION, 528.

One paper was published in a certain county called the Fargo Forum and Daily Republican, and another called the Fargo Forum and Weekly Republican, but no paper was published called the Fargo Forum. *Held*, that the county commissioners, by designating the Fargo Forum as the paper in which the delinquent tax list should be published, did not authorize its publication in any newspaper. Cass County v. Certain Lands of Security Imp. Co., 528.

NORTHERN PACIFIC LAND GRANT.

Congres did not take from the land department the power of withdrawal with respect to lands within the indemnity limits of the grant to the Northern Pacific Railroad Company. Accordingly, *held*, that a patent based upon an entry of land within such limits after the withdrawal thereof by the acting commissioner of the general land office was void. Hewitt v. Schultz, 601.

NOTICE. See LIS PENDENS, 503.

Knowledge of such suspicious facts and circumstances as would put a prudent man on inquiry is equivalent to knowledge of all facts that would have been developed by a reasonable pursuit of such inquiry; but no duty of inquiry whatever devolves upon grantee unless he has actual knowledge of some suspicious fact or circumstance. Fluegel v. Henschel, 276.

Where the grantee has actual knowledge of grantor's fraudulent intent, the transfer may be invalidated by creditors, though the grantee paid a full consideration for the property. Fluegel v. Henschel, 276.

Where the grantee had no notice at the time of the conveyance of the grantor's fraudulent intent, but after notice thereof, and after suit had been brought to set aside the conveyance, paid the grantor a note given for part of the price, the deed may be set aside pro tanto. Fluegel v. Henschel, 276.

The fact that parties to a conveyance are brothers-in-law raises no presumption that such conveyance is fraudulent. Fluegel v. Henschel, 276.

The rule that a purchaser of real estate in possession of another is chargeable with notice of the latter's rights does not apply where such possession is entirely consistent with the record title. Red River Valley Land & I. Co. v. Smith, 236.

A purchaser of land in possession of another who holds a lease may attribute such possession to the lease, where he knows of its existence. Red River Valley Land & I. Co. v. Smith, 236.

The possession of a vendor after conveyance is not notice to a purchaser that he claims any rights inconsistent with the conveyance he has made. Red River Valley Land & I. Co. v. Smith, 236.

NOTICE—Continued.

A purchaser pendente lite from one who is not named as a party defendant in a notice of lis pendens is not affected by the final judgment in the case. Buxton v. Sargent, 503.

But if the person from whom he buys is in fact a party to the suit, and the purchaser knows of such action against him at the time of the purchase, he takes the property which is involved in the action subject to the final judgment therein. Buxton v. Sargent, 503.

But the presumption is that he did not have such notice when he bought. Buxton v. Sargent, 503.

Under the system of numerial indexing in this state, the rule remains unchanged that the purchaser pendente lite is not bound by the judgment unless the person from whom he buys is named in the notice of lis pendens as a party defendant. Buxton v. Sargent, 503.

The record of a second mortgage is not notice to a prior mortgagee. Union Nat. Bank v. M. M. & S. Co., 209.

A corporation vendee of real estate is not chargeable with knowledge of outstanding equities therein although its managing officer had such knowledge when it was obtained more than three years before. Red River Land & Imp. Co. v. Smith, 236.

OFFICERS.

The official acts of de facto officers cannot be collaterally attacked. Cleveland v. McCanna, 455.

PAROLE EVIDENCE. See EVIDENCE, 12.

When parole evidence is competent to explain writing. Bank of Gilby v. Farnsworth, 12.

PAYMENT.

The giving of a promissory note does not constitute payment. Fluegel v. Henschel, 283.

PERSONAL INJURIES. See NEGLIGENCE, 554.

PERSONAL PROPERTY. See GIFT, 544.

PETITION FOR RE-HEARING. See APPEAL AND ERROR, 106.

The rule permitting petitions for rehearing is intended to afford an opportunity of directing the attention of the court to some fact rule or legal principle overlooked by the court in deciding the case, and was not intended to give an opportunity to present an ex parte re-argument upon questions considered and decided. Nichols & Shepard Co. v. Stangler, 106.

PLEADING. See DEMURRER, 45, 591; MISJOINDER, 45; AMENDMENTS, 503, 513.

A complaint verified upon information and belief and not positively will not justify the issuance of a warrant in bastardy. State v. McKnight, 444.

Where a cause of action on contract and a cause of action for conversion are joined in the same pleading, the misjoinder is waived if not taken advantage of by demurrer. Henny Buggy Co. v. Higham, 45.

PLEADING—Continued.

A demurrer to an answer requires the court to search the complaint, and if the complaint is demurrable the case should be dismissed under the rule that a demurrer searches the record and relates back to the first defective pleading. The Tribune Printing & Binding Co. v. Barnes, 591.

An answer after referring to the allegation of the complaint which stated that the note in suit was "sold, assigned, transferred and set over" to the indorsee; proceeded to state that the "defendants have no information sufficient to form a belief and therefore deny the same." This form of denial is unauthorized and insufficient to raise an issue. Massachusetts Loan & Trust Co. v. Twitchell, 442.

In a complaint for conversion by a chattel mortgagee against a purchaser of the mortgaged chattel the allegation that "defendant converted the grain and appropriated it to its own use" is sufficient without alleging that defendant had notice actual or constructive of the mortgage or of the mortgagee's interest therein. Donovan v. St. Anthony & Dakota Elevator Co., 521.

In an action by the mortgagee against a third person for damages for the conversion of grain covered by the mortgage, an allegation in the complaint that defendant converted to its own use certain grain "grown" by the said mortgagor sufficiently avers that the grain was owned by the mortgagor. Donovan v. St. Anthony & D. Elevator Co., 513.

An allegation that, by reason of default, the mortgagee was entitled, "under the conditions of said mortgage," to the mortgaged property, sufficiently alleges that the mortgage provided that on default the mortgagee should become entitled to the possession of the property. Donovan v. St. Anthony & D. Elevator Co., 513.

The rule that the pleading will be amended to conform to the proof does not apply when the evidence which it is claimed tends incidentally to establish a fact outside of the issues was competent and relevant on the actual issue in the case. Buxton v. Sargent, 503.

Plaintiff in an action for fire alleged to have been set by defendant's engine through the negligent operation of the engine can recover only for the particular negligence specified, although other acts of negligence may be shown. Mathews v. Great Northern Ry. Co., 81.

Whether a mortgage can be made a part of a pleading by annexing a copy as an exhibit and referring thereto, is doubted. Scottish American Mortgage Co. v. Reeve, 101.

In a complaint for the foreclosure of a mortgage, the mortgage should either be set forth in haec verba or its provisions set forth according to their legal effect. Scottish American Mortgage Co. v. Reeve, 101.

A complaint defective in substance will not support a default judgment. Scottish American Mortgage Co. v. Reeve, 100.

PLEADING—Continued.

The allowance or rejection of amendments to pleadings is a matter resting largely in the discretion of the trial court, and its action should not be reviewed by an appellate court except in clear cases of abuse of discretion. Loverin-Brown Co. v. Bank of Buffalo, 569.

POLLING JURY. See JURY, 294.

PRACTICE. See APPEAL, 195, 294; REHEARING, 106; PROCESS, 429; TRIAL, 454; JUDGMENTS, 455; SETOFF, 455; DIVORCE, 291; CONTEMPT, 299; DISBARMENT, 316; STATEMENT OF THE CASE, 382; ACCOUNT STATED, 348; JURISDICTION, 358; SUPPLEMENTARY PROCEEDINGS, 358; JUSTICE OF THE PEACE, 576.

A misjoinder of causes of action is waived if not taken advantage of by demurrer. Henny Buggy Co. v. Higham, 45.

A demurrer to an answer raises the question as to the sufficiency of the complaint. The Tribune Printing & Binding Co. v. Barnes, 591.

In actions tried in the District Court without a jury under § 5630 of the Revised Codes, all evidence offered, whether objected to or not, must be received and preserved upon the record. Otto Gas Engine Works v. Knerr, 195; Nichols & Shepard Co. v. Stangler, 102.

Where the District Court upon a trial under § 5630, Rev. Codes, rejected evidence offered, upon objection made thereto, *held*, that this rendered the trial ineffectual, and resulted in a mistrial. Otto Gas Engine Works v. Knerr, 195.

When the jury was being polled one juror, who had been asked, "Is this your verdict?" stated that he desired to make an explanation, but did not disclose the nature or the purpose of such explanation. *Held*, that the court properly refused to allow the explanation to be made at that time, and required the juror to answer "Yes" or "No." State v. Tomlinson, 294.

In actions tried under the provisions of Ch. 82, Laws 1893, no exceptions need be taken to findings of fact made. Nichols & Shepard Co. v. Stangler, 107.

In actions tried under the provisions of § 5630, Rev. Codes, findings of fact cannot be waived by counsel. Nichols & Shepard Co. v. Stangler, 108.

Upon the return day of summons in Justice Court, the defendant appeared specially for the purpose and moved to dismiss the action on the ground of an irregular service of the summons upon him. *Held*, proper method of raising the question, and that the motion should have been granted upon the grounds set forth in the moving affidavits. Hicks v. Besuchet, 429.

Where evidence apparently competent when received is subsequently shown to be incompetent, the party desiring to get rid of the testimony must move to have it stricken out or ask the court to instruct the jury to disregard it. Kneeland v. Great Western Elev. Co., 454.

PRACTICE—Continued.

Mutual judgments will not be set off one against the other in such a manner as to defeat the exemption laws. Cleveland v. McCanna, 455.

To warrant a court in setting aside a decree entered on the default of defendant, an affidavit of merits must be made a part of the application. Kerschner v. Kirschner, 291.

An attorney cannot make an affidavit of merits to set aside a judgment entered by default, unless a reasonable excuse be given for the failure of the party to make it, and when made by an attorney it should be based upon his own knowledge or knowledge obtained from the records. Kirschner v. Kirschner, 291.

One guilty of contempt in the presence of the court may be forthwith condemned without process of any kind. State v. Crum, 299.

It is proper to refuse to require a jury to return a special verdict relating not to the ultimate facts in issue but to the evidential facts upon which the ultimate facts rest. Russell v. Meyer, 335.

It is too late after submitting to an examination and after the appointment of a receiver, in proceedings supplementary to execution, for the judgment debtor to move to dismiss the proceedings on the ground that the execution was not returned within the statutary time. Merchants National Bank v. Braithwaite, 369.

The proper time to present reasons why a receiver should not be appointed is when the application for his appointment is made. Merchants National Bank v. Braithwaite, 369.

Where, under a reference made by consent of parties, the order also recites that the case is sent to the referee to take and report the evidence, the parties cannot afterwards be heard to say that this reference was a nullity because it was not a full reference under the statute. Heald v. Yumisko, 422.

While, under our statute, in all cases except where a court may on its own motion refer a cause, the written consent of the parties is required, to authorize the court to send a case to a referee, yet where the order of reference recites that both parties in open court consented to the same, and the correctness of such recital is not questioned, no further or other written consent is required. Heald v. Yumisko, 422.

No one can take advantage of an unconstitutional provision of law who has no interest in and is not affected by it. State v. McNulty, 169.

PRELIMINARY EXAMINATION. See CRIMINAL LAW.

Where a justice of the peace conducted the preliminary examination of the defendant and held him to bail after he had filed in due time a proper affidavit for a transfer of the action to another justice, the examination was void. State v. Weltner, 522.

A preliminary examination held by a justice of the peace after a proper affidavit for a transfer of the action to another justice has been seasonably filed, being void, an information presented by the state's

PRELIMINARY EXAMINATION—Continued.
attorney in the District Court in such case is voidable and should be set aside upon defendant's motion. State v. Weltner, 522.

PREMISES.
The word "premises" as used in the liquor law defined. State v. McNulty, 169.

PRINCIPAL AND AGENT. See TRUSTS, 460.
An agency cannot be established by proof of any statements or acts of the alleged agent, unless the same were brought to the knowledge of the alleged principal, and not repudiated by him. Loverin-Browne Co. v. Bank of Buffalo, 569.
The testimony by which defendant sought to establish agency in this case examined, and *held* to present no competent evidence of agency, Loverin-Browne Co. v. Bank of Buffalo, 569.
An employer cannot recover from an employee for money earned by the latter in private transactions under allegations that the employee agreed to give the employer all his earnings, where the contract was that he was to give the employer all his time. Hillsboro National Bank v. Hyde, 400.

PRINCIPAL AND SURETY.
While, under our statute (section 4651, Rev. Codes) and settled rules of law, a surety cannot be held beyond the express terms of his contract, yet, in ascertaining those terms, the same rules of construction must be applied as in other contracts. Northern Light Lodge v. Kennedy, 146.
When the provision in a contract, declaring that no alterations should be made except upon written order, was inserted for the mutual benefit of the owner and contractor, the owner alone could not waive or abrogate it. The contractor might legally have refused to make any changes or alterations not ordered in writing. Northern Light Lodge v. Kennedy, 146.
Where a bond had been given by the contractor for the faithful performance of the above contract, and where, without the knowledge of the sureties, the owner ordered, by parol, certain changes that materially increased the cost of such building, and such changes were executed by the contractor, *held*, that the parties thereby changed their contract, and to hold the sureties liable under this substituted arrangement would be to hold them beyond the express terms of their contract. Northern Light Lodge v. Kennedy, 146.
The fact that the owner paid the contractor in full, without retaining money to pay off claims of mechanics and material men, when by the contract it was authorized so to do, would not release the sureties on the bond. Northern Light Lodge v. Kennedy, 146.
A surety on an administrator's bond is not precluded from purchasing claims against the estate. Luther v. Hunter, 544.

PRINCIPAL AND SURETY—Continued.

The sureties on a sheriff's bond are liable for the wrongful act of their principal in seizing the property of a third person under an order in claim and delivery. Weltner v. Jacobson, 43.

PROBATE COURT. See COUNTY COURT, 612.

The probate court has no jurisdiction to try title to land. Gjerstadengen v. Van Duzen & Co., 612; Arnegaard v. Arnegaard, 475.

PROCESS.

A nonresident of the county who resides in the state, who in good faith comes within the county to attend upon the trial of an action, whether as a litigant or as a witness, is exempt from the service of civil process. Hicks v. Besuchet, 434.

PROHIBITORY LIQUOR LAW. See INTOXICATING LIQUORS, 155; CONSTITUTIONAL LAW, 155, 169.

PROXIMATE CAUSE. See NEGLIGENCE.

In an action to recover for personal injury, where the proximate and sole cause of the injury is specifically ascertained, the law will not stop to speculate on what might have occurred had such cause been absent. Heckman v. Evenson, 173.

PUBLIC LANDS.

One who settles upon land before the profile of a railroad is approved, with intent to make a pre-emption filing thereon, secures such a possessory right therein as is required to be condemned by Act Cong. 1875, granting to railroads the right of way through the public lands of the United States, although at the time of his settlement the road had been constructed, and is in full operation. Jamestown & N. R. Co. v. Jones, 619.

The failure of the settler to file his declaratory statement within the time prescribed by the statute will not affect his rights, as against a railroad company claiming a right of way under Act Cong. 1875, granting railroad right of way through public lands. Jamestown & N. R. Co. v. Jones, 619.

The ommission of the settler to make final proof within the statutory period will not destroy his rights as against a railroad claiming under Act Cong. 1875, granting railroads right of way through the public lands, when he is prevented by the fact that there is an uncanceled homestead entry against the land. Jamestown & N. R. Co. v. Jones, 619.

The rule that, when public lands have been entered, they are segregated from the public domain, and that thereafter a railroad grant cannot attach to them, despite the fact that such entry is subsequently abandoned or set aside, does not apply to the grant of right-of-way under Act Cong. 1875, granting to railroads right of way through the public lands. Jamestown & N. R. Co. v. Jones, 619.

PUBLIC LANDS—Continued.

Where a homesteader dies before his right to a patent accrues, he has no such interest in the land as will make it a part of his estate, or subject to the payment of his debts. Gjerstadengen v. Van Duzen, 612.

Where a homesteader dies before his right to a patent accrues, his heirs succeed to his rights, not as heirs, but because the law gives them preference as new homesteaders, allowing to them the benefit of the residence of their ancestor upon the land. Gjerstadengen v. Van Duzen, 612.

As against settlers, the grant of a right of way to a railroad company under Act Cong. 1875, granting to railroads the right of way through the public lands of the United States, attaches only after the profile of the road has been approved by the secretary of the interior, and not from the time the road itself is constructed. Jamestown & N. R. Co. v. Jones, 619.

A patent based upon an entry of land within the indemnity limits of the grant to the Northern Pacific Railroad Company after the withdrawal thereof from entry by the acting commissioner of the general land office was void. Hewitt v. Schultz, 601.

There is an implied license to the public to go upon the unappropriated public lands of the United States and pasture stock or cut hay thereon. One who has cut such hay is the owner thereof, and can recover for its negligent destruction. Mathews v. Great Northern R. Co., 31.

Section 2396, Revised St. U. S., which declares that "each section or subdivision of section the contents of which have been returned by the surveyor general shall be held and considered as containing the exact quantity expressed in such return," fixes the quantity at which the government must dispose of the tract, but does not control the area in contracts between private parties. Heald v. Yumisko, 422.

QUIETING TITLE. See COUNTER CLAIM, 399.

In an action to quiet title, under § 5904, Revised Codes, the defendant sets up a counterclaim when he alleges that he is the owner of the land, and prays that title may be quieted in him. Betts v. Signor, 399.

In an action to quiet title only estates and interests in land can be litigated, a mere lien thereon cannot be investigated against the wishes of either party. But if both parties try such question, the court will pass upon it the same as the question of title. Buxton v. Sargent, 503.

RAILROADS. See TAXATION, 246; INSTRUCTIONS, 95.

Indemnity lands of the Northern Pacific Railroad Company before the selection thereof has been approved by the secretary of the interior, are not taxable. Wells County v. McHenry, 246.

Place lands are taxable after they have been surveyed in the field, although the plat of survey has not yet been filed in the local land office. Wells County v. McHenry, 246.

RAILROADS—Continued.

Taxes against the land grant of the Northern Pacific Railroad Company assessed in 1887 and 1888, are illegal, and no tax judgments therefor can be rendered. Wells County v. McHenry, 246.

The rule that negligence is presumed from the mere fact that an engine set out a fire is a rule of evidence, and is threfore unaffected by the allegations of the complaint. If the plaintiff narrows his averment to a charge of negligence in the operation of the engine, he can still make out a prima facie case by showing that the engine did in fact set the fire. But, so long as the pleading remains unamended, the plaintiff can recover only for the negligence specified; and the defendant is not required to rebut any other presumption of negligence, as it would be under a complaint charging negligence generally. Mathews v. Great Northern Ry. Co., 81.

To entitle one to recover damages for the destruction of property by fire, he must be the owner thereof. Mere possession, such as would support an action for trespass de bonis asportatis, will not suffice. Mathews v. Great Northern Ry. Co., 81.

There is an implied license to the public to go upon the unappropriated public lands of the United States, and pasture stock thereon, and cut the native grasses therefrom, for the purpose of making hay. One who has cut hay from such land is the owner thereof, and therefore may sue for destruction by fire negligently set out by another. Mathews v. Great Northern Ry. Co., 81.

The duty is imposed upon train men of exercising exceptional care in their lookout at crossings to avoid collisions with persons and animals. Johnson v. Great Northern Ry. Co., 284.

A patent based upon an entry of land within the indemnity limits of the grant to the Northern Pacific Railroad Company, after the withdrawal thereof by the acting commissioner of the general land office, is void. Hewitt v. Schultz, 601.

As against settlers, the grant of a right-of-way to a railroad company under the act of congress passed in 1875 attaches only after the profile of the road has been approved by the secretary of the interior, and not from the time the road itself is constructed. The Jamestown & Northern Railroad Co. v. Jones, 619.

One who settles upon land before such profile is approved, with intent to make a pre-emption filing thereon, secures such a possessory right therein as is required to be condemned by section 3 of the act, although at the time of his settlement the road has been constructed, and is in full operation. The land is, from the time of such settlement, land disposed of, within the implication of section 4; and hence the settler does not take subject to the right of way, which is, under the statute, superior to the title of the settler only as to land disposed of after the approval of the profile. The Jamestown & Northern Railroad Co. v. Jones, 619.

The failure of the settler to file his declaratory statement within the time prescribed by the statute will not affect his rights, as against

RAILROADS—Continued.

the railroad company's right-of-way. The Jamestown & Northern Railroad Co. v. Jones, 619.

Neither will his omission to make final proof within the statutory period destroy his superior rights, when he is prevented by the fact that there is an uncanceled homestead entry against the land. The Jamestown & Northern Railroad Co. v. Jones, 619.

The rule that, when public lands have been entered, they are segregated from the public domain, and that thereafter a railroad grant cannot attach to them, despite the fact that such entry is subsequently abandoned or set aside, does not apply to the grant of a right-of-way under the act of congress passed in 1875. As against the United States, the grant attaches at the time of the approval of the profile, even though such land has been already filed upon,—subject, however, to such prior entry. But, if the same is thereafter canceled or abandoned, the grant of the right-of-way becomes absolute. The Jamestown & Northern Railroad Co. v. Jones, 619.

REAL ESTATE. See VENDOR AND PURCHASER, 335.

RECEIVERS.

Plaintiffs instituted an action to have certain property, on which defendants held liens, declared a trust fund for the benefit of all the creditors of the owner and secured the appointment of a receiver. They were unsuccessful in the action, and the property, greatly deteriorated in value, was ordered turned over to the defendant by the receiver after deducting therfrom his fees and expenses. *Held*, that the defendants should recover judgment against the plaintiffs for three-fifths of the amount so deducted for the expenses of the receivership. Cutter v. Pollock, 631.

REFERENCE.

Though by Rev. Codes, § 5455, the written consent of the parties is required to authorize the court to send a case to a referee, yet where the order of reference recites that both parties in open court consented to the same, and the correctness of such recital is not questioned, no further or other written consent is required. Heald v. Yumisko, 422.

Where a reference is made by consent, the parties cannot attack the validity of the proceedings on the ground that the referee was required merely to take and report the evidence, and not to make findings of fact and conclusions of law. Heald v. Yumisko, 422.

REHEARING. See APPEAL AND ERROR, 106.

REPEAL. See STATUTES, 135.

REPLEVIN. See CLAIM AND DELIVERY, 32.

REQUESTS FOR INSTRUCTIONS. See INSTRUCTIONS, 58.

Error cannot be predicated upon the refusal to give requests in the language of counsel, where the court of its own motion gives the law embodied in the request in other language. State v. Campbell, 63.

REQUESTS FOR INSTRUCTIONS—Continued.

Requests cannot be modified by the court without consent of counsel. State v. Campbell, 63.

REQUISITION. See CRIMINAL LAW, 30.

RESCISSION. See VENDOR AND PURCHASER, 88.

RESIDENCE. See DIVORCE, 404; PROCESS, 429.

A person is exempt from the service of civil process when in another county than that of his residence, attending court, either as a party or as a witness. Hecks v. Besuchet, 429.

Under § 2755, Rev. Codes, the word residence must be construed to mean the same as the word domicile. Smith v. Smith, 404.

The motive of taking up a residence is usually immaterial, except so far as it may throw light upon the bona fides of the domicile. Smith v. Smith, 404.

RES JUDICATA.

Where a judgment has been affirmed on appeal, it cannot afterwards be set aside for any alleged infirmity that existed prior to the former appeal, and that might have have been raised and determined on that appeal. Scottish-American Mortg. Co. v. Reeve, 552.

RESTRAINING ORDER. See INJUNCTION, 201.

RULES OF COURT. See CRIMINAL LAW, 522; APPEAL AND ERROR, 565.

SCHOOLS AND SCHOOL TOWNSHIPS.

When a judgment is obtained against a school township organized under Laws 1883, c. 44, on an indebtedness of a school district whose school house and furniture were included in the school township upon the formation of the latter, and for whose bonded indebtedness such school township became liable by section 144, the judgment creditor may proceed to enforce such judgment the same as any other judgment against such school township. Coler v. Coppin, 418.

SEDUCTION.

A settlement between one who has been seduced and her seducer, brought about by the influence of their pastor, for the purpose of avoiding publicity, where the woman received more money than she had agreed to take, and entered into the settlement with a full understanding of the transaction, will not be set aside as having been procured by fraud. Ingwaldson v. Skrivseth, 388.

A father has a cause of action for seduction of his minor daughter, where it does not appear that he has relinquished his right to demand her services. Ingwaldson v. Skrivseth, 388.

An unmarried female has no cause of action for her own seduction. Ingwaldson v. Skrivseth, 388.

SEED LIENS.

The holder of a seed lien had, before the enactment of section 4845, Rev. Codes, no right to take possession of the property covered by his lien, even after default, but must have enforced his right to possession in a court of equity in an action to foreclose the lien. Black v. Minneapolis & Northern Elevator Co., 129.

One who bought the property covered by such lien took it subject thereto, but could not, under any circumstance, be held liable for the conversion thereof, or even in an action on the case for damages to the lienholder's rights, when such purchaser had done nothing to effect the lienholder's rights (as by destruction or removal of the property beyond his reach), but had merely refused to deliver him the property on demand. Black v. Minneapolis & Northern Elevator Co., 129.

Whether the lien pertains to the remedy only, and is destroyed by the repeal of the statute creating it, is not decided. Gull River Lumber Co. v. Lee, 137.

SETOFF. See JUDGMENTS, 455; EXEMPTIONS, 455.

SHERIFFS.

Replevin will not lie against a sheriff who is in possession of the property under a requisition in claim and delivery proceedings in a pending replevin action, unless he fails to deliver the property to the party to the first replevin action entitled thereto, within a reasonable time after it becomes his duty to do so. Weltner v. Jacobson, 32.

To interfere with his possession by claim and delivery proceedings in a second replevin suit aginst him before such failure is a contempt of court. Weltner v. Jacobson, 32.

Under § 5341, Rev. Codes, the sheriff becomes liable in trover in case the statute is complied with, and he, nevertheless, delivers the property to the plaintiff in the replevin action. If the plaintiff refuses to indemnify him, and he promptly surrenders it to the defendant, he is exonerated from all liability. Weltner v. Jacobson, 32.

The sheriff is protected by his writ only when he takes the property from the possession of the defendant. If he takes it from a third person, who is in fact the owner, he becomes instantly liable for the tort. But replevin will not lie against him even in such a case, except upon his failure, after a reasonable time, to deliver it to the party to the original action entitled thereto. Weltner v. Jacobson, 32.

The sureties on a sheriff's bond are liable for the wrongful act of their principal in seizing the property of a third person. Weltner v. Jacobson, 43.

SPECIAL APPEARANCE. See JUSTICE OF THE PEACE, 429; 576.

SPECIAL ASSESSMENTS. See DRAINAGE, 231; COUNTIES, 231.

SPECIAL PROCEEDINGS. See DISBARMENT, 269.

SPECIAL VERDICT.

A special verdict is one which determines specifically the ultimate facts which are in issue, and not one which determines evidential facts upon which such ultimate facts rest. Russell v. Meyer, 335.

SPECIFICATIONS OF ERROR.

Specifications of error are not required to be embodied in a statement of the case on appeal in criminal cases. State v. Weltner, 522; State v. McKnight, 444.

In cases tried under §§ 5630 and 5467, Rev. Codes, a statement of the case must be settled embracing specifications, the same as in jury cases. Nichols & Shepard Co. v. Stangler, 102.

SPECIFIC PERFORMANCE.

A contract for the sale of land upon crop payment plan specifically enforced as against the vendor. Plummer v. Kelly, 88; Fargusson v. Talcott, 183.

STATE EXAMINER.

The state examiner has no authority, under § 143, Rev. Codes, to compel one to testify who is not a county or state officer or the custodian of county or state funds. In re Camp, 69.

STATEMENT OF CASE.

Where the answer admits facts showing that plaintiff is entitled to the relief prayed for, plaintiff need not settle a statement of the case in order to secure a reversal of a judgment against him, there being no issue of fact to be tried within the meaning of Rev. Codes, § 5630. McHenry v. Roper, 584.

Where no statement of the case has been settled, there can be no review of findings of fact for the purpose of determining whether such findings are sustained by the evidence.—Thuet v. Strong, 565.

An extension of time within which to settle a statement of the case, cannot be made by the trial court against objection properly interposed, in the absence of a strong showing of cause for such extension. Woods v. Walsh, 382.

The thirty days within which a statement of the case may be prepared and served do not begin to run until the judgment has been entered in the judgment book. Wood v. Walsh, 383.

An appeal will not be dismissed because the statement of the case contains no specifications of error. State v. McKnight, 444.

The statement of the case in criminal cases need not embody specifications of error, and need not be authenticated by the judge's certificate of identification, as required in civil cases. State v. Weltner, 522.

A statement of the case embracing specifications must be settled to obtain a review in a case tried without a jury, pursuant to § 5630, Rev. Codes. Nichols & Shepard Co. v. Stangler, 102.

STATUTES.

Upon the repeal of a statute and the re-enactment of provisions identical or practically identical with those repealed, such provisions are to be regarded as having continued in force without intermission. Gull River Lumber Co. v. Lee, 135.

A statute in conflict with the constitution will not sustain an action. Whenever the fact is determined that the statute is unconstitutional, the action based thereon will be dismissed. State v. McKnight, 444.

The legislature has power to shorten the statute of limitations even as to existing causes of action. Merchants' National Bank v. Braithwaite, 358

Where a statute is taken from another state, and adopted without change, the same is taken with the construction placed upon it by the court of last resort of the state from whence the statute came. Cass County v. Certain Lands of Security Imp. Co., 528.

The promise of one to pay another for goods delivered by the latter to a third person is an original promise and not within the statute of frauds. Grand Forks Lumber & Coal Co. v. Tourtelot, 587.

The expediency of a statute is a consideration outside of judicial cognizance and one lying wholly within legislative discretion. Tribune Printing & Binding Co. v. Barnes, 591.

No one can take advantage of an unconstitutional statute who has no interest in and is not affected by it. State v. McNulty, 169.

Construing section 1807, Revised Codes, which reads, "All county printing shall be done in the state, and if practicable in the county ordering the same," *held*, that the words "all county printing" include, in addition to legal notices published by or in behalf of the county, all supplies of printed matter necessarily used by county officials in discharging their official duties. Tribune Printing & Binding Co. v. Barnes, 591.

The purpose of said section is to prohibit counties from letting contracts to print and furnish county supplies of printed matter to parties who will not perform the work within the state. Hence it is *held* that mandamus will not lie to compel the county commissioners to recognize and consider a bid for county printing made by parties who will do the work of printing outside the limits of the state if awarded the contract for which the bid is made. Tribune Printing & Binding Co. v. Barnes, 591.

Said section is not repugnant to section 8 of article 1 of the federal constitution, regulating commerce among the states, for the reason that a soverign state, like an individual, may lawfully elect not to purchase its necessary supplies from those who do not manufacture or produce the same within the state so purchasing the same. Tribune Printing & Binding Co. v. Barnes, 591.

Revised Codes, section 1807 (upon authority cited in the opinion,) *held* not to be repugant to section 61 of article 2 of the state constitution, providing "that no bill shall embrace more than one subject," etc. Tribune Printing & Binding Co. v. Barnes, 591.

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SUBROGATION.

Where a person holds a first lien on property on which another holds a second lien, and he also has a lien upon other property, on which there is no other lien, it becomes his duty, as soon as he learns of the second lien, to respect the rights of the holder of such second lien to have the property on which he (the second lien holder) has no lien first applied in extinguishment of the first lien. The law will thwart every attempt of the holder of the first lien to escape the obligation of this equitable duty. If he releases the property on which he alone holds a lien, such lien will, to the extent of the value of such property, be postponed to the second lien on the other property. If he attempts to enforce his lien as to the property on which the other party holds a lien, a court of equity will, except under special circumstances, restrain him until he has exhausted his remedy against the other property. If he does, in fact, first enforce his lien against the property covered by the second lien, the holder thereof will, to the extent that he is prejudiced thereby, be subrogated to the rights of the other party under his first lien upon the other property. Union Nat. Bank v. Moline M. & S. Co., 201.

SUICIDE.

An attempt at suicide cannot be proven as evidence of guilt in a homicide case. State v. Coudotte, 109.

SUMMONS See JUSTICE OF THE PEACE, 576; APPEARANCE, 576.

SUPPLEMENTARY PROCEEDINGS.

The State District Court has jurisdiction to order a disclosure in supplementary proceedings upon a judgment rendered and entered in the Territorial District Court. Merchants' National Bank v. Braithwaite, 358.

Supplementary proceedings instituted during the life of a judgment, and pending when the statutory bar falls upon the judgment, are stricken down with the judgment. Merchants National Bank v. Baithwaite, 358.

SURETIES. See PRINCIPAL AND SURETY, 146, 43; EXECUTORS AND ADMINISTRATORS, 544.

SURVEYS. See PUBLIC LANDS, 422.

TAXATION. See COUNTIES, 231.

Until a tax sale is adjudged void the county is not liable for taxes subsequently paid by the purchaser at the tax sale to protect his title, even though the land on which such taxes were paid was exempt from taxation. Van Nest v. Sargent County, 139.

The provision of Laws 1897, c. 126, § 88, which makes an adjudication of the invalidity of a tax sale a condition precedent to recovery of the money paid from the county, contemplates an adjudication at

TAXATION—Continued.

the instance of the owner of the fee, and a purchaser cannot maintain an action against the county to recover the money by asking that such adjudication be made in the same suit, to which the owner is not a party. Van Nest v. Sargent County, 139.

A county is not liable under Laws 1897, c. 126, § 88 (which provides that when any sale of land for taxes is adjudged void, and where, by mistake or wrongful act of the treasurer, land has been sold upon which no taxes were due, and in cases where taxes have been or may be paid on land not subject to taxation, the money so paid and all subsequent taxes shall be refunded), for taxes paid on a tax sale which has not been adjudged void, although the land is exempt from taxation. Van Nest v. Sargent Co., 139.

Laws 1897, c. 126, § 88, under which it is necessary that a tax sale of land exempt from taxation be adjudged void, before a recovery of taxes paid thereon can be had, is not satisfied by a prayer for such adjudication in a suit to recover the taxes paid, the fee owner not being a party thereto and not requesting any such judgment. Van Nest v. Sargent Co., 139.

Where a certified copy of the resolutions of the county board designating the paper selected for the publication of the delinquent tax list is not filed with the clerk until after the publication has been completed, such publication is invalid. Cass County v. Certain Lands of Security Imp. Co., 528.

In the publication of the delinquent tax list in accordance with the provisions of Laws 1897, c. 67, the penalty and interest need not be separately stated, it being sufficient if the total be stated in a lump sum. Cass County v. Certain Lands of Security Imp. Co., 528.

The publication of the delinquent tax list and notice as required by statute is a jurisdictional prerequisite to the entry of a valid judgment against the property mentioned in the list. Cass County v. Certain Lands of Security Imp. Co., 528.

The omission of the county board to designate the newspaper in which the publication of the delinquent tax list shall be made, or the publication in any other than the paper designated, will render any judgment entered thereon void. Cass County v. Certain Lands of Security Imp. Co., 528.

A company publishing two newspapers, the "Fargo Forum and Weekly Republican" and the "Fargo Forum and Daily Republican," a designation of the "Fargo Forum" is void, and a publication in the "Fargo Forum and Daily Republican" is not a legal publication of the list and notice because said paper was not designated for that purpose. Cass County v. Security Imp. Co., 528.

Warrants on a county treasurer issued by the county auditor for the current expenses of the county, such as sheriff's fees, after the constitutional limit of indebtedness has been reached, but in anticipation of the collection of a tax already levied, are valid to the extent of the

TAXATION—Continued.

taxes levied. Such warrants do not augment the existing indebtedness of the county, within the meaning of the constitution of the state. Construing sections 183, 187, State Constitution. Darling v. Taylor, 538.

Section 90, chapter 132, Laws 1890, making taxes assessed upon personal property a lien upon the personal property of the person assessed was repealed by the Revised Codes. Gull River Lumber Co. v. Lee, 135.

In 1888 the treasurer of Barnes county sold lands at a tax sale, for an alleged tax levied in 1887. The lands were described on the assessment roll and tax duplicate by a system of symbols, held to be insufficient in law, and void, under a decision of this court. *Held*, that as the defective descriptions were placed upon the assessment roll and tax list by other officials, and delivered to the treasurer, such sale was not a mistake or wrongful act of the treasurer, within the meaning of Comp. Laws, § 1629, and no action will lie to recover the amount bid, with interest, against either the county or the treasurer. Iowa & Dakota Land Co. v. Barnes County, 31.

The decision of this court in Jackson v. La Moure Co., 46 N. W. Rep. 449, 1 N. D. 238, and Grandin v. La Bar, 57 N. W. Rep. 241, 3 N. D. 446, followed on the question of the taxability of indemnity lands of the Northern Pacific Railroad Company before the selection thereof has been approved by the secretary of the interior. Before that time such lands are not taxable. Wells County v. McHenry, 246.

Place lands are taxable after they have been surveyed in the field, although the plat of survey has not yet been filed in the local land office; the survey made being thereafter approved as made, and the plat thereof being duly filed in such office. Wells County v. McHenry, 246.

In a proceeding to obtain a tax judgment under Ch. 67 of the Laws of 1897, the failure of the county board of equalization to meet at all is not fatal to the tax, for the reason that the act gives the taxpayer a full hearing, in the very proceeding to enforce the tax, as to the fairness of the assessment and the justice of the tax, and confers upon the court the power to reduce the tax if, on such hearing, it appears that the land has been partially, unfairly, or unequally assessed. Wells County v. McHenry, 246.

So far as matters of form are concerned, that act is a curative law in all cases in which the defects in the tax proceeding have not prejudiced the taxpayer. When, however, there is no assessment or levy no tax judgment can be rendered. The act does not vest in the courts the power to assess property or levy taxes, but merely provides the machinery for enforcing and sustaining taxes. Wells County v. McHenry, 246.

Taxes for 1890, having been assessed by percentages instead of in specific amounts, as required by the act of 1890, are void, and, no tax

TAXATION—Continued.

judgments thereon can be rendered in this proceeding. Wells County v. McHenry, 246.

It will not defeat a tax that one of the items of levy of taxes for general county purposes was stated to be "miscellaneous expenses." Wells County v. McHenry, 246.

A tax lien on real estate being declared to be perpetual, no lapse of time will bar a remedy to enforce such lien against the land. It follows that no limitation statute can be invoked as a defense to a proceeding, under the law of 1897, to foreclose a tax lien. Wells County v. McHenry, 246.

Certain questions decided relating to penalties and interest on taxes levied prior to the act of 1890, and also on taxes levied subsequently to that act, but prior to the time when the Revised Codes took effect. Wells County v. McHenry, 246.

Following the decision of the Federal Supreme Court in McHenry v. Alford, 18 Sup. Ct. Rep. 242, *held*, that the taxes against the land grant of the Northern Pacific Railroad Company, assessed in 1887 and 1888, are illegal, and hence that no tax judgments therefor can be rendered. Wells County v. McHenry, 246.

TRESPASS. See CLAIM AND DELIVERY, 32.

A complaint averring that plaintiff is the owner of certain real estate, and that defendants forcibly entered the same, and tore down and removed a barn erected thereon, states a cause of action for trespass on realty, and not for the conversion of personalty. Russell v. Meyer, 335.

One who has the equitable title and full right to call for the legal title may, as against a trespasser, maintain an action as though he had the legal title. Russell v. Meyer, 335.

The owner of unoccupied land may sue for trespass. Russell v. Meyer, 335.

Where a tenant is in possession, the owner may sue in trespass on the case for the damage to his reversionary interest. Russell v. Meyer, 335.

TRESPASSER. See NEGLIGENCE, 554.

The machinery in an elevator was connected with the engine in another building by a shaft extending across the space between the buildings. The shaft was unprotected though it was dangerous, and though tramps and children sometimes resorted to that place. A boy accompanied by his guardian, trespassed on the grounds, and was injured by the shaft. *Held*, that the elevator company was not liable for damages, it being immaterial whether the place was attractive to children, since he did not enter the grounds by reason of such inducement. O'Leary v. Brooks Elevator Co., 554.

A child may be a trespasser, though the trespass was committed under the coercion of a parent or guardian. O'Leary v. Brooks Elevator Co., 554.

TRIAL. See PRACTICE.

The summary procedure prescribed by § 7605, Rev. Codes, for the punishment of contempt in disobeying an injunctional order is not unconstitutional because it denies the defendant the right of trial by jury. State v. Markuson, 155.

When different minds might honestly reach different conclusions upon a question of fact, is properly a question for the jury. Heckman v. Evenson, 173.

It is proper to refuse to require the jury to return a special verdict relating, not to the ultimate facts in issue, but to the evidential facts on which the ultimate facts rest. Russell v. Meyer, 335.

The plaintiff who claims to be a good faith purchaser in due course of negotiable paper has the burden of proving that the notes in suit were in fact indorsed by the payee at the time of their transfer to the plaintiff. Massachusetts Loan & Trust Co. v. Twitchell, 440.

Where the question was as to which of two points was the corner as established by government survey, it was proper for the court to ask the jury whether such corner was at one point or the other, instead of submitting the general question of where such corner was. Black v. Walker, 414.

Where a jury follow instructions of the court limiting them to a particular ground of negligence their verdict cannot be sustained if there is no evidence to support a finding of that particular negligence. Roehr v. G. N. R. Co., 95.

Where the jury return an informal or invalid verdict in some respect the court has authority to require a correction of the verdict at the hands of the jury. State v. Maloney, 127.

The court has jurisdiction in all cases to send a jury back for deliberation and to instruct them as to the law of the case before sending them back. State v. Maloney, 127.

Where evidence is apparently competent when received, but subsequently proves incompetent, the party desiring to get rid of the testimony must move to have it stricken out or ask the court to instruct the jury to disregard it. Kneeland v. Great Western Elev. Co., 454.

Under Rev. Codes, § 5630, which provides that "in all actions tried in the district court without a jury, in which an issue of fact has been joined, all the evidence offered on the trial shall be received," all evidence offered must be brought upon the record in the District Court, so that it may be considered or rejected upon appeal, as may be proper; and, where the court refuses to permit witnesses to testify, the judgment will be reversed and the case remanded, so that the evidence may be heard, whether competent or not. Otto Gas Engine Works v. Knerr, 195.

TROVER AND CONVERSION. See EVIDENCE, 343.

In an action for conversion of wheat which had been stolen and sold to the defendant elevator company, it was competent, for the purpose

TROVER AND CONVERSION—Continued.

of showing how much of plaintiff's grain was received by the elevator company, to prove the contents of entries made by the agent of the company at the time of the transaction in the stubs of grain tickets kept by the company for that purpose; such entries being the ones from which the agent made up his report to the home office; it appearing that the original entries themselves had been destroyed by the company. Kelly v. Cargill Elevator Co., 343.

A mortgagee of chattels, having a present right of possession, may maintain an action against a third person for the conversion of the property embraced in the mortgage. Donovan v. St. Anthony & Dakota Elevator Co., 513.

A mortgagee of unplanted crops before he can recover for their conversion after they have been harvested and sold must aver and prove that the mortgagor planted and grew the crops, or that they were produced by agencies set in motion by the mortgagor. Donovan v. St. Anthony & Dak. Elev. Co., 513.

Where the complaint avers a conversion of grain covered by plaintiff's mortgage it is not necessary to allege that defendant had notice either actual or constructive of the mortgage. Donovan v. St. Anthony & Dak. Elev. Co., 513.

The holder of a seed lien had, before the enactment of section 4845, Revised Codes, no right to take possession of the property covered by his lien, even after default, but must have enforced his right to possession in a court of equity in an action to foreclose a lien. Black v. Minneapolis & Northern Elev. Co., 129.

One who bought the property covered by such lien took it subject thereto, but could not, under any circumstance, be held liable for the conversion thereof, or even in an action on the case for damages to the lienholder's rights when such purchaser had done nothing to effect the lienholder's rights (as by destruction or removal of the property beyond his reach), but had merely refused to deliver him the property on demand. Black v. Minneapolis & Northern Elev. Co., 129.

A plaintiff suing for conversion of property covered by his lien can only recover the amount of his lien as against the purchaser of the legal title. Union Nat. Bank v. Moline M. &. S. Co., 219.

Where, in an action for conversion, it clearly appears, and is so found by the jury, that at the time plaintiff demanded the goods, and defendant refused to surrender them, on the ground that he had a right to hold them for storage charges, the defendant had in his hands, of the proceeds of the sale by him of plaintiff's property, $45.76 in excess of his charges for commissions and storage, a finding for defendant on the issue of conversion cannot be sustained. Henny Buggy Co. v. Higham, 45.

Under § 5341, Rev. Codes, the sheriff becomes liable in trover in case the statute is complied with, and he, nevertheless, delivers the property to the plaintiff in the replevin action. If the plaintiff refuses to

TROVER AND CONVERSION—Continued.

idemnify him, and he promptly surrenders it to the defendant, he is exonerated from all liability. Welter v. Jacobson, 32.

TRUSTS.

Where an insolvent debtor makes a deed of trust, in which his creditors join, providing that the trustee shall conduct the debtor's business as long as the trustee may think it best for the creditors' interests, that he shall then sell the property, and, after paying the creditors, shall pay the balance, if any, to the debtor, the creditors are not liable to others for the price of goods purchased by the trustee in conducting the business. Wells-Stone Mercantile Co. v. Grover, 460.

Where an insolvent debtor turns over to a trustee his business, of which the trustee is to have entire control, and which he is to conduct for the benefit of the creditors of the insolvent, the trustee becomes liable for all debts contracted by him in conducting the business, in the absence of a contract to the contrary. Wells-Stone Mercantile Co. v. Grover, 460.

VENDOR AND PURCHASER. See TROVER AND CONVERSION, 129; DEEDS, 475.

Where the contract stipulates that the purchaser shall pay on the purchase price each year one half the crops raised on the land with the provision that the vendor may re-enter upon default, the default of the purchaser in that respect as to the crops of one year is waived by the vendor when he permits the purchaser to remain in possession and accepts the proceeds of crops of subsequent years. Plummer v. Kelley, 88.

A vendor of land under a contract requiring the purchaser to deliver one half the crops raised each year in payment of the purchase price, cannot retake possession of the land merely because he suspects that the purchaser will not raise a crop during a given year. Plummer v. Kelly, 88.

Where the purchaser was to pay for the land in wheat to be delivered in installments on or before the 15th of October, in each of several successive years, the purchaser undertaking to crop 400 acres each season, and the vendor being required to give written notice to the vendee of his election to treat the contract as terminated on failure of the vendee to pay at the time specified, time being declared to be of the essence of the contract, a delay of three months after failure to deliver the first installment before giving the required notice to terminate the contract was a waiver of the right to insist on a termination. Fargusson v. Talcott, 183.

A vendor in a land contract waives the necessity of a tender by the purchaser as a condition of the right of the latter to specific performance, by a positive refusal to perform. Fargusson v. Talcott, 183.

The fact that the vendee and vendor were brothers-in-law should not raise any presumption of fraud in a transaction between them. Fluegel v. Henschel, 280.

VENDOR AND PURCHASER—Continued.

The execution and delivery of negotiable paper for the purchase price of land does not constitute payment as between the vendor and vendee so long as the paper remains in the hands of the vendor. Fluegel v. Henschel, 283.

Where, upon the sale of a tract of land, the vendor states the value thereof at a sum greater than its true value, but such statement is made under circumstances that show it to be simply the opinion of the vendor, and where the vendee, though ignorant of the value of the land himself, is unrestricted in his opportunities to learn its true value, no fraud can be credited upon the vendor's statement. Heald v. Yumisko, 422.

The rule of law which declares that a purchaser of real estate in possession of another than his grantor is chargeable with knowledge of all the rights of such party in possession has its exceptions. It does not apply where the possession of such party is entirely consistent with the record title, nor where such party was a former vendor of the land, and remained in possession; and when such party in possession holds a lease of the land, and the purchaser knows of the existence of such lease, he may attribute the possession to such lease. Red River Valley L. & I. Co. v. Smith, 236.

Certain evidence examined, and *held* to have no tendency to establish actual notice on the part of a vendee of real estate of any outstanding equities in the party in possession. Red River Valley L. & I. Co. v. Smith, 236.

In order to charge a corporation vendee of real estate with knowledge of outstanding equities therein, on the sole ground that its managing officer had such knowledge, it is not sufficient to show simply that such officer obtained such knowledge more than three years before the organization of such corporation. It must at least further appear that such knowledge was present in the mind of such officer at the time of the transaction in which the corporation is sought to be charged. Red River Valley L. & I. Co. v. Smith, 236.

Where the grantee in an unrecorded deed sells the land to another, and for the purpose of putting the title in the purchaser without the expense of having the old deed recorded destroys such deed; and procures to be executed to the purchaser a deed directly from the original grantor to the purchaser, no legal title vests in such purchaser, but only an equitable interest, the grantor in such deed having no legal title to convey. A court of equity, however, will compel the holder of the legal title to convey it to such purchaser. Russell v. Meyer, 335.

The law casts upon the vendee no duty to inquire into the motives or circumstances of his vendor unless he is in possession of such suspicious facts or circumstances as would put a prudent man on inquiry. Fluegel v. Henschel, 279.

VENDOR AND PURCHASER—Continued.

The parties to an executory contract for the sale of land may stipulate that a failure to pay on the time specified shall destroy the rights of the defaulting party in a court of equity, as well as in a court of law. Fargusson v. Talcott, 183.

A purchaser pendente lite from one who is not named as a party defendant in a notice of lis pendens is not affected by the final judgment in the case. But if the person from whom he buys is in fact a party to the suit, and the purchaser knows of such action against him at the time of the purchase, he takes the property which is involved in the action subject to the final judgment therein. Buxton v. Sargent, 503.

VERDICT.

The language of the verdict being that of lay people need not follow the strict rules of pleading or be otherwise technical. Whatever conveys the idea to the common understanding will suffice and all fair intendments will be made to support it. State v. Maloney, 125.

Any verdict based upon a refusal to apply the law as laid down by the court would be a verdict against law although the law itself was erroneously stated to the jury. Roehr v. Ry. Co., 97.

Where it is clear that the jury have applied the correct rule of law, although erroneously instructed, the verdict may be permitted to stand. Roehr v. Ry. Co., 97; State v. Maloney, 127.

A verdict that the jury find defendant guilty of an assault and battery with a sharp and dangerous weapon with intent to do bodily harm is sufficient without the addition of the words "without justifiable cause or excuse," under § 7145, Rev. Codes, defining an aggravated assault and battery. State v. Johnson 3 N. D. 150, distinguished. State v. Maloney, 119.

The trial court may send the jury back for further deliberation on their rendering a verdict which it considers insufficient in form, and a verdict subsequently returned by such jury, which is similar to the verdict first returned except for an addition of certain words which are mere surplusage is valid where the verdict first returned was valid. State v. Maloney, 119.

A special verdict is one which determines specifically the ultimate facts which are in issue, and not one which determines evidential facts on which such ultimate facts rest. Russell v. Meyer, 335.

The verdict for plaintiff in this case cannot be disturbed as not being supported by the evidence, although two witnesses for the defendant testified positively to a state of facts different from what the jury must have found, and their testimony was not directly contradicted, but the testimony of plaintiff tended to establish other facts that could not co-exist with the facts testified to by such witnesses for the defense. Black v. Walker, 414.

Where by inadvertence a verdict has been directed for a few dollars more than was proper, the appellant cannot raise the point for the

VERDICT—Continued.

first time in this court. But, where the respondent voluntarily offers to remit the excess, such remittance will be ordered, and the judgment modified and affirmed, at the cost of the appellant. Loverin-Browne Co. v. Bank, 569.

WAIVER. See VENDOR AND PURCHASER, 88.

The vendor of land held to have waived his right to insist upon a termination of the contract by waiting for three months before giving notice of his election to treat it terminated. Fargusson v. Talcott, 183.

Objections to the appointment of a receiver if not made at the time of his appointment are waived, and if an appeal is not taken from the order of appointment within the statutory time the right to thereafter raise the point is gone. Merchants National Bank v. Baithwaite, 369.

After submitting to an examination in supplementary proceedings the debtor cannot move to suppress the proceeding because the execution was not returned within 60 days. Merchants National Bank v. Braithwaite, 369.

Counsel cannot waive court rules prescribing form of the statement of the case. Thuet v. Strong, 566.

An objection that the attorney whose name is signed to the notice of appeal is not appellant's attorney is waived by the appearance of respondent's attorney to argue a motion to dismiss in which such objection is not raised. Woods v. Walsh, 376.

Where a reference was made by consent and the order recited that the referee was to take and report the evidence, *held* that the parties could not afterwards be heard to say that the reference was a nullity because the referee was not empowered to make findings of fact and conclusions of law. Heald v. Yumisko, 422.

A provision in a written building contract inserted for mutual protection and benefit of both the owner and contractor cannot be waived or abrogated by one of them. Northern Light Lodge v. Kennedy, 146.

Where a misjoinder of causes of action was not attacked by demurrer, the right to insist that separate actions should have been brought was waived. Henny Buggy Co. v. Higham, 45.

Where written exceptions are filed to instructions and refusals to instruct, this operates as a waiver of all exceptions not specified in the writing. State v. Campbell, 58.

WITNESS.

There was direct evidence from both sides that a certain witness was not an accomplice in the crime, though the evidence as a whole tended to cast suspicion on him. *Held*, that it was proper to refuse to instruct that the witness was an accomplice, and that his uncorroborated testimony could not convict, though it would have been proper, if requested, to have submitted to the jury the fact whether

WITNESS—Continued.

he was an accomplice, together with the effect of complicity, on his testimony. State v. Haynes, 352.

In this case collateral and irrelevant matter, not adverted to in the examination in chief, was drawn out on cross-examination of the defendant as a witness. In rebuttal, and against objection, the state was permitted to contradict such collateral matter by testimony of a damaging nature highly prejudicial to the defendant. *Held*, that the ruling was prejudicial error, and the judgment must be reversed therefor. State v. Haynes, 70.

Where a witness whose deposition has been taken answers a question by saying, "For answer to that question, I refer to the answer of A.B.," it is error for the court to tell the jury that as a matter of law he has thereby made the answer of A. B. his own answer. Kneeland v. Great Western Elevator Co., 452.

A party to a written contract is a competent witness for a third party in no manner connected with the contract to contradict the terms of the contract. Luther v. Hunter, 544.

State examiner has no power to compel a witness to testify in certain cases. In re Camp, 69.

An accomplice as a witness for the state must be corroborated by other testimony than that alone which tends to show the commission of the offense, else a conviction cannot be sustained secured by his evidence. State v. Coudotte, 109.